ARMED SERVICES BOARD OF CONTRACT APPEALS

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

APPEARANCE FOR THE APPELLANT: Mr. Henry Thomas
President

APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE JAMES

Appellant submitted a $21,959,311 claim under the captioned contract and timely appealed its denial by the contracting officer to this Board. Our 28 August 2001 decision sustained the appeal and awarded appellant $5,907,654. *Freedom NY, Inc.*, ASBCA No. 43965, 01-2 BCA ¶ 31,585, *recon. denied,* 02-1 BCA ¶ 31,676. Both parties appealed that decision to the Federal Circuit Court of Appeals.

That court's May 2003 decision reversed our holding invalidating the release in Modification No. 25 (Mod. 25) on the ground that the government breached the "alleged side agreement" and remanded the issue of the validity of the Mod. 25 release to the Board for consideration of the contractor's other alleged grounds for invalidity, "lack of consideration, duress, unconscionability or fraud." *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1326, 1329, *reh'g denied,* 346 F.3d 1359 (Fed. Cir. 2003), *cert. denied,* 124 S. Ct. 2016 (2004).

Pursuant to Board Rule 32, the parties have proposed additional findings of fact and submitted legal arguments on the remand issues. Familiarity with our decision in *Freedom NY, Inc.*, ASBCA No. 43965, 01-2 BCA ¶ 31,585, is assumed, and we will not repeat our findings therein except when necessary to analyze the remand issues. Our additional findings are numbered to follow those in our August 2001 decision.

ADDITIONAL FINDINGS OF FACT ON CONSIDERATION

134. Modification No. P00011 (Mod. 11) executed 14 June 1985, extended the MRE delivery dates by three months for which FHY was required to pay $100,000 (finding 56).

135. On 15 November 1985, the parties executed bilateral Modification No. P00018 (Mod. 18) which, for a $100,000 price reduction, rescheduled MRE deliveries as follows:

Month	MRE Quantity
1-30 Nov 85	50,000 cases
1-31 Dec 85	65,000 cases
1-31 Jan 86	75,000 cases
1-28 Feb 86	90,000 cases
1-31 Mar 86	100,000 cases
1-30 Apr 86	120,000 cases
1-31 May 86	120,304 cases

(SR4, tab 85)

136. FNY failed to meet the November and December 1985 MRE deliveries. On 6 December 1985 and 2 January 1986, respondent terminated for default 49,758 and 65,000 case increments for November and December 1985. (Finding 76) As of the period 11 October through December 1985, the government was responsible for 235 days of delay in FNY's contract performance (finding 129).

137. On 9 December 1985, the parties discussed delivery of the balance of the MREs. DPSC proposed to "[a]dd a 100,000 case reinstatement quantity . . . at the sole discretion of the Government pending satisfactory performance by Freedom," to extend future deliveries, and for FNY to release all claims it believed it had against the government under the contract. FNY stated that government mishandling and delay in progress payments had caused the 7-month delay in production, and refused to release all prior claims. The parties agreed that DPSC might at its discretion reinstate in FNY's contract 114,758 cases in MRE-6 configuration to be delivered after the MRE-5 deliveries, conditioned on timely deliveries to the new, extended delivery dates. (SR4, tab 100)

138. Bilateral contract Modification No. P00020 (Mod. 20), executed on 29 January 1986, revised the delivery schedule to require delivery of 180,000 MRE cases from 1 January through 30 April 1986, and provided:

> 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.

(SR4, tab 104)

139. From 10 December 1984 through 11 February 1986, the government was responsible for 246 days of delay in FNY's contract performance (findings 129-30).

140. On 20 or 21 March 1986, FNY submitted a "draft" $3.4 million claim to DPSC and on 24 April 1986 submitted a $5,709,560 certified claim to DPSC (findings 85, 88).

141. Bilateral Mod. 25 was drafted by DPSC and was signed on 29 May 1986. It reinstated the terminated 114,758 MRE cases (in return for which FNY was to withdraw its default termination appeal in ASBCA No. 32570 with prejudice), thereby reinstating the original quantity of 620,304 MRE cases with a corresponding $3,181,665.55 contract price increase, re-scheduled the "undelivered balance" of 440,062 cases from 1 May through 31 October 1986, provided that FNY was to be paid the $399,111 balance for capital equipment items that the ACO previously had not paid and rescinded the $100,000 deducted from the contract price by each of Mods. 11 and 18. (Finding 95; SR4, tab 119 at 3) The difference between 620,304 and 440,062 is 180,242, consistent with finding 47 in ASBCA No. 35671, which stated: "By the end of April 1986 more than 180,000 MRE cases had been accepted" (96-2 BCA ¶ 28,328 at 141,465).

142. FNY invoiced, and respondent paid, 100% of the $399,111 capital equipment costs (ex. FT422 at 11292-93), not at the 95% progress payment rate (finding 7). Five percent of $399,111 is $19,955.55.

DECISION

A valid release must be supported by consideration. *See A.R.S. Inc. & National Truck Rental Co., Inc. v. United States*, 157 Ct. Cl. 71, 76-77 (1962). Performance of a pre-existing duty is not sufficient consideration for a supplemental agreement. *See Gardiner, Kamya & Associates, P.C. v. Jackson*, 369 F.3d 1318, 1322 (Fed. Cir. 2004) (performance of a pre-existing legal duty is not consideration); *Allen v. United States*, 100 F.3d 133, 134 (Fed. Cir. 1996) (same).

FNY argues that Mod. 25's release was invalid because each provision in Mod. 25 benefiting FNY – reinstating the terminated 114,758 MRE cases, the schedule extension on account of government delays, the $399,111 capital equipment payment, the $200,000 price increase due to rescinding the $100,000 consideration in Modification Nos. P00011 and P00018 – was a pre-existing duty required by the contract before 29 May 1986, when Mod. 25 was signed, and so was not "new" consideration for release of FNY's $3.4 or $5.7 million claim (app. br. at 26-28).

With respect to Mod. 25, respondent argues that FNY was not entitled to reinstatement of the terminated 114,758 cases since it did not meet the April 1986 delivery increment and the government had discretion to make such reinstatement, and

was not entitled to the $200,000 price increase by rescission of the $100,000 price reductions in Mods. 11 and 18, the delivery schedule extension, or 100% (rather than 95%) of the $399,111 payment for equipment costs (gov't br. at 3-7).

Reinstatement of the terminated 114,758 MRE cases was new consideration for FNY because, even if the default terminations were invalid, FNY was entitled only to their conversion to convenience terminations and recovery of as yet unproved amounts as termination settlements, not to reinstatement of the 114,758 terminated MREs, with a corresponding $3,181,665.55 contract price increase. Furthermore, FNY invoiced, and respondent paid, 100% of the $399,111 capital equipment costs, not at the 95% progress payment rate. Five percent of $399,111 is $19,955.55. (Finding 142) We hold that there was consideration for the release in Mod. 25. We need not address, therefore, whether the other elements cited by respondent also constituted consideration.

ADDITIONAL FINDINGS OF FACT ON DURESS

143. The CO's 11 December 1985 telex to FNY threatened default termination of the contract unless FNY cured its alleged condition of "anticipated significant problems in obtaining the necessary financing to perform" (ex. FT222 at 1545-46).

144. Respondent knew that from January 1985 through April 1986 FNY had complained of financial hardship arising from delayed and withheld progress payments and government interference with securing of outside financing for contract performance (findings 29, 35-38, 51, 66, 88).

145. As of 29 May 1986, the date of execution of Mod. 25, respondent owed $5,368,427 for withheld and unpaid FNY invoices (ex. FT422 at 2870).

146. Mod. 25 provided, *inter alia*, that "this Agreement has been entered into free from duress or coercion" (finding 95). FNY's testimony about the circumstances under which Mr. Thomas signed Mod. 25 did not mention government coercion (tr. 643-54, 2047-60). He testified that without DLA's agreement he would not have signed Mod. 25 (finding 93).

147. FNY's 13 February 1987 letter to DOD General Counsel Lawrence Garrett first asserted that it signed Mod. 25 "under duress and DOD coercion" (ex. G-68).

DECISION

To render a contract unenforceable for duress, the party "must establish that (1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts." *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d at 1329, quoting *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000). "[C]oercion requires a showing that the

government's action was wrongful—*i.e*. that it was (1) illegal, (2) a breach of an express provision of the contract without a good faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing." *Id*. at 1330.

FNY argues that it was coerced to sign Mod. 25 involuntarily and its only alternative was to sign it. Respondent argues that Mod. 25 expressly stated that there was no duress or coercion, FNY introduced no evidence of duress in the circumstances leading to the execution of Mod. 25, and it did not allege duress at the time Mod. 25 was signed, but only for the first time in May 1987, almost a year later. (In fact FNY alleged such duress on 13 February 1987 (finding 147).)

Respondent threatened default termination in December 1985, knew from January 1986 through April 1986 of FNY's financial hardship due to delayed and withheld progress payments and government interference with securing of outside financing, and withheld $5,368,427 in progress payments as of 29 May 1986 when Mr. Thomas signed Mod. 25 (findings 143-45).

Nonetheless, the appeal record does not establish that FNY accepted DPSC's terms in Mod. 25 involuntarily and without any alternative. FNY's testimony about the circumstances under which Mr. Thomas signed Mod. 25 did not mention government coercion. To the contrary, Mr. Thomas testified that without DLA's alleged side agreement he would not have signed Mod. 25. (Finding 146) These latter facts show clearly that FNY did have an alternative to signing Mod. 25, and, therefore, disprove the existence of duress. Accordingly, we hold that the Mod. 25 release is not invalid due to duress.

ADDITIONAL FINDINGS OF FACT ON FRAUD

148. In March-April 1986, Messrs. Raymond Chiesa, DLA Executive Director of Contracts, and Karl Kabeiseman, DLA General Counsel, discussed with FNY's designated representatives, Messrs. David Lambert and Frank Francois, waiving or releasing FNY's pending claim in return for government commitments to negotiate an MRE-7 contract with FNY, to process a V-Loan for FNY, and to award FNY 8(a) contracts (finding 86).

149. 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 (finding 91). Mr. Chiesa's 15 May 1986 memorandum stated:

SUBJECT: Freedom Industries

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

Mr. Chiesa's 20 May 1986 letter sent two documents to LTCOL Menarchick: a proposed Modification, whose text corresponded essentially to Mod. 25, and Mr. Thomas' 2 May 1986 draft letter to CO Bankoff, which corresponded essentially to FNY's 13 May 1986 letter to Mr. Chiesa (the alleged side agreement). (Exs. G-38, -39; AR4, tab M25 at 800503-05).

150. 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 (Mr. Lambert) (finding 99).

151. 50 U.S.C. App. § 2091 was implemented by FAR Subpart 32.3—Loan Guarantees for Defense Production, and by DFARS Subpart 232.3—Loan Guarantees for

Defense Production. DFARS 232.3 was included in the DFARS, 1986-1989 editions. 50 U.S.C. App. § 2166(a), as presently amended, provides, *inter alia*, that 50 U.S.C. App. § 2091, "shall terminate at the close of September 30, 2008." Since 1975 § 2166(a) has also provided that § 2091 "shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts."

152. FNY's brief states in its recitation of "FACTS," ¶ B.10, that--

> Freedom later discovered that approximately six months before Mr. Lambert reached agreement with DLA, the Department of Defense had, in fact, "shut down" the V-Loan program. *DLA knew this information at the time of the Mod. 25 negotiations with Freedom, but DLA withheld the information from Mr. Lambert and, therefore, from Mr. Thomas.* Finding 99. [Italics added.]

(App. remand br. at 8). Finding 99 did not include the italicized statement.

153. At trial, appellant's attorney asked Mr. Lambert:

> Q . . . Is it your belief that their statement that they would process the loan as you testified, do you believe that they did, in fact, process the loan?
>
> A Well, I inceptively [sic] had some concern about that because the – as it unfolded the Federal Reserve Bank was having problems with it and were getting signals from Washington. And I think I eventually was told that there had been a change at some point earlier on in the DOD policy with respect to a guaranteed loans [sic]. In which they were not only discouraged but were basically shut down.
>
> Q Did Mr. Kabazman [sic] at the time you had your discussion with him point out to you that such a change in policy had taken place?
>
> A Absolutely not. I was – I think we discussed and had reference to some prior V-loan situation down in the south in which he was directly involved and we were talking about it in present tense so I had no reason to believe that there had been any change in policy. . . . we were using the regulations, current statutes and regulations with respect to the discussions and the processing of the V-loan.

> Q As general counsel of that . . . agency, do you believe that Mr. Kabazman [sic] should of known that there was in fact a policy change?
>
> A Well, in the context of the conversation, I could of – I have to assume that he knew there would be – there was no objection or no obstacle in getting the V-loan to his knowledge.

(Tr. 839-40)

154. We find that neither the foregoing testimony nor any other record evidence proves that in March-May 1986: (a) Mr. Kabeiseman or Mr. Raymond Chiesa knew or had reason to know that the Defense Department had "shut down" V-Loans, and (b) DLA officials misrepresented to FNY any facts about V-loans or the willingness of DLA or DPSC to negotiate in good faith with FNY for the follow-on MRE-7 contract if FNY was otherwise qualified to participate in the procurement.

DECISION

Appellant argues that the government mislead and induced FNY to sign Mod. 25 with the understanding that the 13 May 1986 "side agreement" to process a $2.7 million V-Loan for FNY and to negotiate in good faith with FNY a follow-on MRE contract. But DLA knew that the V-Loan program was shut down, it had no intention of honoring the "side agreement," and FNY's failure to complete the MRE-5 contract would disqualify it for a follow-on contract. FNY concludes that respondent's actions constituted fraud in the inducement. (App. br. at 28-33)

Respondent argues that the fraud allegation was contrary to FNY's 1989 allegation that Mr. Lambert had misrepresented to FNY that DLA had agreed to the conditions in the side agreement (gov't 11 June 2001 br. at 118; remand br. at 10).

To establish a defense of fraud, a party must show (1) a misrepresentation of a material fact, (2) an intent to deceive, and (3) reliance by the other party to his detriment. *See Bar Ray Products, Inc. v. United States*, 340 F.2d 343, 351 (Ct. Cl. 1964).

The record contains no evidence that the DLA officials who discussed a V-Loan for FNY with Mr. Lambert in March-April 1986 knew or had reason to know that the Defense Department had "shut down" V-Loans and that those DLA officials misrepresented to FNY any facts about V-loans or the willingness of DLA or DPSC to negotiate in good faith with FNY for the follow-on MRE-7 contract if FNY was otherwise qualified to participate in the procurement (finding 154). We hold that prior to execution of Mod. 25, DLA did not misrepresent a material fact with the intent to deceive FNY with respect to V-Loans or the follow-on MRE-7 contract.

ADDITIONAL FINDINGS OF FACT ON UNCONSCIONABILITY

155. From 1984 to 1986, appellant (including its predecessor FII) was a minority, small business firm (tr. 272; exs. FT031, FT291 at 2021). After performing two small DPSC meat retort contracts, the MRE contract in dispute was FNY's first major defense contract (findings 2-5, 22; tr. 217-23, 231).

156. According to Mr. Thomas, in 1986 the PCO and ACO knew that without recovery on FNY's claim, or by monetary relief from another source, FNY could not complete performance of the MRE contract (tr. 610-13), and the parties knew that a $2.7 million loan was required to enable FNY to complete the contract (tr. 650-51).

157. At trial Mr. Lambert was asked, "And you still believe that the modification [Mod. 25] as written would have allowed them [FNY] with its waived claim to complete the contract?" He answered: "Yes. That was my understanding." (Tr. 835) Mr. Lambert's testimony does not support Mr. Thomas' foregoing testimony.

158. We find that the relief terms in FNY's 13 May 1986 letter, including processing the $2.7 million V-Loan for FNY, were not required to permit FNY to complete the contract performance.

DECISION

In *Glopak Corp. v. United States*, 851 F.2d 334, 337-38 (Fed. Cir. 1988), citing *Hume v. United States*, 21 Ct. Cl. 328, 330 (1886), *aff'd*, 132 U.S. 406 (1889), the court described an unconscionable contract as one "which no man in his senses, not under a delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." The same unconscionability criteria apply to a contract modification. *See Tacoma Boatbuilding Co.*, ASBCA No. 50238, 99-1 BCA ¶ 30,590 at 151,071.

The RESTATEMENT (SECOND) OF CONTRACTS (1981), provides:

> **§ 208. Unconscionable Contract or Term**
>
> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965), an early and leading case, identified the criteria for finding unconscionability:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. . . .

We apply the foregoing criteria of unconscionability to the circumstances surrounding the execution of Mod. 25. In 1984-86 FNY was a minority, small business firm. The contract in dispute was FNY's first major defense contract after previously performing two small DPSC contracts. (Finding 155) DPSC drafted Mod. 25 (finding 141). Since Mod. 25 amended the DPSC contract, FNY could make no competitive market comparison, and had no alternative except to deal with the DPSC CO and DPSC's headquarters activity, DLA (findings 85-86). As a government contractor, however, appellant's conduct is judged under the same standard as that of any other concern. *H. B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998).

As of the date of execution of Mod. 25, appellant's claim had been alleged but not proved. Appellant, which has the burden of proof on this issue of unconscionability, has not shown how its acceptance of the Mod. 25 release and agreement to dismiss its appeal relating to the terminated units, in return for rescission of the $100,000 price reductions in bilateral modifications Nos. P00011 and P00018, reinstatement of the 114,758 terminated units, rescheduling deliveries, and allowing payment for the capital equipment items, was unconscionable. The new consideration in Mod. 25 for FNY's release of its claim was substantial (findings 141-42) and clearly not grossly disparate from FNY's $3.4 or $5.7 million claim and the as yet unproven convenience termination amounts for the 114,758 terminated units. *Cf. Old Atlantic Services, Inc.*, ASBCA No. 19876, 75-1 BCA ¶ 11,190 at 53,286 (assessment of liquidated damages at 112% of billing rate for failure to accomplish 2.4% of the functions was "patently unconscionable"). Appellant has not persuaded us that the circumstances surrounding the execution of Mod. 25 and its consideration were unreasonably and grossly favorable to the government, and hence that Mod. 25's release was unconscionable.

Moreover, the record does not substantiate FNY's contention that it could not complete contract performance without a V-Loan (finding 158). FNY's eventual inability to obtain a V-Loan (finding 101) did not cause Mod. 25 to be unconscionable.

We hold that the release provision in Mod. 25 was not unconscionable, and that none of the grounds alleged by FNY to invalidate such release provision are supported by record facts and meet their respective legal criteria.

ADDITIONAL FINDINGS ON QUANTUM

159. The 235-day delay in FNY's claim items (1), (4) and (5) for withheld and suspended progress payments and interferences with prospective financers encompassed the period 10 December 1984 to 11 October 1985 (findings 129, 136). The 11-day delay in FNY's claim item (6) for diversion of CFM was at the end of January 1986 (findings 130, 139). We find that the foregoing claim items antedated Mod. 25 and thus were subject to its release provision.

160. The 40-day and 160-day delays in furnishing GFM in FNY's claim item 9 encompassed the period from early September 1986 to 8 May 1987 (findings 130-31). We find that the foregoing claim item post-dated Mod. 25 and was not subject to its release provision.

DECISION

We eliminate the $2,936,707 recovery found in our decision of 28 August 2001 for claim items (1), (4), (5) and (6), and reduce FNY's total recovery to $2,970,947, plus

CDA interest on such amount, from 6 May 1991 until the date of payment. See 01-1 BCA ¶ 31,585 at 156,068. We sustain the appeal to the extent set forth above, and deny the balance thereof.

Dated: 14 October 2004

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

I concur

I concur

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

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:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals