ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE JAMES

The captioned contract was terminated for default in 1987. In 1991, appellant submitted a $21,959,311 claim, alleging Government breaches and constructive changes under the contract. Appellant appealed from that claim's denial, which we docketed as ASBCA No. 43965. In May 1996, the default termination was converted to a termination for convenience of the Government. *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,328. In August 1996, the Board vacated the part of its May 1996 decision that had denied appellant's breach claim, and reinstated appeal No. 43965. *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,502 at 142,325. The parties stipulated certain facts, and an 11-day hearing was held at Brooklyn and at the Board's offices. Subsequently, in December 2000, the parties settled the amount due for the termination for convenience subject to any adjustment to the contract price resulting from this appeal. The parties submitted post-hearing briefs with copies of the settlement Modification No. A00004, which we receive in evidence as Board Exhibit 1. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. We are to decide both liability and damages (tr. 8).

FINDINGS OF FACT

1. The Meal, Ready-to-Eat (MRE) combat ration is a "mobilization essential item" approved under the Industrial Preparedness Program (IPP) and procurable by negotiation.

MRE contract negotiations were limited to "planned producers" with whom the Defense Personnel Support Center (DPSC) of the Defense Logistics Agency (DLA) had entered into industrial preparedness agreements. The IPP's objective was to maintain viable producers capable of increasing their peacetime production to satisfy national mobilization needs in the event of mobilization. MRE producers had no non-MRE business. (Stip., ¶ 1; exs. FT001, FT004, FT019;[1] tr. 49-51, 83-84, 252-53)

2. From 1979 to early 1984, DPSC made four MRE procurements, designated "MRE-1," "MRE-2," "MRE-3" and MRE-4." Those procurements included "retort" contracts for sterilized entrees and components sealed in a pouch, and "assembly" contracts for sealing retorts and other components in an MRE container, and packing several MREs in a sturdy, air-droppable case (tr. 43-44).

3. Respondent authorized contract awards to Right Away Food Corp. (RAFCO) and Southern Packaging & Storage Co. (SOPACKO) for MRE-2 and for MRE-3 (exs. FT004, FT011). Freedom Industries, Inc. (FII), appellant's predecessor, submitted an offer on MRE-3, but did not receive a contract. FII was approved as an IPP planned producer on 30 March 1983, after the MRE-3 awards. (Stip., ¶¶ 2, 4; ex. FT014) FII's 13 February 1984 IPP "Production Planning Schedule" was limited to fiscal years 1984-1985, and stated that DPSC/DLA intended to negotiate MRE component contracts with FII, with the caveat—

> [T]he signatures hereon in no way bind the named firm(s) nor the Government in any contractual relationship, nor is acceptance to be construed as an agreement by industry to maintain production capability as indicated herein. The signature of industry does not obligate the named firm to accept a military contract if one is offered nor is the Government obligated to convert production planning schedules to contracts, to contract with the named firm if procurement of the items specified herein is required . . . .

(Ex. FT036 at 7)

4. Respondent authorized MRE-4 contract awards to "at least two" of three planned producers, SOPACKO, RAFCO and FII (ex. FT018). FII submitted an offer on MRE-4. DPSC awarded MRE-4 contracts only to SOPACKO and RAFCO. (Stip., ¶¶ 2, 5; ex. FT024A at 237)

5. Respondent authorized MRE-5 contract awards to RAFCO, SOPAKCO, and FII (stip., ¶ 2; ex. FT029). On 15 February 1984, DPSC issued request for proposals (RFP) DLA13H-84-R-8257 for the MRE-5 procurement of 3,099,520 cases in 1985. The RFP requested offers from the three MRE planned producers, and anticipated three fixed-price

[1] Appellant's exhibits all have the prefix "FT."

contracts for 45 percent, 35 percent, and 20 percent of the total requirement. (Ex. FT030A)

6. The RFP required contractors to process, assemble and package MREs in cases containing 12 separate menu bags, each containing a meat entree, crackers and an accessory packet. The Government was required to provide all crackers, various accessory components and eight meat entrees (beef slices, diced turkey, diced beef, ham slices, chicken a la king, frankfurters, beef slices and ground beef) as Government-furnished materials (GFM). The contractor was required to provide five meat entrees (ham and chicken loaf, meatballs, beef patties, pork patties and chicken loaf) as contractor-furnished material (CFM). (Ex. FT030A at 7-8, 12, 57, 59 of 96; tr. 41-42) Army Veterinary Inspectors (AVI) were designated to inspect and accept MREs at FII's facility (SR4, tab 10 at 4).

7. The RFP incorporated by reference the Defense Acquisition Regulations (DAR) 7-103.21(b) TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1974 OCT); 7-104.24(a), GOVERNMENT PROPERTY (FIXED PRICE) (1968 SEP); and 7-104.35(b) PROGRESS PAYMENT FOR SMALL BUSINESS CONCERNS (1982 SEP) clauses, the last of which provided for monthly progress payments of 95% of the contractor's total, reasonable, allocable costs incurred under the contract, plus 100% of progress payments to subcontractors; disallowed costs ordinarily capitalized and subject to depreciation, except for the properly depreciated portion thereof; set no time by which to pay progress payments; set a 95% progress payment liquidation rate; and, in ¶ (c), authorized the contracting officer to reduce or suspend progress payments or to liquidate them at a rate higher than the 95% specified in ¶ (b) of the clause --

> whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

The RFP also incorporated the DAR 7-2003.64 PROGRESS PAYMENTS (1974 APR) clause, which stated in pertinent part:

> The appropriate "Progress Payment" clause . . . included in the contract . . . shall be inoperative during the time the contractor's accounting systems and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs.

The RFP also included the DAR 7-104.77(f) GOVERNMENT DELAY OF WORK (1968 SEP) clause that provided in pertinent part:

> (a) 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 the time specified in this contract (or within a reasonable time if no time is specified), an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by such delay or interruption and the contract modified in writing accordingly. . . . However, no adjustment shall be made under this clause for any delay or interruption . . . (ii) for which an adjustment is provided or excluded under any other provision of this contract.

and General Provision No. 2 "CHANGES" (SR4, tab 2 at 98, tab 3 at 2; ex. FT030A at 81 of 96).

8. RFP § H-5, Government Furnished Property, identified 31 GFM items to be furnished in increments from November 1984 through August 1985, and stated:

> h. The Government reserves the right to substitute any of the above named components, and the contractor shall not be entitled to any additional compensation so long as the substituted items are of substantially the same size as the components for which they are substituted. Procuring Contracting Officer shall be notified no less than 5 days in advance of any component shortage. If contractor fails to provide this notice, and assembly is delayed, resulting assembly delay damages shall not be assessable against the Government.
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> . . . .
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> j. . . . [T]he Government will not be liable for assembly delays caused by delinquent [GFM] components if the components are delivered by the first day of the corresponding final delivery assembly period.

> The assembly contractor shall immediately notify the [PCO] of the failure of any components to be delivered in accordance with the above schedule.

(Ex. FT030A at 57-60 of 96)

9. RFP § L-4, Approval of First Articles and Progress Payments, established the following ceiling on progress payments after first article acceptance at:

> a maximum of 50% of the total item or subcontract dollar value whichever applies. Requests for increases beyond the 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 . . . 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. . . . The progress payments shall be for only those costs that are . . . reasonable, allowable [sic] to the contract, and consultant [sic] with sound and generally accepted accounting principles and practices.

RFP § L08(b) required the contractor to establish a manual or mechanized system to assure control and accounting of all GFM and CFM components. RFP § L-9 required proposals to include monthly cash flow and projected income statements for the entire project, and cost or pricing data for material, labor, overhead and general and administrative (G&A) costs. (Ex. FT030A at 66, 70, 74, 76 of 96)

10. The June 1984 pre-award financial capability survey noted that FII had not performed any major work since January 1984 and that its bank, Dollar Dry Dock Savings Bank (DDD), had withdrawn FII's credit line "because of Freedom Industries' inability to obtain Government contracts." Since the Defense Contract Administration Services Management Area, New York (DCASMA-NY) was reluctant to recommend awarding a contract to a company without adequate financing, the financial survey noted a "Catch-22" situation, which might be alleviated by having DDD send a "pro-forma" letter giving a commitment conditioned on an award to FII. (Stip., ¶ 14; ex. G-5)

11. Best and final offers (BAFO) were invited by 2 August 1984. Awards were made to RAFCO and SOPAKCO. (Stip., ¶ 16)

12. FII's 2 August 1984 BAFO offered: (a) $34.81 per case for 620,304 cases at a total price of $21,593,000 (apparently rounded), over a 24-month period; (b) award under

the Small Business Administration's 8(a) program, in which FII had been approved on 24 February 1984; and (c) payment of its start-up costs for quality control equipment, building repairs, automated building management and control system, and lockers. FII's offer appended 31 July 1984 spread sheets showing: (i) progress payments up to $9,000,000, liquidated at 95%, including progress payments on overhead and G&A costs incurred two months before material and other direct costs, and four months before direct labor costs, would be incurred, and (ii) outside financing of $2,000,000 for production equipment and $5,874,210 for working capital (exs. FT031, FT047A at 00646).

13. DDD's 9 and 10 August 1984 letters to DPSC's contracting officer (PCO) stated that in the event FII assigned a contract pursuant to the RFP in the amount of $21,593,000 to DDD, then DDD would extend FII credit not to exceed $7,244,000 to perform such contract (SR4, tabs 5, 6; ex. FT047A at 00645; tr. 309, 785-90, 959-61, 979). By 13 September 1984, DDD had provided no financing to FII (SR4, tab 8).

14. On 12 September 1984, landlord Richard Penzer leased his Bronxdale Avenue, NY, premises to H.T. Food Products, Inc. (H.T. Food, owned by Henry Thomas), with the right to sublease to FII. From 15 November 1984 to 14 November 1985, the rental was $89,500 plus a tax escrow each month. (Ex. FT052 at 6-7, 42, 45)

15. On 16 October 1984, FII submitted to DPSC a Contract Pricing Proposal for a revised $30.12 unit price (and $18,683,556 total contract price) with spread sheets showing: (a) receipt of 95% progress payments up to $9,000,000, including the costs of machinery, equipment and other tangible fixed assets, liquidated at 84.9%, including overhead and G&A costs incurred four months before material and other direct costs, and seven months before direct labor costs, would be incurred, and (b) $4,061,904 to finance working capital (ex. FT060A at 00812, -820, -823). On about 19 October 1984, FII submitted the Bronxdale facility lease and sublease to respondent (ex. FT057).

16. On 5 November 1984, DPSC, DCASMA-NY, including ACO Marvin Liebman, and Defense Contract Audit Agency (DCAA) reviewed FII's 16 October 1984 cost proposal and 30 October 1984 $29.90 unit price, questioned some costs, and devised a Government negotiation range (ex. FT060E at 00839-60; SR4, tab 9 at 3-4).

17. On 6 November 1984, DPSC and FII concluded negotiations covering all elements of the contract price and agreed to a unit price of $27.725. On that day, FII's President, Henry Thomas, and PCO Thomas Barkewitz signed a Memorandum of Understanding (MOU) with the following "break-out of cost elements" included in the $17,197,928 total negotiated price:

Materials	$ 8,193,637
Direct Labor	811,002
Manuf. O/H	3,627,530
Depreciation	333,333

Other Costs	163,816
G&A	1,840,824
Total Costs	14,970,142
Profit 14.997% [sic, actually 14.88%]	2,227,786
TOTAL PRICE	$17,197,928

(Stip., ¶ 21; AR4, tab F17; SR4, tab 9 at 4-6; tr. 130-32)

18. In the MOU, FII's negotiated manufacturing overhead costs included operating expenses of a capital nature for quality control and maintenance equipment, building repairs, an automated building management and control system, and lockers, totaling $522,218. The $333,333 depreciation cost was based on FII's proposed $1.5 million for capital equipment. (Stip., ¶ 21; SR4, tabs 9, 75 at 7; tr. 192-93, 347-48) The parties agreed that since FII only had one contract, all contract costs would be treated as direct costs (tr. 135-37, 139-40, 190, 387-88), as DPSC had agreed with MRE-1 contractors (ex. FT010 at 73-74; tr. 58-61).

