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ASBCA Nos.
35671 and
43965

Hearing Room C
7th Floor
5109 Leesburg Pike
Falls Church, Virginia 22041

Monday,
February 9, 1993

The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 a.m.

BEFORE: HONORABLE JOHN J. GROSSBAUM
Administrative Judge

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WASHINGTON, D.C. 20005

1 APPEARANCES:
23 For the Appellant:
4

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26 For the Government:
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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIRE</u> <u>DIRE</u>
Marvin Liebman	1-47	1-196	--	--	1-115

OPENING STATEMENT

Government 34

Appellant 40

<u>EXHIBITS;</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
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Government

G-1	--	1-115
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G-2	--	1-135
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G-3	--	1-118
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G-4	--	1-55
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P R O C E E D I N G S

10:00 a.m.

JUDGE GROSSBAUM: Please be seated.

Ladies and gentlemen, this is the time and place appointed by the Board's notice for hearing the appeals of Freedom, N.Y., Inc., under Contract No. DLA 13H-85-C-0591, which appeals are docketed as ASBCA Nos. 35671 and 43965.

Let the record show that Administrative Judge John J. Grossbaum is presiding. Please state your appearances for the record. For the Appellant.

MR. BELL: Your Honor, my name is Albert R. Bell, from the law firm of Maupin, Taylor, Ellis & Adams. And with me is co-counsel from the firm, Hugh R. Overholt, James Dever, as well, co-counsel from Barnes & Thornburg, Indianapolis law firm, Mr. Robert MacGill and Andrew Detherage, on behalf of Freedom, N.Y., Inc.

JUDGE GROSSBAUM: Okay. Now, who is from Indianapolis, and what --

MR. BELL: Mr MacGill and Mr. Detherage.

JUDGE GROSSBAUM: Okay. And who is from the Raleigh firm, apart from yourself and Mr. Overstreet. You've mentioned a third lawyer?

MR. BELL: Mr. James Dever.

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1 JUDGE GROSSBAUM: Okay. How is that
2 spelled?
3 Mr. Dever?

4 MR. DEVER: Yes, sir.

5 JUDGE GROSSBAUM: How do you spell your
6 name?

7 MR. DEVER: D-E-V-E-R.

8 JUDGE GROSSBAUM: Okay. Thank you. And
9 for the Government?

10 MS. HALLAM: Kathleen Hallam, on behalf
11 of the Government. With me at counsel's table is
12 Frank Bankoff, the Contracting Officer.

13 JUDGE GROSSBAUM: Who is Mr. MacGill:

14 MR. MACGILL: I am, Your Honor.

15 JUDGE GROSSBAUM: Okay. And Mr.
16 Detherage?

17 The Board's decision in these appeals
18 will be based upon the appeal record, which is, at
19 all times, available for examination by both
20 parties. The appeal record consists of not only the
21 verbatim transcript of this hearing and any exhibits
22 received in evidence at the hearing, of which we
23 expect there will be very few, but also the appeal
24 files, which are now in the Hearing Room.

25 The appeal files include documents which
26 have been submitted, both by the Government and by

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1 Appellant, pursuant to Rule 4 of the Board's Rules.
2 These documents are known as the Rule 4 papers. The
3 Rule 4 papers are regarded as a part of the appeal
4 record and are considered as evidence on the same
5 basis as if received and admitted in evidence at
6 this hearing, unless objection is heard to them.

7 The Board understands the Government has
8 made this crystal clear. The Board understands that
9 the six-volume submission in -- bound in a
10 salmon-colored construction paper or cardboard is --
11 constitutes the Government's Rule 4 submission, with
12 one exception, and that is that the Government
13 submitted some supplementary documents, which it
14 wishes to substitute at Tab 1 of its Rule 4.

15 We understand that that is the
16 Government's Rule 4 File for both cases, and it
17 supersedes other Rule 4 documents that the
18 Government had previously submitted. Is that
19 correct, Ms. Hallam?

20 MS. HALLAM: Yes, Your Honor.

21 JUDGE GROSSBAUM: Okay. Now, has the
22 Appellant had an opportunity to review the --
23 examine and familiarize itself with the contents of
24 the Government's appeal file?

25 MR. BELL: Yes, Your Honor, we have.

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1 JUDGE GROSSBAUM: Are there any
2 objections to Government papers?

3 (No response.)

4 JUDGE GROSSBAUM: Very well. Now, the
5 Board needs some clarification with regard as to
6 what constitutes -- what constitutes the Appellant's
7 appeal file. The Board has had the privilege of
8 receiving piecemeal, in many pieces, a very, very
9 large collection of documents, at various stages of
10 the proceedings.

11 First, in connection with the
12 supplementation of the record in ASBCA 35671 and
13 then in connection with -- defending against a
14 Motion for Summary Judgment in that appeal. Then we
15 received an enormous collection of documents in one,
16 approximately 8-inch thick, if not more, binder and
17 another one in a, maybe a 3 or 4-inch thick binder,
18 shortly after the docketing of ASBCA No. 43965. And
19 most recently, we have received a collection of
20 documents of Tabs referred to "Revised and
21 Consolidated Rule 4," Tabs Nos. 1 through 192. And
22 for purposes of clarity, the documents that were
23 submitted were marked or tabbed M-1 through M-75.

24 What can Appellant do to make to the
25 Board's -- my -- status of its Rule 4 submission
26 understandable?

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1 MR. BELL: Your Honor, we understand
2 that it, certainly, has been somewhat confusing.
3 The documents you have described do constitute the
4 Appellant's Rule 4 File, designated as an M File and
5 for clarification as an F File. You haven't had --

6 JUDGE GROSSBAUM: What is the F File?
7 Is the F File this enormous thing that Mr. Seraaj
8 sent us?

9 MR. BELL: It should be, Your Honor.

10 JUDGE GROSSBAUM: That comes in two sets.
11 That's what we described as the 8-inch
12 --

13 MR. BELL: Yes, Your Honor.

14 JUDGE GROSSBAUM: I think that's being
15 generous. That's more, like, 10 inches -- 10 inches
16 and 4 inches --

17 MR. BELL: Through Tab F-233.

18 JUDGE GROSSBAUM: F-233. And you have
19 new supplementary documents that are the M File,
20 Tabs M-1 through --

21 MR. BELL: 75.

22 JUDGE GROSSBAUM: -- M-75.

23 MR. BELL: Yes, Your Honor.

24 JUDGE GROSSBAUM: And we, of course, can
25 be confident that there is no duplication between
26 those?

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1 MR. BELL: We believe we can be
2 confident of that.

3 JUDGE GROSSBAUM: Is the Board at
4 liberty, then, to disregard the documents that were
5 submitted in connection with proceedings, in the
6 early stages of proceedings on ASBCA 35671?

7 (No response.)

8 JUDGE GROSSBAUM: We were under the
9 impression that there'd be an enormous amount of
10 duplication of those documents, but has counsel for
11 the Appellant reviewed what had been submitted?

12 MR. BELL: Your Honor, the reason we
13 have -- one of the reasons that we have produced the
14 documents as we have and the volume we have is one
15 of an attempt to avoid duplication, but also to
16 minimize additional documents, which would have to
17 be dealt with independently here.

18 I'm, frankly, not sure I can respond to
19 your question of whether we can ignore the group of
20 documents you mentioned, without a moment to refer.

21 JUDGE GROSSBAUM: Let me ask you one
22 last question, before you -- we will give you the
23 moment to confer.

24 In the letter transmitting the -- which
25 is referred to as the "M" File, "M" as in Mike, is

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1 there any particular magic associated with the
2 letters "F" as in Foxtrot and "M" as in Mike?

3 MR. BELL: Any particular magic?

4 JUDGE GROSSBAUM: Yeah, I mean does "F"
5 stand for something?

6 MR. MAUPIN: Freedom.

7 MR. BELL: Freedom. It's only an -- in
8 a sense of acronymal, if --

9 JUDGE GROSSBAUM: And what would "M"
10 stand for, as opposed to "F"?

11 MR. OVERHOLT: Our law firm.

12 MR. BELL: Mapin or Maupin.

13 JUDGE GROSSBAUM: Reference in the
14 transmittal letter is to "the revised and
15 consolidated Rule 4 File Tabs 1-192." What is that?
16 Is that the old --

17 MR. BELL: That's a reference back to
18 the Government's file.

19 JUDGE GROSSBAUM: That's the
20 Government's. Okay. Now, while we have no problem,
21 there's -- it's very likely that there'll be
22 duplication. We would like to have some levity,
23 based on how the representation made in the Notice
24 of Filing, since no reference is made to the earlier
25 documents, we would like to feel confident that the
26 documents that have initially been submitted in

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1 connection with 35671 have -- those that are
2 considered relevant have already been picked up in
3 this "F and M" submission and that we really needn't
4 bother ourselves.

5 I don't think that you've been prepared
6 or you've been preparing your case around referring
7 back to the documents you have submitted in 35671.
8 Is that a fair assumption by the Board?

9 MR. BELL: That is certainly a fair
10 assumption.

11 JUDGE GROSSBAUM: Okay. So unless
12 somebody hits the Board with a 2x4 and calls our
13 attention to the documents in the -- that had
14 previously been submitted under 35671 by Appellant
15 and a previous law firm or more than one previous
16 law firm, the Board is not going to go out of its
17 way to examine these documents. Is that fair
18 enough?

19 MR. BELL: Yes, Your Honor.

20 JUDGE GROSSBAUM: Okay. So the reference
21 to the 1 through 192 is the Government's 1 through
22 192? Very well. Now, does the Government -- has
23 the Government had an opportunity to review both the
24 "F" file, which was submitted early in this second
25 round of appeals, after 43965 was filed, and also --

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1 well, let's take the "F" file. Has the Government
2 had an opportunity to review the "F" file?

3 MS. HALLAM: Yes, Your Honor. We have
4 no objection to the "F" file. We have not had much
5 of an opportunity to look at the "M" file. We got
6 it on Wednesday.

7 JUDGE GROSSBAUM: Okay. The Government
8 -- the Board would always be receptive to a
9 relevancy objection. But what the Board would be
10 inclined to do if a relevancy objection were made,
11 would be that it would overrule that objection, with
12 the understanding that documents will -- with the
13 understanding that there are certain matters -- and
14 we'll go into this shortly. There are certain
15 matters that simply are not going to be tried or we
16 will not hear testimony about, although some of
17 these matters may very well be -- relate to things
18 that the Board does not consider relevant, we'll
19 keep all the documents that we have.

20 Does either party -- did either party
21 take a chance to familiarize themselves with the
22 Board Order dated 8 April, 1992, which set
23 directions for proceedings preparatory to the
24 hearing?

25 MR. BELL: Yes, Your Honor.

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1 JUDGE GROSSBAUM: Okay. Does anyone
2 have any question about what the scope of this
3 hearing and what the scope of the decision in these
4 appeals will be?

5 MR. BELL: Appellant understands it to
6 be the conversion issue, Your Honor, and --

7 JUDGE GROSSBAUM: Right.

8 MR. BELL: -- as established and what
9 flows from that, yes.

10 JUDGE GROSSBAUM: We'll have to clarify
11 what flows from that early on, because we don't want
12 to get tied down. But let the Board make this
13 ruling on M-1 through M-75. We'll give the
14 Government an opportunity, as it may -- since the
15 Government -- is there any questions to who's going
16 first today?

17 MS. HALLAM: We assume that the
18 Government was.

19 JUDGE GROSSBAUM: Since the Appellant
20 will be putting on its witness until after the
21 Government finishes its case in chief, we'll let the
22 Government reserve, till tomorrow, it's right to
23 raise objections to M-1 to M-75 on any grounds,
24 other than relevance.

25 If it's a relevance objection, we won't
26 entertain it. We'll simply overrule it. We'll

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1 entertain it, but we'll overrule it. You can state
2 it for the record.

3 Okay. That takes care, for the time
4 being, of our rulings and the status of the Rule 4
5 File.

6 In the Board's Order of 8 April, 1992,
7 which, after a September pre-hearing conference, was
8 modified slightly, only for the purpose of changing
9 dates. So none of the substance of the Order was
10 changed. The Board gave certain directions as to
11 what complete witness list information would
12 contain.

13 Among the things that the complete
14 witness list information was to contain was to be a
15 brief statement describing the scope, subject matter
16 and anticipated duration of these witnesses'
17 expected direct testimony and to specify those
18 factual matters which such -- that such testimony is
19 expected to prove.

20 Now, we've got a little bit more in the
21 way of a witness list from the Appellant, but does
22 the Appellant think that they have complied fully
23 with the Board's direction concerning what complete
24 witness list information is supposed to contain?
25 But it was mentioned, also, that the Board closed
26 its Order by observing that "failure to comply with

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1 the instruction for the exchange of information as
2 set forth in Paragraph 4" -- and Paragraph 4 was the
3 paragraph dealing with the witness list -- "may
4 result in the Board declining to permit witnesses to
5 testify."

6 Does the Appellant feel that there's
7 been -- its witness list submission dated 1 February
8 complies fully with the Board's Order?

9 MR. BELL: Your Honor, we understand,
10 certainly, by the question it raised. We submitted
11 a witness list in the context of a Rule 4 File. It
12 would subsume all documents and all testimony would
13 relate, essentially, to the issues raised in the
14 Rule 4 File.

15 Secondly, we were faced with a discovery
16 situation that unfolded much later and in a
17 substantially different format than we anticipated.
18 And, frankly, at best, we were able to prepare, to
19 provide for the use of the Government what you have
20 before you.

21 It is not the ideal compliance. We
22 understand that.

23 JUDGE GROSSBAUM: We don't have the
24 foggiest idea of how much time you plan on taking.

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1 MR. BELL: We anticipated being
2 confined, certainly, to the time you set aside, or
3 less.

4 JUDGE GROSSBAUM: Okay. Well, what the
5 Board envisions is that we would allow -- although
6 we don't expect the Government to consume it --
7 allow the Government -- we don't have the foggiest
8 idea of how much time they expect for their
9 witnesses. Now -- you may be seated.

10 For the Government, the Government has
11 sent us on 27 January, a short letter identifying a
12 Mr. Tom Barkewicz, a Keith Ford, and a Peggy Rowles
13 as possible rebuttal witnesses and made in a light
14 reference to witnesses previously identified by the
15 Government. Could you identify the writing wherein
16 these witnesses were previously identified by the
17 Government in compliance with the Board's
18 pre-hearing Order?

19 MS. HALLAM: They were previously
20 identified, I believe, in connection with the
21 original hearing date. I'm sorry, I can't find our
22 paper right here.

23 At the cover, which is dated July 30th.

24 JUDGE GROSSBAUM: Right. Okay. Fair
25 enough. You actually beat the deadline, you do have
26 to get this witness list in until August 17th, by

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1 which time, we had already made arrangements to
2 continue the matter. But that's okay.

3 Now, this is in addition. Is William
4 Stokes still somebody who might be called as an --

5 MS. HALLAM: Yes, he is.

6 JUDGE GROSSBAUM: Again, you haven't
7 given us the time. We don't have a problem -- the
8 Board would not be inclined to exclude your
9 witnesses since your witness list for your direct
10 case identified Messrs. Bankoff and Liebman, as your
11 case of chief witnesses and Messrs. Bankoff and
12 Liebman have been named on Appellant's witness list
13 anyway. So they'd be very hard pressed to request a
14 continuance for surprise.

15 But the Board will expect from the
16 Government a -- in its opening statement, an
17 estimate of the duration of time that it expects to
18 consume in presenting the direct testimony of its
19 two witnesses. Are these still your two case of
20 chief witnesses?

21 MS. HALLAM: Yes.

22 JUDGE GROSSBAUM: Okay. The Board's
23 inclination would be that, if needed -- and we doubt
24 very much that the Government will need it -- it
25 looks like we're looking at a day and half, rather

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1 than -- the Board would be willing to give the
2 Government up to three out of the six days.

3 Anything that the Government doesn't
4 consume in its case in chief, at least 50 percent of
5 that would be reserved for the Government's
6 rebuttal. But otherwise, we would expect to give
7 the Appellant three days to present its case.

8 Does that sound, sort of, a fair
9 arrangement, considering this amount of time?

10 MR. BELL: Yes, sir.

11 JUDGE GROSSBAUM: Considering the number
12 of documents that we have, we don't really want
13 witnesses to come up and talk about documents,
14 although some of the documents may need explanation.
15 Some documents speak for themselves. Others, we
16 need explanation.

17 But -- so would -- this is not an admonition that
18 the witness can't refer to the documents. As a
19 matter of fact, we expect they'll be referring to
20 documents in the Rule 4.

21 In that connection, it can just -- just
22 for ease of reference -- and we will suggest to the
23 parties that when they call their witnesses, that
24 they be prepared. I see the Government has already
25 set up its Rule 4 documents at the witness table --
26 the party be prepared to have before the witness

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1 they attempt to call, the documents that they expect
2 the witness to refer to, particularly in the direct
3 examination, and to the extent that you can plan
4 ahead and anticipate what the witness may be asked
5 to look at during cross, have those documents
6 readily available, so that they can either be before
7 the witness or given to the witness on short notice,
8 during cross-examination.

9 But witnesses should be prepared for
10 their direct examination, not have to rummage
11 through a lot of documents, but should know what it
12 is that they're going to be looking at, testifying
13 about, and have that immediately before them.

14 For ease of reference, we'll simply
15 refer to the Rule 4, Government Rule 4 papers as
16 Rule 4 by the tab numbers, without any letter prefix
17 before that. And for ease of reference in
18 connection with the Appellant's Rule 4 documents,
19 we'll refer to them by the Rule 4 papers with the
20 Appellant's designated prefix, either "F" as in
21 Foxtrot or "M" as in Mike, as the case may be. So
22 there shouldn't be any confusion.

23 Understand, again, that the documents in
24 the Rule 4 have been admitted. It's not necessary,
25 unless there's something obscure about the document
26 that's not self-identifying, to preface the

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1 witnesses' testimony about a document by asking him
2 to identify it. They don't have to be offered
3 again. They're in the record.

4 The witness can simply -- unless the
5 need for the document is obscure, in which case, it
6 has to be identified and explained, the witness can
7 simply testify about a document, to which he or she
8 has been referred to, providing, of course, there's
9 some basis that would assess firsthand knowledge.
10 We're not interested in testimony by people who
11 happened to have sat back and analyzed the claim and
12 analyzed documents in the files. That's not what
13 we're here for. We're here for the testimony of the
14 people who have firsthand knowledge.

15 Does either party expect to invoke the
16 rule? Government?

17 MS. HALLAM: I'm sorry. Does either
18 party expect to invoke the --

19 JUDGE GROSSBAUM: Invoke Rule 615 on
20 excluding witnesses.

21 MS. HALLAM: Oh, no, Your Honor.

22 JUDGE GROSSBAUM: No? Okay. Appellant?

23 MR. BELL: No.

24 JUDGE GROSSBAUM: We have conference
25 rooms available. I think that the Appellant has
26 already camped out Conference Room No. 4.

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1 MR. OVERHOLT: Yes, we have.

2 JUDGE GROSSBAUM: And Conference Room
3 No. 3, which is directly adjacent to this hearing
4 room, is available for the Government to use. And
5 they would be available if we were excluding
6 witnesses, and they're certain available for you to
7 keep papers and to -- for study purposes at all
8 times.

9 There will be no eating, drinking --
10 eating or drinking anything but water and no smoking
11 in these hearing rooms, no reading of newspapers.
12 And that admonition applies whether we're in recess
13 or whether we're in the hearing.

14 The Board does not -- our hearings are
15 open, and the Board -- there is nothing classified,
16 at least as far as we understand in this hearing.
17 Our hearings are public, and people can come and go.
18 We don't have to -- witnesses don't have to request
19 permission to be excused. Their availability,
20 essentially, unless the Board -- unless another
21 party is going to require a witness to be recalled,
22 their availability is at the pleasure of the counsel
23 that's calling them. And witnesses don't have to
24 stay in the hearing room or -- when they're not
25 testifying. But they're free to, as long as the
26 rule hasn't been invoked.

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1 I think it might be worthwhile to
2 mention the Government having filed with us in
3 September, a copy of a 20 June, 1991 Contracting
4 Officer's decision demanding the repayment of
5 progress payments in the amount of 1,630,000, plus.

6
7 What is the Government's feeling with
8 regard to whether or not that is a matter that is
9 within the scope of these appeals?

10 MS. HALLAM: We hadn't been considering
11 it a matter within the scope of these appeals.

12 JUDGE GROSSBAUM: Okay. Does the
13 Government consider it a matter on which -- since no
14 timely appeal appears to have been taken from that
15 final decision, is the Board correct in assuming
16 that?

17 MS. HALLAM: Yes.

18 JUDGE GROSSBAUM: Since no final appeal
19 -- no appeal or lawsuit commenced within twelve
20 months or appeal to this Board taken within three
21 months or 90 days from that decision, under the
22 Disputes Act, that decision is final and conclusive.
23 Is that the Government's position?

24 MS. HALLAM: Yes.

25 JUDGE GROSSBAUM: Subject to what?

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1 MS. HALLAM: I would just like to
2 clarify that I believe that -- well, the reason that
3 that is in the Rule 4, to begin with, is just to
4 establish what is owed to the Government, to show
5 that it's -- well, that it 's a lost contract, plus
6 the contractor has his money on top of that, sort of
7 establish, maybe, some set-off rights if there is a
8 conversion.

9 JUDGE GROSSBAUM: Well, we had the --

10 MS. HALLAM: It wasn't put there to
11 raise a new issue.

12 JUDGE GROSSBAUM: We did have the --
13 during our prehearing conference in September we had
14 discussed

15 the fact that the Government had made a loss factor
16 computation. And while the Board has it, there were
17 so many figures thrown around, the Board understands
18 the Government's loss computation to be somewhere
19 over a million dollars, somewhere over a million
20 dollars.

21 So if the Government -- if the Appellant
22 were to -- if the Government prevails, that is, the
23 appeal is denied or the appeals are denied, since
24 both appeals will -- the second appeal dovetails
25 into the first -- well, it raises infirmative claims
26 and it raises an issue that goes simply beyond the

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1 events that took place at the -- termination was on
2 22 June, 1987. And it raises some -- it presents a
3 claim. That claim is not being litigated here.

4 What we discussed at our pre-hearing
5 conference was that if, in the abstract, if
6 Appellant prevails on the termination for -- skip
7 it.

8 The last thing I was saying was, if the
9 appeal or appeals are denied, that is, the
10 termination for default is upheld, that will subsume
11 all the issues that have been raised by the
12 Appellant concerning infirmities in certain
13 agreements, certain bilateral modifications,
14 particularly Modification 25. And if Appellant will
15 lose, then Appellant would owe the Government the
16 unliquidated progress payments, which the Government
17 has calculated at \$1.6 million and, apparently, had
18 made a demand back in '91 for that.

19 If the appeal is sustained, or the
20 appeals are sustained, there are a couple of
21 combinations. If the appeals are sustained, simply
22 on the basis that the Government's termination on
23 the 22nd of June, 1987 was improper, even if there
24 is no infirmity in any prior bilateral
25 modifications, then the default termination may be
26 converted to a termination for convenience.

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1 Although on appeal, the Government's --
2 the Government will invite the Government's comment
3 on this -- although on appeal, the Government's
4 final decision demanding 1.6 million in payment of
5 unliquidated progress payments would essentially be
6 nullified or would be vitiated by a determination
7 that the -- was proper. And the Appellant would
8 then get a termination for convenience, which would
9 be subject to the application of a loss factor,
10 which, based on calculations of a previously made,
11 could mean that the Appellant would owe the
12 Government over a million dollars.

13 The Government -- does the Government
14 agree with what the Board has said concerning the
15 consequences of sustaining the appeal, simply on the
16 basis of the impropriety of the 22 June, '87 default
17 termination, even if it upholds the propriety of the
18 other bilateral modifications?

19 MS. HALLAM: Yes, Your Honor.

20 JUDGE GROSSBAUM: Yeah, okay. So the
21 only way that Appellant could conceivably have a
22 foot in the door to collect any of the money that it
23 claims which, is the subject of ASBCA 43968, would
24 be if Appellant can establish some infirmity in
25 connection with the bilateral modifications that
26 postdated 29 May, 1986, or that occurred or

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1 postdated 29 May, '86. That is Mod 25 and a couple
2 of other bilateral modifications.

3 Is the Board correct in assuming that
4 Appellant would like, through this appeal, to attack
5 Modification 25 on the ground, on two grounds. One
6 is duress in the making, and the second is that
7 after it was made, it was somehow breached by the
8 Government? Is that -- is the Board's understanding
9 of that correct?

10 MR. BELL: Your Honor, as I understand
11 your question, this comment was directed solely to
12 our attacks upon Mod 25. Is that --

13 JUDGE GROSSBAUM: So right now -- to Mod
14 25.

15 MR. BELL: That both grounds, Your
16 Honor, are clearly from a perspective of breach, as
17 well as a question of consideration, which goes
18 straight to the heart of 25. Yes, Your Honor.

19 JUDGE GROSSBAUM: Well, okay. The
20 concern that we have is we're not going back to 15
21 November, 1984 or before then. We have documents in
22 the record that go back to that, but we're not, at
23 this hearing, going to go back to the formation of
24 this contract, for purposes of establishing the
25 breach. If there's something wrong -- or the
26 failure of consideration.

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1 If there's something wrong with Mod 25,
2 it's going to have to be shown by testimony that
3 goes back no earlier than, say, 20 March, 1986, when
4 the \$3 million claim was filed. We don't really
5 want to hear anything that took place -- we don't
6 want to hear testimony from that, because we don't
7 consider relevant, testimony about it for purposes
8 of assessing the propriety of a default termination,
9 testimony about anything that predates Paragraph 26
10 of the amended complaint.

11 Most of the stuff that predates
12 Paragraph 26, half of it has been admitted by the
13 Government, half of the allegations. Many of them
14 have been -- there are several that have been denied
15 categorically. But some of them have been admitted
16 in part and denied in part. And the purpose of
17 trial is to ascertain the truth about facts,
18 relevant facts, that are in dispute. So we don't
19 really need -- we'll be receptive to relevant
20 subjections for any -- to any testimony that goes to
21 events before the spring of 1986.

22 MR. BELL: Your Honor, I don't
23 understand. Excuse my obtuseness here. As it
24 relates to my -- that statement --

25 JUDGE GROSSBAUM: We're only talking 25
26 on it. The subsequent ones -- whatever happened

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1 that is wrong with the subsequent modifications -- I
2 think there was a 27, a 29. If there's anything
3 wrong with them, they would postdate Mod -- it would
4 postdate the 29th of May '86 anyway. So there's no
5 problem. The problems with these later mods
6 shouldn't go back to the inception of the contract.
7 They shouldn't go back any further than Mod 25.

8 MR. BELL: Your Honor, we proposed in a
9 -- what you described as a sink opening statement to
10 make a specific reference to the need with respect
11 to issues, other than Mod 25, to elicit information
12 that will precede the date you're describing.

13 We understand in a -- the words in the
14 Government's mouth, that they have proposed -- they
15 see the same need to address some of those same
16 issues. I preserve that for the opening statement.

17 JUDGE GROSSBAUM: Okay. Well, the Board
18 will be open-minded about whether or -- based on the
19 parties' perception of what needs to be tried, as to
20 what went on before the spring of '86. As we
21 pointed out, there aren't that many matters. There
22 are some matters that have been traverse to the
23 Government's Answer to the Amended Complaint. We
24 don't want to have the whole thing -- the whole
25 history of this contract to be hashed.

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1 The propriety of the default
2 terminations or the propriety of -- the validity of
3 Mod 25, from the standpoint of an infirmity in its
4 making, in it's formation, or a breach of that
5 modification or a breach of the other two subsequent
6 modifications that may, possibly, be challenged,
7 does not require us to relive every event that went
8 into making this contract and into the early
9 administration's contract.

10 The Board will -- well, we'll invite --
11 have there been any stipulations or agreements
12 between the parties, that have not been a matter of
13 record, that should be?

14 MS. HALLAM: No. We don't have any
15 stipulations, Your Honor, but we did agree that Tom
16 Barkewicz is going to testify. He'll be coming in
17 on Tuesday. And we've agreed that we will allow for
18 his testimony on that day, no matter where we are in
19 the hearing.

20 JUDGE GROSSBAUM: Okay.

21 MS. HALLAM: I waive clarification.
22 That's next Tuesday.

23 JUDGE GROSSBAUM: That's if we still
24 have to be here by next Tuesday. The Board is going
25 to expect from the Appellant in its opening
26 statement a little bit more specificity about the

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1 many people that it has listed on its witness list,
2 as to what is proved with them.

3 We're interested -- for example, is it
4 Mr. Francois or Francois?

5 MR. OVERHOLT: Francois.

6 JUDGE GROSSBAUM: What, in fact,
7 firsthand knowledge he would bring to the -- any
8 matter that's relevant to the dispute.

9 MR. BELL: May I have a moment, Your
10 Honor?

11 JUDGE GROSSBAUM: Okay.

12 MR. BELL: Your Honor, part of our
13 activity, since the submission of the list has been
14 cutting down the list. We have succeeded in that.

15 JUDGE GROSSBAUM: But you'll tell us
16 about that during the opening statement.

17 The Board will entertain opening
18 statements by both parties. And we're not going to
19 put a time limitation on you. The parties may have
20 different perceptions of what it is that they want
21 to get across.

22 Let me make sure that we have wrapped up
23 the matter of a progress payment demand. If the
24 Government could make this case, if it were to come
25 up, if the appeal or appeals were denied and the
26 Government has this demand for unliquidated progress

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1 payments, which would be 1.6 million, for which no
2 timely appeal was taken or suit commenced.

3 The Board would not be surprised if the
4 Government took the position, well, that amount, the
5 establishment of that amount is final and
6 conclusive. And the Government, as it indicated in
7 response to a Board question, does not feel that
8 litigation of that amount is within the scope of
9 this appeal, conceivably, there could be a challenge
10 to that, although the Board's not that anxious to
11 invite a challenge in this particular form.

12 How does Appellant regard that? Was
13 Appellant planning on challenging or litigating the
14 amount of the demand for unliquidated progress
15 payments?

16 MR. BELL: Your Honor, we recognize that
17 the status of the original issue and the lack of
18 appeal. We believe that the issue of the 1.6 or
19 some derivative number thereof will be at issue for
20 the vantage side of this question presented now.
21 Obviously, we believe the information we will bring
22 to the court will make it clear that the 1.6 was
23 subsumed within our ultimate demand more than
24 offset, producing a recovery for the Appellant.

25 JUDGE GROSSBAUM: Again, even if the
26 Board sustains the appeals, the Board -- it is not

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1 within the scope of what the Board perceives its
2 decision in this appeal or these appeals to be, to
3 make a computation of the amounts to which the
4 Appellant would be entitled. That, essentially, is
5 for a later date.

6 MR. BELL: Yes, Your Honor. That's our
7 understanding.

8 JUDGE GROSSBAUM: We'll take a brief
9 recess, in place.

10 (Whereupon, these was a brief
11 recess.)

12 JUDGE GROSSBAUM: If there -- unless
13 there are procedural questions by either side, which
14 we will invite, the Board would now entertain
15 opening statements by both parties, with the
16 Government going first. Does either side have any
17 procedural questions?

18 MR. OVERHOLT: No, Your Honor.

19 MS. HALLAM: No. Your Honor, we did
20 have one additional administrative matter.

21 JUDGE GROSSBAUM: Okay.

22 MS. HALLAM: I noticed that at Tab 193
23 of the Government's Rule 4, that pages 37 and 38 are
24 missing.
25 I'll provide it.

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1 JUDGE GROSSBAM: Okay. Let me make this
2 -- let the record show that the Board has been
3 provided with pages 37 and 38 for Tabs -- for Tab
4 193 and that these will be inserted in the record
5 that appears at Volume 6.

6 Now, the Board notes that -- and we had
7 stated on the record previously, reading from the
8 Appellant's Notice of Filing of its Supplementary
9 Rule 4, we referred to Tabs 1 through 192 of the
10 Government's Rule 4 -- it appears that when we
11 consider all six volumes, the Government's Rule 4
12 goes up through Tab 194. Is that correct?

13 MS. HALLAM: Yes, Your Honor.

14 JUDGE GROSSBAUM: So we will -- we stand
15 corrected on our reference, simply to Tab 192. If
16 there's nothing further, counsel for the Government?

17 MS. HALLAM: Your Honor, the Government
18 intends to call two witnesses in its case in chief.
19 The first witness that we'll be calling is Marvin
20 Liebman, the Administrative Contracting Officer.
21 Marvin will testify as to his actions under and
22 administering the progress payments, and his
23 testimony will establish that at all times, they
24 administered them in a proper manner, in compliance
25 with the DAR and FAR.

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1 His testimony -- we're eliminating
2 everything prior to Mod 5. We'll probably wrap up
3 in about three, four hours.

4 JUDGE GROSSBAUM: Okay. Let me -- I
5 don't like to interrupt opening statements. But let
6 me ask this, because, in a way, the Government has
7 to look at this case in two levels.

8 The Government's position, as reflected
9 in Summary Judgment Motion, had been that everything
10 before any excusable delays, occurring before
11 bilateral modifications that extended delivery dates
12 or contract -- dates, essentially nullifying -- were
13 essentially nullified by those bilateral
14 modifications. So, therefore, the Government's
15 focus, for purposes of the propriety of the default,
16 would occur sometime in the late 1986 and early 1987
17 time frame.

18 And there are some issues there, the
19 Board denied the Motion for Summary Judgment on
20 those grounds, indicating that it perceived some
21 triable facts to be in dispute, that needed to be
22 established by the Government, to support its
23 position.

24 So is the Board correct in assuming that
25 one part of the Government's case is to focus,
26 particularly, on those events that transpired after

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1 -- I guess it was Mod 29, with the last, apart from
2 the unilateral change of delivery dates which the
3 Government ordered by another modification, that the
4 Government would concentrate a good deal of its case
5 in chief on those late '86 and early '87 events? Is
6 that a fair assumption?

7 MS. HALLAM: Your Honor, coming into
8 this hearing, we were prepared to go back to Day 1,
9 just so we would have everything on the record.
10 It's been the Government's feeling that Mod 25
11 waived all claims, prior to Mod 25. It's been the
12 Government's feeling that the bilateral delivery
13 schedule waived their rights to any excusable delay.
14 But as I mentioned, we were prepared to go back to
15 day one, just in case that was not the Board's
16 feeling.

17 JUDGE GROSSBAUM: No, no. The thing
18 that we're interested -- with both Mr. Liebman, now,
19 in a way -- it is Mr. Bankoff who is the PCO when
20 the contract was terminated?

21 MS. HALLAM: That's correct.

22 JUDGE GROSSBAUM: Mr. Liebman was ACO
23 throughout the, basically, the totality of the
24 proceedings. It's mostly with Mr. Liebman's
25 testimony that, perhaps, the Government, you know,
26 should be very clear as to what dates they're

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1 talking about, with regard to certain events or
2 progress payment events, and so on, because from the
3 standpoint of the Mod 25 and other bilateral
4 modifications wiping out previous excusable delays,
5 that's one way of looking at it.

6 I think the Board may determine that
7 that is the case and still may find that there was
8 something wrong with the termination to default,
9 based on the events that transpired close to the
10 termination. So we want to have care in making sure
11 we -- we make it clear for the record what period
12 we're talking about, what progress -- what events,
13 what complaints about progress payments we're
14 dealing with.

15 Okay. Please excuse the interruption.
16 Go ahead.

17 MS. HALLAM: Mr. Frank Bankoff will
18 testify as to his actions in administering the
19 contract and will establish through his testimony
20 that the termination was indeed proper.

21 JUDGE GROSSBAUM: Okay, and I -- that's
22 a generalization. What -- how about telling us what
23 it was -- what's he going to prove about what was
24 proper? We've got a -- what's he going to prove
25 with regard to the propriety of issuing a unilateral
26 time -- a unilateral modification, extending time

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1 periods when there is -- there are modifications in
2 the contract that say any modification has to be
3 bilateral. What's he going to tell us about that?

4 MS. HALLAM: Well, he's going to tell us
5 that he did that because at the time, he was -- it
6 was his feeling that he had waived the delivery
7 schedule. I believe that any arguments as to the
8 effect of that language in Mod 29 is a legal
9 argument, which he would not be addressing.

10 JUDGE GROSSBAUM: Well, that language
11 doesn't appear only in Mod 29, does it?

12 MS. HALLAM: Well, 28 and 29.

13 JUDGE GROSSBAUM: Is he going to -- were
14 efforts made to negotiate a new delivery schedule
15 with the contractor? is he going to testify about
16 that?

17 MS. HALLAM: From the time period of
18 when the contractor first went into default in
19 December, there were negotiations that were
20 conducted, as far as re-establishing a new delivery
21 schedule, getting the contractor back on track.

22 JUDGE GROSSBAUM: Okay. What is the
23 Government's theory, again, focusing on the 22 June,
24 '87? What is the Government's theory of what type
25 of a default termination we have here? Do we have
26 an A1 or an A2 default?

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1 MS. HALLAM: The Government believes
2 that regardless of the language in Mod 29, that the
3 termination based on failure to make progress is
4 proper, but the Government believes that Mod 30 is
5 set aside and the termination is for failure to
6 deliver, that the Government can also support that.

7 JUDGE GROSSBAUM: Well, okay. The
8 Government's position is that there is no waiver?

9 MS. HALLAM: That's correct.

10 JUDGE GROSSBAUM: Is that possibly an
11 inconsistent position?

12 MS. HALLAM: Inconsistent?

13 JUDGE GROSSBAUM: Yeah. I mean the
14 Government -- if the Government's position is that
15 there was no waiver of the December delivery dates,
16 and then why would the Government have issued
17 unilateral delivery date extensions?

18 MS. HALLAM: It was the feeling of the
19 Contracting Officer, at that time, that there may
20 have been a waiver or that he did waive. So he
21 extended that on the theory that it's better safe
22 than sorry.

23 JUDGE GROSSBAUM: Does the Government
24 plan to show that it perceived a -- an abandonment
25 or a repudiation by the Appellant?

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1 MS. HALLAM: They believe the contract
2 was abandoned, yes.

3 JUDGE GROSSBAUM: Okay. Does the
4 Government plan on presenting evidence of what it
5 perceived to be an unequivocal manifestation of an
6 intention not to continue performance?

7 MS. HALLAM: Yes, regardless of the --
8 yes, regardless of what Appellant has expressed in
9 some of its letters. Appellant has stated in a
10 number of its letters that it's ready, willing and
11 able to perform. But talk is cheap. They were just
12 words, and the Appellant wasn't taking any action to
13 make that happen.

14 JUDGE GROSSBAUM: Okay. Go ahead.
15 Thank you very much. For the Appellant?

16 MR. BELL: Your Honor, I'm generally a
17 little reluctant to tailor any part of an opening
18 statement to the Government's opening statement.
19 But I really want to start with part of what we just
20 heard.

21 It is very consistent with the manner in
22 which the contract was handled. At a point, the
23 Government reaches the state where it says "Well, we
24 know that." It doesn't really matter whether there
25 was an obligation about our requirement. Just
26 looking at the array of things in front of us, we

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1 know best. We don't have the obligation to go back
2 to Mr. Thomas, despite the fact that the previous
3 contracts, the Mods, require that. But it's not
4 necessary anymore.

5 We believe -- let me jump back now to
6 the -- opening statement -- that what we have is,
7 consistent with your limitation to this, with -- to
8 the termination for convenience conversion request
9 from the termination for default, is an obligation
10 to do one of two things.

11 In order to convert it, we would have to
12 show that the default activity complained of did not
13 happen, off the bat, or that it wasn't of the, in
14 this case, the Appellant. Our testimony goes to the
15 issue of whether it was or was not the fault of Mr.
16 Thomas and Freedom, N.Y. on two perspectives, not
17 one of which you have indicated more willingness to
18 hear than the other.

19 But regardless, at this point, I'll tell you what we
20 have.

21 Looking first at the issue that you're
22 clearly receptive to, and that is what happened,
23 working backwards, from the default, and working
24 back and stopping at Mod 25. We believe we will
25 establish through the testimony -- and we'll
26 certainly go over in very brief form the witnesses

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1 that we'll use for this purpose -- an entirely
2 different set of breaches that occurred, starting
3 with Mod 25 and moving forward, and in a fashion
4 that put Mr. Thomas -- surely as we are here today
5 -- that will put in a position that at some point,
6 he could no longer perceive.

7 If you stop right there, just in that
8 time period, we believe we would be able to
9 establish that their final act, the termination, was
10 based on faulty assumptions. The reliance on
11 failure to make progress, we lay completely at their
12 feet. There is no question that we can make out in
13 the abstract the failure to make progress. Our
14 concern is why.

15 Could anyone reasonably have been put in
16 the position and dealt with by the Government, as it
17 was, the imposition to where it could demonstrate
18 ability to make progress. We don't concede a total
19 lack of ability to make progress; but frankly, Mr.
20 Thomas' business and fiscal heart had been ripped
21 out. No question on that.

22 The issue of waiver? Waivers are not
23 hard to deal with. If a waiver is required, you
24 don't have to speculate about whether a party is
25 willing to waive. You go ask them.

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1 The concept of waiver doesn't include
2 the concept of unilateral action. So on those two
3 fronts, with respect to the Government's own T for D
4 documents, we think it failed. And we think that is
5 demonstrated, moving from Mod 25 forward, by itself.

6 We are proposing, for purposes, for the
7 moment, of not dealing with Mod 25, but for purposes
8 of explaining to the court why the events terminated
9 as they did or concluded as they did. But it began
10 at the beginning.

11 We believe -- and we will use, primarily
12 Mr. Thomas and Mr. Liebman, and ultimately, Mr.
13 Barkewicz on next Tuesday -- that the case is as
14 simple as we described it in September. A contract
15 was negotiated. A different contract was
16 administered. And the difference is critical.

17 The contract that was negotiated
18 provided, essentially, for financing of Mr. Thomas
19 and gave him an ability to do two things: to
20 jettison his outside financial support, his equity
21 financing and the debt service, and allow him to
22 lower his price. We believe that's why the
23 negotiations were entered into. We will establish,
24 we think, we contend, through our evidence that
25 those discussions took place, they had the intended
26 result of lowering the contract price, and that the

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1 Government, from that moment forward -- and we will,
2 primarily, refer to Mr. Liebman here, as well as Mr.
3 Thomas -- never, for a moment, administered that
4 contract.

5 Mr. Thomas regularly and routinely beat
6 on the Government, "You don't understand what you're
7 doing." And at some point, he finally said, "No,
8 you do understand what you're doing, and you're
9 administering Contract B and you've negotiated with
10 me Contract A. You're going to kill me off. You're
11 going to put me out of business. And as surely as
12 we're here today, that's exactly what happened.

13 We have evidence from an accounting
14 standard standpoint that will show exactly how the
15 deficit built up. It was the direct result of Mr.
16 Thomas' progress payment requirements and the
17 shortfalls and the delays that occurred.

18 It doesn't, Your Honor, go to Mod 25, at
19 this point. It goes to the final position that Mr.
20 Thomas was in when the T for D activities occurred.
21 We attribute that outcome solely to the actions
22 taken by the Government, with full knowledge of, we
23 believe, the agreement that was originally construed
24 -- constructed and the awareness that they were
25 going to administer it, and did in fact administer
26 it in a different fashion.

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1 Our witnesses for that purpose -- and
2 respective of cutting the list down, we have done
3 that -- we believe this will be the required array
4 -- Mr. Thomas, who will testify largely as I've just
5 described. Colonel Francois, we do not anticipate
6 needing him, but we have not stricken him from the
7 list.

8 Mr. Liebman, of course, we will deal
9 with Mr. Liebman. And Mr. Bankoff and Mr.
10 Barkewicz, we think those are all critical. We, at
11 this point, do not intend to use Mr. Marra, Mr.
12 Rosenberg, Mr. Barage, Mr. Saff or Weisman. Mr.
13 Weisman is less clear to us. At this point, we're
14 not sure. We're not taking him from the list.

15 JUDGE GROSSBAUM: He wasn't subpoenaed?

16 MR. BELL: Sorry?

17 JUDGE GROSSBAUM: He wasn't subpoenaed.

18 MR. BELL: We understand that.

19 JUDGE GROSSBAUM: When you put somebody
20 on the witness list, particularly as your witness,
21 do you have confidence that they're available to
22 you?

23 MR. BELL: Well, we have confidence,
24 Your Honor. We've been disappointed occasionally.
25 Not here. But the witnesses, I think with that, it
26 is clear how we intend to use them.

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1 We do believe there is another issue,
2 which we will try to persuade you on, and that would
3 go directly to Mod 25 and whether it has any
4 validity or if, in fact, it can be erased from these
5 proceedings, and allow us to move forward with that
6 as an issue which would encompass potential
7 Government liability.

8 So we clearly have two tracks. We would
9 like to merge them. We will attempt to, guided by
10 your --

11 JUDGE GROSSBAUM: Thank you very much.
12 Now, if the Government would be prepared to call its
13 witnesses, why don't we take a 15-minute recess, and
14 we'll start at 20 minutes after eleven. Is that
15 satisfactory?

16
17 (Whereupon, there was a brief
18
19 recess.)

20 JUDGE GROSSBAUM: The hearing will come
21 to order. Is the Government prepared to call its
22 first witness?

23 MS. HALLAM: Calling Marvin Liebman.
24 Whereupon,

25 MARVIN LIEBMAN

1 was called as a witness by the Appellant, and having
2 been first duly sworn, assumed the witness stand and
3 was examined and testified as follows:

4 JUDGE GROSSBAUM: Would you please, for
5 the record, state your full name, giving the
6 spelling of your last name?

7 THE WITNESS: Yes. My name is Marvin
8 Liebman, and its' spelled L-I-E-B-M-A-N.

9 JUDGE GROSSBAUM: In what city do you
10 reside?

11 THE WITNESS; New York City.

12 JUDGE GROSSBAUM: And by whom are you
13 presently employed and in what capacity?

14 THE WITNESS: Defense Logistics Agency,
15 specifically, DCMAO, New York, Defense Contracts
16 Management Area Operations, New York, and I'm an
17 Administrative Contracting Officer.

18 JUDGE GROSSBAUM: Your witness.

19 DIRECT EXAMINATION

20 BY MS. HALLAM:

21 Q Would you tell us what your title is?

22 A I'm an Administrative Contracting
23 Officer.

24 Q And is that the title you had during the
25 course of the subject contract?

26 A Yes, it was.

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1 Q And you were the Administrative
2 Contracting Officer for the subject contract?

3 A Yes, I was.

4 Q And the acronym for that is ACO; is that
5 correct?

6 A Yes, it is.

7 Q During the course of the contract, was
8 DCMAO known as something else?

9 A Yes. It was know as DCASMA, at the
10 time, Defense Contracts Administrative Services
11 Management Area, New York.

12 Q Would you briefly describe what your
13 duties and responsibilities were as ACO for the
14 subject contract?

15 A Yes. I was empowered to enforce or
16 administer the terms and provisions of assigned
17 contracts.

18 Q I'd like you to refer to what's been
19 marked as G-4, Government Exhibit G-4, Mr. Liebman.

20 JUDGE GROSSBAUM: Okay, now, don't
21 forget, G-4 is a proposed exhibit. These have not
22 been admitted.

23 MS. HALLAM: They are exhibits --

24 THE WITNESS: Oh, I'm sorry.

25 BY MS. HALLAM:

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1 Q Can you identify what these documents
2 are under Tab G-4?

3 A Yes. These are various reports that I
4 had to issue to higher authority concerning the life
5 of -- during the life of this contract.

6 Q Thank you. Now to --

7 JUDGE GROSSBAUM: Are these the totality
8 of the reports that he issued?

9 MS. HALLAM: No, Your Honor. Would you
10 tell us the time period that these reports covered?

11 THE WITNESS: Yes. This is -- covers
12 the period of -- this covers 1985.

13 MS. HALLAM: I'd like to admit these
14 into evidence at this time, Your Honor.

15 JUDGE GROSSBAUM: Are these the totality
16 of the reports that you issued to higher authority
17 under this contract in 1985?

18 THE WITNESS: Well, I couldn't answer
19 that, Your Honor. I'd have to look at the entire
20 package. There were many reports. Do you want me
21 to skim through --

22 JUDGE GROSSBAUM: I want you to answer
23 the question.

24 THE WITNESS: Well, without looking at
25 the entire Tab, I couldn't say, 'cause there were
26 three types of reports.

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1 JUDGE GROSSBAUM: Well, can you answer
2 the question if you look at the entire tab? We want
3 you to answer the question.

4 THE WITNESS: I will try to.

5 (Whereupon, the witness
6 examined
7 the document.)

8 THE WITNESS: I do not believe so,
9 because there were various point papers that I had
10 to prepare for higher authority, which may have
11 occurred during the '85 period. These include two
12 types of reports. It's what we call "Smart
13 Reports," to our Headquarters, Cameron Station.
14 These were monthly reports.

15 Also contained here are what we called
16 "Bi-weekly Reports," which is a different type of
17 report to Headquarters, Cameron Station.

18 JUDGE GROSSBAUM: Are they also included
19 in this exhibit?

20 THE WITNESS: Yes, sir.

21 JUDGE GROSSBAUM: G-4

22 THE WITNESS: Yes, sir.

23 JUDGE GROSSBAUM: Who -- when you refer
24 to "higher authority," to whom are you making these
25 reports, and where on the reports is it indicated
26 you're making them?

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1 THE WITNESS: Okay. For example, the
2 first one, the January report, which is page 1, this
3 is the Smart Program. The Smart Program is a
4 DLA-administered program. And our agency, meaning
5 DCASMA, New York, through our region, DCASR, New
6 York, had to submit monthly reports to Headquarters
7 under this Smart Program. This was a DLA program.
8 So that would go directly from our District to our
9 Region to DLA Headquarters, on a monthly basis.

10 JUDGE GROSSBAUM: Is this the only
11 contract number under this Smart Program?

12 THE WITNESS: No. There were other
13 contracts and other contractors under this program.
14 It's a high- visibility program that's only certain
15 contracts -- contracts and contractors were included
16 on this program.

17 JUDGE GROSSBAUM: What did "Smart" stand
18 for? Is it an acronym?

19 THE WITNESS: It's an acronym. Offhand
20 -- special emphasis, but offhand, without referring
21 back to the original regulation or regulations
22 concerning this particular program, I can't answer
23 that. But it was a special emphasis type program
24 where high-visibility contracts and contractors
25 required reporting to Cameron Station.

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1 JUDGE GROSSBAUM: Voir dire? Do you
2 have an offer?

3 MR. OVERHOLT: Your Honor, we have
4 objection, so long as it's understood as the court
5 -- as the Board has clarified that these are only
6 various reports, not a complete set.

7 JUDGE GROSSBAUM: Well, can we establish
8 that all of these reports were authored by you?

9 THE WITNESS: I signed all the reports,
10 but during the 1985 time period, they were written
11 by my Contract Administrator, to a certain extent,
12 Mr. Mel Zitter. I, of course, reviewed the reports.
13 We wrote portions. Sometimes I re-wrote the entire
14 report. I edited the reports. And, of course, I
15 signed as Contracting Officer.

16 JUDGE GROSSBAUM: Where in this --

17 THE WITNESS: I'm sorry, sir?

18 JUDGE GROSSBAUM: Where are the
19 signatures on these reports that you signed?

20 THE WITNESS: Okay. I don't -- for some
21 reason, I don't see one on the January report. But
22 it concerns -- see, for example, page 7 of the file.
23 You'll see my signature for a report dated 14 March,
24 1985. And you can see on the top, "Mr. M. Zitter."
25 He was the one that drafted the report. This was

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1 one of -- this report was one of the bi-weekly
2 reports that went to Cameron Station.

3 And if you keep turning, I think the
4 others should show either -- if not my name stamp,
5 my signature. For example, the next one is 28
6 March, '85, which is one of the bi-weekly ones. It
7 has my signature on page 9 -- my signature block on
8 page 9. It's unsigned. Obviously, the original was
9 signed.

10 For some reason, the next one doesn't
11 have a signature. If you go to page 12 -- page 13
12 of the April report, that has my signature. Page 14
13 has my signature. Page 18 has my signature.

14 JUDGE GROSSBAUM: What are we supposed
15 to understand, for example, about the report that
16 appears at page 3 and 4 of this exhibit?

17 MR. MACGILL: I didn't hear, Your Honor.

18 JUDGE GROSSBAUM: Pages 3 and 4 of the
19 exhibit?

20 THE WITNESS: Okay. This was sort of
21 instructions and, basically, opinions, instructions
22 and concerns DLA Headquarters had concerning this
23 particular contract.

24 JUDGE GROSSBAUM: But this isn't a
25 report. This doesn't really belong in Exhibit G-4,

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1 since you identified G-4 as being reports that you
2 had written. Is that correct?

3 THE WITNESS: Well, I'm saying that this
4 particular document basically sets the requirement
5 for one type of report. This came from Mr. Keating,
6 who is the head of Contracts at Cameron Station.
7 And as you can see on page 4, on the top, it says,
8 "In order to insure continued Headquarters
9 visibility into the status of this situation, we
10 believe that special reporting requirements are
11 necessary for this contractor. We, therefore,
12 request an initial report," and then it said, "this
13 report should be followed by bi-weekly updates on
14 the situation," you know, so on and so forth.

15 So I can only assume that it's part of
16 the file, just to show that we were required to
17 submit this report to Cameron Station on a bi-weekly
18 basis.

19 JUDGE GROSSBAUM: When the Commander of
20 the DCASR, New York received this report, the
21 Director of Contract Management, who would that have
22 been, and to whom would you have referred this
23 memorandum?

24 THE WITNESS: Yes. That was James
25 Driscoll, who was the Chief of our Contract
26 Managements provision at Region Headquarters, at the

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1 time. And he appointed a Mr. Steven Massas --
2 you'll see his name on that -- as, sort of, the
3 coordinator. Mr. Massas was part of Mr. Driscoll's
4 staff. So the reports on, a bi-weekly basis, would
5 be prepared within my group. I would sign them.
6 They would go to Mr. Massas, who would then review
7 them and transmit them to Cameron Station.

8 JUDGE GROSSBAUM: Is this the report
9 that was actually, personally -- this memoranda to
10 DLA, Mr. Keating was actually, personally shown to
11 you?

12 THE WITNESS: Oh, yes, absolutely.

13 JUDGE GROSSBAUM: Without objection,
14 Exhibit G-4 is admitted. Go ahead.

15 (Whereupon, the document
16 identified as Exhibit G-4 was
17 received in evidence.)

18 BY MS. HALLAM:

19 Q Mr. Liebman, I'd now like you to refer
20 to Government Rule 4, Tab 194. Can you tell us what
21 those documents are under that Tab?

22 A Yes. These are reports for the year
23 1986.

24 Q Are these the same type of reports?

25 A Yes, except they call them now,
26 "Contract Management Alerts" instead of Smart

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1 Reports. But that program changed its names several
2 times. It used to be "Special Emphasis," became
3 "Smart," then became Contract Management Alert.

4 Q You had stated that these reports were
5 required because of the high visibility of this
6 contract?

7 A Yes.

8 Q Could you explain what that means?

9 A Yes. It was a very important contract,
10 and it was MRE's. It was an assembly contract. But
11 also, it had visibility at the highest levels, at
12 the Three Star level at Cameron Station, General
13 Babers. And it was a "political type," in quotes,
14 of contract. There was a lot of -- put it this way,
15 a lot of concern at high levels, a lot of interest
16 at high levels, both in Congress, at the Department
17 of Defense, at Cameron Station, at DPSC, at DCASR,
18 New York and at DCASMA, New York.

19 And we were, sort of, operating in a
20 goldfish bowl. And when something happened, whether
21 a positive or negative nature, everyone wanted to
22 know. And that was one of the reasons why this
23 particular contract was put on this program.

24 Q Under this program, was there specific
25 information that you were supposed to convey in your
26 reports, or was the format up to you?

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1 A Well, the only one that was kind of
2 rigid -- well, two of the reports were rigid. The
3 bi-weekly report to Cameron Station wanted certain
4 things answered each, you know, every two weeks.

5 The Smart Report had a certain format, a
6 monthly basis. And there was a third type of report
7 where -- you may see some of them in here -- those
8 are the Weekly Paint Papers to our Region Commander.
9 We call them "Point Papers" or "Fact Sheets."
10 There, I was more free concerning, you know, the
11 type of format.

12 But a lot of the reports kind of
13 overlapped. Okay? A lot of it contained lots --
14 you know, all three reports, basically, contained a
15 lot of the same information, except the format was
16 different regarding the bi-weekly and also the Smart
17 Report.

18 Q Did the bi-weekly reports -- what type
19 of information was required for you to send?

20 A Okay. I just want to refer back to the
21 Driscoll letter, if I may. Again, off the top of my
22 head, they wanted certain financial information that
23 the Smart Program didn't require.

24 For example, in the -- okay. Now, it's
25 not really in this one. But there was specific
26 instructions from Cameron Station. They wanted

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1 information concerning its financing. They were
2 very concerned about that. Again, I'd had to refer
3 to the original instruction letter. But it was
4 different from the Smart Program

5 The Smart Program emphasized production
6 and emphasizes the whole gamut. Cameron Station,
7 regarding the bi-weekly, sort of structured it
8 differently. They were really -- they wanted a lot
9 of information from a financial standpoint,
10 cash-flow, payback to creditors, things like that,
11 progress payments, financing -- it was different.

12 Q With regard to the financial information
13 that's conveyed in these reports, where did you get
14 that information from?

15 A Basically -- well, mainly from Bill
16 Stokes, who was our Financial Analyst. Also, from
17 our review of progress payments. Also, from our
18 discussions with the -- as well as reports from the
19 Defense Contract Audit Agency.

20 Q And you said that the Smart Report later
21 came to be known as the Contract Management Alert
22 Report?

23 A Yes.

24 Q Required more general or a wider range
25 of information, including production information?

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1 A Right. The Smart Report was sort of a
2 comprehensive type of thing. And while the -- while
3 a lot of the information was still required in the
4 bi-weekly, it wasn't as structured in the area of
5 financing.

6 If I may backtrack to your previous
7 question, if I may, when you asked where I got my
8 information on the financial, you know, information
9 concerning Freedom's financing. I got some of the
10 information from Freedom, itself.

11 Q From Freedom, itself?

12 A That's right.

13 Q What individuals are you --

14 A Mainly, Pat Marra. Of course, Mr.
15 Thomas, at times, but Pat Marra was the main point
16 of contact. That was part of my overall assessment
17 of Freedom's, you know, financial ability.

18 Q With respect to the production
19 information that is contained in your reports, where
20 did you obtain that information from?

21 A Mainly from my assigned Industrial
22 Specialist, Mr. Raymond Troiano. Also, sometimes,
23 some of the Army Veterinarian group that was
24 stationed at Freedom, specifically, Sgt. Patterson.

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1 Q I'd like you to refer to The Rule 4, Tab
2 193. Did you get copies of these reports that are
3 under Tab 193?

4 A Actually, I received the originals. And
5 these were prepared by Mr. Raymond Troiano.

6 Q Explain why they were prepared for and
7 what purpose.

8 A Yes. These were basically reports that
9 Mr. Troiano prepared for the official file, which is
10 the ACO file, based on planned visits to Freedom and
11 also based on telephone conversations we had with
12 Freedom.

13 Q And you said you got the original
14 reports. Why were the reports sent to you?

15 A As the ACO, the originals are required
16 to be placed in the official file. The official
17 file is the ACO file. So I would get the originals,
18 review them, and then place the -- those documents
19 in my ACO correspondence file. And copies, of
20 course, were distributed, you know, to relevant
21 personnel.

22 Q Were these reports the source of your
23 production information that you incorporated into
24 your reports?

25 A Yes. In the main, yes.

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1 Q Did you discuss production problems with
2 the IS --

3 A Yes, I did.

4 Q -- personally, or did you just copy down
5 what he had said about the --

6 A No. We had a very close relationship
7 with the Industrial Specialist, because of the
8 visibility of this particular contract and the, you
9 know, the nature of, you know, of this situation.
10 We were in constant communication. There was not
11 only a dialogue in person, but also on the phone.
12 We worked very closely.

13 I met with Mr. Troiano several times a
14 week. And there was a, sort of a close
15 relationship, above and beyond the norm, meaning ACO
16 vis-a-vis Industrial Specialist.

17 Q Your reports sometimes convey
18 information about the PCO's activities; is that
19 correct?

20 A Yes.

21 Q And how would you get that information?
22 How was that information obtained?

23 A I also had a -- basically, it was
24 usually a verbal information from the PCO, be it Tom
25 Barkewicz or Frank Bankoff. Sometimes we'd have
26 meetings where we'd both be present. But there was

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1 a constant flow of communication between Frank and
2 myself.

3 Prior to preparing these reports, I
4 would be in communication with Frank or Tom. I had
5 to give a full picture, a full presentation of the
6 status of this particular contract. And in order to
7 do that, I had to make available all potential
8 resources. So Frank and I had a very close
9 relationship. Also, with Tom. Also, with his
10 buyers, Keith Ford and the other personnel at DPSC.

11 Q Were you copied on the correspondence
12 that the PCO sent to the contractor?

13 A Yes, I was.

14 Q And did you copy the PCO on the
15 correspondence that you sent to the contractor?

16 A Yes, I did.

17 Q Were you copied on all the
18 correspondence, to your knowledge, that this PCO
19 sent out?

20 A I can't say all, but in the main, I was.
21 There may be some documents, perhaps, that I was not
22 copied on. I can't say without comparing, ACO and
23 PCO files. But I'd say in the main, I was.

24 Q I'd like you to refer to Tab 194 of the
25 Government's Rule 4, page 35 and 36, and Paragraph
26 F. You talk about a wire dated 24 October, '86.

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1 A Yes.

2 Q Were you copied on that wire?

3 A I would have to check the record. I
4 would presume I was. I couldn't say with certainty,
5 without checking my file. But I would presume I
6 was. This would be of the nature of documents that
7 Frank would provide copies, you know, to me. I
8 should be copied on it. But again, as I'm saying, I
9 would have to check the actual file.

10 Q During the time frame of Freedom's
11 contract, on an average, how many contracts were you
12 administering, at that time?

13 A Well, my team was administering from
14 five to 700 contracts, roughly, at that time.

15 Q During Freedom's performance of Contract
16 0591, what percentage of your time was spent on
17 administering Freedom's contract?

18 A About one-third.

19 Q One-third of your time?

20 A Yes.

21 Q Would you explain what accounted for
22 that disproportionate amount of time that you spent
23 on one contract?

24 A Sure, because of the visibility
25 involved, the problems that were involved, the
26 reporting requirements that were involved. There

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1 was a lot of work entailed with the administration
2 of this one contract -- the meetings -- I had the
3 meetings, the letter writing, the reviews that we
4 had to take, the briefings I had to prepare -- it
5 was just an enormous amount of work.

6 Q You spent a lot of your own time
7 administering Freedom's contract?

8 A Yes. For two years, I worked on
9 Sundays, three-quarters of the time, at my, you
10 know, my own time, my own expense. Also, I spent
11 late hours. I worked into the evening, late into
12 the evening, in the office, trying to handle a lot
13 of Freedom's things.

14 I -- in fact, I let go -- a lot of other
15 work suffered as a result of spending this time on
16 Freedom. I also gave up my vacations for several
17 years. I would give up 20 days a year vacation and
18 wouldn't get compensated. The work had to be done,
19 and the only way to do it was working extra time.

20 Q Were you involved in any way in the
21 pre-award survey or in any pre-award matters,
22 relating to Contract 0591?

23 A Yes, only to a minimal extent. There
24 were only, basically, two matters, really, that I
25 was really involved with. One, I was the focal
26 point for the pricing review that DCASR, New York

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1 conducted for DPSC. And I was, sort of, the
2 moderator where we had to do an audit in the
3 technical, and I was. sort of, the focal point.

4 And the other area that I was involved
5 with concerning the survey was, I attended a meeting
6 in late July, 1984, at Cameron Station, substituting
7 for our pre-award monitor, who couldn't attend. And
8 basically, it was a meeting called by Henry Thomas
9 at DLA Headquarters to discuss problems he was
10 having satisfying DCASR, New York financial,
11 regarding financial support for this MRE 5 contract
12 and the problems he was having satisfying, you know,
13 our, you know, the requirements in my office. So I
14 did attend that one meeting.

15 Other than that, I really wasn't
16 involved at all in the pre-award processing.

17 Q Would you explain what the require --
18 you said, "He was having problems satisfying the
19 requirements of our office." What were the
20 requirements?

21 A Right. Apparently, he needed outside
22 financing. Freedom needed outside financing. And
23 again, I don't, you know, I wasn't involved in the
24 particulars. But in fact, prior to that meeting, I
25 wasn't even aware there was a survey going on. I
26 got the notice on Friday afternoon, when I was going

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1 home, that I had to attend a meeting that Monday at
2 Cameron Station about a Freedom survey. And I had
3 no idea there was even a survey going on.

4 But apparently, there were problems with
5 the type of commitment letter that our financial
6 people needed from Freedom, concerning financial
7 support. And Mr. Thomas was, I understand, was very
8 upset about this and contacted, I believe, General
9 Connolly, who was the Two-Star General down at DLA
10 Headquarters. And the General, of course, was at
11 that meeting. And Henry brought his banker there,
12 and -- prospective banker, anyway. It was Dollar
13 Dry-Dock.

14 And there were just problems getting a
15 clear cut letter of commitment, that would meet the
16 satisfaction of our financial services group.

17 Q During the meeting, did they -- was
18 there a discussion letting Freedom know exactly what
19 it was that the Government wanted?

20 A Yes.

21 Q And what was it that the Government
22 wanted?

23 A Again, without checking the record, it
24 -- we had our financial analyst there, Mr. Morris
25 Luster. And, again, to the best of my recollection,

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1 they wanted something concrete, something hard and
2 fast, concerning a commitment.

3 They didn't want any reservations or
4 qualifications or contingencies involved with
5 financial support. There had to be a clear-cut line
6 of credit. And, again, without checking the record,
7 this is all I recall.

8 Q Do you recall when Freedom submitted its
9 first progress payment under the contract?

10 A Yes, I do.

11 Q And when was that?

12 A The end of November, 1984.

13 Q And when Freedom submitted the progress
14 payment, what did you do with the request?

15 A We -- I conducted, what they call, a
16 prepayment type of review, which means that an
17 audit, financial, production -- an ACO type of
18 review.

19 Q When Freedom submitted that progress
20 payment, what was the liquidation rate, do you
21 recall, that they requested on it?

22 A Yes. I think it was 82.5 percent, I
23 believe.

24 Q Was that the liquidation rate that was
25 applied?

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1 A In the contract? No. The liquidation
2 rate in the contract was 95 percent.

3 Q Had anyone, prior to the submission of
4 that progress payment, indicated to you that there
5 was a different liquidation rate, applicable to this
6 contract?

7 A No, not to the best of my knowledge.

8 Q Was there a payment made on that
9 progress payment?

10 A Initially, no.

11 Q Was that progress payment resubmitted?

12 A Yes.

13 Q And when was it resubmitted?

14 A It was resubmitted at the time of the
15 post-award conference, which December 14, 1984. It
16 was dated December 7th, but it was handed to us at
17 the post-award conference, December 14th.

18 Q What was the reason for it being
19 resubmitted; do you recall?

20 A Yes. After I notified Freedom, verbally
21 and in writing, that I was doing a prepayment review
22 and that we would try to do it as quickly as we
23 could, although it could take a few weeks, Mr. Pat
24 Marra felt that he was incurring additional costs --
25 or had incurred additional costs -- and he,

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1 basically, wanted him -- include those in our review
2 and in the payment process.

3 And -- because initially, the first
4 progress payment, which came at the end of November,
5 was just for rent and some real estate taxes. The
6 resubmitted progress payment contained officer's
7 salaries, you know, indirect costs, of that nature.
8 And it more than doubled the original progress
9 payment in terms of dollars.

10 And you were talking 100,000 on the
11 first submittal, in -- the end of November. And
12 then, when he resubmitted towards mid-December, he
13 was talking about 250,000.

14 Q What did you do with the resubmitted
15 progress payment?

16 A We sent it -- I sent it in for a
17 prepayment review.

18 A And why did you have a prepayment review
19 conducted --

20 A Okay, because --

21 Q -- on that progress payment?

22 A Freedom had never had progress payments
23 before. And we had to test his accounting system.
24 This is standard procedure. We must test the
25 accounting system. He never had progress payments

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1 before, and there was also concern about his
2 financial situation.

3 So that is why, under the regulations, I
4 elected to go for a prepayment review, with the
5 qualification that we would go above and beyond the
6 normal time cycle. A normal time frame for
7 prepayment reviews is, at least, 30 days.

8 I promised to get an auditor out there
9 as quickly as I could. I promised to get an
10 Industrial Specialist out at Freedom as quickly as I
11 could. It wouldn't -- it wasn't business as usual,
12 realizing the need he had for the particular
13 financing involved for the progress payments. So it
14 wasn't the usual situation.

15 We did everything we could to expedite
16 this review.

17 Q What does a prepayment review consist
18 of?

19 A Sure. Normally, it consists of an audit
20 review, DCA audit by the Defense Contract Audit
21 Agency, a review by our Industrial Specialist for
22 progress, a review by our pricing group, which would
23 also do, sometimes, a financial capability review,
24 an ACO review, and sometimes, if warranted, a review
25 by legal.

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1 Q You had mentioned that progress payment
2 number one was submitted to you at a post-award
3 conference.

4 A Yes.

5 Q Was there discussions during the
6 post-award conference about the contractor's
7 finances?

8 A At the conference, but not at the main
9 or formal conference, with everybody there. I had
10 suggested to the Freedom people that when we start
11 talking progress payments and financing, dollars,
12 that there was -- it would be in the best interests
13 of both parties that the Freedom rank and file will
14 be at the main conference, not at the conference
15 concerning, you know, money.

16 Freedom agreed. So we had a sidebar or
17 a second conference -- I would call it a limited
18 post-award -- right after the formal post-award,
19 where only certain people attended. The Government
20 people -- we had the DPSC people. We had the
21 DCASMA, you know, DCASMA, New York. And, of course,
22 we had the Freedom people there.

23 And we felt that there was no need for
24 everybody to hear this on the Freedom side, the rank
25 and file.

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1 Q What was it that you didn't feel that
2 the rank and file needed to hear what was discussed?

3 A Well, obviously, when you're talking
4 about a company that's hurting financially and
5 you're talking dollars and payments, and if you have
6 people below the management, top management level,
7 it could create problems for the rank-and-file
8 workers they'd be worrying about when their next
9 paycheck is or whether they have a future at the
10 company, and things like that.

11 Q Would you just explain what it is --
12 what financial matters were discussed?

13 A Sure.

14 Q What came to light at the post-award?

15 A Okay. We talked about progress payments
16 and financing, okay. And what really disturbed us
17 -- disturbed me and the other Government people --
18 was Henry's statements concerning -- and Pat Marra's
19 statements concerning -- the Dollar Dry-Dock
20 situation, that basically, they were not successful
21 in obtaining this financing from Dollar Dry-Dock.

22 And that was -- that financing was the
23 basis for a positive pre-award survey in the
24 financial area. That -- he had -- this was now
25 December, 1984. He saw little hope in getting this
26 financed from Dollar Dry-Dock.

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1 Freedom -- what also disturbed me was,
2 Freedom's statements concerning the debts that they
3 owed to past creditors, as well as, you know,
4 current creditors. I think it was up to \$3.2
5 million. I think that was the figure that Mr.
6 Thomas mentioned -- Mr. Marra mentioned. They owed
7 over \$3 million.

8 Dollar Dry-Dock was the largest
9 creditor, for about \$1.4 million. Dollar Dry-Dock,
10 apparently, had interests in the other company Henry
11 owned, HT Foods, had, -- 9 percent of preferred
12 stock. They owned -- I think they had a lien on
13 profits, to a certain extent.

14 There was discussion about HT Foods, how
15 Mr. Thomas stated that HT Foods, which the other
16 company he owned, was, basically, the main financial
17 backer and the main management force behind Freedom,
18 New York. So it was a very -- we found it very
19 disturbing, the Government side, because we had a
20 situation where Henry Thomas is admitting that the
21 source of credit he needed from Dollar Dry-Dock
22 wasn't there.

23 And alternative forms of credit were not
24 presented. He mentioned that he was trying to get
25 credit. He mentioned Broadway Bank in Patterson,
26 New Jersey. But there was nothing there.

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1 He mentioned trying to get an SBA loan,
2 things like that, guaranteed loans, Government
3 guaranteed loans. So it left us with the impression
4 that Henry Thomas Freedom lied -- was exposed, was
5 naked, basically, from a financial standpoint.

6 We were afraid that the creditors could
7 force him out of business. There were no Chapter 11
8 -- there was no Chapter 11 protection. There was no
9 payback plans for the creditors, no deferred
10 payments, that we were made aware of. And we were
11 very concerned about that.

12 Q I'd like you to refer to the
13 Government's Rule 4, Tab 5.

14 A Yes.

15 Q What was this letter -- what was the
16 purpose, as far as you understand it, of this
17 letter?

18 A Right. This was part of the pre-award
19 survey process. And, basically, it was Dollar
20 Dry-Dock's letter of commitment to DPSC, stating
21 that in the event of award of a contract of \$20
22 million, that they promised a financial commitment,
23 not to exceed \$7.2.

24 Q To your knowledge, is this the letter
25 that was presented to the pre-award survey team?

26 A Yes, it was.

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1 Q I'd like you to refer, now, to
2 Government's Rule 4, Tab 6.

3 A Yes. This is a letter from Dollar
4 Dry-Dock to DPSC, dated 20 August, which sort of --

5 MR. MACGILL: Pardon me, Your Honor.
6 We'll object to it. An analysis or characterization
7 of a letter. The letter speaks for itself.

8 JUDGE GROSSBAUM: Make an offer of
9 proof, counsel. What are you going to try to prove
10 through the testimony of this witness?

11 MS. HALLAM: The --

12 JUDGE GROSSBAUM: About these -- about
13 the commitments that were made, the findings for
14 commitments, what are you trying to prove?

15 MS. HALLAM: Trying to set the tone for
16 the Government's future actions. The Government
17 went into the contract, believing that the Appellant
18 had financing, outside financing, equity financing.
19 It turned out that the contractor didn't.

20 Because of that reason, the contractor
21 was plummeted into disaster.

22 JUDGE GROSSBAUM: Okay. Did this
23 witness conduct the pre-award survey?

24 MS. HALLAM: Excuse me?

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1 JUDGE GROSSBAUM: Did this witness
2 conduct the pre-award survey?

3
4 MS. HALLAM: No, he didn't. He was
5 involved in these matters, later.

6 JUDGE GROSSBAUM: Is the pre-award
7 survey in the record?

8 MS. HALLAM: It's the Tab No. 1, that I
9 amended.

10 JUDGE GROSSBAUM: Does the pre-award
11 survey reflect the Government's belief that the
12 contractor has outside financing?

13 MS. HALLAM: The financial capacity
14 portion of it, yes, there is some text in there
15 concerning the August 9th letter of commitment.

16 JUDGE GROSSBAUM: What's this witness's
17 firsthand knowledge of the Government's belief, at
18 the time of the pre-award survey, concerning the
19 outside financing?

20 MS. HALLAM: His firsthand knowledge is
21 after-the-fact knowledge, when he found out at the
22 post-award meeting that the letter that we were
23 relying -- the letter that the Government relied on
24 was no longer viable -- the commitment that the
25 Government relied on was no longer viable.

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1 JUDGE GROSSBAUM: Then the objection is
2 sustained. You can still ask the witness a question
3 about the letter. We just don't need to have the
4 witness interpret the letter for us.

5 MS. HALLAM: Okay.

6 JUDGE GROSSBAUM: Basically, what the
7 witness perceived and saw and did at this meeting in
8 August -- if there was a meeting in August -- and
9 was there?

10 MS. HALLAM: The post-award was December
11 14th.

12 JUDGE GROSSBAUM: So both these letters
13 were in the possession of DPSC?

14 MS. HALLAM: No, Your Honor.

15 JUDGE GROSSBAUM: Okay. Let's find out
16 about that.

17 BY MS. HALLAM:

18 Q To your knowledge, when did the
19 Government first become aware of the letter under
20 Tab 6?

21 A During a telephone conversation -- it
22 was a joint conversation that Colonel Hein, our
23 DCASR Commander and several other Government people,
24 including myself, had on, what they call, the squawk
25 box -- with Dollar Dry-Docks, specifically, Mr. Noel
26 Siegert, on the 17th of December, 1984.

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1 Q Why were you on the squawk box with Noel
2 Siegert of Dollar Dry-Docks?

3 A This was caused by our concern, as a
4 result of the post-award conference on December
5 14th, where Freedom, basically, stated that Dollar
6 Dry-Dock had, more or less, evaporated. So as part
7 of our progress pre-payment review and as part of
8 our concern, concerning the financial health of
9 Freedom, we decided to call Dollar Dry-Dock, at the
10 Commander's request, meaning General Hein.

11 Q And what was discussed during the
12 telephone conversation?

13 A Various things concerning financing were
14 discussed, one of which was this 10 August, 1984
15 letter, which we never knew existed. What shocked
16 us was, it was that Siegert stated that the 9 August
17 letter, which the Government relied on in awarding
18 this contract. And that was the only reason we were
19 positive, from a financial standpoint, was that the
20 9 August letter was never sent, that he called it a
21 draft letter that was only sent to Henry Thomas. It
22 was never sent. I'm sorry, the 10 August letter --
23 correct me. I stand corrected. The 10 August
24 letter -- I'm sorry. The 9 August letter was never
25 sent. It was only a draft that was sent to Henry
26 Thomas.

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1 It was really the 10 August letter that
2 was really the letter that was pertinent to the
3 award of this contract, which the Government never
4 received.

5 JUDGE GROSSBAUM: Well, wait a second.
6 Let me understand. You're testifying that the 9
7 August letter was never sent. Yet you're testifying
8 that the Government relied on a text of the 9 August
9 letter --

10 THE WITNESS: No, I'm sorry. I stand
11 corrected on that. It was the 10 August letter that
12 wasn't -- I'm getting confused. The Government
13 relied on the 9 August letter.

14 JUDGE GROSSBAUM: So that was sent?

15 MS. HALLAM: I think --

16 JUDGE GROSSBAUM: How did the Government
17 -- how did the Government -- you wouldn't have
18 firsthand knowledge of this but based on your -- on
19 what you have heard, how would you come to
20 understand that the Government relied on the 9
21 August letter?

22 THE WITNESS: I --

23 JUDGE GROSSBAUM: Was it something that
24 was just flashed in front of him for a moment and
25 then pulled away, or was it sent to Mr. Barkewicz?

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1 THE WITNESS: I believe what happened
2 was, the letter was -- the 9 August letter for
3 Dollar Dry-Dock was sent to Henry Thomas, who, in
4 turn, I presume, passed it on to the -- our
5 financial analyst, as part of the pre-award survey
6 process.

7 And that 9 August letter was the letter
8 that the Government relied during the pre-award
9 survey. What disturbed us was that Dollar Dry-Dock,
10 who was -- now, said that that 9 August letter was
11 just a draft. It was not meant to be sent to the
12 Government.

13 However, Mr. Thomas passed on that
14 letter to the Government, and that was the letter
15 that we relied on. Mr. Siegert stated during the
16 conversation that it was really the next letter, the
17 10 August letter, that was the bank's commitment
18 letter, not the 9 August letter. The Government
19 didn't know about this 10 August letter?

20 JUDGE GROSSBAUM: Well, was this letter
21 supposed to be sent, if this is a letter that Mr.
22 Siegert signed?

23 THE WITNESS: It was a letter that Mr.
24 Siegert signed and was addressed to DPSC --

25 JUDGE GROSSBAUM: Right.

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1 THE WITNESS: -- and DPSC said they
2 never received such a letter.

3 JUDGE GROSSBAUM: Did DPSC ever receive
4 the 9 August letter, since the letter at Tab 5
5 purports to be addressed to DPSC?

6 THE WITNESS: Yes, Your Honor. Whether
7 they received it directly from Freedom --

8 JUDGE GROSSBAUM: You wouldn't know?

9 THE WITNESS: No, I wouldn't know. But
10 they did receive the 9 August letter.

11 JUDGE GROSSBAUM: That's all right. Go
12 ahead.

13 BY MS. HALLAM:

14 Q You were explaining what was discussed
15 during your conversation with Dollar Dry-Dock or the
16 conference call to Dollar Dry-Dock.

17 A Besides the 9 August and 10 August
18 letters, which was disturbing -- are disturbing, the
19 -- Dollar Dry-Dock, now, sort of qualified its
20 conditions or specified its conditions for granting
21 credit -- I mean financial credit or financial
22 support to Freedom.

23 And, specifically, they wanted to see a
24 payback arrangement in place with its credit -- with
25 Freedom's creditors before any financing would be
26 advanced. This was a new development.

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1 Also, they wanted any --

2 MR. MACGILL: Pardon me, Your Honor.
3 Again, we'll object for the same reasons as before.
4 He has no personal knowledge of what happened with
5 Dollar Dry-Dock. He's now testifying on his
6 analysis of some letters --

7 JUDGE GROSSBAUM: No, no. I think --
8 has the witness testified that he participated on
9 the squawk box -- in the conference call on the 17th
10 of December, 1984? Is that correct?

11 THE WITNESS: Yes, sir. I was --

12 JUDGE GROSSBAUM: Who else participated
13 in this conference call?

14 THE WITNESS: There were four high-level
15 people from my office: Colonel Don Hein, our
16 Commander; Leonard Gutfleisch, our Deputy Commander;
17 Sam Stern, who was our Chief of Contracts -- in fact
18 there were five people: Carl Heringer, who was our
19 Deputy Counsel; and myself, as Administrative
20 Contracting Officer.

21 JUDGE GROSSBAUM: This is all out of the
22 New York office of DCASR?

23 THE WITNESS: Yes, sir.

24 JUDGE GROSSBAUM: And you all spoke with
25 Mr. Noel Siegert?

26 THE WITNESS: Yes, sir.

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1 JUDGE GROSSBAUM: Anybody else at Dollar
2 Dry-Dock that you were speaking with?

3 THE WITNESS: No, Your Honor.

4 JUDGE GROSSBAUM: And this telephone
5 conversation took place on the 17th of December?

6 THE WITNESS: Yes, Your Honor.

7 JUDGE GROSSBAUM: 1984?

8 THE WITNESS: Yes, Your Honor.

9 JUDGE GROSSBAUM: Okay. Well, the
10 objection's overruled to the extent that the witness
11 is testifying about matters that he perceived during
12 conversation, of which -- during a telephone
13 conversation in which he partook. So go ahead.

14 You don't have to editorialize it.
15 Just, basically, tell us what was said and what you
16 heard.

17 THE WITNESS: Yes, sir. Besides these
18 new -- another new condition that was imposed by
19 Dollar Dry-Dock, prior to advance in funds, was that
20 they wanted a Government guarantee concerning
21 payback of any funds that might be advanced. So
22 this was also a new development, again, very
23 disturbing.

24 We were given the impression,
25 categorically told, that the prospect of advancing
26 money to Freedom was bleak.

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1 BY MS. HALLAM:

2 Q There's a side issue here. Referring to
3 Tab 8 of the Government's Rule 4, do you have a copy
4 of this letter in your files?

5 A Yes, I do.

6 Q And how did you come to obtain a copy of
7 this letter?

8 A Okay. This was provided by Mr. Henry
9 Thomas, as part of various documents sent to me, in
10 December, 1984, during the pre-payment progress
11 payment review. And it was in response to my letter
12 dated 18 December, 1984, to Henry Thomas.

13 Q It was provided in January, did you say,
14 or December?

15 A No. It was provided, to the best of my
16 knowledge, in late December. I think it was Henry
17 Thomas's letter of 27 December or thereabouts, 1984,
18 in response to my letter of 18 December, 1984, which
19 raised various questions that I needed answered, as
20 part of my pre-payment progress payment review.

21 Q Prior to Mr. Thomas's submittal of this
22 letter in late December, were you aware of this
23 letter or aware of the statements made in the
24 letter?

25 A I was not aware of the letter, but I was
26 aware of the Dollar Dry-Dock situation, because Mr.

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1 Thomas conveyed that -- Mr. Marra conveyed that at
2 the December 14th post-award. The statement here,
3 from Henry Thomas to his wife, Jacine Thomas, dated
4 13 September, 1984, solidified what was discussed at
5 the post-award concerning the small chance of
6 obtaining financing from Dollar Dry-Dock. It
7 solidified in writing from Henry Thomas.

8 Q Prior to the post-award on December 14th
9 of 1984, did you have any knowledge of Dollar
10 Dry-Dock's drying up?

11 A No, I did not.

12 JUDGE GROSSBAUM: Well, Dollar Dry-Dock
13 no longer exists, but they didn't dry up back in
14 1984. So what is it that dried up, based on that
15 question? What did you understand that question --

16 THE WITNESS: The commitments of Dollar
17 Dry-Dock to supply a certain amount of financing,
18 several million dollars in financing, to Freedom, to
19 enable them to perform on this contract.

20 JUDGE GROSSBAUM: Now, is it your
21 testimony that you or the -- you, personally, or to
22 your knowledge, the officials at DCASR, New York
23 were unaware of any problems with the Dollar
24 Dry-Dock financing of Freedom, prior to the middle
25 of December, 1984?

26 THE WITNESS: That is correct.

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1 JUDGE GROSSBAUM: But you said that this
2 letter at Tab 8 was something that had been given to
3 you before the pre-award?

4 THE WITNESS: No. This letter was
5 provided to us after the post-award, I believe, as
6 part of a package, in late December, 1984, in
7 response to my letter of 18 December. It was over
8 -- I would say, possibly, about 13 days after the
9 post-award conference. This was part of a whole
10 package of information that Henry Thomas provided to
11 me, concerning the questions I raised in my 18
12 December letter.

13 BY MS. HALLAM:

14 Q Mr. Liebman, I'd like you to refer to
15 that letter at Tab 12 of the Government's Rule 4.

16 A Yes. This is my letter of 18 December,
17 1984, to Henry Thomas, concerning -- requesting
18 certain information concerning his financial
19 position.

20 Q And what was the purpose in requesting
21 this information?

22 A Again, it was part of the progress --
23 pre-payment progress payment review and also
24 evidence of concern we had concerning his ability --
25 Henry Thomas's ability, Freedom's ability to perform
26 under the contract.

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1 Q And did Freedom provide a response to
2 this request for financial information?

3 A Yes, it did.

4 Q Referring to Tab 13, is that a copy of
5 Freedom's response?

6 A Yes, it is.

7 Q And did you review that response on the
8 December, '84 time frame?

9 A Yes, I did.

10 Q And just to clarify, along with this
11 response, Mr. Thomas sent a letter which is under
12 Tab 8 of the Government's Rule 4?

13 A Yes, he did. To the best of my
14 knowledge, yes, he did.

15 Q Did you find the information provided in
16 this response to be adequate, to relieve your
17 concerns?

18 A No, we did not, because there was no
19 firm commitment from any financial source. There
20 was a lot of verbiage and things that were planned
21 -- the Freedom planned to do, but there was no firm
22 commitment to allay the Government's fear of its
23 financial difficulties.

24 Q What was it that --

25 JUDGE GROSSBAUM: Why don't you describe
26 with particularity, and let's talk about your fear,

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1 rather than the Government's. What was -- in your
2 capacity as an ACO for this contract, which had just
3 been awarded, what was your "fear" concerning the
4 financial capacity of Freedom --

5 THE WITNESS: Sure. Basically, you had
6 a company that was in, Your Honor, that was
7 insolvent when the contract was awarded. He owed
8 several million dollars to past creditors. It was a
9 start-up contractor. He didn't have a facility that
10 was operational.

11 So you had to start from scratch, hire
12 people, rehabilitate a building. You were already
13 insolvent to begin with.

14 JUDGE GROSSBAUM: Now, who owed the
15 several million?

16 THE WITNESS: Freedom Industries owed --

17 JUDGE GROSSBAUM: Freedom Industries is
18 an entity?

19 THE WITNESS: Yes, sir.

20 JUDGE GROSSBAUM: As opposed to HT
21 Foods?

22 THE WITNESS: Freedom Industries is an
23 entity, Your Honor.

24 JUDGE GROSSBAUM: Now, that was a
25 different entity from HT Foods?

26 THE WITNESS: That is correct.

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1 JUDGE GROSSBAUM: Was HT Foods an
2 ongoing concern?

3 THE WITNESS: Well, it wasn't -- well, I
4 would --

5 JUDGE GROSSBAUM: Well, on your
6 understanding.

7 THE WITNESS: Well, it existed, but it
8 was not what I would call operational. I would
9 describe it that way, Your Honor. There was no bank
10 of record. It wasn't a viable concern, an ongoing
11 concern, as we know would describe such a concern.

12 JUDGE GROSSBAUM: And how about Freedom
13 Industries? Is that a concern that had --

14 THE WITNESS: It existed. It had been
15 dormant, regarding business, for about a year and a
16 half to two years. He had a few small contracts in
17 1982, 1983, two small ones, which I administered.
18 Then he didn't receive any more awards for about a
19 year and a half.

20 JUDGE GROSSBAUM: How did it manage to
21 -- it's Freedom Industries, now, that had a couple
22 of million in debts?

23 THE WITNESS: Yes, sir.

24 JUDGE GROSSBAUM: How did they manage to
25 accumulate these debts, to the best of your -- what
26 was the nature of their creditors?

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1 THE WITNESS: Well, Dollar Dry-Dock was
2 the largest creditor. And there were creditor --
3 many creditors. In fact, Freedom supplied a volume
4 full of creditors. There were many, many creditors.
5 And we had asked for -- what I had asked for was the
6 creditors, during the pre-payment review process.
7 And we were surprised to the large number of
8 creditors.

9 JUDGE GROSSBAUM: Did this show up
10 during the pre-award survey, based on your review of
11 the pre-award survey documents concerning financial
12 capability?

13 THE WITNESS: Yes, it did. The
14 insolvency and the need -- I think you'll see the
15 words in the -- one of the pre-award documents from
16 my office, saying, "the need for tremendous" -- I
17 think that's right -- "tremendous financial
18 support," describing the debts that he owed, the
19 negative working capital, so on and so forth.

20 JUDGE GROSSBAUM: Okay, excuse the
21 interruption. Go ahead.

22 BY MS. HALLAM:

23 Q Could you tell us exactly what it was
24 that you were looking for by way of a response to
25 your questions?

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1 A A commitment. A commitment from a
2 financial institution to help fund this contract.
3 Freedom could not fulfill this contract on progress
4 payments alone. It needed outside financing. We
5 needed something firm. We didn't receive that in
6 his response.

7 And when I say "firm," I mean not just
8 to cover the current contracts, contract, we also
9 covered the past debts, enough in there, in that
10 pool, to address both issues.

11 Q Referring to this letter, again, at the
12 Tab 13, on the first page, "Freedom indicates
13 private funding of working capital is reduced for
14 depreciation" --

15 A Yes.

16 Q And it has a figure for depreciation of
17 333333.

18 A Yes.

19 Q Do you know where that figure came from?

20 A Yes. That came from the PCO, the DPSC
21 PCO'S negotiation memorandum that was part of award
22 in this contract.

23 Q I'd like to refer you now to Tab 14 of
24 the Government's Rule 4. Would you explain why this
25 letter is -- was sent? What was the purpose of it?

26 A May I have a chance, just to look at --

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(Whereupon, the witness

reviewed the document.)

THE WITNESS: Yes, I have basically -- during the December 17th, 1984 squawk box conversation that we had with Dollar Dry-Dock, I had asked that Dollar Dry-Dock to speak with us so that we confirm in writing the gist of the conversation, which he agreed to do. And that was basically the purpose of this letter.

BY MS. HALLAM:

Q The second sentence of the first paragraph there, it says, your earlier letter dated August 9, 1984, which we understood you received from Mr. Thomas (Dry-Dock not -- Dollar Dry-Dock) was actually a draft, which was never sent? Is that what you were talking about?

A Exactly, yes.

Q The phone conversations?

A Yeah.

Q And the letter goes on to point out that the difference --

JUDGE GROSSBAUM: Are you going to -- counselor, you're testifying.

MS. HALLAM: Excuse me?

JUDGE GROSSBAUM: Are you going to testify?

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1 MS. HALLAM: No.

2 JUDGE GROSSBAUM: Do you have a
3 question?

4 MS. HALLAM: Yes.

5 BY MS. HALLAM:

6 Q For purposes of determining the
7 financial capacity of a potential contractor, does
8 the Government accept commitment letters that are
9 conditional?

10 A Absolutely not.

11 Q Do you know what the principal
12 conditions for any loan which the bank might make,
13 what were those conditions?

14 A Dollar Dry-Dock stated that they wanted
15 to receive some sort of payback arrangement that
16 Freedom had with its past, you know, would have with
17 the knowledge of its past creditors. Also, they
18 stated that I would have to pay the first progress
19 payment before they would commit themselves to any
20 financing.

21 And also, they wanted a Government guarantee of any
22 loan or any money that might -- that Dollar Dry-Dock
23 might advance to Freedom.

24 So those were the three basic conditions
25 set forth by Dollar Dry-Dock, before any money would
26 flow to Freedom.

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1 Q And up to this point, there hadn't been
2 any progress payments; is that correct?

3 A No progress payments paid, although we
4 were under a pre-payment review mode.

5 Q What were the results of the pre-payment
6 review?

7 A The results were DCAA recommending zero
8 payment.

9 Q Do you know what the basis of DC -- tell
10 us who DCAA is.

11 A Right. DCAA is the Defense Contract
12 Audit Agency, that does the actual audit of a
13 company's books and records for progress payment
14 purposes.

15 Q And what was the basis of their
16 recommendation?

17 A Unsatisfactory financial condition.
18 Also, many of the costs that were in the first
19 progress payment or what we would call "claim
20 books," meaning they were costs incurred by the
21 other company, HT Food, not Freedom Industries'
22 costs.

23 But the bottom line was financial, was
24 the main thing. Also, there was -- regarding the --
25 costs, there was a special statement in the audit

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1 report for the first progress payment concerning
2 unsatisfactory financial condition because of this.

3 Q In determining whether to --

4 A I'm sorry -- unsatisfactory accounting
5 system. That was incorrect.

6 Q And that was all expressed in their
7 audit report?

8 A Yes.

9 JUDGE GROSSBAUM: Is that audit report
10 in the record?

11 MS. HALLAM: It's at Tab 15.

12 THE WITNESS: In fact, Your Honor, there
13 were two audit reports.

14 JUDGE GROSSBAUM: Now, these audits took
15 place in connection -- you were in the pre-payment
16 mode in the context of revised progress payment
17 request number one. Is that correct?

18 THE WITNESS: Yes.

19 JUDGE GROSSBAUM: So you were still in
20 the mid-December, 1984 time frame?

21 THE WITNESS: Well, the -- well a little
22 bit later, Your Honor. It was now -- there were two
23 audit reports. The first audit report was January
24 4th, 1985. And it was the second audit report,
25 January 14, 1985.

26 BY MS. HALLAM:

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1 Q In determining whether to pay progress
2 payments or how much to pay, what weight do you give
3 DCAA's recommendation?

4 A Well, their -- and again, it's a
5 recommendation. And their recommendation is very
6 important, because they are the agency that audits
7 the books and records. So what they say is
8 important, although it's my decision as the ACO.

9 Q You mentioned that there were two audit
10 reports. Why is that?

11 A After the first audit report, Freedom
12 took strong exception to the statements concerning
13 un-booked costs and the unacceptability of the
14 accounting system at Freedom. Freedom claimed that
15 it did have books and records and would show the
16 Government, if they went out again.

17 So I ordered a second review
18 immediately, to get the view of Freedom's objection.

19 BY MS. HALLAM:

20 Q And what was DCAA's recommendation in
21 the second audit?

22 A The bottom line was, they recommended
23 zero payment, because of unsatisfactory financial
24 condition. However, they did claim that the costs
25 were now booked. That was the big change. The

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1 costs were booked, as opposed to un-booked. But
2 they still recommended zero payment.

3 Q Referring to Tab 21 of the Government's
4 Rule 4, is that a copy of the second audit report?

5 A Yes, it is.

6 Q What was your decision with regard to
7 progress payments?

8 A Okay. I made a --

9 Q With regard to paying progress payment
10 number one?

11 A I made the decision to consider
12 suspending progress payments, based on the first
13 audit report. That was the January 4th audit
14 report. And it was because -- well, let me look at
15 it, to sort of qualify that.

16 The first -- when I got the first audit
17 report, which is dated 4 January, 1985, coupled with
18 its unsatisfactory financial condition, and in
19 consideration of the failure to obtain outside
20 financing from Dollar Dry-Dock or any other source,
21 I then made the decision to consider -- underline
22 the word "consider" -- suspending progress payments.
23 This was on or about January -- right after New
24 Years, January 2nd or January 3rd -- I'm sorry,
25 January 4th, 1985 or January 3rd, 1985. It was
26 based on a verbal I received from DCAA. The hard

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1 copy of the report was -- probably came a few days
2 later, that was dated January 4th. It was right
3 after New Years.

4 Q Referring to Tab 16 of the Government's
5 Rule 4, what is this?

6 A This is my letter dated 4 January, 1985,
7 to Henry Thomas, advising Mr. Thomas that I was
8 considering suspending his progress payments because
9 of his unsatisfactory financial condition.

10 Q Could you tell us what the distinction
11 is between "considering suspending" and
12 "suspending"?

13 A Yes. It's, basically, sort of a giving
14 the contractor a chance to respond before I made a
15 decision, whether you -- you may going under the
16 name of a show cause of the circumstances. But it's
17 basically a letter saying we are concerned, I'm
18 considering doing this, we're giving you an
19 opportunity to address my concerns, prior to taking
20 final action. And it's in accordance with our
21 procedures and regulations.

22 Q And did Freedom provide a response to
23 your notice?

24 A Yes, they responded. Yes, they did.

25 Q And what did the response provide, by
26 way of information?

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1 A Again, without checking the documents,
2 but they did respond. There were several letters
3 that followed and meetings that followed and oral
4 discussions and not too much satisfaction. There
5 was still no firm commitment from any financial
6 source.

7 Q Returning to Tab 22 of the Government's
8 Rule 4. Is that copy of Freedom's response?

9 A Yes, it is.

10 Q I'd like you to refer to page 5 of that
11 response, where they address some of the issues.

12 A Okay.

13 Q Would you tell us if you were satisfied
14 with the responses that they provided, at least as
15 to these issues?

16 A Well, again, this didn't -- the issues
17 raised here weren't -- didn't address the heart of
18 the matter or the heart of the problem, which was a
19 some sort of commitment from a financial source to
20 fund this, you know, to help fund this contract and
21 pay back its past debts.

22 He was just talking about payroll and
23 salary payments and, of course, the issue of
24 progress, you know, what constitutes progress. But
25 it didn't solve the problem. There's no indication
26 here that Freedom had any financial support from

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1 anywhere that would enable them to perform this
2 contract.

3 Q With regard to the issue of progress,
4 would you just briefly explain what the dispute
5 there was?

6 A Yes. This was kind of an unusual
7 situation. Normally, when you receive a progress
8 payment, normally when you apply what they call
9 "indirect costs," you have something direct to apply
10 it against. By direct, it could be material costs,
11 labor costs, engineering costs.

12 What happened in this situation was in
13 Freedom's first progress payment, there were costs
14 that were enclosed normally of an indirect nature,
15 rent, real estate taxes, some office salaries.
16 Freedom's position was that, this is the way the
17 contract was negotiated with DPSC, that all costs --
18 because this is Freedom's only contract and because
19 of the way it was negotiated -- all costs are really
20 direct in nature.

21 So it was kind of an unusually thing
22 which I referred for review by higher authority and
23 I also referred it to various sources, such as
24 legal, audit, financial, Cameron Station, DPSC.
25 That was -- became really an odd issue as we started
26 -- and I started getting opinions from various

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1 sources, that was really an odd issue. And that was
2 not the reason for suspension.

3 It was agreed, conceded, that -- by me
4 that I was convinced that all costs are directly
5 related to this contract, based on information I
6 received from various sources, including DCA.

7 Q When progress payments began to flow,
8 were any costs eliminated because of this dispute --

9 A No.

10 Q -- because of this issue?

11 A No. This was a dead issue. If costs
12 were eliminated -- what costs were eliminated when
13 they started the progress payments, they were for
14 other reasons. This was a dead issue. It had
15 nothing to do with the payment of progress payments,
16 any of the progress payments I made. It had nothing
17 to do with the suspension of progress payments. It
18 was a dead issue after we conducted a review of the
19 matter.

20 Q I'd like you to refer now to page number
21 3. The second half of the page lays out a Freedom
22 story and a Liebman story.

23 A What's that page?

24 Q We're still on the same tab, Tab 22,
25 page 3.

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1 A Okay. Yes. This is -- okay, yes.
2 During -- several times during the early phases of
3 this contract, Freedom would put on a potential
4 financial source, perhaps a creditor, perhaps a
5 combination of both. There might have been five or
6 six calls at most.

7 And Henry would call me up and say, "I
8 want to put on my creditor, if you would please tell
9 him the situation," or "I want to put on a potential
10 financial source, would you please tell him where we
11 are and what are your progress payments."

12 Henry would be on the phone. I didn't
13 object to speaking to the creditor or to the
14 potential financial source. Henry would stay on the
15 phone. I think maybe one or two times, I was
16 talking alone to the creditors, and I'd basically
17 tell them the situation. I didn't pull any punches.

18 Mr. Thomas got very upset a few times,
19 because, basically, he wanted me to tell this
20 creditor or a potential financial source what they
21 wanted to hear or he wanted me to tell them. And I
22 can't do that. I have voice my position as an
23 Administrative Contracting Officer. A contractor
24 can't tell me what to tell somebody.

25 Q So what was it that you were telling
26 these --

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1 A Again, at this point, to the best of my
2 recollection, I would say, okay -- let's say
3 progress payment one was still under review. They
4 might ask when are you going to pay number one. I
5 would have to state, well, when Freedom obtains
6 adequate financing -- again, I'm only generalizing
7 right now. I would have to check the record, to see
8 exactly what was said, if there is such a record of
9 those propositions.

10 Q Referring to the letter here at page 3,
11 it says, "Freedom's story," could you read that?
12 Do you recall telling the bankers this story that's
13 set forth here?

14 A Yes. When Freedom Industries incurs
15 direct labor and direct material costs, an overhead
16 rate will then be applied, and Freedom will receive
17 payment only then. I would say, not in this vein.
18 This would have been early on, when the matter of
19 direct costs and indirect costs and progress arose.

20 I would have to qualify this statement
21 in Mr. Thomas's letter, stating that this was a
22 matter of -- that this particular matter was under
23 Government review at that time. What I would -- in
24 other words, I wouldn't have phrased it this way.

25 The issue concerning direct and indirect
26 and the issue concerning progress was being reviewed

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1 by us at that time as part of the pre-payment review
2 process. And this is what I would have told anybody
3 that would have called me, be it a creditor or a
4 financial backer. I would not have made any sort of
5 an outright categorical or fail-safe type of
6 statement, saying outright, it's denied.

7 I would say it's a matter we're
8 reviewing. The norm is to have something either of
9 a direct nature there, before you apply indirect
10 costs. This was an unusual case that is being
11 reviewed. So in that sense, I would have to qualify
12 the direction that this statement is going.

13 Q I'd like you to refer, now, to Tab 25.

14 A Yes. This is a post-award financial
15 surveillance report, prepared by Mr. William Sokes,
16 who is our DCASMA, New York financial analyst. And
17 it basically -- It was prepared, as a result of the
18 various supporting documents Mr. Thomas provided as
19 a result of my notice of considering suspending
20 progress payments.

21 Mr. Thomas provided balance sheets,
22 income statements, various other financial
23 statements, that I immediately sent in for review by
24 our financial services group.

25 Q This is a result of a request made by
26 you --

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1 A Yes, it was.

2 Q -- to review certain documents?

3 A Yes, it was, provided by Mr. -- by
4 Freedom, New York -- Freedom Industries.

5 Q Did anything in this post-award
6 financial surveillance report sway you either way,
7 as far as suspension of progress payments?

8 A Yes. This made -- this basically
9 clenched -- was the clincher, based on this report,
10 which was an adverse type of report, from a
11 financial standpoint. And based on Freedom's
12 inability to provide any source of financing, I had
13 no choice but to suspend progress payments until
14 adequate financing was found to nullify what was in
15 this post-award financial surveillance report.

16 I mean, you can read it for yourself.
17 It says, "It should be fairly obvious the company
18 could not have performed under this award without a
19 tremendous infusion of equity and/or debt financing,
20 so on and so forth.

21 It's clear. You look at the various
22 ratios, the various figures. And you can turn to
23 the second page of this report, which says
24 "Conclusion" on the bottom, paragraph three. Mr.
25 Stokes, on the bottom, is saying, "Without any valid
26 financing, which we of DCASR, New York can verify,

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1 the financial analyst is of the opinion that
2 Freedom's financial condition is so weak, without an
3 infusion of capital/financing,
4 that continued performance is in jeopardy."

5 If you would, further, go back to the
6 top of the page, it states that the financial
7 statements covered the period 1 July, 1984 to 4
8 January, '85, "reflects an even worse financial
9 position in that there is still no bank commitment
10 or a commitment from any other financial
11 institutions. The losses continue, and net worth
12 shows great indebtedness at 3.7 million," so on and
13 so forth.

14 And then it goes on in the middle of
15 that paragraph, "This would imply that there are no
16 stated current assets, zero, upon which to offset or
17 assert its liabilities," so on and so forth. So it
18 painted a pretty poor picture concerning Freedom's
19 condition and its hopes of coming out of this
20 condition, in the way of getting financing.

21 And based on this and based on every
22 opportunity we gave Freedom, it's during the month
23 that elapsed from the date I sent them a letter
24 considering suspension, which was 4 January, '85, to
25 the time I decided to suspend a month later, a month
26 elapsed.

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1 And during that month, there was an
2 exchange of correspondence with Freedom. There were
3 meetings. There were telephone discussions. Every
4 opportunity was given Freedom to come up with a
5 source of credit. We didn't get that. And as a
6 last resort, I had to suspend progress payments,
7 with the stipulation that they be resumed or
8 initiated, once it came in with that source of
9 credit.

10 Q Referring to Tab 26 of the Government's
11 Rule 4, is that a copy of your notice of suspension?

12 A Yes, it is.

13 Q What was the stated reason for the
14 suspension?

15 A Okay. If you look at --

16 JUDGE GROSSBAUM: Can't the letter speak
17 for itself? I mean, we only have --

18 MS. HALLAM: Okay.

19 JUDGE GROSSBAUM: -- can testimony about
20 all these documents and what they're saying?

21 BY MS. HALLAM:

22 Q Did -- when was -- when were progress
23 payments finally paid?

24 A I believe in early May, 1985.

25 Q Did the contractor continue to present
26 progress payment requests to you?

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1 A Yes. There was a progress payment
2 resubmitted. At the time of the suspension, early
3 February, there was -- no, there were two progress
4 payments on hand, number one -- we submitted number
5 one and number two.

6 I think two days after the suspension,
7 February 8, 1985, they submitted -- Freedom
8 submitted a progress payment number three, that was
9 just for the record. I don't believe there were any
10 other progress payments until the novation agreement
11 occurred, and, you know, had started progress
12 payments.

13 Q What had occurred -- what situations had
14 changed, that made it possible, that resulted in the
15 payment of progress payments?

16 A Well, two main things. The main thing
17 was Freedom changed source of financial backing,
18 specifically, \$5 million, or whatever figure it was,
19 five or 5.5, and unrestricted support --
20 purportedly, an unrestricted line of credit from
21 Bankers Leasing out of Chicago or Glencoe, whatever
22 the place is, Glen Row, Illinois. That was the main
23 reason.

24 And also, the other reason, we novated
25 the contract, at Freedom's request in its letter of
26 22 February, '85, to HT Foods.

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1 Q And what was the purpose -- why was it
2 novated?

3 A Why me? The Government, and not just
4 myself, but the Government -- and the reason I say
5 the Government, because of the visibility and it was
6 involved in discussions of this.

7 We had a meeting at Cameron Station in
8 mid-February, 1985, at the Government's, meaning DLA
9 Headquarters, DPSC, DCASR, New York, DCASMA, New
10 York, myself as ACO, had the responsibility -- was
11 concerned about peer -- piercing the corporate veil.
12 Okay? We were afraid the creditors, because of the
13 absence of Chapter 11 protection, the absence of
14 deferred payments, could force them out of business.

15 And we -- our progress payments -- what
16 the Government has invested in Freedom could be
17 jeopardized, because they could, possibly, seize the
18 assets, including our progress payment inventory.
19 We felt additional protection was necessary.

20 And during the discussion -- during the
21 meeting at Cameron Station, the matter of novation
22 was raised, in private, by the Government, to the
23 best of my recollection, posed to Freedom.

24 When Freedom was at the meeting, about a
25 week later, Freedom came in with a letter saying,
26 "We ask you to novate." Discussion of the novation

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1 occurred at the meeting in mid-February. And we had
2 an interest in novating. We had not -- we didn't,
3 you know, we didn't make the decision. Freedom
4 asked for the novation. We discussed novation at
5 the meeting, but Freedom asked for it in a letter, a
6 week later.

7 Q Did you approve the novation?

8 A Yes, I did.

9 Q Was your approval necessary or sought?

10 A Mandatory by regulation.

11 Q And what was your approval based on?

12 A We did a complete review of Freedom's
13 novation request package, as required by the DAR,
14 Defense Acquisition Regulation. That review
15 included -- we had -- I had to determine if the
16 successor company, meaning HT Foods, was a
17 responsible company.

18 And I'm required to do a financial
19 review, a production capability review. I could
20 even do a quality review. I had no notify Cameron
21 Station. They have 30 days to respond. That's
22 required. I had to do a legal review of the
23 documents. And it was an intensive and extensive
24 review, required by the regulations, to determine
25 whether or not HT Foods was a responsible company
26 and could perform under the contract.

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1 Q You mentioned that Freedom came through
2 with a letter of commitment. Was that letter of
3 commitment to Freedom or HT Foods?

4 A I would have to check the records, to be
5 honest with you.

6 Q What was -- was financial stability part
7 of HT Foods' responsibility determination?

8 A Yes. Yes. HT Foods had to show that it
9 was a viable contractor. One of the conditions we
10 presented to Freedom at the big meeting at Cameron
11 Station in -- February 14th, 1985, was that we
12 needed a letter of commitment from a financial
13 institution that was a viable financial institution,
14 not a fly-by-night concern, that we needed a viable
15 -- we needed a commitment from a viable institution.

16 Q I'd like you to refer to Tab 40 of the
17 Government's Rule 4. Is this your memory as to --
18 about the commitment of Freedom or HT Foods?

19 A Tab 40? Was the -- it's on Tab 40?

20 Q Tab 40.

21 A Okay. May I look at this for a moment?

22 (Whereupon, the witness

23 reviewed

24 document.)

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1 THE WITNESS: All right. This is a
2 letter from Freedom, addressed to myself, dated 20
3 March. And -- well, basically, this --

4 JUDGE GROSSBAUM: She's not asking you
5 what the letter is. There's a question for you.

6 What is it that you want the witness to
7 testify about? His recollection of a letter of
8 commitment or what?

9 MS. HALLAM: Whether the commitment was
10 to HT Foods or to Freedom Industries.

11 THE WITNESS: Yes. One of the
12 attachments --

13 JUDGE GROSSBAUM: You don't need to tell
14 us about the attachments.

15 THE WITNESS: I'm sorry.

16 JUDGE GROSSBAUM: You just need this
17 letter to refresh your recollection. Based on the
18 refreshment of your recollection, can you answer the
19 question, whether or not Bankers Leasing's letter of
20 commitment was to Freedom or to HT Foods?

21 THE WITNESS: Yes, I can, Your Honor.
22 It was to HT Foods.

23 BY MS. HALLAM:

24 Q As part of your review of HT Foods'
25 responsibility, did you review also the letter of
26 commitment?

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1 A Yes, I did.

2 Q Was that letter of commitment found
3 satisfactory?

4 A Without checking the record, I -- well,
5 eventually I'd say -- without checking the record, I
6 don't know if that particular letter was found
7 satisfactory or possibly a subsequent letter.

8 But the commitment, eventually, was
9 found to be satisfactory, whether in this form --
10 whether in the form dated 28 February '85 or some
11 revised form, I wouldn't know, without checking the
12 record. But ultimately, a commitment from Bankers
13 Leasing was found to be satisfactory.

14 Q Do you know if that commitment was
15 conditional, in any way?

16 A It was supposed to be an unrestricted
17 line of credit with Bankers Leasing.

18 Q And is there anything else that was
19 required, prior to the payment of progress payments?

20 A Yes. Of course, we would have to do, of
21 course, a review of the progress payments, which is
22 standard. But as long as we had a letter of
23 commitment and the contract was novated and, of
24 course, the buying activity wanted the contract to
25 continue, those would be pluses.

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1 And, of course, we would -- any progress
2 payment submitted would be subject to a review,
3 whether on a pre- or post-payment basis. And then,
4 of course, I would make a decision to pay or not to
5 pay.

6 Q Getting back to the suspension, what
7 factors do you consider in deciding to suspend
8 progress payments?

9 A I consider the factors cited in the
10 progress payment clause and DAR Appendix C,
11 specifically, unsatisfactory financial condition
12 that endangers performance, such as the case here.
13 It could be failure to make progress, failure to
14 comply with a material aspect of the contract.
15 There's a whole list of reasons for an ACO to
16 consider suspending or reducing a progress payment.

17 Q Referring to the Government's Exhibit
18 G-1, can you identify that?

19 A Yes. This is DAR Appendix E, which is
20 the progress payment, Part V, of Appendix E to the
21 DAR, which is our bible concerning progress payment
22 rules and regulations.

23 Q And were you administering this contract
24 under the DAR, rather than the FAR?

25 A Yes, I was.

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1 Q Can you point out, right offhand in
2 here, where -- is this Appendix the provision that
3 you were testifying to with regard to the factors
4 that you considered in suspending progress payments?
5 Is that contained in here?

6 A Yes, I can.

7 JUDGE GROSSBAUM: Okay. Do you want to
8 offer this as an official document?

9 MS. HALLAM: Yes.

10 JUDGE GROSSBAUM: Is there any
11 objection?

12 MR. MACGILL: No objection.

13 JUDGE GROSSBAUM: Okay. Without
14 objection, the Government's proposed Exhibit G-1,
15 which is -- presumes to -- appears to be a complete
16 extract from the Part V of DAR Appendix E, as it
17 existed in the early 1980's. It is admitted as
18 Exhibit G-1.

19 (Whereupon, the document
20 identified as Government's
21 Exhibit G-1 was received in
22 evidence.)

23 MR. MACGILL: Your Honor, may I back up
24 one step?

25 JUDGE GROSSBAUM: Go ahead.

1 MR. MACGILL: I said no objection. I
2 just -- I don't think the record is as clear as I
3 would like. Can I ask one voir dire question of the
4 witness?

5 JUDGE GROSSBAUM: Certainly.

6 VOIR DIRE

7 BY MR. MACGILL:

8 Q Mr. Liebman, are these -- is -- does
9 Exhibit G-1 contain portions of the Defense Contract
10 Financing Regulations that you relied on in your
11 administration of this particular contract?

12 A Yes, it does.

13 MR. MACGILL: With that understanding,
14 Your Honor, I have no objection to G-1.

15 JUDGE GROSSBAUM: Okay.

16 THE WITNESS: Getting back to your
17 specific question, it's E5-24, which is the title,
18 Suspension or Reduction of Payments-General. It
19 outlines the basis for suspending or reducing
20 progress payments.

21 Q Turning now to --

22 JUDGE GROSSBAUM: Are you saying E5-24
23 or E-24?

24 THE WITNESS: I'm sorry, E-524. I'm
25 sorry.

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1 MS HALLAM: I'm sorry, Your Honor. The
2 pages are out of order here. And I forgot that I --

3 JUDGE GROSSBAUM: That's okay, as long
4 as the pages are there.

5 MS. HALLAM: They are there. I have the
6 copies. I'll get them renumbered, in the right
7 order.

8 DIRECT EXAMINATION (CONTINUED)

9 BY MS. HALLAM:

10 Q I'd like you to refer now to Government
11 Exhibit G-3.

12 A G-3?

13 Q Yes.

14 A Okay.

15 MR. MACGILL: Your Honor, just for the
16 record, so it is clear, can we substitute the -- I
17 don't have -- this has more pages than I had, I
18 think. I'm not sure about that. But can we
19 substitute what was just produced and make this G-1
20 or put this as a part of the record?

21 JUDGE GROSSBAUM: Well, you've got the
22 same number of pages. You've got 36 pages. Well,
23 G-1 -- we'll use this -- we'll use the, what is
24 called as G-1. We'll use the compilation that the
25 Government counsel has just provided, because the
26 pages are in order.

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1 MR. MACGILL: Thank you.

2 BY MS. HALLAM:

3 Q Would you tell us what this document at
4 G-3 is?

5 A Yes. This is the progress payment
6 portion of our agency manual, specifically, DLAM
7 8105.1, which is the Defense Logistics Agency Manual
8 for Contract Administration Services. It's guidance
9 for the ACO for administering contracts. It
10 implements the DAR regulations.

11 Q And did you follow this guidance in
12 making your determination to suspend progress
13 payments?

14 A Yes, I did.

15 MS. HALLAM: I'd like to move this --

16 JUDGE GROSSBAUM: Okay. Is this
17 published anywhere? Is this manual public?

18 THE WITNESS: I believe it is available
19 from the Government Printing Office.

20 JUDGE GROSSBAUM: It's not published in
21 the Federal Register?

22 THE WITNESS: I do not know.

23 JUDGE GROSSBAUM: And what does DLAM
24 stand for?

25 THE WITNESS: Defense Logistics Agency
26 Manual for Contract Administration Services. They

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1 have one for production, one for quality, various
2 functional elements.

3 JUDGE GROSSBAUM: Any objection?

4 MR. MACGILL: Nope, no objection.

5 JUDGE GROSSBAUM: Then without
6 objection, Exhibit G-3 is admitted.

7 (Whereupon, the document
8 previously marked for
9 identification as Exhibit G-3
10 was admitted into evidence.)

11 BY MS. HALLAM:

12 Q You have testified that progress
13 payments, they got to be paid in the April, '85 time
14 frame?

15 A We made the --

16 JUDGE GROSSBAUM: He didn't testify
17 about that. He testified it was early May of '85.

18 THE WITNESS: May of '85.

19 JUDGE GROSSBAUM: Okay. Since we've
20 finished with suspension progress payments and I
21 want to start into a new era when Freedom was being
22 paid progress payments, why don't we take a recess
23 for an hour and 25 minutes. We'll be back here at
24 20 minutes after two.

25 (Whereupon, there was a recess
26 for lunch.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:23 p.m.

JUDGE GROSSBAUM: This hearing will come to order. Please continue.

BY MS. HALLAM:

Q Mr. Liebman, I'd like to refer you to Appellant's Exhibit F-49. Tell us what the purpose of this letter was.

A Yes. The purpose of this letter was to confirm the commitments made at Cameron Station, at a meeting held on the 14th of February, 1985. This letter was written the day after, on 15 February, 1985.

Q And what were those commitments?

A Basically, that a \$3.8 million line of credit was needed by Freedom and from a reliable, reputable and verifiable source of credit, and also, sufficient information, meaning documentation records, was required -- were required to support progress payment requests and that these actions were to be accomplished at no additional cost to the Government and that -- I also indicated in the letter that these conditions would also apply to HT Foods, should the contract be so novated.

Also, I indicated that the \$3.8 million line of credit would also have to include a

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1 timetable, regarding the actual transfer of funds,
2 you know, to Freedom.

3 Q And when was the contract -- when did
4 Freedom provide a novation agreement, if you recall?

5 A During March of 1985, to the best of my
6 knowledge and recollection, the novation documents
7 were submitted, at various times, because there was
8 inadequacies with some of the documents. There had
9 to be resubmittals, things like that. But it was
10 during the March and -- '85, April '85 time frame.

11 Q And when was the novation agreement
12 approved?

13 A 17 April, 1985.

14 Q And what took place during that period,
15 when the novation agreement was submitted and when
16 it was approved?

17 A We had -- DCASMA, New York had to
18 conduct a review concerning whether or not HT Foods
19 is a responsible company. And this is part of the
20 DAR regulations per our DLAM regulations, which
21 implements the DAR.

22 And the review encompassed audit,
23 financial check, production check, quality check,
24 you name it. And this -- legal check. It also had
25 to be reviewed by Cameron Station, which is

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1 required. And there's a 30-day -- minimum 30-day
2 time period for that.

3 Now, let me backtrack -- a maximum of 30
4 days instead of a minimum. We have to give Cameron
5 Station 30 days to review the novation package.

6 Q Is that an internal requirement or --

7 A No. This is part of -- it's, basically,
8 in the FAR. There's a section in the -- in the DAR.
9 There's a section in the DAR concerning novation
10 agreements. And also, it's part of our DLAM, which
11 implements the DAR, that I must follow in these
12 procedures.

13 JUDGE GROSSBAUM: I'm not clear on your
14 answer to the question. Did the question have to do
15 with the 30 days in which the 30 days is something
16 that was an internal procedure? Wasn't that the
17 last question, about the 30 days?

18 MS. HALLAM: Well, just the entire
19 process, the review by Headquarters, Cameron
20 Station.

21 JUDGE GROSSBAUM: Yes, the Headquarters
22 review, is that something that's called for in the
23 DAR?

24 THE WITNESS: Yes. You must go to the
25 Service Command involved with the contracts. If it
26 was an Army contract, you would have to go to the

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1 Army Materiel Command for -- to get their opinion.
2 We send a standard letter out to the Navy Material
3 Command if it's a Navy contract.

4 In this case, it was --

5 JUDGE GROSSBAUM: The question is, is
6 this a DAR requirement?

7 THE WITNESS: It's a DAR requirement and
8 also a DLAM requirement.

9 JUDGE GROSSBAUM: Well, which is the
10 DLAM requirement and which is the DAR requirement?

11 THE WITNESS: I would have to look at
12 both regulations. But it's a -- DLAM implements
13 the DAR, and there is a --

14 JUDGE GROSSBAUM: Is this the 30 days --
15 is that something that's specified in the DAR, or is
16 that specified in the DLAM?

17 THE WITNESS: I would have to check the
18 regulations, Your Honor.

19 JUDGE GROSSBAUM: Do you have the DLAM
20 in front of you?

21 THE WITNESS: No. I only have the
22 progress payment portion of it. No, I do not have
23 the novations.

24 JUDGE GROSSBAUM: No novations.
25 Whatever it is, it will show. It won't show -- if
26 it's a DLAM requirement, it won't show in this

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1 record, because we don't have that requirement in
2 this record. That manual is not a published
3 document.

4 Go ahead.

5 THE WITNESS: But --

6 JUDGE GROSSBAUM: Go ahead. Answer the
7 next question. I'm sorry.

8 BY MS. HALLAM:

9 Q I'd like you to refer, now, to
10 Appellant's Rule 4, Tab F-232. It's up top at
11 sub-tab entitled progress payment number one.

12 I believe you're looking at the wrong
13 sub-tab. You're looking at Freedom Industries --

14 A Progress payment one?

15 Q Yeah. We're referring to the sub-tab
16 entitled progress payment number one, which, I
17 think, is the fourth sub-tab.

18 A Oh, okay. Oh, okay. You're right.
19 Okay.

20 Q Could you tell us what that is?

21 A Okay. They're several documents here,
22 one of which is the progress payment number one,
23 from HT Food Products. And this is dated 10 April,
24 1985, but it was not approved until -- in fact, this
25 was dated before the novation, and it was approved
26 by me on the -- in a reduced amount. I reduced this

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1 in a small amount. I approved it in the amount of
2 \$1.7 million on the 6th of May, 1985.

3 Q Would you refer to the first page of
4 that sub-tab?

5 A Yes.

6 Q What is that?

7 A This is a check, a copy of the check for
8 progress payment one, in the amount of \$1.7, from
9 the Treasurer of the United States to Bankers
10 Leasing and -- because Bankers Leasing was the
11 assignee, under the contract.

12 Q Tell us what day that's dated?

13 A May 6th. We paid it the same day I paid
14 the progress payment. I arranged a special payment,
15 which is very unusual.

16 Q Tell us what that \$1.7 million includes?

17 A Okay. I would have to -- well, it's not
18 in the tab, but I would have to check the progress
19 payment file or perhaps the documents are in one of
20 the files here, to see exactly what the \$1.7 million
21 consisted of.

22 JUDGE GROSSBAUM: Would it have included
23 anything more than the 1.767 million that was
24 requested in the progress payment?

25 THE WITNESS: No. Well, he requested
26 1.766. I approved \$1.7. What the elements were --

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1 JUDGE GROSSBAUM: Well, that's what
2 you're being asked, isn't it?

3 THE WITNESS: Yes. Without seeing the
4 backup sheets with the progress payment form backup
5 sheet, breaking down the costs, as required -- I
6 believe it's, possibly, in our Rule 4 File. If not,
7 it's, of course, in the record, back in my office,
8 because every progress payment request is backed up
9 by a breakdown of costs. And off the top of my
10 head, I just don't recall, you know. I'd have to
11 check the record and see what's in there.

12 BY MS. HALLAM:

13 Q Does this include payments on what had
14 been submitted as progress payment number one,
15 number two and number three?

16 A Oh, I would presume -- I would have to
17 say yes, that they would be costs from inception of
18 the contract to the -- to that date, that would be
19 included in the progress payment request, yes. In
20 fact, it says, "costs under this contract." Section
21 2 of the form says, "Statement of Costs under this
22 Contract through 5 April, '85." So I'd have to
23 presume it's from inception of the contract to the
24 5th of April, 1985.

25 In fact, the -- although it was -- I'm
26 just noticing although it was dated the 10th of

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1 April on the next page, it was received by me,
2 because there's a receipt here. It was received on
3 the 25th of April in '85.

4 Q I'd like you to refer to Government's
5 Exhibit or Government's Rule 4, Tab 54 --

6 JUDGE GROSSBAUM: Wait. Before we go
7 on, could you explain to us how we can tell, by
8 looking at this pre-awards acceptance, this document
9 invoice acceptance, that bears at the top a date of
10 25 April, 1985, that that somehow represents the day
11 that this was received by you?

12 THE WITNESS: Well, the only thing I'm
13 alluding to -- I mean, I could be wrong, because I
14 know Mr. Thomas, or whoever he would send down with
15 the progress payment -- they usually hand-carried
16 the progress payment -- would have me sign a
17 receipt.

18 The only thing that leads me to this
19 conclusion --

20 JUDGE GROSSBAUM: Is this a receipt?

21 THE WITNESS: Well, the only thing that
22 leads me to this conclusion, Your Honor, is the
23 statements here at the beginning of the third line,
24 where it says, "Has been received by the
25 undersigned," "The attached invoice, progress
26 payment one, has been received by the undersigned."

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1 I could be wrong. It could have been
2 received a few days earlier. I may not be -- I
3 would have to admit that I may not be exactly
4 accurate in this conclusion.

5 JUDGE GROSSBAUM: Well, I mean, who --
6 would Mr. Thomas be preparing a memorandum on DLA,
7 DCASR letterhead?

8 THE WITNESS: No. No. He would have his
9 own form, and that was the usual -- so I could be
10 wrong in this case, Your Honor. Obviously, it's --
11 obviously, this was the -- well, I could be wrong.
12 I was just going by the word "received."

13 JUDGE GROSSBAUM: Okay. Continue.

14 BY MS. HALLAM:

15 Q Turning to Government's Rule 4, Tab 54
16 -- A Yes. This is an audit report for
17 progress payment two, submitted by HT Foods. The
18 report is dated 12 June, 1985.

19 JUDGE GROSSBAUM: I didn't know that
20 there was a question. All you had been asked to do
21 was to turn to a particular document. You're going
22 to have to wait till you're asked a question.

23 BY MS. HALLAM:

24 Q This audit report on progress payment
25 number two, is that on the progress payment request

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1 that is at Appellant's Rule 4 at F-232, sub-tab
2 entitled progress payment number two?

3 A Yes, it is.

4 Q Is it correct that there had been a
5 previous progress payment number two submission, the
6 one that is under sub-tab Freedom Industries
7 progress payment number two?

8 A Yes. There had been an earlier
9 submission, meaning number two, in the early '85
10 time period, from Freedom Industries, per se.

11 Q And what does this audit report
12 recommend, as far as payment?

13 A The audit report is recommending that
14 zero be paid on the request.

15 Q And how much did you pay under the
16 request?

17 A I paid \$332,421.

18 Q And how much was requested?

19 A The requested amount was \$673,074.

20 Q Do you recall what your payment
21 includes?

22 A I would have to check the record.

23 Q Why didn't you follow the DCAA's
24 recommendation to pay zero amount?

25 A DCAA was still refusing to recognize
26 progress payments, unless there was "direct

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1 progress" under the contract. They never bought off
2 on our position that all costs were directly related
3 to this contract. Their position was, without
4 physical progress, zero should be paid.

5 And, of course, I was the
6 decision-maker, and, of course, I deemed otherwise.

7 Q Let's take you back to progress payment
8 number one. I'd like you to refer to Government
9 Exhibit G-4, page 14, paragraph 7. Does that
10 refresh your memory as to what progress payment?

11 A G-4? May I ask which page?

12 Q Fourteen.

13 A Fourteen.

14 Q Paragraph 7. Does that reflect or
15 refresh your memory as to what progress payment
16 number one included, the \$1.7 million?

17 A Yes. Yes. It sort of -- it has more
18 specifics concerning my original contention that it
19 went back to day one, meaning, since inception of
20 the contract.

21 Q Did that include the Appellant's
22 progress payment number one, two and three?

23 A It included Freedom Industries' progress
24 payments one, two and three, yes.

25 Q And are they the progress payment
26 requests that are included in Freedom's Rule 4, Tab

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1 231 under sub-tabs entitled "Freedom Industries
2 Progress Payment Number One, Number Two and Number
3 Three"?

4 A Yes.

5 Q Okay. I just want to clarify, for the
6 record, what progress payments went to what payment.

7 JUDGE GROSSBAUM: Is there anything in
8 this paragraph 7 that you just looked at at page 14
9 of Exhibit G-4 that might give you another idea as
10 to the date that you received progress payment
11 number -- request number one?

12 THE WITNESS: Yes, Your Honor, the 17th
13 of April, 1985.

14 JUDGE GROSSBAUM: Thank you.

15 BY MS. HALLAM:

16 Q So by paying progress payment number
17 two, you did not follow DCA's -- DCAA's
18 recommendation as far as their opinion of tying
19 payments to progress?

20 A That is correct.

21 Q Did DCAA, with their review of progress
22 payment number two, raise an issue as to
23 capitalization -- capital equipment, rather?

24 A Yes. May I be permitted just to quickly
25 refresh my memory of this?

26 (Whereupon, the witness

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1 reviewed the document.)

2 THE WITNESS: Yes. On page 3 of the
3 audit report, they mention quality control
4 equipment, automation building management costs, and
5 equipment costs, which are normally capitalized and
6 not expensed 100 percent.

7 BY MS. HALLAM:

8 Q What was the issue here?

9 A Basically -- now, let me just backtrack,
10 one second. Okay. Basically, you can't bill for
11 these type of costs, under normal conditions, at 100
12 percent. You can only capitalize or depreciate
13 them; and, perhaps, that's a better word.

14 You bill for the depreciated value of
15 this equipment. You know, you're dealing with
16 capital type equipment -- okay -- equipment that's
17 going to be used for other contracts, not just for
18 the instant contract.

19 You're not dealing with special tooling,
20 special test equipment. And in -- per accepted
21 accounting principles and practices, these costs
22 should be expensed or spread out or capitalized,
23 depreciated. They're not to billed 100 percent
24 under normal conditions.

25 JUDGE GROSSBAUM: When you say "these
26 costs should be expensed," and then you say, "these

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1 costs should be capitalized," are those two concepts
2 mutually exclusive?

3 THE WITNESS: You're right, Your Honor.
4 By expense, meaning you put something down 100
5 percent. Again, I'm not an accountant. But by
6 expensing something, I would normally interpret that
7 to mean 100 percent payment.

8 And this was the -- DCA's position was
9 that the billings for these types of equipment
10 violated generally accepted accounting practices,
11 and accordingly, they disallowed them as being
12 eligible for progress payment purposes. And that
13 was their recommendation to me.

14 BY MS. HALLAM:

15 Q Did you follow their recommendation with
16 regard to excluding the costs of capital equipment?

17 A Regarding expensing them 100 percent,
18 yes, I did. I agreed with DCAA in this particular
19 situation.

20 Q To your knowledge, is this the first
21 progress payment where this issue came up?

22 A To my knowledge, it was the first
23 progress payments concerning the equipment issue. I
24 could be wrong, you know. I would have to check the
25 record. But to the best of my knowledge, this was
26 probably the first time this came up.

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1 Q I'd like you to refer to what's been
2 marked as Government Exhibit G-2.

3 A Yes.

4 Q If you would explain what this is.

5 A This is from the DAR, the Section 15,
6 that is our "Bible for Contract Cost Principles and
7 Procedures." And it has a -- the regulations, the
8 DAR regulations concerning depreciation of DAR
9 15-205.9.

10 Q Did you rely on these regulations or
11 follow these regulations in eliminating the costs
12 for capital equipment from payment, of progress
13 payment number two?

14 A Yes, I did.

15 MS. HALLAM: I'd like what's been marked
16 as Government G-2 admitted into evidence.

17 MR. MACGILL: Your Honor, we do not have
18 a copy of G-2. We have G-1, G-3, G-4.

19 We have no objection, Your Honor, to
20 G-2.

21 JUDGE GROSSBAUM: Without objection,
22 Government's proposed Exhibit G-2 is admitted.

23 (Whereupon, the document
24 previously marked for
25 identification as Exhibit G-2
26 was received in evidence.)

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1 BY MS. HALLAM:

2 Q Referring back, again, to Government's
3 Rule 4, Tab 54, page 3, paragraph F --

4 A Yes.

5 Q That paragraph says that an assist audit
6 is being obtained.

7 A Yes.

8 Q What does that mean?

9 A We had subcontractor progress payment
10 requests included in this progress payment from
11 Cadillac Products, Del Monte and Trans-Packers. The
12 same rules and regulations apply to subcontractors
13 as they do to prime contractors that involve
14 progress payments.

15 You had, actually a sub -- you had,
16 actually, subcontractor progress payment requests.
17 So we had to request full-blown reviews by the local
18 DCASMA's of these particular subcontractors. And
19 some were in various parts of the country.

20 We did full-blown audit, technical
21 pricing reviews by local DCASMA's. I think Cadillac
22 was out of Michigan. Del Monte, where they were.
23 Trans-Packers, I think, was in New York City. So we
24 had to wait -- before I could act on these
25 subcontractor dollars, progress payment dollars, I
26 had to get the results of reviews.

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1 Q Were these -- were -- was this -- was --
2 were any of these subcontractors' costs included in
3 your payment of progress payment number two?

4 A To the best of my knowledge, they were
5 not, no. I -- again, I would have to check the
6 record. I might not have -- I would have to check
7 the record. I might not have had the results of any
8 of them. Or maybe I did have the results of one or
9 more. I would have to check the record, to be
10 honest with you.

11 If the results were not in, I could say
12 I could not have acted on these requests, at that
13 time.

14 Q And what date was progress payment
15 number two made?

16 A I approved progress payment 92 on the
17 3rd of June, 1985.

18 Q What day is the check dated?

19 A The check is dated the 6th of June,
20 1985.

21 Q Referring back, again, now, to
22 Government's Rule 4, Tab 54.

23 A I think we have answered the question,
24 because I'm saying, if the auditor had stated --

25 Q I'm on the next question.

26 A Oh, I'm sorry. I'm sorry.

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1 Q What is the date of this audit report?
2 Why was it issued before the audit report was even
3 issued?

4 A I -- it's a verbal. I would go --
5 proceed on verbal. My instructions to DCAA was,
6 give me verbal. Don't wait for the written report.
7 I don't want to wait for the written report. We'll
8 save time. So I proceeded, based on a verbal from
9 DCAA.

10 Q Is that your course of action through
11 the entire contract?

12 A Oh, absolutely. Yes.

13 Q I'd like you to refer, now, to
14 Government's Rule 4, Exhibit 57.

15 A Yes.

16 A Could you tell us how much DCAA
17 recommends for progress payment number three?

18 A Zero.

19 Q And this audit report lays -- does this
20 audit report lay out the basis of the
21 recommendation?

22 A Yes, it does.

23 Q Referring to Appellant's Exhibit F-232,
24 sub-tab, tab entitled "Progress Payment Number
25 Three," is that the request that's the subject of
26 this audit?

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1 A Yes. Although the dollars are off, for
2 some reason, the Appellant's tab has 535,767 being
3 requested, and the audit report indicates 544,086
4 being requested. So I don't know, offhand, the
5 reason for the disparity.

6 JUDGE GROSSBAUM: How much did you
7 approve?

8 THE WITNESS: I'm sorry?

9 JUDGE GROSSBAUM: How much did you
10 approve?

11 THE WITNESS: Okay. I think it's -- I
12 approved \$535,767, on the 24th of June. There's a
13 copy of a check here

14 BY MS. HALLAM:

15 Q So, again, you went against DCAA's
16 recommendation?

17 A That is correct.

18 Q And you paid the entire amount
19 requested?

20 A That is correct.

21 JUDGE GROSSBAUM: Don't go too fast.

22 MS. HALLAM: Excuse me?

23 JUDGE GROSSBAUM: Don't go too fast.

24 Did DCAA -- were there any costs of a capital nature
25 in this particular --

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1 THE WITNESS: May I look at the request
2 for a minute?

3 JUDGE GROSSBAUM: Sure.

4 THE WITNESS: Apparently not, Your
5 Honor.

6 JUDGE GROSSBAUM: Okay.

7 BY MS. HALLAM:

8 Q I'd like you to refer, now, to
9 Government's Rule 4, Tab 58. Is this one of the
10 assist audits that you had spoken about previously?

11 A Yes, it is.

12 Q Are subcontractors' costs, generally,
13 treated separately for progress payments purposes?

14 Q Well, they're part of the prime
15 contractor's progress payment request and so broken
16 out on the progress payment form. But a separate
17 review must be done of the sub, to determine whether
18 or not the sub has an adequate accounting system or
19 not.

20 If the sub does have an adequate
21 accounting system and there are no problems, you can
22 do periodic reviews.

23 Q I'd like you, now, to refer to
24 Appellant's Rule 4, Tab F-232, sub-tab entitled
25 "Progress Payment Number Four."

26 A Yes.

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1 Q Could you tell us what that payment was
2 for?

3 A This is a progress payment for \$170,689
4 for Cadillac Products, Incorporated.

5 Q I'd like you, now, to refer to Tab 60 of
6 the Government's Rule 4.

7 A Yes.

8 Q Is this advisory report on the review of
9 progress payment request number four?

10 A It is.

11 Q Does that have any connection to the
12 actual progress payment number four?

13 A No, because it was an administrative
14 change. The \$170,689 referred to in the Appellant's
15 Rule 4, was only from Cadillac Products and was tied
16 in or is tied into the previous exhibit, the
17 Previous Rule 4 File you showed me, that's Tab 58.

18 When you look at the audit report for
19 Cadillac, which is Tab 58 of the Rule 4, that
20 addressed the \$170,689. There was a -- the record
21 shows -- and again, I'd have to start checking the
22 records -- that for some reason, there was an
23 administrative change. And I think it had -- tie-in
24 -- it's related to the Cadillac situation.

25 In other words, I paid Cadillac under
26 progress payment four, and I think the second number

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1 four, Freedom's request, was changed to five, for
2 administrative purposes, to account for the costs
3 that are above and beyond Cadillac. We needed a
4 separate progress payment number, just to pay
5 Cadillac alone.

6 Q Okay.

7 A And there was a letter in the file
8 documenting all of this. I don't know if it's in
9 the Rule 4, but it's in my file in the office.

10 Q What did DCAA recommend for payment on
11 what they reviewed as progress payment number four?

12 A Right. Which was -- as I said, was
13 administratively changed. They recommended that
14 zero be paid.

15 Q And again, the basis of their
16 recommendations are set forth in this report?

17 A Yes, they are.

18 Q Did anything in this report cause you
19 concern?

20 A May I briefly look at the --

21 Q Yes.

22 A Okay.

23 (Whereupon, the witness
24 reviewed

25 the document.)

26 MS. HALLAM: Yeah.

1 THE WITNESS: Yes. Yes. Yes. It's on
2 page 5 and 6. May I highlight some of the --

3 BY MS. HALLAM:

4 Q Yes.

5 A Okay, on 5 and 6. DCA is saying in the
6 middle of page 5, "Based on the above conditions, we
7 cannot place any reliance on the contractor's books
8 and records. Therefore, we consider the
9 contractor's accounting system inadequate for
10 purposes of progress payments."

11 That made it impossible for me to pay
12 progress payments.

13 Q Why did that make it impossible?

14 A In order to -- in order for a company to
15 receive progress payments, the accounting system
16 must be deemed acceptable for progress payment
17 purposes, and the agency that makes that
18 determination is the Defense Contract Audit Agency.
19 That created a serious problem.

20 Also, if you will turn to page 6, the
21 paragraph states, "In summary, the contractor's
22 financial condition is not adequate for performance
23 of the contract. As previously reported, the
24 contractor is insolvent. In the absence of the
25 required (cash flow) working capital, it is

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1 exceedingly doubtful the contractor can complete
2 this contract.

3 Q You didn't mention that the DAR
4 prohibits --

5 A Yes, the DAR specifically states --

6 Q DAR Appendix E?

7 A Yes.

8 Q Did you have any discussions with anyone
9 at DCAA concerning their findings and conclusions?

10 A Yes. Ed Hintz, who was our counsel, and
11 myself went to DCAA during that time frame -- it
12 might have been right after the report, I'm not
13 sure, but -- to discuss in depth the situation and
14 the seriousness of what was happening.

15 And also, I discussed this matter with
16 -- I briefed DPSC. I briefed the Commanders' levels
17 at both DCASMA and DCASMR, New York. And I'm sure
18 DLA was alerted through our various point papers and
19 based on our lines of communication with DLA. So
20 everyone was alerted that I was now faced with the
21 prospect of considering suspending progress
22 payments, again, because of an inadequate accounting
23 system.

24 Q Under the Government's Rule 4, Tab 60,
25 there's a sub-tab A. Can you just tell us what the
26 purpose of this document is?

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1 A Yes. This is a pricing report that's
2 prepared for every progress payment. It comes from
3 our Financial Services Branch. And it's for
4 progress payment five. Remember, I said earlier
5 during the testimony that it was administratively
6 changed from four to five, the non-Cadillac portion,
7 you know, of the costs.

8 Do you want me to read further into
9 this?

10 Q No.

11 A Okay. And pricing is recommending that
12 zero be paid.

13 Q What's the purpose of having pricing do
14 a review of the progress payment, in addition to
15 DCAA?

16 A Well, there are several reasons. One,
17 pricing marries the -- they analyze and marry
18 together the audit report from DCAA and the
19 production report from the Industrial Specialist and
20 create their own report and also provide their own
21 independent view of the situation. And, if
22 necessary, they'll do what they call a financial
23 services review.

24 So it goes above and beyond the audit
25 technical. It regards price -- the pricing aspect
26 or opinion of the situation and recommendations and

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1 also, the financial services recommendation. And it
2 all comes to me.

3 Q Referring to sub-tab B under Tab 60 of
4 the Government's Rule 4 --

5 A Yes.

6 Q -- what is this document?

7 A This is the production review of the
8 progress -- of progress -- well, in this case, it's
9 progress payments five, six and seven, dated 21
10 October, '85. And it's a -- basically, a production
11 status of the contract.

12 Q With all the progress payment
13 submissions under Contract 0591, was there a pricing
14 analysis done, plus a technical analysis plus the
15 audit?

16 A Every progress payment, except one, I
17 believe, which was just an administrative progress
18 payment or just some previous progress payments --
19 but every one, per se, except that administrative
20 one -- not the Cadillac one, that's a different one,
21 involved a full review, pricing audit, etcetera.

22 Q With regard to the recommendations made
23 or the recommendation made by the pricing analysis,
24 what -- did you rely on that recommendation -- what
25 --

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1 A I relied -- I made the decision. I
2 considered all recommendations. All recommendations
3 were informations to me.

4 Q Were you required to give greater
5 credence to any particular recommendation?

6 A Well, obviously, some are more severe
7 than others -- you have to take more seriously.
8 Obviously, you're sort of tied in when DCAA says the
9 accounting system is unacceptable. And unless I
10 have a basis to overrule them, it's very difficult,
11 obviously.

12 But obviously, we take everything
13 seriously, some more so than others. Obviously, if
14 you have an unacceptable accounting system, that's
15 very serious. Or if you're insolvent, you know, if
16 you're going out of business, that's very serious.

17 So there are different degrees of
18 information that would come to me, and I would have
19 to weigh everything and assign importance as the
20 situation arises.

21 Q With regard to DCAA's determination that
22 the contractor was insolvent, is that something that
23 you had spoken to one of the auditor's about?

24 A Well, it was nothing new, you know. We
25 knew he was insolvent. So this was not really new
26 information.

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1 Q Didn't the contractor get a letter of
2 credit?

3 A Right. But it wasn't being utilized.
4 That letter of credit wasn't being utilized in the
5 way that it was intended to. It was supposed to be
6 an unrestricted line of credit, and it was not being
7 used that way.

8 Bankers Leasing tied, you know -- posed
9 certain restrictions.

10 Q What restrictions did Bankers --

11 A They, basically, tied in money -- in the
12 main. They tied in advancing any money to payment
13 of progress payments or what they called
14 receivables. Instead of being an unrestricted line
15 of credit, it became accounts-receivable financing.

16 Bankers Leasing wouldn't advance money
17 without some assurance from me that progress
18 payments were flowing. In fact, Bankers Leasing
19 used to call me, wanting to know what I was
20 releasing, before they would release money to Henry
21 Thomas. And also, Henry Thomas didn't want to --
22 really wasn't keen on drawing upon Bankers Leasing,
23 because they would have to pay interest.

24 Q How do you know that Bankers Leasing
25 would not release the money until they got some

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1 confirmation from you, as far as what you were going
2 to pay?

3 A Well, two ways. One, from Bill Stokes,
4 who constantly was dealing with Bankers Leasing.
5 They were on the phone all the time with Bankers
6 Leasing, monitoring the whole arrangement, because
7 this was a tightly monitored, a closely monitored
8 situation, meaning between Bankers Leasing in
9 relation to Freedom.

10 So, from Bill Stokes, and also, based on my own
11 phone calls from the people up at Bankers Leasing.
12 They'd call me from Chicago all the time, wanting to
13 know when I'm paying money.

14 So it became clear that there was a
15 restriction here.

16 Q After receiving the audit report at Tab
17 60, what action did you take?

18 A I would have to check the record, if I
19 may.

20 May I refer to -- it's in one of the Rule 4 Files.

21 Q I refer you to Government Exhibit 4,
22 page 35. Does that refresh your memory?

23 A Government Exhibit Rule 4 or --

24 Q Government Exhibit G-4.

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1 A Oh, I'm sorry. Okay. Because I believe
2 I did pay a good part of this. I just wanted to
3 check the record.

4 JUDGE GROSSBAUM: Wait, just a second.

5 (Whereupon, there was a brief
6 recess.)

7 THE WITNESS: Okay. This is Government
8 Exhibit 4, Rule 45? Page 45?

9 BY MS. HALLAM:

10 Q Thirty-five.

11 Q I'm sorry, okay. May I have the
12 opportunity to read it, for a moment --

13 Q Yes.

14 Q -- to look at it? Okay.

15 (Whereupon the witness
16 reviewed
17 the document.)

18 THE WITNESS: Yes. It, basically, talks
19 about, you know, the inadequacy of the accounting
20 system and mentions progress payments five and six.

21 BY MS. HALLAM:

22 Q Does it refresh your memory as to what
23 action you took, as a result of getting that audit
24 report?

25 A Yes. In the second --

26 Q What action did you take?

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1 A Yes, that I sent Freedom -- on the
2 bottom of page 35 -- I sent Freedom a letter on the
3 23rd of August, advising that after careful
4 consideration, I was considering returning progress
5 payment five, unpaid, and suspending progress
6 payments, because evidence available to me indicated
7 that Freedom's accounting system was not considered
8 adequate for accumulating costs on progress
9 payments.

10 Again, it was not a suspension. It was
11 only a consideration to suspend.

12 JUDGE GROSSBAUM: Now, what happened to
13 Freedom's cost accounting system, between the time
14 that you first approved it for progress payments and
15 May of 1985, and this time? How did their cost
16 accounting system, which, apparently, must have been
17 adequate at some point, to be able to make progress
18 payments -- how did it deteriorate? In what manner?

19 THE WITNESS: Well, I can only go by
20 this report. Apparently, the accounting system, I
21 guess -- flaws, if that's a good word -- became so
22 flagrant and so numerous, as is outlined in the
23 report, that --

24 JUDGE GROSSBAUM: You can't -- you have
25 no firsthand knowledge of anything --

26 THE WITNESS: No.

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1 JUDGE GROSSBAUM: -- other than what's in
2 the report?

3 THE WITNESS: That's -- other than
4 what's in the report and discussions with the
5 auditors, that I -- it was just -- the flaws were so
6 pervasive at that point, in August, '85 --

7 BY JUDGE GROSSBAUM:

8 Q How do you know this?

9 A From the reports.

10 Q Well, how do you know this, personally?

11 A I'm not following you.

12 Q How do you know it?

13 A Well, I read the reports. I had --

14 Q Well, we can read the reports too.

15 A Right. I had discussions --

16 Q If you can read the reports, the other
17 side can read the reports. I want to know how you,
18 personally, know that-- how inadequate --

19 A From my own -- well, again, I'm not an
20 accountant. I'm a layman. But from my own
21 perception --

22 Q Well, what did you observe in their
23 books and records?

24 A I, personally, did not look at the books
25 and records.

26 Q Okay.

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1 A The auditors --

2 JUDGE GROSSBAUM: Why don't we move on,
3 counsel.

4 BY MS. HALLAM:

5 Q Referring to Government's Rule 4, Tab
6 62, is that a copy of the letter that you just
7 speaking of?

8 A I'm sorry. Could you repeat the --

9 Q Government's Rule 4, Tab 62.

10 A Yes. This is the -- yes, it is. That's
11 the letter, dated 23 August, where I advised Freedom
12 I was considering suspending progress payments, and
13 all deficiencies for this are outlined in this
14 letter.

15 Q Okay. And did you advise Freedom as to
16 what they were expected to do about this?

17 A Okay. I, basically -- may I -- yeah.
18 On the bottom of page --

19 JUDGE GROSSBAUM: No, you're not asked
20 to --

21 THE WITNESS: I'm sorry.

22 JUDGE GROSSBAUM: -- read a document.
23 You're being asked a question, did you advise
24 Freedom as to what they were expected to do. And
25 then, if you answer in the affirmative, the next
26 question is, what did you advise them. And you

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1 don't have to read, unless you'll state under oath
2 that you have no present recollection of what you
3 did, and then, in which case, we'll take a look at
4 the document.

5 But otherwise, you're just looking at
6 these documents to refresh your recollection, so
7 that you can testify, as of your own, personal
8 recollection, as to the events that you perceived.
9 Okay?

10 THE WITNESS: Yes. May I refresh my
11 memory?

12 JUDGE GROSSBAUM: Certainly.

13 THE WITNESS: Okay.

14 (Whereupon, the witness
15 reviewed
16 the document.)

17 THE WITNESS: Yes. May I --

18 JUDGE GROSSBAUM: The question was what
19 do you recall that you told them.

20 THE WITNESS: Yes.

21 BY JUDGE GROSSBAUM:

22 Q What did you tell them?

23 A Okay, that one, I was giving them the
24 opportunity to respond. They had ten days. Also,
25 per their -- per Freedom's request, that a meeting
26 be held on the 19th of August. I agreed to have

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1 DCAA take a second look at Freedom's accounting
2 system and control. So they were going to go out
3 there again, based on Freedom's request. But we
4 were giving them an opportunity, you know, to
5 address the consideration I had in this letter. We
6 were giving them every opportunity.

7 JUDGE GROSSBAUM: You have a question?

8 BY MS. HALLAM:

9 Q Did Freedom provide a response to that?

10 A I would have to check the record, if I
11 may.

12 Q Tab 60, sub-tab D, is that a copy of
13 Freedom's response?

14 A Yes, it is.

15 Q Okay. Was there a meeting that occurred
16 on August 19, 1985?

17 A Yes, there was.

18 Q And do you recall what was discussed at
19 that meeting?

20 A I would have to refer to my various
21 reports to absolutely have a full -- in order to
22 completely refresh my memory. Obviously, we
23 discussed the accounting system and controls. But I
24 think there were other matters that came into play.
25 That's why, if I may, I would like to look at the
26 report I would have prepared during that time frame.

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1 Q Back to Freedom's response --

2 A Okay.

3 Q -- did you review Freedom's response,
4 when you got a copy of it?

5 A Yes I did.

6 Q Did you refer it to anyone else for
7 review?

8 A I do not recall. Again, I would have to
9 check the record, if I made an official submission
10 to pricing. Obviously, copies were supplied to
11 cognizant personnel. The report came in in a very
12 thick binder. It was a very thick report, prepared,
13 basically, I think, by their lawyers. And cognizant
14 people did look at it, meaning legal, financial
15 services, audit, DCA audit.

16 Whether or not it was done by means of
17 an official request from me, I do not recall. But
18 everyone that had an interest in this, within my
19 agency and DCAA, was shown as copy of this.

20 Q Did anything in the report change your
21 position with regard to the possible suspension of
22 progress payments?

23 A I would have to refresh my memory, to be
24 honest with you. Maybe --

25 JUDGE GROSSBAUM: Why don't you do that?

26 THE WITNESS: Okay.

1 JUDGE GROSSBAUM: I mean, you're here to
2 answer questions. If your only answer is, you have
3 to refresh your memory, then you shouldn't have been
4 called as a witness. Your memory should have been
5 refreshed before you took the stand.

6 MS. HALLAM: Perhaps --

7 THE WITNESS: It might be easier to look
8 at my report.

9 BY MS. HALLAM:

10 Q G-4 of the Government -- Exhibit G-4,
11 your Smart Report for the --

12 A Yes, that's probably --

13 Q -- time frame?

14 A Yes.

15 Q Thirty-three?

16 A Right.

17 Q On to -- looks like 38.

18 (Whereupon, the witness
19 reviewed
20 the document.)

21 THE WITNESS: I would have to stand
22 corrected. I'm looking at page 39. Then again,
23 this is, you know -- all right. Checking the
24 record, actually, sort of brings some of these
25 things back into focus.

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1 I'm looking at 39, and I remember
2 progress payment four was administratively changed
3 to progress payment five. If you look at the first
4 page, the second paragraph, paragraph 1-D of page 39
5 -- if I may, may I just in this --

6 It says, Freedom, New York's detailed
7 written response to the cost question by DCAA on
8 progress payment five, reference DCAA Report No.
9 such and such, dated 13 August, which had been
10 promised within 24 hours, blah-blah-blah, was not
11 received until 4 September, '85. The request is
12 currently being reviewed by the DCASMA, New York ACO
13 Price Analyst
14 DCASMR, New York Analyst and DCAA.

15 I knew I showed the report to everybody.
16 I gave them copies. Perhaps, there was an official,
17 you know, review request. Now, let me just go
18 further -- to the next one --

19 Do you want me to go -- prospective
20 beyond --

21 Q No. Did any review -- Freedom's
22 response caused you to change your position, with
23 regard to the suspension?

24 A Again, I'd have to -- I feel embarrassed
25 in front of the Judge. I would have to keep looking
26 at the record.

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1 Q Did you ultimately suspend --

2 BY JUDGE GROSSBAUM:

3 Q Excuse me.

4 A Yes.

5 Q Did you change your position with regard
6 to suspending progress payments?

7 A Yes. Ultimately, I did, yes.

8 Q What did you do?

9 A Okay. We had -- progress payments were
10 resumed, because the accounting system got better.
11 We had several meetings, including one in Cameron
12 Station in September, '85. It had reached high
13 levels. And we -- progress payments were not
14 suspended. And I paid progress payments five, six
15 and seven.

16 Q Were progress payments ever -- after you
17 suspended the first progress payments, first two,
18 that were requested by Freedom Industries and after
19 the novation agreement, when HT Foods became the
20 party, were progress payments suspended?

21 A They were never officially -- there was
22 no suspension of progress payments.

23 Q Thereafter?

24 A Thereafter, period.

25 Q There had, in fact, been a suspension of
26 progress payments in February of 1985, in connection

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1 with a request by Freedom Industries; is that
2 correct:

3 A That is correct.

4 Q But after the novation, we had HT Foods
5 take over. There was no suspension of progress
6 payments?

7 A There was never any -- there were no
8 further suspensions of progress payments.

9 Q Okay. The next question is, at some
10 point in time, did the name of HT Foods get changed?

11 A Yes, at Freedom's request.

12 Q Okay.

13 JUDGE GROSSBAUM: Continue.

14 THE WITNESS: HT Foods request -- I'm
15 sorry.

16 BY MS. HALLAM:

17 Q I'd like you to refer to Tab 66 of the
18 Government's Rule 4.

19 A Yes.

20 Q What did DCAA recommend for payment of
21 progress payment number six?

22 A Zero.

23 Q And along with this review, did DCAA
24 take a second look at Freedom's or HT Foods'
25 bookkeeping?

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1 A Well, they took a second look. It might
2 have been related to five. They might have taken a
3 second look based on five. I'm not sure if they
4 took a second look on six, per se. This might just
5 be an initial look at six.

6 Q Referring to page 4, the first paragraph
7 --

8 A Of 232?

9 Q No, 66.

10 A 66? Page 4?

11 Q Yes.

12 A And the first paragraph? Okay. Okay.

13 Q What were DCAA's findings with regard to
14 Freedom's accounting system?

15 A Oh, okay. May I quickly read this?
16 Okay. We noted some deficiencies in the accounting
17 system --

18 BY JUDGE GROSSBAUM:

19 Q You don't have to read it aloud. Just
20 read it to yourself and answer the question.

21 A Okay. All right.

22 (Whereupon, the witness
23 reviewed

24 the document.)

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1 THE WITNESS: They found no significant
2 changes, as it related to six, since the last
3 review. The major deficiencies were still there.

4 BY MS. HALLAM:

5 Q You had mentioned that there was a
6 meeting at DLA Headquarters, that meeting in
7 September?

8 A Yes, there was.

9 Q Do you remember the date?

10 A I believe it was September 25th, 1985.

11 Q And what was the purpose of that
12 meeting?

13 A Okay. Obviously, the accounting system
14 situation and again, I wouldn't -- I believe there
15 was also a problem concerning performance. Again,
16 the record would speak for itself. I believe there
17 was a problem -- without -- again, I'm speaking from
18 memory.

19 I think DPSC had issued a cure notice, I
20 believe. And so the meeting was, basically, I
21 believe, two-fold: the accounting system and also
22 the cure notice, and the future course of the
23 contract.

24 BY JUDGE GROSSBAUM:

25 Q And why would a cure notice have been
26 issued?

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1 A He was --

2 Q Who is he?

3 A Okay. The contractor was --

4 Q Who would have issued the cure notice?

5 A DPSC. The PCO at DPSC.

6 Q Okay.

7 A Again, I would have to confirm this by
8 checking the record. And again, I'm embarrassed.
9 But again, I believe that was the situation. I'm
10 speaking from memory.

11 Q Okay. In your capacity as ACO, you did
12 or did not have any firsthand knowledge of
13 delinquencies in deliveries?

14 A I did have firsthand knowledge, from my
15 Industrial Specialist.

16 Q Okay.

17 BY MS. HALLAM:

18 Q Do you recall what was -- what decisions
19 were made as a result of that meeting?

20 A Again, do you want me just to give my
21 best recollection or may I look at --

22 Q Please.

23 A Just my best recollection?

24 Q Yes.

25 A Okay. Basically, there was no decision
26 that the -- everything was deferred until further

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1 meetings were held in New York. Okay. In the next
2 week or whatever, we had to -- they wanted meetings
3 in New York, because that's where the accounting
4 records were, the financial records. So everybody
5 from Philadelphia came up to New York. And we had a
6 two-day meeting, I think in the first week in
7 October, '85, at Freedom.

8 And high level people from DPSC came.
9 The PCO was there. I was there. My people were
10 there. And I think -- believe, to the best of
11 recollection, the reason for this was -- I believe I
12 stated at the meeting in Cameron Station on 25
13 September, that I didn't have my records there. I
14 didn't have any accounting records, financial
15 records. We would need to go back to New York to
16 get these.

17 And again, this is my best recollection,
18 without referring to the record.

19 Q And do you recall when that meeting in
20 New York occurred?

21 A I believe the first week in '85,
22 October, '85.

23 Q And was HT Foods part of that meeting?

24 A Yes, they were.

25 Q And do you recall what was discussed
26 during that meeting?

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1 A Again, may I just offer my recollection,
2 which may not be accurate. Obviously, to give
3 accurate information, I'd have to refresh my memory.
4 But I know the whole thing was discussed,
5 performance, obviously, financial progress payments,
6 cure notice, the future of the contract -- and
7 again, this information may not be exactly accurate.
8 I must say so for the record, without getting a
9 chance to look at the record.

10 JUDGE GROSSBAUM: Would you be good
11 enough to take those two loose-leaf binders and put
12 them on the witness table.

13 THE WITNESS: Yes.

14 BY MS. HALLAM:

15 Q Would you refer to Government Exhibit
16 G-4 --

17 A Yes.

18 Q -- pages 45 to 46. Does that refresh
19 your need -- refresh your memory as to what was
20 discussed at the meeting?

21 A Yes. It has a synopsis of what was
22 discussed. May I read this or look at it, silently?

23 Q Yeah, please look at it, to refresh your
24 memory.

25 A Okay.

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1 (Whereupon, the witness
2 reviewed
3 the document.)

4 THE WITNESS: Yes. This, basically,
5 gave the green light. These are the results of the
6 meetings where the green light was given to continue
7 the contract. Evaluation of Freedom's cure notice
8 response was made. There was a technical
9 evaluation. There was a financial evaluation.

10 And basically, the decision was made by
11 the PCO to extend the schedule. I was going to pay
12 progress payments. Also, we were going to monitor
13 payback to, you know, to Freedom's creditors, you
14 know, in certain amounts.

15 So the course was set to continue the
16 contract and not terminate the contract.

17 JUDGE GROSSBAUM: Counsel, what does
18 this have to do with the default termination? What
19 does all of this have to do with the default
20 termination?

21 MS. HALLAM: One of their claims -- one
22 of -- their key defense to the default termination,
23 beside their technical arguments, is that Marvin
24 Liebman had mismanaged the contract from day one.

25 JUDGE GROSSBAUM: Well, if it's any --
26 any deficiencies in their accounts, so on, got wiped

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1 out by a modification that you people entered into
2 in 1986, what does it have to do, from the
3 Government's standpoint, isn't this rebuttal?

4 I'd like to get to the default
5 termination, why you defaulted this contractor. You
6 know, you obviously didn't default him because his
7 progress payment requests were lousy or unsupported
8 back in 1985. You didn't default him for anything
9 that happened in 1985.

10 Let's get to 1986 and '87.

11 MS. HALLAM: Okay.

12 JUDGE GROSSBAUM: If you need any time
13 to adjust your thinking -- Now, that doesn't mean
14 that you can't cross-examine him on everything that
15 he said. That's fair game. But let's limit what's
16 he going to talk about in 1985. We've gone through
17 most of it, and it's not terribly exciting. It'll
18 only be exciting if it's put in a context that it
19 means something. But it doesn't mean anything at
20 this point.

21 So if you need some time to collect your
22 thoughts and get organized, let's get us into 1986
23 real fast. And we'll be back in 17 minutes or
24 quarter to four.

25 (Whereupon, the was a brief
26 recess.)

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1 JUDGE GROSSBAUM: The hearing will
2 come to order.

3 BY MS. HALLAM:

4 Q Mr. Liebman, I'd like you to refer to
5 Government's Rule 4, Tab 144.

6 JUDGE GROSSBAUM: Would you be good
7 enough just to assist the Board and the parties by
8 when you go to a Government Rule 4, would you
9 identify the volume that it's in.

10 MS. HALLAM: Ours are now in different
11 volumes than what yours --

12 JUDGE GROSSBAUM: We have six volumes.
13 And it would be helpful if you can point us into the
14 correct volume.

15 MS. HALLAM: -- your volumes too?

16 JUDGE GROSSBAUM: Yes. I don't see
17 anything in Volume 4. Volume 4 starts with 91. It
18 goes up to 150. I take it back, 153.

19 BY MS. HALLAM:

20 Q Mr. Liebman, were you involved in
21 discussions that resulted in this modification?

22 A Yes, I was.

23 Q And what was your input into this
24 modification?

25 A I recommended to the PCO that the
26 ceiling be raised.

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1 Q And why did you make that
2 recommendation?

3 A Because Freedom needed the progress
4 payments, and it's normal to have the full
5 complement of progress payments allowed by the DAR,
6 be it 90 percent or 95 percent. That was not the
7 case here. There was a limit of 13 million.

8 Q Had they exceeded that limit?

9 A If they had -- if they did not exceed
10 it, they were close to it.

11 BY JUDGE GROSSBAUM:

12 Q Now, if this contract provided for
13 progress payments at a 95 percent rate and it was a
14 seventeen plus million dollar contract, how come
15 there had been a \$13 million ceiling in the first
16 place?

17 A I am not able to answer that because I
18 was not involved with the award of contract.
19 Correct me if I'm wrong.

20 BY MS. HALLAM:

21 Q At the time this progress payment was
22 issued, do you know what --

23 A I'm sorry. This progress?

24 Q At the time this modification was
25 issued, do you know what progress payments they had
26 outstanding?

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1 A Oh, I did know. I just don't recall off
2 the top of my head. Obviously, I did know at the
3 time. It might have been 22 or 21.

4 BY JUDGE GROSSBAUM:

5 Q What figure did you throw out,
6 speculating, just now? What did you just say -- it
7 might have been?

8 A It might have been progress payment
9 number 21.

10 Q Oh, the number -- not the number.

11 A Obviously, at the time, I did know.

12 Q I think the question to you was what
13 progress payments in dollar amounts. Is that what
14 you'd meant?

15 MS. HALLAM: I was just trying to
16 establish a time frame where we were with the
17 progress payments, whether it was progress payment
18 16, 17, 18, 19.

19 JUDGE GROSSBAUM: You mean what progress
20 payment request was outstanding?

21 MS. HALLAM: Correct.

22 BY MS. HALLAM:

23 Q Some point in the contract -- during the
24 contract, did you start applying a loss-ratio
25 formula?

26 A Yes.

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1 Q Could you explain what a loss-ratio
2 formula is?

3 A Okay. It's, basically, a formula
4 provided for in the DAR, to be applied at the
5 discretion of the ACO, when a contract's in a loss
6 position. It basically serves to reduce or lessen
7 the risk to the Government to pay progress payments
8 to a contractor who is losing money on a contract
9 and whose ability to absorb a loss from other
10 sources is questionable.

11 Q Would this be applied anytime a
12 contractor is in a loss position?

13 A It's judgmental on the part of the ACO,
14 after weighing the loss formula provisions in DAR
15 Appendix E. It's the ACO's decision. He can apply
16 it in full. He could apply it in part. Or he
17 doesn't have to apply it at all. He must weigh the
18 entire situation carefully.

19 Q In applying the lost ratio --

20 A Loss -- I'm sorry, loss, L-O-S-S.

21 Q In applying the formula --

22 A Right.

23 Q -- is there a formula that is required
24 for you to compute this ratio on?

25 A There is a formula cited in the FAR.
26 It's a matter of interpretation as to what formula

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1 you apply, because the ACO has the power to only it
2 in part or not apply it. So it's a matter of how
3 much elasticity you want to give this to -- give
4 this formula.

5 But there is a sample in the old DAR.

6 Q I'd like to refer you to Tab 142, DCA
7 audit --

8 A Yes.

9 Q In regard to progress payment 18, what
10 was DCAA's recommendation?

11 A DCA recommended that 42,895 be paid and
12 that 3,081,329 not be paid.

13 Q On the third page, it sets forth an
14 opinion that audits at one-month intervals will be
15 sufficient. Was there a time when DCAA was
16 recommending anything other than one-month
17 intervals?

18 A Yes. I think the highest I remember are
19 two-month intervals. I don't think there was
20 anything above and beyond two months. You had to
21 closely survey this particular account. I do not
22 think the auditors ever recommended waiting more
23 than two months.

24 Q Did you always have every progress
25 payment audited, prior to payment?

26 A Yes, except for one administrative one.

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1 Q Why -- and you had pre-payment audits
2 done, even in face of DCAA's recommendation that
3 some other time frame would be sufficient; is that
4 correct?

5 A That is correct. It's my decision.
6 Theirs is just an opinion.

7 Q And why did you have audits done,
8 pre-payment audits done throughout the entire
9 contract period?

10 A Because of the numerous problems that we
11 encountered, both from a financial standpoint, an
12 accounting standpoint, a physical progress
13 standpoint -- the contract was delinquent many
14 times.

15 Considering the whole picture, I decided
16 to protect the Government's interests, I needed
17 pre-payment reviews. The auditor only presents an
18 opinion, from an audit vantage point. I look at
19 other things besides the auditor's opinion. It was
20 my decision that everyone had to be audited.

21 Q I'd like you to refer to Tab A of --
22 sub-tab A of 142.

23 A Yes.

24 Q What did the Pricing Analyst recommend
25 for payment of this progress payment?

26 A Zero.

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1 Q When you got this information, a
2 recommendation from DCAA for a payment of 42,000 and
3 zero payment here, how do you weigh the various
4 recommendations that you get?

5 A I weighted -- I weighed both
6 recommendations but ruled against them. And I
7 proceeded to pay progress payments, during that time
8 period in whatever amount I felt I could and could
9 fairly do.

10 Q Did there come a point when DCAA was
11 recommending paying or taking the loss-ratio
12 formula?

13 A Yes. In the report you just referred us
14 to prior to referring us to the price report, DCA
15 did apply a loss-ratio formula.

16 Q Is their application different from the
17 application that you ultimately used?

18 A Yes.

19 Q Could you explain the difference between
20 them?

21 A Sure. DCAA and also Pricing used a
22 formula based on total costs or cumulative costs for
23 the entire contract. If I had used that method and
24 applied the loss formula, Freedom would have gotten
25 -- Freedom would have received zero.

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1 I used an alternate means, which was
2 within my interpretation of the DAR. My alternate
3 formula was to include only costs for the instant
4 progress payment and work up a formula based only on
5 costs in that instant progress payment, not
6 cumulative costs for the entire contract.

7 That enabled me to apply a loss-ratio
8 and also enabled me to pay Freedom something. Had I
9 gone the way DCAA did and the way Pricing did, they
10 would wind up with nothing. So I elected to give a
11 liberal or elastic interpretation of the DAR and
12 made the decision to apply the loss formula "in
13 part," which I have the right to do, to pay Freedom
14 something, to keep the contract going, because that
15 was the wish of DPSC, that was the wish of DLA, and
16 that was my wish. We wanted them through this
17 contract.

18 JUDGE GROSSBAUM: Had you ever,
19 previously to this audit report of August 4, 1986 --
20 had you ever applied loss formula in making your
21 progress payment determinations?

22 THE WITNESS: I do not recall, off the
23 top of my head.

24 BY JUDGE GROSSBAUM:

25 Q Why does the DCAA audit report at page 2

26 --

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1 A I'm sorry, what's that page?

2 Q At page 2 of the audit report. This is
3 at Tab 142.

4 A Yes.

5 Q Paragraph A.

6 A Yes.

7 Q In the second sentence, they refer to
8 application of the loss-factor by the ACO. To which
9 ACO would they be referring?

10 A I was the ACO. Again, it's conceivable
11 that there was. I don't recall off the top of my
12 head. It's conceivable I might have applied it,
13 prior to this report.

14 Q But you were applying what you described
15 as liberal --

16 A Yes, a modified version of the
17 loss-ratio to keep the contractor going.

18 BY MS. HALLAM:

19 Q I'd like you to refer to Tab 194, pages
20 26 and 27.

21 A Yes.

22 Q Does that indicate the loss-ratio that
23 you computed?

24 A Yes, on page 27. That's correct. It
25 enabled me -- as you can see, by doing what I did,
26 Freedom was able to receive \$704,068. By applying

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1 this modified version of the loss-ratio, had I gone
2 the other way, they would have wound up with zero.

3 Q And there was also a calculation made
4 per Modification 28. Can you explain what that
5 calculation is?

6 A Yes. Progress -- Modification 28 set a
7 ceiling for progress payments, based on deliveries.
8 So when you go through the various steps here,
9 basically, applying the ceiling and in accordance
10 with the Mod -- and you didn't actually reach the
11 increments or the ceilings, the ceiling increments,
12 you could apply it in part or pro tanto if the mod
13 reads.

14 And when you go through this, you know,
15 we tie it in -- the mod tied in, at that point,
16 progress payments to actual deliveries. So I had to
17 see what he had delivered between progress payments
18 17 and 18 and -- or at that time period, and then,
19 gauge or calculate, based on deliveries, what would
20 be normal -- what would be eligible for progress
21 payments.

22 And the maximum eligible per this
23 calculation, as a result of Mod 28, was \$817,245.
24 And I made a reduction for capital equipment costs
25 that DCA took out. Then I applied my loss-ratio,
26 and I was able to pay 704. But the compilation was

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1 tied into 28, which geared progress payments to the
2 number of cases that were delivered. And the
3 ceiling was better set forth, in relation to
4 progress payments and deliveries in that
5 modification.

6 Q I'd like you to refer to the
7 Government's Rule 4, Volume 4, Tab 152.

8 A Yes.

9 Q Did you redo this calculation?

10 JUDGE GROSSBAUM: Did you sat at Tab 152
11 of the Rule 4?

12 THE WITNESS: Yes, I did.

13 BY MS. HALLAM:

14 Q And is Freedom's calculation of the loss
15 formula different than yours, the loss ratio
16 formula?

17 A Yes, it is.

18 Q And how is Freedom's different than
19 yours?

20 A May I refer back to the other tab, to
21 compare? And which -- may I ask, again, what tab
22 that was? 194, I think?

23 Q Page 27 at 194.

24 A I just want to look at the bottom line
25 again.

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1 (Whereupon, the witness
2 reviewed the document.)

3 THE WITNESS: Well, there's a difference
4 in the ratio percentage. They're using 85.80. I'm
5 using 88.73. And I would also -- well, to really
6 answer this thing intelligently, I would have to
7 refer to the progress payment request, to see what
8 the loss is, what loss he's shown.

9 Without some study of this -- I mean I'd
10 have to look at the form, and I just can't -- other
11 than a difference in the percentage, the ratio
12 percentage, I would need to see the loss. They're
13 showing a loss. They're saying the loss is \$2.8
14 million.

15 I don't know if you want me to backtrack
16 with this. I would have to go back to the progress
17 payment request and, possibly, the audit report.

18 JUDGE GROSSBAUM: Well, how about
19 calculating the -- how about establishing a ratio, a
20 contract price over the contract price plus the
21 purported loss. Is that the way you would calculate
22 the factor of the ratio?

23 THE WITNESS: Yes. Yes.

24 BY JUDGE GROSSBAUM:

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1 Q Okay. So obviously they were
2 calculating the loss differently than you were; is
3 that correct?

4 A Correct. Well, also, it could be the
5 costs might be different in the numerator and the
6 denominator.

7 Q Okay?

8 A Okay.

9 Q Well, you should have both used the same
10 numerator, shouldn't you?

11 A For the contract price, yes. Yes,
12 that's correct. Obviously, the denominator might be
13 different, which are the incurred costs. That's
14 correct.

15 JUDGE GROSSBAUM: Go ahead, counsel.

16 BY MS. HALLAM:

17 Q In any event, you used your own
18 calculation; is that correct?

19 A That is correct.

20 Q And did Freedom dispute your calculation
21 beyond this point, as far as your loss ratio?

22 A I -- I'm unable to answer that, without
23 looking at the record.

24 Q I'd like you to refer to Tab 160, which
25 is in Volume 5 of the Government's Rule 4. Why is
26 Freedom advising you of their inventory status?

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1 A Well, I was notified by my production
2 people that -- as part of their intensive
3 surveillance of the account -- that he was short
4 CFM. He had a very little CFM in-house. There were
5 a lot of shortages. And obviously, that was a
6 matter of concern to myself, as ACO, and also as a
7 PCO.

8 And obviously, I must have called Mr.
9 Marra at Freedom and advised him of our concerns.
10 And this was in response to my telephone
11 conversation.

12 Q Why would this be one of your concerns,
13 as an ACO, rather than a PCO concern?

14 A Oh, absolute -- well, first of all, I am
15 responsible for administering the contract and also,
16 I'm the person who pays the progress payments. And
17 if the contractor doesn't have sufficient inventory
18 in-house to continue performance and complete the
19 contract, I'm very concerned, because the contract
20 is put at risk and the Government would lose money
21 in the way of lost progress payments.

22 Q Did Freedom provide you with an
23 inventory, a list of its inventory, that satisfied
24 your concerns, alleviated your concerns?

25 A Well, again, I -- off the top of my
26 head, I'm not able to answer that. Obviously, they

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1 responded. I know the situation deteriorated in the
2 following months. Whether or not there was some
3 sort of temporary relief, I don't know.

4 I could just tell you categorically that
5 in the November time frame, there was serious --
6 there was a shortage of CFM. Whether or not it
7 changed from October to November or whether or not
8 -- whether it got worse or slightly better, there
9 was still a problem there, because it was addressed
10 later on, at the time of the shutdown and, you know,
11 beyond that.

12 So there was a problem with CFM, going
13 into the future, now.

14 Q I'd like you to look at Tab 162 of the
15 Government's Rule 4 in Volume 5, sub-tab A. It's
16 the second page on paragraph 8.

17 A This is from the Pricing Report,
18 correct?

19 Q Yes.

20 A Attached Schedule A indicates that the
21 contractor has -- I'm sorry. I'm sorry.

22 Q Referring to that statement there by the
23 Pricing Analyst, what does that mean, that the
24 contractor has received progress payments of \$1.4
25 million, in excess of the 95 percent?

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1 A Well, I would say this is an incorrect
2 statement, unless they're considering application of
3 a loss formula, and I can only assume that that's
4 what they meant, because numerous or many reports we
5 were getting from Pricing involved calculation of
6 their own loss factor. And as a result, they were
7 recommending zero. And they would make some sort of
8 statement, the contractor's been overpaid by one
9 million or two million or three million, or whatever
10 the case is, if you applied the loss formula.

11 I presume that's what they mean here,
12 but didn't spell it out as they did with other
13 pricing reports. So there's more here than what
14 meets the eye.

15 Q And referring to sub-tab C, how much did
16 you recommend for payment of progress payment number
17 21?

18 A Well, not recommend. I actually paid
19 \$721.887 on October 3rd, '86.

20 Q Referring, now, to Tab 169 --

21 A Yes.

22 Q Could you tell us what the purpose of
23 this letter is?

24 A Yes. Again, because of the shutdown, I
25 had to advise Freedom in January, '87 that I was
26 considering suspending progress payments, returning

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1 progress payment 22 unpaid, and suspending progress
2 payments. Again, it was a consideration.

3 Q Okay.

4 BY JUDGE GROSSBAUM:

5 Q What shutdown? This is the first we've
6 heard of a shutdown.

7 A Yes. Freedom shut down production in
8 early November, '86.

9 Q How did you know that?

10 A I was informed by my Government -- my
11 team member, specifically, the Industrial
12 Specialist, possibly, the Army Veterinary people at
13 the station there, possibly, even Freedom, itself.

14 BY MS. HALLAM:

15 Q At that time, what progress payment
16 request was still outstanding?

17 A Progress payment number 22, dated 20
18 October, '86.

19 Q And referring to Appellant's Exhibit
20 F-232, sub-tab entitled Progress Payment Number 22,
21 tell us what the date of that submission was.

22 A Yes. Apparently, they had the wrong
23 date here. And then, someone wrote it in by hand.
24 They had, originally, 1/20/86. And then, somebody
25 -- it looks like -- I don't know if this is Henry

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1 Thomas. I don't know if this is his initials. They
2 put in 10/20/86.

3 JUDGE GROSSBAUM: Where are we here?
4 What tab?

5 MS. HALLAM: It's Appellant's Rule 4,
6 Tab F-232, sub --

7 JUDGE GROSSBAUM: It's Progress Payment
8 22?

9 MS. HALLAM: Correct.

10 BY MS. HALLAM:

11 Q When you received this progress payment
12 request, was that routed for pre-payment audit?

13 A I'm certain it was.

14 Q And was there any preliminary action on
15 your part to pay that progress payment?

16 A No. Every progress payment, except one
17 administrative, involved a pre-payment review.

18 Q Prior to your learning that Appellant's
19 operations had ceased, or at least, it's final
20 assembly had ceased, had you approved progress
21 payment number 22 for payment?

22 A I'm sorry. Could you repeat the
23 question. Prior --

24 Q Prior to your learning that Appellant's
25 final assembly had ceased in November, had you
26 approved progress payment number 22?

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1 A No, because the pre-payment review
2 hadn't run its course. It takes about 30 days to --
3 or less, sometimes, for a pre-payment review. No,
4 not to my recollection. If it came in on October
5 20th or 26th, as the record show, I wouldn't have
6 had the results until sometime in November.

7 We were probably paying, if anything,
8 number 21, at that time.

9 Q Did you have a conversation sometime in
10 November with Mr. Pat Marra about holding progress
11 payment number 22 in abeyance?

12 A I'm sure I did. I mean, without -- to
13 the best of my recollection, I'm sure that we had
14 many conversations during that time period. So I
15 would say, my best guess is I did. I'm sure it's in
16 the record. My best guess is I would, not only with
17 -- probably with Par Marra, possibly with Henry
18 Thomas.

19 Mostly at that time, I was dealing with
20 Pat Marra in financial. Pat was calling just about
21 every day, wanting to know the status of this and
22 the status of that. So I would have to say, to the
23 best of my recollection, I would have. But I'm sure
24 the record will probably confirm that.

25 Q During the period -- you said you
26 speculate that everything would have been paid at

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1 the end of November, if it was going to be paid.
2 During the period from November up to January 26,
3 what occurred that this letter took to January 26th
4 to be issued?

5 Q Okay. Basically, when Freedom shut
6 down, in order to meet -- prior to sending such a
7 letter to a contractor, be it Freedom or anybody
8 else, I have to review the situation very, very
9 carefully, before we can send a notice of suspension
10 consideration.

11 And I had sent the matter to legal, and
12 it got -- it wasn't -- it was being reviewed by
13 legal. I was also having the matter looked at and
14 discussed with DPSC. The matter was referred to
15 Cameron Station, DCAA, Financial. I was also
16 briefing command levels, both at DCASMA, New York and
17 at DCASR, New York. It was given very high
18 visibility, because of the nature or, you know, of
19 the contract and of the situation.

20 Everyone that had a need to know was
21 briefed. And also, the letter I prepared -- I
22 prepared a letter to go to Henry Thomas, that was
23 sent to Legal for review for legal sufficiency. And
24 once I -- well, as I got the letter back, I was able
25 to, you know, send my letter to Henry Thomas.

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1 So we didn't, you know -- we didn't sit
2 idly by on this thing. There was also a meeting --
3 may I continue or add something?

4 Q All right.

5 A There was also a meeting, you know -- it
6 calls for a big meeting -- at Admiral McKinnon's
7 office, at DLA Headquarters, December 30th, 1985,
8 Government meeting, to discuss this, as well as MRE
9 7, you know, so on and so forth. So as I'm saying,
10 this matter -- the whole Freedom scenario, during
11 this time period, which involved other matters
12 besides, you know, the shutdown -- meaning MRE 7,
13 things like that -- was escalated to the highest
14 level at Cameron Station.

15 Q I'd like you to refer back to your
16 letter at Tab 169. At paragraph C, it talks about
17 telephone conversations during October, November and
18 December.

19 A Oh, yes. There were many conversations,
20 sometimes almost daily, with Pat Marra, several
21 times a day, sometimes. Yes.

22 Q Do you remember any specific
23 conversations you had with him about the plant
24 closing?

25 A Not specific ones. There were just so
26 many conversations, plant closing, financing,

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1 progress payments. A specific one doesn't come to
2 mind.

3 Q When this letter was sent out on January
4 26th, was the plant operating at that time?

5 A It possibly, to a very limited capacity.
6 After the shutdown, it did do some work, some -- I
7 think he was trying to complete certain -- I think
8 he was completing certain MRE's that had been
9 previously rejected the Army Veterinarian people. I
10 think he was doing a very limited assembly of
11 crackers, things like that.

12 It was a limited operation. You weren't
13 really geared up to complete the contract. It was
14 just sort of, like a sort of patchwork things, some
15 accessory packets, cracker packets, accessory bags,
16 completing previously rejected items. But he was
17 not in a, what you'd call a real production mode.
18 It was very, very limited.

19 He laid off most of his people. It was
20 very limited.

21 Q Did there come a point during the
22 contract where you began liquidating the progress
23 payments at 100 percent rate?

24 A That is correct. That's at the very
25 end, yes.

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1 Q Do you recall the time frame in which
2 you started to do that?

3 A Obviously, it was after the shutdown.
4 And I -- without looking at, you know, the record --
5 it was between, sometime between November, after the
6 shutdown, and November to January. It was the last
7 few -- we did a few invoices in-house. We had some
8 invoices in-house that I felt, you know, that --
9 there was no indication when he was going to start
10 up again, if at all, no indication when he would be
11 able to have financing to complete the contract,
12 because Bankers Leasing had just, basically,
13 withdrawn from the picture and they refused to
14 advance any more credit.

15 So Bankers Leasing was gone, in reality
16 was gone. There was no financing. There was no
17 evidence they would ever start up again. So my
18 interest, at that time, my concern at that time, was
19 to try to mitigate damages to the Government. And
20 the only way I could do that was from the few
21 invoices we had in house, was to liquidate at 100
22 percent, as opposed to the normal 95.

23 It wasn't -- I don't think it was really
24 that much money involved, but there was just no
25 hope, at that point, of survival. And MRE 7 was
26 gone. And there was no indication that we could --

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1 to enable Bankers Leasing to commit more money. It
2 was a situation that was totally hopeless.

3 Q And the basis for you liquidating at 100
4 percent was the financial --

5 A Right. The loss of MRE 7 -- it would
6 have been the loss of 7. It would have been the
7 withdrawal of Bankers Leasing from supporting
8 Freedom financially. That would have been the
9 shutdown. The situation was just totally hopeless.
10 And if -- there was no hope of us recouping.

11 At that point, I saw no hope of ever
12 recouping the 1.6 million in progress payments that
13 we were exposed, the Government was exposed. My
14 goal then was, at that point, was, all right, let's
15 try to reduce the 1.6 million in whatever amount we
16 could. And I don't think we were talking much
17 dollars at that point.

18 Q Does DAR Appendix E provide for
19 liquidation at 100 percent?

20 A Yes. And the ACO can raise -- has the
21 power to raise the liquidation rate up to 100
22 percent at anytime, as long as he can justify it.

23 Q Administering Freedom's contract, did
24 you treat Freedom any differently because it was a
25 minority small business?

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1 A Yes. We treated them better than --
2 contractor, in the sense of expediting things,
3 giving emphasis to his submissions. It wasn't
4 business as usual. Considering the nature of the
5 contractor. it was minority owned, it was in the
6 South Bronx, it was in a depressed area, you had
7 mostly minority employees, considering the high
8 level of interest, the Government objective of
9 developing a new assembler, you know, a third
10 assembler or fourth assembler, you know, I gave the
11 contractor special emphasis and meaning, I dropped a
12 lot of other things to work on Freedom's work, and
13 other work suffered because of that.

14 We expedited reviews, when we normally
15 don't. It wasn't business as usual. We tried to
16 expedite things. We tried to move things along as
17 best we could.

18 Q Were you the target of an Inspector
19 General's investigation with regard to your
20 administration of this contract?

21 A Yes. There was a DOD Inspector General.
22 There were several reviews or investigations. But
23 specifically, there was a DOD IG investigation. I
24 think it was in -- if I remember, I think it was the
25 fall of '88 or '89. I think it was '88, two DOD IG
26 people came up from Washington,

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1 Q Do you know who initiated that
2 investigation?

3 A Mr. Thomas.

4 Q And do you know what the results of that
5 investigation were?

6 A Well, I never received the results.
7 Obviously, what I hear, secondhand, third-hand, was
8 there was nothing adverse --

9 MR. MACGILL: Your Honor, we object the
10 testimony of the witness. He has no firsthand what
11 that DOD --

12 JUDGE GROSSBAUM: He's been testifying
13 at great length about things he doesn't know
14 firsthand. So we're going to overrule that
15 objection, at this point. Go ahead.

16 THE WITNESS: Okay. I'm sorry. Again,
17 I -- basically, what I have heard is that there was
18 nothing adverse. Obviously, I would have heard if
19 there was something wrong.

20 Q Were you ever reprimanded

21 A Oh, no. No.

22 Q Were you also the target of an internal
23 investigation conducted by DLA?

24 A Yes, Colonel Holland's investigation.

25 Q And do you know who initiated that
26 investigation?

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1 A Henry Thomas.

2 Q And do you know what the results of that
3 investigation were?

4 A Totally positive. A letter from General
5 Russo, a Three-Star General, who was the head of
6 DLA, to Freedom, at the time, provided Freedom with
7 the results of his intensive investigation, citing
8 that my department was at all times proper, nothing
9 of a negative nature, so on and so forth -- that I
10 administered the contract properly, in accordance
11 with the regulations.

12 Q And were you one of the targets of a
13 investigation by DCIS?

14 A Again, it's secondhand. I have heard I
15 was. I have never --

16 Q Were you interviewed in connection with
17 an investigation by DCIS?

18 A I was interviewed in connection with an
19 investigation, but never was informed directly that
20 I was the target of an investigation. But I was
21 interviewed many times by DCIS concerning Freedom,
22 yes.

23 Q Do you know who initiated the DCIS
24 investigation?

25 A I only have secondhand information. I
26 don't know if you want -- I can tell you secondhand

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1 that I was -- it is my -- if you want me to. It was
2 DCAA, itself. This is what I hear, secondhand,
3 because they objected to my payment progress rates.
4 And my secondhand information was initiated by the
5 Branch Manager in DCAA. Again, it's secondhand
6 information.

7 Q Were you ever, as a result of any of
8 those investigations, reprimanded?

9 A (No audible response.)

10 Q There's one last document, referring to
11 the Government's Rule 4, Tab 181.

12 A 184, page 1?

13 Q No. 181.

14 A Oh, I'm sorry.

15 Q Could you tell us what the purpose of
16 this letter is?

17 A Yes. It talks about the -- obviously,
18 the -- that Mr. Thomas was dispossessed, and it
19 talked about safeguarding Government materiel there,
20 you know, so on and so forth.

21 And it was a letter I sent to Henry
22 Thomas on the 22nd of April, '87. And there was a
23 problem, at the time, about access to facility.
24 Freedom was having trouble with the landlord, and,
25 you know, because he wasn't paying rent, the
26 landlord was trying to dispossess him.

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1 There was an auction at the facility.

2 And we were concerned about protecting our --

3 JUDGE GROSSBAUM: Rather than get the --
4 have the witness read -- establish whether the
5 witness had a telephone conversation with Mr. Henry
6 Thomas, who was the principal of the Appellant
7 company and have him relate what Mr. Thomas told him
8 concerning the status of the possession of the
9 building. Could you do that, counsel, by asking him
10 questions?

11 BY MS. HALLAM:

12 A Mr. Liebman, do you have any
13 recollection of what the status of the Government's
14 materials were?

15 A Well, we were concerned, because there
16 was a problem of the mixing of Government material
17 with -- material we paid for in the way of progress
18 payments with material that was being auctioned.
19 That was one problem.

20 BY JUDGE GROSSBAUM:

21 Q How did you know this?

22 A I was present at the auction. And I had
23 DCAA present. And we identified --

24 Q When was the auction?

25 A In April of 1987.

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1 Q Did you speak to Mr. Thomas, after the
2 auction?

3 A Oh, yes.

4 Q On the telephone?

5 A (No audible response)

6 Q In person?

7 A Yes, many times.

8 Q Did Mr. Thomas tell you about being
9 evicted?

10 A Oh, yes.

11 JUDGE GROSSBAUM: Go ahead.

12 MS. HALLAM: I have no further
13 questions.

14 JUDGE GROSSBAUM: We'll take a -- how
15 much time do you need for your phone call? We'll
16 take a five-minute recess, and then, we'll start
17 cross-examination.

18 (Whereupon, there was a brief
19 recess.)

20 JUDGE GROSSBAUM: Counsel for
21 Government, you've completed your direct examination
22 of this witness?

23 MS. HALLAM: Yes, Your Honor.

24 JUDGE GROSSBAUM: Okay. Cross-examine.

25 MR. MACGILL: Thank you, Your Honor.

26 CROSS-EXAMINATION

1 BY MR. MACGILL:

2 Q Mr. Liebman, just a few question on
3 background, before we get to the contract itself. I
4 understand that you were graduated from the City
5 College of New York in 1966; is that correct?

6 A That is correct.

7 Q And you've lived in New York City since
8 that time?

9 A Yes, I have.

10 Q You've been -- you've worked for the
11 Department of Defense for 22 years, since the time
12 -- or more than 22 years, now, since the time that
13 you graduated from City College?

14 A That's correct.

15 Q In terms -- can you estimate for the
16 Board how many Government contracts you have
17 administered in your time, in the last 20 plus
18 years?

19 A Thousands.

20 Q And I understand from your testimony on
21 direct examination that you, during the time of the
22 Freedom contract, were administering some five to
23 seven hundred contracts; is that correct?

24 A (No audible response)

25 Q Now, were there some problem contracts
26 -- strike that. You said that Freedom took, roughly

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1 speaking, one-third of your time, during this period
2 of time, 1985, 1986?

3 A That is correct.

4 Q Now, did you have some other problem
5 contracts during that period of time?

6 A I had one main -- one other main problem
7 contractor, the WedTech Corporation.

8 Q The which corporation?

9 A The WedTech Corporation.

10 Q How do you spell that?

11 A W-E-D-T-E-C-H Corporation.

12 Q Wedtech. Now, Wedtech was a massive
13 problem for you, was it not, sir?

14 A That is correct.

15 Q And when you testified earlier that this
16 particular contract, this Freedom contract, took
17 roughly one-third of your time, did you really mean
18 that Wedtech took one-third of your time?

19 A No. I meant -- Wedtech also took
20 one-third of my time. If you look at three-thirds,
21 Freedom took a third of my time. Wedtech took a
22 third of my time. The other contractors that I had,
23 the other five, 600 or 700 contracts took the other
24 third of my time.

25 Again, I'm assisted by Contract
26 Administrators.

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1 Q Now, as far as Wedtech was concerned,
2 that was a matter that involved a tremendous amount
3 of the Government's money; is that correct?

4 A That is correct.

5 Q Roughly speaking, some \$200 million of
6 Government money was lost?

7 A No, that is not correct.

8 Q Can you estimate for the Board how much
9 money was lost in Wedtech?

10 A We got -- we received most of the money
11 back, in the way of progress payment inventory. I,
12 again -- somewhere, possibly between 10, maybe 10
13 million. I don't know offhand. Most of the money
14 came back.

15 Q Roughly speaking, at least \$10 million
16 was lost in Wedtech?

17 A Off the top of my head, may -- well, no.
18 Let me backtrack. Just let me gather my thoughts
19 for a second. When Wedtech went under, unliquidated
20 progress payments were about 47 or 49 million, on
21 all their contracts.

22 However, the contractor was filled to
23 the rafters with inventory, work in process,
24 whatever, completed work. Once that was removed, we
25 took title to all that stuff. The unliquidated
26 progress payments were very significantly reduced.

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1 So whatever the figure was, it was much smaller -- I
2 don't know, 5, 10 million. I don't know what the
3 figure was.

4 Q Okay. But --

5 JUDGE GROSSBAUM: Excuse me. Just a
6 second. Wedtech had several contracts; did they
7 not?

8 THE WITNESS: Yes, sir.

9 BY JUDGE GROSSBAUM:

10 Q Okay. What would you put the total
11 value of the Wedtech contracts in the 1985-1986
12 period?

13 A 200 million.

14 Q Over 200 million in value.

15 A Face value.

16 Q Now, Freedom had a value of less than 18
17 million; is that correct?

18 A That is correct.

19 Q Okay.

20 BY MR. MACGILL:

21 Q Now, with respect to the some \$200
22 million of Wedtech contracts, you were the ACO on
23 the Wedtech matters?

24 A That is correct.

25 Q Now, this -- strike that. Wedtech and
26 Freedom overlapped in time, correct?

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1 A That is correct.

2 Q Wedtech involved a tremendous amount of
3 public scrutiny; is that correct, sir?

4 A That is correct.

5 Q Wedtech involved an FBI investigation,
6 did it not?

7 A That is correct.

8 Q Wedtech involved tremendous Government
9 scrutiny; did it not?

10 A That is correct.

11 Q And you, personally, were involved in
12 that scrutiny during this period of time, 1985-1986,
13 correct?

14 A 1986, not '85. 1986.

15 Q All right. Now, with respect to that
16 scrutiny, sir, you gave grand jury testimony during
17 this period of time also; did you not?

18 A As a Government witness, yes.

19 Q During the summer of 1986, you told
20 Henry Thomas on at least one occasion that you could
21 not deal with his progress payment request because
22 you were too busy with Wedtech, correct?

23 A It requires an explanation.

24 JUDGE GROSSBAUM: Well, answer yes or
25 no.

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1 THE WITNESS: Incorrect in times of
2 date.

3 BY MR. MACGILL:

4 Q Fine.

5 A The date is wrong.

6 Q All right. When did you tell Mr. Thomas
7 that you were too busy to deal with his progress
8 payment request, given Wedtech?

9 A It was either in -- as a joke -- either
10 in September or October, 1986. It was a joke.
11 Because I had a personal relationship with Thomas,
12 we could talk -- we could joke sometimes. And it
13 was meant as a joke.

14 Q Your characterization of that statement,
15 "joke," right?

16 A That is correct.

17 Q At the time, you owed millions in
18 dollars -- millions of dollars in past progress
19 payments, that had not been paid to Freedom. Is
20 that right, sir?

21 A That is -- millions of dollars?

22 Q Millions.

23 A That is incorrect.

24 Q Fine. Now, as far as the weekends and
25 the lost vacation is concerned, that you testified
26 to to this Board in your direct examination, that

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1 loss of time, weekends and vacation loss, was due to
2 Wedtech, correct?

3 A That is not correct. It was due to
4 Wedtech and Freedom.

5 Q November, 1984, you entered into --
6 strike that. November, 1984, the Government entered
7 into a contract with Freedom; is that correct?

8 A That is correct.

9 Q Now, that contract, sir, came after a
10 pre-award survey that was done, right?

11 A That is correct.

12 Q Now, is it your memory that Mr. Stokes
13 was the man who did -- who authored that pre-award
14 survey?

15 A Mr. Stokes did the financial portion of
16 the pre-award survey.

17 Q He did the financial capability portion
18 of the pre-award survey, correct?

19 A That is correct.

20 Q And Mr. Stokes was the man that you
21 worked with regularly at DCASR, New York?

22 A That is correct.

23 Q You were, once this contract was
24 assigned, of course, as you testified, the ACO,
25 right?

26 A That is correct.

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1 Q And as you said in your direct, you were
2 responsible for enforcing the terms and conditions
3 of that contract?

4 A That is correct.

5 Q Now, you understood, as you began your
6 work on that contract, that you were to enforce the
7 terms and conditions as written, you were not to add
8 terms and conditions to the contract?

9 A As long as those terms and conditions
10 were consistent with Government regulations, that is
11 correct.

12 Q But as a general matter, sir, you
13 understood that you were not to add terms or
14 conditions to the contract, at the time you began
15 your administration?

16 A That is correct.

17 Q All right. You didn't negotiate this
18 contract?

19 A No, I did not.

20 Q The negotiation instead was negotiated
21 with PCO at the time, Mr. Barkewisch?

22 A That is correct.

23 Q You did, though, have a perspective on
24 this contract; did you not, in terms of how much it
25 cost?

26 A Very limited.

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1 Q Well, the one perspective that you had
2 was that the Government was paying "\$6 million
3 extra" for this contract?

4 A I did not know that, prior to award. I
5 found this out after award. I was not really
6 involved in the -- prior to award of the contract.

7 Q As a matter of fact, though, after the
8 contract was awarded, you brought to this ACO
9 responsibility the perspective that the Government
10 had paid or agreed to pay Freedom \$6 million,
11 correct?

12 A I'm not sure. I'm not sure what you
13 mean by \$6 million extra.

14 Q Well, you looked at the costs of doing
15 business with Freedom to be \$6 million extra, didn't
16 you?

17 A This, I learned after the contract
18 award, that had the Government gone to the other two
19 assemblers, they could have gotten -- these MRE
20 cases, \$6 million cheaper.

21 Q Right.

22 A I found this out after award, that's
23 correct.

24 Q Right. And in November of 1984, that
25 was the perspective that you started with, correct?

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1 A I'm not sure if I learned this in
2 November, '84. It might have been December, January
3 '85 sometime after award.

4 Q November?

5 A I don't --

6 Q November, December or January?

7 A Sometime afterwards. Sometime after
8 award.

9 JUDGE GROSSBAUM: Can we clarify this,
10 that your perception of \$6 million extra, is that
11 because the extended price of the per case unit
12 price in the Freedom contract would have worked out
13 to \$6 million more than it would have been from one
14 or two of the other two suppliers?

15 THE WITNESS: That is correct.

16 BY JUDGE GROSSBAUM:

17 Q So Freedom's unit price was higher than
18 the other suppliers?

19 A That is correct.

20 BY MR. MACGILL:

21 Q Now, the other perspective that you
22 brought to this contract was that the ACO enforces
23 the agreement, which was negotiated by the PCO,
24 correct?

25 A The ACO enforces the provisions of the
26 contract.

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1 Q As negotiated by the PCO?

2 A That is correct. As long as it is
3 consistent with Government regulations.

4 JUDGE GROSSBAUM: Are you saying that the
5 ACO second guesses the terms and conditions of the
6 contract as the PCO, in terms of conditions?

7 THE WITNESS: Not exactly, Your Honor.
8 Contractual matters can arise during the life of the
9 contract, that require reference to our regulations,
10 the DAR or -- in this case, the DAR. And if a --
11 let's say, for example, a progress payment. If a
12 progress payment violates the DAR, although the
13 contract provides for progress payments, as part of
14 my administration of the progress payment provisions
15 provided for in the contract, that progress payment
16 cannot violate the progress payment provisions of
17 the DAR.

18 If they're unallowable costs cited in
19 the DAR, like advertising expenses, things like
20 that, I have to, you know, measure or compare what's
21 in that progress payment request, provided for by
22 the progress payment clause in the contract with the
23 progress payment regulations cited in the DAR.

24 BY JUDGE GROSSBAUM:

25 Q What if there are advanced
26 understanding?

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1 A Again, I have to administer the contract
2 as an ACO in accordance with the regulations. I
3 have an obligation. I cannot violate those
4 regulations without a DAR deviation.

5 Q How do you know that the PCO doesn't get
6 a DAR deviation? Where do you go first?

7 A Well, there are procedures under the
8 regulations, to get a deviation. And it has to be
9 approved by higher authority, higher agency
10 authority.

11 Q All right.

12 A And that was not the case with this
13 contract.

14 Q Well, do you just assume that the PCO
15 doesn't have the authority, or don't you --

16 A No. I just -- I discuss this -- in the
17 Freedom case, I discussed the matter with the PCO.

18 BY MR. MACGILL:

19 Q You had previous experience with
20 Freedom, prior to the time of the MRE 5 contract; is
21 that right?

22 A Yes, I did.

23 Q That experience was in connection with
24 the MR 3 contract, or a portion thereof; was it not?

25 A I don't know if it was MRE -- MR 3.
26 There were two small contracts, retorting contracts.

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1 Q Freedom worked as a subcontractor,
2 right, in the MRE 3 context?

3 A I'm not familiar with the description
4 MRE 3. Freedom was a prime contractor with two
5 small retorting contracts, one of which was in the
6 main, ultimately subbed out, with Government
7 approval. And this was in 1962, '63 time frame.

8 Q And later, in the late --

9 A 1983 time frame, I'm sorry.

10 Q Okay. So in the early 1980's, Freedom
11 was operating in this Government realm?

12 A In a very limited -- on a very limited
13 basis, yes.

14 Q With you, specifically?

15 A That is correct.

16 Q And Freedom, had an operation up and
17 going in 1982, 1983; is that correct?

18 A They had a, sort of, "infant" type of
19 operation. They had to start up again. It was a
20 start-up type of thing with two small contracts.

21 Q So this instant --

22 A Pardon me, it was infant.

23 Q My mistake. This infant operation did
24 have overhead, right, as you understood it in
25 1982-1983?

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1 A But no progress payments. There was
2 overhead, that is correct, but no progress payments.

3 JUDGE GROSSBAUM: You weren't asked
4 that.

5 THE WITNESS: Sorry.

6 MR. MACGILL: And that's the next
7 question. There was nothing to cover the overhead
8 when Freedom was not given a portion or MRE 4,
9 right?

10 A I don't -- not familiar with MRE 4, and
11 --

12 Q Freedom did not have MRE 4, did they?

13 A I don't know. I don't know the -- the
14 only labeling or description of Freedom's contracts
15 that I was aware of was that these were retorting
16 contracts. Whether or not they were related to MRE
17 10 or MRE 1, I don't know the answer to that.

18 JUDGE GROSSBAUM: You have not
19 established through his answers to your questions
20 that Freedom did have either a prime or a
21 subcontract for MRE 3. That hasn't been
22 established.

23 He's testified, not contrary -- he's
24 not contradicting you, but he's testified he hasn't
25 established that.

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1 MR. MACGILL: We'll tie that up with Mr.
2 Thomas, rather than take the Board's time at this
3 point.

4 BY MR. MACGILL:

5 Q But you do understand that Freedom did
6 not have any Government contracts or progress
7 payments in the 1983-1984 period of time?

8 A Well, they had Government contracts, but
9 they did not have progress payments.

10 Q Okay. That's where the debt came from,
11 wasn't it, the overhanging debt that you testified
12 to in your direct examination, that Mr. Stokes
13 mentioned?

14 A Yes, from those earlier contracts.

15 Q And it was that overhang of debt from
16 those earlier contracts and the continuation of
17 overhead that Mr. Stokes wrote about in his
18 pre-award survey of financial capability?

19 A I cannot say, without checking the
20 record, it involved a continuation of overhead,
21 because he was basically out of business for a year
22 and half. He didn't have a facility, really. He
23 was evicted from that facility at 1 Loop Drive. So
24 he wasn't really operational, so I wouldn't call it
25 overhead. I don't think I would describe it as an
26 overhead type of thing.

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1 Q Do you specifically know what his
2 circumstances were in 1982, '83 and '84?

3 A Yeah, in a general way.

4 Q Well, do you specifically know what
5 facility he had?

6 A Well, he had, during that time frame, a
7 facility, I think, that he -- I don't know if he was
8 lease -- I think it was leased from the City at the
9 Port of Terminals of New York City. It was a
10 City-owned building, I believe.

11 Q How much was he paying in rent in
12 1982-'84?

13 A I do not know.

14 Q How much in salary in 1982-'84?

15 A I don't know, and I'll tell you why,
16 because there were no progress payments. We did not
17 evaluate costs.

18 Q So you don't know all what general
19 administrative expenses were?

20 A Not at all, no. We didn't do any
21 reviews.

22 Q Fine. Mr. Stokes, though, did report to
23 you in pre-award survey that there was an overhang
24 of debt?

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1 A Oh, absolutely. He owed money to
2 creditors. That's correct -- millions to creditors.
3 That's correct.

4 Q Now, as far as your perspective goes in
5 this time frame, November of '84, you understood
6 that Freedom was a small business?

7 A That's correct.

8 Q A minority contractor?

9 A Minority-owned contractor; that's
10 correct.

11 Q That they were going to employ four to
12 five hundred of the chronically unemployed
13 minorities in the Bronx?

14 A That's correct.

15 Q You knew, also, that this was Freedom's
16 only Government contract, MRE 5?

17 A That's correct.

18 Q You knew it was a start-up operation?

19 A Correct.

20 Q And you also knew that there were going
21 to be substantial start-up costs for Freedom?

22 A Correct.

23 Q Now, as far as the -- Mr. Stokes'
24 pre-award survey goes, that is something that you
25 read at sometime during this November, 1984 period
26 of time?

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1 A That's correct.

2 Q Final item of perspective here in this
3 November, 1984 period of time, you understood, did
4 you not, that this was going to be a high visibility
5 contract, given its circumstances?

6 A Correct.

7 Q You felt it was going to be like living
8 in a goldfish bowl?

9 A Correct.

10 Q And your perspective was that your
11 actions, specifically, would be scrutinized by
12 Headquarters?

13 A Correct.

14 Q By Congress, perhaps?

15 A Perhaps.

16 Q Perhaps, the White House?

17 A Perhaps.

18 Q The contract, when it was awarded, was
19 awarded pursuant to United States Code 2304A16; is
20 that correct?

21 A I would have to check the contract.

22 Q Well --

23 A What is A -- I know it's one of the
24 reasons for -- I would have to check.

25 Q Fine. You understood, though,
26 generally, that this was a law enacted by Congress

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1 to create, develop and maintain vital suppliers of
2 MRE's?

3 A I cannot -- I do not know offhand.

4 JUDGE GROSSBAUM: I don't think that the
5 assumption is warranted. I don't think Congress
6 passed 2304A16 as an exception to the advertising
7 statute, simply for the purpose of creating an
8 industrial base of MRE producers.

9 MR. MACGILL: The first --- I didn't
10 hear the first part of what you said.

11 JUDGE GROSSBAUM: I don't think Congress
12 passed this law, just to create an industrial base
13 of MRE producers. So I don't think the witness
14 would be justified in answering that in the
15 affirmative.

16 MR. MACGILL: I think I understand.

17 JUDGE GROSSBAUM: Did you want to change
18 your technique?

19 BY MR. MACGILL:

20 Q Let me rephrase my question. You,
21 personally, understood that one of the purposes of
22 this law was to create, develop and maintain vital
23 suppliers of MRE's?

24 A Let me answer this question and the
25 questions you may have along this line. I was not
26 involved, in the main, in the pre-award phase of the

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1 contract. All I know about the industrial base was
2 Henry Thomas -- Freedom was approved as a third
3 planned producer, and there were various letters and
4 lobbying and discussions between Freedom and high
5 levels of DOD, Eleanor Specta, Norma Leftkovich,
6 whatever.

7 I was not involved with that. I cannot
8 answer your questions, specific questions, along
9 this line. All I know is that he was approved as a
10 planned producer. I wanted him -- they wanted him
11 as this third assembler. That is all I can answer.
12 I was not involved with that.

13 Q So as an ACO, you never, at anytime,
14 have had the perspective in the industrial
15 preparedness plan, that there is an over-arching
16 purpose of developing some MRE suppliers?

17 A I was aware that Freedom was approved as
18 the third assembler. The Government wanted a third
19 assembler. I was aware that he was officially
20 approved. I know what an IPP Program is. I know
21 IPP reviewed Freedom. So I know, in a general way,
22 the visibility of this at DOD level under the IPP
23 Program.

24 But when you start quoting laws and
25 dates, along this line, I was not involved with
26 this. So if there are other questions along this

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1 line, I will not be able to answer probably other
2 than what I've just stated now, up to this point.

3 Q All right. Sir, you testified on direct
4 examination about some letters that had been
5 received by the Government or as you testified, was
6 not received by the Government, from Dollar
7 Dry-Dock. Do you remember that line of testimony?

8 A Yes, I do.

9 Q And specifically, I'd like to refer you
10 to Government Rule 4 Exhibits 5 and 6.

11 A Yes.

12 Q Now, as I -- strike that. You
13 previously told the court that you received -- that
14 the Government received the August 9 letter, which
15 is 5, but not the August 10 letter, which is Exhibit
16 6. Correct?

17 A That is correct?

18 Q Now, in terms of your comparison of
19 Exhibit 9 -- pardon me, 5 and 6, did you compare the
20 signatures that were on each one of those pages?

21 A No. There wasn't -- they looked the
22 same. Whether I compared it at the time, I don't
23 recall.

24 Q Is it unusual in your experience, sir,
25 for a draft letter to be signed or executed by
26 signatory?

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1 A Definitely not. The draft letter is
2 unsigned in the normal course of events, yes.

3 Q But in this case, what you're
4 characterizing as a draft letter, in terms of your
5 testimony to this Board, you're characterizing a
6 signed, executed letter as a draft; are you not?

7 A No, I'm not. I'm only repeating what
8 Noel Siegert from Dollar Dry-Dock -- Noel Siegert
9 from Dollar Dry-Dock says that the 9 August letter
10 was only a draft letter, that was sent to Henry
11 Thomas and not passed on to the Government. So it's
12 not my characterization. I'm just repeating Noel
13 Siegert from Dollar Dry-Dock's characterization.

14 Q And you're repeating what Mr. Siegert
15 said to you, personally?

16 A No, that said to five Government
17 employees on the squawk box to my commander. I was
18 present.

19 Q You were present? Now, so that the
20 scene for the Board to understand --

21 A And also in writing. It was confirmed
22 in writing by Dollar Dry-Dock.

23 Q Fine.

24 A Okay.

25 Q But so the Board fully understands the
26 context, there are five or six Government officials

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1 on the squawk box with a man from New York Dollar
2 Dry-Dock commercial, right?

3 A That's correct.

4 Q And the perspective that you conveyed to
5 that man, that individual in New York, is that the
6 five or six of you were unhappy with the financial
7 situation, right?

8 A We were express -- the reason for the
9 call was Henry's statements at the post-award, three
10 days earlier. December 14th, 1984, at the
11 post-award, Henry told us that it didn't look like
12 he was going to get money from Dollar Dry-Dock,
13 nothing had been advanced.

14 We were concerned. As a result of this
15 concern and in view of the fact we had a pre-payment
16 progress payment review going on, we decided -- the
17 Colonel decided, Colonel Hein decided to call Dollar
18 Dry-Dock. That was the reason for the call.

19 Q And Mr. Siegert knew that the Government
20 was upset, when you had this telephone call?

21 A I don't recall. I don't recall saying
22 that we were upset. I think our questions were
23 mainly in the way of inquiry, you know. We were
24 just asking, what's the status of the request.
25 Whether or not we mentioned our concern, I don't
26 recall, to be quite honest.

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1 Q But nevertheless, he was either
2 characterizing it as a draft -- strike that. But he
3 was characterizing it at -- the August 9 letter as a
4 draft?

5 A That is correct.

6 Q And did you get the impression, sir,
7 when you and the other five or six Government
8 officials had this telephone call with him, that he
9 was back-pedaling on you, to try to keep the bank
10 from getting sued by the Government?

11 A No, I wouldn't describe it that way. I
12 would just say he was just telling us -- he was
13 giving us the facts as he saw them. I wouldn't
14 describe it as back-pedaling.

15 Q But you told this Board that you did not
16 get, that the Government did not get the August 10
17 letter.

18 A That is correct, because we checked with
19 DPSC.

20 Q But that's not true, is it, sir?

21 A That is true. We did check with DPSC.
22 That is true.

23 Q You checked with DPSC?

24 A I checked with Tom Barkewicz, and Tom
25 Barkewicz said he did not receive such a letter;

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1 had he received such a letter, he could have altered
2 award of the contract.

3 Q All right. Now, Mr. Barkewicz was --
4 just so we're very clear, because I think it's
5 important that the Board see the full perspective
6 here. Mr. Barkewicz was the PCO at the time? Is
7 that right?

8 A That is correct.

9 Q Would you please refer, sir, to your own
10 drafted documents out of the Government Rule 4 File,
11 Exhibit 16.

12 A Yes. There's an error in that letter.

13 Q Pardon me, sir. I have a question.

14 JUDGE GROSSBAUM: Do you mean Tab 16?

15 MR. MACGILL: Yes, Tab 16.

16 THE WITNESS: I'm sorry.

17 MR. MACGILL: May I proceed, Your Honor?

18 JUDGE GROSSBAUM: Yes.

19 BY MR. MACGILL:

20 Q Now, Mr. Liebman, this was a document
21 that you wrote.

22 A That is correct.

23 Q You wrote this to the President of
24 Freedom?

25 A That is correct.

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1 Q Now, I take it, this was written at or
2 near the time of January 4, 1985?

3 A That is correct.

4 Q And just as a general practice of your
5 own personal accuracy, I take it that you strive to
6 be accurate in your written communications.

7 A That is correct.

8 Q Now, that letter, this January 4 letter,
9 of course, was written more than eight years ago; is
10 that right?

11 A That is correct.

12 Q And you were more familiar with the
13 situation eight years ago than you are today; is
14 that right?

15 A My memory was fresher, absolutely.

16 Q Now, what you stated in the letter, at
17 the bottom of the first page, is as follows: "This
18 stated condition is contrary to Dollar Dry-Dock's
19 commitment letters of 9 and 10 August, 1984, that
20 were sent to the Defense Personnel Support Center,
21 Philadelphia, PA, Attention: Thomas Barkewisch,
22 Procuring Contracting Officer, and which were relied
23 upon by the Government in the award of subject
24 contract to Freedom Industries."

25 Were those your words, sir, written on
26 January 4, 1985?

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1 A Those were my words, that were in error.
2 That is correct.

3 Q All right. But you're just -- what
4 you're telling the Board now is that this letter was
5 in error?

6 A That particular statement about the 10
7 August was in error.

8 Q All right. Let's go to another exhibit,
9 then, sir. Let's go to Exhibit 26 of the same
10 binder. And sir, first of all, is Exhibit 26
11 another letter that you authored on or about 6
12 February, 1985?

13 A That is correct.

14 Q And again, this letter was written at a
15 time you were more familiar with the situation as
16 posed by Dollar Dry-Dock than you are today?

17 A That is correct.

18 Q Sir, would you refer to the second page,
19 please.

20 A Yes.

21 Q Did you state -- and I quote: "This
22 condition is contrary to Dollar Dry-Dock's
23 commitment letters of 9 and 10 August, 1984, that
24 were sent to the PCO, Defense Personnel Support
25 Center, Philadelphia, PA, and which were relied upon

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1 by the Government in the award of the subject
2 contract to Freedom Industries"?

3 A That is correct.

4 Q Your words on the 6th -- your words on
5 the 6th of February, 1985?

6 A My words in error, again.

7 Q All right. So we have -- your memory
8 today is better than your words eight years ago?

9 A I would say that it was in error in both
10 letters. That's all I can say.

11 Q All right. Sir, now, let's go to
12 another point that the Government counsel asked you
13 to affirm in your direct examination. You said that
14 the Government does not -- strike that.

15 You said, generally speaking, that the
16 Government does not accept conditional letters of
17 commitment. Do you recall that line of testimony?

18 A Categorically speaking -- I --
19 categorically speaking, DCASMR, New York. Again,
20 the -- well, let me backtrack. It is policy not to
21 accept such commitment letters, conditional
22 commitment letters, at DCASMR, New York.

23 Q Refer, sir, if you would, to the first
24 paragraph of Exhibit 5. Are you there, sir?

25 A Yes.

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1 Q Exhibit 5 says, "In the event Freedom
2 Industries is awarded a contract in the amount of
3 \$21.593 million" -- and I've skipped some of the
4 language -- but "in the amount of \$21.593, we will,
5 upon assignment," etcetera.

6 Did you regard, sir, at the time of this
7 letter, that to be conditioned on the award of a
8 contract to Freedom?

9 A Well, again, I was not involved with
10 this letter.

11 Q All right.

12 A During the pre-award phase. Those were
13 other individuals that were involved with this.

14 Q But now, having seen the letter, you'll
15 be quick to agree, won't you, sir, that that is a
16 conditional commitment letter?

17 A I disagree.

18 Q All right. But you know for sure, don't
19 you, sir, that there was never a contract entered
20 into between Freedom on the one hand and the
21 Government on the other hand, for \$21.5 million?

22 A That is correct.

23 Q In fact, it was known, after this letter
24 was sent to the United States Government, this
25 contract was negotiated with Mr. Thomas of Freedom;
26 was it not?

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1 A That is correct.

2 Q And the price was ratcheted down from
3 \$21.593 million to \$17.1 million; is that correct?

4 A That's correct.

5 Q And Dollar Dry-Dock's commitment, if
6 there was one, sir, you would agree was for a \$21.5
7 million contract?

8 A That is correct.

9 Q And that was the same commitment that
10 they made to you the next day, August 10, 1984 in
11 Exhibit 6?

12 A No, it was different.

13 Q Well, the commitment was that it had to
14 be a contract at \$21.593 million. Correct?

15 A Well, when you're talking about only \$21
16 million, when you're comparing the dollars on both
17 letters, that's correct. But when you're -- if you
18 look at paragraph 2, you're talking about a
19 different animal, now.

20 Q All right.

21 A But just the dollars, the gross dollars.
22 Yes.

23 Q So -- but just as a matter of pure and
24 easy lineal logic, you knew, when you had the
25 conversation with Mr. Siegert, months later, that
26 Dollar Dry-Dock never had a commitment to anybody?

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1 A No, I did not know that.

2 Q At the time that you had that
3 conversation with Siegert, did anybody in the
4 Government make a careful analysis of really what
5 this letter exactly said?

6 A Which letter are we talking about? The
7 9 August letter?

8 Q Pardon me, August 9.

9 A Yes. It was analyzed by our Financial
10 Analysis people during the pre-award phase. And it
11 was based on that letter, that the -- only based on
12 that letter, that they went positive from a
13 financial standpoint.

14 Q Let's go back to -- let's look at the
15 time again, during this chronologically and
16 hopefully in a summary fashion. What happened after
17 August 9, 1984 and August 10, 1984, was that there
18 were negotiations between the Government and Mr.
19 Thomas, right?

20 A After 9 and 10?

21 Q Right. There were negotiations.

22 A Yes.

23 Q And what happened was -- is that Mr.
24 Thomas was told to reduce that price, roughly
25 speaking, \$4.4 million. Right?

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1 A I don't know. I don't know who told
2 what to who. I wasn't a party to that.

3 Q But you understand as a general matter,
4 just based on these letters alone, that that price
5 went somehow from 21.5 to 17.1?

6 A Yes, I know it went down. That's
7 correct.

8 Q And you know, from your work as an ACO
9 on this contract, that there were two promises that
10 the Government made in exchange for reducing the
11 price \$4.4 million. Right?

12 A I don't know. What other -- you'd have
13 to --

14 Q The Government agreed to eliminate
15 outside financing, number one. Number two, the
16 Government agreed to pay costs directly and to pay
17 95 percent progress payments.

18 A The first, I would say no. I -- that, I
19 am not aware of. Never was aware of that, that
20 outside financing was to be eliminated 100 percent,
21 or at all. I'm not aware of that at all. This is
22 the first I ever heard of it.

23 Q All right. In fairness to you, sir, I
24 think I said two conditions, and I listed three.
25 Let's make sure we're clear on the three.

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1 A What's the second. Tell me what the
2 second one is.

3 Q The Government told Mr. Thomas, between
4 August and November of 1984, that he would be paid
5 95 percent progress payments. Right?

6 A That's -- that is the percentage that
7 would be in the progress payment costs, correct.

8 Q Second, the Government -- second, the
9 Government said that certain costs would be treated
10 as direct costs. Right?

11 A That is correct. That, I found out
12 after award. That is correct.

13 Q Right. And you also found out after the
14 award that the Government had eliminated the outside
15 financing requirement?

16 A Negative.

17 Q All right. Refer, if you would, sir, to
18 the contract in this matter, which is M-7.

19 A Which -- I don't think I have M-7.

20 MR. MACGILL: Your Honor, I have an
21 extra copy, if I may hand it to the witness for
22 speed of --

23 JUDGE GROSSBAUM: Certainly.

24 MR. MACGILL: May I approach the
25 witness, Your Honor?

26 JUDGE GROSSBAUM: Go ahead.

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1 MR. MACGILL: Thank you.

2 BY MR. MACGILL:

3 Q Sir, I put in front of you what's before
4 the Court as M-7. Is that contract entered into
5 between Freedom, on the one hand, and the United
6 States Government, on the other?

7 A Yes, it is.

8 Q There is no requirement in any term or
9 condition of outside financing in that document, is
10 there, sir?

11 A Well, you don't see that in the
12 contract, and I'm sure it's not in this contract. I
13 don't see that in contracts.

14 Q Fine. So the contract goes forward as a
15 \$17.1 million contract. Right?

16 A Correct.

17 Q And you understood from the beginning of
18 that contract administration that certain agreement
19 and promises had been made by Mr. Barkewicz to Mr.
20 Thomas. Right?

21 A What promises are we talking about? I
22 don't --

23 Q Well, just -- for this line, sir, just
24 certain promises had been made --

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1 A I can't comment until I know what
2 promises that we're talking about. I'm not going to
3 make a general statement.

4 Q But won't you admit to the Board here
5 and now that you knew there were some promises that
6 were made?

7 A I'm not going to classify or categorize
8 it as a promise. I learned during -- after award,
9 during the progress payment review that basically,
10 the Government wanted Freedom as a third assembler.
11 You know, they wanted him to be successful, that
12 this was -- contract. All costs were really direct
13 costs. I mean, this was part of the pre-payment
14 review.

15 I don't know what type of promises we're
16 talking about. I don't know what you're talking
17 about.

18 Q Well, specifically, you understood that
19 there was a memorandum of understanding that had
20 been signed and agreed to by Mr. Thomas and Mr.
21 Barkewicz?

22 A Are we talking about the negotiation? I
23 think I read -- vaguely recollect something about
24 it. I remember -- I saw his negotiation memorandum.
25 I think there was a memorandum of understanding,

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1 yes. I think there was some sort of memorandum of
2 agreement.

3 Q And when you say the negotiation
4 memorandum, you're referring to the price
5 negotiation memorandum that was -- is before the
6 court as a November 8, 1984 price negotiation
7 memorandum price analysis?

8 A Again, I don't know of the date offhand,
9 but I've seen the memorandum prepared by Barkewisch.
10 And I believe, back to your previous question, there
11 was some sort of memorandum of understanding. I
12 don't recall what was in there. But I think it was
13 done prior to the negotiations. What the contents
14 were, I --

15 Q Just as an overview for the Board, now,
16 sir, you understood that there had been an agreement
17 between the PCO and Freedom to treat certain capital
18 equipment as direct costs to the contract?

19 A I learned, during the -- after award and
20 during the pre-payment progress payment review phase
21 that the PCO decided to fund this 100 percent --
22 they felt, well, if we're going to pay for -- if we
23 want Freedom as an assembler for years to come, as
24 one of the three planned producers, let's pay it all
25 at once. You know, why pay this for this capital

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1 equipment and spread it out, which is the normal way
2 to do things.

3 Q Right. And you never cared for that
4 agreement, did you, sir?

5 A No, I wouldn't describe it that way.

6 Q All right. Then you --

7 A Let's don't say I don't care for it. I
8 did say that it violated the DAR.

9 Q And that's a decision that you made
10 independently?

11 A No. It's not a decision that I made
12 independently. I discussed this particular point
13 with higher authority at various agencies, including
14 counsel. I mean DPSC, DLA Headquarters, DCASR, New
15 York, DCASMA, New York, office counsel, you name it,
16 commanders --

17 Q But you made the decision by yourself?

18 A I -- of course, as the ACO.

19 Q And you took whatever advice you could
20 get on the subject?

21 A Absolutely.

22 Q But it was your --

23 JUDGE GROSSBAUM: Excuse me. Did you
24 discuss this with the PCO?

25 THE WITNESS: Oh, absolutely. Sure.
26 Certainly.

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1 BY MR. MACGILL:

2 Q And you knew, from the beginning to the
3 end of this, that the PCO had agreed to treat
4 certain capital equipment as direct costs in the
5 contract?

6 A In violation of the DAR, yes.

7 Q Okay. And your perspective was,
8 regardless of what that man agreed to with this man,
9 Mr. Thomas, you were going to superimpose your
10 reading of the DAR on that understanding?

11 A Not my reading of the DAR, my decision,
12 based on the DAR, based on legal interpretation.
13 Legal interpretation that the only way to get around
14 this -- we weren't -- let me backtrack.

15 I was not interfering with the contract
16 price. The contract price was fixed. It would be
17 paid, in the form of deliverables, the full contract
18 price. We weren't interfering with the price of 17
19 million, and he would be paid for the equipment 100
20 percent.

21 What I couldn't pay him for, because it
22 would violate the DAR, would be 100 percent of his
23 capital type items in the way of progress payments.
24 I couldn't do that without a DAR deviation, so I was
25 advised by legal. And I agreed.

26 Q Well, --

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1 A It was my decision, based on advice from
2 legal and other sources, that it couldn't be done
3 without a DAR deviation. This includes Cameron
4 Station, by the way.

5 Q Legal told you to pay this twice, didn't
6 they, on December 26 --

7 A Legal did --

8 Q Pardon me. On December 26, 1984, they
9 told you to pay these progress payments, didn't
10 they?

11 A December...?

12 Q 26th, 1984.

13 A Well, let me answer that, because I
14 think you're mixing apples and oranges. Okay. The
15 issue, at that time, was the issue of progress,
16 direct versus indirect costs. I don't think we were
17 dealing with capital equipment at that point. It
18 had to deal with direct versus indirect. And at the
19 time, those progress payments were only indirect.

20 I don't think the capital equipment
21 thing was involved at that point.

22 Q But on December 26th -- pardon me --
23 December 26, 1984, you were advised that -- about
24 the circumstances of the PCO's agreement.

25 A I would have to check. I would have to
26 read what you're referring to. I don't recall. You

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1 know, I did receive advice from Legal at various
2 agencies. I would have to see the document you're
3 referring to.

4 Q And you were told by lawyers for the
5 Government that if you administered this contract in
6 a way different than negotiated, there may be an
7 estoppel, as far as the Government is concerned?

8 A I would have to refer to what you're
9 reading. And lawyers do not tell me. They advise
10 me. Okay? But I would have to see -- I just don't
11 recall. There was input from legal, my own legal,
12 DPSC. Again, I would have to see what you're
13 referring to. I don't want to give a statement that
14 might be contrary to my understanding.

15 Q We will refer -- we will refer
16 specifically to those documents at a later time.
17 But regardless of the advice, sir, that you got, you
18 made these decisions to administer this contract
19 your way, as you deemed appropriate, regardless of
20 how it was negotiated.

21 A That's not correct. Deemed appropriate,
22 in accordance with DAR regulations and after advice.
23 I did not violate any regulations.

24 BY JUDGE GROSSBAUM:

25 Q You had testified earlier, for example,
26 that the DAR is fairly specific as to the manner and

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1 the formulas that are applied to calculating a loss
2 factor; did you not?

3 A That's correct.

4 Q And yet, the ACO has a considerable
5 amount of discretion as to how he is going to apply
6 the loss factor?

7 A That's correct.

8 JUDGE GROSSBAUM: We need to -- as we
9 indicated earlier, we were going to conclude today
10 around this time. Would this be an appropriate time
11 to take a recess?

12 MR. MACGILL: Whatever your choice is,
13 Your Honor.

14 JUDGE GROSSBAUM: Do you think that this
15 is a logical point? Is there anything that you
16 wanted to tie in with this last question?

17 MR. MACGILL: Your Honor, I think it's
18 very logical to do -- to return at --

19 JUDGE GROSSBAUM: This is Mr. MacGill,
20 is it?

21 MR. MACGILL: Yes, sir.

22 JUDGE GROSSBAUM: Very well. We'll
23 recess at this point, and we'll resume at 9:15
24 tomorrow morning.

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1 (Whereupon, at 5:12 o'clock p.m., the
2 hearing was recessed, to resume at 9:15 o'clock a.m.
3 on Tuesday, February 10, 1993.)
4

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Appeal Docket No.: ASBCA Nos 35671 and 43965

Appellant's Name: Freedom, N.Y., Inc.

Hearing Date: Monday, February 9, 1993

Location: 5109 Leesburg Pike, Falls Church, VA

Reporting Method: Electronic Tape Monitoring

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