

1 UNITED STATES OF AMERICA

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5 ARMED SERVICES BOARD OF CONTRACT APPEALS6
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9 HEARING

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14 IN THE MATTER OF: :
15 :
16 THE APPEAL OF FREEDOM N.Y., INC. :
17 : ASBCA No. 35671
18 : 43965
19 UNDER CONTRACT NUMBER: :
20 :
21 DLA 13H-85-C-0591 :
22 :
23 -----x

24
25 VOLUME THREE26
27
28 Hearing Room C, 7th Floor
29 5109 Leesburg Pike
30 Falls Church, VA 2204131
32 Thursday, February 11,
33 199334
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37 The above-entitled matter came on for
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39 hearing, pursuant to notice, at 11:32 a.m.
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43 BEFORE: THE HONORABLE JOHN J. GROSSBAUM
44 ADMINISTRATIVE JUDGE
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C O N T E N T S

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
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MARVIN LIEBMAN		6, 57	146	189
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E X H I B I T S

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A-4		72		73
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A-5		79		80
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P R O C E E D I N G S

ADMINISTRATIVE JUDGE JOHN J. GROSSBAUM:

The hearing in the appeals of Freedom New York, Inc., will come to order. Counsel for Appellant, are you planning to resume your cross-examination?

MR. MacGILL: We are, Your Honor. I might just report briefly -- I do believe we've made progress. We've had good discussions with the Government. I think we've had a dialogue that has allowed the Counsel and the people in your courtroom to get an analytic hold on this problem, and I think we've come pretty close to making recommendations to our principals that are clear and to the point.

We don't have the principals signed off. We believe it's in the Board's best interest to continue with Mr. Liebman, and to continue the trial.

We can't promise the Board anything, but I do believe -- and correct me if I'm wrong, Frank or Kathleen, I think that we've made considerable progress. I don't know that this is going to be resolved but I think we've made significant progress in the last couple of hours.

JUDGE GROSSBAUM: Does everybody concur

1 in that view?

2 MS. HALLAM: Yes, Your Honor.

3 JUDGE GROSSBAUM: Very well. Might we
4 resume with Mr. Liebman, who was previously sworn.

5 Would you please take the stand?

6 Whereupon,

7 MARVIN LIEBMAN

8 recalled as a witness, having been previously duly
9 sworn, was examined and testified as follows:

10 JUDGE GROSSBAUM: We were still into progress
11 payment number 22 of the -- we hadn't gotten all the
12 way to January 1987 when the ACO told the contractor
13 that he was spending -- returning progress payment
14 number 22, somewhere at the bottom down in November
15 or December of 1986.

16 MR. MacGILL: Yes, sir. Your Honor, if
17 I may -- I had one question relating to May and
18 April 1986 that I omitted, which relates to some of
19 the Mod 25 circumstances. If I could pick up that
20 one area with Mr. Liebman, and then move back to the
21 time frame the Board just mentioned.

22 FURTHER CROSS-EXAMINATION

23 BY MR. MacGILL:

24 Q Mr. Liebman, going back to the time
25 frame January 1986 to March 1986, would you agree,

1 sir, that during the time frame January 1986 to
2 March-April 1986, Freedom performed in a
3 satisfactory manner and met the schedule?

4 A I would have to check the record. I
5 don't recall.

6 Q Sir, I can refresh your memory if you
7 would like with your testimony given on June 21,
8 1989. I have the testimony marked here.

9 MR. MacGILL: If the Board has no
10 objection, I would be happy to --

11 JUDGE GROSSBAUM: The Board has no
12 objection.

13 BY MR. MacGILL:

14 Q And I will refer you, sir, to page 106
15 of testimony that you gave on that date, lines 4
16 through 6. Would you read those to yourself please?

17 A Yes. I can only accept this at face
18 value. Yes, that was my thought at the time, yes.

19 Q All right. Let's clarify it, then, sir.
20 Is it your testimony here today, now having
21 refreshed your recollection, that during the time
22 frame January 1986 to March-April 1986, Freedom
23 performed in a satisfactory manner and met the
24 schedule?

25 A That was my thoughts to the best of my

1 recollection at that time, almost four years ago.

2 JUDGE GROSSBAUM: Is there anything that
3 changes your thought?

4 THE WITNESS: Well, of course, I would
5 like -- I would have preferred, if it was possible,
6 the opportunity to verify that against the record,
7 but that was my thought --

8 JUDGE GROSSBAUM: Haven't you had an
9 opportunity to examine the records before you came
10 here to testify?

11 THE WITNESS: Yes, I spent many weeks
12 going through thousands of documents.
13 Unfortunately, there are so many facts and figures,
14 and there were so many events involved with this
15 contract scenario, you know, it's impossible to
16 remember everything. Also, considering the fact
17 that many of these events occurred seven or eight
18 years ago.

19 JUDGE GROSSBAUM: Now, was that
20 testimony that you characterize as that was your
21 thought four years ago --

22 THE WITNESS: That was my recollection.

23 JUDGE GROSSBAUM: That was your thought
24 and your recollection.

25 THE WITNESS: My recollection.

1 JUDGE GROSSBAUM: Was that recollection
2 given under oath?

3 THE WITNESS: Yes, it was, Your Honor.

4 Well, let me qualify that. Was there
5 any swearing in at that meeting? I don't recall if
6 there was any swearing --

7 BY MR. MacGILL:

8 Q All right, sir. And, sir, I wanted to
9 refresh your recollection so we didn't have to go
10 through this.

11 A Yes.

12 Q On June 21st, 1989, you gave testimony
13 in New York City; did you not?

14 A That's correct.

15 Q And before you gave that testimony, you
16 raised your right hand and swore to tell the truth.

17 A Okay. I didn't remember, but, okay.

18 Q Well, but you were giving sworn
19 testimony on June 21, 1989, right?

20 A I'll accept that at face value.

21 JUDGE GROSSBAUM: Well, do you mean you
22 don't have any recollection of having participated
23 in a proceeding where you gave sworn testimony?

24 THE WITNESS: No, that's not what I
25 said, Your Honor. I said I remember the proceeding

1 very well. I just don't remember any -- I just
2 didn't recall anybody swearing people in. It could
3 have happened, I just don't recall that particular
4 act at the --

5 JUDGE GROSSBAUM: Make an offer. Was
6 this a trial or was this a deposition?

7 THE WITNESS: It was a deposition.

8 MR. MacGILL: I will do that, Your
9 Honor.

10 THE WITNESS: It was a deposition.

11 BY MR. MacGILL:

12 Q I'll refer you specifically, sir, to
13 page 4 of the deposition. Let's even go back
14 further than that. It's a June 21, 1989 deposition;
15 is that correct?

16 A Yes.

17 Q And it was taken of you by Pepper
18 Reporting Service out of New York City; is that
19 correct, sir?

20 A That's what it says, yes.

21 Q All right. And page 4 of this
22 deposition transcript says, "Marvin Liebman, a
23 non-party witness, after first having been duly
24 affirmed by Gayle M. Piccolo, a stenotype reporter
25 in and for the State of New York, was examined and

1 testified as follows". Have you read that now, sir?

2 A Yes, I have.

3 Q Does that refresh your memory that, in
4 fact, you were sworn?

5 A My memory is refreshed. Thank you.

6 Q And you understood when you gave this
7 testimony on June 21, 1989, that you were to tell
8 the truth, the whole truth?

9 A As I would always.

10 Q And what you testified to was at page
11 106, "During the time frame January 1986 to
12 March-April 1986, Freedom performed in a
13 satisfactory manner and met the schedule."

14 A That was my recollection at the time,
15 yes.

16 Q And that was your testimony at the time?

17 A That is correct.

18 Q Under oath.

19 A That is correct.

20 Q And the same kind of oath you took here
21 today?

22 A That is correct.

23 Q Continuing with progress payment 22,
24 sir, you testified previously you did not pay that;
25 is that correct?

1 A That is correct.

2 Q Now, in terms of progress payment 22,
3 that was submitted, as we know, on October 20, 1986.

4 A That is correct.

5 Q You did not officially suspend progress
6 payment ever relative to progress payment 22.

7 A It was no formal suspension letter, but
8 the payment was held in abeyance.

9 Q It was held in abeyance by you in your
10 discretion?

11 A That is correct.

12 Q That was the choice that you made
13 yourself individually?

14 A That is correct.

15 Q And you gave no notice of even an
16 intention -- even an intention to withhold payment
17 until January 26, 1987.

18 A That is not correct, because in my fact
19 sheets there is a statement -- there is a statement
20 here that during -- I had numerous conversations
21 during October, November and December, regarding the
22 progress payment, with Mr. Pat Marra.

23 Q You never put that in writing, sir,
24 until January 26, 1987?

25 A As far as I can recollect, that is

1 correct; in writing to Freedom, but Freedom was
2 verbally notified numerous times.

3 JUDGE GROSSBAUM: Did you keep any
4 memoranda of these numerous notifications?

5 THE WITNESS: Yes. It's in my papers
6 here, Your Honor. May I refer to them?

7 JUDGE GROSSBAUM: If it would help you
8 to answer the question, yes.

9 THE WITNESS: Yes. Okay, it's reflected
10 in the letter -- I'm trying to find the tab -- the
11 letter I sent to Freedom in January 1987 advising
12 him I'm considering suspending progress payments.
13 Would you know offhand what tab that is, because
14 that's where that statement is.

15 BY MR. MacGILL:

16 Q All right, well, we'll just take your
17 word for it, sir, that that was January 26, 1987.

18 A Right. But may I just look at the
19 letter? If I may.

20 Q Sure.

21 A Thank you.

22 Q 169, sir, of the Government's file.

23 A Thank you. This is the letter dated 26
24 January 1987 that I wrote to Mr. Thomas advising him
25 I'm considering suspending progress payments. And

1 in the preamble where I said, "Dear Mr. Thomas, Here
2 are the references", and I'm referencing my
3 telephone conversations with Mr. Patrick Marra,
4 Executive Vice President of Freedom, during October,
5 November and December 1986, "regarding the
6 foregoing". The "foregoing" includes progress
7 payment number 22, dated 20 October 1986, in the
8 amount of \$1.4 million.

9 And I can also --

10 JUDGE GROSSBAUM: You don't have any
11 other memoranda that corroborates any reference in
12 this January letter, any contemporaneous memoranda?

13 THE WITNESS: There's nothing here in
14 the file that I'm aware of, Your Honor.

15 JUDGE GROSSBAUM: All right.

16 BY MR. MacGILL:

17 Q And you -- you're not trying to get the
18 Board to believe here, are you, sir, that this
19 letter by itself confirms that you told Mr. Marra
20 many times that you, in fact, intended to suspend
21 the progress payment; are you, sir?

22 A What I'm telling the Board is that there
23 is a record here that there were numerous phone
24 calls with Mr. Marra concerning the --

25 Q And that's all the record says, is that

1 there were numerous phone calls with Mr. Marra
2 regarding progress payment 22.

3 A Okay. Now, what would you presume was
4 discussed with Mr. Marra --

5 JUDGE GROSSBAUM: You're the one who is
6 answering the questions.

7 THE WITNESS: Okay. Mr. Marra would
8 call me --

9 JUDGE GROSSBAUM: You don't have a
10 question.

11 BY MR. MacGILL:

12 Q Now, this is the letter you wrote,
13 January 26, 1987, right?

14 A That is correct.

15 Q And this is Exhibit 169, as you
16 previously testified to; is that correct?

17 A That is correct.

18 Q This is your first written notice after
19 the submission more than three months earlier of the
20 progress payment request number 22.

21 A Correct.

22 Q Now, you knew -- strike that. As far as
23 you knew, there were still activities going on at
24 the Freedom plant.

25 A There were signs of it, yes.

1 Q As far as your perspective was
2 concerned, you understood that Freedom was operating
3 in this three-month period of time with the
4 assumption it was going to be paid.

5 A No. That is not correct. Freedom was
6 operating in a very, and I underline the word
7 "very", limited capacity.

8 Q You knew that Freedom had resumed
9 operations January 20, 1987.

10 A In a limited capacity, very limited
11 capacity.

12 Q And you knew they did that in reliance
13 -- on the assumption that they were going to be
14 paid.

15 A That is not correct. I do not know
16 that. That's your statement. I do not know that.

17 Q All right, but you knew at a minimum,
18 that they were operating on the assumption that they
19 would be given certain GFM so that they could
20 continue --their assembly begun again on January 20,
21 1987.

22 A I do not recollect.

23 Q Now, you didn't tell Freedom anything
24 other -- on progress payment 22, you didn't tell
25 Freedom anything other than you were considering

1 suspending progress payments.

2 A That is correct.

3 Q You didn't use the "held in abeyance"
4 language in your January 26, 1987 letter, did you,
5 sir?

6 A That is correct.

7 Q And the "held in abeyance" is not a term
8 of art under DAR, is it?

9 A I do not know offhand.

10 Q Well, DAR speaks in terms of reduction
11 or suspension of progress payments, doesn't it, sir?

12 A Well, we're getting into -- well, I
13 would say it's an offshoot. Before you suspend you
14 consider to suspend, so that would -- I would
15 interpret that to mean -- "holding in abeyance"
16 means it's part of consideration to suspend, and
17 that's within the realm of DAR.

18 Q But the words "held in abeyance" aren't
19 part of the -- those aren't words you find in DAR,
20 right, sir?

21 A I would have to check the DAR verbatim.

22 JUDGE GROSSBAUM: How about the DAR
23 section in Appendix E that deals with progress
24 payments? You testified -- in earlier testimony you
25 seemed to wish to convey to the Board the view that

1 you are quite well versed in the requirements of the
2 DAR as it pertains to progress payments. Do you
3 think without reading it verbatim that you could
4 answer the question about the term "held in
5 abeyance"?

6 THE WITNESS: Okay. My best guess is --

7 JUDGE GROSSBAUM: We don't want you to
8 guess. We want you to testify as to your knowledge.
9 You conveyed to us the impression that you're very
10 knowledgeable about what the DAR provides.

11 THE WITNESS: Well, see, I don't want to
12 say something absolute that may be proven to be
13 incorrect afterwards. All I can say, Your Honor, in
14 honesty, is, I do not recall ever seeing the word
15 "abeyance". That does not mean it's not there.

16 But there is the provision for -- that
17 we do not suspend progress payments -- it's
18 considered an extreme situation, an extreme action;
19 and before we consider suspending progress payments,
20 the ACO and the contractor have intensive
21 discussions. It's something we just don't do
22 arbitrarily.

23 And during these intensive discussions
24 and ACO review of the progress payment problem, I
25 would interpret that to mean that the progress

1 payment is held in abeyance while the ACO is
2 considering his action and discussing the matter
3 intensively with the contractor. There's a dialogue
4 between the contractor and, you know, and the ACO
5 and the PCO.

6 And so, I would say the word "abeyance"
7 would apply, but whether or not it's mentioned in
8 the DAR -- I mean I've never seen it, but that
9 doesn't mean it's not there. But the principle is
10 the same, and whether you call it abeyance or
11 holding it for consideration of suspension, it means
12 the same thing.

13 JUDGE GROSSBAUM: Thank you.

14 BY MR. MacGILL:

15 Q Sir, would you refer to M-47?

16 A I do not have M-47.

17 Q I'm sorry, M-46.

18 A Was that one of the documents that you
19 gave me yesterday?

20 Q M-46.

21 A Could you point it out to me please?
22 Okay.

23 Q Sir, first, just so we're clear, M-46,
24 is that a memo that you personally wrote on the 12th
25 of January 1987?

1 A That is correct.

2 Q And, obviously, that was before you sent
3 your January 26th letter.

4 A That is correct.

5 Q Now, there had been certain
6 deliberations by the Government, had there not, in
7 terms of what was going to happen under this
8 contract, prior to the time of your January 26th
9 letter?

10 A Well, I'm not sure what you mean by
11 "what was going to happen under this contract".

12 Q Well, there was a Government meeting on
13 the 30th of December, wasn't there?

14 A Yes, there was a meeting at DLA
15 Headquarters on the 30th of December.

16 Q And you were a participant in that
17 meeting?

18 A I was an attendee at the meeting, yes.

19 Q And as a matter of fact, you had drafted
20 your letter advising Freedom of a possible
21 suspension as of January 12, 1987.

22 A That is correct.

23 Q And it was held up because you wanted to
24 have it looked at by Counsel at DCASR, New York.

25 A That is correct.

1 Q And some, what, eleven days later, it
2 went out?

3 A That is correct.

4 Q Now, let's go here, in terms of your
5 meeting on December 30, 1986, it was basically
6 decided that the Government was not going to
7 exercise any termination.

8 A "At this time".

9 Q All right.

10 A Those are the words here, "at this
11 time".

12 Q Well, specifically, it was decided by
13 DLA and DPSC, that they had elected not to exercise
14 the Government's right to terminate for default the
15 undelivered portion of the contract.

16 A "At this time".

17 Q Right.

18 A At that time.

19 Q Now, you, then, put a conclusion on the
20 next page of this, didn't you, sir, in your
21 memorandum of 12 January 1987, and you stated, did
22 you not, in your memorandum, that "DLA and DPSC have
23 been totally briefed regarding the matter, but have
24 elected to forebear at this time"?

25 A That is correct.

1 Q Your word was "forebear"?

2 A That is correct.

3 Q Now, you wrote some more memos, did you
4 not, sir, relating to this whole subject of
5 forbearance?

6 A Well, I'd have to check the other memos;
7 obviously, related to the subject, but I'd have to
8 check the other memos to see if the word "forebear"
9 is there.

10 Q Would you refer to the next memorandum,
11 sir?

12 A Okay, that would be --

13 Q M-47.

14 A -- M-47. Okay.

15 Q Is that a memorandum that you wrote on
16 January 16, 1987?

17 A Yes.

18 Q And, again, you confirmed a few days
19 later, that the Government had elected not to
20 terminate for default the undelivered portion of the
21 contract; that is, the 107,000 cases "at this time".

22 A Correct.

23 Q And you didn't agree with that, did you,
24 sir?

25 A That's not correct.

1 Q Oh, you agreed --

2 A Wait, wait, wait. Let me backtrack a
3 second.

4 Q Well, my sole question is this, did you
5 or did you not agree that the Government should
6 forebear?

7 A I would have to check the record on
8 that.

9 Q So you don't remember?

10 A I don't want to say something that may
11 not be true. I'd have to check the record.

12 Q Well, let's go forward on the record to
13 January 23, 1987.

14 MR. MacGILL: And, Your Honor, I've
15 supplied this -- this was not in the binder that Mr.
16 Liebman and the Government submitted. I did provide
17 a copy the first thing this morning.

18 JUDGE GROSSBAUM: We'll mark this as A-3
19 for identification. It's one page.

20 (Whereupon, the document
21 referred to was marked for
22 identification as Appellant's
23 Exhibit Number A-3.)

24 BY MR. MacGILL:

25 Q With reference to A-3, is this another

1 one of your memoranda?

2 A What's A-3?

3 Q A-3 is what -- is this memorandum,
4 January 23, 1987.

5 A That is correct.

6 Q All right.

7 MR. MacGILL: Your Honor, we would ask,
8 if the Government has no objection, that the January
9 23, 1987 memorandum, marked as A-3 by the Board, be
10 received as part of the record on this.

11 MS. HALLAM: No objection.

12 JUDGE GROSSBAUM: Okay, without
13 objection, Appellant's Exhibit A-3 for
14 identification is admitted as Appellant's Exhibit
15 A-3. This is a one-page 23 January 1987 point paper
16 prepared by the witness, and the words "for
17 identification" are deleted.

18 (Whereupon, the document
19 referred to, previously marked
20 for identification as
21 Appellant's Exhibit Number
22 A-3, was received into
23 evidence.)

24 MR. MacGILL: Thank you, Your Honor.

25 BY MR. MacGILL:

1 Q Mr. Liebman, in this memorandum, January
2 23, 1987 -- well, first of all, I think we've
3 established it, but I'll make sure; this is your
4 memorandum?

5 A That is correct.

6 Q You wrote it on or about January 23,
7 1987.

8 A Correct.

9 Q And you confirmed once again, didn't
10 you, sir, that the Government elected not to
11 terminate for default the undelivered portion of the
12 contract; i.e., the 107,842 cases "at this time"?

13 A "At this time", correct.

14 Q And you were referencing, once again,
15 this December 30 meeting.

16 A Correct.

17 Q Now, you then reference a letter from
18 Freedom dated January 15, 1987 requesting a revision
19 of the delivery schedule, right?

20 A Correct.

21 Q And do you know what happened with
22 respect to that delivery schedule revision?

23 A I would have to check the record.

24 Q You don't know?

25 A I would have to check the record.

1 Q I don't want to argue with you, sir, I
2 just want to make sure we're clear that you don't
3 know, without looking at the record.

4 A My statement is I would have to check
5 the record.

6 Q All right.

7 JUDGE GROSSBAUM: Do you know without
8 checking the record?

9 THE WITNESS: No.

10 JUDGE GROSSBAUM: Okay.

11 THE WITNESS: Okay.

12 BY MR. MacGILL:

13 Q Now, you then refer, sir, to the ACO
14 letter advising Freedom that suspension of progress
15 payments is being considered, "has been reviewed by
16 DCASR, New York, Office of Counsel, and will be
17 forwarded to Freedom during the week of January 26."
18 That's the January 26 letter you've already
19 testified about?

20 A Correct.

21 Q Now, you will agree, won't you, sir,
22 that you didn't tell Freedom anything about the
23 Government's decision not to terminate for default
24 in your January 26 letter?

25 A May I go back to my letter? Let me go

1 back to my letter before I answer that. I just want
2 to check the letter. Okay, the second page of the
3 letter is blurred here. They talk about delivery,
4 but I can't see why -- I'm talking about status.
5 No, I don't see -- I'm looking at the second page,
6 paragraph D, where it's blurred, it says, "Continue
7 performance of the contract", "Freedom's last full
8 day of production", "he's behind schedule", and the
9 rest is blurred. I don't know, there are like three
10 or four lines here in paragraph D --

11 Q Fine. My only question is, now that you
12 have reviewed the letter, you can pretty much assure
13 us, can't you, sir, that you didn't reference
14 anything about the Government's decision to
15 forebear?

16 A About the Government's decision to
17 forebear?

18 Q Yes, sir.

19 A No, there's nothing here about that.

20 Q All right. Can you tell the Board why
21 you wanted to wait until the week of January 26 to
22 send the letter to Freedom?

23 A Well, because it had to be reviewed by
24 appropriate authorities and I -- the main reviewing
25 entity that I was waiting for was the Office of

1 Counsel.

2 Q But aren't you saying in your own words,
3 sir, on paragraph number 4, that your letter "has
4 been reviewed" as of January 23, 1987?

5 A Right. And, again, I would have to -- I
6 don't know, you know, what happened between the 23rd
7 and the 26th; perhaps there was a weekend, perhaps
8 there was some editing, perhaps --

9 Q I don't want the perhaps or speculation,
10 sir, just, do you know -- can you tell the Board why
11 you wanted to wait until the week of January 26?

12 A Well, first -- I can't tell that without
13 checking the calendar and the records.

14 Q Fine.

15 A I don't know what happened in those
16 three days offhand.

17 Q That's fine.

18 JUDGE GROSSBAUM: Talking about those
19 three days, when was it that Freedom resumed work on
20 the contract?

21 THE WITNESS: I do not know the date
22 offhand.

23 JUDGE GROSSBAUM: Well, I bet you have
24 some documentation in front of you.

25 THE WITNESS: Oh, yes.

1 JUDGE GROSSBAUM: Go ahead and find it.

2 THE WITNESS: Sure.

3 JUDGE GROSSBAUM: Take as much time as
4 you need.

5 THE WITNESS: Okay, again, the first
6 thing I see here right now is Government Rule 4,
7 193.

8 JUDGE GROSSBAUM: Does it refresh your
9 recollection as to when the contractor resumed -- or
10 what you've characterized in other testimony as
11 having "resumed" performance?

12 THE WITNESS: Right. Well, again, I'm
13 reading from the industrial specialist's report. It
14 says here on page 106 at Tab 193, "The contractor
15 resumed accessory production on 20 January 1987.
16 Only one line/table is being utilized. The
17 personnel for this operation provided by United
18 Cerebral Palsy."

19 Then there's a second statement, "The
20 cracker production also resumed on 20 January 1987.
21 The total labor force now stands at approximately 50
22 to 60 employees." This is exclusive of
23 administrative and management personnel, as opposed
24 to the three or four hundred they had before.

25 JUDGE GROSSBAUM: Is 50 or 60 employees

1 an insignificant number of employees for a company?

2 THE WITNESS: Oh, yes, for this -- to
3 resume full production, this is minuscule. They had
4 three or four hundred employees. This would be
5 extremely or very -- very limited production for
6 that company to perform under this contract.

7 And it's saying, "At the present time"
8 --

9 JUDGE GROSSBAUM: Is 50 or 60 employees
10 an insignificant number of employees?

11 THE WITNESS: Well, for this operation
12 and for this contract. In order for them to
13 complete the contract --

14 JUDGE GROSSBAUM: Did he ever have so
15 many employees that he was classified as a large
16 business?

17 THE WITNESS: No.

18 JUDGE GROSSBAUM: "He" meaning Thomas.

19 THE WITNESS: Correct. No, he was never
20 a large business.

21 JUDGE GROSSBAUM: So 50 or 60 employees
22 is a minuscule number of employees for a company?

23 THE WITNESS: Not for a company, but for
24 this contractor to perform on this contract in
25 accordance with the schedule.

1 JUDGE GROSSBAUM: All right. Go ahead.

2 THE WITNESS: Okay. It also --

3 JUDGE GROSSBAUM: No. Oh, do you have
4 something else to tell us on the 20th of January --

5 THE WITNESS: Yes, on the same --

6 JUDGE GROSSBAUM: We only asked you if
7 you knew when he resumed production, and you
8 testified the 20th of January. Did you have
9 firsthand knowledge of that or only what you learned
10 from the industrial specialist?

11 THE WITNESS: Well, at that time I don't
12 recall visiting the plant in January of 1987,
13 although I visited the plant many times.

14 JUDGE GROSSBAUM: Many times before
15 January 1987?

16 THE WITNESS: Oh, many times, yes, yes;
17 and after January 1987 I did.

18 JUDGE GROSSBAUM: No, I just wanted to
19 know many times before January 1987.

20 THE WITNESS: Yes.

21 JUDGE GROSSBAUM: On what degree of
22 frequency?

23 THE WITNESS: Well, it would depend on
24 the situation. Obviously, I would go there when
25 something important was going on.

1 JUDGE GROSSBAUM: What do you consider
2 important?

3 THE WITNESS: Well, we had many big
4 meetings. I mean on a daily basis, no; on a weekly
5 basis, no. But as -- we had many important meetings
6 concerning progress, progress payments; visitors
7 would come from DPSC.

8 JUDGE GROSSBAUM: You didn't refer to
9 any of these big meetings that you had in your
10 letter of January 20 -- January 26, 1987 to Mr.
11 Thomas concerning meetings to discuss progress
12 payments.

13 THE WITNESS: No, we did not have a
14 major meeting -- a meeting at Freedom on this
15 progress payment.

16 JUDGE GROSSBAUM: On number 22.

17 THE WITNESS: On number 22; no, that's
18 correct.

19 JUDGE GROSSBAUM: Okay. Go ahead.

20 BY MR. MacGILL:

21 Q Let's refer to Freedom 193, sir.

22 JUDGE GROSSBAUM: Is that Freedom 193?

23 MR. MacGILL: Freedom 193.

24 JUDGE GROSSBAUM: He had just been
25 referring to Government's 193, hadn't he?

1 MR. MacGILL: Yes, he had.

2 JUDGE GROSSBAUM: Okay.

3 BY MR. MacGILL:

4 Q Sir, I'll put in front of you Freedom
5 193. That's a letter to Mr. Bankoff; is it not,
6 requesting -- making a request for certain
7 accommodations on the delivery schedule; is that
8 correct?

9 A Correct.

10 Q And you understood -- you received a
11 copy of this letter, didn't you?

12 A Well, again, I don't see myself on the
13 distribution list, but that doesn't mean I didn't
14 receive a copy.

15 Q But you did reference this letter
16 specifically in your later correspondence, didn't
17 you, sir?

18 A Are you talking about my January 26
19 letter or a later correspondence?

20 Q In this chain of correspondence that
21 we're going to go through one by one, before we get
22 to them, can you tell the Board whether you remember
23 having seen this January 15, 1987 letter?

24 A I do not recall, but I'm sure if you
25 give me an opportunity I can check.

1 Q Okay. All right, back to A-3, sir,
2 which we just reviewed with you, you say on
3 paragraph 3, this is your memorandum, "Freedom, by
4 letter dated January 15", all right?

5 A Okay. Correct. So I would have to
6 answer in the affirmative then.

7 Q So you knew, based on what you saw on
8 January 15 and what you wrote on January 23, that
9 Freedom was relying on your forbearance -- on the
10 Government's forbearance.

11 A I would say he requested a new schedule.
12 I don't want to -- he requested a new schedule.

13 Q Well, you knew specifically that he was
14 relying on your forbearance by getting 50 to 60
15 employees into the plant to go to work on January
16 20. A The record stands for itself that my
17 reply to your question is that by Freedom's letter
18 dated 15 January, he asked the PCO for a new
19 schedule. That's my response.

20 Q Well, but you wrote --

21 JUDGE GROSSBAUM: Well, we know that's
22 what the document says. We're talking about what
23 you know. We're not asking you to either interpret
24 a document -- we're asking you about an event that
25 took place many years ago in which you had a large

1 hand in the chain of events, and which you have
2 displayed or you have reflected somewhat selective
3 knowledge about your participation in this chain of
4 events.

5 Now you're being asked if based on what
6 you knew in and around the 15th of January or in and
7 around the 26th of January you knew that Freedom had
8 some kind of an expectation which might be
9 characterized as a reliance which was causing them
10 to bring 50 or 60 people back to the facility. What
11 did you do? Or was your mind a blank back then? Or
12 don't you recall what you knew? Or didn't you know
13 anything back then? Give us an answer.

14 THE WITNESS: Again, Your Honor, I'm
15 trying to be as honest as possible, you know. I am
16 honest and I'm trying to answer.

17 JUDGE GROSSBAUM: I'm sure you're
18 trying.

19 THE WITNESS: Believe me, I am. You
20 know, we're talking many years ago and many facts.
21 At the time, I was well-versed in every aspect of
22 Freedom and this contract. Many years have passed
23 and I just don't recall what my thought processes
24 were on everything in January of 1987 or any other
25 time period during this contract.

1 I recollect many, many things. I know
2 where many of the documents are. But to tell me
3 what did I think on every little thing, at a certain
4 day or certain month during that time period; I
5 can't. I don't want to mislead the court, and I'm
6 being truthful by telling you and telling the court
7 that I just either don't recollect -- obviously, at
8 the time I would know what was going on.

9 And, again, I do recollect many things,
10 and there are many documents I can confirm that
11 with. But I don't want to -- I can't give anybody
12 the impression I'm lying or, you know, trying to
13 mislead anybody. That's not my intention. I'm
14 trying to answer the questions as best I can, and if
15 I don't recollect, it's because of the time period
16 and because of the volume of information in
17 documents.

18 I tried to prepare for this case as best
19 as I could. I had other work in the office, as I'm
20 sure everybody else does; and, you know, I'm doing
21 the best I can here. I don't want to mislead
22 anybody.

23 And what I'm saying is, at the time, I
24 was very well-versed in all aspects of this
25 contract. And, again, many years have passed.

1 JUDGE GROSSBAUM: Well, we wouldn't want
2 you to guess or speculate. We just want, you know,
3 what you understood in this chain of events with
4 Freedom's letter requesting a time extension, and
5 with your knowledge that as of the 20th they brought
6 approximately 50 or 60 people back to their plant,
7 what you understood about either Freedom's
8 expectation or reliance on what the Government was
9 doing vis-a-vis their delinquency in meeting the
10 delivery schedule.

11 THE WITNESS: Well, again, with all due
12 respect, Your Honor, the only thing I can do is
13 presume or try to say "this is what I probably would
14 have thought at the time". I can't say with
15 certainty here, now, in 1993, six years later, that
16 this is what I thought six years ago, when I'm not
17 really sure on this particular point.

18 I can say "this is how I probably
19 thought", "this is what I probably would have
20 thought six years ago", but I can't say that --

21 JUDGE GROSSBAUM: Your presumption --
22 what would you presume?

23 THE WITNESS: On this particular point,
24 obviously, I would have considered the letter. That
25 was part of the consideration. Obviously, here,

1 Freedom is asking the PCO for a new schedule. He's
2 asking that progress payments be resumed. Freedom
3 knew that I was considering suspending progress
4 payments.

5 Obviously, what I would have done was
6 talk to the PCO. That's the way they operated. I
7 would have referred to Mr. Bankoff and said, well,
8 okay, what's DPSC's and DLA's intention concerning
9 this procurement? Do we intend to give him a new
10 schedule? You know, please let me know. I won't
11 act until I hear from you.

12 Also, there's the consideration of
13 Freedom's ability to complete the contract.
14 Bankers' Leasing had sort of backed out of the
15 picture, you know, because of the MRE-7 type of, you
16 know, scenario.

17 JUDGE GROSSBAUM: No, we don't know
18 that. We don't know that, but that's -- we'll take
19 that as your testimony.

20 THE WITNESS: Okay. Thank you. So I
21 would say, okay, if you want to reschedule, let me
22 know. Let me know what your position is. But then,
23 as part of your consideration on reschedule or not
24 reschedule, we have to consider the financial
25 wherewithal of the company and his ability to

1 complete the contract. Look at all the risks, let
2 me know, and before you -- and until you let me
3 know, I won't take any final action concerning
4 suspension.

5 I may send him a letter that I'm
6 considering suspending. That just gives him an
7 opportunity to respond. It's not a decision on my
8 part. It's just a consideration. So I wouldn't --

9 JUDGE GROSSBAUM: You're doing a
10 fascinating job retracing the steps, the thought
11 processes that you might very well have gone
12 through.

13 THE WITNESS: Well, this is the way I
14 operate.

15 JUDGE GROSSBAUM: And what we're
16 interested in is something that's responsive to the
17 Board's question, and that is, what was your
18 presumption -- you deal with people in your -- and
19 you deal with contractors. You make assumptions
20 about the good faith, the -- what the contractor's
21 expectations are. What was your understanding given
22 these thought processes that you meticulously
23 describe to us as to when the contractor was relying
24 on the Government's forbearance in bringing its
25 people to the factory on the 20th of January?

1 THE WITNESS: Well, the reason, Your
2 Honor, that I'm reluctant to say absolutely that I
3 did this -- you know, this is the way I operate.
4 The reason I'm reluctant to say 100 percent is
5 because, obviously, the Counsel for the Appellant is
6 far better versed on these documents than I am and
7 he may --

8 JUDGE GROSSBAUM: That has nothing to do
9 with it. This is actually a mental process that
10 we're interested in.

11 THE WITNESS: Right.

12 JUDGE GROSSBAUM: Mr. Thomas will no
13 doubt -- will no doubt testify that he relied on the
14 Government's forbearance; but we just want to find
15 out whether you -- since you're not the PCO, you're
16 not in a position to terminate the contractor for
17 default -- you're almost like an independent person
18 -- and, you know, as an upstanding citizen,
19 objectively, what do you think Freedom's perception
20 of the Government's forbearance was? Why do you
21 think Freedom was bringing 50 or 60 people to the
22 plant on the 20th of January 1987?

23 THE WITNESS: Well, again, I mean I
24 can't put myself in Henry Thomas' brain.

25 JUDGE GROSSBAUM: No, no, don't. Put

1 yourself in the brain of an independent observer who
2 is very well versed in the administration of
3 Government contracts.

4 THE WITNESS: Well, obviously, he was
5 trying to survive. Logically, and as an ACO, my, I
6 guess, interpretation of Freedom's letter is that,
7 hey, he wants to try to continue and complete the
8 contract. He always wanted to be a success. And
9 so, that would be my view of this, that he still
10 wanted to try. He still had hopes and complete --
11 he wanted to complete the contract and he wanted to
12 get MRE-7, and other contracts.

13 JUDGE GROSSBAUM: Okay. So you don't
14 know if he had any bases for -- apart from this
15 selfish desire to complete the contract, and to
16 succeed, if he had any other bases for wanting to do
17 this and for bringing people to the factory on the
18 20th of January?

19 THE WITNESS: Well, if you may -- well,
20 I wouldn't describe it as "selfish".

21 JUDGE GROSSBAUM: Well, certainly, I
22 mean this is a very self-serving thing. He wanted
23 to succeed, and he wanted to get another contract.

24 THE WITNESS: That's correct. As was
25 always the case with Mr. Thomas. And may I get back

1 to what I was saying before? Because, obviously,
2 you know, the other side is -- as familiar with the
3 documents as I am --

4 JUDGE GROSSBAUM: The documents have
5 very little to do with the question of whether or
6 not your perception as an independent person, as a
7 Government official or an ACO who is familiar with
8 the administration of contracts, what contractors
9 want and expect from the Government, and understand
10 by the Government's actions -- that's your
11 familiarity, and reading documents has very, very
12 little to do --

13 THE WITNESS: Well, the reason --

14 JUDGE GROSSBAUM: -- other than the
15 documents you've just been shown, for you to assess
16 whether or not there was some element of reliance.
17 I just want to hear from an independent person,
18 rather than just have to trust Henry Thomas, Thomas'
19 demeanor. I'd like to see whether or not an
20 independent person, like yourself, who has no stake
21 in the outcome of this controversy whatsoever --

22 THE WITNESS: Well, I do.

23 JUDGE GROSSBAUM: -- reputational or
24 otherwise --

25 THE WITNESS: No, I do, Your Honor.

1 JUDGE GROSSBAUM: -- would think the
2 contractor perceived by this chain of events in
3 January.

4 THE WITNESS: May I respond, Your Honor?
5 No, I do have a very big stake, the Government does,
6 because I am responsible for the progress payments.
7 And one of the biggest concerns, as I'm sure Your
8 Honor is aware, is -- to DLA and to DoD, and the
9 Government, is what they call "lost progress
10 payments". It's a very big concern.

11 And, obviously, we had a case here where
12 the Government was exposed several million dollars
13 in unliquidated progress payments. I have to weigh
14 my considerations very carefully, and -- because if
15 the Government loses -- if a company goes under and
16 the Government cannot recover unliquidated progress
17 payments in the way of working process, inventory,
18 all hell comes to bear. And so, I do have a very
19 big stake because I'm responsible for that money.

20 And if something goes wrong, they're
21 going to come to me as the ACO. So I have a very
22 big responsibility, but I have to act fairly.

23 JUDGE GROSSBAUM: Are you sort of like
24 -- do you have an equity interest in the recoupment
25 of the progress payments.

1 THE WITNESS: Well, the Government does.

2 JUDGE GROSSBAUM: No, I'm talking about
3 you personally.

4 THE WITNESS: Personally?

5 JUDGE GROSSBAUM: Yes, personally. Are
6 you personally accountable for those lost progress
7 payments?

8 THE WITNESS: Well, I'm not an expert.
9 I don't think I -- unless I've done something that's
10 illegal, illegal or abuse -- or that I acted outside
11 my authority, I believe -- again, I'm not a lawyer,
12 but I am personally liable as a contracting officer,
13 if I do something that's unlawful and I act with
14 malice and I do something outside the scope of my
15 authority. As long as I'm acting within my
16 authority, I don't think personally they can come
17 after me, my own financial resources.

18 However, I'm subject to disciplinary
19 action internally. I could be reprimanded. I could
20 be fired, if the Government feels I acted
21 improperly, and I didn't act with good judgment.
22 You know, I have a warrant, I have a responsibility.
23 Whether or not they can tap my funds personally, I
24 think that's only if I do something unlawful. But I
25 can be fired. I could lose my job. I could be

1 demoted. I could be reprimanded, if I don't act
2 properly as a contracting officer.

3 JUDGE GROSSBAUM: Why don't you try to
4 answer the question?

5 THE WITNESS: Can I just say one last
6 thing, Your Honor? And it's related to the
7 question. The reason I had to qualify about how I
8 respond, and, you know, the preparation of the
9 Counsel, the reason I'm saying that is because if I
10 say something that might be proven to be
11 contradicted in one of the documents, the Counsel
12 for the Appellant immediately hollers "impeachment".

13

14 JUDGE GROSSBAUM: He's only mentioned
15 that word once.

16 THE WITNESS: Well, he mentioned it
17 informally this morning before -- we had a session.

18 JUDGE GROSSBAUM: Well, you know, for
19 example, we have a document prepared by you that's
20 in the record as Appellant's Exhibit A-2. And
21 you're talking about impeachment. And we have a
22 document in the record that you have been referred
23 to, which was M-46.

24 Now Appellant's Exhibit A-2 is one of
25 your memos dated 10 November 1986. And M-46 is one

1 of your memos dated 12 January 1987. And you,
2 yourself, explained there was a mistake you made.
3 You show in A-2 unliquidated progress payments as of
4 7 November of over \$3 million, and you show on 12
5 January 1987 unliquidated progress payments of \$1.6
6 million.

7 Now one of those figures is wrong,
8 although the dates are different; isn't that
9 correct?

10 THE WITNESS: Well, no. After we left
11 the court yesterday, I had further thoughts, which I
12 conveyed to the other Government people. What I
13 think happened was that --

14 JUDGE GROSSBAUM: No, no. I'm not
15 asking for an explanation, yet.

16 THE WITNESS: Okay.

17 JUDGE GROSSBAUM: I'm just pointing out,
18 is it fair to say that -- or would the Board -- is
19 the Board so uninformed that it can't grasp how
20 unliquidated progress payments went down \$1.4
21 million in two months? Is it fair to say that one
22 of those figures was erroneous?

23 THE WITNESS: No, because -- that's what
24 I was trying to say. I had further thoughts and --

25 JUDGE GROSSBAUM: Just answer the

1 question, yes or no; no, it's not fair to say, that
2 both figures are correct?

3 THE WITNESS: Can I see the other --

4 JUDGE GROSSBAUM: I'll give you the
5 figures again. You don't have to see anything.

6 THE WITNESS: Sure.

7 JUDGE GROSSBAUM: \$3.060 million as of 7
8 November 1986 --

9 THE WITNESS: That's unliquidated
10 progress payments?

11 JUDGE GROSSBAUM: Unliquidated progress
12 payments.

13 THE WITNESS: 7 November 1986, okay.

14 JUDGE GROSSBAUM: And \$1.634 million as
15 of 12 January 1987.

16 THE WITNESS: I'm sorry? \$1. --

17 JUDGE GROSSBAUM: \$1.634.

18 THE WITNESS: As of January --

19 JUDGE GROSSBAUM: 1987.

20 THE WITNESS: Okay. So over a two-month
21 period -- okay, obviously -- okay. Yesterday we
22 didn't address the January figure, but I think I
23 have a logical explanation without confirming the
24 record.

25 JUDGE GROSSBAUM: I'm just asking you,

1 is it your -- are you going to testify that both
2 figures are accurate?

3 THE WITNESS: Well, I didn't have a
4 chance to look at the second figure yesterday, but
5 the first figure, the \$3 million, I now believe that
6 it is accurate based on other thoughts I had after I
7 left the courtroom.

8 JUDGE GROSSBAUM: So then the \$1.6 is
9 probably wrong.

10 THE WITNESS: No, not necessarily,
11 because I think I can explain that.

12 JUDGE GROSSBAUM: Well, let's take the
13 dollar value of the cases shipped. The dollar value
14 of the -- well, I don't know, which is a better
15 figure for determining liquidated and unliquidated
16 progress payments?

17 THE WITNESS: Well, I have --

18 JUDGE GROSSBAUM: The dollar value of
19 cases shipped?

20 THE WITNESS: Well, shipped; that's the
21 way you do it, rather than --

22 JUDGE GROSSBAUM: Okay. Well, let's say
23 that the change in dollar value of cases shipped was
24 only a change of \$175,000.

25 THE WITNESS: Was that the --

1 JUDGE GROSSBAUM: \$275,000. I'm sorry.

2 THE WITNESS: \$275,000.

3 JUDGE GROSSBAUM: It's the difference
4 between the figure for the value of all cases
5 shipped. Now, explain a difference of \$1.4 million
6 in unliquidated progress payments.

7 THE WITNESS: Okay. This is from what I
8 had, okay?

9 JUDGE GROSSBAUM: Well, just explain it.

10 THE WITNESS: Well, this is the
11 explanation I believe could apply to this scenario
12 and why I thought the \$3 million figure is probably
13 correct. Freedom had numerous invoices outstanding
14 in our Office of Finance during that time period,
15 because he had shipped a lot of cases in September
16 and October.

17 I think he shipped 80,000 cases. I'd
18 have to confirm the record. There were a lot of
19 cases shipped in September and October. Now,
20 Freedom's invoices weren't paid on an expedited
21 basis. They were paid within the normal time frame;
22 usually 30 days.

23 So what I was getting at, Your Honor,
24 was the difference between the unliquidated progress
25 payments and dollar value of the cases shipped, was

1 the numerous invoices we had in-house. The contract
2 calls for \$27 a case, roughly. And if he shipped
3 80,000 cases during September and October, and maybe
4 it was even more, I don't know, but he shipped a lot
5 of cases; we're talking a lot of dollars that was
6 outstanding and not paid at that time.

7 So, logically -- and, again, you know,
8 I'd have to check out all the figures and the
9 records to confirm that, but my logical explanation
10 for this was he had a lot of dollars down there that
11 hadn't been paid, and as a result, hadn't been
12 liquidated.

13 JUDGE GROSSBAUM: Hadn't been paid to
14 whom?

15 THE WITNESS: To Freedom; and as a
16 result, had not yet been liquidated. That's why you
17 have that \$3 million figure of unliquidated progress
18 payments. If all those invoices were paid -- were
19 liquidated and the balance paid to Freedom at 5
20 percent, that \$3 million figure would slip down to
21 \$1.6 million, or whatever. That's how I account for
22 the difference between the \$3 million --

23 JUDGE GROSSBAUM: So as far as the
24 unliquidated progress payments are concerned, it's
25 the Government's liquidation of the progress

1 payments by making payments to Freedom on delivery?

2 THE WITNESS: Yes, as Freedom delivers
3 the invoices, and --

4 JUDGE GROSSBAUM: The unliquidated
5 progress payments --

6 THE WITNESS: -- we liquidate 95 percent
7 against the value of the invoice because that's the
8 value of the shipped product, and he gets paid the 5
9 percent -- actually, Bankers' Leasing in this case.

10 So, you've got to figure 95 percent of
11 80,000 cases, or whatever the number of cases was,
12 at \$27 a case; you're talking a lot of dollars that
13 we could liquidate for the invoices that were
14 pending in-house. Invoices are not like progress
15 payments. We expedited progress payments but not
16 the -- the invoices were paid in the normal course
17 of events in the main.

18 JUDGE GROSSBAUM: So the Board would be
19 off the wall in presuming that there was an
20 inconsistency between these two unliquidated
21 progress payment figures?

22 THE WITNESS: Well, I wouldn't say "off
23 the wall". I would just say this would be a logical
24 explanation. And I believe that is the explanation
25 that occurred here, because I checked the various --

1 he delivered a lot of cases during that time period.

2 JUDGE GROSSBAUM: When he delivered
3 cases, he wasn't paid any more money, was he?

4 THE WITNESS: Oh, yes. He was paid the
5 5 percent.

6 JUDGE GROSSBAUM: He's paid the 5
7 percent.

8 THE WITNESS: Yes. Bankers' Leasing is
9 paid 5 percent. So if he shipped 100,000, he would
10 get \$5,000.

11 JUDGE GROSSBAUM: So on his progress
12 payment request where he indicates progress payments
13 paid to date are \$14,000,894, that is not the sum
14 total of all the payment -- of all the payments made
15 to him?

16 THE WITNESS: No, just progress
17 payments.

18 JUDGE GROSSBAUM: And he was actually
19 paid more than \$14,000,894?

20 THE WITNESS: That is correct.

21 JUDGE GROSSBAUM: Did you want to answer
22 the question about your perception of whether or not
23 Freedom might have relied on this chain of events?

24 THE WITNESS: Right. As long as Your
25 Honor understands that it is my perception as to

1 what, you know, could have happened at that time. I
2 just don't want to be accused --

3 JUDGE GROSSBAUM: Obviously. The point
4 is, you voice your perception.

5 THE WITNESS: Obviously, as we said
6 before, obviously, the way I operate --

7 JUDGE GROSSBAUM: What is your
8 perception of what you think Freedom's expectation
9 was?

10 THE WITNESS: Freedom wanted to continue
11 the contract, wanted to perform. He wanted to be a
12 success in this field, in the MRE program.

13 JUDGE GROSSBAUM: Okay. So you haven't
14 been able to assess from the standpoint of an
15 independent observer what Freedom's perception -- or
16 what Freedom's expectations would be from the
17 Government's actions or inactions.

18 THE WITNESS: Well, as an independent
19 observer, not as an ACO? If I just --

20 JUDGE GROSSBAUM: Well, given your
21 qualifications as an ACO, given your expertise. I
22 mean you had then 17 or 18 years of experience in
23 Government contracting.

24 THE WITNESS: Freedom is asking for the
25 Government not to suspend progress payments. He's

1 asking for a new schedule. He's asking for --
2 that's all I can say.

3 JUDGE GROSSBAUM: Do you think he has
4 any expectations which are reasonable?

5 THE WITNESS: That are reasonable?

6 JUDGE GROSSBAUM: Yes, does he have any
7 reasonable expectations that any of these things
8 would be forthcoming?

9 THE WITNESS: Well, as an -- I would
10 have no way of knowing that, Your Honor. I don't
11 know what his thoughts were as an independent
12 observer, as an ACO --

13 JUDGE GROSSBAUM: No, you, as an
14 independent observer.

15 THE WITNESS: Not as an ACO?

16 JUDGE GROSSBAUM: Any way you want to do
17 it. Any way that you can express an opinion whether
18 or not Freedom's expectation that he is not going to
19 be defaulted at that -- as of the middle of January,
20 that might be reasonable.

21 THE WITNESS: To be honest with you,
22 Your Honor, I have no thought one way or the other
23 on the matter, in that particular area. I don't
24 know what the Government's thoughts were.

25 JUDGE GROSSBAUM: And as somebody who --

1 and somebody with all this experience in Government
2 contracts has no reason -- what if you were called
3 upon to testify and asked the question, if Freedom,
4 based on the documents that you looked at -- since
5 your recollection and your knowledge seems to be so
6 dependent on perusal of these documents -- what if
7 Freedom were to say that we understood that the
8 Government was forbearing in terminating us for
9 default, and we had some expectation that we might
10 get a time extension, we were hoping to get some
11 money; would you characterize that as -- that
12 expectation that I've just described to you, would
13 you characterize that as reasonable or unreasonable?

14 THE WITNESS: Well, I'll tell you, I
15 don't have -- I wouldn't at the time, and even now,
16 looking at this, I wouldn't have all the facts. I
17 don't know everything that transpired between
18 Freedom and DPSC.

19 JUDGE GROSSBAUM: Well, just give me a
20 limited -- just based on that limited amount of --

21 THE WITNESS: I would say it's a mixed
22 bag. It could go either way.

23 JUDGE GROSSBAUM: So you wouldn't be
24 qualified to testify then about the reasonableness
25 or unreasonableness of a contractor's expectation?

1 THE WITNESS: In this particular --

2 JUDGE GROSSBAUM: Given the facts that
3 you were given.

4 THE WITNESS: Given the facts I know,
5 speaking right now, 1993, or even if the situation
6 was the same in 1987, given the limited information
7 I have, I wouldn't know conclusively what Mr. Thomas
8 expected or thought -- I wouldn't know conclusively
9 how Mr. Thomas thought the Government would act in
10 this situation in regards to a revised schedule.

11 JUDGE GROSSBAUM: Well, of course, you
12 wouldn't. You're not a mind reader. But you ought
13 to be able to -- you are not qualified to testify as
14 to the reasonableness or unreasonableness --

15 THE WITNESS: Yes. I can say that in
16 this particular case -- you know, obviously, you
17 know, I've been in the Government --

18 JUDGE GROSSBAUM: Now you're changing
19 your testimony.

20 THE WITNESS: Well, the way you worded
21 it is a little different, Your Honor. What I'm
22 getting at is, this is not a clear-cut situation.
23 You have like a balance here. Half you have -- you
24 have one-half and then you have the other half. You
25 have two poles here.

1 It's not -- it's hard to put
2 preponderance on one side or the other. Meaning, is
3 it more likely the Government is going to reschedule
4 and adhere to Henry Thomas' request, or is it
5 unlikely? I look at it as a 50-50 thing.

6 You have a lot of points in the
7 contractor's favor. You have points in the
8 Government's favor. There are a lot of things out
9 there.

10 You have a company that's insolvent,
11 unsatisfactory financial condition, progress payment
12 problems, had accounting system problems, scheduling
13 problems. You had other things where Thomas accused
14 the Government at being at fault. It's not a
15 clear-cut picture where you could say the Government
16 was 100 percent at fault, where you could say, hey,
17 the blame is on the Government, or the blame is on
18 the contractor. There are a lot of factors here
19 that come into play.

20 JUDGE GROSSBAUM: Did you have any
21 difficulty in finding the question that we asked him
22 about -- his last question?

23 (Whereupon, the previous question was
24 electronically replayed.)

25 JUDGE GROSSBAUM: We'll go back again.

1 Please excuse the interruption, but, the question
2 is, are you or are you not qualified to express an
3 opinion about the -- given the facts that have been
4 presented to you, about the reasonableness of
5 Freedom, New York, Inc.'s expectations as to whether
6 or not they would be terminated for default given
7 the events that existed as of the 15th to the --
8 given what they did on the 20th of January, given
9 the events as they should have perceived them, what
10 you know, these limited facts, perceived them on or
11 about the 15th of January 1987? Are you qualified?

12 THE WITNESS: Given those limited facts,
13 Your Honor, no, I am not.

14 JUDGE GROSSBAUM: Okay. Why don't we
15 take a recess for lunch. We'll be back at 2
16 o'clock.

17 (Whereupon, the luncheon recess was
18 taken at 12:34 p.m.)

19

20

21

22

23 A F T E R N O O N P R O C E E D I N G S

24 (2:35 p.m.)

25 JUDGE GROSSBAUM: The hearing will come

1 to order. Resume your cross-examination.

2 MR. MacGILL: Thank you, Your Honor.

3 FURTHER CROSS-EXAMINATION

4 BY MR. MacGILL:

5 Q Mr. Liebman, I want to go back, if we
6 could, to the January 15, 1987 letter sent to you by
7 Mr. Thomas. I believe you had that opened on your
8 binder here. If you -- it would be F-193, sir.

9 A I have it.

10 Q Sir, now I want to be -- just to bring
11 you back up to speed with where we were before
12 lunch, you recall your general line of testimony,
13 you had received this letter from Mr. Thomas, this
14 January 15, 1987 letter.

15 A Well, apparently I received a copy. I
16 didn't receive it directly.

17 Q Right. You received a copy of this
18 letter.

19 A That's correct.

20 Q Now, if you would, sir -- strike that.
21 After you received this letter, you knew, in fact,
22 that Freedom had made a decision to continue
23 production of "meals ready to eat" under this
24 particular contract.

25 A Correct.

1 Q And you further knew, according to this
2 letter, January 15, that Mr. Thomas was going to
3 bring production supervisors and other key
4 production personnel back to resume producing
5 cracker accessory and sub- -- pardon me. You knew
6 that Mr. Thomas was going to bring back production
7 supervisors and other key production personnel
8 relative to producing cracker and accessory
9 sub-assemblies?

10 A Yes.

11 Q And further, you knew that he was
12 intending in the near future beginning that work.

13 A Yes.

14 Q Specifically, you also came to know, did
15 you not, sir, that as of January 20, 1987, he did,
16 in fact, begin sub-assembly production?

17 A Yes, I believe that was the date that
18 was referenced in the industrial specialist's report
19 that we looked at before lunch.

20 Q That's right. And, in fact, he did that
21 specifically in reliance on the Government's
22 forbearance that we described in your testimony this
23 morning.

24 A I wouldn't answer it that way. I'm not
25 in position to answer it that way.

1 Q All right. Maybe I should ask a better
2 question.

3 A Okay.

4 Q You knew that from the December 30, 1986
5 meeting that the Government had decided to forbear,
6 correct?

7 A Yes.

8 Q And you knew that that decision had
9 continued in January.

10 A That is correct.

11 Q And, in fact, you wrote about that
12 several times in your memoranda during the month of
13 January 1987.

14 A Right.

15 Q Now, in terms of what happened next
16 relative to those sequences -- or that sequence, Mr.
17 Thomas began production again on January 20, 1987.

18 A Correct.

19 Q Then he got your letter shortly
20 thereafter; that is, on or around January 26, 1987,
21 saying you were "considering suspending progress
22 payment".

23 A Correct.

24 Q You didn't tell him -- strike that.
25 Sir, you wrote a memorandum to your file on January

1 30, 1987, which is M-45, correct?

2 A May I have the opportunity to look at
3 this?

4 Q Sure.

5 A Yes.

6 Q And, specifically, sir, in M-45, you
7 referenced the fact that Freedom's January 15, 1987
8 letter was still under evaluation.

9 A Yes.

10 Q Now, the Government is still making an
11 evaluation on the one hand, while Mr. Thomas is
12 recalling 40 to 50 employees on the other, at that
13 point in time; correct, sir?

14 A Correct. Well, I'm not sure how many
15 employees, but he was recalling employees.

16 Q Well, I thought that you wrote about the
17 number of employees; didn't you, sir?

18 A Oh, okay.

19 Q And I think it was 50 to 60 by your
20 numbers.

21 A Okay. I'll accept that at face value.
22 Which document are you referring to?

23 JUDGE GROSSBAUM: What document did you
24 refer to when you got the figure 50 to 60? What
25 document did you refer to? There's an industrial

1 specialist's report that you referred to. Is that
2 in the record?

3 THE WITNESS: Yes, it is, Your Honor.

4 JUDGE GROSSBAUM: Could you identify it
5 by tab?

6 THE WITNESS: Well, if you give me a
7 minute. Yes, I have that figure. It's Government
8 Rule 4, Tab 193, page 106.

9 BY MR. MacGILL:

10 Q And is that your February 6 --

11 A No, I'm looking --

12 JUDGE GROSSBAUM: No, we're looking for
13 the industrial specialist's report; is that correct?

14 THE WITNESS: Yes, it's 5 February 1987,
15 industrial specialist's report.

16 JUDGE GROSSBAUM: And that was page what
17 at 193?

18 THE WITNESS: Page 106.

19 JUDGE GROSSBAUM: Okay.

20 BY MR. MacGILL:

21 Q Now, sir, back to the Freedom letter,
22 February 15, that had an appendix, did it not, Mr.
23 Liebman?

24 JUDGE GROSSBAUM: That was January 15.

25 MR. MacGILL: Thank you, sir.

1 THE WITNESS: Appendices.

2 BY MR. MacGILL:

3 Q Yes, it had appendices, and as the Board
4 has corrected me, that's the January 15, 1987
5 letter; is it not, sir?

6 A Yes.

7 Q Now, one of the appendices; that is,
8 Appendix B, references the GFM that's needed by
9 Freedom as of January 15 for them to complete the
10 MRE contract, correct?

11 A Correct.

12 Q So you knew when you got this letter
13 that there was a substantial amount of GFM needed
14 for Freedom to complete the contract.

15 A I would say GFM. Whether or not it's --
16 well, let's say GFM. Whether it's substantial or
17 not, I'm not --

18 Q Again, I don't want to argue with --

19 A GFM. GFM.

20 Q I don't want to argue with you, sir,
21 about what is substantial or not, but isn't 108,500
22 pieces of turkey substantial?

23 A I would say there were numerous items of
24 GFM --

25 Q 162,000 pieces of grape jelly?

1 A Numerous items of GFM that was required.

2 Q All right.

3 JUDGE GROSSBAUM: Now, you've expressed
4 opinions about the substantiality of 50 or 60
5 employees at Freedom's plant, in light of what it
6 would take to perform the contract; is that correct?
7 You've expressed that opinion?

8 THE WITNESS: Yes.

9 JUDGE GROSSBAUM: But you're not in a
10 position to express an opinion about the
11 substantialities of these quantities of GFM that are
12 listed in Appendix B to the letter.

13 THE WITNESS: That's not correct.

14 JUDGE GROSSBAUM: Oh, you are in a
15 position to express --

16 THE WITNESS: I'm in a position to say
17 that it appears not to be substantial, because when
18 you have some knowledge of the MRE -- of this MRE
19 contract, you would know that the components
20 involved with the MRE's were in the millions,
21 multiple millions; and hundreds of thousands are a
22 small portion of multiple millions.

23 JUDGE GROSSBAUM: Well, what are the
24 multiple millions of the -- at this stage where you
25 still have about 100,000 cases that are --

1 THE WITNESS: Again, I'm trying to
2 recollect. Each case had "X" number of MRE's. And
3 let's just take an individual MRE. I don't know if
4 you're familiar with what MRE is, but it's a packet
5 -- it's a meal. It's a meal packet in a plastic
6 pouch, consisting of various components; a desert.
7 It could be toilet paper, whatever, sugar, coffee,
8 spoons, forks.

9 You know, in those days I had firsthand
10 information as to what the quantities were, but each
11 packet maybe had -- could have, I don't know, 15 or
12 20 components in each meal bag. And in each case,
13 when you're talking of a case, that case had "X"
14 number of meals in that case.

15 JUDGE GROSSBAUM: What would the "X" be,
16 since you --

17 THE WITNESS: Well, right here and now I
18 cannot give you numbers.

19 JUDGE GROSSBAUM: Is there any way you
20 can find out?

21 THE WITNESS: Yes. I could ask Mr.
22 Bankoff, if I may, who is surely more familiar with
23 quantities and things like that than I am as the
24 PCO, because he was buying these items. Also, I can
25 check with my industrial specialist, Mr. Troiano,

1 who, I'm sure, is more familiar with this.

2 JUDGE GROSSBAUM: Did you know at one
3 time how --

4 THE WITNESS: Oh, yes.

5 JUDGE GROSSBAUM: -- how many packets
6 went into a case?

7 THE WITNESS: Oh, yes. How many packets
8 went into a case, and so on and so forth; and
9 components were in the millions. It had to be
10 tracked by a special computerized system. So that's
11 why I'm saying --

12 JUDGE GROSSBAUM: How many millions per
13 case?

14 THE WITNESS: I can't answer that right
15 now, Your Honor. At the time, I could answer that.
16 All I know in a general way that you're talking a
17 lot of components, and if you have ever --

18 JUDGE GROSSBAUM: When you're talking
19 components, you're talking components like turkey
20 and beef slices; that's a component?

21 THE WITNESS: Oh, yes. Applesauce,
22 jelly; sure, that's a component of the meal.

23 JUDGE GROSSBAUM: Now, let's take a
24 figure like 108,000, turkey, 108,000 pieces of
25 turkey. How many pieces of turkey would there be in

1 a single meal?

2 THE WITNESS: Well, obviously, one in a
3 meal.

4 JUDGE GROSSBAUM: Nothing is obvious to
5 me or to the Board since we don't know anything.

6 THE WITNESS: Right.

7 JUDGE GROSSBAUM: As you have so
8 astutely observed. We don't know anything about
9 MRE's.

10 So one turkey and -- you don't know how
11 many MRE's to a case.

12 THE WITNESS: I did. I can't tell you
13 that now, Your Honor.

14 JUDGE GROSSBAUM: Would there be a
15 turkey meal -- would every MRE be a turkey meal?

16 THE WITNESS: No. That's just one type
17 of meal.

18 JUDGE GROSSBAUM: Could there be 144
19 MRE's to a case?

20 THE WITNESS: I wouldn't even want to
21 speculate.

22 JUDGE GROSSBAUM: Could there be 12
23 MRE's to a case? Did you ever see a case?

24 THE WITNESS: Oh, yes.

25 JUDGE GROSSBAUM: What's the

1 configuration of a case?

2 THE WITNESS: It sort of looks like a
3 beer case to the best of my recollection. It's a
4 rectangular type of thing.

5 JUDGE GROSSBAUM: About how high is it?

6 THE WITNESS: I don't know, maybe six
7 inches. I just don't recall exactly.

8 JUDGE GROSSBAUM: Six inches high.
9 What's the length and what's the width?

10 THE WITNESS: Not to hold me to this.
11 I'm trying to guess to the best of my ability. I
12 don't know, maybe two feet. It's sort of like these
13 old victrolas, I would guess, or a beer case, maybe
14 larger. And, of course, the meal packets are small.
15 You know, you're talking -- it's small and it's, you
16 know -- again, I can't give you numerics, but I can
17 just talk in a general way.

18 JUDGE GROSSBAUM: Okay.

19 THE WITNESS: That's why I'm trying to
20 relate this -- I didn't want to say something was
21 substantial when on the surface compared to the
22 whole -- to 100,000 cases, it may not be
23 substantial. And I don't want to say something that
24 may be untrue.

25 JUDGE GROSSBAUM: Since you don't want

1 to say it's substantial, do you want to say
2 categorically that it's insubstantial?

3 THE WITNESS: I would say numerous.

4 JUDGE GROSSBAUM: No, would you say
5 insubstantial?

6 THE WITNESS: I'm not prepared to say
7 that.

8 JUDGE GROSSBAUM: You're not prepared to
9 say either substantial or insubstantial; is that
10 correct?

11 THE WITNESS: I would say numerous.

12 JUDGE GROSSBAUM: I'm not asking what
13 you would say. I'm just asking --

14 THE WITNESS: That is correct.

15 JUDGE GROSSBAUM: -- you, if you had to
16 choose between saying substantial and insubstantial,
17 you are not prepared to say --

18 THE WITNESS: I would say I can't
19 choose.

20 JUDGE GROSSBAUM: So it could be either.

21 THE WITNESS: I'm saying it's possible.

22 JUDGE GROSSBAUM: If those were the two
23 choices, it could be either substantial or
24 unsubstantial.

25 THE WITNESS: I feel I would be

1 perjuring myself, to be honest with you, if I
2 answered that without a qualification. I would have
3 to qualify my answer.

4 JUDGE GROSSBAUM: No, if those were the
5 two choices, then you wouldn't be prepared to say --

6 THE WITNESS: That's correct.

7 JUDGE GROSSBAUM: And, therefore, we
8 might infer that it could be either substantial or
9 insubstantial.

10 THE WITNESS: One might, sure.

11 JUDGE GROSSBAUM: Okay. Go ahead.

12 MR. MacGILL: Thank you, Your Honor.

13 BY MR. MacGILL:

14 Q Mr. Liebman, I just want to get -- I
15 want to get even some more detail on what you
16 learned from Appendix B. You also learned that Mr.
17 Thomas had to have these GFM materials not later
18 than either the 23rd of January or the 30th of
19 January, 1987; is that correct?

20 A That is correct.

21 Q And that's what "NLT" means in the
22 right-hand column, correct?

23 A That is correct.

24 Q Now, while Mr. Thomas is saying he --
25 he's telling the Government he must have those

1 materials to continue "not later than", the
2 Government on January 30 is still evaluating his
3 request of January 15, which specifies that he needs
4 the materials by 23 January or 30 January, correct?

5 A Correct.

6 Q Now, the Government never supplied this
7 GFM, did it, sir?

8 A I cannot answer that without checking
9 the record, the various reports. I can't give you
10 an off-the-cuff answer.

11 Q As you sit here today, you have no
12 knowledge whatsoever about whether this GFM was
13 delivered?

14 A That is -- well, I have no recollection
15 right now, many years later; and I don't want to
16 lie, and I would have to check the record. I'm sure
17 it's in the record. The trip reports are here, and
18 my point papers are here. But I don't want to say
19 something that I do not accurately recollect.

20 Q All right. What you do remember is on
21 January 15, the first page of that letter, he's
22 telling you that he's going to start up production,
23 right?

24 A Well, that's self-explanatory.

25 Q Right.

1 A That's correct.

2 Q The second major component, as far as
3 you were concerned in the administration of the
4 contract, was he told you that he absolutely had to
5 have GFM by a date certain, right?

6 A That's what the letter says, yes.

7 Q And on January 30, by your own
8 memorandum, you are writing that Freedom's January
9 15 letter is still under evaluation, correct?

10 JUDGE GROSSBAUM: I think, again,
11 Counsel, not to mislead; the letter was not
12 addressed to Mr. Liebman. Mr. Liebman is either
13 copied on it or he's somehow a recipient.

14 But the letter is to the PCO, and it's
15 the PCO who is doing the evaluation. So if anybody
16 is to be cajoled for not acting on this letter, it's
17 not Mr. Liebman as such. The actions that are
18 called for are actions that are within the realm of
19 the PCO.

20 MR. MacGILL: I stand corrected. I
21 apologize.

22 JUDGE GROSSBAUM: Okay.

23 BY MR. MacGILL:

24 Q Mr. Liebman, continuing with what your
25 involvement was, and I need to continue to make a

1 better distinction, Mr. Liebman, between the PCO, as
2 the Board has admonished me, and your activities.

3 On February 6, 1987, you wrote another
4 memorandum, did you not, sir?

5 A Can we refer to it?

6 Q Yes, and I gave a copy to your Counsel
7 this morning.

8 MR. MacGILL: Your Honor, let me give
9 you a copy also. Your Honor, this is a 6 February
10 1987 memorandum.

11 JUDGE GROSSBAUM: Mark it as A-4 for
12 identification.

13 (Whereupon, the document
14 referred to was marked for
15 identification as Appellant's
16 Exhibit Number A-4.)

17 MR. MacGILL: If Government's Counsel
18 has no objection, I would ask that it be made a part
19 of this record.

20 JUDGE GROSSBAUM: Well, let's identify
21 it first.

22 BY MR. MacGILL:

23 Q Mr. Liebman, is this a memorandum that
24 you authored on or around February 6th, 1987?

25 A Yes.

1 Q And you did so in your capacity as an
2 ACO?

3 A Yes.

4 Q And, I take it, this was maintained
5 among your files at DCASR, New York?

6 A Yes.

7 JUDGE GROSSBAUM: Offered?

8 MR. MacGILL: Offered.

9 JUDGE GROSSBAUM: Offered. Objection?

10 MS. HALLAM: None.

11 JUDGE GROSSBAUM: Okay. Without
12 objection, Appellant's Exhibit A-4 for
13 identification is admitted as Appellant's Exhibit
14 A-4. It is a one-page memorandum called a "point
15 paper", dated 6 February 1987, and it's prepared by
16 Marvin Liebman. And the words "for identification"
17 will be deleted.

18 (The document referred to,
19 previously marked for
20 identification as Appellant's
21 Exhibit Number A-4, was
22 received into evidence.)

23 BY MR. MacGILL:

24 Q Mr. Liebman, in paragraph A of this, you
25 were then acknowledging in writing what you had

1 understood, as of the time of this memo, that
2 production had, in fact, restarted.

3 A In a limited capacity, yes.

4 JUDGE GROSSBAUM: Where do you say
5 "limited capacity"?

6 THE WITNESS: Well, from my knowledge of
7 this operation; cracker and accessory packets are a
8 minimal part of the MRE.

9 JUDGE GROSSBAUM: You're good at
10 providing assessments of minimal, not of
11 substantiality and insubstantiality. Would you say
12 that packets and crackers and accessory packets are
13 insubstantial?

14 THE WITNESS: Yes. If you look at the
15 second paragraph, B, this is the key. "There is no
16 activity in the meal bag in final assembly areas.
17 That's the crux of the operation. That's the crux
18 of the assembly operation. Crackers and accessory
19 packets are a minor portion of the MRE assembly --

20 JUDGE GROSSBAUM: This is based on what?
21 On the industrial specialist's report or on your
22 visit?

23 THE WITNESS: No, this is based on
24 production input, my industrial specialist; and
25 also, the Army veterinarian --

1 JUDGE GROSSBAUM: Okay. You did not
2 personally observe this?

3 THE WITNESS: No.

4 JUDGE GROSSBAUM: This situation. Okay.

5 MR. MacGILL: If I may, relative to the
6 Board's line of questioning there, there's another
7 exhibit that we would like to submit now for
8 identification purposes, A-5. This was provided to
9 the Government this morning, as well.

10 JUDGE GROSSBAUM: Okay, we'll mark this
11 plant visit report as -- dated 5 February 1987, as
12 A-5 for identification.

13 BY MR. MacGILL:

14 Q Mr. Liebman, with reference to what has
15 been marked for identification only at this time as
16 A-5, is this a plant visit report that you received
17 from Mr. Roy Troiano --

18 JUDGE GROSSBAUM: That's the same thing
19 that's in the record. That's page 106 of Tab 193,
20 except for the fact that the one that's in the
21 record has Mr. Bankoff's name printed in. So,
22 obviously, the one that's in the record was Mr.
23 Bankoff's copy. But, otherwise, unless there's
24 something special on here --

25 MR. MacGILL: There is not, Your Honor.

1 JUDGE GROSSBAUM: Okay.

2 MR. MacGILL: We may just have not seen
3 that this was in the record.

4 JUDGE GROSSBAUM: There is something
5 that is different. There is a marking "no GFM" on
6 this thing -- on this A-5, that doesn't appear at
7 page 106. So is there any significance to that?

8 MR. MacGILL: That may well have been
9 our marking. So if the Board -- we're not
10 interested in putting our markings before the Board
11 on the exhibits, Your Honor.

12 JUDGE GROSSBAUM: If that's the case, it
13 duplicates what we've already got.

14 MR. MacGILL: And we will not offer
15 this. But if I may use it just for reference -- or
16 if you would prefer, I will refer him to 206.

17 JUDGE GROSSBAUM: It's interesting. You
18 have this marked as F-206. Is this your F-206?

19 MR. MacGILL: We think so. I wasn't
20 able to check that this morning before coming to
21 court.

22 JUDGE GROSSBAUM: Because it's the
23 Government's 193, page 106.

24 MR. MacGILL: Let me proceed -- if the
25 Board is comfortable, I will -- just having

1 refreshed his memory, go on with some questions
2 apart from the document, if I can, sir.

3 BY MR. MacGILL:

4 Q Mr. Liebman, I take it that at the time
5 that you wrote what's been received in the record --

6 A I'm sorry?

7 Q At the time you wrote the February 6
8 memo, which has been received as A-4 --

9 A Okay.

10 Q -- that you had in your possession the
11 document -- the plant visit report by Mr. Troiano.

12 A Well, if I didn't have the report, I'd
13 have the verbal information. You know, it depends
14 on -- I would say it seems logical I would have it,
15 but surely, I would have his verbal information.

16 Q Well, fine. And you knew, for example,
17 when you wrote the February 6, 1987 memorandum, that
18 the contractor had said that the meal bag and final
19 assembly could not resume without the GFM requested
20 in the July 15 letter.

21 A Oh, yes, yes.

22 Q Now, you understand also at the time you
23 wrote the February 6, 1987 letter, that Freedom's
24 January 15 letter request for a revised delivery
25 schedule, and for GFM was still under evaluation by,

1 now, DLA Headquarters, and the PCO.

2 A Yes.

3 Q Why was DLA Headquarters now involved,
4 in addition to Mr. Bankoff?

5 A Well, they were involved, not just now,
6 regarding this matter, but earlier. They got --
7 concerning this scenario. I mean DLA Headquarters
8 was involved from day one. But in regards to this
9 scenario, they were involved at the start of the
10 shutdown. And that was one of the reasons we had
11 the meeting in Admiral McKinnon's office on 30
12 December 1986. So they were involved beforehand,
13 not just on or about February 1987.

14 Q Now, sir, all the while, you continued
15 to hold progress payment 22 in abeyance, as you say.

16 A That is correct.

17 Q You had not done anything beyond your
18 written statement in late January 1987 that you were
19 considering suspending.

20 A I don't recall any letters to Mr.
21 Thomas. I'm sure there were discussions, because
22 Marra would call almost everyday, so I'm sure there
23 were status discussions to what my, you know,
24 position still was. I don't recall any other
25 letters at that time going to Freedom, although it's

1 possible there may be some document, you know, here
2 in the files. But there were ongoing discussions
3 all the time.

4 Q Now, sir, one of the final documents
5 that I want to ask you about is a point paper that
6 you wrote on February 12, 1987. Is this a document
7 --

8 A Could you refer me to the --

9 Q Do you recall writing a point paper on
10 February 12, 1987?

11 A I don't recall the date, but I'm sure if
12 you have it, I wrote it. May I see it or may you
13 refer me to the tab, so I can speak intelligently on
14 it.

15 MR. MacGILL: Your Honor, this one, I
16 think I am correct in saying I don't think this was
17 produced in the Government's file.

18 JUDGE GROSSBAUM: Very well. We're
19 going to mark this as A-5. We're going to return
20 the A-5 for I.D., previously, as being duplicative.
21 And we're marking this two-page document, dated 12
22 February 1987, as A-5 for identification.

23 (Whereupon, the document
24 referred to was marked for
25 identification as Appellant's

Exhibit Number A-5.)

BY MR. MacGILL:

Q Sir, is this a memorandum that you personally authored?

A Oh, yes.

Q On or about February 12, 1987?

A Yes.

Q And you did so in the course of your work as an ACO?

A Yes.

Q And I take it this document has been maintained among your files at DCASR, New York?

A Yes.

MR. MacGILL: Your Honor, if the Government has no objection, we would offer this to be a portion of the record.

MS. HALLAM: No objection.

JUDGE GROSSBAUM: Without objection, Appellant's Exhibit A-5 for identification is admitted as A-5, and the words "for identification" are deleted, and A-5 can be described as a two-page point paper dated 12 February 1987, and signed by Marvin Liebman.

(The document referred to, previously marked for

1 identification as Appellant's
2 Exhibit Number A-5, was
3 received into evidence.)

4 BY MR. MacGILL:

5 Q Mr. Liebman, this point paper was
6 authored for what reason?

7 A Well, I was required to brief our DCASMA
8 and DCASR commanders via a point paper or a fact
9 sheet every week, in addition to other reporting
10 requirements that I had to comply with.

11 Q Well, did you want this point paper to
12 be used in connection with the Government's decision
13 of whether to terminate this contract?

14 A Oh, no. This is just a status because
15 of the high visibility of the Freedom contract. Our
16 commanders wanted to be briefed on a weekly basis,
17 and sometimes more frequently than weekly if there
18 was a significant development during that week. So
19 it's just for status. That's all.

20 Q Now, you say here, as of February 12,
21 1987, that there was a delinquency in terms of
22 delivering certain cases. Correct?

23 A Yes.

24 Q And there were cases due on 15 November
25 1986; is that right?

1 A Yes.

2 Q Now, at the time that you wrote this
3 memo on February 12, 1987, you knew that the cases
4 to be delivered on February 19 -- pardon me, on
5 November 15, 1986, were going to be hard for Freedom
6 to deliver given the fact that they hadn't been paid
7 after October 9.

8 A Oh, yes, yes.

9 Q And you then wrote in the next column
10 that the cause of the delinquency was the financial
11 cash flow problems, right?

12 A Yes.

13 Q And you knew that a large part of the
14 financial problems was the fact that the Government
15 was not paying Freedom.

16 A The Government paid Freedom what it
17 could under the circumstances.

18 Q Well, I didn't ask that. You knew that
19 a large part of the reason that Freedom was having
20 financial and cash flow problems was the Government
21 was not paying Freedom's progress payment --

22 A Are we talking about progress payment 22
23 or prior progress payments?

24 Q Either one. Not 22, but prior to this.

25 A Prior to that time, the Government paid

1 -- in my capacity as ACO, paid Freedom what I could
2 in accordance with our regulations. That's my
3 answer. I paid them whatever I could in accordance
4 with the regulations.

5 Q You paid them what you thought you
6 should pay them in the exercise of your judgment.

7 A In the exercise of my judgement as ACO,
8 which I believe was in compliance with the DAR
9 regulations, I paid what I could under the contract
10 -- on the specific progress payment requests.

11 Q And you knew that you had paid in the
12 last several months of this contract leading up to
13 the payment on October 9, you knew that you had paid
14 them substantially less on at least three progress
15 payments than DCAA recommended.

16 A I paid them justified amounts -- amounts
17 that are justified.

18 Q My question is not what you justified,
19 but I want to compare what you paid with DCAA
20 requests on at least three progress payments late in
21 the contract.

22 A Well, back -- DCAA requests or Freedom's
23 requests? Are you talking about Freedom's requests?

24 Q I misspoke.

25 A Okay, yes --

1 Q You paid Freedom in the last months of
2 the contract more than \$840,000 less than DCAA
3 recommended.

4 A I can't answer that without comparing
5 audit reports, again, with what I paid. All I can
6 see is, following the chart, I can just say I paid
7 them less than they requested because I made what I
8 deemed to be justifiable reductions. In order for
9 me to compare what I paid with what DCAA was
10 recommending, I'd have to go back and start
11 comparing audit reports again and progress payments
12 with my signature.

13 Q Back to February 12, you again,
14 referenced the fact that DLA Headquarters and DPSC
15 elected to forebear, and not terminate for default
16 on the undelivered portion of the contract.

17 A Okay. Where are you looking at right
18 now? Which paper?

19 Q The front page of the point paper.

20 A Of the 12 February paper?

21 Q Yes.

22 A Oh, okay. I see. Right. Right.
23 That's about towards the middle of the page? Yes.
24 Yes, that's correct.

25 Q Now, in your previous memoranda, where

1 you had referenced the election to forebear by the
2 Government, and the election not to terminate by the
3 Government, you always seemed to add the clause "at
4 this time". Do you recall that?

5 A Oh, yes.

6 Q You didn't use the words "at this time"
7 in this point paper, February 12, 1987, did you,
8 sir?

9 A That is correct.

10 Q You then recounted the January 15, 1987
11 circumstances in terms of the request to Mr. Bankoff
12 and DPSC to revise the delivery schedule.

13 A Yes.

14 Q You then recapped the progress payment
15 situation in a summary; is that correct, sir?

16 A Yes.

17 Q And then you came to what we discussed
18 late yesterday afternoon, the pre-award survey; is
19 that correct, sir?

20 A Yes.

21 Q And that was the pre-award survey
22 relative to MRE-7.

23 A Yes.

24 Q And you testified yesterday you didn't
25 know what happened relative to MRE-7. Do you recall

1 that?

2 A Well, no, no. I said I had very little
3 involvement, you know, in the survey. I prepared
4 one memo. Again, you know, I didn't recall many of
5 the events. Obviously, when I wrote this status
6 report, I obtained information probably from the
7 pre-award monitor, because this was a visible issue
8 at the time.

9 Q What I would like you to tell the Board
10 is that as of February 12, 1987, you knew that on
11 September 25 a partial award was recommended on
12 MRE-7 for Freedom, correct?

13 A That is correct.

14 Q Then you did what we talked about
15 yesterday. You wrote your memorandum dated October
16 10, 1986 to people of DCASR, New York, didn't you,
17 about Freedom?

18 A Oh, yes, yes.

19 Q And you described why you thought
20 Freedom should not be given MRE-7 on that date,
21 right?

22 A Again, without looking at the memo --
23 all I did was present some problem areas that I had
24 experienced in the financial and accounting area. I
25 don't think I recommended "no award". I don't think

1 I ever made such a statement. I mean, I could be
2 wrong. I'd have to look at the memo, but I don't
3 think I made such a statement.

4 Q All right. Well, the document speaks
5 for itself.

6 A Yes. I'm sure I didn't make such a
7 statement. I know I commented about problems, but I
8 don't recall making a statement like that. But I'd
9 have to look at that memo to confirm that or not.

10 Q Six weeks after getting your memorandum,
11 pre-award -- strike that. There was a re-survey of
12 Freedom on MRE-7, wasn't there?

13 A Six weeks after my memorandum?

14 Q Let me restate the question. Six weeks
15 after the initial recommendation of an award to
16 Freedom -- I still said it wrong. I apologize.
17 After receiving your memorandum sometime after
18 October 10, 1986, there was a re-survey, and no
19 award was recommended to Freedom as of 4 December of
20 1986, correct?

21 A That is correct.

22 Q And you confirmed that in your
23 memorandum here, didn't you, sir?

24 A That is correct.

25 Q Sir, I want to go back now to a couple

1 of points, in conclusion here of your testimony.

2 A But -- go ahead.

3 Q Is there something you wanted to add?

4 A May I just read the last paragraph of
5 this?

6 JUDGE GROSSBAUM: Why?

7 THE WITNESS: Because this is very
8 important.

9 JUDGE GROSSBAUM: Why? It's in the
10 record, isn't it? Do you think that by mouthing it
11 that somehow that is going to make the words -- as
12 it appears in the transcript, to have greater
13 significance?

14 THE WITNESS: Maybe not, but at least it
15 will be highlighted.

16 JUDGE GROSSBAUM: Why does it need to be
17 highlighted? The Government has an attorney. They
18 are very well represented.

19 THE WITNESS: Okay.

20 JUDGE GROSSBAUM: If the Government
21 feels that something needs to be highlighted, they
22 might very well seek to do so.

23 THE WITNESS: Okay. That's fine.

24 BY MR. MacGILL:

25 Q Sir, I just want to conclude on a couple

1 final subjects briefly. You had considerable
2 discretion under this contract as ACO; is that
3 correct?

4 A Discretion within the scope of my
5 regulations and authority, yes.

6 Q And speaking colloquially, sir, this was
7 really your game on how certain matters would be
8 administered under this contract, right?

9 A Correct.

10 Q Now, you exercised your discretion on a
11 wide array of matters from the beginning of this
12 contract until the end, correct?

13 A I would use a better word, "judgment".

14 JUDGE GROSSBAUM: What was the word you
15 used?

16 MR. MacGILL: Discretion.

17 JUDGE GROSSBAUM: The question that was
18 asked you is susceptible to being answered "yes" or
19 "no".

20 THE WITNESS: Yes.

21 JUDGE GROSSBAUM: Go ahead.

22 BY MR. MacGILL:

23 Q Sir, you used your discretion -- you
24 exercised your discretion on how much to pay in
25 progress payments, did you not?

1 A Yes.

2 Q You exercised your discretion on when
3 progress payments would be made, did you not?

4 A Yes.

5 Q You exercised your discretion on whether
6 outside financing would be required.

7 A At times, yes.

8 Q You did in terms of requiring Bankers to
9 be an outside financing entity here, didn't you,
10 sir?

11 A You mean Bankers --

12 Q Bankers' Leasing.

13 A Not Bankers. We required outside
14 financing.

15 Q You required outside financing.

16 A The Government required outside
17 financing.

18 JUDGE GROSSBAUM: Well, he's asking
19 "you" as a representative of DCASMA, New York, as
20 opposed to DPSC.

21 BY MR. MacGILL:

22 Q You, as ACO, required outside financing,
23 didn't you, sir?

24 A That is correct.

25 Q You, as ACO, determined whether there

1 would be a pre-payment audit on every progress
2 payment.

3 A Yes.

4 Q You, as ACO, determined whether there
5 would be a novation required under this contract.

6 A Now, as I said in testimony yesterday,
7 we initiated -- to the best of my recollection -- I,
8 as ACO? I, as part of the Government -- as part of
9 the Government's position at the DLA Headquarters
10 meeting in 1985, initiated, to the best of my
11 knowledge, a novation scenario to Freedom.

12 JUDGE GROSSBAUM: Let's try this. Did
13 DPSC initiate the request that there be a novation?

14 THE WITNESS: They were part of the --

15 JUDGE GROSSBAUM: Did the idea come from
16 DPSC?

17 THE WITNESS: To the best of my
18 knowledge, it was collective; DLA, DPSC and DCASR.

19 JUDGE GROSSBAUM: Is it your testimony
20 that the idea of requiring a novation agreement did
21 not originate with DCASMA, New York?

22 THE WITNESS: I can't say that
23 categorically. I remember the discussions at the
24 Government meeting about novation. Who exactly
25 first initiated that matter within the Government, I

1 do not recall.

2 JUDGE GROSSBAUM: Could it have been
3 you?

4 THE WITNESS: No, I'm pretty sure it was
5 not me.

6 BY MR. MacGILL:

7 Q Sir, you decided, as ACO, whether
8 capital costs would be paid Freedom?

9 A In my capacity as ACO?

10 Q Yes, sir.

11 A In terms of progress payments? Yes.

12 Q You, as ACO, decided whether physical
13 progress would be required before payment was going
14 to be made on progress payments.

15 A That's not correct. Well, are you
16 talking about mod 28 or just --

17 Q No, I'm talking about you, as ACO,
18 decided whether physical progress would be required
19 before payment was going to be made on progress
20 payments.

21 A Yes, per the DAR, yes.

22 Q You, as ACO, decided whether progress
23 payments would be suspended.

24 A Yes.

25 Q You, as ACO, decided whether you would

1 accept or reject legal advice.

2 A Yes.

3 Q You, as ACO, decided whether Ms. Rowles'
4 directive on quality control equipment would be
5 followed.

6 A That's not a correct question. Ms.
7 Rowles did not issue a directive. She just provided
8 me with information.

9 Q Okay. Let's not quibble over
10 "directive". You, yourself, as ACO, decided not to
11 accept her recommendation to pay 100 percent of the
12 costs for quality control, computer and other
13 equipment.

14 A I can't answer the question as presented
15 because she did not recommend or direct. She just
16 informed me that this was part of the negotiated
17 price. She didn't recommend or direct. She just
18 gave me information.

19 Q All right. At a minimum, you will
20 concede that the 6-9-95 Telex speaks for itself.

21 A Exactly. It speaks for itself.

22 Q All right. You, yourself, decided
23 whether a DAR deviation would be pursued on the
24 capital cost question.

25 A That is correct. No, no, no. I decided

1 -- I decided -- I made the decision. That's
2 correct.

3 Q Yes, sir.

4 A Okay.

5 Q You, yourself, decided whether the
6 accounting system was adequate.

7 A That is not correct. That's DCAA's
8 responsibility.

9 Q Well, let's cut this a little finer.
10 You decided whether progress payments would be
11 considered suspended or for suspension, based on
12 whether the accounting system was adequate.

13 A Based on the adequacy determination
14 provided by DCAA, yes.

15 Q All right. You, yourself, decided
16 whether loss ratio would apply here.

17 A That's correct.

18 Q And, finally, you decided whether you
19 would accept or reject DCAA recommendations.

20 A That is correct.

21 Q Sir, in terms of the discretion that you
22 exercised under this contract, you took
23 recommendations or advice throughout from various
24 governmental entities; did you not?

25 A That is correct.

1 Q And as far as your exercise -- or your
2 acceptance or rejection of that advice, you would
3 agree that on legal matters, for instance, you chose
4 on December 26, 1984, not to accept the advice given
5 by Mr. Heringer about whether physical progress
6 would be required under the contract.

7 A That's not correct. I did ultimately
8 accept his advice, yes.

9 Q You didn't accept it in December or
10 January --

11 A No, that is not correct. I did not
12 inform Mr. Thomas until February 1985 at the
13 meeting, but I did accept that advice, not just from
14 Mr. Heringer, but from other sources internally
15 within the Government. It was not conveyed to Mr.
16 Thomas, but I did accept the advice. I don't know
17 if it was December 27 or December 28, but before the
18 February meeting. It was before February. It was
19 probably in the latter part of December or early
20 part of January that that was no longer an issue.

21 Q Well, I believe your previous testimony
22 was that it was February 1985 before Freedom was
23 informed.

24 A But internally, in my own mind, and as a
25 Government representative, that was no longer an

1 issue. I had enough advice from legal and contract
2 management to enable me to put that aside. That was
3 not an issue.

4 Q All right. Let's take legal aside for a
5 minute and not argue back and forth about the legal
6 advice.

7 A Right.

8 Q Let's focus on the advice given to you
9 by PCO's for a minute.

10 A Okay.

11 Q And contrast your acceptance or
12 rejection of that advice, sir.

13 A Okay.

14 Q You were given advice by Ms. Rowles and
15 Mr. Barkewitz about how to treat capital costs; were
16 you not?

17 A Are you talking about that memo now?

18 Q I'm talking about treating capital costs
19 as direct. You were given advice by both Rowles and
20 Barkewitz on how to treat capital costs.

21 A You're just talking advice in general?

22 Q Yes, sir.

23 A Oh, yes.

24 Q And the advice was to treat it as a
25 direct cost, pay it 100 percent?

1 A Basically, they informed me that this
2 was the way the contract was negotiated.

3 Q And you didn't accept that advice, did
4 you, sir?

5 A I accepted that advice in terms of the
6 contract price, but not in regards to the payment of
7 progress payments.

8 Q And by doing that, that was detrimental
9 to Freedom, when you rejected that portion of the
10 advice.

11 A That it would result in less payments to
12 Freedom, yes.

13 Q All right. Now let's contrast that,
14 sir, with what you did with Mr. Bankoff on October
15 3, 1986.

16 A Yes.

17 Q You testified on direct that Mr. Bankoff
18 asked you to hold payment of progress payment 21
19 pending signing of Mod 29. Do you recall that line
20 of testimony?

21 A Yes, yes.

22 Q Now, that was advice, you would concede,
23 that worked against Freedom's interest.

24 A Possibly for a few days, yes.

25 Q All right. And you accepted the advice

1 then, didn't you, sir?

2 A Different situation, different scenario;
3 yes.

4 Q Now, let's contrast what you did with
5 advice in one other context; DCAA. DCAA in August
6 1985 told you the accounting system was bad.

7 A Inadequate, unacceptable.

8 Q All right. Their words. You accepted
9 that determination by DCAA; did you not?

10 A That is correct.

11 Q DCAA on progress payments 17, 19 and 21,
12 recommended that you pay more than \$840,000 more
13 than you actually paid, right?

14 A Oh, without checking, I'll accept, you
15 know, what you're saying.

16 Q You did not accept the DCAA advice in
17 those circumstances; did you, sir?

18 A No, that requires -- no, in fact, I did,
19 but it requires an explanation, if I may.

20 Q You didn't pay the \$840,000.

21 A I did not because we were now dealing
22 with Mod 28, and we were dealing with a loss ratio,
23 which DCAA didn't include. So I followed DCAA's
24 advice but went beyond it because I had to comply
25 with Mod 28, which tied in progress payments to

1 deliveries; and also, I was applying a loss ratio.
2 So, I followed their advice, but had to go beyond
3 it.

4 Q Well, and you were also, during this
5 same period of time, holding payment at Mr.
6 Bankoff's request so that Mod 29 could get signed.

7 A That is correct.

8 Q All right. Now, you never paid one
9 dollar of damages for delay to Freedom during this
10 contract, did you?

11 A Not to my knowledge.

12 Q Never paid for the six months of delay
13 in payment from November 1984 to May 1985.

14 A Are you talking about dollars? There
15 was some -- I know in one instance, there was credit
16 given to Freedom in the way of -- well, in the way
17 of progress payments for some GFM outages. We gave
18 them credit for cases when there were some GFM
19 outages.

20 Q I'm not talking --

21 A But in terms of dollars --

22 Q Yes, in terms of cash.

23 A Offhand, I don't know. I'd have to
24 check the mods, but I don't recall any.

25 Q You never paid Freedom for the delay

1 occasioned by the novation that was initiated by the
2 Government, did you?

3 A There was no delay occasioned by the
4 novation.

5 Q Well, now, sir, I think we went about
6 that at length yesterday afternoon in terms of how
7 long that took to get that novation made.

8 A I disagreed with your analysis, and as
9 far as I'm concerned, there was no delay. We have a
10 disagreement.

11 Q Fine.

12 A Okay.

13 Q You never paid one dollar of delay or
14 interest costs for the deductions or delay on
15 progress payments; did you, sir?

16 A Well, without checking every PCO mod --
17 I mean, I don't recall any, but I would have to, of
18 course -- to make my statement absolute, would have
19 to check every mod, 30 or so mods. I mean I don't
20 recall any to be quite honest with you.

21 Q Of the \$840,000 recommended by the DCAA
22 for payment, in excess of what you paid on progress
23 payments 17, 19 and 21, you never remitted one
24 dollar of what they recommended to Freedom; did you,
25 sir?

1 A That's incorrect. As I said earlier
2 when you asked the question, I went beyond -- I
3 complied with the recommendations and even went
4 beyond it, because of the Mod 28 provisions and
5 because of the application of the loss formula.
6 That's incorrect.

7 Q You didn't pay the \$840,000 that DCAA
8 recommended.

9 A I think that's incorrect. I disagree.

10 Q You don't recollect from the documents
11 that we reviewed, that the DCAA recommended payment
12 in excess of \$840,000 more than you actually paid?

13 A I'll accept your figures at -- you know,
14 I'll accept your figures at face value. I don't
15 recall all the figures from yesterday, but what I am
16 saying is, I did not take exception to their
17 recommendations, but I had to make reductions from
18 their recommendations because of Mod 28, and because
19 of the loss formula.

20 Q But you never paid anything in addition
21 -- you never paid anything after October 9, 1986; is
22 that right, sir?

23 A That is correct.

24 Q And you never paid a dollar of the
25 \$840,000 referenced by DCAA.

1 A I would have to challenge that. We
2 would have to start recalculating everything,
3 because I paid what I could. I accepted -- you
4 know, DCAA's recommendations were advisory to me,
5 which I accepted, but I had to make reductions
6 because of Mod 28 and the loss ratio scenario.

7 JUDGE GROSSBAUM: Well, what did Mod 28
8 -- Mod 28 is the thing that lifted the \$13 million
9 ceiling?

10 THE WITNESS: Right, and tied in
11 progress payments to deliveries. I could no longer
12 pay just for incurred costs. I had to only pay if
13 the company delivered a product; incurred costs were
14 out unless --

15 JUDGE GROSSBAUM: No, incurred costs
16 weren't out.

17 THE WITNESS: Unless he delivered.

18 JUDGE GROSSBAUM: But the lifting -- he
19 was entitled to 95 percent of incurred costs up to
20 \$13 million.

21 THE WITNESS: Previously.

22 JUDGE GROSSBAUM: Apart from deliveries.

23 THE WITNESS: That is correct.

24 JUDGE GROSSBAUM: And then, based on Mod
25 28, there were three increments of deliveries by

1 which he could get up to \$15,800,000. And then --

2 THE WITNESS: Correct.

3 JUDGE GROSSBAUM: -- progress payments
4 were counted, right?

5 THE WITNESS: That's correct.

6 JUDGE GROSSBAUM: So your testimony
7 earlier had been that the reason you didn't pay --
8 \$800,000 more that DCAA had recommended to you on
9 these progress payment requests, was because of your
10 use of the loss factor.

11 Now you're saying that the Mod 28
12 ceilings impacted --

13 THE WITNESS: Oh, yes, they're all in my
14 point papers here. They're in the papers that we
15 looked at yesterday when we went through this
16 progress payment by progress payment. Remember, we
17 had the pro tanto portion. We went through all of
18 these calculations.

19 Remember, we came up with these figures.
20 They're all here in the record. And DCAA did not
21 take this into consideration when they wrote their
22 reports. So I was locked into that Mod, and I had
23 to then work downward from the DCAA recommendations.

24 And then, once I worked downward from
25 28, I went with the loss formula. And again, it's

1 part of the Rule 4.

2 JUDGE GROSSBAUM: Go ahead.

3 BY MR. MacGILL:

4 Q And, Mr. Liebman, I want to take this
5 real slow. You just told the Board here that your
6 payments on 17, 19 and 21 were affected by Mod 28,
7 correct?

8 A To the best of my belief, yes.

9 Q And Mod 28 was signed on the -- on
10 August 7, 1986; is that correct?

11 A I'll accept that at face value, yes.

12 Q Well, that's what you testified to
13 yesterday.

14 A Okay. Okay. 17, 18 --

15 Q Now, wait a minute, sir.

16 A Okay.

17 Q On 17, you paid that when, sir?

18 A July 15th.

19 Q Right. You paid that three weeks before
20 Mod 28; is that right?

21 A All right. Then I'll have to stand
22 corrected on that particular one.

23 Q All right, but, that's not the only
24 thing I want to correct you on, sir.

25 A Okay.

1 Q You just told the Board that the loss
2 ratio came into effect, and that accounted for the
3 differences in terms of what you paid relative to
4 the DCAA --

5 JUDGE GROSSBAUM: I don't want you to
6 get confused on this. We're not saying that the
7 loss ratio first came into effect in connection with
8 these, 17, 18 and 19.

9 MR. MacGILL: We're definitely not.

10 JUDGE GROSSBAUM: We understood his
11 testimony yesterday, and the witness has very
12 emphatically corrected the Board's misunderstanding,
13 if that's what it was, that his testimony was that
14 the only reason -- the only explanation he offered
15 for not -- the difference between what he paid and
16 what DCAA had recommended with regard to these three
17 particular progress payment requests, was the
18 application of the loss factor, which he testified
19 to.

20 He was very liberal in his application.
21 He didn't use as high a loss factor as he
22 conceivably could have, being generous towards the
23 interests of Freedom. But, be that as it may, that
24 was the Board's recollection. And now, we're
25 learning, as we've been corrected that he did

1 testify yesterday about Mod 28 being the -- the
2 constraint, or another constraint.

3 MR. MacGILL: One final point, Your
4 Honor.

5 BY MR. MacGILL:

6 Q Sir, the loss ratio that you applied was
7 roughly 15 percent?

8 A Well, if you're going to get specific on
9 progress payments, I'm going to have to look at my
10 --

11 Q Just roughly, 15 percent. That's what
12 you testified to yesterday.

13 A It varied, yes, 15 percent, 12 percent,
14 16 percent.

15 Q Okay, 12, 15 percent.

16 A Yes. Yes.

17 Q Just to clarify in terms of what you
18 just testified to to the Board, on progress payment
19 19, sir, you paid \$200,219; is that correct?

20 A Yes.

21 Q The DCAA recommended that you pay
22 \$699,904; didn't they, sir?

23 A I tell you, before I answer any more,
24 can I have the opportunity to look at my papers.

25 Q That was your testimony yesterday.

1 A Oh, okay, if that was my testimony
2 yesterday, that was based on looking at the document
3 yesterday.

4 Q Yes, sir.

5 A Okay.

6 Q Now you testified to this Board
7 yesterday, that \$699,904 was what DCAA recommended
8 to you.

9 A Okay, I'll accept that at face value.

10 Q And they did that in Exhibit 158; and
11 you testified at length about that yesterday. Do
12 you recall that, sir?

13 A I testified a lot about a lot of things.
14 May I refer to the document?

15 JUDGE GROSSBAUM: Wait until you get the
16 question, then if you need to refer to the document
17 --

18 THE WITNESS: Okay.

19 BY MR. MacGILL:

20 Q You're not trying to get this Board to
21 believe, are you, sir, that the loss ratio accounted
22 for roughly \$500,000 of a deduction between what the
23 DCAA recommended and what you paid?

24 A No, no, no, no. I would have to --
25 obviously, it's not that high, but I would have to

1 check. I don't want to speak off the top of my
2 head. Obviously, \$500,000 is a very high figure
3 just for the loss ratio.

4 JUDGE GROSSBAUM: Which progress
5 payment?

6 MR. MacGILL: Your Honor, I'm referring
7 to 19, and for the record I will represent that
8 Exhibit 158 shows a DCAA recommendation of \$699,904;
9 \$200,219 was paid.

10 I have no further questions.

11 JUDGE GROSSBAUM: Would you be good
12 enough to tell us how Mod 28 -- feel free to look at
13 any documents.

14 THE WITNESS: Thank you.

15 JUDGE GROSSBAUM: Tell us how Mod 28
16 comes into play.

17 THE WITNESS: Sure. Okay. Here's the
18 first one that I see, Your Honor, it's Government
19 Rule 4, Tab 194, page 27 of Government Rule 194.
20 Well, start with page 26. Starting with paragraph G
21 towards the bottom.

22 JUDGE GROSSBAUM: We can read it.

23 THE WITNESS: Oh, okay.

24 JUDGE GROSSBAUM: I just want to know
25 how this affects, for example, a particular progress

1 payment, since we have established now that progress
2 payment number 17 was paid before Mod 28; so it,
3 obviously, couldn't have affected progress payment
4 17, could it?

5 THE WITNESS: That's correct.

6 JUDGE GROSSBAUM: So what were the two
7 other progress payments where you say there's a
8 combined \$800,000? 17 and what are the other two,
9 Counsel?

10 MR. MacGILL: 19 and 21.

11 JUDGE GROSSBAUM: Okay, let's find
12 progress payment 19 and then you tell us -- okay.
13 How is progress payment number 19, which is dated
14 August 26th, it post-dates Mod 28 -- how is that
15 affected by the Mod 28?

16 THE WITNESS: In order to answer that, I
17 want to refer to the actual progress payment as
18 well, if I may.

19 JUDGE GROSSBAUM: Fine. Go ahead.

20 THE WITNESS: Okay. If I may.

21 JUDGE GROSSBAUM: We see, for example,
22 that the progress payment indicates a previous
23 amount of progress payments, \$13.65 million.

24 THE WITNESS: I'm sorry, Your Honor?

25 JUDGE GROSSBAUM: \$13.65 million had

1 previously been paid.

2 THE WITNESS: Where are you reading?

3 Well, I see \$13.6 million.

4 JUDGE GROSSBAUM: I see a 5 there. I

5 see \$13.65.

6 THE WITNESS: Oh, are you looking at

7 page 27, Your Honor?

8 JUDGE GROSSBAUM: No, I'm looking at the

9 progress payment request.

10 THE WITNESS: Oh, okay. Okay, I just

11 want to find it in the tab here. Could you tell me

12 what tab you're referring to, Your Honor?

13 JUDGE GROSSBAUM: There's a book of the

14 Appellants that was on progress payments.

15 THE WITNESS: Okay, because here in our

16 Rule 4, I don't see 19 here. I see 18 and 20.

17 JUDGE GROSSBAUM: Now the top part of

18 the form -- that's actually filled out by the

19 contractor, isn't it?

20 THE WITNESS: Yes. I'd feel more

21 comfortable if I could actually see the Appellant's

22 -- the actual request, if I may.

23 MR. MacGILL: I'll hand that to you,

24 sir.

25 THE WITNESS: Thank you. Yes, thank

1 you.

2 JUDGE GROSSBAUM: The contractor asked
3 for \$2 million, indicating that he had already been
4 paid progress payments, he had been paid
5 \$13,650,000?

6 THE WITNESS: Yes.

7 JUDGE GROSSBAUM: He asked for
8 \$2,136,000?

9 THE WITNESS: No, he's asking for
10 \$2,136,572, yes.

11 JUDGE GROSSBAUM: Okay. How did he get
12 to be paid \$13,650,000?

13 THE WITNESS: That was based on
14 decisions I made as ACO on previous progress
15 payments.

16 JUDGE GROSSBAUM: But he's the one who
17 ought to know how much he's been paid; oughtn't he?

18 THE WITNESS: The contractor? Oh, yes,
19 yes.

20 JUDGE GROSSBAUM: If we go back to 18,
21 he says he's been paid \$11,620,000.

22 THE WITNESS: Yes.

23 JUDGE GROSSBAUM: And you only paid
24 \$704,000 on that progress payment.

25 THE WITNESS: No, that's not correct.

1 See, here's the important thing. On 18 it says,
2 "progress payments requested", if you look on block
3 18. If you look at progress payment 19, I had -- it
4 was struck out and it says "paid". Okay. That's
5 very important --

6 JUDGE GROSSBAUM: Okay.

7 THE WITNESS: Now here's -- if I may --
8 I'm referring now to Government Rule 194, page 32.
9 Okay. Now, before I start with this, it's important
10 to look at 18 quickly and then 19.

11 JUDGE GROSSBAUM: We can do that.

12 THE WITNESS: Okay. Now, if you have 18
13 in front of you, look at block 10. You see
14 "incurred costs, \$16,156,915?

15 JUDGE GROSSBAUM: Yes.

16 THE WITNESS: Okay. Now go, do the same
17 thing, the same block, with progress payment 19.

18 JUDGE GROSSBAUM: We're up to
19 \$17,400,000.

20 THE WITNESS: Right. Now the difference
21 between \$16,100,000 and \$17,400,000; let's round it
22 at \$1,300,000. And then look at the dates of the
23 requests. 18 was dated 7-14-86; 19 was dated
24 8-26-86. The significance of this is that between
25 this time period, 7-14-86 and 8-26-86, the

1 contractor incurred \$1.3 million, roughly, in costs;
2 correct, which he would normally, under the
3 traditional method of progress payments, based on
4 incurred costs, could bill the Government for this
5 \$1.3 million for this roughly six-week period.

6 Now, with this in mind, Your Honor, if
7 you go to page 32 of Tab 194, where I tie in Mod 28.
8 Do you want me to read it out loud?

9 JUDGE GROSSBAUM: No.

10 THE WITNESS: Okay. If you follow that,
11 you'll see what happened. In other words, I could
12 pay them \$1.3 million theoretically for incurred
13 costs; but he submitted a payment in the amount of
14 \$2,100,000 and it's explained how I made the
15 deductions.

16 JUDGE GROSSBAUM: What I'd like to have
17 you do is explain how the Mod 28 puts a -- a limit
18 on how much you could have paid.

19 THE WITNESS: Sure. Let's say the top
20 part, for a hypothetical situation --

21 JUDGE GROSSBAUM: No, let's not take a
22 hypothetical.

23 THE WITNESS: Okay.

24 JUDGE GROSSBAUM: Let's just take this
25 particular progress payment. How is this progress

1 payment request -- the ability to pay him, limited
2 by Mod 28? You have to tie this into deliveries,
3 don't you?

4 THE WITNESS: Okay. In order to -- yes,
5 but in order to do that, I just wanted to get the
6 figure DCAA recommended. There's a change in costs
7 of \$1.3 million. I would just then like to look at
8 the DCAA audit report before I go and answer your
9 question, because that's important.

10 That's why I wanted to give a
11 hypothetical situation and just say, let's say, DCAA
12 accepted everything and just ignore it as a
13 hypothetical situation, but it may be more
14 beneficial than this to refer back to the audit
15 report. If you'll bear with me one second, Your
16 Honor.

17 Okay. That's Tab 158. I just want to
18 see what they recommended. Okay. Of the \$2,100,000
19 that apparently was the billing for progress payment
20 19, okay, I think the chart is wrong -- well,
21 anyway, they're saying -- this is the DCAA report.
22 They're saying, current progress payment on 19 was
23 \$2,100,000. They took out \$900,000 for prior period
24 costs. So that leaves you with costs to work with
25 of \$1,200,000.

1 In other words, Freedom kept factoring
2 in costs we previously disallowed into their
3 progress payments. DCAA kicked it right out. So
4 DCAA's now working with \$1,200,000 as costs for the
5 current period, meaning from July 14th to August 26,
6 1986.

7 So DCAA, of the \$1,200,000, questions a
8 half a million, okay? So, you're really down to
9 basically \$700,000, roughly, to play with on this
10 particular progress payment request.

11 Now, with this in mind, please go now to
12 page 32. Okay? If you may. All right, and let's
13 see if we can tie this all in. I'm repeating DCAA
14 factored all this stuff out. And, okay, normally
15 then, I would have paid \$700,000 recommended by
16 DCAA, under normal conditions, if 28 didn't exist.

17 JUDGE GROSSBAUM: Okay.

18 THE WITNESS: But because of 28, I now
19 had to tie in any progress payments to deliveries.
20 We're not just paying on incurred costs anymore. So
21 we had to, then, go through this 80,000 cases. So
22 what I'm saying here in the bottom of paragraph J on
23 the top of the page, the payment represented 18,052
24 cases shipped against an 80,000 case delivery
25 increment -- that's per Mod 28. So you divide

1 18,052 cases that he shipped, by the 80,000 case
2 increment per Mod 28, you have a factor of .22565,
3 which I could pay based on the pro tanto provision
4 of Mod 28.

5 So what I did was -- the calculation is
6 I took the million dollar in parenthesis progress
7 payment increment per Mod 28, times the 22 percent
8 factor. Because, remember, if you shipped 80,000
9 cases, you would get a million dollars in progress
10 payment ceiling increase.

11 So he only shipped a portion of that
12 million -- or only a portion of the 80,000 cases.
13 He only shipped 22 percent of that during this
14 six-week period. So I took 22 percent of a million,
15 and that gave us a maximum amount payable of
16 \$225,750.

17 So what I'm saying is, if Mod 28 wasn't
18 there, I could have paid \$700,000. Now, because of
19 Mod 28, I can pay \$225,650. However, to that I
20 added a loss ratio -- if you go down to the next
21 line. So instead of the \$225,650, I used a loss
22 ratio of .8873, meaning 11.7 percent loss. So that
23 further reduced it from the \$225,650 per Mod 28, to
24 \$200,291.

25 JUDGE GROSSBAUM: Okay.

1 THE WITNESS: Okay?

2 JUDGE GROSSBAUM: So the figure should
3 be \$200,291?

4 THE WITNESS: Yes.

5 JUDGE GROSSBAUM: Because we see
6 \$200,219 as the amount paid.

7 THE WITNESS: Let's see what I say here;
8 \$200,291.

9 JUDGE GROSSBAUM: But the check is
10 \$200,219.

11 THE WITNESS: Yes. I can't explain that
12 offhand.

13 JUDGE GROSSBAUM: That's okay. But if
14 he, in fact, had already been paid by the 20th of
15 August, \$13,650,000, now is he eligible for any
16 payment if you're factoring in -- because what
17 increment are you going to?

18 THE WITNESS: Well, I would have to
19 research further. Can I backtrack? Maybe there's
20 an explanation?

21 JUDGE GROSSBAUM: Sure.

22 THE WITNESS: Because we try to -- I
23 tried to adhere to the Mod -- 28. I would have to
24 check to see if there's any indication of what
25 happened. And if I may try to backtrack. Okay. I

1 we need to know offhand the date of Mod 28.

2 JUDGE GROSSBAUM: I thought we already
3 had some testimony about that.

4 THE WITNESS: Yes, but it's just
5 important for the purposes at hand right now. I'll
6 just check the file, just to be sure. Okay.
7 Apparently it's dated 15 September 1986 -- no, I'm
8 sorry, it's dated August 27th, 1986, Tab 144. Yes
9 -- no, it's dated August 7th, August 7th, 1986, not
10 August 27th, August 7th, 1986.

11 So with that in mind, let me do some
12 backtracking. Okay. So 18 wouldn't come into play.
13 Okay -- well -- okay. Yes, it's kind of tricky.
14 I'm going to try to reconstruct this. Mod 28,
15 issued August 7th, was sort of in between the period
16 between 18 and 19. 18 was dated 7-14-86; 19,
17 8-26-86.

18 I can't -- let me backtrack to 17. That
19 might shed some light. I can't --

20 JUDGE GROSSBAUM: Were you satisfied
21 that 330 cases had already been completed and
22 accepted?

23 THE WITNESS: Can I check my paper -- if
24 I may. I'm trying to confirm the 330 case. May I
25 ask where you're referring to, Your Honor?

1 JUDGE GROSSBAUM: Mod 28.

2 THE WITNESS: Mod 28? I would have to
3 check the production records -- at this point, I
4 don't know offhand.

5 JUDGE GROSSBAUM: Well, can we draw any
6 assumptions from your October 6th memorandum that's
7 at page 32 of Tab 194?

8 THE WITNESS: Okay.

9 JUDGE GROSSBAUM: Which talks about this
10 being 18,000 cases shipped against 80,000 required
11 --

12 THE WITNESS: Yes, yes.

13 JUDGE GROSSBAUM: Can we draw any --

14 THE WITNESS: Yes, a logical conclusion.

15 JUDGE GROSSBAUM: Okay. Is it fair to
16 conclude that there had already been 150,000 cases
17 delivered?

18 THE WITNESS: 150,000? Of course,
19 150,000; oh, yes, yes.

20 JUDGE GROSSBAUM: Now the 80,000 cases
21 due on 12 August would have brought you to what?

22 THE WITNESS: Okay, if he had shipped
23 the 330, and then -- assuming that was the situation
24 --

25 JUDGE GROSSBAUM: That would be 230,

1 wouldn't it?

2 THE WITNESS: We said 330 before.

3 JUDGE GROSSBAUM: How much had been
4 delivered by the time of the modification?

5 THE WITNESS: May I check my records
6 here? Obviously, it was probably about 400,000, but
7 I just want to -- if you want an exact figure, I
8 just want the opportunity to confirm, Your Honor.
9 Well, I have a statement on page 26 of Government
10 Rule 194. This is a start. On page 26, paragraph
11 F, it says, "as of close of business 31 August 1986
12 a total of 415,000 cases plus were accepted" -- now
13 I'm just going to refer back to an earlier --

14 JUDGE GROSSBAUM: Okay.

15 THE WITNESS: Yes, here it is, on page
16 23 of Government's Rule 4, paragraph G. It says,
17 "as of close of business 31 July 1986", page 23, "a
18 total of 366,065 cases have been accepted", and
19 "362,411 have been shipped".

20 JUDGE GROSSBAUM: This was as of when?

21 THE WITNESS: As of close of business 31
22 July 1986.

23 JUDGE GROSSBAUM: Okay. So therefore,
24 you're over the 330, aren't you?

25 THE WITNESS: Oh, yes.

1 JUDGE GROSSBAUM: So you're up over the
2 13 million then.

3 THE WITNESS: Yes.

4 JUDGE GROSSBAUM: And if you already, as
5 of close of business 31 August, you've already
6 accepted 410, then shouldn't you be at 14 million?

7 THE WITNESS: 14 million, a little plus,
8 because you're beyond already.

9 JUDGE GROSSBAUM: Right.

10 THE WITNESS: And you get into the pro
11 tanto.

12 JUDGE GROSSBAUM: Yes, not an awful lot,
13 plus 410,242 as of --

14 THE WITNESS: Right.

15 JUDGE GROSSBAUM: -- as of the 31st of
16 August.

17 THE WITNESS: Yes.

18 JUDGE GROSSBAUM: Okay. What do you
19 mean then in your page 32 when you're saying that
20 "the payment represents the balance of 18,052
21 shipped against 80,000 delivery of 12 August".

22 THE WITNESS: Well, yes -- apparently we
23 had paid --

24 JUDGE GROSSBAUM: Listen, I'm going to
25 give you some paper that you can write on, and I'll

1 give your counsel a -- unless you -- you didn't
2 bring your own.

3 THE WITNESS: Not -- no.

4 JUDGE GROSSBAUM: Does the Government
5 have one?

6 MS. HALLAM: Yes.

7 JUDGE GROSSBAUM: Okay.

8 THE WITNESS: Okay. Because on the
9 surface what this looks like, Your Honor, is that
10 62,000 roughly, cases were paid on a prior progress
11 payment. But I just want to confirm that. Here it
12 is. I have the insert right now. We don't even
13 need the calculator. Page 27.

14 JUDGE GROSSBAUM: Okay. If you look at
15 page 27 on the Rule 4, we are now talking about
16 progress payment 18 as reflected on page 26. Now
17 here's what I mean when I say there's roughly
18 62,000. If you follow the math here -- previous
19 progress payment ceiling, 13 million; amount
20 remaining from ceiling, 42,000. Then let's go on.

21 So in the calculation you see the
22 caption on the left, payment ceiling for Mod 28, a
23 million times .777, representing percentage of cases
24 shipped; that is, 61,948, at the delivery increment
25 of 80. So if you take the 61,948 here and add it to

1 the other page where we have 18,052, we come up with
2 the 80,000. And that's what I mean where the
3 payment represented the balance of 18,000 shipped
4 against the 80 case increment. So progress payment
5 18, he didn't ship the full 80, he only shipped
6 61,948. Now with the next progress payment, 19, he
7 completed the 80,000 increment by shipping another
8 18,000.

9 So basically I'm saying he's fulfilling
10 now the full 80; and I paid him in part on 18,
11 61,000 cases; and in part now on 19, 18,000 cases.

12 JUDGE GROSSBAUM: What was the total
13 quantity under the contract?

14 THE WITNESS: 620,000, I believe. I
15 have it. Well, it's roughly 620,000. I don't
16 recall exactly. Let's check the award document.
17 620,304, I'm sorry, Your Honor.

18 JUDGE GROSSBAUM: Okay. Would the
19 conclusion of the August 12th shipment, the delivery
20 of schedules for August 12th, would that constitute
21 completion of the 410 cases -- 410,000?

22 THE WITNESS: Okay, you're looking at
23 Mod 28, Your Honor?

24 JUDGE GROSSBAUM: Yes.

25 THE WITNESS: Well, if you give me a

1 moment, let me do some quick calculation here. If
2 he shipped August 12th, that would leave him with a
3 balance of roughly 210,000 cases -- it might be even
4 exactly 210,000 cases.

5 So that would have meant if he met that
6 increment it would be another 410,000, that's
7 correct; shipped.

8 JUDGE GROSSBAUM: Okay. So both
9 progress payments 18 and 19, then, you're working
10 with partials of the 80,000 required in the 12
11 August due date?

12 THE WITNESS: That is correct.

13 JUDGE GROSSBAUM: All of which he
14 apparently satisfied this by the end of August.

15 THE WITNESS: Well, based on --

16 JUDGE GROSSBAUM: Based on page 26.

17 THE WITNESS: Yes, he had shipped as of
18 31 August, 415. He more than satisfied it, yes.

19 JUDGE GROSSBAUM: And that would have to
20 be accepted --

21 THE WITNESS: Yes, accept that 410 was
22 shipped, that's correct.

23 JUDGE GROSSBAUM: Just a couple other
24 questions. And Counsel from both sides can ask
25 questions based on anything the Board asks. On

1 Tuesday you testified at the outset on direct about
2 the high visibility of this particular -- was it the
3 program that you meant was high visibility or this
4 particular contract?

5 THE WITNESS: This particular contract
6 and the contractor, and I believe also the program
7 had high visibility; but especially the contract and
8 contractor.

9 JUDGE GROSSBAUM: Okay. Now you
10 mentioned that there were a lot of people who wanted
11 to know about what was going on?

12 THE WITNESS: Yes, Your Honor.

13 JUDGE GROSSBAUM: Who were these people,
14 as particularly as you can. You mentioned people
15 from various segments.

16 THE WITNESS: Yes, Congressman Joseph
17 Adabo.

18 JUDGE GROSSBAUM: Okay. He was
19 representative from what state?

20 THE WITNESS: New York City. He was the
21 Chairman of the House Armed Services Committee.

22 JUDGE GROSSBAUM: Okay. He was a
23 Congressman from the Bronx?

24 THE WITNESS: Queens County.

25 JUDGE GROSSBAUM: Queens County. Okay.

1 And any other congressmen interested?

2 THE WITNESS: I learned way into -- I
3 think after the contract that also Congressman
4 Robert Garcia from the Bronx was interested in it.
5 During the life of the contract I was not aware of
6 that, but after the contract I learned that he was.

7 JUDGE GROSSBAUM: Any interest by Mario
8 Biaggi?

9 THE WITNESS: Not to my knowledge.

10 JUDGE GROSSBAUM: Not in this contract.
11 He had other contracts that he was interested in.

12 THE WITNESS: Not the Biaggi-Erlich law
13 firm, but Mario Biaggi, per se, I do not know.

14 JUDGE GROSSBAUM: How about Congressman
15 Rangel?

16 THE WITNESS: I do not know.

17 JUDGE GROSSBAUM: What were the
18 interests -- you mentioned high level within DLA.

19 THE WITNESS: Yes. Starting from the
20 top down, General Babers -- I don't recall his first
21 name. He's the three-star general who is the head
22 of DLA -- had a personal interest. His deputies --
23 the first deputy was General Connolly, a two-star
24 general.

25 After General Connolly, the military

1 person that replaced him as Admiral McKinnon, a
2 two-star rear admiral; all the way down, from the
3 top all the way down, all levels. I mean I'll
4 mention names.

5 Carl Kobeisman, I'm sure you're familiar
6 with, the Counsel for DLA. Ray Chiesa, the head of
7 procurement. Bill Gordon, the executive director of
8 contract management. William Keating, the chief of
9 contract management. You name it. Ray Dellas, the
10 small business top gun there. Charlie Alderman, who
11 I believe was his deputy. I mean I can go on and on
12 and on.

13 JUDGE GROSSBAUM: What kind of things
14 did they want to know about this contract?

15 THE WITNESS: Status, what is going on.
16 And then they imposed a reporting requirement -- a
17 bi-weekly reporting requirement because of the
18 financial problems. They wanted specific
19 information in the financial area, cash flow; in
20 addition to production status, a bi-weekly
21 requirement.

22 So I'm saying from the top down within
23 DLA, and also from the top down within DCASR, New
24 York; meaning a general, our general -- well, first
25 it was a colonel, Colonel Gunther, who is now a

1 two-star general.

2 Then after him, General Charles St.
3 Arnaud, DCASMA, New York. Colonel Don Hein.
4 Afterwards, Colonel Witty. DPSC, starting with the
5 commander at the time was Admiral Ruehlin, I
6 believe, and his replacement, I think General
7 Voorhees. Top down, all levels of management, from
8 the general or admiral on down, all the way to the
9 lowest individual, meaning the ACO and the PCO.

10 It was life in a goldfish bowl. There
11 was also, to some extent, White House interest,
12 meaning there was a -- I think there was a Black
13 liaison type in the White House that's sort of like
14 a focal point for Black interests. They had an
15 interest in this.

16 Also, local New York City politicians,
17 apart from Congressman; a State senator, a senator
18 who died -- I forget his name. He's Italian
19 ancestry. He passed away, but -- and also City
20 officials, New York City officials would call me.
21 Mr. Checko -- I forget his first name, who was sort
22 of in one of these business development type
23 positions.

24 So I had New York City officials calling
25 me. I remember a name, Mr. Bass, one of these small

1 business type individuals. So I was getting calls
2 -- whatever I did, I was getting calls from
3 everybody. And that's why I'm saying, I was
4 operating within a goldfish bowl.

5 JUDGE GROSSBAUM: I'm going to ask you
6 this about the interest within DLA. As you
7 perceived the interest, you described -- I asked you
8 what they wanted to know and you said, basically,
9 status. And was your perception of the interest
10 within DLA simply a, you know, a hands off, they
11 just wanted to know the status of this, or did they
12 have an interest in seeing this project succeed?

13 THE WITNESS: The latter. They had an
14 interest in seeing this project succeed. I received
15 the impression that, collectively, the Government,
16 including all of these agencies and politicians,
17 wanted this contract to be successful; including the
18 ACO.

19 JUDGE GROSSBAUM: As of around the 15th
20 of January 1987, do you feel that there was any
21 amount in progress payments that were owing to --
22 legitimately owing to Freedom?

23 MR. MacGILL: Your Honor, pardon me.
24 Did you say January 15th?

25 JUDGE GROSSBAUM: 15th, 1987.

1 MR. MacGILL: 1987?

2 JUDGE GROSSBAUM: Yes.

3 MR. MacGILL: Thank you.

4 THE WITNESS: Under the circumstances,
5 above and beyond the pure progress payment form,
6 above and beyond the form itself and the audit that
7 was conducted, in view of the other circumstances,
8 such as the shutdown and his lost posture and the
9 withdrawal of financial support; in view of all of
10 that, no, nothing was owing.

11 If those circumstances did not exist,
12 the shutdown -- a complete shutdown, not limited --

13 JUDGE GROSSBAUM: You're talking what's
14 alleged to be the November 7th --

15 THE WITNESS: Yes, in other words, if
16 these factors didn't exist; if Bankers' Leasing
17 hadn't stopped advancing money, if the loss hadn't
18 been there, and if the contractor's ability to
19 eliminate the loss had not been -- and the
20 contractor's inability to cover the loss had not
21 been there; then I could have paid whatever amount I
22 was able to, after Government review, and after
23 application of Mod 28, and after application of the
24 loss formula.

25 But because these other factors existed,

1 and came into play, I was not in any position to pay
2 a progress payment.

3 JUDGE GROSSBAUM: Would you put the key
4 date for these factors gelling to be around this
5 November 7th, 1986, what's characterized as a
6 "shutdown"?

7 THE WITNESS: That was the initial -- I
8 guess that's when the first -- it first became
9 evident in regards to the shutdown.

10 JUDGE GROSSBAUM: How about Bankers'
11 Leasing pulling out, was that before or after the
12 so-called shutdown?

13 THE WITNESS: Well, it's around that --
14 I cannot say with certainty without checking the
15 record, but they pulled out when there was no
16 assurance -- when MRE-7 "dried up" in regards to
17 Freedom.

18 JUDGE GROSSBAUM: That wouldn't have
19 been until January of 1987, would it, when there was
20 a negative -- or maybe December 1987 when the
21 pre-award survey was re-surveyed to a negative?

22 THE WITNESS: Well, to my recollection,
23 Bankers' Leasing was getting nervous early on
24 because the MRE-7 -- the procurement process was
25 going on, I think, for months, and Bankers' Leasing,

1 to the best of my knowledge, became -- was losing
2 confidence in Freedom's ability to ever obtain a
3 portion of the MRE-7, not all of it, of course, but
4 at least a portion of it.

5 And in view of this dragout -- well, not
6 dragout; in view of the procurement process that had
7 been going on for a few months -- I don't know the
8 exact number of months offhand, Bankers' Leasing
9 apparently lost confidence in Freedom, because there
10 was no assurance of anything.

11 JUDGE GROSSBAUM: Your knowledge, your
12 view of whether Freedom was entitled to any amount
13 of progress payments was based largely on your
14 perception of what was going on.

15 THE WITNESS: Yes.

16 JUDGE GROSSBAUM: Did you know before
17 this November 7th date, which was presumably the
18 date of the alleged shutdown, that Bankers' Leasing
19 was in the process of pulling out or having pulled
20 out?

21 THE WITNESS: Well, I can't say -- I
22 would say it was within that time frame. Whether it
23 was exactly on or before or immediately, you know, a
24 day after, without --

25 JUDGE GROSSBAUM: Well, by that time,

1 they had not -- by that time Freedom's prospects of
2 getting the MRE-7 weren't kaput, were they?

3 THE WITNESS: No. It might have been
4 until December. But what was -- the problem was
5 Bankers' Leasing -- if Bankers' Leasing -- you see,
6 this is the problem. If Bankers' Leasing had
7 fulfilled the intention of the commitment, meaning
8 unrestricted line of credit, Freedom would have had
9 the financial wherewithal to continue performance
10 and finish this contract. But because Bankers'
11 Leasing tied in incorrectly, improperly, financing
12 to Freedom to receivables from the Government,
13 meaning progress payments and invoices, Bankers'
14 Leasing didn't advance this money. If they had
15 advanced the money, Freedom should have had the
16 capacity to continue.

17 JUDGE GROSSBAUM: Well, you knew all
18 along that this was not an unrestricted line of
19 credit in terms of accounts receivable financing.

20 THE WITNESS: Well, the intent was that
21 it was supposed to be unrestricted. That was the
22 intention.

23 But, anyway, Bankers' Leasing, whether
24 it was November, it was that time frame, lost
25 confidence.

1 JUDGE GROSSBAUM: Were they
2 communicating with you that they were getting cold
3 feet?

4 THE WITNESS: Not to my recollection,
5 directly.

6 JUDGE GROSSBAUM: So you didn't really
7 have any firsthand knowledge of Bankers' Leasing
8 until such time as Mr. Thomas might have told you
9 that they had pulled out.

10 THE WITNESS: That is correct. The
11 information would be secondhand. To the best of my
12 -- I may add, Bankers' Leasing was calling me all
13 the time, as well as our financial analyst.

14 JUDGE GROSSBAUM: Now, how about -- so
15 in your view, based on your answer to the Board's
16 question about as of the 15th of January 1987, that
17 you would probably put it back as to on or before --
18 that if Freedom was entitled to -- if they had
19 entitlement to progress payments, it probably would
20 have been up until the shutdown; and at that point
21 your view would be that after that, that prospects
22 were either so nil or whatever, that you would
23 didn't feel any entitlement to progress payments.

24 THE WITNESS: Unless they obtained
25 outside financing for MRE-7, that's correct.

1 MR. MacGILL: Pardon me. Did he say --
2 his last words "that's correct"?

3 THE WITNESS: Yes.

4 JUDGE GROSSBAUM: "That's correct unless
5 they obtained outside financing for MRE-7",
6 something like that.

7 MR. MacGILL: Thank you.

8 JUDGE GROSSBAUM: Okay. Progress
9 payment request number 21 came to you before the
10 shutdown, didn't it?

11 THE WITNESS: Yes.

12 JUDGE GROSSBAUM: Would it be fair to
13 say that Freedom was owed anything -- were there any
14 progress payments owing to Freedom between October
15 20th, 1986 and November 7th, 1986, when Freedom
16 allegedly shut down?

17 THE WITNESS: May I check the documents?

18 JUDGE GROSSBAUM: Yes.

19 THE WITNESS: Okay. 21 was submitted on
20 15 September 1986, covering costs --

21 JUDGE GROSSBAUM: I'm sorry. I don't
22 mean 21. I mean 22.

23 THE WITNESS: Oh, okay. I'm sorry.

24 JUDGE GROSSBAUM: 21 was paid.

25 THE WITNESS: Yes. Try 22. 22 was

1 submitted on 20 October 1986, covering costs through
2 8-2-86. I don't understand that, but anyway, let me
3 just see what my notes say. Well, there's something
4 wrong here because I remember there was an
5 administrative change, but let's not -- I don't want
6 to confuse this.

7 There's something wrong here with 22.
8 I'm going to try to find my own 22, because it says
9 it was submitted on 10-20-86, covering costs through
10 8-2-86, but that doesn't make sense, because the
11 previous progress payment covered costs through 9-5,
12 and I know there was some sort of administrative
13 change, but I just want to match that up with what I
14 have in the Government's Rule 4.

15 Okay, I'll show you where the confusion
16 is. If you refer to page 36 of Government Rule 194,
17 there's a little confusion which I'm sure we can
18 eventually unravel. Okay, if you see Paragraph I
19 towards the middle of the page -- if you go down to
20 the second line, Your Honor, where it says, "21,
21 received 16 September 1986, became progress payment
22 22 for administrative purposes", DCA audited
23 progress payment number 21 and presented it as 22.

24 So I'm trying to -- you know, there was
25 some sort of puzzle -- there's a little puzzle here.

1 JUDGE GROSSBAUM: Okay. We're concerned
2 about whatever it is that came in on the 20th of
3 October.

4 THE WITNESS: Yes.

5 JUDGE GROSSBAUM: And was for a --

6 THE WITNESS: Yes, \$1.4 million, if the
7 chart is correct, yes. But then there's a statement
8 on the next -- see, that's what I'm saying, there's
9 a little confusion. There's a statement on page 45
10 of my -- of 194, paragraph I -- where it says
11 "progress payment 22 in the amount of" -- so there's
12 something -- whatever the amount was -- I mean
13 there's some sort of puzzle here; but whatever the
14 amount was, I reached the decision that -- I had to
15 hold this in abeyance.

16 JUDGE GROSSBAUM: As far as the records
17 show, number 22 seemed to be the last progress
18 payment request, and unless there's something wrong
19 with the form that we have in the record, it seems
20 to be dated 10-20-86.

21 THE WITNESS: Yes, you see the initial
22 there -- my initial; and originally it was dated
23 one, dash, slash, 20, '86. So there's something
24 wrong. But I was holding 22.

25 JUDGE GROSSBAUM: A typo?

1 THE WITNESS: Yes, possibly. And,
2 again, I was -- there were no other progress
3 payments, to my knowledge, beyond 22; that was the
4 one that we held -- I held.

5 JUDGE GROSSBAUM: Okay. So you did have
6 a progress payment request before -- apparently, per
7 your one document there, for \$1.4 million as of the
8 20th of October 1986, which was not paid prior to
9 the so-called shutdown?

10 THE WITNESS: Yes.

11 JUDGE GROSSBAUM: Okay. When did you
12 first begin applying the loss formula for progress
13 payments?

14 THE WITNESS: Several progress payments
15 earlier. I think it was -- I'd have to check.

16 JUDGE GROSSBAUM: Before Mod 25 -- Mod
17 25 might be characterized as a seminal event which
18 took place at the end of May 1986. You had been
19 applying loss formula before Mod 25?

20 THE WITNESS: I would have to check.
21 It's around that time frame. I think it was
22 starting with progress payment 14, but if you want
23 --

24 JUDGE GROSSBAUM: Yes, go ahead.

25 THE WITNESS: Okay. Definitely what --

1 I'm looking at page 10 of Government Rule 4.

2 JUDGE GROSSBAUM: Tab?

3 THE WITNESS: I'm sorry, Tab 194. And
4 there's a statement here on page 10, paragraph
5 three, the second line, "The ACO applied a loss
6 ratio of 83.6." Now I'm backtracking to 13. So
7 definitely with progress payment 14, which is the
8 May time period, prior to Mod 25.

9 Well, I didn't on 12. That's for sure.
10 If you turn to page 5 of the same tab, okay,
11 paragraph 4, financial, where I state that -- if you
12 look at the fifth line, "The ACO, after a thorough
13 review of the situation, elected not to apply the
14 loss ratio at this time." So 12 is out. The only
15 question is 13.

16 JUDGE GROSSBAUM: How did you become
17 aware of a \$700,000 loss?

18 THE WITNESS: Well, the 700 -- well,
19 okay, obviously, the progress payment form itself
20 would admit to a loss. May I just refer to the form
21 itself?

22 JUDGE GROSSBAUM: Okay. Because I'm
23 looking at 14 and I'm trying to figure out -- the
24 Board is not an accountant so --

25 THE WITNESS: Sure. Yes, it's by the

1 contractor's own admission. If you have 14 in front
2 of you.

3 JUDGE GROSSBAUM: I've got 14 in front
4 of me.

5 THE WITNESS: Look at Block 5, the
6 contract price, \$13.8 million. Now look at Blocks
7 12A and 12B.

8 JUDGE GROSSBAUM: Okay.

9 THE WITNESS: That's by the contractor's
10 own admission that --

11 JUDGE GROSSBAUM: Well, how did this
12 contract price get to be 13?

13 THE WITNESS: Partial termination for
14 default, December 1985.

15 JUDGE GROSSBAUM: Okay. So that's where
16 you start getting the loss --

17 THE WITNESS: Well, no, I believe
18 earlier.

19 JUDGE GROSSBAUM: Where did you get the
20 \$700,000 loss?

21 THE WITNESS: Okay, at that time, if I
22 may -- oh, right here. Sure. Yes, right here. Add
23 11 -- see Blocks 12A and B?

24 JUDGE GROSSBAUM: Right.

25 THE WITNESS: Add 11.4 -- that's 14.5;

1 compare the 14.5 to 13.8, contract price.

2 JUDGE GROSSBAUM: Okay.

3 THE WITNESS: He's admitting to a
4 \$700,000 -- and for your information, Your Honor,
5 the first admission of a loss by the contractor was
6 four or five months earlier at the December 1985
7 meeting at DPSC where he admitted at the meeting
8 there was going to be a loss. When he first
9 admitted it on a form, I would have to just
10 backtrack. But he admitted it several months
11 earlier -- five months earlier than this; December
12 1985 at the meeting at DPSC.

13 JUDGE GROSSBAUM: Progress payment 12
14 doesn't show any loss.

15 THE WITNESS: May I -- I don't have --

16 JUDGE GROSSBAUM: Showing \$16 million
17 out of a \$17 million contract.

18 THE WITNESS: Okay. I don't have that
19 tab.

20 JUDGE GROSSBAUM: He only shows a loss
21 after the partial termination for convenience; that
22 is, in his progress payment forms, when he starts
23 showing --

24 THE WITNESS: Well, again, there's
25 another vehicle I used.

1 JUDGE GROSSBAUM: Partial termination --

2 THE WITNESS: Not just the form but
3 there's another vehicle. As part of our progress
4 payment reviews, the industrial specialist develops
5 a percentage of completion. Myself, in pricing, our
6 financial -- take the percentage of completion and
7 compare that to the percentage of the costs
8 incurred.

9 And in these various pricing reports --
10 and, again, I don't know offhand if, you know, if it
11 had occurred at an earlier time period, but if you
12 look at these pricing reports in the Government's
13 Rule 4, you'll see a disparity, a wide disparity
14 many times, between progress and costs.

15 So even though a contractor may not
16 admit on the form that it's a loss, when I compare
17 -- the Government reviews, comparing the percentage
18 of progress by the IS to the percentage of costs
19 incurred, if there's a disparity -- usually we're
20 concerned if there's a swing of more than 10 percent
21 between progress and cost.

22 If it's more than 10 percent -- 10
23 percent, we're even concerned if it's late in the
24 contract, but normally, 10 percent there's some
25 leeway. But here we were having 15, 16, sometimes

1 there were 30 percent swings between progress and
2 cost. That's another source of information for the
3 ACO. Even if a contractor doesn't admit a loss on
4 the form, the progress payment form.

5 JUDGE GROSSBAUM: You were asked some
6 questions on cross-examination about the period --
7 you had a meeting at DLA on the 30th of December,
8 1986.

9 THE WITNESS: Yes.

10 JUDGE GROSSBAUM: You also wrote a
11 couple of point papers subsequent to that. Put
12 yourself back in the time frame between 30 December
13 1986 and 12 January 1987. Do you recall being
14 advised that DPSC and -- people from DPSC and DLA,
15 that they were electing to forebear?

16 THE WITNESS: Yes.

17 JUDGE GROSSBAUM: Forebear from what?

18 THE WITNESS: From a decision to T for
19 D, the Freedom contract; and also, I believe a
20 decision on the award of the balance of the MRE
21 portion, or the unawarded MRE portion, because they
22 were going to award to various sources, and I think
23 perhaps there was maybe one source that they hadn't
24 decided on yet, whether it's going to go to Freedom
25 or SO-PAK, or whoever. And I believe that was the

1 other area of forbearance.

2 JUDGE GROSSBAUM: Okay. Putting
3 yourself back in that time period, you had learned
4 about DPSC's and DLA's mutual election to forebear.
5 Did you formulate an opinion in that time frame
6 concerning the wisdom of that election?

7 THE WITNESS: No, not really, no. To be
8 honest with you, no. They were the decision-makers
9 and there -- to be honest with you, I'll tell you
10 why, because there was really nothing I could do. I
11 couldn't pay a progress payment while the company
12 was shut down, and while the financial problems were
13 there. So whatever DPSC was doing, and DLA, really
14 had -- as long as the matter wouldn't become
15 protracted, you know. I really had no impact at the
16 time on what I had to do as an ACO.

17 JUDGE GROSSBAUM: How did you happen to
18 -- oh, in your capacity as an ACO, or even in your
19 capacity with various contract specialist functions
20 that you had --

21 THE WITNESS: Yes.

22 JUDGE GROSSBAUM: -- have you ever
23 participated with a pre-award survey?

24 THE WITNESS: No, not as a direct
25 participant. Only as an indirect participant in the

1 form of comments, as I mentioned yesterday. That is
2 a standard -- a standard IOM -- it's a form,
3 actually, a pre-printed form that's sent to the ACO
4 informing him there's a survey and you attach the
5 first page of the survey document -- the survey
6 package that comes in -- saying, there's a survey
7 for this type of procurement; do you have any ACO --
8 comments of an ACO nature.

9 And many of them -- most of them are
10 usually negative. Rarely will an ACO -- not rarely,
11 but only on occasion or upon exception -- that's a
12 better description -- will an ACO actually sit down
13 and write a memorandum. Usually they are routine
14 things and we say "no comment".

15 But with this case, I felt that I would
16 like, for the record, just to provide certain
17 comments in the progress payment and financial
18 areas.

19 JUDGE GROSSBAUM: Who was Aldo
20 Bertolini?

21 THE WITNESS: He was DCASMA, New York
22 pre-award monitor.

23 JUDGE GROSSBAUM: What grade would he
24 have been?

25 THE WITNESS: Well, normally the monitor

1 is a grade 12, GS-12. In his case, he might have
2 been an 11 acting for the -- or placed in the
3 monitor's position as a sort of like acting monitor.
4 I believe that might have been the case.

5 JUDGE GROSSBAUM: Now, is he a
6 decision-maker as far as the conclusion that is made
7 in the pre-award survey as to whether or not it is a
8 favorable or an unfavorable?

9 THE WITNESS: No, he is just the
10 monitor. He's like the coordinator.

11 JUDGE GROSSBAUM: He collects --

12 THE WITNESS: Yes, he's the routing
13 point. And the decision-maker is the pre-award
14 board. DCASMA has a pre-award survey board, and
15 it's very visible in the sense that it's not -- it
16 doesn't operate in isolation.

17 If there's a negative survey, the
18 commander has to see the negative survey. That's
19 the policy. And he reviews the final package before
20 it goes out. And if it's a high visibility thing,
21 such as in Freedom and a few other contracts, like a
22 WEDTECH, say; then our region might want to see it,
23 like our general. You know, it depends on the
24 situation.

25 JUDGE GROSSBAUM: Do you happen to

1 recall how the circumstances under which you were
2 requested to send some kind of a response to Mr.
3 Bertolini in connection with pre-award of Freedom
4 with respect to MRE-7?

5 THE WITNESS: I presume it would have
6 been the normal route, a memo; or he might have come
7 over to me. Sometimes the monitor will come over
8 and say -- they'll see you're on the elevator or
9 something and say, oh, by the way, we just got a
10 survey in, if you wish to comment. So sometimes you
11 may not get the memo. But you'll be informed by the
12 monitor, either -- usually by this pre-printed
13 form, and sometimes just verbally, if they see you
14 in the hall or whatever, and they'll let you know
15 there's a survey in the house.

16 JUDGE GROSSBAUM: In your capacity as
17 ACO -- and in any prior contract specialty
18 capacities you have served, did you have occasion to
19 communicate with the Small Business Administration?

20 THE WITNESS: Not just with Freedom,
21 Your Honor?

22 JUDGE GROSSBAUM: Not just with Freedom.

23 THE WITNESS: Oh, yes, many times; many,
24 many times.

25 JUDGE GROSSBAUM: Did you communicate

1 with the Small Business Administration concerning
2 such things as size determinations, in particular?

3 THE WITNESS: Rarely, because it was in
4 the -- the DAR used to have a section on sizes as
5 compared to commodities. I think over 20, 25 years,
6 I maybe only called them a handful of times about
7 size.

8 JUDGE GROSSBAUM: How about certificates
9 of competency? Did you have occasion to communicate
10 with them about certificates of competency?

11 THE WITNESS: No, only upon -- rarely.
12 I'm out of the loop when it comes to certificates of
13 competency. You know, if there's a negative survey
14 and if the COC route is followed -- I'm out of the
15 loop.

16 Sometimes the SBA would call me, as the
17 ACO, or any other ACO, and may ask some questions;
18 are you the ACO for this account? Could you tell me
19 something about his performance? So as a result of
20 an ongoing COC, you know, scenario, I might receive
21 -- I haven't received one in years, but I have over
22 the years, received some.

23 JUDGE GROSSBAUM: Did you receive any
24 inquiries from the SBA in connection with Freedom?

25 THE WITNESS: Not that I recall.

1 JUDGE GROSSBAUM: The next step of the
2 scenario is redirect. Is the Government prepared to
3 redirect?

4 MS. HALLAM: Yes, Your Honor.

5 JUDGE GROSSBAUM: We've been going now
6 for almost two hours. Want to take a recess?

7 MS. HALLAM: I'd love a recess.

8 JUDGE GROSSBAUM: About ten minutes.
9 We'll be back at ten minutes to five.

10 (Whereupon, a short recess was taken.)

11 JUDGE GROSSBAUM: The hearing will come
12 to order. Redirect.

13 REDIRECT EXAMINATION

14 BY MS. HALLAM:

15 Q Mr. Liebman, you were testifying to a
16 comment that you made to Freedom regarding being too
17 busy to handle their progress payments. Would you
18 explain the circumstances of that comment?

19 A Yes. I knew Henry Thomas well enough to
20 speak casually at times. Although we might have had
21 differences over issues under this contract, we
22 still had a good personal relationship, and we could
23 joke and talk off-the-cuff. And the scenario
24 involved the fall of 1986 newspaper articles
25 concerning Freedom's allegations to the press that a

1 law firm that represented WEDTECH tried to shake
2 Freedom down.

3 The law firm was Biaggi & Erlich.
4 Biaggi meaning the -- Mario Biaggi's son, Richard
5 Biaggi, and General Erlich. And there were various
6 articles, starting in September 1986, and became
7 more frequent in October 1986, concerning this
8 allegation of a shakedown by WEDTECH. And then the
9 whole WEDTECH scenario blew up in the papers and in
10 the media.

11 And during a casual conversation with
12 Thomas on the phone, which I had many of, you know,
13 Thomas would say, well, did you see the article, and
14 I'd say, yes. And at one time, I did jokingly
15 humorously say, well, gee, Henry, you know, with all
16 this stuff now going on with WEDTECH, I may not have
17 to sign for your stuff -- your progress payment.

18 And it was just in the form of a joke,
19 and it was nothing serious about it, and I never
20 intended, obviously, to withhold any progress
21 payment, or decrease my attention to any of
22 Freedom's work. It was just a joke, which was in
23 consonance with the informal relationship I did have
24 with him apart from, you know, business.

25 And, obviously, it was not to be taken

1 seriously. And, unfortunately, I do regret that the
2 contractor is using that improperly as a means of
3 attacking the Government. And he used this four
4 years ago at the Lambert deposition and, apparently,
5 is trying to use that now. The whole argument is
6 ridiculous. And it never happened. I never
7 lessened my attention to Freedom because of the
8 burgeoning WEDTECH problem.

9 Q I'd like for you to refer now to Mod 25,
10 which is at the Government's Rule 4, Tab 119. Yes.

11 Q Page 3 of that modification, paragraph
12 2.

13 A Yes.

14 Q There's a list of capital equipment
15 there

16 A Yes.

17 Q Referring you to the sentence right
18 under that list, where it says "less previous
19 payments of \$123,107".

20 A Yes.

21 Q Could you explain what those previous
22 payments were?

23 A Yes. While the DPSC PCO -- in the midst
24 of working on this modification, meaning the DPSC
25 PCO, I did receive a call from him during this time

1 frame as he was preparing this modification
2 document, and he wanted to know if I had previously
3 paid any progress payments for any capital-type
4 equipment.

5 And I said offhand I didn't think so but
6 let me check all of my files. And I remember
7 spending a few days delving into all the paperwork,
8 because they were quite extensive. And I did find
9 that, unfortunately, in the earlier progress
10 payments, I believe progress payments 1, 2 and 3 --
11 these are HT Food progress payments, possibly up to
12 4.

13 But in the earlier HT Food progress
14 payments, which, of course, included the earlier
15 Freedom ones, the Freedom number 1, revised, and
16 number 2, the Freedom number 3, which were
17 incorporated in HT Food's number 1, HT Food's number
18 2 --

19 Q We'll get into that later.

20 A Right. That we did find that I did
21 erroneously pay \$123,107 for capital-type equipment.
22 And I so conveyed that to Mr. Bankoff.

23 Q And when you say you paid it for
24 "capital-type equipment", are you referring to the
25 equipment that's specifically listed here?

1 A I cannot say that with certainty, maybe
2 some, maybe all. I would have to go back to the
3 original paperwork, but it was for capital-type
4 equipment that we were billed for by the contractor
5 in the form of progress payments.

6 I would say it probably was. The
7 equipment looks to be -- the categories look similar
8 to the categories cited in these early progress
9 payment requests, but I -- without backtracking,
10 obviously, I can't say categorically that every item
11 here was in those earlier progress payments. But I
12 can say it appears to be, yes -- they appear to be,
13 yes.

14 Q There was also some testimony on cross
15 that you required financing.

16 A Yes.

17 Q And you testified that you did require
18 financing generally; is that correct?

19 A That is correct?

20 Q Why was that? Why were you requiring
21 financing?

22 A Because of the adverse financial
23 situation that surrounded the history of this
24 contract and occurred during the life of this
25 contract, that the contractor needed this outside

1 financing.

2 Q Was this over and above the financing
3 that the contractor purportedly had from Dollar
4 Dry-Dock?

5 A No. No, it was not.

6 Q Was it instead of the financing?

7 A It was within the dollar limits cited in
8 the Dollar Dry-Dock letter of commitment, which was
9 never honored by Dollar Dry-Dock.

10 Q How much financing was the Government
11 requiring Freedom to demonstrate?

12 A Okay, eventually it came to \$5 million
13 or \$5.5 million. And as is evidenced in the
14 Bankers' Leasing letter of commitment submitted as
15 part of the novation scenario in the March 1985 time
16 period.

17 Q That was to replace the seven point
18 something million dollars from Dollar Dry-Dock?

19 A That is correct.

20 Q I'd like to run through these progress
21 payments with you. Progress payment 1 that's dated
22 11-15-84.

23 A Yes.

24 Q It indicates a payment date. Was there
25 actually a payment made on that progress payment?

1 A No, it was paid under HT --

2 Q Was there a payment made on it?

3 A Yes. Yes.

4 Q When was that -- there was a payment
5 made on that progress payment?

6 A No, not on that progress payment per se.

7 Q Fine.

8 A Okay.

9 Q Okay. What became of that progress
10 payment?

11 A That progress payment was paid via HT
12 Food's progress payment number one on May 6, 1985.

13 Q Did that payment become revised and
14 become progress payment 1, dated 12-7?

15 A Oh, I'm sorry. I stand corrected. I'm
16 sorry. I was looking at the wrong figure. Yes,
17 progress payment 1, dated 11-15-84, for \$100,310,
18 was later revised, called 1 Revised, dated 12-7-84,
19 in the amount of \$252,150.

20 Q And was anything paid on that progress
21 payment request?

22 A Not on that progress payment request per
23 se.

24 Q Was anything paid on progress payment 2,
25 dated 1-14-85?

1 A No, not on that progress payment request
2 -- Freedom progress payment request number 2, per
3 se.

4 Q Was anything paid on progress payment --
5 Freedom progress payment 3, request dated 2-8-85?

6 A Not against that progress payment
7 number, Freedom number 3, per se.

8 Q What happened to those three progress
9 payments?

10 A Freedom progress payment number 1,
11 resubmitted, dated 12-7-84, Freedom progress payment
12 number 2, dated 1-14-85, and Freedom progress
13 payment number 3, dated 2-8-85, were factored into
14 HT Food's progress payment number 1, dated 4-10-85,
15 and were paid by the ACO on 5-6-85.

16 Q For progress payment number 2, would you
17 refer to Tab 54 of the Government's Rule 4?

18 JUDGE GROSSBAUM: Whose progress
19 payment? HT's or --

20 MS. HALLAM: Yes, Your Honor.

21 THE WITNESS: Yes.

22 BY MS. HALLAM:

23 Q Can you confirm whether this is the
24 audit report on that progress payment?

25 A Yes, I can.

1 Q Just leave that volume open and also
2 open the Appellant's file, Tab F-232, subtab,
3 progress payment number 2.

4 A I no longer have that. My volume starts
5 with number 13. Thank you. Yes.

6 Q Between those two documents, can you
7 explain to us why the payment was made for 332421 in
8 light of a request for \$633,074?

9 A Yes. The difference represents -- in
10 the main three subcontractor progress payments, that
11 we were waiting for the results of review by various
12 DCASMA's. The three subcontractor progress payments
13 totaled \$209,268, involving Cadillac Products, Del
14 Monte and Transpackers; and the rest of the costs
15 are based on various deductions that are reflected
16 in the DCA audit report.

17 Q Okay. And just for the record,
18 referring to Tab 57.

19 A Yes.

20 Q Can you confirm that this is the audit
21 report on HT Food's progress payment number 3?

22 A Yes.

23 Q Referring to Tab 60.

24 A Yes.

25 Q Can you confirm that this is the audit

1 report on Freedom, New York, number 4 -- progress
2 payment number 4?

3 A Yes.

4 Q Progress payment number 4, as submitted
5 by Freedom, New York, was there any payment on that,
6 against progress payment number 4 as submitted?

7 A Yes, there was a payment of, I believe,
8 \$170,689 for one of the subcontractors; I believe,
9 Cadillac Products. When the results came in, I paid
10 it out of 4. So the balance of 4 was
11 administratively then changed to 5. Yes.

12 Q That \$170,000 represented a contractor's
13 claim?

14 A No, it was a subcontractor progress
15 payment request from Cadillac Products,
16 Incorporated.

17 Q Is that part of the previously reduced
18 \$209,000 for subcontractors' claims, under progress
19 payment number 2?

20 A No, it's part of -- well, bear with me a
21 moment. I just want to -- if I may, I just want to
22 compare the progress payment 3 form with the
23 progress payment 4 form, if I may.

24 No -- well, on the surface the progress
25 payment 3 form does not -- the subcontractor portion

1 of the form is not filled out. However, progress
2 payment 4 has the figure of \$170,689. So based on
3 the submission from HT Food, I have to conclude that
4 it was part of progress payment 4.

5 Q Referring to Appellant's Rule 4 File,
6 F-232, under the subtab, progress payment number 5.

7 A Yes.

8 Q The cover letter there, does that
9 confirm that the Cadillac Food amount was deducted
10 from progress payment number 2?

11 A Okay, I have to stand corrected. Yes,
12 this -- the statement here is the progress payment
13 request of Cadillac Products, totalling \$170,689,
14 have been deducted from the original progress
15 payment 2, and progress payment 3 requests, and have
16 been requested and paid as 4. Our original number 4
17 has now been renamed 5. So, obviously, then,
18 Cadillac apparently was tied into 2 and 3, according
19 to Mr. Thomas. And that tie-in from 2 and 3, then,
20 switched over to 4. So we paid it under 4.

21 Q And there was a payment -- two small
22 payments; one in the amount of \$6,687.46, made on
23 July 5th -- or made on September 25th, 1985. What
24 does that payment represent?

25 A Yes. The \$6,687.46 was an emergency

1 payment to enable Freedom to pay an electrical bill.

2 Q And the \$4,389 payment, also made on
3 September 25th, what does that represent?

4 A An emergency payment to Freedom on the
5 same date to pay -- to enable Freedom to pay his
6 electrical bill.

7 Q And referring to Tab 66 of the
8 Government's Rule 4.

9 A Yes.

10 Q Can you confirm that this is the audit
11 report for progress payment number 6?

12 A Yes.

13 JUDGE GROSSBAUM: Excuse me. Would you
14 repeat that tab number?

15 MS. HALLAM: 66.

16 BY MS. HALLAM:

17 Q Referring to Tab 76.

18 A Yes.

19 Q Can you confirm that this is the
20 progress payment report for progress payment request
21 number 7?

22 A Yes.

23 Q And could you tell us what number 7
24 included in the way of costs?

25 A It included costs -- the unpaid progress

1 payment costs involved with progress payments 5, 6,
2 plus additional costs that would have been submitted
3 as part of the normal 7. So it was 5, 6, plus the
4 costs beyond 6 that would have been the normal 7.

5 Q And under this progress payment you made
6 a payment of approximately \$1 million less than the
7 requested amount; is that correct?

8 A That is correct.

9 Q Could you explain that deduction?

10 A Yes, on page 5 of the audit report,
11 reflected -- or identified as Tab 76, page 5 of the
12 audit report for number 7, has the breakdown. Apart
13 from subcontractor progress payment requests, DCA
14 has a figure -- a subtotal of \$1,000,076 and some
15 change for claim costs and question costs, \$543,273.
16 So DCA questioned \$543,273 for costs other than the
17 subcontractor progress payments.

18 Then going two lines down, there's a
19 category, subcontractor progress payments, \$534,456,
20 which is identified or explained in six in
21 parentheses,, and it says, "Represents subcontractor
22 progress payments. We have been advised that assist
23 audits are being obtained by DCASMA, New York, which
24 will be forwarded to the ACO. Accordingly, these
25 costs are subject to the result of the assist

1 audits."

2 So this is how you get the million
3 dollars. The half -- the \$534,456, where I was
4 waiting for a subcontractor progress payment review
5 from the DCASMA, and the \$543,273, which were
6 question costs by DCAA. That's how you would get
7 roughly the million dollars I deducted.

8 Q Would you explain what the question
9 costs involved -- why those costs were questioned?

10 A Yes. If you could bear with me a
11 moment. Okay, there were many reasons, and they
12 were also added in the audit report. Some of the
13 costs represented costs that should be capitalized.
14 They represented capital improvements to the
15 building, which DCA felt should be capitalized,
16 rather than expense the 100 percent. There were
17 costs for capital equipment, and DCA took exception
18 to expensing these.

19 There were costs related to salaries
20 that involved effort related to the improvement of
21 the building. DCA felt the cost should be
22 capitalized. Other question costs involved
23 financial management fees, which were considered to
24 be unallowable interest expenses.

25 There was \$400,000 in a rental income

1 credit that Mr. Thomas obtained from his landlord,
2 thereby, in my eyes -- in DCA's eyes and the ACO's
3 eyes, voiding roughly 4 months of rental.

4 There was duplication of real estate
5 taxes, \$96,539. There were excessive legal and
6 accounting fees, \$65,000. That's basically the gist
7 of it, plus, of course, the subcontractor progress
8 payment review that we were waiting the results of.

9 Q Explain what that questioned \$400,000
10 for the rental income credit was.

11 A Yes. Roughly, Freedom paid rental at
12 about \$100,000 a month, which was an allowable cost.
13 And I paid progress payments for these costs. And
14 DCA found out after the fact that the "landlord"
15 forgave this rental cost that Freedom was obligated
16 to pay, because Freedom waived its option to buy the
17 building.

18 Audit disallowed it, and I also
19 disallowed this, because we looked at it as a --
20 what we call a "void cost". It was no longer an
21 incurred cost. We paid for these costs. Freedom
22 never passed on this payment to the landlord,
23 because the landlord forgave the \$400,000 because
24 Freedom gave up its option to buy the building.

25 So as far as I was concerned, and DCA

1 was concerned, it was an invalid incurred cost. We
2 had already paid for that in the form of progress
3 payments, so DCAA and the ACO -- of course, I was
4 the decision-maker, but on the advice of DCAA, I
5 concluded that this cost should be deducted from
6 current and future progress payments until the
7 Government got the \$400,000 back.

8 Q Referring to Tab 80 of the Government's
9 Rule 4.

10 A Yes.

11 Q Can you confirm that that's the audit
12 report for progress payment number 8?

13 A Yes.

14 Q Under subtab A there, would you identify
15 what that document is?

16 A Yes, that's the pricing report for
17 progress payment number 8. The DCASMA, New York,
18 pricing report for progress payment number 8.

19 Q And the document under the B tab?

20 A Yes, that's the -- DCASMA, New York,
21 industrial specialist's report for progress payment
22 number 8.

23 Q And what type of information does the
24 industrial specialist's report tell you?

25 A He reports on progress as related to the

1 specific progress payment. And it also reports on
2 total progress for the contract and develops a
3 percentage of physical completion, as is indicated
4 here in paragraph 1A, 23.41 percent.

5 Q On this progress payment there was a
6 payment made of 347 plus dollars on a requested
7 amount of 869,000 plus dollars.

8 A Yes.

9 Q Can you explain what was deducted?

10 A Yes. If I may refer to the audit report
11 in this tab. Bear with me a moment. Okay, no, not
12 the audit report. I would first refer -- I have
13 handwritten notes here which I think may -- it's
14 right after -- if you look at Tab A, 80A, the second
15 page of 80A, I have handwritten notes dated 11-6-85,
16 and I don't know if you can read my handwriting, but
17 I'll try to talk us through this.

18 Freedom submitted \$869,688. And I paid
19 \$349,958, and in going through the deductions, I'm
20 saying, less \$86,108, which for deductions reflected
21 in the DCA report, and I spell it out for plant and
22 ground maintenance, manufacturing overhead salaries,
23 legal and accounting. There was excess legal and
24 accounting fees.

25 Then I'm saying less \$400,000 for the

1 rental offset against progress payment 5. That's
2 the rental scenario I spoke about. Freedom would,
3 you know, continually factor this \$400,000 into
4 progress payment requests, although I had disallowed
5 it. So we had to keep pulling it back each time.

6 Less \$70,288, for manufacturing overhead
7 salaries paid on progress payment 6, which should
8 have been capitalized. Then I gave him a plus; plus
9 \$36,487 for G&A salaries, which represented an
10 adjustment from progress payment 7. We had to do
11 some transposing. Freedom had indicated that -- I
12 think it was to DCAA, that there was sort of like an
13 incorrect mixture between certain manufacturing
14 overhead salaries and G&A salaries. So we had to
15 recategorize certain things.

16 And then going further down, it gets a
17 little more confusing. We can try to talk through
18 this. I think this is how I'm explaining this plus
19 \$36,487. Yes. This is going to get really
20 confusing, but here's how I arrived at a plus
21 \$36,487.

22 Freedom submitted \$167,154 for G&A
23 salaries, DCAA reclassified \$47,090 to manufacturing
24 overhead salaries. Okay. So that resulted -- by
25 this deduction you had a new subtotal for G&A

1 salaries of \$120,065. Then I had to take out
2 \$83,577 paid by the ACO representing one-half of
3 submitted G&A salaries based on verbal information
4 from DCAA.

5 If you turn the page to page two of my
6 notes -- and again, this is getting really
7 confusing. I have in parenthesis, "At the time of
8 the verbal information, DCAA was not sure of the
9 exact amount that we would be allowed for G&A." So
10 I sort of like split it and we'd settle the
11 difference once I got the final results. So there
12 was an adjustment of \$36,487.

13 Going down the line -- it becomes easier now
14 -- I deducted \$85 -- oh, I'm sorry, less -- it says
15 "less allowed" -- maybe I meant disallowed. I don't
16 know. It says "allowed by DCAA on progress payment
17 8 for automated building management, less 508
18 receiving and maintenance equipment credit on
19 progress payment 7", and then I added a plus, 772
20 for startup costs under 7, that had been set aside
21 pending DCAA review.

22 So "Paid by ACO, \$349,958, 11-12-85,
23 contractor verbally advised". So I would have to
24 say, there is a record here -- and you can see, it's
25 a very complex payment scenario involved here.

1 The bulk of the money is this \$400,000
2 that was, again, factored in, which we took out; and
3 then \$86,000 deducted by DCAA for number 8, for
4 plant and ground maintenance, you know, legal and
5 accounting fees, manufacturing overhead salaries,
6 and -- it was a very intricate and complex-type of
7 payment scenario. And that, hopefully, will answer
8 your question.

9 Q Is that \$400,000 the same \$400,000 that
10 was disallowed on the previous progress payment?

11 A Yes.

12 Q Referring to Tab 94 of the Government's
13 Rule 4.

14 A Yes.

15 Q Can you confirm that that's the audit
16 report for progress payment request number 9?

17 A Yes, I do.

18 Q And there's a little differential there
19 but we'll move on to the next one.

20 A Okay.

21 Q Can you explain what the payment for
22 progress payment number 10, the \$353.61 represents?

23 A Yes, that was some sort of
24 administrative adjustment, and we paid the exact
25 amount Freedom submitted. I think it adjusted some

1 previous progress payments that, I think, both
2 Freedom and, I believe, DCAA brought to my
3 attention.

4 So I reviewed -- Freedom submitted 10.
5 I did a desk review, ran it by DCAA, and it was
6 decided to pay the amount in full. It was for
7 adjustments over several progress payments.

8 Q Okay. I'd like you to refer now to
9 Government's Rule 4, Tab 105.

10 A Yes.

11 Q Can you just identify the documents
12 under this tab?

13 A Yes, they are related to progress
14 payment number 11 -- previous progress payment
15 number 11.

16 Q Referring now to -- they are related to
17 -- could you?

18 A Well, they are the documents involved
19 with progress payment number 11.

20 Q What is the first document here?

21 A The first document I have is the DCASMA,
22 New York price analysis report for progress payment
23 11.

24 Q And B?

25 A B is the progress payment request

1 itself, number 11.

2 Q I'm sorry. Tab A?

3 A Tab A is the DCASMA, New York industrial
4 specialist's report for 11.

5 Q Referring to Tab 107.

6 A That's the DCA audit report for progress
7 payment 12.

8 Q And A?

9 A A is the price -- DCASMA, New York price
10 analysis computation of the loss ratio formula and
11 the amount they are recommending that I pay on
12 progress payment 12.

13 Q I'd like you to look at B, which is the
14 request.

15 A Yes.

16 Q What line is it where the actual amount
17 of the request is reflected?

18 A That's line 26, that's \$623,371. In
19 relation to the chart, when I gave the information
20 yesterday, I was reading from the upper part of the
21 form, that figure of \$638,034, I erroneously quoted
22 to the Appellant's attorney. That was Block 19. I
23 should have given him the figure in Block 26;
24 \$623,371.

25 Q Referring to Tab 109 of the Government's

1 Rule 4, can you identify those documents?

2 A Yes, these are the documents pertaining
3 to progress payment 13.

4 Q And for progress payment 13, there was a
5 payment of \$700 paid against a request of
6 \$1,700,000; paid against a request of more than \$1
7 million.

8 A Yes.

9 Q What does the \$700,000 request, what
10 accounts for the disparity?

11 A I think I can more easily explain this
12 if I refer to one of my point papers, if I may,
13 because I remember during testimony yesterday -- I
14 can start with the reports here, and then if you'll
15 allow me, I'd like to go to a point paper.

16 Q Maybe I can refer you to something
17 quicker.

18 A Okay. Sure.

19 Q Does Government's Rule 4, Tab 113
20 explain the payment? It's a rather illegible copy
21 there.

22 A Yes. Right, this helps, you know, open
23 some eyes concerning the \$700,000. Paragraph 2 --
24 may I read aloud?

25 Q If you can, yes.

9 "During the conversation, I advised Mr.
10 Marra that \$700,000 of the \$1,002,222 requested
11 under progress payment 13 had been approved for
12 payment. I explained that the \$700,000 was fair and
13 reasonable in considering the significant disparity
14 between cost incurred; that is, 66 percent and
15 progress, 39." -- it looks like "39.8 percent, and
16 considering that application of the loss formula per
17 the DAR would probably have resulted in very little
18 or zero payment. I further explained that the
19 balance; that is, \$284" -- it looks like "\$284,507
20 (\$302,223 less 5 percent)" -- and then "\$17,717 of
21 disallowed legal fees, of \$18,648 would be
22 considered for payment after Freedom's revised
23 breakdown of costs incurred to date, plus estimated
24 cost to complete was received."

25 And in line with this -- I just want to

1 go back now to the audit reports, if I may -- to the
2 reports in the tab that we started with, and maybe
3 it will shed a little more light, with this in mind.

4 Okay, in the audit report per se, DCA's
5 questioning the \$17,716. But the problem is, we now
6 look at Tab A of the Rule 4 document, 109, Tab A,
7 the first and second pages. This is the pricing
8 report and this explains why my letter to Mr. Thomas
9 is very important.

10 In Tab A, which is the pricing report
11 for 13, pricing is bringing out the wide disparity
12 between progress and costs. In paragraph 2, they're
13 saying progress is 39.8 percent, paragraph 3, 64.5.
14 And then at the bottom line of paragraph 7, they are
15 saying -- they are recommending for payment,
16 \$557,967, and it says "see schedule A attached".

17 We go to schedule A, which is the
18 attachment, there's the pricing calculation of the
19 loss formula, which comes up to \$555,967. So, I
20 paid \$700,000, which was more than what pricing was
21 recommending. So the bulk of the deduction,
22 basically -- almost the entire deduction on this
23 progress payment was due to the indicated loss.

24 Q Referring to Tab 117 of the Government's
25 Rule 4 file, can you identify those documents?

1 A Yes. Those are the documents pertaining
2 to progress payment 14.

3 Q Can you explain what your payment of 14
4 reflects, the \$1,125,000 plus reflects?

5 A Yes.

6 Q Maybe more correctly, what it doesn't
7 reflect against the request of more than \$2 million.

8 A Yes. Okay, the audit report is not in
9 the tab, but we have the pricing report. The first
10 page of Tab 117 is the DCASMA, New York pricing
11 report for progress payment 14. And if you look at
12 paragraph 6 of this report, it says, "In his report
13 of 5-15-86, the auditor recommends that \$1,054,014
14 be paid on the subject request." And then it breaks
15 out the reasons for the reductions.

16 Apparently -- well, okay, they are
17 talking here about occupancy costs, \$335,000,
18 insurance, \$29,000, legal and accounting fees,
19 \$13,000; and it goes further into the occupancy cost
20 for the rental of wracks and forklifts for the
21 duration of the building lease agreement, which
22 costs should be pro-rated over the terms of the
23 lease; insurance costs, which are duplication; legal
24 and accounting fees, which are excessive.

25 Now here you'll see the contractor

1 requested \$2,100,000. I don't have benefit of the
2 actual audit report here, but you see the auditor --
3 they are talking here about a lesser amount. If you
4 go up to paragraph 1 of the pricing report, it says,
5 "A review was performed on the subject request in
6 the amount of \$1,400,000." But what I would have to
7 say they are eluding to is the fact that Freedom
8 really has factored in costs that had been
9 previously disallowed.

10 That would account for the difference of
11 the \$2,100,000 that they submitted. That should
12 account for the \$2,100,000 and the \$1,400,000 that
13 the price analyst here is saying is in the progress
14 payment request in paragraph 1. I don't have the
15 benefit of the audit report to confirm that.

16 Q Mr. Liebman, referring to the
17 Government's Rule 4, 194 -- Tab 194, pages 7 through
18 10. Is there an explanation of your deductions or
19 calculation of the payment there?

20 A Yes. I believe we discussed this in
21 testimony yesterday. Pages 7 through 10?

22 Q 7 and 10.

23 A 7 and 10? Yes. On page 7, paragraph 4,
24 it says "progress payment 14 in the amount of
25 \$1,412,276 submitted by the contractor on 21 March

1 1986 is currently under review", blah, blah, blah.

2 We also made a decision to apply the loss formula.

3 Now going to page 10, there's a
4 statement in paragraph 3; "progress payment 14, the
5 reduced amount of \$1,125,437, there's a proof of
6 payment on 25 April 1986. In calculating the
7 payable amount, the ACO applied a loss formula of
8 83.6 percent utilizing contractor's revised loss of
9 \$2.6 million."

10 Q So what does that mean? How did you
11 arrive at what you did, or what you paid?

12 A Okay. What I did was, I -- the
13 \$700,000, basically, was a reasonable amount --

14 Q We're talking about 14 now.

15 A Okay, I'm sorry. I applied a loss ratio
16 formula, and I came out -- and based, of course,
17 upon the Government reviews, I came out with an
18 amount that was -- that I could pay. And that was
19 the \$1,125,437.

20 Q What amount did you apply the loss ratio
21 formula against?

22 A Let me go back and see, if I may, to the
23 progress payment request, if I may. What tab was
24 that again in our Rule 4?

25 Q 194?

1 A No, not 194 but I mean --

2 Q 117?

3 A Okay. Because I was just looking at the
4 F-file and there was an original 14 and then a
5 revised one. And I just want to compare what's in
6 the original and the revised. The original request
7 -- well, we can go with this one.

8 The original one was dated 19 March 1986
9 and there was a revised one 22 April 1986. I just
10 want to check at Tab 117 if I may. Okay, same
11 document, and the -- there is an emission here of a
12 -- okay, I see here, yes. There is a contract price
13 of \$13,800,000; costs incurred to date of \$11.4;
14 estimated cost to complete of \$3 million.

15 So this is how the \$700,000 comes into
16 play. Price is \$13.8 million; costs from inception
17 to complete the contract are indicated by the
18 contractor in the total amount of \$14,500,000. So
19 if you subtract the contract price of \$13.8 million
20 from the cost the contractor expects to incur during
21 the life of the contract, which is \$14.5 million,
22 you come up with a \$700,000 differential.

23 So in this case, I applied a modified
24 loss ratio-type of scenario. I paid him -- well, I
25 deducted the difference. I deducted the difference

1 between --

2 Q Mr. Liebman --

3 A I'm sorry.

4 Q -- what number did you apply the loss
5 ratio factor against? Was it against the progress
6 payment requested number, or was it against a
7 reduced number?

8 A Okay. May I check the tab again? Okay,
9 I don't see a full calculation reflected here in my
10 documents, but the normal way I did this was, I
11 would apply the loss ratio against the amount --
12 reduced amount recommended by DCAA. I would use the
13 DCAA report, see what they disallowed, and then once
14 they came up with a figure, I would use those
15 figures and then work the loss formula off against
16 that. I don't see the calculations here, but that
17 was the method that I traditionally used in applying
18 the loss formula.

19 Q Could you tell us how you arrived at the
20 reduction in progress payment number 15?

21 A May I refer to the -- my -- Rule 194?

22 Q Certainly.

23 A Okay. Yes, on page 14 of Government's
24 Rule, Tab 194, there's a complete analysis of my --
25 of progress payment 15 and what I did. Paragraph 3,

1 page 14, it states that -- may I read this?

2 Q Can you just tell us briefly what it was
3 you did?

4 A Yes. Yes. Basically, I indicate that
5 there was a big disparity between progress and
6 costs, that DCA took exception to certain dollars,
7 and based on -- I'm saying here, based on this
8 information, meaning the disparity between progress
9 and costs, and based on the DCA review, I then made
10 the appropriate adjustments and computed a loss
11 ratio formula of 83.59 percent, utilizing the
12 contractor's revised loss of \$2.6 million. The ACO
13 applied this ratio of 83.5 percent and determined
14 the amount that was payable.

15 So this is consistent with my policy. I
16 would see what DCA factored out, and then if I
17 decided to apply the loss formula, I applied against
18 the net amount after DCAA disallowed costs were
19 factored out.

20 Q Could you identify the documents under
21 Rule 4, Tab 118?

22 A These are documents pertaining to
23 progress payment number 15.

24 Q And referring to Government's Rule 4,
25 Tab 120.

1 A Yes.

2 Q Can you confirm that these are the
3 review documents for progress payment 16?

4 A Yes.

5 Q On progress payment 16, you made a
6 payment of a little more than \$1 million against a
7 request of not quite \$3 million. Can you explain
8 that difference?

9 A Yes. Again, may I go to -- yes, on page
10 114 of Tab 194, Government Tab 194, there's a
11 complete explanation. And DCA questioned \$1,674,824
12 from prior period costs. And I explain that these
13 were costs previously disallowed or deducted, and
14 also, costs regarding -- pertaining to the
15 application of the loss formula.

16 It also included legal and accounting
17 fees. And then it says, "The ACO applied a loss
18 ratio" -- so if you bear with me, I think I'm going
19 to have to turn to another page. And there should
20 be some further narrative on this, if I may.

21 I don't see -- let's see -- okay, I
22 don't see it in the next point paper, the actual
23 computation of the loss formula and the amounts.
24 But this is the same scenario.

25 I would have taken what the DCAA

1 factored out, which are -- and then applied the loss
2 formula against that. And you can see, roughly,
3 that per this chart, Freedom came in for \$2.9
4 million, and I paid \$1.1 million, which is close to
5 the prior period costs.

6 The differential between \$2.9 that they
7 came in with and \$1.1 that I paid, almost equates to
8 the prior period costs that were factored out by
9 DCAA. That amount was \$1.6 million, plus; and
10 that's indicated on page 4. And, of course, there
11 were some legal and accounting fees.

12 Q Referring to the Government's Rule 4,
13 Tab 136, can you confirm that these are the review
14 documents for progress payment request number 17?

15 A Yes.

16 Q For progress payment number 17, you paid
17 \$1.3 million, plus, against a request of \$3.8
18 million plus?

19 A Yes.

20 Q Can you explain that deduction?

21 A Yes, as the audit report indicates in
22 Tab 136, the first page, DCAA, out of the \$3.8
23 million, factored out questioned prior period costs
24 of \$2.2 million, and -- okay, I don't have page 2 of
25 the audit report, but they are referring to a

1 subparagraph A, which would explain what the prior
2 period costs were.

3 And so that left -- when you factored
4 out \$2.2 million -- when DCAA factored out 2.2 of
5 the 3.8, that left 1.5 for DCAA then to address.
6 And of the 1.5, they questioned \$66,000.

7 Now I would like to refer to my papers,
8 if I may. Yes, on page 23 of Governments Rule 4,
9 Tab 194, next to the last paragraph -- and I'll just
10 sort of generalize this. The request was \$3.4
11 million -- really \$1.5 million after the Government
12 disallowed costs that were factored out. DCAA took
13 exception to the following costs out of the \$1.5
14 million; excessive legal and accounting fees,
15 \$19,000, lease of equipment, \$62,800, for a total
16 amount of \$82,000 such and such.

17 I took the figure that DCA came up with,
18 meaning subtracting \$82,000 plus that they
19 questioned out of the \$1.5, and you come up with a
20 figure of roughly \$1.4 million, whatever. And then
21 I applied a loss ratio against that DCA figure.

22 So after I applied the loss ratio
23 against the DCA recommended figure, I came up with a
24 net amount of \$1,325,327, which is the amount that I
25 released for payment.

1 Q Referring to the Government's Rule 4,
2 Tab 142, can you confirm that all those documents
3 there are the review documents for progress payment
4 request number 18?

5 A Yes, I can.

6 Q Okay. Progress payment 18, you made a
7 payment of a little more than \$700,000 against a
8 request of more than \$3.7 million. Can you explain
9 your payment?

10 A Yes, first starting with the audit
11 reports in that Tab 142. It states on the first
12 page that Freedom submitted a request of \$3.1,
13 questioned prior period costs, \$2 million; and here
14 we do have the second page in the audit report on
15 this one.

16 And if you look at reference small A in
17 parentheses, which is on page 2 of the audit report,
18 it says, "The contractor has included costs for
19 progress payments 16 and 17, which were not paid as
20 of the date of the current request." Meaning we had
21 rejected these costs on 16 and 17. And he included
22 them again on 18.

23 In addition, Freedom has included in
24 this progress payment costs that have been
25 previously disallowed or withheld, resulting from

1 application of the loss formula by the ACO. So even
2 though on previous requests I applied the loss
3 formula, Freedom has reinstated the deduction per
4 the loss formula in the progress payment requests.

5 So anyway, after the questioned prior
6 period costs, that left a net of \$1,054,000 for DCA
7 to review. And of the \$1,054,000 DCA questioned
8 \$1,011,017. And referring to the reasons for this,
9 apparently, they're talking here now about the bulk
10 -- some of it had to do with equipment leased; the
11 bulk of it is what they call "excessive costs over
12 contract limitation".

13 And here -- and what they mean by that,
14 they explain it in one of these small subparagraphs
15 on page 2; specifically, paragraph 2 in parentheses.
16 Apparently, this has to do with the progress payment
17 ceiling. And apparently, DCA felt that they had
18 incurred costs above and beyond the ceiling of \$13
19 million, and they go into a calculation.

20 Well, anyway, going back to what I paid,
21 I paid \$704,068. DCA is basically recommending very
22 little be paid, perhaps \$43,000, if anything.

23 But anyway, I'd like now to refer to my
24 point paper which should add some further light to
25 this. Yes, on page 26 of Government's Rule 4, 194,

1 I'm saying progress payment 18, in the reduced
2 amount of \$704,068 was paid. And I refer to the
3 previous progress payment ceiling on page 27 of the
4 Rule 4 which states, there's a previous progress
5 payment ceiling of \$13 million. And the only amount
6 remaining from the ceiling was \$42,895.

7 So then I go through a computation,
8 which apparently now we were dealing with Mod 28,
9 which tied in progress payments to deliveries.

10 So I went through the Mod 28
11 calculation, and this is where the progress payment
12 ceiling could be increased from \$13 million to \$14
13 million if 80,000 cases were delivered; then to \$15
14 million if another 80,000; and then up to a maximum
15 of \$15,800,000.

16 Well, at this particular time, the
17 contractor hadn't shipped the first full 80,000 case
18 increment. He had shipped 61,948 out of the first
19 80,000. So I couldn't raise the ceiling a total of
20 a million, but I could raise it on a pro tanto
21 basis.

22 So I multiplied the percentage that
23 \$61,948 out of the 80,000 amounted to, which was
24 .77435, and I multiplied that by the million dollar
25 ceiling. And that enabled me -- that came up with a

1 bottom line figure, as a result of doing this, of
2 \$817,245, from which I deducted capital equipment
3 costs deducted by DCAA in the amount of \$22,750,
4 giving us a subtotal of \$793,495, to which I applied
5 a loss ratio of .8873, resulting in an amount
6 approved for payment of \$704,068.

7 Q When you were making these calculations,
8 what did you do to determine how many cases were
9 shipped?

10 A I coordinated with our industrial
11 specialist. He provided the case information to me.

12 Q Referring now to Tab 158 of the
13 Government's Rule 4, will you confirm that those
14 documents under that tab relate to the review of
15 progress payment number 19?

16 A Yes. Yes, I can

17 Q On progress payment 19, I believe this
18 is the one we already went through, so we won't go
19 through it again. Progress payment 20 is a payment
20 of \$311,000 against a request of \$2.4 plus million.

21 A Yes.

22 Q Can you explain that reduction?

23 A May I refer to the tab and, of course,
24 my reports?

25 Q There's no review documents with it.

1 A Okay. Well, then I'll refer to
2 documents in Government Tab 194, and here I have the
3 page right now, page 32, paragraph K. And it
4 states, "Progress payments in the reduced amount of
5 \$311,447 became payable on 22 September 1986.
6 Calculations were as follows". Of the 80,000 case
7 increment the contractor had shipped 33,061, which
8 represented a 41 and some decimals factor.

9 In other words, he shipped 41 percent of
10 the 80,000-case increment. So I multiplied that 41
11 percent factor against the million dollar increment
12 per Mod 28, and that came to \$413,262.50; less
13 unallowable costs per DCA report on progress
14 payments 19 and 20. That amounted to \$31,166.

15 So I deducted \$31,166 from the
16 \$413,262.50 that he could have been paid per the
17 increments, you know, pertaining to Mod 28. And
18 that came up to a subtotal of \$382,096.50, to which
19 I applied a loss ratio of .8580, resulting in an
20 amount of \$327,838.79, to which I applied the
21 progress payment rate of 95 percent, and that came
22 up to \$311,477, and that was the amount I paid.

23 Q And the last one, referring to the
24 Government's Rule 4 File, Tab 162, can you confirm
25 that those documents are review documents for

1 progress payment number 21?

2 A Yes, they are.

3 Q And for progress payment 21 you made a
4 payment of \$721,000 plus against a request of \$2 --
5 not quite two and a half million?

6 A Yes.

7 Q Could you explain what the reduction
8 was?

9 A Yes. If you will bear with me a moment.
10 This is Tab 162? I'm sorry. I just lost track for
11 a second.

12 Q Yes.

13 A Thank you. Let's first turn to the
14 audit report, which is the second page of this tab,
15 and the report states that, "Freedom submitted a
16 progress payment for \$2,399,374, and less questioned
17 prior period costs of \$1,306,032. And on the next
18 page they explain what those prior period costs are.

19 Again, these are costs that Freedom
20 included in this progress payment request that we
21 previously disallowed or withheld resulting from
22 application of the loss formula by the ACO and
23 contractual limitations.

24 After this was factored out, that
25 resulted in an amount of \$1 million plus for DCA to

1 look at. And of the \$1,000,093, DCA questioned
2 \$231,157. So that left roughly about \$770,000 that,
3 you know, would be passed on to the ACO as a
4 possible payment figure.

5 Now marrying this audit report up with
6 my documentation, if -- this is explained on page 36
7 of Government Rule 4, Tab 194. On page 36, in the
8 last paragraph, paragraph J, it says, "The ACO on 3
9 October 1986 made a decision to pay progress payment
10 21 in the reduced amount of \$721,887. Considered in
11 his decision was the best interest of the
12 Government, the contract loss of approximately \$2.8
13 million, progress payments paid to date, cases
14 accepted to date, including 13,600 cases that the
15 PCO DPSC anticipated Freedom might have shipped had
16 there been no GFM outage", so it gave Freedom credit
17 for some GFM outage; meaning credit in the form of
18 some progress payment dollars.

19 "Also included in the ACO's decision was
20 31,166 in DCA disallowances per Mod P-29." And then
21 on the next page, page 37, is a detailed computation
22 of how I arrived at the \$721,887. And here it says,
23 "Cases accepted as of 2 October 1986, 467,978 cases.
24 Credit given Freedom in the amount of 13,600
25 credited for stock outage of GFM items."

1 Therefore, I used as a calculation base,
2 total cases shipped of 481,578, which included
3 credit of 13,600 for a stock outage of GFM outage --
4 GFM items authorized by the PCO.

5 Then I went through a little
6 computation. I divided the 80,000-case increment --
7 I divided an 80,000-case increment for Mod 28. I
8 took that as the denominator and I divided into the
9 numerator cases accepted -- I took the 71,578 cases
10 accepted as the numerator, and I divided into the
11 71,578 the 80,000-case increment, giving me a
12 delivery percentage factor of .89 and some decimals.

13 So .89 percent -- in other words, he
14 delivered 89 percent of the 80,000-case increment.
15 I multiplied that by the \$1 million progress payment
16 increment, and that would come up to a subtotal of
17 \$894,725 maximum amount payable.

18 And then I have a deduction of \$172,838
19 against the 894,725, which was previously paid
20 against progress payment -- left blank -- previously
21 paid against the progress payment increment, which
22 gives us an amount payable of \$721,887. And based
23 on this, I paid the \$721,887. Everything is
24 well-documented here in the file.

25 Q Okay. Could you explain this credit for

1 stock outage of GFM items?

2 A Yes. In the interest of fairness,
3 during my conversation with Mr. Bankoff, Mr. Bankoff
4 -- the DPSC PCO said, okay, let's give the
5 contractor some credit in the interest of fairness,
6 because there was a GMF outage. And one way of
7 giving the contractor some, I guess, equity or
8 making him whole in this area, was to give him the
9 number of cases that he conceivably would have
10 shipped had there been no GFM outage.

11 So, therefore, Frank computed that this
12 would have been the number of cases, roughly, and
13 therefore, he authorized me to include this in my
14 case computation in regards to determining the
15 number of cases that were shipped per Mod P-28.

16 So here's a case where we were giving
17 him some credit in helping to make the contractor
18 whole. And it was a means of, I guess, of equity.

19 Q Progress payment 22, there was no
20 payment made on that. Would you tell us what amount
21 had been determined by you to be paid if a payment
22 was made?

23 A Bear with me a moment. Unfortunately, I
24 do not see any information --

25 Q Let's refer you to page 37 of the

1 Government's Rule 4, Tab 194, paragraph K.

2 A Yes, okay. All right, let me read this.
3 Yes. May I read this?

4 Q Well, just tell us what the amount was.

5 A Okay. Bear with me a moment. Okay,
6 yes. There's a figure cited here that the ACO is
7 considering suspending the amount of \$208,915, based
8 on 500,364 cases accepted. Okay, so per application
9 of Mod P-28, I apparently would have been -- in
10 accordance with my point paper, I would have been
11 able to pay \$208,915; less, of course, any loss
12 formula that I might have wished to apply.

13 Q That's fine. And you had also testified
14 that you were holding up progress payment 21, was
15 it?

16 A 22.

17 Q That Mr. Bankoff had asked you to hold
18 up a payment of a progress payment?

19 A Yes, for a few-day period, yes.

20 Q And during that period that you were
21 holding that progress payment, did you advise
22 Freedom, or anyone at Freedom, that it was being
23 held up? Did you make them aware of it in any way?

24 A May I have the opportunity to check my
25 record? I believe there is such a document. I have

1 my point paper which describes the scenario. There
2 was a letter that we were looking at yesterday --
3 during yesterday's testimony. And I have the
4 citation of the PCO's request at 1600 hours on 3
5 October, that I'm to hold -- a request that I hold
6 the progress payment in abeyance, pending execution
7 of Mod P-29.

8 And I know there was another document
9 that we looked at yesterday. I'm just trying to
10 locate that.

11 Q Do you have any recollection?

12 A Well, there was a letter -- I would have
13 to look at the document.

14 Q Do you have any recollection right now?

15 A No.

16 MS. HALLAM: Okay. I'm finished.

17 MR. MacGILL: Your Honor, I have just a
18 few questions on recross.

19 RECROSS EXAMINATION

20 BY MR. MacGILL:

21 Q The first thing, Your Honor, and Mr.
22 Liebman, I wanted to follow-up with is some
23 questions that the Board specifically asked you
24 prior to the time that the redirect began. Do you
25 remember, sir, when the Board asked you -- and this

1 was around 4 o'clock, did the Government owe
2 progress payments during the period October 20, 1986
3 through November 7, 1986, and you basically said,
4 yes? Do you remember that testimony and that
5 question from the Board?

6 A Did the Government owe progress
7 payments?

8 Q Yes, did you owe Freedom progress
9 payments between October 20, 1986 and November 7,
10 1986? Do you remember the Board asking you that
11 specific question?

12 A Give me that date again. I'm sorry.

13 Q October 20, 1986 and November 7.

14 A I don't -- well, I know the matter was
15 discussed --

16 Q Yes, the Board asked you that question.

17 A Yes. Yes.

18 Q And you didn't have a definite answer,
19 but you did basically say, yes. Right?

20 A Yes.

21 Q Now the Government Counsel just asked
22 you specifically about something relative to the
23 Board's question on page 37, which of Exhibit 194.

24 A May I have an opportunity to look at it?

25 Q I have it right here, sir, to save the

1 time. Now, when the Board asked you that question,
2 you didn't tell the Board that you had calculated
3 that the amount due under progress payment 22 was
4 \$208,915; did you, sir?

5 A I do not recall. I just mentioned it
6 now.

7 Q You mentioned it now but you didn't tell
8 the Board that when you were asked that directly;
9 did you, sir?

10 A I do not recall.

11 Q All right. Now, furthermore, relative
12 to that same question by this Board, the ACO's
13 decision, "relative to progress payment 22 is
14 expected to be made during the week of 3 November
15 1986"; right, that's what you wrote on this page 37
16 of Exhibit 194?

17 A That is correct.

18 Q The fact of the matter is, we know from
19 the correspondence we went through before, you
20 didn't deal with this until January 1987; did you,
21 sir?

22 A The notice of consideration of
23 suspension was mailed to Freedom in early January
24 1987.

25 Q January 26, 1987.

1 A Right, January 26.

2 Q And you said relative to this amount of
3 \$208,000 owed to Freedom, you were going to make
4 that decision the week of November 3, weren't you,
5 sir?

6 A Can I ask for the date of the paper?

7 Q Yes, sir. It says "November 3, 1986",
8 doesn't it? "ACO decision expected to be made 3
9 November 1986"?

10 A Yes, that was my thought at the time.

11 Q The plant shut down November 7th; didn't
12 it, sir?

13 A That is correct.

14 Q So you didn't do what you expected, and
15 the plant shut down on the 7th of November.

16 A That is correct.

17 Q Now I want to go to another specific
18 area that the Board asked you about between 4 and
19 4:30 this afternoon. Do you recall the Board having
20 questions -- detailed questions about Mod 28? Do
21 you recall that, sir?

22 A Yes, I do.

23 Q And do you recall that the Board asked
24 you specifically about Mod 28 in relation to this
25 progress payment, progress payment number 19? Do

1 you recall that, sir? The Board asked you about
2 this progress payment ceiling that came through Mod
3 28. Do you recall that detailed testimony?

4 A Yes, I do.

5 Q And do you recall telling the Board
6 essentially that you had -- that, yes, the DCAA
7 recommended \$699,000 of payment, but that you
8 reduced the payment down to 200 because of the loss
9 ratio?

10 A And because of Mod 28.

11 Q Yes, sir. Because of the loss ratio,
12 and critically, Mod 28, right?

13 A That's correct.

14 Q And the DCAA did not account for Mod 28,
15 only you did that.

16 A To the best of my recollection, yes.

17 Q That's not true, is it, sir?

18 A I don't know. If you can prove
19 otherwise.

20 Q Well, what you testified to, sir, to
21 this Board on that subject when he took you through
22 those questions at length, was not true, was it?

23 A Well, no, let me check my -- I'll see
24 what you have and let me check my point paper. Do
25 you have my point paper or are you looking at

1 something else?

2 Q Sir, I'm going to refer you to Exhibit
3 158, page 3. In fact, to save you time, sir, I'll
4 put it in front of you. This is the DCAA audit
5 report relative to progress payment request -- which
6 number, sir?

7 A This is progress payment 19.

8 Q Yes, sir. You didn't tell the Board
9 when you testified, did you, sir, that they had
10 calculated a progress payment ceiling pursuant to
11 Mod 28, correct?

12 A That is correct.

13 Q And, in fact, they had done just that,
14 hadn't they?

15 A Apparently, they had.

16 Q Yes, they had.

17 A Yes.

18 Q And what they did, was that they found
19 that the ceiling, under Mod 28, was \$14,350,000.
20 That was in a finding by this auditor, wasn't it,
21 sir?

22 A That is correct.

23 Q And that they then made a calculation
24 and came up with the figure of \$699,904, right?

25 A That's correct.

1 Q Now, Mod 28, as an ACO, you had the
2 obligation to honor that; did you not, sir?

3 A I had an obligation to consider that --
4 oh, Mod 28, yes, I had an obligation to honor Mod
5 28, that's correct.

6 Q And wouldn't you agree, sir, that this
7 DCAA audit report suggests pretty clearly you did
8 not honor Mod 28?

9 A Not necessarily. I have to refer to my
10 paperwork to answer that.

11 Q Sir, you didn't -- when this Board,
12 again, took you down detailed -- a detailed analysis
13 of Mod 28 and it's effect on the progress payment
14 ceiling, you didn't tell him that in relation to
15 progress payment 21, that you had -- that that was
16 one -- first of all, let me back up a second.

17 Progress payment 21, you paid \$140,000
18 less, approximately, than recommended by the DCAA,
19 right?

20 A You mean \$1.4 million, not \$140,000.

21 Q Sir, to speed this up, I'm going to put
22 in front of you Exhibit 162.

23 A Okay, now we're talking about 21.

24 Q Yes, sir.

25 A But if you look at your chart, it shows

1 \$1.7 million difference, \$2.4 million requested --

2 Q No, I'm talking about what you paid --
3 you paid \$721.

4 A Correct.

5 Q DCAA in Exhibit 162 recommended \$862,
6 didn't they, sir?

7 A That's correct.

8 Q \$140,000 differential.

9 A That's correct.

10 Q And, sir, you'll agree, you didn't tell
11 the Board when you testified earlier, at length in
12 response to the Board's questions, that on progress
13 payment 21 they also included the Mod 28 progress
14 payment ceiling; right, sir?

15 A If I'm in error, I'm in error.

16 Q And they did that, didn't they, sir?

17 A Well, let's see.

18 Q They included a ceiling of \$14.7
19 million, on page 3 of this report, which is Exhibit
20 162.

21 A Well, it speaks for itself. I'm in
22 error and I would have to stand corrected.

23 Q Now, as you administered the contract
24 relative to progress payment 21, you understood that
25 you not only had to honor Mod 28, but also Mod 29,

1 right?

2 A Correct.

3 Q Because Mod 29 was executed on the 7th
4 of November 1986, correct?

5 A I would have to check the date.

6 Q You may assume that that's in evidence,
7 sir, that it was October 7, 1986 that that mod was
8 signed. You made this payment \$140,000 short of the
9 DCAA recommendation on October 9, 1986, correct?

10 A I would like to have the opportunity to
11 check all the notes and paperwork before I -- if I
12 am wrong, I am wrong. But I would have to check
13 everything here.

14 Q But your testimony yesterday, sir, to
15 this Board was that it was October 9, 1986 when that
16 payment was made, right?

17 A That's correct.

18 Q Sir, your Counsel asked you about
19 progress payments 1 through 3, and basically asked
20 you whether these F-1, 2 and 3, were made or
21 withdrawn. Do you recall that line of testimony?

22 A That is correct.

23 Q They were resubmitted because of the
24 novation, right?

25 A That is correct.

1 Q The novation initiated by the
2 Government.

3 A That is correct.

4 Q Progress payment 13, sir, you referred
5 to the audit report, did you not, of the DCAA, in
6 your testimony on redirect.

7 A Okay.

8 Q Do you recall progress payment 13?

9 A Yes.

10 Q You paid \$700,000, didn't you, sir?

11 A Yes.

12 Q That's here on the chart.

13 A Yes.

14 Q The recommendation of the DCAA was
15 \$984,507, right?

16 A Yes.

17 Q Just so the Board recalls -- pardon me
18 -- this payment of \$700,000, \$284,507 short of the
19 DCAA was made March 18th, roughly two months before
20 Mod 25, right?

21 A Correct.

22 Q Next, sir, Exhibit 120, would you refer
23 to that? Do you have it in front of you?

24 A Give me a moment.

25 Q Maybe we can find it for you.

1 A I'll find it.

2 Q I'm nearly done. These are the last two
3 or three questions. Sir, I'm going to put in front
4 of you Exhibit 120 --

5 A I have it right here.

6 Q All right. Do you have this portion of
7 120 in front of you, sir, which is your document
8 dated 6-16-86?

9 A Yes, I do.

10 Q Now that was, just so we remember where
11 we are in point of time, that's 17 days after Mod 25
12 is signed; is that correct?

13 A Roughly, yes.

14 Q So you are applying the loss ratio;
15 aren't you, sir?

16 A I would have to check the work papers.

17 Q Wait, sir. I don't think you have to
18 look at the work papers. You testified to the Board
19 that you were applying the loss ratio in March of
20 1986.

21 A Well, if I so testified, then I did.

22 Q Fine. You were applying the loss ratio
23 -- please leave it on that page, sir -- you were
24 applying the loss ratio on 6-18-86, were you not?

25 A If that's how I testified.

1 Q Tell the Board the value of the contract
2 that you applied. What was the contract value that
3 you utilized in calculating the loss ratio?

4 A I would have to check my work papers for
5 that.

6 Q Well, didn't you reference --

7 JUDGE GROSSBAUM: Which progress payment
8 are we dealing with now?

9 MR. MacGILL: We are dealing with
10 progress payment 16.

11 THE WITNESS: I must check my work
12 papers to reply.

13 BY MR. MacGILL:

14 Q Sir --

15 A May I have a moment? Some water spilled
16 here. Bear with me a moment. Okay? Okay, I'm just
17 looking -- I found my work papers. It's page 14 of
18 Government Rule 194. I just want to see what I have
19 here. Okay, DCA resulted in questioning of
20 \$1,677,751, consisting of prior period costs of
21 \$1,674,824 --

22 Q Sir, my sole question to you is what was
23 the contract price that you used in calculating the
24 loss ratio; and I'm referring to the document that I
25 handed you initially, 6-16-86. You, obviously, can

1 refer to what you want. But what was the contract
2 price that you used?

3 A In order to do that, I want to look at
4 Mod P-25, if I may.

5 Q Wait a minute. Let's not have an
6 argument.

7 A I can't answer that without referring to
8 the documents.

9 JUDGE GROSSBAUM: You can look at the
10 document.

11 BY MR. MacGILL:

12 Q You referenced on Exhibit -- on this
13 exhibit --

14 JUDGE GROSSBAUM: What's the number?

15 MR. MacGILL: Your Honor, it's 120, and
16 it is Exhibit C to 120.

17 JUDGE GROSSBAUM: This is Government
18 Rule 4?

19 MR. MacGILL: I'm sorry. Yes.

20 BY MR. MacGILL:

21 Q Sir, top right-hand corner, you
22 reference a contract price; don't you, sir?

23 JUDGE GROSSBAUM: Of course, it's not
24 his reference. That's the contractor's figure.

25 BY MR. MacGILL:

1 Q There is a contract price referenced;
2 isn't there?

3 A Referenced by the contractor, yes.

4 Q Give us the contract price.

5 A \$13,816,163.

6 Q Is that the figure you used in
7 calculating -- well, this was submitted to you when,
8 sir?

9 A The date of the request is 9 May 1986.

10 Q And that was before Mod 25; wasn't it?

11 A That's correct.

12 Q And that was correct when the contractor
13 told you that on May 9, 1986, that the contract
14 price was \$13.8 million and some change.

15 A I would have to check. I would accept
16 it at face value. Of course, I'd have to check if
17 you want to be absolutely sure, but I'll accept it
18 at face value.

19 Q On Mod 29, 114,000 cases were
20 reinstated, bringing the contract --

21 A Mod 25.

22 Q Thank you. Mod 25, the contract is --

23 A \$17 million now.

24 Q -- \$17 million.

25 A Okay.

1 Q When you put the loss ratio together,
2 sir, you used \$13 million, not 17.

3 A Well, again, I'd have to determine that.
4 I'm trying to find out what I did here.

5 JUDGE GROSSBAUM: Why don't you look at
6 the last pages?

7 THE WITNESS: Okay. Let's see what
8 happened here.

9 BY MR. MacGILL:

10 Q Schedule A.

11 A Oh, yes. Okay, this is pricing.

12 JUDGE GROSSBAUM: Who did that? Was it
13 you?

14 THE WITNESS: No. The pricing section
15 in DCASMA, New York.

16 JUDGE GROSSBAUM: Okay.

17 BY MR. MacGILL:

18 Q You relied on this document?

19 A Well, I read it, but I want to see what
20 I did.

21 JUDGE GROSSBAUM: And how do we tell
22 what you did?

23 THE WITNESS: Well, normally I would
24 have it explained in my work papers. There is a
25 reference to progress payment 16 on page 14 of the

1 Government Rule 194. They mention the loss ratio.
2 The calculation is not indicated.

3 The only thing -- again, I'm trying to
4 logically connect all of this, and now you say the
5 date of Mod P-25 -- what's the date of that again?
6 May 29th?

7 BY MR. MacGILL:

8 Q May 29th.

9 A Okay. The reason that's important is,
10 pricing based their figures -- my pricing department
11 based their figures on the request, which was dated
12 May 9th.

13 Q Sir, do you know what you did; not what
14 anybody else did, what you did?

15 A Well, I'm trying to decipher what I did,
16 and at this point, I don't know which set of figures
17 I used. Of course, pricing is advisory to me. It
18 required further study. And, again, you were
19 dealing with a progress payment that's dated May
20 9th; you know, 20 days or so before Mod P-28, and
21 that's what we were basing the progress payment on.

22 Again, I'm speaking hypothetically.
23 Let's say I used the old price. You know, Freedom,
24 of course, could have come in with a new request,
25 with the adjusted price. But, again, I don't know

1 what I did offhand. It's not reflected -- the
2 specifics are not reflected on page 14 of Government
3 Rule 194.

4 Q Well, you admit that if you used the \$13
5 million price in calculating the loss ratio, that
6 that would have been inappropriate?

7 A No, no, no. Not necessarily. Because
8 the progress payment request -- if you look at this
9 -- look at the request, section two, on top. This
10 is a statement of costs incurred through May 2nd,
11 1986. As of May 2nd, 1986, the contract price was
12 only \$13.8 million. Why should I apply a different
13 price when costs are only through May 2nd?

14 Q Sir, if you would have paid it
15 expeditiously, it would have been before Mod 25 on
16 May 29, right?

17 A If I had paid it without a pre-payment
18 review, then we would be using the -- there would be
19 -- your question wouldn't have arisen if I had paid
20 it without review.

21 Q If you paid it promptly, there would
22 have been no issue. But you didn't pay it until
23 June 18, 1986, right?

24 A Let me check the date.

25 Q June 18, 1986.

1 A But there's still no issue in my eyes.

2 I see no issue.

3 Q I'm not asking -- you paid it on June
4 18, 1986.

5 A The date that I paid it was after the
6 date of Mod P-25.

7 Q And the contract you were administering
8 at that time was a contract that had Mod 25 as a
9 portion of it, right?

10 A But that's irrelevant. It's irrelevant,
11 because you were dealing with a progress payment
12 request for costs only through May 2nd; almost a
13 month before the Mod. Freedom should have revised
14 its progress payment request if they wanted to
15 consider a \$17 million --

16 JUDGE GROSSBAUM: If they revised their
17 progress payment request, then would you have sent
18 that through a pre-payment audit review?

19 THE WITNESS: No, no, no. Because the
20 revised request -- or if they added more costs in,
21 from May 2nd, say, to May 27th or May 29th, the date
22 of Mod P-25 -- if the added costs in for the month
23 of May that are not reflected in this original
24 submission, I would have paid what I could on this
25 submission, held the new one for the month of May,

1 and just reviewed that portion. I wouldn't have
2 held the whole thing, obviously. I would have paid
3 what I could on this initial submission.

4 Of course, I would have probably have
5 decided to review the new one, just that portion of
6 the new one pertaining to the month of May; between
7 May 2nd -- May 3rd, actually, and the date of Mod
8 P-25, whatever date that was. But right now, I
9 think your point is inappropriate because we were
10 dealing with a request for costs incurred through
11 May 2nd. That's what we reviewed. That's what I
12 acted upon.

13 BY MR. MacGILL:

14 Q In June.

15 A Well, because of a pre-payment review,
16 yes.

17 Q That you imposed.

18 A That I decided to accomplish, yes.

19 Q You imposed the pre-payment review.

20 A Yes, absolutely.

21 Q There's no payment until June because of
22 that, right?

23 A That's correct.

24 Q And you are administering a new contract
25 in June, right?

1 A But a new contract, but an old progress
2 payment applied to that. Freedom didn't revise the
3 progress payment.

4 Q Sir, let's refer -- for the final three
5 questions, let's refer to 194, page 26.

6 A Yes.

7 Q 194, page 26, sir, this is your
8 document, as we know, from your prior testimony,
9 right?

10 A Yes.

11 Q You then referenced Mod 28, 7 August
12 1986, increasing the progress payment ceiling,
13 right?

14 A Correct.

15 Q And what you said is, the ceiling goes
16 to -- from 14 to 15 to 15.8, depending on
17 deliveries, right?

18 A Correct.

19 Q And that was correct at the time you
20 wrote it as far as you understood?

21 A At the time that I wrote the point
22 paper, yes.

23 Q Okay. Now, if you'll refer to page 30,
24 please, the status.

25 A Okay.

1 Q There were, according to your notes, on
2 September 30, 1986, 465,722 cases shipped, right?

3 A Right.

4 Q And that would have put the total very
5 much in line with what DCAA said ultimately later in
6 the fall, correct?

7 A I'm not sure what they said later in the
8 fall. What are you referring to?

9 Q The record will speak for itself on
10 that, sir.

11 A Okay.

12 Q One more reference, sir. You can keep
13 194 handy. Sir, if you would refer to page 38,
14 okay. Sir, are you -- if you would look at status
15 point, small B --

16 A Yes.

17 Q -- 507,521 cases had been shipped.

18 A Correct.

19 Q And that's your recollection of what
20 happened under this contract?

21 A Correct.

22 Q That is, all the MRE-5 cases delivered,
23 MRE-6 cases --

24 A As of close of business 28 November
25 1986, yes.

1 Q Fine. Paragraph D, I'm interested in
2 paragraph D, relative to progress payment 22. To
3 orient you, sir, remember progress payment 22, the
4 one that you never paid?

5 A Correct.

6 Q And the one the Board asked you directly
7 about in the sense of what did you pay between 20
8 October and November 7?

9 A Correct.

10 Q You are now saying, progress payment 22
11 in the amount of \$327,893 continues to be held in
12 abeyance.

13 A Yes.

14 Q That's what you wrote on December 16,
15 1986?

16 A That's correct.

17 Q And now, if we go back one page, to 37,
18 where I started this re-cross, you said that
19 progress payment 22, in the amount of \$208,915, was
20 due. You then increased the numbers on the next
21 page to \$327,893. Is that correct, sir?

22 A That's correct.

23 Q So looking at it in terms of what you
24 did relative to progress payment 22, now on December
25 16, 1986, you are withholding what you think to be

1 due in the amount of \$327,893.

2 A Correct.

3 MR. MacGILL: I have no further
4 questions, Your Honor.

5 JUDGE GROSSBAUM: Would you be good
6 enough to look at Tab 119 of the Government's Rule 4
7 File?

8 THE WITNESS: Certainly.

9 JUDGE GROSSBAUM: That is Modification
10 25.

11 THE WITNESS: Yes, Your Honor.

12 JUDGE GROSSBAUM: Page 3 of 4 of the
13 modification, paragraph 2, where it describes
14 certain categories of what has been referred to
15 sometimes as capital-type equipment.

16 THE WITNESS: Yes.

17 JUDGE GROSSBAUM: Do you see any items
18 in there at all that could be, just based on the
19 nomenclature used, could be expensed in the normal
20 course of business?

21 THE WITNESS: Charged 100 percent? No,
22 Your Honor.

23 JUDGE GROSSBAUM: How about building
24 repairs?

25 THE WITNESS: No, because that's the

1 life of the building or the occupant's utilization
2 of the building. No, Your Honor.

3 JUDGE GROSSBAUM: Repairs on normal
4 maintenance item that could ordinarily be expensed?

5 THE WITNESS: Well, these were not -- as
6 far as I know --

7 JUDGE GROSSBAUM: It's repairs. It
8 doesn't say alterations.

9 THE WITNESS: No, these weren't -- well,
10 in this case, these were major repairs. I've seen
11 it. I was there when they were repairing the
12 building.

13 JUDGE GROSSBAUM: It should more
14 accurately have been described as an alteration
15 then, correct?

16 THE WITNESS: Possibly. It wasn't minor
17 repairs where you're fixing a faucet.

18 JUDGE GROSSBAUM: Suppose you had broken
19 fixtures? Or suppose you have to replace plumbing
20 pipes? Is that a repair?

21 JUDGE GROSSBAUM: Okay, as a -- again,
22 speaking as a non-accountant, which I am, it's
23 classified as a repair, yes.

24 JUDGE GROSSBAUM: And could it be fairly
25 extensive, particularly if you've got to tear out

1 some fixtures and replace them -- say you're
2 replacing galvanized with copper?

3 THE WITNESS: Oh, yes.

4 JUDGE GROSSBAUM: It could be expensive.

5 THE WITNESS: Oh, yes, very expensive.

6 JUDGE GROSSBAUM: Now, your
7 understanding of DAR 15205.9, the depreciation cost
8 principle --

9 THE WITNESS: Yes.

10 JUDGE GROSSBAUM: -- basically, your
11 view is that those things that have to be
12 depreciated under that cost principle are
13 capitalized.

14 THE WITNESS: Capitalized, that's
15 correct.

16 JUDGE GROSSBAUM: And is it one of the
17 significant tests, particularly since the
18 Government's interested in -- this is not a cast
19 contractor, is it?

20 THE WITNESS: No, because he's small
21 business.

22 JUDGE GROSSBAUM: It's just generally
23 accepted accounting principles --

24 THE WITNESS: And practices, that's
25 correct.

1 JUDGE GROSSBAUM: And one of the
2 principles -- I stand to be corrected because you're
3 much more familiar with the cost principles in your
4 role as ACO. Is this one of the standards of your
5 award if something should be depreciated, is whether
6 or not you're required to depreciate it for income
7 tax purposes?

8 THE WITNESS: As a layman speaking, as a
9 requirement, I can't say that. But, obviously, if
10 you're depreciating something, I know that's an item
11 on the income tax where you get the credit. It's
12 deductible. There is a deductible for depreciation.

13 JUDGE GROSSBAUM: Aren't there certain
14 items that you expense if you're running a business
15 for your income tax purposes; certain items are
16 expensed and certain items tend to be -- either have
17 to be amortized or depreciated?

18 THE WITNESS: That's correct, Your
19 Honor.

20 JUDGE GROSSBAUM: Now, a repair, even if
21 it's a major repair, if it's not an alteration, but
22 it's -- your pipes break and they have to be
23 repaired -- it costs \$160,000. Do you think the
24 businessman is going to now depreciate the cost of
25 the new pipes over some period of time or is he

1 going to treat this as a repair and expense it --

2 THE WITNESS: Well, in regards to income
3 taxes, I really can't say. I'm not a tax
4 accountant, and I would have to refer to an expert.
5 But in regards to my understanding of the DAR and
6 the cost principles contained in the DAR, and in
7 relation to allowable costs, you know, under
8 Government contracts, particularly progress
9 payments, my experts advise me that these costs
10 should be capitalized. And I agreed. I agreed.

11 JUDGE GROSSBAUM: Suppose the contractor
12 did a major job of replacing some of his plumbing
13 because it was getting -- his galvanized pipes were
14 rotten and he had to replace them with copper, and
15 it cost \$160,000. Just because it was a big
16 replacement job, do you think that that necessarily
17 calls for depreciation added in expensing?

18 THE WITNESS: In terms of progress
19 payments --

20 JUDGE GROSSBAUM: In terms of DAR 15205?

21 THE WITNESS: Yes, my understanding as a
22 contracting officer, that if it involves capital
23 improvement -- the key thing is capital improvement,
24 that -- capital-type nature, that these costs are to
25 be depreciating or capitalized.

1 JUDGE GROSSBAUM: Painting?

2 THE WITNESS: Well, this may be --
3 again, this may just be normal maintenance. I would
4 -- okay, first of all, I would check with DCA. But
5 my gut feeling is, if you have to paint an apartment
6 or a small plant every three years, that might just
7 be considered normal maintenance. I'm not an expert
8 on this; and of course, I would refer that to the
9 expert. But it seems to me that would probably be
10 normal maintenance, as opposed to repairing pipes,
11 which you're talking about some long-term type of
12 situation.

13 Obviously, you have to do painting. You
14 have to clean the building. You know, there are --
15 and I remember DCA addressing this in the Freedom
16 progress payments. You have what you call "normal
17 maintenance", like cleaning. You must clean the
18 building, things like that. There was some snow
19 removal, things like that. That's normal
20 maintenance.

21 JUDGE GROSSBAUM: Building management
22 and computer systems. What are the management
23 systems?

24 THE WITNESS: Sure. This is definitely
25 capital equipment, and in Freedom's case --

1 JUDGE GROSSBAUM: What were the
2 management systems? What kind of equipment was
3 involved?

4 THE WITNESS: There was two types that I
5 recall offhand; one was the -- Freedom had an
6 elaborate security system, very elaborate,
7 television cameras, you name it; highly
8 sophisticated. That's capital equipment.

9 And also, Freedom had what they called a
10 lot-tracking system, a computerized lot-tracking
11 system, to track all those millions of components I
12 mentioned -- we mentioned earlier today.

13 JUDGE GROSSBAUM: An inventory system?

14 THE WITNESS: Yes. And that was the
15 only way he could track millions of components.
16 That's capital equipment. If you're talking about,
17 you know, a radio or something, for the office, I
18 mean I wouldn't classify that as capital equipment,
19 but this was an elaborate, expensive piece of
20 equipment.

21 JUDGE GROSSBAUM: How about lockers?
22 That's the thing where the employees come in and
23 change?

24 THE WITNESS: Yes. Yes. DCAA
25 classified them as capital equipment. I took no

1 exception -- because certain office equipment can be
2 considered capital equipment. You know, obviously,
3 you're not going to include, you know, staples and
4 staplers as capital equipment.

5 JUDGE GROSSBAUM: You have some kind of
6 standard as to a purchase price as to what has to be
7 capitalized?

8 THE WITNESS: Well, again, as a layman,
9 I only can speak generally. I mean DCAA, I'm sure,
10 is well-versed in this area. But, obviously, I'm
11 sure the type of the item would come into play. You
12 know, you're dealing with, you know, a hole puncher
13 versus a piece of machinery.

14 Also, you have to differentiate between
15 capital equipment, which is like general purpose
16 equipment, as opposed to special equipment or
17 special tooling and test equipment, which they can
18 receive progress --

19 JUDGE GROSSBAUM: How about this
20 elaborate inventory system? Couldn't there have
21 been a discretion to treat that as special
22 equipment?

23 THE WITNESS: Oh, no, not at all. This
24 was an elaborate piece of machinery that was going
25 to be used for many, many years. It was expensive.

1 It was large. It's not special tooling or test
2 equipment. You're dealing with a major item -- I
3 mean an item of a capital nature. Nothing that's
4 minute. It was expensive. You're not dealing with,
5 you know, a hole puncher.

6 JUDGE GROSSBAUM: Does the DAR prescribe
7 a dollar threshold for an item, at which point it
8 has to be capitalized?

9 THE WITNESS: Not to my knowledge. I've
10 read the DAR. I've never seen such a threshold to
11 the best of my knowledge. There may be one in
12 there. Again, the experts, of course, at DCAA, they
13 have their DCAA audit manual, the accounting
14 regulations.

15 JUDGE GROSSBAUM: Well, the DCAA audit
16 manual does not have the force -- it can guide you,
17 but it doesn't necessarily have the force and effect
18 of law.

19 THE WITNESS: Okay.

20 JUDGE GROSSBAUM: So you have some
21 discretion?

22 THE WITNESS: I would imagine, you know,
23 unless there's something -- okay, obviously, going
24 by the DAR, obviously, you know, we have to consider
25 what they call generally accepted -- how is it

1 applied in terms of generally accepted accounting
2 principles and practices? The DAR specifically
3 mentions that, that incurred costs must be allowable
4 to contracts, and consistent with generally accepted
5 accounting principles and practices; which we would
6 refer to the institute of -- CPA Institute, there's
7 the audit manual. There are other DCA regulations.

8 JUDGE GROSSBAUM: Do you ever look at
9 the financial accounting standards? Doesn't this
10 tend to be the hallmark of generally accepted
11 accounting principles?

12 THE WITNESS: I'm familiar with cost
13 accounting, sir, but not the description financial
14 accounting standards. I'm not familiar with that.

15 JUDGE GROSSBAUM: Okay. How do these
16 office equipment -- how does item F differ from item
17 D?

18 THE WITNESS: Well, of course, item F is
19 office equipment. Again, these are like office
20 computers, things like typewriters. Again, I would
21 have to refer to all the documents, but speaking
22 right now, these are items that are used in the
23 office. Item D was the lot-tracking system that we
24 just mentioned. And building managements. Offhand,
25 I would imagine -- not imagine, but I believe --

1 obviously, the lot-tracking system fell in this
2 category; possibly the elaborate security system.
3 But again, the specifics are all contained in the
4 progress payment work papers that Freedom supported
5 their request with.

6 JUDGE GROSSBAUM: What kind of
7 maintenance equipment are we talking about? Are we
8 talking about buckets and brooms?

9 THE WITNESS: Oh, no, no. That's for
10 standard maintenance. I remember there was
11 something -- it may fall in this category. I'm not
12 sure if -- we were billed once for snow removal
13 equipment that Freedom bought. I don't know if it
14 falls in here. But you're not talking about buckets
15 and brooms. You're not talking about routine or
16 standard --

17 JUDGE GROSSBAUM: Vacuum cleaners?

18 THE WITNESS: I would have to check.

19 JUDGE GROSSBAUM: Floor polishers?

20 THE WITNESS: Perhaps.

21 JUDGE GROSSBAUM: Rug washers?

22 THE WITNESS: Perhaps. That seems
23 reasonable. It seems more logical. Obviously, it's
24 something -- it's possible.

25 JUDGE GROSSBAUM: Quality-control

1 equipment and supplies. Isn't that oxymoron to
2 think about capitalizing supplies?

3 THE WITNESS: Define oxymoron, Your
4 Honor.

5 JUDGE GROSSBAUM: Oxymoron is something
6 that basically is contradictory.

7 THE WITNESS: Okay, a paradox.

8 JUDGE GROSSBAUM: Could be.

9 THE WITNESS: Okay. Well, supplies, I'm
10 not sure what they mean here offhand, but quality
11 control equipment -- I don't know what they mean
12 offhand -- well, I know what they mean by quality
13 control equipment. I'm familiar with the Freedom
14 quality control equipment.

15 JUDGE GROSSBAUM: What was the QC
16 equipment?

17 THE WITNESS: Okay. They had certain
18 scales, large scales for weighing the product that I
19 remember. I remember that offhand because I
20 remember walking through it and seeing these items.
21 I believe that's how you get the quality control.
22 They had to weigh the product, things like that.

23 JUDGE GROSSBAUM: Did they have
24 equipment to calibrate their scales?

25 THE WITNESS: I don't know offhand. My

1 industrial specialist would, but I don't know
2 offhand.

3 JUDGE GROSSBAUM: Did they have
4 instrumentation?

5 THE WITNESS: I don't recall offhand.
6 But I remember weighing equipment specifically.
7 Checkers, I remember the descriptions checkers and
8 weighing equipment, scales, and things of that
9 nature.

10 JUDGE GROSSBAUM: You don't know what
11 dollar threshold your auditors used as --

12 THE WITNESS: If they used the dollar
13 threshold at all. I just don't know.

14 JUDGE GROSSBAUM: For something like
15 lockers?

16 THE WITNESS: Offhand, I do not know.

17 JUDGE GROSSBAUM: Any redirect?

18 MS. HALLAM: No, Your Honor.

19 JUDGE GROSSBAUM: Any recross?

20 MR. MacGILL: No, Your Honor.

21 JUDGE GROSSBAUM: Thank you very much
22 for your testimony. You may be excused.

23 (Witness excused.)

24 JUDGE GROSSBAUM: We'll reconvene at
25 9:15 tomorrow.

1 (Whereupon, the proceedings were
2 recessed at 6:45 p.m., to be reconvened at 9:15
3 a.m., Friday, February 12, 1993.)