19. At the parties' contract negotiation on 6 November 1984, FII's Chief Financial Officer Patrick Marra prepared spreadsheets to back up the MOU costs, and provided a copy of them to the PCO on 6 November 1984, and to ACO Liebman on 13 December 1984 for guidance in progress payments. FII's spreadsheets showed: (a) $13,326,175 in progress payments at "95%" liquidated at 82.6%, and beginning in December 1984 with 18 cost items otherwise classified as "indirect costs" to be incurred two months before incurring material costs, four months before incurring other direct costs, and six months before incurring direct labor costs; and (b) outside financing of $1,500,000 for capital equipment and $1,798,936 for "working capital." (Exs. FT062 at 00908-20, FT064, FT072; tr. 133-35, 187-89, 300-01, 341-43)

20. The parties agreed on $811,002 in direct labor costs based on FII's proposed 144 persons using state-of-the-art, automated equipment to assemble MREs and to track GFM and CFM, namely, Koch Multi-Vac vacuum equipment for bagging crackers and accessories more reliably so as to avoid retort sealing problems experienced by prior contractors, Doboy continuous band sealers and double belt conveyors for MRE main assembly, and International Paper V-2 case-forming and sealing equipment (SR4, tab 9 at 7; ex. FT022 at 00193; tr. 327-29, 516-19).

21. FII's 8 November 1984 letter notified DDD of successful completion of MRE-5 contract negotiations, enclosed the MOU and final cash flow spread sheets, and requested DDD's finalizing of working capital and equipment financing, about 5% of the contract costs (ex. FT064).

22. On 15 November 1984, the PCO awarded the MRE-5 captioned contract to FII to supply 620,304 cases of MRE at $27.725 per case, for a total firm fixed-price of $17,197,928. Pursuant to Box 18 of the Standard Form 26 Award/Contract, the contract

consisted of the RFP, FII's offer and the Award/Contract. We find that FII's final offer included the spreadsheets backing up the 6 November 1984 MOU. Delivery was to be made in six monthly installments between 2 July and 31 December 1985. Inspection and acceptance were to be made at the contractor's plant. The contract also modified the § L-4 progress payments ceiling (finding 9) as follows:

> [T]he limitation of Progress Payments shall increase by $2,000,000 after the first delivery increment (100,000 cases) has been completed. This limitation shall increase by another $2,000,000 after the second delivery increment (100,000 cases) has been completed.

(Stip., ¶¶ 25, 26; SR4, tab 10)

23. At the time of contract award, ACO Liebman knew that the MRE-5 contract was FII's only Government contract; FII anticipated progress payment financing of 95% of costs; all costs were to be treated as direct costs, including the start-up operating expenses of a capital nature in G&A and overhead; DCAA had found that FII's accounting system was adequate for all purposes, including progress payment purposes; and FII had a negative net worth and owed prior creditors about $2.6 million dollars (ex. FT050; tr. 1516, 1621, 1623-27, 1644-45).

24. On 16 November 1984, FII hand delivered Progress Payment Request (PPR) No. 1 to ACO Liebman, requesting payment of $89,500 for rent and $16,089 for taxes, 95% of which total was $100,310 (ex. FT422), together with a copy of the recently awarded contract. ACO Liebman refused to process PPR No. 1 until he received the contract through "official channels." (Tr. 369-70) At that time the DAR regulations provided in pertinent part:

> **E-506** . . . If the contractor's accounting system and controls have been found [by DCAA] to be sufficient and reliable for segregation and accumulation of contract costs, no further examination should be necessary [for progress payments] so long as the efficiency and reliability of the contractor's system and controls are maintained.
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> . . . .
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> **E-520** . . . Preaudit, that is, audit before the making of progress payments will be limited to those situations in which there is reason to question the reliability or accuracy of the contractor's [progress payment] certificate, or reason to believe that the contract will involve a loss. Where the adequacy and reliability of the contractor's accounting system

> and controls have been established in accordance with E-506, there shall be no requirement for preaudit of the first progress billing under new contracts.

(Ex. G-1) ACO Liebman acknowledged receipt of PPR No. 1 on 29 November 1984 (AR4, tab F20), but held payment in abeyance pending audit.

25. On 28 November 1984, Richard Penzer notified H. T. Food that their 12 September 1984 lease was canceled for non-payment of the first month's rent on 15 November 1984, but he would reinstate the lease if H. T. Food paid the rent (ex. G-12). According to Henry Thomas' 11 July 1985 affidavit, he and Richard Penzer orally agreed to restrict H. T. Food's use of the premises to 800 square feet, and H. T. Food would be liable for the $89,500 rent only when it began to occupy the entire 400,000 square foot premises (ex. G-18 at 26). We do not find Mr. Thomas' statement as a fact, because Mr. Penzer's testimony did not confirm such oral agreement, and such agreement conflicts with respondent's January-March 1985 plant visit reports, in which respondent noted several inspection tours around FII's plant, inside and exterior, with no mention of any restriction of FII's use to a 800 square foot area, and its April 1985 report, which does not mention any expansion of FII's use from 800 to 400,000 square feet (SR4, tab 193).

26. The 7 December 1984 DCAA audit memorandum to ACO Liebman stated that PPR No. 1 was "returned since the requested amount is not supported by fair value of any work accomplished under the contract." (SR4, tab F21) Although ACO Liebman knew that progress payments to small business firms did not require physical work progress (tr. 1778), on 10 December 1984 he requested a legal opinion on whether PPR No. 1 was payable without physical progress (SR4, tabs F22, F25).

27. On 7 December 1984, FII resubmitted PPR No. 1 requesting $252,150, including $211,178 for two months' rent and taxes (SR4, tab 21 at 12; tr. 1658).

28. On 13 December 1984, DCAS attorney Carl Heringer orally advised ACO Liebman that FII was deemed solvent and all its contract costs were negotiated as direct costs, for which progress payment could be made (ex. FT074 at 2; tr. 1684, 1720). On 14 December 1984, FII told ACO Liebman that DDD had advanced no money and said that it wanted an arrangement in place to deal with FII's creditors, and FII was looking for less expensive financing, such as Broadway Bank (ex. G-15; tr. 356, 1499, 1703-04, 1743-44).

29. On 17 December 1984: (a) FII proposed to change the progress payment liquidation rate to 82.6% (ex. FT076), and (b) the ACO and others called Noel Siegert of DDD about extending credit to FII. Mr. Siegert said that before DDD could extend credit to FII, an arrangement for settlement of FII's prior creditors would have to be in place; DCASMA-NY had to confirm that it intended to pay progress payments; and SBA had to confirm that it would guarantee repayment of credit extended. (SR4, tab 17; tr. 1499-1500)

Soon afterwards, ACO Liebman told DDD's Mike Durso that progress payments were not going to be paid until direct labor and material costs were incurred (tr. 449-50).

30. On 18 December 1984, the ACO: (a) sent a letter to FII inquiring about financing sources and repayment of past debts, and (b) rejected resubmitted PPR No. 1 on the bases of FII's need to repeat figures elsewhere set forth on the document, to enter "0" instead of "---" or blanks, and to enter 95% instead of 82.6% liquidation rate (SR4, tab 12; ex. FT422 at 02904). DCAS attorney Carl Heringer's 26 December 1984 letter to the ACO stated that in FII's contract, all costs were considered direct costs; the DAR 7-104.35(b) clause did not require physical progress for payment of progress payments, only incurred costs allocable to the contract; and there had been no post-award change in FII's financial position, which the ACO should take into account in weighing any financial bases for non-payment of the progress payment (AR4, tab F25).

31. FII's 26 December 1984 letter to ACO Liebman described eight potential sources of $4,587,000 in financing – including DDD, H. T Food's bank, H. T. Food direct, SBA guaranteed loan, subcontract retentions of 10% of material costs, payment for first 500,000 MRE cases, equipment manufacturer/lessor financing, and second mortgages on equipment -- which was more than the $415,164 working capital and $1,500,000 capital equipment financing that FII calculated it needed (SR4, tab 13).

32. After giving audit results on resubmitted PPR No. 1 to the ACO on 20 December 1984, DCAA's 4 January 1985 report recommended payment of $0, citing submission of indirect costs, lack of proof that FII's costs incurred had been booked or had been paid, and FII's insolvency (SR4, tab 15; tr. 1689). Upon learning that DCAA found no proof of booked costs, FII took its books to the ACO's office on or about 28 December 1984 (tr. 445). DCAA re-audited PPR No. 1 on 14 January 1985, noted that the costs FII incurred were booked, but reiterated its other conclusions (SR4, tab 21).

33. ACO Liebman's 4 January 1985 letter to FII said that he was considering suspending progress payments because FII was in such unsatisfactory financial condition as to endanger contract performance since DDD would extend no credit to FII until an arrangement was in place to settle FII's pre-contract debts, a term not in DDD's 9-10 August 1984 financial commitment letters to FII; DCAA had no proof of payment of some costs and found other costs incurred by H. T. Food; and FII had made no physical progress in performing the MRE-5 contract (SR4, tab 16).

34. FII's 14 January 1985 PPR No. 2 requested $299,683, including $89,500 for rent and $16,089 for taxes, and stated a 95% liquidation rate, as did all subsequent PRRs. The ACO requested an audit of this and every other PPR submitted under the contract. (Ex. FT422; tr. 1509) DCAA questioned the entire amount of PPR No. 2 on the same bases raised on PPR No. 1 (AR4, tab F41).

35. On 17 January 1985, FII proposed to assign the MRE-5 contract payments to H. T. Food and to Broadway Bank and Trust Co. (ex. FT087). On about that date Henry Thomas met with Dick Lanza of Broadway Bank. Mr. Thomas called ACO Liebman to confirm the contract cash flow information for assignment of claim purposes. ACO Liebman refused to do so. Without such confirmation, Broadway Bank declined to provide credit to FII. (Tr. 450-54)

36. In the same time frame, FII asked the owner of its leased building, Richard Penzer, to finance MRE-5 contract equipment and working capital. Mr. Penzer contacted ACO Liebman about progress payments to confirm the circumstances for providing such financing. ACO Liebman told Penzer that, even if Mr. Penzer financed FII through Chemical Bank, and even after Chemical Bank called ACO Liebman and confirmed Mr. Penzer's net worth, he, Liebman, would deal only with a bank. (Tr. 799, 809-18)

37. FII asked Mr. William Robbins to finance about $2.5 million for MRE-5 contract equipment and working capital. Mr. Robbins reviewed FII's cash flow statements and telephoned ACO Liebman to verify the 95% progress payments. When ACO Liebman heard that Mr. Robbins was not a bank, he refused to talk to him. (Tr. 854, 858-60, 862-66, 868) FII suggested that Mr. Robbins place funds in Citibank, and have Citibank approach ACO Liebman (tr. 867). Citibank Branch Manager Clarence Stanley and Henry Thomas met with ACO Liebman to discuss release of progress payments. After a heated exchange, ACO Liebman ran out of the room. After Mr. Thomas reported that meeting to Mr. Robbins, the latter declined to provide FII financing. (Tr. 879-82)

38. FII's 18 January 1985 letter to the ACO reported that all FII's first article samples had been approved as of 16 January 1985, it had firm commitments with all its primary subcontractors, and FII attributed its inability to conclude financing arrangements to the ACO's having provided incorrect information to FII's prospective financial backers and his refusal to pay progress payments promptly (SR4, tab 22).

39. On 31 January 1985, FII ordered Doboy sealers and conveyors for $180,330 and Koch Multi-Vac accessory and cracker packaging equipment for $311,645 (exs. FT086, FT098, FT427; tr. 527-28).

40. The ACO's 6 February 1985 letter returned PPR Nos. 1 and 2 to FII unpaid and advised it that progress payments were suspended due to FII's unsatisfactory financial position, since DDD had withdrawn any credit commitment until an arrangement was made to settle FII's debts; FII had neither applied for nor received loans from any other "financial institution;" FII was "insolvent" with a deficit net worth of about $3.7 million; FII was the defendant in numerous claims arising from non-payment of bills; and H. T. Food, which was committed to provide financing to FII, had no bank of record and no evidence that it was a viable concern (SR4, tab 26).

41. On 11 February 1985: (a) Performance Financial Services, Inc. (PFS) committed to FII to provide accounts receivable financing and $1,000,000 for plant equipment (AR4, tab F46), and (b) Bankers Leasing Association, Inc. (BLA) agreed with FII to finance 80% of accounts receivable under the MRE-5 contract, not to exceed $13,758,342 (ex. FT094). On 20 February 1985, FII requested PFS to purchase $1.6 million in production equipment, and to lease such equipment to FII (ex. FT098).

42. In mid-February 1985 meetings and discussions, DLA and DCASMA-NY personnel advised FII that release of progress payments depended on its obtaining a $3.8 million line of credit from a financial institution and novating the contract from FII to H.T. Food, purportedly to protect the Government from FII's unsecured creditors (SR4, tab 27; AR4, tab F49; ex. FT104; tr. 1798, 1807). FII's 22 February 1985 letter to the ACO and PCO advised that FII and H. T. Food were preparing a novation agreement to be sent for the ACO's consent (SR4, tab 29).

43. On 25 February 1985, FII submitted PPR No. 3, dated 8 February 1985, in the amount of $231,555, including $89,500 for rent and $16,089 for taxes. ACO Liebman requested an audit; DCAA recommended paying $0, reiterating its previous reasons. (Ex. FT422) Due to lack of progress payments, FII put building repairs and renovations on "hold" (AR4, tab F51; ex. FT428).

44. On 28 February 1985, BLA approved a $5 million loan commitment for FII, with assignment of the MRE-5 contract payments to BLA (SR4, tab 36).

45. In March 1985 AT&T installed a networked, automated, building management and control system in FII's facility (tr. 502-04). ACO Liebman knew that this system was needed for contract performance (AR4, tab F87; tr. 1812-14). AT&T's Jim McGowan called ACO Liebman to confirm progress payment financing, but Liebman refused to do so, whereupon AT&T repossessed and removed its equipment (SR4, tab 38; tr. 505-06). On 29 March 1985, FII sought PFS financing for six AT&T personal computers, without networking or AT&T technical support (ex. FT112; tr. 506-07).

46. On about 15 March 1985 the Government approved FII's Inspection Plan for MRE-5 assembly. That plan provided:

> Moving Lot Sampling/Inspection: Will be utilized for government verification inspection for normal production of all end items (crackers and accessory packet and final case). Cracker and accessory packet samples will be selected and inspected after sealing. Point of sample selection and inspection for final assembly cases will be after case is strapped and final markings are applied, but prior to palletization.

That plan provided for a "Stationary Lot Sampling/Inspection" on palletized cases only in the event of rejection, rework or reinspection of lots. (Ex. FT106; tr. 2084-85)

47. On 20 March 1985, FII sent to ACO Liebman for consent, BLA's 28 February 1985 commitment letter to finance $5 million with assignment to BLA of the contract payments. BLA sent to ACO Liebman a 25 March 1985 addendum to the commitment letter, to confirm the financing upon the novation to H. T. Food (SR4, tabs 40, 42).

48. On 26 March 1985, FII and H.T. Food entered into a Novation Agreement, transferring FII's interest in the contract to H.T. Food. The Government approved the novation agreement on 17 April 1985. (Stip., ¶ 36) On 3 April 1985, H.T. Food changed its name to Freedom NY, Inc. (hereinafter FNY), which name change the ACO recognized in unilateral modification No. A00002 on 15 August 1985 (SR4, tab 61). ACO Liebman admitted that he would have released progress payments to FNY because the PFS-BLA financing was acceptable, even in the absence of the novation (tr. 1805-07).

49. On 28 March and 2 April 1985, FNY requested delay in delivery of GFM until 15-30 May 1985, since its building was not yet ready to receive the GFM. The PCO's 9 April 1985 letter to FNY denied that request and gave FNY 10 days to cure its delinquent performance. (SR4, tab 44) On 8 April 1985, Richard Penzer sold the premises leased to H. T. Food to Pilot Realty Co. (ex. G-18 at 16).

50. On or about 10 April 1985, FNY submitted a new PPR No. 1 in the amount of $1,766,923, which superseded the earlier requests, and, according to DCAA, included $730,073 in rent and taxes (stip., ¶ 37; ex. FT422).

51. ACO Liebman's 19 April 1985 letter to Citibank stated that progress payments would not be paid until FNY responded to, and resolved, the cure notice, and that $620,000 of PRR No. 1's $1,766,923 appeared to be payable (AR4, tab F69). Citibank wrote to BLA on 22 April 1985 saying that Citibank would not release the $960,000 received from BLA for FNY's account without BLA's authorization (ex. FT199).

52. FNY's 19 and 23 April 1985 replies to DPSC's cure notice reported continued building repairs, urged release of progress payments or documentation to release BLA financing, and proposed to extend the delivery schedule at a $100,000 price reduction, without admitting responsibility for the delay (AR4, tabs F70, F71). On 6 May 1985, the ACO approved and made payment of $1,700,073 on new PPR No. 1, thereby lifting the suspension of progress payments, but also disallowing $66,192, representing "capital" costs, of which about $22,000 were for office automation equipment (stip., ¶ 37; ex. G-95). From 15 November 1984 to 6 May 1985, landlord Richard Penzer did not evict H. T. Food/FII, but "carried" overdue rentals, taxes, utilities, insurance and guard service costs (tr. 455-57, 808-09). In May 1985 FNY paid Pilot Realty, the second landlord, $100,000 for April 1985 rent (ex. G-18 at 31).

53. In May and June 1985, FNY submitted PPR Nos. 2 and 3 in the amounts of $673,074 and $535,767 (as revised), respectively. The ACO paid only $332,421 with respect to PPR No. 2 (stip., ¶ 39), disallowing accrued but unpaid labor costs, costs not related to production, and operating costs of a capital nature on the basis that such costs must be depreciated, not expensed, unless the Government granted a DAR deviation (tr. 1517-18, 1918). The ACO approved payments of PRR Nos. 3 and 4 in full (ex. FT422).

54. When PFS called ACO Liebman on 16 May 1985 to verify payment of PPR No. 2, Liebman told PFS that "there were problems with this invoice and payment was not forthcoming." Thereupon, PFS declined to finance the automated building management and control system and other capital equipment at that time. (AR4, tab F81 at Ex. III; tr. 507-08, 513)

55. FNY's 23 May 1985 letter to the PCO requested resolution of the ACO's disallowance of automated building and management control system costs (AR4, tab F74). On 4 June 1985, the PCO advised ACO Liebman that DPSC had originally agreed "to pay for these elements as 100% cost rather than insist upon depreciation" (AR4, tab F77). Nonetheless, ACO Liebman requested a DCASR legal opinion on the propriety of 100% payments (AR4, tab F79). Following the recommendation of DCASR counsel, the ACO and the PCO requested a DAR deviation to pay FNY's capital equipment costs directly rather than indirectly by depreciation (AR4, tabs F85, F87, F91; exs. FT195, FT233).

56. On 14 June 1985, the parties executed bilateral Modification No. P00011, which extended the MRE-5 delivery dates by three months, required FNY to pay $100,000, and included no contractor release of claims (SR4, tab 55).

57. On 20 June 1985, ACO Liebman told FNY and PFS that he would prepare a list of routine costs, excluding salaries and rent, approved for payment at 80% of costs (ex. G-16). The ACO did not provide such a list (AR4, tab F92; ex. FT318; tr. 512). Since neither FNY nor PFS paid the down payment on the Koch Multi-Vac equipment, on 22 June 1985 Koch canceled FNY's order (ex. FT136; tr. 530).

58. The 20 June 1985 Justification for MRE-6 authorized contract awards to three planned producers, SOPACKO, RAFCO, and FII, but stated that "CINPAC" (of Cincinnati, Ohio) might be approved as a planned producer (stip., ¶ 46). DPSC awarded MRE-6 contracts to SOPACKO, RAFCO and CINPAC (ex. FT253).

59. On 9 August 1985, FNY leased from the Teknic Corp. through BLA six used 72 inch Eastern Machine Builders Corp. turntables for assembly; 14 Production Packaging Equipment, Inc. (PPE) Model 552 and 10 Model HSB horizontal band sealers and six Model 18V vacuum sealers, 12 S&B conveyors , and a Marq Automatic Case Sealer, for the period September 1985 through May 1986 for $375,000 (as amended in November 1985) (ex. FT153).

60. The horizontal sealers did not have the production capacity and speed of the originally contemplated equipment (200 v. 425 inches per minute), and the case sealer broke down frequently in forming the heavy-duty V-2 fiberboard cases (tr. 516-21, 523-27, 904-06, 1039-41). When DCASMA inspectors observed FNY's 13 August 1985 test of the horizontal sealers to increase their rate beyond 200 inches per minute, the meal bag seals twice failed (SR4, tab 193). Due to delayed progress payments for production equipment costs, BLA delayed lease payments to Teknic, and FNY delayed paying overdue repair balances. Consequently, Marq required COD payment for case sealer repairs, and PPE refused to ship repair parts. (Exs. FT215, FT216, FT225)

61. DCAA's 13 August 1985 audit report on PPR No. 5 stated that FNY's "current cost accounting system is not considered adequate for accumulating contract costs in support of progress payment requests," citing failure of FNY's books to include entries for discounts, occupancy taxes, subcontractor invoices, a cash disbursement journal, and subsidiary ledgers (SR4, tab 60).

62. On 21 August 1985 Richard Penzer, H. T. Food, and Pilot Realty executed an "Agreement of Compromise and Settlement," stating that H. T. Food had paid rentals of $395,000 to Penzer; increasing Penzer's original lease rentals from 15 November 1984 to 31 March 1985 by $335,000; releasing H. T. Food's option purchase claim against Penzer; and providing:

> Penzer agrees to release any and all claims he may have against H. T. Food for unpaid rent in the amount of $400,000 and hereby authorizes H. T. Food to keep the sum of $400,000 . . . as accrued unpaid rent . . . .

(Ex. G-22) Mr. Penzer was not sure whether he gave FII a check or a credit (tr. 823-24).

63. On 23 August 1985, ACO Liebman again suspended progress payments on the basis of the foregoing DCAA assertions (SR4, tab 62). As a result, ACO Liebman did not authorize payment of FNY's PPR Nos. 5, 6, and 7, dated 5 July, 8 August and 11 September 1985, respectively (ex. FT422).

64. The PCO's 30 August 1985 letter gave FNY 10 days to cure (i) the alleged accounting system deficiencies cited by the ACO, and (ii) the absence of much production equipment needed for contract performance at FNY's facility (SR4, tab 63).

65. On 4 September 1985, the PCO learned that the capital equipment cost deviation request had been denied. The Office of the Secretary of Defense again denied such deviation request in February 1986. (Exs. FT168, FT225)

66. FNY's 13 September 1985 reply to the PCO's cure letter stated that the ACO/DCAA contentions about FNY's accounting system and contract charges were based

on a misunderstanding of the originally negotiated contract price and cost terms, FNY had received all equipment needed for performance and was installing and testing such equipment at that time, and respondent was responsible for contract performance delays. FNY proposed extending the delivery schedule. (SR4, tab 67)

67. Jordan Fishbane, an ex-Army auditor, CPA, and FNY's expert witness in finances (tr. 942-43, 950), opined that FNY's omitted entries were "human errors," not accounting system deficiencies, and its PPRs were documented completely, allowing him to support each progress payment to the penny (tr. 983-86). We have examined FNY's PPR support documentation, and find that DCAA's accounting contentions were baseless.

68. On 25 September 1985, respondent paid progress payments for FNY's utility bills totaling $11,076.75 to prevent loss of electricity and gas at the facility (ex. G-14 at 16).

69. FNY resubmitted PPR No. 7 in the cumulative amount of $2,994,154 on 2 October 1985 (SR4, tab 73).

70. On 2 October 1985, DCASMA calculated that FNY needed an additional $500,000 of outside financing to complete performance to the extended delivery schedule it proposed. On the next day the parties agreed to increase the progress payment ceiling by $1,000,000 when each of the first four 50,000 case increments was delivered, and to extend the delivery schedule by 60 days, for a $100,000 price reduction to be made after April 1986. (SR4, tab 75 at 5-7; AR4, tab F100; ex. FT186) That agreement was incorporated in bilateral Modification No. P00018, executed 15 November 1985, which modification included no contractor release of claims (SR4, tab 85).

71. ACO Liebman authorized a $1,913,726 payment on resubmitted PPR No. 7 on 11 October 1985 (ex. FT422). The ACO reduced PPR No. 7, and later PPRs, by applying a percentage of physical completion factor (AR4, tab F90).

72. From PPR No. 8, submitted on 11 October 1985, ACO Liebman deducted a $400,000 payment FNY purportedly received from Richard Penzer, who bought FNY's purchase option (provided in ¶ 40 of its lease) in 1985, to disencumber sale of the property to Pilot Realty. That $400,000 had been included and paid in PPR No. 1, and FNY's July 1985 balance sheets reported that amount as income. The ACO regarded the payment as a "rental income credit," pursuant to the 21 August 1985 settlement agreement. (SR4, tab 60; exs. G-22, FT052 at 00739, FT162; tr. 818-24, 986-89, 1821-24, 1870-74).

73. In October 1985 DAR Appendix E provided:

> **E-501 Percentage or Stage of Completion.** Progress payments based on a percentage or stage of completion will be confined to contracts for construction . . . shipbuilding and ship

> conversion, alteration or repair. For all other contracts, . . . the only types of progress payment provisions will be those based on costs, as authorized herein.

(Ex. G-1) On 17 October 1985, FNY protested to DCASMA such unauthorized deductions based on physical percentage of completion (ex. FT193).

74. When MRE production began on 29 October 1985 (SR4, tab 193 at 29), FNY performed "Moving Lot Sampling/Inspection" pursuant to its approved inspection plan. Two weeks later the Army Veterinary Inspectors (AVI) performed "Stationary Lot Sampling/Inspection" while awaiting confirmation that FNY's strapping was adequate (tr. 2086-87). In November 1985 AVI corrected its inspection procedure and began moving lot inspection, rejecting 31,817 cases in FNY's lots 2 through 20 (ex. FT243 at 01649).

75. FNY hired Dave Corry, an ex-AVI inspector at SOPACKO, to train FNY's inspectors, and AVI brought in experienced inspectors to train the AVI inspectors at FNY to identify valid defects. By 19 December 1985, AVI's rejection rate decreased markedly (SR4, tab 194 at 2; tr. 2089-90, 2095-97). By 27 January 1986, ACO Liebman reported that FNY's strapping was acceptable (ex. FT437).

76. FNY failed to make the rescheduled November and December 1985 deliveries. On 6 December 1985 and 2 January 1986, respondent terminated for default the 49,758 and 65,000 case increments. On 23 January 1986, those terminations were formalized in unilateral Modification No. P00019. FNY disputed and took an appeal from those terminations (ASBCA No. 32570). (Stip., ¶ 44; SR4, tab 103; ex. FT211)

77. To meet IPP mobilization needs, DPSC needed delivery of the terminated 114,758 MRE-5 cases (SR4, tab 90). On 9 December 1985, FNY rejected the Government's request and refused to release all prior claims. The parties agreed that DPSC would reprocure those 114,758 cases and would reinstate in FNY's contract another 114,758 cases in MRE-6 configuration to be delivered after the MRE-5 deliveries, contingent upon timely deliveries to new, extended delivery dates. (SR4, tab 100)

78. FNY directed Sterling Bakery, a CFM supplier, to "ship-in-place" FNY's order. On 7 January 1986, DPSC countermanded FNY's direction and ordered Sterling to divert those CFM components from FNY to RAFCO to support the reprocured MRE-5 units (exs. FT436, FT255). That diversion led to a brownie "outage" (shortage) on 30 January 1986 which halted FNY production for 11 days (SR4, tab 194 at ¶ 3). Later, the 29 December 2000 Termination Supplemental Agreement (Modification No. A00004; finding 124, *infra*) stated that of its $387,455 claim for CFM "seized" by respondent, FNY was entitled to $193,727 (Memorandum of Agreement (MOA) at 5).

79. Pending resolution of DPSC's 11 December 1985 cure notice regarding FNY's delinquent December 1985 increment, ACO Liebman released no progress payments (ex.

FT239). On 21 January 1986, PCO Frank Bankoff ordered ACO Liebman to withhold progress payments until FNY signed a modification embodying the 9 December 1985 agreement, at which time the cumulative amount of $3,603,497 in progress payments was unpaid and pending (exs. FT219, FT422; tr. 1468-70).

80. On 29 January 1986, DPSC notified FNY that it planned to solicit a 4.5 million case MRE-7 IPP requirement, expected to involve three separate awards at 47 percent, 33 percent and 20 percent of the calendar year 1987 requirement (stip., ¶ 46). The 15 April 1986 Justification for MRE-7 authorized solicitation of SOPACKO, RAFCO, FNY, and CINPAC, but did not state how many contracts were to be awarded (ex. FT247).

81. Bilateral Modification No. P00020, executed on 29 January 1986, reduced the quantity of MREs by 114,758 cases, provided for a 60-day delivery schedule extension and deletion of the phrase in § L-4 "or 50% of the contract value whichever is lesser" so as to preserve $9,000,000 as the initial progress payment limitation despite the diminished contract price on account of the terminated cases in consideration of a $100 price reduction, added the provision:

> In the event the contractor meets the 1-31 Jan 86 through 1-30 Apr 86 increments as set forth . . . above, the Government may reinstate the 114,758 cases terminated for default . . . . Reinstatement will be at the sole discretion of the Government.

and included no contractor release of claims (SR4, tab 104).

82. On 30 January 1986, ACO Liebman authorized payment on FNY's PPR Nos. 10 and 11, including a $44,539 "adjustment" of the purportedly "actual" $374,180 option purchase payment previously "estimated" at $400,000 (SR4, tab 89; AR4, tab F232).

83. On 11 March 1986, Government inspectors found "micro-holes" in retort pouches containing CFM applesauce, beans and tomato sauce, and meatballs prepared by FNY's subcontractor Star Food Processing in Texas. All such items in stock were warehoused on "medical hold." (SR4, tab 193 at 52; tr. 2098-2100) Beginning on 11 March 1986, DPSC authorized CFM/GFM substitutions to maintain MRE deliveries. Some substituted items were not the same size as those replaced, causing case bulging and sealing problems, impacting FNY's production efficiency (tr. 2103-04).

84. On 18 March 1986, starting with PPR No. 13, when FNY's costs incurred plus estimated costs to complete first exceeded the contract price, ACO Liebman withheld $59,644.29 due to the disparity between the percentages of physical progress and incurred costs; he also withheld $284,507 pending FNY's resubmission of costs incurred and estimated to complete; and he applied a "loss ratio" to all progress payments (AR4, tab F232; tr. 1547-48; ex. G-95). DAR § E-524.5(b) prescribed a loss ratio of the "revised

contract price" divided by the sum of costs incurred and estimated to complete. ACO Liebman applied what he called a "modified loss ratio," considering costs only on the "instant" progress payment, rather than total costs. (Ex. G-1; tr. 1550-51) The record does not show that use of this loss ratio was less favorable to appellant than the prescribed loss ratio.

85. On 20 or 21 March 1986, FNY submitted a "draft" $3.4 million claim to DPSC. That claim is not in evidence. DPSC and ACO Liebman discussed that claim with FNY on 26 March 1986, saying they were willing to reinstate the 114,758 terminated cases, to extend the delivery schedule at no cost, to refund the two $100,000 amounts in Modification Nos. P00011 and P00018, and to pay $500,000 in disallowed, capital-type costs. The parties did not resolve the claim because FNY insisted on a guaranteed MRE-7 contract. (AR4, tabs M20, M22; SR4, tabs 55, 85, 194 at 7)

86. FNY retained lawyer David Lambert to seek to resolve FNY's claim with DLA. In March-April 1986 Mr. Lambert and FNY consultant Frank Francois discussed with DLA's Director of Contracts, Raymond Chiesa, and his General Counsel, Karl Kabeiseman, waiving or releasing FNY's pending claim in return for Government commitments to negotiate an MRE-7 contract with FNY, to process a guaranteed "V-Loan" of about $2.7 million to finance contract performance, and to award contracts to FNY under the SBA 8(a) program. (Tr. 622-28, 833-38, 840-47)

87. Due to a CFM maple nut cake outage, from 10 to 21 April 1986 FNY performed no final MRE-5 assembly, but continued to make accessory and cracker packets (SR4, tab 193 at 62-64).

88. FNY submitted a $5,709,560 certified claim to DPSC on 24 April 1986, alleging that DCASMA-NY failed to make full and prompt progress payments, interfered with contract performance, required performance to standards higher than specified, and improperly recouped monies by withholdings from progress payments. The claim did not address award of an MRE-7 contract. (Ex. FT266)

89. On 6 May 1986, Mr. Lambert sent Mr. Chiesa a 2 May 1986 draft FNY letter to PCO Frank Bankoff for submission with the proposed modification. The 2 May letter stated that DLA and FNY had agreed to settle FNY's $3,481,768 claim in return for Government commitments to (1) negotiate a fair and reasonable MRE-7 contract with FNY based on its existing mobilization capacity; (2) process a "guaranteed loan" to be submitted by BLA under 50 U.S.C. App. § 2091 and applicable FAR and DAR regulations in an amount not to exceed $2.7 million to finance MRE-5 contract costs; (3) assist FNY to obtain contracts under the 8(a) program; and (4) assist FNY in reworking 46,000 MRE-5 cases on "medical hold." (ex. FT273) PCO Bankoff received and read that 2 May 1986 letter (ex. G-37; tr. 1267).

90. To resolve the "micro-hole" problem in Star Foods' retort pouches, DPSC issued unilateral Modification Nos. P00024, dated 14 May 1986, and P00026, dated 27 June 1986, that required FNY to inspect 200 pouch samples per lot for micro-holes, and to send 50 such samples to AVI for "Zyglo" florescent dye testing, and gave FNY the right to equitable adjustments for the changes. FNY visually inspected retort pouches for micro-holes for six to eight months, thereby increasing its production time. (SR4, tabs 116, 127; ex. FT435; tr. 2105-08)

91. Mr. Lambert's 15 May 1986 letter to DPSC withdrew FNY's draft 2 May 1986 letter to the PCO (ex. G-37). Mr. Chiesa's 15 and 20 May 1986 internal notes, undisclosed to FNY at the time, state that he agreed to process the loan guarantee and to provide production assistance, but he believed that it was inappropriate for DLA to commit to a follow-on competitive contract to FNY (exs. G-38, -39).

92. Henry Thomas understood that Messrs. Chiesa and Lambert had agreed that FNY would waive its $3.4 million claim and DLA would commit to process a $2.7 million V-loan for FNY and to negotiate an MRE-7 contract with FNY, although the Government could not "guarantee" an MRE-7 contract to FNY (tr. 629-42, 2052-58).

93. On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa (ex. G-40), conforming in substance to the 2 May 1986 version, attached to proposed Modification No. P00025 (P00025). Mr. Bankoff saw the 28 May date of that letter, and provided an essentially identical FNY 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to Mr. Chiesa for approval. At 11:00 a.m. DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. (AR4, tab M25; ex. FT280; tr. 643-51, 2047-49)

94. According to Mr. Bankoff, on 29 May 1986 he told FNY that he knew nothing of any side agreement FNY made with DLA: '"There is no side agreement. There is no attachment to the modification. There is no addendums. [sic] . . .' And then it was like, 'Forget it. We won't sign the mod.'" (tr. 1267-71, 1386). Considering the documents in evidence and Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the "side agreement" attached to P00025.

95. P00025, signed by both parties on 29 May 1986, recited that FNY had submitted a $3,481,768 certified claim; provided that the terminated 114,758 cases were reinstated in MRE-6 configuration, with a price adjustment therefor under the Changes clause; FNY was to withdraw ASBCA No. 32570 (the 114,758 case default termination appeal) with prejudice; extended the schedule for the undelivered balance of MREs to

1 May through 31 October 1986; stated that FNY was to be paid $399,111 for capital equipment items ($522,218 total, less $123,107 in previous payments); and rescinded the $100,000 consideration for each of Modification Nos. P00011 and P00018, thus increasing the contract price by $200,000. P00025 finally provided in paragraph 5:

> With execution of this modification, Freedom waives all claims for all happenings and/or occurrences which have arisen to date under law and/or relating to the contract, DLA13H-85-C-0591, except for any claims that may have arisen from the manufacture of contractor furnished material by Star Food Processing under Government specifications: MIL-B-44057A, MIL-B-44066A, MIL-F-44067A. Both parties have had time and opportunity to review this Agreement and consult with counsel. Both parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement and that this Agreement has been entered into free from duress or coercion.

(SR4, tab 119) Respondent paid FNY $399,111 on 13 June 1986 (ex. FT422).

96. In a letter to Mr. Thomas dated 30 May 1986, Mr. Chiesa expressed his disagreement with the "May 13" letter, cautioned that the letter jeopardized the integrity of the recently negotiated settlement and reemphasized that the settlement reflected in Modification P00025 "stands on its own" (stip., ¶ 55).

97. On 4 June 1986, FNY proposed an 88.73% "loss ratio factor" for PPRs Nos. 13-16, resulting in a proposed total payment of $1,172,654 thereon. ACO Liebman agreed, and authorized payment of that amount to FNY on 18 June 1986. (AR4, tab F136; ex. FT422)

98. Mr. Thomas' 25 June 1986 letter to Mr. Chiesa reiterated FNY's understanding that the DLA commitments were inappropriate for inclusion in Modification No. P00025, and were agreed upon in a separate letter (AR4, tab F140).

99. In June or July 1986 FNY learned that about six months before David Lambert met with DLA, the Department of Defense had changed its policy and discouraged and "shut down" "V-Loans," though DLA did not so advise him (tr. 838-40, 848-51).

100. In mid-July 1986, FNY notified DPSC of a GFM jelly outage to begin 16 July 1986 (SR4, tab 141 at 2). Bilateral Modification No. P00028 (P00028), effective 7 August 1986, extended the overall delivery schedule a total of eight days to 12 November 1986. The $13 million limit on progress payments was to be increased in steps, based on completion of successive 80,000 case increments, as follows: to $14 million upon completion and acceptance of a cumulative total of 410,000 cases; to $15 million at

490,000 cases; and to $15.8 million at 570,000 cases. P00028 stated, *inter alia,* that FNY's delivery delay was "partially excusable due to lack of [GFM] jellies for eight production days" and FNY waived all claims "whatsoever for any consideration or damages, monetary or otherwise, resulting from lack of [GFM] jellies during the period 16-28 July 86." (SR4, tab 144; findings 70, 81)

101. On 19 August 1986, the ACO approved payment of $704,068 on PPR No. 18 (ex. FT422). At a 26 August 1986 meeting with FNY and DLA, Assistant Secretary of Defense James P. Wade stated that the Defense Department would not support FNY's guaranteed loan (exs. G-46, -49), and no guaranteed loan was made.

102. Despite reworking about 40,000 MRE-5 cases and correcting problems with the case erector/bottom sealer of the automatic case sleever that had impeded production, FNY shipped only 46,260 of the 80,000 cases due by 10 September 1986 (stip., ¶ 64). Contributing to the production shortfall were a 9-day delay due to lack of GFM fruit and potato patties, GFM substitutions and reverse substitutions, and pouch tears (SR4, tabs 153, 194; AR4, tab M33).

103. FNY responded to the RFP for the MRE-7 requirement. A 24 September 1986 pre-award survey for that procurement reviewed FNY's financial capability and $2.4 million current loss position, but was favorable and recommended a complete award to FNY of an MRE-7 contract. (Stip., ¶ 68; AR4, tab F163)

104. On 25 September 1986, DPSC amended the MRE-7 solicitation to provide for as many as four awards (AR4, tab M35).

105. On 8 and 23 September 1986, the ACO approved payments of $200,219 and $311,447, respectively, on FNY's PPR Nos. 19 (showing a $2.2 million loss) and 20 (showing a $3.5 million loss) (ex. FT422). At the end of September 1986 a GFM cream outage caused a one-week FNY production shutdown (AR4, tabs F164, M44).

106. On 3 October 1986, the ACO approved a $700,000 payment on PPR No. 21, which FNY had submitted on 1 October 1986 for $2,165,098 (SR4, tab 162(C)). PCO Bankoff told ACO Liebman to withhold payment of PPR No. 21 until FNY signed proposed Modification No. P00029 (AR4, tab F164). We find that both men knew of FNY's financial distress. Mr. Bankoff's 7 October 1986 letter to FNY stated that upon execution of Modification No. P00029, the progress payment ceiling would be $14,900,725, leaving "a balance of $721,887.00 available to you, [which] will be paid to you by DCASMA N.Y. against progress payment requests" (AR4, tab F165).

107. Bilateral Modification No. P00029, executed on 7 October 1986, recited that FNY's "delinquency or anticipated delinquency may be the responsibility" of FNY, extended the delivery dates for the 210,062 case MRE balance by about one month for a $100 price reduction, and stated:

> C. In further consideration of the aforesaid extension of delivery schedule, the contractor for itself, its successors and assigns, releases and forever discharges the Government of and from all manner of action, causes of action, suits, proceedings . . . damages, claims, and demands whatsoever, in law or equity or under administrative procedures which, against the Government, the contractor ever had, now has, or may have for or by reason of any matter, cause, or thing whatsoever arising out of award and performance of the subject contract to date, except claims relating to Zyglo testing implemented in modifications P00024 and P00026 or monies due or to become due as payment for product delivered to and accepted by the Government.
>
> . . . .
>
> H. This document contains the complete agreement of the parties. There are no collateral agreements, reservations or understandings other than expressly set forth herein. It is agreed that no subsequent modification of this agreement shall be binding unless reduced to writing and signed by both parties.

(SR4, tab 159)

108. On 7 October 1986, BLA stated to DCASMA-NY that it would issue FNY a $6 million line of credit for the MRE-7 contract (AR4, tab F163).

109. A $721,887 payment was issued on PPR No. 21 on 9 October 1986 (ex. FT422), bringing cumulative progress payments to $14,894,725 and the total amount disbursed under the contract to $15,876,512 (stip., ¶ 69).

110. On 15 October 1986, FNY informed the ACO of impending "serious stock shortages of both CFM and GFM components that would impact on performance of the MRE[-6] assembly portion of the contract" (AR4, tab M44). The PCO was also advised that specific GFM meat entree items for the MRE-6 configuration (ground beef, diced turkey, frankfurters and ham slices), which should have been provided by the end of September, had still not been received as of 15 October (stip., ¶ 72). FNY's 17 October 1986 letter informed the ACO that shortage of GFM components was--

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

(SR4, tab 160)

111. ACO Liebman withheld from FNY's 21 PPRs, at least $406,670 for his "modified loss ratio," and $400,000 (corrected to $374,180) for "rental income credit" (ex. G-95). After FNY superseded the previous FII PPRs and resubmitted a new PPR No. 1 on 10 April 1985 (see finding 50), respondent paid all of FNY's PPRs more than 10 days after submission except PPR No. 4, for a total of 317 non-concurrent days of progress payment delinquencies, but with no proven impact on performance of the contract. On 20 October 1986, FNY submitted PPR No. 22 for $1,433,211 at 95% of costs incurred, net of prior PPR payments. Respondent did not pay PPR No. 22. (Ex. FT422)

112. FNY's 22 October 1986 letter advised the PCO that all CFM needed to begin producing MRE-6 configured cases was received, but that it was shutting down assembly production of MRE-6 cases, effective immediately, due to "lack of GFM" beef slices, diced turkey, ground beef, and ham slices (SR4, tab 161). On 23 and 24 October 1986, FNY laid off 286 (of 400) production workers. DPSC authorized GFM substitutions, which disrupted FNY's production and required it to store incomplete MREs while awaiting substituted GFM. (AR4, tabs F172, F183, M44; tr. 895-96)

113. On 29 October 1986, ACO Liebman ordered liquidation of FNY's progress payments at 100% because it was "experiencing serious financial difficulties and has ceased full scale production" (AR4, tab F173). By about 5 November 1986, FNY rehired workers and resumed MRE assembly (SR4, tab 193 at 104). FNY was delayed by the need to train new and rehired workers (tr. 1083-88).

114. In a 5 November 1986 telephone conversation with FNY's vice president, the ACO advised that he would not make a further progress payment because, *inter alia*, the Government was unwilling to "increase exposure until outside financing flows or MRE 7 is awarded." The ACO subsequently acknowledged that FNY's PPR No. 22 would have been payable "in the amount of $327,893." (Stip., ¶ 80)

115. Notwithstanding its production difficulties in November 1986, FNY still wished to complete the contract and to receive an MRE-7 contract award. FNY advised the PCO that, if it received an MRE-7 award, BLA would resume financial support, and production under the MRE-5 contract balance could start up in January 1987.

116. FNY submitted the lowest offer for the portion of the MRE-7 requirement for which it was eligible. On 18 November 1986, the PCO requested DCASMA-NY to perform another pre-award survey to determine FNY's responsibility for an MRE-7 award. Although the initial survey had recommended award for 867,792 MRE-7 cases, the PCO justified the second pre-award survey on the ground that, subsequent to the initial survey, FNY "has run out of financial resources and has shut down production" on the MRE-5 contract. (Ex. G-

58) As of 28 November 1986, FNY delivered 512,462 MRE cases, including 505,546 MRE-5 and 6,916 MRE-6 configured cases (SR4, tab 194 at 38).

117. In November 1986, DLA decided to award three MRE-7 contracts (AR4, tab M54). The second pre-award survey of FNY recommended "No-Award" (stip., ¶ 84). On 4 February 1987, SBA declined to issue a Certificate of Competency to FNY (SR4, tab 171). DPSC negotiated no MRE-7 contract with, and awarded no 8(a) contract to, FNY.

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

119. The 23 March 1987 Justification for MRE-8 authorized solicitation of SOPACKO, RAFCO, FNY and CINPAC, but did not designate how many contracts were to be awarded (ex. FT328).

120. On 22 June 1987, PCO Bankoff terminated the contract for default. On 20 June 1991, PCO Bankoff claimed repayment of $1,630,747.28 in unliquidated progress payments (ex. FT389).

121. On 1 May 1991, FNY filed a certified claim for an adjustment in the amount of $21,959,311, based on alleged constructive changes and breaches by Government officials from the inception of the contract, including failing to pay for product accepted. The claim included nearly $6 million in increased costs and lost profits under the contract; $375,000 for "income improperly offset and taken by ACO;" $1.2 million for capital equipment and leasehold improvements "lost through insolvency;" and $14.4 million in "[l]ost profits on promised future MRE procurements (MRE7-MRE11)." FNY did not claim any right to a convenience termination settlement, or Prompt Payment Act (PPA) interest. (AR4, tab F1) Appellant timely appealed from the PCO's denial of that claim, which was docketed as ASBCA No. 43965.

122. On 29 April 1997, FNY notified DCASMA that 33 MRE-5 contract invoices for shipments (DD Forms 250) totaling $1,907,979.05 allegedly had not been paid (ex. FT404 at 3). According to Government payment office records, as understood by the termination contracting officer (TCO) James Ljutic, 28 of those 33 invoices had been "paid" by "crediting" or "recouping" the invoiced amounts against unliquidated progress payments and other alleged FNY debts owed to respondent: 4 invoices at a 95% liquidation rate, and 24 invoices (totaling $1,455,119) at a 100% liquidation rate, starting 14 November 1986. The payment office issued to BLA several "Advice of Payment" (DLA Form 477) documents itemizing groups of invoices, showing the foregoing recoupments. The remaining five invoices, Nos. FNY-0172, -0244, -0297, 0298, and -0339, totaling $246,946.57, were not paid or credited against unliquidated progress payments. (Ex. G-92;

tr. 113-19, 1129-30) In the December 2000 convenience termination settlement agreement, Modification No. A00004, the TCO agreed to pay $246,947 for invoices FNY-0172, -0244, -0297, 0298, and -0339 (Bd. ex. 1, MOA at 4; finding 124, *infra*).

123. On 19 May 1998, pursuant to Board order, FNY submitted a "More Definite Statement" seeking specific performance of FNY's IPP agreement by ordering FNY to be reinstated as an MRE planned producer, and $55,489,549.29, as "business destruction damages," including failure to pay 34 DD Form 250 invoices for MREs accepted.

124. On 29 December 2000, FNY and TCO entered into a convenience termination settlement resulting in a net payment to FNY of $799,947 (Modification No. A00004). This amount reflected a loss adjustment of 25.1% (recovery rate on costs incurred of 74.9%). The modification stated:

> Based upon the outcome of the contractor's ASBCA case # 43965 it is possible that the contract price may be adjusted upward. If the Request for Equitable Adjustment of the contract price results in an increase of the contract price . . . , this settlement will be adjusted in accordance with a revised loss ratio. A re-computation of the loss ratio may result in an additional net payment to Freedom.

(Bd. ex. 1 at 3) The accompanying MOA explained:

> [U]pward adjustment of the termination settlement amount is dependent upon the Board finding that the contractor is entitled to an upward adjustment in contract price. . . . Any possible or potential compensation by the ASBCA for damages, interest, or penalties is not part of an Equitable Adjustment of the Contract Price and is not to be considered in computing a revised loss or profit.

(*Id.*, MOA at 7)

125. Appended to FNY's post-hearing brief are 13 "QUANTUM CHARTS" which revise FNY's total claim to $48,108,217, including the following items: (a) $9,686,129 equitable adjustment for Government-caused cost overrun, (b) $1,062,138 unrecovered program investment costs, (c) $20,748,290 lost profits on post-MRE-5 awards, and (d) $16,611,660 in "financial damages." According to FNY's brief, item (a), $9,686,129, includes an alleged $8,466,039 Government-caused cost overrun, *less* a $34,520 "estimate variance," plus $1,254,610 in profit at 14.88%. FNY "allocates" that $8,466,039 cost overrun as follows:

(1) $1,950,615 due to suspension of progress payments, imposition of the

novation agreement, and interference with financiers, resulting in a "preproduction" delay from May to October 1985 (5 months x $390,123).

(2) $ 548,057 due to alleged use of 230 vs. 134 budgeted laborers.

(3) $1,918,158 for a 3.5-month delay of production due to unplanned, less efficient equipment (3.5 months x $548,045).

(4) $ 548,045 due to a 1-month failure to pay allowable incurred costs.

(5) $ 548,045 due to a 1-month improper rejection of MRE units.

(6) $ 822,068 due to a 1.5-month failure to receive CFM (1.5 x $548,045).

(7) $1,170,369 due to a 3-month delay arising from the Government failure to provide GFM from September to November 1986 (3 x $390,123).

(8) $ 548,045 due to a 1-month failure to make DD250 payments.

(9) $ 313,236 due to "unnecessary and unreasonable" interest costs.

(10) $ 355,155 due to material cost increases.

$8,721,793 Sub-Total

Less: (11) $ 255,754 for "Freedom's responsibility" under Mod. P00028.

$8,466,039 "Total Claimed Additional Cost."

126. FNY's allocations (1) and (7) used a $390,123 average monthly overhead plus G&A cost as a factor, and its allocations (3)-(6) and (8) used a $548,045 average monthly overhead, G&A plus labor cost factor. FNY's allocation (9) is the difference between its incurred interest costs of $484,900 stated in Modification No. A00004 (Bd. ex. 1 at 7), and its pre-award, negotiated and budgeted amount of $171,664 for (working capital) interest cost (ex. FT062 at 00910). FNY does not explain allocations (2) and (10). FNY's allocation (11) calculates the $255,754 for a two-week delay due to GFM jelly outage, which FNY released in Modification No. P00028.

127. The alleged $8,466,039 cost overrun is inaccurate, because the parties agreed in the December 2000 convenience termination settlement agreement, that FNY incurred $21,525,710 in costs during contract performance, and FNY's estimated costs to complete were $1,435,171, totaling $22,960,881 (Bd. ex. 1, MOA at 2). Absent the termination, FNY would have incurred $7,990,739 in costs exceeding the $14,970,142 costs originally negotiated and budgeted for performance (finding 17). Moreover, FNY's alleged cost overrun "allocations" are inaccurate. FNY's cost overrun allocations, Figures 6-10, cite no substantiating evidence. What little evidence supports those calculations we have set forth in finding 126.

128. We find that FNY performed the MRE-5 contract for 31½ months, from 15 November 1984 (SR4, tab 10) to 22 June 1987 (SR4, tab 186). FNY admittedly incurred no costs during the last 1½ months (app. br., Fig. 5). FNY incurred $7,032,904 in manufacturing overhead costs and $3,593,672 in G&A costs during these 30 months, and incurred $2,526,746 in direct labor costs during the 13 months from November 1985 through November 1986 (Bd. ex. 1, MOA at 2; ex. FT 422 at 03915), yielding monthly averages of $234,430 for manufacturing overhead, $119,789 for G&A, and $194,365 for direct labor costs. We find that these monthly averages are sufficient for us to make a fair

and reasonable approximation of FNY's damages (exclusive of profit) during periods of delay.

129. We find that respondent's conduct was the predominant, if not sole, cause of (a) the 147 days of delay from 10 December 1984 to 6 May 1985 in beginning MRE production, and (b) 88 days of delay from 15 July to 11 October 1985. FNY incurred a monthly average of $354,219 in overhead and G&A costs. Thus, that 235-day delay resulted in $2,738,206 (235 ÷ 30.4 x $354,219) in Government-responsible costs.

130. We find that respondent's January 1986 diversion of CFM resulted in an 11-day delay in FNY's production at the end of January 1986 (finding 78), and that lack of GFM and GFM substitutions were the principal causes of delay of FNY's production for a total of 40 days from early September through early November 1986 (findings 102, 105, 110, 112-13). FNY incurred a monthly average of $548,584 in overhead, G&A and labor costs. Thus, the foregoing 11-day delay resulted in $198,501 (11 days ÷ 30.4 monthly days x $548,584) and 40-day delay resulted in $721,821 (40 days ÷ 30.4 x $548,584) in Government-responsible costs.

131. We find that respondent's non-delivery of GFM for 160 days starting on 29 November 1986 and up to 8 May 1987 was the sole cause of FNY's incurrence of overhead and G&A costs during that period. FNY incurred a monthly average of $354,219 in overhead and G&A costs. Thus, those 160 days resulted in $1,864,310 (160 ÷ 30.4 x $354,219) in Government-responsible costs.

132. According to FNY's brief: (a) damage item (b), $1,062,138, includes $651,010 in capitalized leasehold improvements and $531,205 in capitalized furniture, fixtures and equipment (both figures net of expensed amounts allocated to the contract), less $257,652 in depreciation and amortization, plus $137,575 in profit at 12.88%; (b) damage item (c), $20,748,290, includes expected profit of $11,657,381 on MREs 7 to 11, calculated at 14.88% of an alleged $78,342,618 "cost base," plus expected profit of $9,090,909 on MREs from "1991 to present," calculated at 10% of an alleged $90,909,090 "cost base"; and (c) damage item (d), $16,611,660, includes $1,429,012 for DDD's unpaid loan principal; $4,900,000 in interest on BLA's $3.5 million loan balance; $8,282,648 in "Accounts payable, penalties and interest"; and $2,000,000 for "Lost salary, @ $125,000 per annum x 16 years."

133. We further find that the record does not show the specific time or cost effects of respondent's other conduct, including that relating to the improper $59,664 progress payment deduction, AVI inspection procedures and Zyglo testing, since FNY's cost overrun "allocations" did not apportion costs caused by its own defective and delayed work (see findings 74-75, 87, 102, 110).

DECISION

I.

PROMPT PAYMENT ACT INTEREST

On 26 February 2001, FNY submitted a motion for PPA interest on $799,947 it received by virtue of the parties' 29 December 2000 convenience termination settlement agreement. Respondent argues that such motion does not relate to ASBCA No. 43965. FNY's 1 May 1991 claim did not allege any right to PPA interest on a convenience termination settlement (finding 121). Therefore, the Board lacks jurisdiction to adjudicate payment of such PPA interest. We dismiss FNY's motion for PPA interest.

II.

MOTION TO STRIKE AFFIRMATIVE DEFENSES

On 30 April 2001, FNY moved to strike the affirmative defenses of statute of limitations, accord and satisfaction, waiver, and release set forth in respondent's answer because at that time respondent had submitted no post-hearing brief, and to accept FNY's supplemental brief on such defenses. On 17 May 2001, the Board determined to accept FNY's supplemental brief, and on 11 June 2001 respondent submitted its post-hearing brief. FNY has not cited any legal authority, nor is any known to the Board, holding that a party's omission or delayed submission of a brief on the merits of an appeal results in waiver of such party's affirmative defenses. We deny FNY's motion to strike respondent's affirmative defenses.

III.

ENTITLEMENT

FNY argues that it is entitled to the added costs resulting from the following Government constructive changes and breaches of contract:

(1) Improper denial of progress payments.
(2) Improper delay of progress payments.
(3) Improper deductions from progress payments.
(4) Improper suspension of progress payments.
(5) Government interference with FNY's prospective financers.
(6) Unauthorized diversion of FNY's CFM.
(7) Unauthorized liquidation of progress payments at a 100% rate.
(8) Failure to pay FNY's invoices for delivered MREs.
(9) Delays and failures to provide GFM.
(10) Improper AVI inspection procedures.
(11) Added Zyglo testing requirement.
(12) Breach of an implied contract to maintain FNY as a planned producer for

MRE-7 and subsequent acquisitions.

FNY further argues that items (1)-(5) and (7) were done in bad faith by ACO Liebman, and so constituted breaches of contract.

Progress Payments

(Claim Items (1), (2), (3), (4))

Failure to make progress payments is a breach of contract. *See Pilcher, Livingston & Wallace, Inc.*, ASBCA No. 13391, 70-1 BCA ¶ 8331 at 38,765; *R.J.H. Corp.*, ASBCA No. 9922, 66-1 BCA ¶ 5625 at 26,278-79 (delay in initiating progress payments due to erroneous assumption that completion and acceptance of preproduction sample were conditions precedent to making of progress payments). ACO Liebman refused to authorize FII's first three PPRs on the erroneous assumptions that G&A and manufacturing overhead costs unaccompanied by direct costs were not payable, and the MRE-5 supply contract required physical progress, rather than incurrence of costs, and suspended progress payments from 6 February to 6 May 1985. FNY received no progress payments from 16 (or 29) November 1984 until 6 May 1985. (Findings 7, 18, 23-24, 26, 28-31, 33, 40, 51-52) ACO Liebman did not authorize FNY's PPR Nos. 5-7 from 5 July until 11 October 1985 and suspended progress payments from 23 August to 11 October 1985 on the erroneous assumption that FNY's accounting system was inadequate to cumulate and support costs of progress payments (findings 61, 63, 67, 71). Respondent should have made payment on the first PPR in each period no later than 10 December 1984 and 15 July 1985 (for the reasons explained *infra*). We hold that such denials, suspensions and delays in making progress payments were breaches of the contract.

FNY contends that respondent was required to pay progress payments within 5 to 10 days after their submission, citing a 4 January 1983 OSD memorandum excerpted in Defense Acquisition Circular No. 76-42. FNY's MRE-5 contract did not include or refer to such OSD memorandum. Absent a contractual or statutory time limit, progress payments are required to be paid within a reasonable time after submission. We believe that the DAC 76-42 payment guideline of 5-10 days is a reasonable standard. Respondent paid all FNY's PPRs except No. 4 and No. 22 (which was not paid at all) more than 10 days after submission for a total of 317 non-concurrent days of progress payment delinquencies, but with no proven impact upon performance of the contract (finding 111). We hold that such delays in payment of approved progress payments did not result in any additional compensable delay.

From FNY's PPR No. 8 ACO Liebman deducted $400,000 for the purportedly "actual" payment FNY received for sale of the purchase option on the leased premises, as a "rental income credit" pursuant to the 21 August 1985 Penzer-H. T. Food-Pilot Realty settlement agreement (finding 72). The $400,000 was corrected to $374,180 in January 1986 (findings 82, 111). That August 1985 settlement agreement provided that H. T. Food

was authorized to keep the $400,000 as accrued, unpaid rent, and Mr. Penzer was not sure whether he gave FII a check or a credit (finding 62). We hold that the ACO's $400,000 or $374,120 deduction from PPR No. 8 for the rental credit was proper.

ACO Liebman deducted $59,664.29 from FNY's PPR No. 13 on 18 March 1986 by mistaken application of a "percentage of physical progress" factor prescribed for construction and shipbuilding contracts, but not supply contracts (findings 71, 73, 84), and also withheld from other PPRs $399,111 in costs for office automation, production equipment and other normally capitalized costs, but which the parties agreed at the outset were direct costs without need for capitalization and depreciation, from submission of PPR No. 1 on 16 April 1985 until the $399,111 was paid on 13 June 1986 (findings 18, 23, 50, 52-55, 95). We hold that the foregoing invalid deductions were breaches of contract. *See Pilcher, Livingston; R.J.H., supra*.

On 18 March 1986, starting with PPR No. 13, when FNY's costs incurred plus estimated costs to complete first exceeded the contract price, ACO Liebman applied a "loss ratio" to all progress payments (findings 84, 111). At that time, ¶ (c)(v) of the DAR 7-104.35(b) PROGRESS PAYMENT clause authorized the CO to reduce or to suspend progress payments whenever he found upon substantial evidence that the contractor "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" (finding 7), and, in implementation of that ¶ (c)(v), DAR § E-524.5(b) provided—

> If it is determined that the total costs incurred plus the estimated additional costs to complete the contract will exceed the contract price, . . . all further progress payments will be adjusted using a loss ratio factor . . . . For the purpose of computing the loss ratio factor, a revised contract price will be used consisting of the current contract price . . . plus unpriced contract actions, such as change orders . . . , ***to the extent obligated***. The revised contract price divided by the sum of the total costs incurred to date . . . plus the estimated additional costs to complete . . . will be the loss ratio factor. [Emphasis added.]

On 20 or 21 March 1986, FNY submitted a "draft" $3.4 million claim, whose allegations are not known, because the document is not in the record (finding 85). On 24 April 1986, FNY submitted a certified, $5,709,560 claim alleging failure to make full and prompt progress payments, interference with contract performance, requiring excess performance and improper withholdings from progress payments (finding 88), the same constructive changes and breaches as in the May 1991 claim, subject of this appeal (finding 121). None of those claims were "unpriced contract actions, such as change orders," and certainly no such claim obligated any funding at that time, within DAR § E-524.5(b). We hold that the

ACO's deductions due to his "modified loss ratio" were not an abuse of discretion at that time, and were not a breach of contract.

FNY also alleged delay due to an unnecessary novation agreement. However, such delay was concurrent with the foregoing progress payment delays.

Government Interference

(Claim Item (5))

Starting in December 1984, ACO Liebman provided inaccurate information about the requirements for incurrence of costs and physical progress under the contract's progress payment clause, and refused to confirm the proper terms of that clause, to FII's prospective sources of contract financing: DDD, Broadway Bank, Richard Penzer, William Robbins, AT&T and PFS. The results of the ACO's conduct were to deter or delay those prospective sources from financing FII, and to cause FII to put building repairs and renovations on hold, to lose its financing opportunity for state-of-the-art building management and control system hardware and software, and instead to purchase less efficient equipment for that purpose. (Findings 29, 35-39, 43, 45, 54)

ACO Liebman's foregoing interferences with prospective financers – conjoined with his aforesaid failure to initiate progress payments – delayed physical progress from 15 November 1984, when the contract was awarded (finding 22), until 11 February 1985, when FNY arranged contract financing from PFS and BLA (finding 41), except for building repairs and renovations, and first article completion and approval on 16 January 1985 (finding 38). We hold that such interference with FNY's securing of contract financing was a breach of contract. *See George A. Fuller Co. v. United States*, 69 F. Supp. 409, 411, 108 Ct. Cl. 70, 95 (1947) (the implied duty of non-interference is that neither party to the contract will do anything to prevent performance thereof by the other party or will hinder or delay him in its performance; interference is a breach of contract).

In summary, after contract award, ACO Liebman's repeated interferences with FNY's prospective financiers and his refusal to approve progress payments to FNY until 6 May 1985 delayed FII's commencement of performance by 172 days and his erroneous refusal to authorize payment of PPRs Nos. 5-7, and suspension of progress payments from 15 July to 11 October 1985 further delayed FNY's performance by 88 additional days. The record contains no evidence that FII/FNY caused any delay in physical progress on the contract during that period. (Finding 129)

Government Diversion of CFM

(Claim Item (6))

FNY directed Sterling Bakery, a supplier of CFM brownies, to "ship-in-place" FNY's order. On about 7 January 1986, DPSC countermanded FNY's direction and ordered Sterling to divert those CFM components from FNY to RAFCO to support the reprocured MRE-5 units. That diversion led to a brownie outage on 30 January 1986 and halted FNY production for 11 days. (Finding 78) Contract § H-5, Government Furnished Property, ¶ h, gave the Government the authority to direct the substitution of any of the specified GFP components of the MREs (finding 8). But DPSC had no authority to direct a CFM supplier of FNY to provide such CFM to another prime contractor. The convenience termination settlement agreement provided that FNY was entitled to $193,727 as settlement of its $387,455 claim for CFM "seized" by respondent (finding 78). We hold that respondent is also liable for the 11-day delay in FNY's production at the end of January 1986 (finding 130), as a breach of contract.

Unauthorized Liquidation of Progress Payments

(Claim Item (7))

In FNY's MRE-5 contract, the DAR 7-104.35(b) PROGRESS PAYMENT clause prescribed a 95% progress payment liquidation rate, and authorized an increased liquidation rate under any of the six conditions set forth in ¶(c) (finding 7). On or about 29 October 1986, ACO Liebman ordered liquidation of FNY's progress payments at 100% citing FNY's "serious financial difficulties" and cessation of production (finding 113). Respondent recouped the invoiced amounts on 24 of FNY's invoices, totaling $1,455,119, at a 100% progress payment liquidation rate (finding 122). We hold that respondent properly liquidated, at the 95% rate, the amounts in four FNY invoices against previously unliquidated progress payments, and respondent's recoupment of progress payments at the 100% rate was authorized by ¶(c)(ii) of the Progress Payment clause, "has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract."

Failure to Pay Invoices For Supplies Delivered

(Claim Item (8))

FNY's 1 May 1991 claim for $21,959,311 included failure to pay for product accepted (finding 121). On 29 April 1997, FNY notified respondent that it had not paid 33 invoices totaling $1,907,979.05 for MREs delivered and accepted (finding 122). FNY's 18 May 1998 More Definite Statement of its ASBCA No. 43965 complaint included, in ¶ 47, non-payment of 34 DD 250 invoices for $1,907,979.05, as a "material breach of contract." In September 1999, FNY submitted a claim to the CO alleging that respondent had not paid

a net $95,398.95 for 34 invoices for MREs delivered under the captioned contract, and in October 1999 took an appeal from the deemed denial thereof (ASBCA No. 52438) We dismissed ASBCA No. 52438 on the basis that the $95,398.95 sought therein duplicated that same amount sought in ASBCA No. 43965. *Freedom NY, Inc.*, ASBCA No. 52438, 00-1 BCA ¶ 30,873 at 152,432. FNY moved for summary judgment on its right to $95,398.95 on the 34 invoices. Respondent argued that whether it had paid those 34 invoices was a disputed material fact. We deferred ruling on that motion until deciding the merits of this appeal.

Modification No. A00004 resolved FNY's entitlement to payment of $246,947 for the five unpaid invoices (finding 122). We hold that FNY is entitled to that $246,947 already paid, and no more.

GFM Delays

(Claim Item (9))

Paragraph (a) of the DAR 7-104.24(a) GOVERNMENT PROPERTY clause of the MRE-5 contract (finding 7) provided that in the event the Government did not deliver the specified GFM to the contractor by the time stated in the schedule, *viz.*, § H-5 of the MRE-5 contract, then the contractor is entitled to an equitable adjustment of the contract price and delivery dates affected by such delay. Respondent delayed delivery of GFM for 40 days in September-November 1986. FNY notified respondent of the GFM outages. Such GFM delays resulted in closure of FNY's production line for 40 days, and release of some of its production workers. (Findings 102, 105, 110, 112-13, 130) Moreover, respondent's non-delivery of GFM to FNY from 29 November 1986 to 8 May 1987 (finding 131) caused that 160-day delay in resuming and continuing contract performance. We hold that FNY is entitled to recover the costs of such 40 and 160-day extensions under DAR 7-104.24(a), ¶ (a).

Improper Inspection

(Claim Item (10))

FII's approved Inspection Plan for MRE-5 assembly included (1) "Moving Lot Sampling/Inspection," for Government verification inspection for normal production of all end items, in which the point of sample selection and inspection for final assembly cases was after strapping and final marking of cases, but before their "palletization," and (2) only in the event of rejection, rework or reinspection of lots, "Stationary Lot Sampling/ Inspection" after palletization (finding 46). The Government inspectors (AVI) improperly performed "Stationary Lot Sampling/Inspection" for about two weeks in October 1985. In November-December 1985 AVI changed to the "Moving Lot Sampling/Inspection" and trained its inspectors to identify valid defects, indicative that it had notice of its improper

procedures. The result of AVI's corrective actions was that AVI's rejection rate decreased markedly by 19 December 1985. (Findings 74-75)

Inspection performed in accordance with the inspection plan upon which the parties agreed at the outset of contract performance is proper, and does not constitute a constructive change. *See Max Bauer Meat Packer, Inc. v. United States*, 458 F.2d 88, 91 (Ct. Cl. 1972). We hold that respondent's imposition of improper inspection procedures was a constructive change. *See Astro Dynamics, Inc.*, ASBCA No. 28381, 88-3 BCA ¶ 20,832 (imposition of inspection procedure different from and more stringent than contract specified was constructive change).

Added Zyglo Test Requirement

(Claim Item (11))

The Government issued two change orders, by unilateral Modification Nos. P00024 and P00028 in May and June 1986, that added new requirements for FNY to inspect 200 pouch samples for "micro-holes" and to send 50 such samples to AVI for "Zyglo" florescent dye testing. FNY visually inspected for micro-holes for six to eight months, thereby increasing production time. (Finding 90) Such testing was a claim reserved from the releases in Modification Nos. P00025 and P00029 (findings 95, 107) and appellant is entitled to an equitable adjustment for it.

Loss of Post-MRE-5 Contracts

(Claim Item (12))

FNY argues that DLA/DPSC breached the MRE-5 contract by declining to award subsequent MRE contracts to FNY, an IPP planned producer, and instead awarding such contracts to CINPAC, after 1986. FNY argues that DPSC's failure to award MRE-7 and following MRE contracts to FNY is governed by *United Technologies Corp., Pratt & Whitney Group*, ASBCA Nos. 46880 *et al*., 97-1 BCA ¶ 28,818. There, the engine contract's § H-24, "Investment Incentives," provided that the Navy had determined it in the national interest and industrial mobilization to have two F404 aircraft engine manufacturers, and it intended to award at least 30 percent of the total annual F404 engine production requirements over the following five fiscal years to Pratt & Whitney, provided the Congress appropriated funds therefor and four other conditions, all of which the contractor and the Government met. The Board held that failure to award such F404 contracts to Pratt & Whitney was a breach of contract. 97-1 BCA at 143,763, 143,804. By contrast, in *Defense Systems Co., Inc.*, ASBCA No. 50918, 00-2 BCA ¶ 30,991, *modified on motion for recon.*, 01-1 BCA ¶ 31,152, cited by appellant, the Board held that the award of a rocket fin replacement contract to the system contractor's competitor was not a breach of contract, since the system contractor had no separate contract for such rocket fins, and it

did not automatically become a fin mobilization producer by virtue of award of its rocket system contract. 00-2 BCA at 152,998-99.

The MRE-5 contract had no provision stating DPSC's intent to award future MRE contracts to FNY. FNY's IPP agreement did not bind DLA or DPSC to any contractual relationship or obligate the Government to contract with FNY (finding 3). Although several MRE procurement justifications and solicitations provided for soliciting offers and negotiating with three or four IPP planned producers, DPSC from time to time made MRE contract awards to fewer than the number of IPP planned producers that submitted offers (findings 4, 104, 117, 119). We conclude that designating FNY as an IPP planned producer was not a Government commitment or guarantee that it would maintain FNY in such status or continue to award MRE contracts to FNY. We hold that DPSC's failure to award FNY MRE-7 and subsequent ME contracts was not a breach of any express or implied contract term or condition to maintain FNY as an IPP planned producer.

Remote or speculative damages such as general loss of business or loss of potential contracts are, as a matter of law, not recoverable. See *Defense Systems Co.*, 00-2 BCA at 152,965, citing *William Green Const. Co. v. United States*, 477 F.2d 930, 936, 201 Ct. Cl. 616, 626 (1973), *cert. den.*, 417 U.S. 909 (1974) (damages such as general loss of business and loss of entire net worth considered too remote and consequential to be recovered). The Board cannot order respondent to reinstate FNY as a planned producer of MREs, because we have no jurisdiction or authority to grant the relief of specific performance. *See Alsace Industrial, Inc.*, ASBCA No. 51709, 99-1 BCA ¶ 30,227 at 149,543 (and authorities cited therein).

Summary of Entitlement

We hold that (a) respondent breached the MRE-5 contract with respect to FNY's claim item Nos. (1), (3) (except for the rental credit and loss ratio deductions), (4), (5), (6) (which was resolved in Modification No. A00004 other than as to delay), and (8) (which was resolved in Modification No. A00004 for $246,947); (b) respondent's actions constituted constructive changes or were compensable under the Government Property clause, with respect to FNY claim item Nos. (9), (10) and (11); and (c) there was no breach or compensable change proven with respect to FNY's claim item Nos. (2), (3) (rental credit and loss ratio deductions), (7) and (12).

IV.

AFFIRMATIVE DEFENSES

We next address whether FNY's 1 May 1991 claim is barred, in whole or in part, by accord and satisfaction by Modification Nos. P00011, P00018 or P00020, or by the release provisions in contract Modification Nos. P00025, P00028 or P00029.

Modification Nos. P00011 and P00018. These modifications extended the MRE contract deliveries by three months on 14 June 1985 and by 60 days in November 1985, each for "consideration" of a $100,000 price reduction (findings 56, 70). On 29 May 1986, Modification No. P00025 rescinded those $100,000 price reductions (finding 95). We interpret the reinstatement of the two $100,000 considerations to the MRE contract price as tacit admission that the delivery extensions in Modification Nos. P00011 and P00018 were not for contractor-caused delays. We hold that those modifications did not constitute an accord and satisfaction with respect to any prior FNY claims, for lack of consideration, a necessary element of accord and satisfaction. *See Brock & Blevins Co., Inc. v. United States*, 343 F.2d 951, 955, 170 Ct. Cl. 52, 58-59 (1965) (the essential elements of an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration).

Modification No. P00020. This modification extended the MRE contract delivery schedule by 60 days, provided for discretionary reinstatement of the disputed 114,758 MRE-5 cases terminated for default, and adjusted the § L-4 progress payment limitation (finding 81). Modification No. P00020 embodied the parties' 9 December 1985 agreements (finding 79). On 9 December 1985, the parties orally agreed to the terms later set forth in Modification No. P00020, but additionally on that date the Government requested FNY to release all its prior claims, and FNY rejected that request and refused to release all prior claims (finding 77). Respondent's review and consideration of FNY's March 1986 $3.4 million claim (finding 85) and the parties' discussions and negotiations to resolve that claim (findings 86, 89, 91-93), are indicative that they did not consider Modification No. P00020 to constitute an abandonment or an accord and satisfaction of FNY's prior claims. Given this history of the parties' communications and negotiations prior to and after its execution, we hold that Modification No. P00020 was not an accord and satisfaction of FNY's prior claims because there was no meeting of the minds with respect to releasing such claims, and such a meeting of the minds was a necessary element of accord and satisfaction. *See Brock & Blevins, supra*; *Teledyne Lewisburg v. United States*, 699 F.2d 1336, 1361-62 (Fed. Cir. 1983) (modification executed after contractor refused to sign a release of claims was not an accord and satisfaction).

Modification No. P00025 dated 29 May 1986. Paragraph 5 of Modification No. P00025 released all prior FNY claims except with respect to CFM manufactured by Star Food, stated that the parties' terms and conditions were integrated therein, and the modification was entered into free from duress or coercion (finding 95). FNY argues that ¶ 5 does not bar any part of its claim because: (1) without the 13 May 1986 "side agreement" with DLA, FNY would not have signed P00025; (2) each provision in P00025 benefiting FNY – reinstating the terminated 114,758 cases, schedule extension on account of Government delays, the $399,111 capital equipment payment, the $200,000 price increase due to the invalid $100,000 consideration in Modification Nos. P00011 and P00018 – was required by the contract before 29 May 1986, and so was not "new" consideration for release of FNY's $3.4 million claim; (3) respondent failed to process a $2.7 million FNY "V-loan" and to negotiate in good faith a fair and reasonable MRE-7 contract with FNY, as

agreed in the "side agreement"; (4) FNY signed Modification No. P00025 under duress; (5) enforcement of Modification No. P00025 would be unconscionable because DLA and DPSC misled FNY to sign Modification No. P00025 with the understanding that DLA had approved the "side agreement"; and (6) the "side agreement" was induced by fraud, since DLA knew, or should have known, but did not disclose to FNY, that V-loans were discontinued before May 1986.

We have found that, but for the DLA 13 May 1986 "side agreement," FNY would not have signed Modification No. P00025 (finding 93). PCO Bankoff's testimony that he said there was no side agreement on 29 May 1986 was not probative (finding 94). To the extent that DLA disagreed with the MRE-7 negotiations and 8(a) awards elements of that side agreement (finding 91), DLA did not notify FNY of any disagreement until 30 May 1986 (finding 96). The Defense Department did not support the $2.7 million guaranteed loan for FNY, and no guaranteed loan was made to FNY (finding 101). DPSC did not negotiate an MRE-7 contract with FNY despite the favorable 24 September 1986 pre-award survey, and DLA did not initiate any 8(a) contract with SBA for FNY. (Findings 103, 117)

The Government's delayed payment of an amount less than specified in an agreement to settle contract claims was a breach of contract. *See Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 224 Ct. Cl. 111, 138 (1980) ("the Government cannot enforce the benefits of the settlement agreement against the contractor, and, at the same time, vary its own obligations thereunder."). We hold that respondent cannot enforce the Modification No. P00025 release provision, since it did not fulfill its duties under the side agreement thereto. Accordingly, we do not decide the other grounds of lack of new consideration, duress, unconscionability or fraud.

Modification No. P00028. Modification No. P00028, on 7 August 1986, gave FNY an eight-day schedule extension and released FNY's claims resulting from lack of GFM jellies during the period 16-28 July 1986 (finding 100). Thus, any part of FNY's May 1991 claim seeking costs caused by the foregoing lack of GFM jellies was barred by Modification No. P00028.

Modification No. P00029. Modification No. P00029, executed on 7 October 1986, recited that FNY's "delinquency or anticipated delinquency may be the responsibility" of FNY, gave FNY a delivery schedule extension for a $100 price reduction, released all FNY's prior claims except for claims relating to Zyglo testing or "monies due or to become due as payment for product delivered to and accepted by the Government," and stated that it was an integrated document with no collateral agreements, understandings or reservations (finding 107).

FNY argues, principally, that the Modification No. P00029 release does not bar its claims because (1) Modification No. P00029 reserved FNY's claim for "monies due or to become due as payment for product delivered to and accepted by the Government," which payment is subject to Changes clause adjustments; and (2) FNY signed Modification No.

P00029 under economic duress, namely, improper withholding of PPR No. 21 well knowing of FNY's immanent financial collapse due to respondent's antecedent maladministration of the contract.

The ACO had been deducting loss ratio factor amounts from FNY's progress payments since March 1986 (finding 84). In early October 1986, the PCO knew of FNY's claims of financial hardship on account of delayed and withheld progress payments, and of the September 1986 GFM outages that had delayed and shut down production (findings 85, 88, 102-03, 106). The PCO and ACO well knew of FNY's financial distress (finding 106). On 3 October 1986, after the ACO had approved FNY's PPR No. 21 for payment of $700,000, the PCO told the ACO to withhold such payment until FNY signed Modification No. P00029. PCO Bankoff's 7 October 1986 letter to FNY advised that upon executing Modification No. P00029 the $721,887 balance would be paid against PPRs. (Finding 106)

The elements of proof of duress are that (1) one party involuntarily accepted the terms of another; (2) the circumstances permitted no other alternative; and (3) such circumstances were the result of coercive acts of the other party. *See Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 126 Ct. Cl. 51, 62 (1953). The DAR 7-104.35(b) PROGRESS PAYMENT clause in FNY's contract gave the contracting officer no right to withhold an approved progress payment until the contractor signed a contract modification. Since the PCO and ACO were both well aware of the contractor's financial distress immediately prior to execution of Modification No. P00029, we are persuaded that their delaying payment on the previously approved PPR No. 21 coerced FNY to sign Modification No. P00029. FNY's duress resulted not from its financial necessities, but rather from the Government's coercive act. *Cf. Progressive Bros. Const. Co. Inc. v. United States*, 16 Cl. Ct. 549, 554 (1989) (financial stress without Government coercion was not duress).

We hold that the general release provision in Modification No. P00029 is not enforceable because the extended delivery dates provided in Modification No. P00029 did not result from delays for which FNY was responsible, but rather for delays for which DPSC was responsible (findings 102, 105), and on account of duress.

We have considered the Government's other affirmative defenses and find them meritless.

V.

QUANTUM

We held that ACO Liebman's interferences with FNY's prospective financers and refusal to authorize progress payments delaying commencement of performance by 147 days; his erroneous refusal to authorize PPRs Nos. 5-7 delaying performance for 88

additional days (finding 129); respondent's diversion of FNY's CFM resulting in an 11-day delay (finding 130); and the ACO's unauthorized deductions from progress payments, were breaches of contract (claim items (1), (3, partly), (4), (5), (6)). However, the MRE-5 contract incorporated the DAR 7-104.77(f) GOVERNMENT DELAY OF WORK clause (finding 7), which provides a remedy for Government delay. The clause includes delay "by an act of the Contracting Officer in the administration of this contract, which act is not expressly or impliedly authorized by this contract." A contractor cannot maintain a breach claim for Government delay when relief is available under the contract. *See Triax Pacific, A Joint Venture*, ASBCA No. 36353, 91-2 BCA ¶ 23,724 at 118,747, *aff'd,* 958 F.2d 351, 354 (Fed. Cir. 1992) (delay in issuing notice to proceed was not a breach because remediable under the contract's "Suspension" clause); *Mega Const. Co., Inc. v. United States*, 29 Fed. Cl. 396, 415 (1993) (default termination was not a breach because it was subject to equitable adjustment under the convenience termination clause). Accordingly, the foregoing Government interferences, delayed and withheld progress payments, and diversion of CFM were remediable by adjustment to the contact price under the MRE-5 contract's DAR 7-104.77 clause, under which no profit is recoverable.

We also held that FNY was entitled to an equitable adjustment under the GOVERNMENT PROPERTY clause for delays attributable to late delivery of GFM (claim item (9)).

The costs relating to the $59,664.29 improper progress payment deduction (claim item (3)) are encompassed in the "estimated cost at completion" in the convenience termination settlement agreement, and will become payable upon recomputation of the "loss ratio" utilized therein based upon our holding in this appeal. The TCO has paid the five unpaid invoices (claim item (8)) in the convenience termination settlement. We held that FNY established entitlement on its claims (10) and (11), but we found that record evidence did not show the time or cost effects of the Government's conduct sufficient to establish monetary recovery for such items (finding 133).

Based on those holdings, the record evidence substantiates recovery of the following adjustments to the contract price:

Claim Item(s)	Amount		Finding
(1), (4), and (5), delay of 235 days due to withheld and suspended progress payments, interferences with prospective financers	$2,738,206		129
(6) 11-day delay due to diversion of CFM	$ 198,501		130
Subtotal:		$2,936,707	
(9) GFM delay of 40 days	$ 721,821		130
(9) GFM delay of 160 days	$ 1,864,310		131

Subtotal:	$2,586,131	
Profit at 14.88% on $2,586,131	$ 384,816	
Subtotal:		$2,970,947
Total recovery:		$5,907,654

In summary, we hold that FNY is entitled to a contract price adjustment under the GOVERNMENT DELAY OF WORK and GOVERNMENT PROPERTY clauses of $5,907,654, plus CDA interest on such amount, from 6 May 1991, when we deem that the PCO received FNY's 1 May 1991 certified claim, until the date of payment. We sustain the appeal to the extent set forth above, and deny the balance thereof.

Dated: 28 August 2001

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 43965, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals