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2 UNITED STATES OF AMERICA  
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6 ARMED SERVICES BOARD OF CONTRACT APPEALS  
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10 HEARING  
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17 In the Matter of: :  
18 :  
19 THE APPEAL OF : ASBCA Nos. 35671  
20 : and 43965  
21 FREEDOM, N.Y. INC. :  
22 :  
23 Under Contract No. :  
24 DLA 13H-85-C-0591 :  
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28 Hearing Room C, Seventh Floor  
29 5109 Leesburg Pike  
30 Falls Church, Virginia 22041  
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32 Tuesday,  
33 February 16, 1993  
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41 The above-mentioned matter came on for  
42  
43 hearing, pursuant to notice, at 9:20 a.m.  
44

45 BEFORE:

46  
47 THE HONORABLE JOHN J. GROSSBAUM  
48 Administrative Judge  
49

1        APPEARANCES:

2  
3        For the Appellant:

4  
5                ROBERT D. MACGILL, ESQ., and  
6                ANDREW J. DETHERAGE, ESQ.  
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20        For the Government:

21  
22               KATHLEEN HALLAM, ESQ.  
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24               2800 S. 20th Street  
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59OPENING STATEMENT:PAGE:

(None)

## VOIR

WITNESSES:DIRECTCROSSREDIRECTRECROSSDIRE

Thomas Barkewitz

By Ms. Hallam

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By Mr. MacGill

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Henry Thomas, Jr.

By Mr. Detherage 50

EXHIBITS:IDENTIFIEDIN EVIDENCEAppellant's:

A-10

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Government's:

(None)

P-R-O-C-E-E-D-I-N-G-S

(9:20 a.m.)

JUDGE GROSSBAUM: The hearing will come to order. We concluded last Friday with the testimony of Mr. Bankoff. Does Government have any further witnesses it wishes to call?

MS. HALLAM: We call Mr. Barkewitz.

JUDGE GROSSBAUM: Very well.  
Whereupon,

THOMAS A. BARKEWITZ  
having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE GROSSBAUM: Please be seated.  
Would you be good enough to state for the record your full name, giving the spelling of your last name.

THE WITNESS: It's Thomas A. Barkewitz.  
That's B-A-R-K-E-W-I-T-Z.

JUDGE GROSSBAUM: What city do you now reside in?

THE WITNESS: Well, I reside in Bothell, Washington. That's B-O-T-H-E-L-L.

JUDGE GROSSBAUM: By whom are you presently employed and in what capacity?

1 THE WITNESS: By the Law Firm of Perkins  
2 Coie, C-O-I-E, in Seattle, Washington; and I'm an  
3 attorney.

4 JUDGE GROSSBAUM: Okay. Your witness.

5 DIRECT EXAMINATION

6 BY MS. HALLAM:

7 Q Mr. Barkewitz, are you the contracting  
8 officer for Contract No. DLA-13H-85-C-0591?

9 A I was.

10 Q And what period of time were you the  
11 contracting officer for that contract?

12 A From the time of award in November of  
13 '84 through March of '85, when I left.

14 Q And were you also the contracting  
15 officer for the solicitation that lead to the  
16 contract?

17 A Yes, I was.

18 Q Prior to MRE-5, were you the contracting  
19 officer involved in the MRE Program?

20 A I was. I was the contracting officer  
21 from about 1980, I guess it was, on the MRE Program.

22 Q And what was the first MRE that you were  
23 involved in?

1           A       The first one I was involved in was as a  
2       procurement agent; and it was MRE-1, the very first  
3       MRE in '79. I think a few awards were in '79.

4           Q       Was MRE-5 the last MRE you were involved  
5       in?

6           A       It was.

7           Q       And prior to your involvement with  
8       MRE-5, did you have any previous involvement with  
9       Freedom?

10          A       I did to the extent that Freedom had  
11       earlier expressed an interest in the program and  
12       expressed an interest in becoming a contractor.

13          Q       Did you negotiate the price for Contract  
14       No. 0591?

15          A       I did, along with a procurement agent  
16       and, I believe, our division chief at the time.

17          Q       Who were you involved with on behalf of  
18       Freedom in negotiating the price for the contract?

19          A       Well, Henry Thomas, and I believe it was  
20       Pat Marra.

21          Q       Give us a little idea of what the  
22       negotiations involved.       Were they one-day  
23       negotiations?

24          A       We had talked back and forth and sent  
25       some letters back and forth on pricing information

1 over a period of time; but I believe when we  
2 actually sat down and negotiated face to face, it  
3 was one day. I think it was one day.

4 Q What was discussed during the price  
5 negotiation?

6 A Well, we discussed the various cost  
7 elements, starting with, I believe, direct labor and  
8 going down through manufacturing overhead and  
9 general administrative expenses -- those types of  
10 things. What we mostly discussed were the areas  
11 where we had differences between the Government  
12 position and Freedom's position; and those  
13 differences were based on the audit report and the  
14 DCASR, or the Contract Administration Office's  
15 pricing report.

16 Q I would like you to refer to  
17 Government's Rule 4, Tab 9. Can you identify this  
18 document?

19 A This is the price-negotiation memorandum  
20 and price analysis on the negotiation with Freedom  
21 Industries.

22 Q And what was the purpose of this  
23 memorandum?

24 A This memorandum is a typical price  
25 negotiation memorandum that's written after any

1 negotiation of this magnitude. Its purpose is to  
2 both document what happened during negotiations and  
3 what we negotiated and to submit the proposed  
4 contract award for approval up the chain of command  
5 -- in this case, up to DLA headquarters.

6 Q Does this document set forth all the  
7 areas that were discussed in the face-to-face  
8 negotiations?

9 A Yes, it does.

10 Q Could you tell us what was discussed  
11 with regard to progress payments?

12 A Well, at the very end of negotiations,  
13 when we had basically come to an agreement on price,  
14 either Henry or Pat or both said, you know, at this  
15 point they were going to get together a progress  
16 payment and, you know, submit it. We told him that  
17 the ACO was the person -- the administrating  
18 contracting officer was the person to submit the  
19 progress payments to and that we would be glad to  
20 talk to them, you know, at any time if they had any  
21 questions about what we might have negotiated; that  
22 we, you know, just thought Henry should talk to them  
23 about what the progress-payment submission should  
24 look like, what it should entail, and that they were  
25 the experts on the progress payments. It is not



1 something we did, but we would be glad to talk to  
2 them and clarify any points of negotiation --  
3 anything like that.

4 Q Is there certain capital equipment that  
5 was expensed under the contract rather than  
6 depreciated?

7 A Well, although there was an element for  
8 depreciation, I think there were some areas in the  
9 manufacturing overhead that were -- basically 100  
10 percent of the cost of certain equipment was going  
11 to be covered under this contract; yes.

12 Q And allowing that equipment to be  
13 expensed, did you agree that the cost of the  
14 equipment was to be recovered by way of progress  
15 payments?

16 A I didn't, because that's not my function  
17 as a PCO.

18 Q You mentioned that there was  
19 depreciation allowed. Would you explain what the  
20 depreciation was and what it was allowed for?

21 A Yes. I think their proposal was for  
22 about \$1.5 million in capital equipment. Although  
23 it was difficult to come up with an actual  
24 depreciation on this, our auditors had come up with  
25 a depreciation amount of \$333,333 on, I guess, an

1 estimate that the type of equipment involved there  
2 would last for four or five years, in that period.  
3 So the depreciation represented the amount for the  
4 one-year contract for that equipment.

5 Q You mentioned that it was difficult to  
6 come up with a figure there. What was the  
7 difficulty?

8 A Well, according to our auditors, the  
9 difficulty was in lack of pricing documentation. I  
10 mean, they knew equipment was necessary. They just  
11 didn't have the documentation that they normally  
12 like to see, the price of the equipment.

13 Q Where was the contractor expected to get  
14 the difference between the \$1.5 million and the  
15 \$333,333 for depreciation?

16 A Well, I don't know if we ever looked at  
17 it that way, as to where a contractor gets a certain  
18 amount. Any time you deal with an overhead and a  
19 depreciation, you expect that the contractor will  
20 have other business, whether it's future business,  
21 other business, whatever the case may be. You know,  
22 what we were doing in allowing depreciation was  
23 saying, "This is the amount of the cost of this  
24 equipment that we think is reasonable for this  
25 particular contract."

1                   It's not really in the Government's  
2           interest or in any contract interest to give  
3           somebody 100 percent of any cost they might possibly  
4           spend for that contract. You're going to give them  
5           100 percent of certain costs that are going to be  
6           expended during the course of that contract, and  
7           then you are going to give them a portion of other  
8           costs. You know, if they buy equipment that's going  
9           to last them over a period of time, you're not going  
10          to pay for all of that equipment.

11                   So I think that was the thought process  
12          here, or generally the thought process, when we  
13          negotiated these contracts. I don't think we ever  
14          actually thought of it in terms of, "Where will they  
15          get the rest of the money for that?" It's just an  
16          expense of doing business.

17                   Q       The contract price did not cover that  
18          difference.

19                   A       No.

20                   Q       During the negotiation of Contract No.  
21          0591, did you discuss the progress payment  
22          liquidation rate?

23                   A       I don't remember discussing it; no.

24                   Q       Was there an agreement reached that the  
25          liquidation rate would be 82.6 percent?

1           A       No.

2           Q       During the negotiation of Contract No.  
3       0591, did you agree to allow all costs to be direct  
4       costs allocable and allowable for reimbursement  
5       under the negotiated progress payment clause?

6           A       Well, as I said before, as a PCO, I  
7       can't tell them what is or isn't subject to progress  
8       payments. There were certain costs that were 100  
9       percent allowable or allocable under this contract.  
10      There were other costs, such as depreciation, that  
11      weren't.

12          Q       During the negotiation of the contract,  
13      was it your understanding that the contractor had  
14      outside financing?

15          A       Yes.

16          Q       And in signing the contract award  
17      document, was it also your understanding at that  
18      time that the contractor had outside financing?

19          A       Yes. They had passed a pre-award survey  
20      based on outside financing.

21          Q       And what was your understanding of their  
22      outside financing?

23          A       My understanding was that they had a  
24      commitment letter from Dollar Dry-Dock Savings Bank,

1 I think it was, that would provide them certain  
2 financing for the contract.

3 Q At any time prior to award, did Freedom  
4 advise you that its reduction in price -- that the  
5 basis for that price reduction was its lack of need  
6 for outside financing?

7 A No.

8 Q I would like you to refer to the  
9 Government's Rule 4, Tab 5.

10 A Okay.

11 Q Do you have any recollection of  
12 receiving this document prior to award of the  
13 contract?

14 A Well, I don't know. I mean, when I  
15 would get a letter or document or whatever, I would  
16 always put my initials and date on the top. This  
17 one doesn't have it. It doesn't necessarily mean I  
18 didn't see it. I am sure at some point we saw some  
19 form of -- this appears to be a letter of commitment  
20 from Dollar Dry-Dock Commercial. I'm sure we saw  
21 some letter of that nature; although a letter like  
22 this would be submitted for a pre-award survey, and  
23 that was done by the DCASR. But I'm sure we saw  
24 some letter of this nature. Whether this is the one  
25 I saw or not, I really don't remember.

1           Q     I would like you to refer now to  
2     Government's Rule 4, Tab 6. Do you recall seeing  
3     this letter prior to the award of Contract No. 0591?

4           A     Again, this is a similar letter. It's a  
5     little bit different. As to whether or not I saw  
6     this particular letter or not, you know, I can't  
7     remember at this point. I notice the letters are  
8     one right after another, so it would seem odd to  
9     have seen both letters and not have some question  
10    about it.

11          Q     Do you recall, prior to the award of the  
12    contract, DCASR being concerned about various  
13    commitment letters that were submitted by Freedom?

14          A     Yes, I do. There were apparently  
15    qualifications in some of the commitment letters  
16    that had been given by the bank; and DCASR, in doing  
17    their pre-award survey, were very concerned about  
18    the qualifications.

19          Q     I would like you now to refer to  
20    Appellant's Rule 4, Tab 17.

21                   I am not sure whether that's up there or  
22    not, Your Honor. Mind if I look through it?

23                   JUDGE GROSSBAUM: Certainly.

24                   THE WITNESS: Okay.

25                   BY MS. HALLAM:

1 Q Can you identify that document?

2 A Yes. This is a memorandum of  
3 understanding that was written up and signed on the  
4 date of negotiations.

5 Q And what is the purpose of that  
6 memorandum of understanding?

7 A Well, this was something that we did in  
8 the last one or two contracts, I guess, that I  
9 negotiated. We had experienced a problem in that we  
10 had negotiated contracts and submitted these  
11 contracts for review. They had to go through  
12 several levels of review at DPSC, where we were, and  
13 then go to DOA headquarters in Washington. Often  
14 that took a good period of time -- several months  
15 sometimes.

16 What we started to do was to actually,  
17 at the end of negotiations, set out what cost  
18 elements we had negotiated and what the dollar value  
19 was so that if it did take a long time for these to  
20 be approved up the chain of command, there would  
21 never be any argument about what dollar values were  
22 where. We had actually, in some previous contracts  
23 with other contractors, experienced some problems in  
24 getting a contract awarded. Everybody agreed on the  
25 bottom line; but the contractor would come back

1 later and say, "Well, no, I really thought you had  
2 negotiated `x' amount of this element and a  
3 different amount for this element."

4 JUDGE GROSSBAUM: Would you identify  
5 again what tab we are looking at?

6 MS. HALLAM: Excuse me, Your Honor?

7 JUDGE GROSSBAUM: What tab are we  
8 looking at?

9 MS. HALLAM: We are looking at  
10 Appellant's Rule 4, Tab 17.

11 JUDGE GROSSBAUM: Is that F-17?

12 MS. HALLAM: Yes.

13 THE WITNESS: So the purpose of this  
14 basically was to show what those costs were that we  
15 had negotiated so that there was no question or  
16 argument about it later.

17 BY MS. HALLAM:

18 Q Was this document prepared in any way  
19 for purposes of progress payments?

20 A No.

21 Q Do you know what the progress payments  
22 allowed under the solicitation were?

23 A Do you mean what percentage?

24 Q Yes.



1           A       I believe they were 95 percent for small  
2       business.

3           Q       Was there a ceiling?

4           A       There was.   We originally had in the  
5       solicitation a ceiling of, oh, I want to say \$9  
6       million or 50 percent; something of that nature.   I  
7       think that was raised at the time of the contract  
8       award, based on possible deliveries.

9           Q       I would like to refer you now to the  
10       Government's Rule 4, Tab 10.

11          A       Okay.

12          Q       Page 7 of that documentation --

13          A       Yes.

14          Q       -- referring to the second paragraph  
15       concerning progress payments.

16          A       Okay.

17          Q       Explain what that allows, that clause.

18          A       Okay.   This was an increase in that  
19       limitation that I just mentioned, basically saying  
20       that after the contractors delivered the first  
21       100,000 cases, the progress-payments ceiling could  
22       be lifted by \$2 million.

23          Q       And when was this clause added?

24          A       Oh, at the time of contract award.

1           Q       Was this clause discussed, do you  
2 recall, during negotiations?

3           A       I don't recall discussing it during  
4 negotiations.       Sometime between the close of  
5 negotiations and the time that we awarded this,  
6 which was probably not more than a week or so, it  
7 was discussed.

8           MS. HALLAM: No further questions.

9           JUDGE GROSSBAUM: The Board needs to --  
10 before we go to cross-examination, to avoid the  
11 Board getting too confused by a line that will  
12 proceed in cross-examination concerning the change  
13 in Freedom's prices, would you be good enough to go  
14 back to Rule 4, Tab 9, the price-negotiation  
15 memorandum.

16          THE WITNESS: Okay.

17          JUDGE GROSSBAUM: Would you be good  
18 enough to turn to page 2 of the price-negotiation  
19 memorandum, under II, particulars, where there is a  
20 chart of offers.

21          THE WITNESS: Right.

22          JUDGE GROSSBAUM: Now is it fair to say  
23 that you received offers before you received "best  
24 of final offers"?

25          THE WITNESS: Yes.

1 JUDGE GROSSBAUM: Okay. Can you explain  
2 what the column "Original Offer/CS," which we  
3 understand would stand for "cases" --

4 THE WITNESS: Yes.

5 JUDGE GROSSBAUM: -- means?

6 THE WITNESS: Well, what that means is  
7 that would be the price per case that was originally  
8 offered by the contractors.

9 JUDGE GROSSBAUM: Okay. Is that a price  
10 per case exclusive of CFM, or what exactly is that  
11 price per case?

12 THE WITNESS: That would be a price per  
13 case that includes everything that the contractor  
14 has to do, including CFM.

15 JUDGE GROSSBAUM: Including CFM. So the  
16 cost of CFM is actually added in.

17 THE WITNESS: Right.

18 JUDGE GROSSBAUM: Okay. What is your  
19 understanding of, before we get to Freedom's, how  
20 does RAFCO's, who is observed to be the low offerer  
21 -- how their original offer, price per case at "best  
22 and final offer" stage, goes up as high as \$22.92,  
23 which is more than their original offer, price per  
24 case, for a smaller quantity. Where does the  
25 smaller quantity come in in the first place?

1           Q       Well, the smaller quantity was in  
2 attempting to make, as I remember it -- is in  
3 attempting to make an award based on competition.

4           JUDGE GROSSBAUM: Right.

5           THE WITNESS: We offered a larger  
6 quantity to the contractor who came in with the  
7 lowest price. But in order to make awards for all  
8 these quantities that we had established, we had to  
9 ask for "best and finals" on both quantities. In  
10 this case, Right Away's price is \$2 or \$2 and some  
11 cents higher than its price for the larger quantity,  
12 based on economies on scale and based on the fact  
13 that they have more cases to recover, certain  
14 overhead costs, G & A costs and that type of thing.

15          JUDGE GROSSBAUM: The comment is made  
16 that, "A favorable comparison of their offer for the  
17 largest quantity, with the contract price awarded  
18 under MRE-4, awarded under competitive environment."  
19 Does that mean that there were more than three  
20 offers for MRE-4?

21          THE WITNESS: Not necessarily.

22          JUDGE GROSSBAUM: Okay. Same  
23 plan-producer environment?

24          THE WITNESS: Yes.

1 JUDGE GROSSBAUM: For the entire MRE  
2 Program?

3 THE WITNESS: Yes.

4 JUDGE GROSSBAUM: The folks you were  
5 with at --

6 THE WITNESS: After MRE-1. I think  
7 MRE-1 did not, but after that.

8 JUDGE GROSSBAUM: Okay. So how was the  
9 RFP structure for quantities -- the maximum quantity  
10 that anybody could bid on was 1.395 million cases?

11 THE WITNESS: That's right.

12 JUDGE GROSSBAUM: Okay. And was the  
13 other increment 1.085, or was there anything in  
14 between? Any flexibility?

15 THE WITNESS: Well, there wasn't  
16 anything between 1.085 and 1.395; but as you can see  
17 from Freedom's offer, you could offer on a lesser  
18 quantity if that's the quantity you could produce.

19 JUDGE GROSSBAUM: Okay. Now Freedom  
20 would be the only company that would have offered on  
21 that lesser quantity; is that correct?

22 THE WITNESS: In this case, that's true.

23 JUDGE GROSSBAUM: And that, again,  
24 lesser quantity was specified in the RFP. It was

1 not a quantity that the offerer picked out of the  
2 air.

3 THE WITNESS: That I don't remember, but  
4 that may be true.

5 JUDGE GROSSBAUM: Okay. The question  
6 the Board wants so that we avoid any confusion is,  
7 where does the figure \$25.376 per case come from if,  
8 as you say, that is inclusive of CFM?

9 THE WITNESS: Well, that would have been  
10 Freedom's original offer for 620,000 cases,  
11 including CFM.

12 JUDGE GROSSBAUM: What is your  
13 understanding of how Freedom rose to \$34.81 at the  
14 time of "best and final offer" from its original  
15 offer? It seems to be almost more than a \$9  
16 per-case increase.

17 THE WITNESS: Well, since we did not  
18 have any cost and pricing data on the \$25, because  
19 we didn't ask for it, I don't know what the  
20 differences were in those two.

21 JUDGE GROSSBAUM: Would you have no  
22 question in your own mind about the accuracy of that  
23 \$25 figure?

24 THE WITNESS: As to whether it was a  
25 figure that they could produce at, you mean?

1 JUDGE GROSSBAUM: No, no. That it was  
2 the figure offered.

3 THE WITNESS: Oh, no. I have no --

4 JUDGE GROSSBAUM: That is not a typo.  
5 It was not \$35.

6 THE WITNESS: No, no. No, I have no  
7 question about that.

8 JUDGE GROSSBAUM: Okay. The other thing  
9 about the RFP, you have been asked some questions  
10 about the award document and a provision raising the  
11 ceiling of progress payments.

12 THE WITNESS: Right.

13 JUDGE GROSSBAUM: Okay. Was a ceiling  
14 on progress payments something that was commonly  
15 employed in MRE procurements?

16 THE WITNESS: No. I believe this may  
17 have been the first that it was employed in.

18 JUDGE GROSSBAUM: Had you ever used a  
19 ceiling in progress payments in the RFP?

20 THE WITNESS: In the RFP for this  
21 particular procurement?

22 JUDGE GROSSBAUM: Yes, from your  
23 recollection. You had been with the food director  
24 for about five years.

1 THE WITNESS: Right. No, this is the  
2 first time, I think, that I remember using it.

3 JUDGE GROSSBAUM: Did you come up with  
4 it yourself?

5 THE WITNESS: Did I personally come up  
6 with it?

7 JUDGE GROSSBAUM: Yes.

8 THE WITNESS: No.

9 JUDGE GROSSBAUM: How did it get in the  
10 RFP?

11 THE WITNESS: It was part of the  
12 procurement plan.

13 JUDGE GROSSBAUM: Okay. Cross-examine.

14 MR. MACGILL: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. MACGILL:

17 Q Mr. Barkewitz, going to this  
18 price-negotiation memorandum -- just a couple of  
19 follow-up points -- you understood that DAR governed  
20 this contract; did you not?

21 A Yes.

22 Q And were you personally familiar, sir,  
23 with the DAR requirements of paying 95 percent of  
24 properly incurred costs that are allocable to the  
25 contract?



1           A       Well, I was familiar to the point that I  
2 understood, you know, that that's the general theory  
3 of small business progress payments; yes.

4           Q       And the theory underlying that is that  
5 these progress payments will, in fact, be a way of  
6 financing a government contract; right?

7           A       It would be an assistance to a  
8 contractor; sure.

9           Q       And analytically speaking, your  
10 understanding was, as far as a small business was  
11 concerned, that they would be allowed this form of  
12 financing up to 95 percent of incurred costs; right?

13          A       Well, they would be allowed progress  
14 payments up to 95 percent; and they would be  
15 allowed, I think, as opposed to a large business, to  
16 get progress payments on invoices versus paid costs  
17 -- that type of thing. It was meant to be a benefit  
18 to small businesses; yes.

19          Q       And as far as that benefit to small  
20 business goes, I take it you understood, as a PCO at  
21 the time of the award of this contract, that this  
22 limit would work against the progress payment clause  
23 in the DAR in the sense that it would not be, in the  
24 true sense, 95 percent of contractor's total costs  
25 incurred in the contract.

1           A       You are right. It would 95 percent up  
2 to that limit.

3           Q       Did that trouble you at the time, sir?

4           A       It didn't, because we had approval of  
5 the procurement plan to do that.

6           Q       You had governmental approval in the  
7 sense of DPSC or DCASR?

8           A       Well, up to DLA level.

9           Q       Okay.

10          A       And there was some DOD involvement in  
11 that.

12          Q       All right. So you had government-agency  
13 approval, as you say, for this L-4 clause limit.

14          A       Yes.

15          Q       All right. But you did not personally  
16 regard the DAR as being right out of the law at that  
17 point; did you, sir?

18          A       No; not at all.

19          Q       Okay. The DAR was, so to speak, the  
20 applicable regulation, as you understood it.

21          A       Yes.

22          Q       Okay. Now with reference to a couple of  
23 questions that the Government counsel asked you  
24 about in the context of the price-negotiation  
25 memorandum, I understand that this price-negotiation

1 memorandum was your effort, or the effort of your  
2 staff, to negotiate really what had been the back  
3 and forth in terms of the Government position and  
4 the Freedom position. Is that correct?

5 A That's correct.

6 Q And you were --

7 JUDGE GROSSBAUM: Do you want to use the  
8 word "negotiate" or "describe"? Your question was,  
9 "This was intended to reflect the back and forth of  
10 his efforts to negotiate..." or "... his efforts to  
11 describe the back and forth negotiations."

12 MR. MACGILL: I stand corrected. I  
13 should have said, Your Honor, "describe."

14 BY MR. MACGILL:

15 Q This was your best effort, Mr.  
16 Barkewitz, to describe, really, the give and take in  
17 negotiations. Is that correct?

18 A That's correct.

19 JUDGE GROSSBAUM: Is this a memorandum  
20 that is required by regulation?

21 THE WITNESS: It is.

22 BY MR. MACGILL:

23 Q And it would not be customary, would it,  
24 sir, relative to a price-negotiation memorandum, to  
25 discuss progress-payment treatment; would it, sir?

1           A       Not unless it was negotiated.

2 Q All right. And it would not be  
3 customary to discuss what costs would be direct or  
4 indirect in terms of a price-negotiation memorandum;  
5 would it?

6           A       Yes. I don't see why not.

7 Q Okay. Sir, do you recall giving sworn  
8 testimony in a case, Henry Thomas v. David Lambert  
9 and Bankers, leasing the Barnett Malaysia in Seattle  
10 on March 15, 1990?

11 A Well, I remember being deposed.

12 Q All right.

13           A       At this point, I don't even remember who  
14       deposed me, but it was one of several I gave around  
15       the same time for various government contracts.

16 Q All right. And you understood, in the  
17 deposition context, sir, that that is sworn  
18 testimony just like --

19                    A       Yes.

20 Q -- the testimony you are giving here  
21 today.

22                    A       Yes.

23 Q Sir, I refer you specifically to your  
24 testimony on page 187.

25 Your Honor, may I approach the bench --

1 JUDGE GROSSBAUM: Surely.

2 MR. MACGILL: -- and show the witness  
3 the testimony?

4 BY MR. MACGILL:

5 Q I am going to ask you, sir, for the  
6 benefit of the Board, if you were asked the  
7 following questions and gave the following answers;  
8 and I am referring to line 15 at page 187.

9 JUDGE GROSSBAUM: Is this recollection  
10 refreshment inquiry or is it impeachment inquiry?

11 MR. MACGILL: This would be impeachment,  
12 Your Honor.

13 JUDGE GROSSBAUM: What did he say that  
14 you want to impeach?

15 MR. MACGILL: That it was --

16 JUDGE GROSSBAUM: Just now. I mean,  
17 what is he testifying just now?

18 MR. MACGILL: What he said just now is  
19 that it was not customary -- that it was customary  
20 to show what costs, whether costs were direct or  
21 indirect in a price-negotiation memorandum.

22 JUDGE GROSSBAUM: Is that what he  
23 testified to just now?

24 MR. MACGILL: Just here now.

25 BY MR. MACGILL:

1           Q     Sir, relative to this memorandum of  
2 negotiation that you have been referring to, were  
3 you asked, at line 18, question: "Was it customary  
4 in a memorandum of negotiation to show what costs  
5 were direct costs under a contract?" Did you  
6 answer, "No, not usually."

7           A     Well, not having reviewed this, all I  
8 can say is, I must have answered that way.

9           Q     All right. Sir, I want to take you to  
10 some of the other questions that the Government  
11 counsel asked you relative to financing.  
12 Specifically, I want to refer you to the August 9,  
13 1984, letter from Dollar Dry-Dock, which is the  
14 Government's Rule 4 file, Exhibit 5. Could you  
15 refer to that, sir?

16          A     Okay.

17          Q     Sir, after having looked at that again,  
18 do you now remember that you received that August  
19 9, 1984, letter from Dollar Dry-Dock shortly after  
20 August 9, 1984?

21          A     Like I said, I -- having received some  
22 kind of a letter from Dollar Dry-Dock. Whether it  
23 was this one or not, I don't remember.

24                 MR. MACGILL: Your Honor, I would ask to  
25 refer the witness's recollection of testimony given

1 on March 15, 1990, by showing him the testimony on  
2 page 71.

3 JUDGE GROSSBAUM: You do not have to  
4 show him anything. Why don't you read it?

5 MR. MACGILL: Pardon me, Your Honor?

6 JUDGE GROSSBAUM: Ask him a question if  
7 he ever testified such and such.

8 MR. MACGILL: All right. I will do  
9 that, Your Honor.

10 JUDGE GROSSBAUM: And if he denies  
11 testifying such and such, or if he cannot recall  
12 testifying such and such, then you can have it read  
13 into the record. If he admits testifying such and  
14 such, that ends your inquiry. Do you understand  
15 that?

16 MR. MACGILL: I understand.

17 JUDGE GROSSBAUM: Go ahead.

18 BY MR. MACGILL:

19 Q Sir, I will refer you to page 71.

20 JUDGE GROSSBAUM: Just ask him if he  
21 ever testified -- if he ever said something.

22 BY MR. MACGILL:

23 Q Were you asked the following question,  
24 and did you give the following answer? The question  
25 I am going to hand you, which we have marked as

1 Defendant's Exhibit 1511, is a copy of a letter from  
2 Dollar Dry-Dock to DPSC, Attention: Thomas  
3 Barkewitz, and signed by Noel Siegert. "Did you  
4 receive --

5 JUDGE GROSSBAUM: I want you to do it  
6 this way. I do not know what your Exhibit 1511 is.  
7 You can establish that if you do not get the right  
8 answer. Ask him if he ever testified -- see, I do  
9 not know what his testimony is that you are going to  
10 read from. But all you are going to say is, "Did  
11 you ever say this about this 9 August letter from  
12 Dry-Dock?"

13 That is all you are going to ask him,  
14 and he is going to say, "I don't recall," or he is  
15 going to deny it, or he is going to admit it. If he  
16 admits it, that is it. If he denies it, then you go  
17 ahead and you put it in the record. Then it stands  
18 there and you have done whatever it is you think you  
19 have done about impeachment.

20 BY MR. MACGILL:

21 Q Did you testify, sir, that you received  
22 this letter, this August 9, 1984, letter shortly  
23 after August 9, 1984?

24 A If someone showed me a copy with my  
25 initials, I may have.



1           Q       You testified specifically on March 15,  
2       1990, in answer to this question, "Did you receive  
3       this letter, sir, shortly after August 9 of 1984?",  
4       and you answered, "Yes, I did."

5           A       I may have.

6                   JUDGE GROSSBAUM: Do you recall?

7                   THE WITNESS: Not at this point, no.

8                   BY MR. MACGILL:

9           Q       Sir, as far as that Exhibit G-5 is  
10       concerned, would you agree that you regarded that  
11       letter from Dry-Dock as a qualified commitment?

12          A       It was qualified to some extent.

13          Q       And specifically, you believed it was  
14       qualified to the extent that it was not valid if the  
15       contract was not awarded at \$21.5 million; correct?

16          A       The way this reads, I could read it that  
17       way; sure.

18          Q       Well, and that is what you testified to  
19       on March 15, 1990; that that was a qualified  
20       commitment to the extent that you could not accept  
21       it if the contract was not awarded at \$21.5 million.

22          A       And if I was the ACO, I might not have  
23       accepted it.

24          Q       Well, let's talk about what you said to  
25       the ACO at the time. You told all the people at

1 DPSC and your bosses at your agency that that was a  
2 qualified commitment; did you not, sir?

3 A Well, if this is the letter that I saw  
4 -- like I said, I did see a letter or some letters  
5 at some point during the pre-award survey process.  
6 If this was the letter I saw before the pre-award  
7 survey was passed, there was a letter that was  
8 qualified that I said was qualified to the extent  
9 that I didn't think it would suffice for a pre-award  
10 survey.

11 Q And you specifically told the ACO on  
12 this matter, Mr. Liebman, did you not, in August or  
13 September of 1984, that you personally thought this  
14 commitment, August 9, 1984, was qualified?

15 A If this was that letter, then I told him  
16 that; yes.

17 Q As PCO, you were not willing to accept  
18 the August 9, 1984, letter as evidence of financial  
19 capability on Freedom's part?

20 A Well, as PCO, that wasn't my function.

21 Q Well, but my question is, as PCO, you  
22 were not willing to accept that as evidencing  
23 financial capability.

24 A As PCO, I advised the ACO that I thought  
25 this was too qualified.

1           Q     All right.  You did, at the time of the  
2 negotiations, discuss with Mr. Thomas, of Freedom,  
3 that you would be willing to give certain assistance  
4 in getting progress payments paid; did you not?

5           A     Oh, I don't know if I'd say "in getting  
6 them paid."  We were willing to call the ACO and  
7 talk about what we negotiated to try to clarify any  
8 questions or problems he had.

9           Q     And did you specifically tell Mr. Thomas  
10 that you would be willing to help Freedom with the  
11 ACO in whatever problems he had in trying to  
12 expedite progress payments?

13          A     Well, whether that's the way we said it  
14 to him, we might have; yeah.  I mean, we certainly  
15 -- it was in our best interest to help him through  
16 the process; yes.

17          Q     Do you recall specifically telling Mr.  
18 Thomas that, yes, you would be willing to help him  
19 try to expedite progress payments on this matter?

20          A     I don't remember the exact words I used;  
21 no.

22          Q     But would you agree that, in the general  
23 sense, you told him that you would, in essence, help  
24 expedite the progress payments?

1           A       I'd agree that we told him that we would  
2       do everything we could to help him with his  
3       progress-payments submission in talking to the ACO.

4           Q       All right. Is it a fair statement to  
5       say, sir, that a consensus emerged among the  
6       governmental entities that Freedom should be  
7       micro-managed by the DLA, the DCAA and the ACO?

8           A       To the extent that all MRE contracts  
9       were micro-managed, yes.

10          Q       Well, as far as Freedom's was  
11       specifically concerned, there was that consensus,  
12       wasn't there, Mr. Barkewitz, that Freedom would, in  
13       fact, be micro-managed by DCAA, DLA and the ACO?

14          A       Well, the consensus was that, yes, we  
15       definitely had to put very concerted effort in  
16       managing the contract; yes.

17          Q       Sir, with respect to the cost referenced  
18       on the memorandum of understanding, which is F-17 --

19          A       Yes.

20          Q       -- with the exception of depreciation,  
21       it was your understanding that all costs under this  
22       contract would be direct costs. Is that correct?

23          A       That may well be; yes.

24          Q       Well, that is what you testified on  
25       March 16, 1990; isn't it, sir?

1           A       That's probably true, then.    I mean,  
2       right now I can tell you that depreciation certainly  
3       wouldn't be a direct cost.

4           Q       But all other costs referenced on  
5       Exhibit F-17 were, as you understood it at the time  
6       of the contract award, to be direct costs.  Correct?

7           A       Well, since Freedom had no other  
8       contracts, that's probably true.

9           Q       All right.  At the time --

10           JUDGE GROSSBAUM:       Okay.       So you  
11       understood, in answer to that question -- do you  
12       have F-17 in front of you?

13           THE WITNESS:   I do.

14           JUDGE GROSSBAUM:   It is that one-page  
15       memorandum.  The category of manufacturing overhead  
16       was understood to be a direct cost.

17           THE WITNESS:   Those were probably all  
18       direct costs in a single pool; yes.

19           BY MR. MACGILL:

20           Q       Sir, you came to that conclusion during  
21       the time of your negotiations and at the time of the  
22       award because Freedom was just starting as an MRE  
23       supplier; correct?

24           A       That's correct.

1           Q     And because they had no previous cost  
2     experience; correct?

3           A     As far as we knew, yes.

4           Q     They had no other contracts.

5           A     Right.

6           Q     Therefore, as you saw it at the time,  
7     virtually everything he had was a direct cost  
8     because he had no other contracts to spread the cost  
9     over.

10          A     Virtually everything. Most everything;  
11     yes.

12          Q     All right.

13                 MR. MACGILL:     Nothing further, Your  
14     Honor.

15                 JUDGE GROSSBAUM: Redirect?

16                         REDIRECT EXAMINATION

17                         BY MS. HALLAM:

18          Q     I would like you to refer back again to  
19     the Government's Rule 4, Tab 9, reference to  
20     Freedom's original offer.

21          A     All right.

22          Q     At the time the original offer was made,  
23     was Freedom in a different facility than the one it  
24     performed the contract at?

25          A     They were.

1           Q     Do you recall if that was a reason for  
2     the lower price?

3           A     It may have been, and I say that only  
4     because there is a later reference in the  
5     price-negotiation memorandum that Freedom did submit  
6     additional costs because of moving to the Bronxdale  
7     building.

8           Q     So with regard to your memorandum, if  
9     progress payments were discussed during  
10    negotiations, would that be reflected in your  
11    memorandum?

12          A     It would be; yes.

13          Q     Is there a mechanism provided under the  
14    contract for increasing progress payments?

15          A     I'm not sure what you mean.

16          Q     Was there a way by which the contractor  
17    could increase the ceiling?

18          A     Oh, there was that clause in the actual  
19    contract that by delivering 100,000 cases, a ceiling  
20    would go up \$2 million.

21          Q     Was there a provision under which the  
22    contractor could apply for increased progress  
23    payments above the 95 percent?

24          A     There was, as I remember it, a provision  
25    -- well, not a provision in this contract or

1 anything, but there was a method of obtaining  
2 approval for extraordinary progress payments at some  
3 higher level than 95 percent that was available. I  
4 think you had to have approval at at least the DLA  
5 level.

6 Q Going back again to your price  
7 memorandum, you said that the price memorandum is  
8 required by regulation?

9 A It is as far as I know.

10 Q Do the regulations provide for what  
11 matters should be discussed in the memorandum?

12 A In a general sense that you have to  
13 discuss or you have to describe all of the  
14 discussions -- all of the substantial or significant  
15 items of negotiation.

16 Q Is it required that special treatment of  
17 indirect costs be described in the pre-negotiation  
18 memorandum?

19 A If that was done, yes.

20 Q Does it require that unique issues be  
21 discussed in the pre-negotiation memorandum?

22 A Yes.

23 Q Going back again to your testimony  
24 concerning the commitment letter at Government's  
25 Rule 4, Tab 5 --



1           A       Okay.

2           Q       -- you testified that you received one  
3       or more letters or had seen one or more letters  
4       prior to the award of the contract?

5           A       I had.

6           Q       Do you recall -- and you had also  
7       testified that there was at least one letter that  
8       was qualified to the extent that you raised that  
9       issue with the ACO?

10          A       There was and, yes, I did.

11          Q       Do you remember what qualifications were  
12       in the letter that you were concerned about?

13          A       Well, because I have this in front of  
14       me, I think the qualification about the amount. I  
15       don't know if this was a precise amount or higher  
16       amount or what the case may be. It seems to me that  
17       there were other qualifications, but I don't  
18       remember what they were.

19          Q       Other qualifications than what is in  
20       this letter at Tab 5?

21          A       Yes.

22                   MS. HALLAM: No further questions.

23                   JUDGE GROSSBAUM: Re-cross?

24                   MR. MACGILL: No, Your Honor.

1 JUDGE GROSSBAUM: Mr. Barkewitz, we will  
2 spend some time on Tab 9.

3 THE WITNESS: Okay.

4 JUDGE GROSSBAUM: Describe your  
5 understanding of the procurement to the Board. Do  
6 you recall whether or not Freedom had been approved  
7 as a plan producer for MRE-4?

8 THE WITNESS: I believe they had.

9 JUDGE GROSSBAUM: Did they submit a bid  
10 for MRE-4?

11 THE WITNESS: I'm sure they did.

12 JUDGE GROSSBAUM: They did not get an  
13 award.

14 THE WITNESS: That's right.

15 JUDGE GROSSBAUM: Where had their  
16 location been, and where exactly do you comment in  
17 your price-negotiation memorandum? What page is  
18 there a discussion of the move from one location to  
19 the Bronxdale building?

20 THE WITNESS: Okay. That is on page 8  
21 in the second paragraph. It says, "Freedom did,  
22 however, submit costs of \$650,000 for rehabilitating  
23 the Bronxdale building." There might have been some  
24 other discussion in here about it. Offhand, I don't  
25 know where it would be.

1 JUDGE GROSSBAUM: What was your  
2 understanding of where Freedom had been located at  
3 the time of the original offer?

4 THE WITNESS: I think they had been  
5 located in a plant at Hunts Point in the Bronx.

6 JUDGE GROSSBAUM: Now is it understood  
7 that this would be a leased facility, the one that  
8 they were moving to?

9 THE WITNESS: Yes.

10 JUDGE GROSSBAUM: Okay. Let's assume --  
11 and this remains to be seen because we do not have  
12 anything else in the record about it -- let's assume  
13 that the relocation from the Hunts or Hunters Point  
14 facility in the Bronx to the Bronxdale location is  
15 the major cause of Freedom increasing its first  
16 "best and final offer" more than \$9 a case, which  
17 includes the CFM since we do not know anything else.  
18 Could you describe as best you can -- would you turn  
19 to page 2 of the price-negotiation memorandum?

20 THE WITNESS: Okay.

21 JUDGE GROSSBAUM: Would you describe to  
22 the Board your recollection of the chain of events  
23 which lead from the reduction of the first "best and  
24 final offer" of \$34.81 a case, plus EPA, down to the  
25 eventual lowering of the negotiated unit price to

1       \$27.72 and 1/2 cents per case between 2 August 1984  
2       and roughly 6 November or 8 November 1984? Could  
3       you, to the best of your recollection --

4               THE WITNESS: Yes. As best --

5               JUDGE GROSSBAUM: -- and does the  
6       price-negotiation memorandum help you recall?

7               THE WITNESS: Well, the  
8       price-negotiation memorandum helps me to recall to  
9       the extent that when Freedom came in with their  
10      \$34.81 offer and other variations of offers -- I  
11      don't remember at that point whether they had passed  
12      a pre-award survey or not. But at some point after  
13      they had passed a pre-award survey, we had an audit  
14      performed. The audit came in with a certain pricing  
15      range; the DCASR people put a pricing report on top  
16      of that with a pricing range; and we set up our  
17      pricing objectives, our negotiation objectives,  
18      based on that.

19              I believe there was probably a second  
20      audit, and I only say that because it talks in here  
21      about Keith Ford and me travelling to New York to  
22      talk to the DCASR and the DCA people on an audit  
23      that was performed, it looks like, in early  
24      November. That audit was where we came up with our

1 final range for price negotiations, and that is  
2 where we would have negotiated the price of Freedom.

3 JUDGE GROSSBAUM: Okay. Could you  
4 recall the circumstances -- well, let's digress for  
5 a moment. Was an award made to RAFCO at the price  
6 of \$20.73 for the large quantity?

7 THE WITNESS: I believe it was.

8 JUDGE GROSSBAUM: Was an award made to  
9 Southern Packing at the price of \$20.89 and 1/2  
10 cents for the larger quantity?

11 THE WITNESS: No. I believe they  
12 received the smaller quantity and probably received  
13 an award for \$22.82.

14 JUDGE GROSSBAUM: Now turning to  
15 Freedom, as best you can recall, what were the  
16 events that initiated or stimulated these successive  
17 reductions in Freedom's unit price; and also explain  
18 at what point in time Freedom was persuaded that an  
19 economic price-adjustment provision was not  
20 appropriate for the contract.

21 THE WITNESS: All right. I believe that  
22 we went back and told them right away that they  
23 would have to bid or have to offer a price, not  
24 including the following contracts or additional

1 monies or EPAs or anything that was not in the  
2 solicitation.

3 JUDGE GROSSBAUM: What we have is three  
4 successive offers, all of which are higher than the  
5 final negotiated price, indicated as "B," "C" and  
6 "D" and the "best and final offer per case" column  
7 --

8 THE WITNESS: Right.

9 JUDGE GROSSBAUM: -- on page 2 of the  
10 price-negotiation memorandum. Could you describe  
11 the circumstances that lead to each of these  
12 changes? Were they Government-initiated,  
13 contract-initiated? How would they have come about,  
14 to the best of your recollection of the time frame  
15 in which this took place?

16 THE WITNESS: Well, as best I remember  
17 right now, I don't think they were successive. I  
18 think they were all in one offer. I think it was an  
19 alternative-type situation.

20 JUDGE GROSSBAUM: Okay.

21 THE WITNESS: The alternative being  
22 \$34.81 plus an EPA; and then as additional monies or  
23 following contracts were added, the price reduced.

1 JUDGE GROSSBAUM: Okay. So basically  
2 these were all a combination of a single "best and  
3 final offer."

4 THE WITNESS: I think that's true.

5 JUDGE GROSSBAUM: Okay. So basically  
6 the eventual price that was agreed upon was not some  
7 process of give and take, coming down from \$34.81 to  
8 \$31 -- \$32.85, something like that.

9 THE WITNESS: No. It was basically a  
10 process of us receiving the audits, setting up our  
11 ranges and then negotiating with Freedom based on  
12 that, and making the audit available to Freedom so  
13 that they understood where we were establishing our  
14 pricing range.

15 JUDGE GROSSBAUM: As a former  
16 contracting officer, could you explain to the Board  
17 your understanding of the difference between  
18 progress payments, whether they be for small  
19 business concerns at 95 percent or for large  
20 business concerns at a lower percentage, and  
21 advanced payments?

22 THE WITNESS: Well, I don't know as I  
23 ever got into a situation with advanced payments.

24 JUDGE GROSSBAUM: Did you ever do a  
25 closed-typed contract?

1 THE WITNESS: No, not that I remember.

2 JUDGE GROSSBAUM: Do you know what  
3 advanced payments are conceptually?

4 THE WITNESS: I know what they are  
5 conceptually.

6 JUDGE GROSSBAUM: Are progress payments  
7 advanced payments?

8 THE WITNESS: No.

9 JUDGE GROSSBAUM: Okay. Is there a  
10 statute that prohibits the use of advanced payments  
11 in contracts specifically as otherwise -- by law?

12 THE WITNESS: I think that's true; yes,  
13 Your Honor.

14 JUDGE GROSSBAUM: Is it your view that  
15 95 percent of progress payments with small business  
16 concerns does not mean that the Government is coming  
17 up with all the money for a contract or to perform a  
18 contract?

19 THE WITNESS: Yes.

20 JUDGE GROSSBAUM: Redirect?  
21 Re-redirect?

22 MS. HALLAM: No, Your Honor.

23 JUDGE GROSSBAUM: Re-recross?

24 MR. MACGILL: No.



1 JUDGE GROSSBAUM: Thank you very much  
2 for your testimony, Mr. Barkewitz. You are excused.

3 THE WITNESS: Thank you, Your Honor.

4 (Whereupon, the witness was excused.)

5 JUDGE GROSSBAUM: Does the Government  
6 wish to call any other witnesses on its case in  
7 chief?

8 MS. HALLAM: No, Your Honor.

9 JUDGE GROSSBAUM: Okay. Is Appellant  
10 prepared to call its first witness?

11 MR. MACGILL: We are, Your Honor: Henry  
12 Thomas.

13 JUDGE GROSSBAUM: Before we take Mr.  
14 Thomas's testimony, the Board has instructed the  
15 parties to ensure that their witnesses have before  
16 them the documents that they may be looking at from  
17 time to time. The Board's recollection is that the  
18 Government provided these documents to its  
19 witnesses. Is the Appellant satisfied that it is  
20 prepared with its assembly of documents that this  
21 witness is going to have you looking at.

22 MR. DETHERAGE: Judge, I believe so. If  
23 I could take a real quick look at this.

24 JUDGE GROSSBAUM: Okay.

1 MR. DETHERAGE: Yes. I think he is  
2 going to look at a few documents.

3 JUDGE GROSSBAUM: Fine.

4 MR. DETHERAGE: I think what we need is  
5 there.

6 Whereupon,

7 HENRY THOMAS, JR.

8 having been first duly sworn, was called as a  
9 witness herein and was examined and testified as  
10 follows:

11 JUDGE GROSSBAUM: Sir, would you be good  
12 enough to state for the record your full name,  
13 giving the spelling of your last name.

14 THE WITNESS: My name is Henry Thomas,  
15 Jr. Thomas, T-H-O-M-A-S.

16 JUDGE GROSSBAUM: In what city do you  
17 reside?

18 THE WITNESS: Mount Vernon, New York.

19 JUDGE GROSSBAUM: And by whom are you  
20 presently employed and in what capacity?

21 THE WITNESS: I am basically  
22 self-employed. I am President of Freedom, New York.  
23 I am the -- that's it.

1 JUDGE GROSSBAUM: Okay. Do you have any  
2 other business enterprise of which you are a  
3 principal?

4 THE WITNESS: Yes. I own TFTF Capital  
5 Corporation, the Technique Corporation. I own  
6 Starchoc, smaller.

7 JUDGE GROSSBAUM: What lines of business  
8 are these other corporations in?

9 THE WITNESS: Basically real estate  
10 holding investment.

11 JUDGE GROSSBAUM: Is Freedom, New York,  
12 presently a company that has operations?

13 THE WITNESS: No.

14 JUDGE GROSSBAUM: Go ahead.

15 DIRECT EXAMINATION

16 BY MR. DETHERAGE:

17 Q Mr. Thomas, I would like to have just a  
18 small amount of background. Are you married?

19 A No.

20 Q Do you have any children?

21 A Yes.

22 Q How many?

23 A Ten.

24 Q And what was your employment between  
25 1984 and 1987?

1           A       Between 1984 and 1987, I was employed as  
2       President of Freedom Industries and then Freedom,  
3       New York.

4           Q       Again, as a matter of background, can  
5       you describe how you first became involved with the  
6       MRE Program?

7           A       I first got involved in the Meals Ready  
8       to Eat Program as a result of a phone call from the  
9       White House. I think it came from Pauline Snyder  
10      and Jack Watson -- asked me, as a result of me being  
11      in the food business and having contracts with the  
12      United States Department of Agriculture, to go out  
13      to Chicago and look at the American Pouch Foods'  
14      contractor who had the first MRE-1 contract in 1979  
15      and to see if I could give them a helping hand since  
16      they were having some problems in food production.  
17      That was my first involvement.

18          Q       Okay. At the time you first became  
19      actively involved in seeking an MRE contract, what  
20      MRE contract was being offered?

21          A       It was the MRE-1 re-procurement of the  
22      APF contract. They were terminated for default; and  
23      I immediately, having seen and understood exactly  
24      what the problems was, I immediately put in a

1       proposal to DPSC to become the third contractor,  
2       since there were three contracts.

3               I had visited Washington, D.C., daily  
4       headquarters, and they said that they wanted three  
5       contractors. They wanted to maintain three; and  
6       they had just defaulted one, so that was my  
7       invitation to come to the table.

8               Q       Okay. Who were the two contractors that  
9       were in the program?

10              A       It was three altogether. It was  
11       American Pouch Foods, which I understood was first.  
12       Then Southern Packaging and Storage was the second  
13       contractor, and the third contractor was Right Away  
14       Foods out of McAllen, Texas.

15              Q       Okay.

16              A       The first contractor was defaulted, and  
17       the other two were there. The Government was  
18       re-procuring the defaulted contractor.

19                    JUDGE GROSSBAUM: Do you happen to  
20       recall where American Pouch Foods was headquartered  
21       or located?

22                    THE WITNESS: In Chicago, Illinois.

23                    JUDGE GROSSBAUM: Excuse the  
24       interruption. Go ahead.

25                    BY MR. DETHERAGE:

1 Q Did you then become involved in the  
2 MRE-2 solicitation?

3 A Yes. I withdrew my offer from MRE-1  
4 re-procurement as a result of getting a letter from  
5 Tom Barkewitz saying that if I withdrew, that they  
6 would give me all the necessary assistance under the  
7 MRE-2 procurement. So I built a proposal and  
8 submitted it under MRE-2.

9 Q What happened with your MRE-2 proposal?

10 A Nothing happened. The Government  
11 informed me that they had awarded all the contracts  
12 to RAFCO and SO-PAK Co. and that I wasn't in the  
13 Industrial Preparedness Program.

14 Q Again, just as a matter of background,  
15 RAFCO and SO-PAK CO., that is Right Away Foods and  
16 Southern Packing?

17 A Yes.

18 Q What was the Industrial Preparedness  
19 Program?

20 A I later found out that this was a  
21 Congressional mandated program that the Government  
22 had to always have -- be ready to respond in the  
23 event of a national emergency; and that they were  
24 going to take certain selected contractors and put  
25 them inside of a program to maintain them, to

1 develop them, to make major military weapon systems.

2

3 Q When you are talking about weapon  
4 systems, what is an MRE?

5 A The MRE is "Meals Ready to Eat" that has  
6 been designated by the military services as a major  
7 need or some sort of component that they had to have  
8 in the event of mobilization. This is something  
9 that you can't buy off the street. You can't get it  
10 from various people. It's got to be packaged just  
11 such such, to withstand all kinds of heat and cold  
12 and under water and all kinds of stringent tests for  
13 dropping it out of helicopters and all that kind of  
14 stuff. So therefore the Meals Ready to Eat had been  
15 designated as a "military essential item," I think  
16 is the word they might have used.

17 Q Mr. Thomas, you described that you were  
18 told that you needed to be part of the industrial  
19 planning base. What did you do to become part of  
20 that program?

21 A I sent a letter off to DPSC, requesting  
22 to be put into the Industrial Preparedness Program  
23 since that's what they said I had to do. Once I did  
24 that, they mobilized the DCASMA in New York to come  
25 out and do an industrial survey to see what facility

1 I had, what capability I had to participate in the  
2 program.

3 Q Were you eventually brought into the  
4 program as one of the IPP producers?

5 A Yes. I believe at that time we did  
6 prepare all of the necessary documentation. The  
7 surveys were completed. The Government did allow us  
8 in and made us a planned producer in the Industrial  
9 Preparedness Program as a prime contractor planned  
10 producer, I should say.

11 Q Were there certain things you had to do  
12 before you became a prime contractor?

13 A At that time, it may have. But at that  
14 moment, we didn't know it.

15 Q Okay. At what point in time are you  
16 talking about now, when you became part of the IPP  
17 Program?

18 A We became part of it, I believe, right  
19 after -- right before MRE-3.

20 JUDGE GROSSBAUM: Could you put a date  
21 on that?

22 THE WITNESS: Sure. MRE-3 had to be in  
23 late 1982, I would say. In '82 -- yes, late '82 or  
24 mid '82, is when we basically became a planned  
25 producer as a prime contractor planned producer.



1 BY MR. DETHERAGE:

2 Q Did you submit a proposal for MRE-3?

3 A Yes.

4 Q Can you tell us what happened with that?

5 A Yes. After we became a planned  
6 producer, the Government then allowed us to come in,  
7 and they solicited us under MRE-3 as a planned  
8 producer, since we was one. Again, the Government  
9 turned around to us and said to us that we were  
10 going to have to have subcontractor planning in  
11 order to participate. So all of a sudden now, I'm  
12 going toward, "What's this? This is a new  
13 requirement."

14 So we mobilized the DCASMA in New York  
15 again, and this time I had to go out and find all  
16 the GFM subcontractors that's going to support this  
17 prime effort and to get -- if I was going to do  
18 500,000 cases, then the subcontractors had to supply  
19 me with various CFM that was going to be necessary.  
20 I had to show that they had the capacity to actually  
21 mobilize within 90 days and also get me the  
22 Government-furnished material in time, within 60  
23 days, for me to actually deliver within 90 days the  
24 end item.

1                   So we went and had to unfortunately  
2           educate all of the subcontractors to the Industrial  
3           Preparedness Program; and we were shocked, as a  
4           result of this educating them, because we thought  
5           that they had done this prior for RAFCO and SO-PAK  
6           Co. All of the subcontractors who were supplying  
7           them said they had never heard of the Industrial  
8           Preparedness Program, and they never filled out a  
9           subcontractor planning schedule, and this is the  
10          first time. So New York had to mobilize and show  
11          everybody, which wasted a lot of time.

12                   So by the time we got that finished, at  
13          the end of it, right as we were rushing to DPSC to  
14          tell them that we were finished and got this thing  
15          approved, and now we're the only prime contractor  
16          that has all of the support material that they've  
17          got to negotiate with us, they told us they awarded  
18          the contracts to the other two and there's no room  
19          for me.

20                   JUDGE GROSSBAUM: This was MRE-3?

21                   THE WITNESS: This was MRE-3.

22                   BY MR. DETHERAGE:

23                   Q       So did you do any work on the MRE-3  
24          Program?

1           A       I jumped up and down about it and made a  
2       lot of noise. The DLA headquarters looked into what  
3       DPSC had done to me; and they sort of peased me by  
4       saying, "Well, they've still got to award some meat  
5       contracts." Come to find out that they didn't think  
6       that you were Walsh-Healy qualified, and you've got  
7       to be Walsh-Healy qualified in order to be a prime  
8       contractor.

9                       Well, I'm putting up a little argument  
10       with them that I'm a USDA supplier. I manufacture  
11       school lunches for all these kids in Patterson, New  
12       Jersey; for Newark; Westchester. I've got a  
13       facility here that I'm making food, so that's  
14       Walsh-Healy. They turned around and told me that  
15       I'd have to make something in this contract, a  
16       retort pouch; and until I make a retort pouch, that  
17       I'm not considered Walsh-Healy.

18                      "How do I get this done?" Well, there's  
19       some methods that the Government can sort of set  
20       aside for labor-surplus areas, some component  
21       subcontracts, to support the two contracts they just  
22       awarded to the primes. So we quickly submitted our  
23       proposal under those meat solicitations, and we got  
24       negotiated with, and we were awarded two meat  
25       contracts. I was in my living room. I didn't even

1 have that type of facility or any equipment. So  
2 with the award of that contract, I'm now off to  
3 satisfying the Government requirement that I be  
4 Walsh-Healy qualified.

5 Q Mr. Thomas, did you eventually become  
6 Walsh-Healy satisfied?

7 A Yes. We got all the necessary  
8 equipment. We went to Dollar Dry-Dock at the time.  
9 Dollar Dry-Dock was not the bank that we used for  
10 the meat solicitation as to show financial  
11 capability. We used First Woman's Bank to do that.  
12 But after I got these two awards, I went to Dollar.  
13 I explained to them what was going on and that we  
14 were lined up to become a prime contractor, and this  
15 was a thing that I had to do in order to bring the  
16 400 jobs to the Bronx.

17 What we did at that point in time was to  
18 bring Dollar on and to invest in Freedom as an  
19 investment. This is not loan money. They were not  
20 loans. So they invested in Freedom.

21 We delivered on the contract, although  
22 we did have a lot of problems on that contract with  
23 the building that we had; and we subcontracted the  
24 tail-end of the contract in order to complete it.

1           Q       Mr. Thomas, to get started on the retort  
2 contract, did you have to start a facility?

3           A       Yes.

4           Q       And where was that facility?

5           A       We took the Hunts Point facility, which  
6 was the old -- well, I shouldn't say old. It was  
7 the Vita Foods facility. It was a \$20 million,  
8 200,000 square-foot food processing building in  
9 Hunts Point, Bronx, New York.

10          Q       After you completed the MRE-3 retort  
11 contracts, what was your next proposal in the MRE  
12 Program?

13          A       Since we was running out of MRE-3 and  
14 into MRE-4, as a prime contractor in the Industrial  
15 Preparedness Program, we were solicited; and we  
16 submitted a proposal under MRE-4.

17                 JUDGE GROSSBAUM: Before we go any  
18 further, could you tell us, to the best of your  
19 recollection, the dollar value of your two meat  
20 contracts that supported MRE-3?

21                 THE WITNESS: I think it was around \$1.3  
22 million or \$2 million. It was very little. It was  
23 nothing.

1 JUDGE GROSSBAUM: What quantities were  
2 you producing? Were you producing the whole pouch?  
3 You mentioned a retort pouch.

4 THE WITNESS: Right.

5 JUDGE GROSSBAUM: What exactly were you  
6 producing?

7 THE WITNESS: They awarded us a beef  
8 stew contract and a diced beef with gravy contract.  
9 So we had two meat-component contracts.

10 JUDGE GROSSBAUM: These would be the  
11 entree? But that would not be a complete package;  
12 would it?

13 THE WITNESS: No. Just the entree. The  
14 retort pouch is just the entree, and it was  
15 considered GFM to the other two subcontractors. But  
16 it's not the meal bag. I mean, if you want, Your  
17 Honor, just for clarity, I could show you an MRE  
18 pouch as well as a case.

19 JUDGE GROSSBAUM: That is up to counsel.  
20 So you put together a component and actually sold it  
21 directly to DPSC, and it was furnished to the MRE-3  
22 prime contractors as GFM.

23 THE WITNESS: That's right.

1 JUDGE GROSSBAUM: Okay. And you said  
2 that the dollar value of these two contracts was  
3 about \$1 million each?

4 THE WITNESS: No. One of them was about  
5 maybe \$700,000 - \$800,000, I think the beef stew  
6 one; and I think the diced beef with gravy was \$1.1  
7 million -- something like that.

8 JUDGE GROSSBAUM: Okay. And were these  
9 actually produced by Freedom in the Hunts Point  
10 facility, the former Vita Foods plant, or was it  
11 subcontracted out?

12 THE WITNESS: No. Initially, we had to  
13 develop and get the plant USDA approved. We brought  
14 in kettles, retorts, and got all the necessary  
15 governmental USDA and FDA approvals for this; and we  
16 actually started doing them in that facility.

17 Due to a time constraint, as well as a  
18 defect in the building that we didn't know -- I  
19 think they call it a "hidden defect" or the piping,  
20 the plumbing -- the city decided to fix the building  
21 for us, all right, for our upcoming MRE-4 contract  
22 that we was talking about. They dug up the floors,  
23 and we had to stop producing. We couldn't produce,  
24 so we made arrangements with, I think it was,  
25 Southern Packaging for them to finish off and

1 deliver it to themselves and to Right Away Foods,  
2 the balance of our contract. We gave them letters  
3 of credit and various financial mechanisms to make  
4 that happen.

5 JUDGE GROSSBAUM: You indicated that  
6 around this time, the early 1980s or even 1979, you  
7 had been -- "you," meaning Freedom -- preparing and  
8 selling school lunches for the school system in  
9 Patterson, New Jersey?

10 THE WITNESS: Right.

11 JUDGE GROSSBAUM: What was the facility  
12 that you were using when you were providing school  
13 lunches?

14 THE WITNESS: All right. I had two  
15 facilities. I had a facility at 16 North Street,  
16 Mount Vernon, New York, which was about 5,000 to  
17 6,000 square feet, which was USDA approved; and I  
18 was using that facility to do both these White  
19 Plains, Mount Vernon schools. In New Jersey, I had  
20 a 25,000 square-foot, USDA-approved plant that was  
21 servicing Newark, New Jersey, and Patterson, New  
22 Jersey. We did some chicken dinners and various  
23 dinners for Philadelphia, okay?

24 JUDGE GROSSBAUM: How large a facility  
25 was the Hunts Point plant?



1 THE WITNESS: It was 200,000 square  
2 feet.

3 JUDGE GROSSBAUM: How many stories?

4 THE WITNESS: One, with a loft. It was  
5 one story.

6 JUDGE GROSSBAUM: Excuse the  
7 interruption. Go ahead.

8 FURTHER DIRECT EXAMINATION

9 BY MR. DETHERAGE:

10 Q Mr. Thomas, I think you described that  
11 you had submitted a proposal for the MRE-4 Program  
12 --

13 A Right.

14 Q -- at about the time that you completed  
15 the MRE-3 retort packages.

16 A Right.

17 Q What was the result of your MRE-4  
18 proposal?

19 A We were informed by, I believe it was  
20 Tom Barkewitz and Mike Cunninghame, again, that they  
21 had awarded the contracts to Right Away Foods and  
22 Southern Packaging, and there was just no room for  
23 Freedom.

24 Q At this point in time, was Freedom IPP  
25 qualified?

1           A       Yes.

2           Q       And they were one of how many IPP  
3 producers?

4           A       According to the D & F, Freedom was one  
5 of three IPP prime contractors at the time.

6           Q       And what was the effect on Freedom, in  
7 light of your MRE-3 work, of not getting the MRE-4  
8 contract?

9           A       Well, that effect was devastating  
10 because we were already up and running with retort  
11 pouches. We had the momentum of the city of New  
12 York there. We had training programs. We lined up  
13 all kinds of money. We had Dollar Dry-Dock running  
14 around, beating on their chests, telling the  
15 community that they're bringing 400 to 500 jobs to  
16 town. We were training people for various things  
17 and going through the solicitation, seeing exactly  
18 what we would need as far as running this  
19 200,000-square-foot, MRE prime contractor plant.

20                   So when we didn't get it, it's like  
21 flying an airplane and all of a sudden not getting  
22 any fuel. All of a sudden, everything comes to a  
23 screeching halt. How do you support it if you have  
24 no business? So that's what happened to us. We  
25 just got disconnected in some kind of way.

1           Q       Mr. Thomas, at the time you found out  
2       that you were not going to get the MRE-4 contract,  
3       did you have any debt or deficit as a result of the  
4       MRE-3 work you had done?

5           A       Well, what we did was we justified the  
6       Government putting us into the Industrial  
7       Preparedness Program: making us a plan producer,  
8       making us go through the subcontract of planning --  
9       that whole drill that the bank also was involved in  
10      with us as justification for spending all this money  
11      to fire up that plant. When we didn't get it, it  
12      was a serious problem for me, because we basically  
13      turned it into an investment. It was an investment  
14      that was just hanging there that we couldn't  
15      understand why we wasn't being developed like  
16      everybody else.

17          Q       You have used the term "develop." Can  
18      you describe what you mean by that?

19          A       Okay. In my quest to figure out how to  
20      get into the Industrial Preparedness Program, I met  
21      with various people at the Office of the Secretary  
22      of Defense, DLA Headquarters. They brought in their  
23      Industrial Preparedness specialists; they brought in  
24      their Industrial Resources and explained to me, in

1 coming into the program, if we were to be put into  
2 this program, that we would be developed.

3 In other words, they did not expect me  
4 to know how to do all the various things that the  
5 military want and to meet all the specifications if  
6 it's not a commercial something that's automatically  
7 doing, like my school lunches; that the MRE has a  
8 unique pack, a flexible bag, something that you  
9 don't find in school lunches. The retort system,  
10 the thermal stabilization process is something for  
11 the retort pouch. That is something that is not, or  
12 at the time was not, commercialized; and that the  
13 entire ration system or unique system was something  
14 that the Government would work with us and help  
15 develop us to become a plan producer in the event of  
16 war.

17 JUDGE GROSSBAUM: Now you talk about  
18 developing. You have earlier testified, before this  
19 last question, that you wanted to be developed like  
20 the others. Who did you know in this business that  
21 was being developed in the way that you expected  
22 Freedom Industries to be developed?

23 THE WITNESS: Okay. Right Away Foods  
24 and Southern Packaging were both developed, as well  
25 as American Pouch Foods. When I went to Chicago and

1 was talking to American Pouch Foods, that's where I  
2 got the whole concept that this is a very unique  
3 item; that the Government had to develop these  
4 sources of supply. I had looked at various  
5 Government records where they had done certain  
6 things to help develop Right Away Foods: in areas  
7 of getting a plant, in areas of making sure that  
8 they had certain-type personnel on board and  
9 recruitment process.

10 For Southern Packaging, I understand  
11 that they did not have, at the time, a retort pouch  
12 plant because they were coming off of a MCI  
13 contract, and they were developed into the  
14 Marionette. They let them develop this retort pouch  
15 capability, along with them developing their new  
16 ration-assembly capability of the MRE versus the  
17 MCI.

18 So the development stage of this has  
19 been told to me by various people of how the  
20 Government had helped get Right Away Foods up on its  
21 feet; Southern Package up on its feet; and had  
22 attempted, to the tune of about \$25 million, I  
23 understand, to get American Pouch Foods. I believe  
24 that was a \$25 million loss on the American Pouch  
25 Foods contract.

1 JUDGE GROSSBAUM: Continue.

2 BY MR. DETHERAGE:

3 Q Mr. Thomas, in your last answer, you  
4 describe the start-up of a facility for Right Away  
5 Foods. What was your understanding of the  
6 relationship between this development concept that  
7 you have described and start-up costs and pricing  
8 differentials?

9 A In other words, since this is a very  
10 unique type of a contract and is being done solely  
11 for the United States Government -- it is not being  
12 done for anyone else -- that the Government  
13 understood and wanted the MRE to be sort of  
14 segregated. They didn't want anything else in that  
15 plant. They didn't want anything else going on in  
16 that plant.

17 They were very, very cautious about  
18 letting us know that my school lunches was not going  
19 to be accepted along-side those rations, okay, and  
20 that basically I wasn't in a position to try to do  
21 both things at the same time.

22 The development of this thing here got  
23 so intense with discussions at DPSC that the concern  
24 by DPSC of Freedom doing school lunches and  
25 management, taking its time for other things other

1       than the MRE Program, was discussed with us -- the  
2       bank, Peat Marwick & Mitchell, which is a big  
3       accounting firm I had taken down to talk with them  
4       at the time -- and it was all decided that we'll  
5       just drop the school lunch thing, and we'll just be  
6       developed and concentrate strictly 100 percent on  
7       the MRE once it's awarded to us.

8               So that's the kind of development that  
9       we were looking for; that we were walking into  
10      something that we really wasn't sure exactly where  
11      we were going as far as other than on paper. I  
12      wasn't allowed to see other plants. I wasn't  
13      allowed to see what an end-item case looked like. I  
14      didn't even know what an end-item case, inside that  
15      case, should look like at the time. I had to go by  
16      just what was in these documents and certain  
17      military specifications.

18             Q       Mr. Thomas, you described your work on  
19      the MRE-3 contract and the fact that you did not get  
20      an MRE-4 contract. What happened, then, in relation  
21      to MRE-5?

22             A       After MRE-4 didn't come along, I once  
23      again jumped up and down and went to the Department  
24      of Defense, Industrial Resources. I complained. I  
25      put in protests; and we showed the Government once

1 again that DPSC had once again not awarded us a  
2 contract after we had done a survey for them,  
3 showing that the equipment necessary to mobilize our  
4 nation's resources was not available in the United  
5 States, and specifically it was not available to  
6 Right Away Foods or to Southern Packaging in order  
7 to respond in the event of a national emergency.

8 The Pentagon's Industrial Resources  
9 Department, as well as the Inspector General's  
10 Office that I went complaining to, I complained  
11 because I said that the two contractors had  
12 over-extended and had basically exaggerated their  
13 mobilization capability; so therefore, with that  
14 coming to play, what they did was, they turned  
15 around and basically told me that next time the D &  
16 F comes up to the Pentagon, they're going to make  
17 absolutely sure that there's fair play here and that  
18 there is a third contractor going to be put in this  
19 program.

20 Q Were you allowed to make a proposal for  
21 MRE-5?

22 A Yes, I was.

23 Q And when you say "D & F," do you mean  
24 directing and findings?



1           A       Determination.       Determination       and  
2       findings.

3           Q       Was a determination and findings issued  
28       \*with respect to MRE-5?

29           A       Yes, a determination and findings was  
30       issued.

31           Q       And what did they provide?

32           A       It was different than the other MRE-2, 3  
33       and 4 solicitations, where the D & F required that  
34       the contracting officer can make at least two awards  
35       and use his discretion, I guess, in making a third  
36       award.    They took that discretion away from the  
37       contracting officer and told him he will make three  
38       awards and, specifically, that Freedom or -- maybe  
39       he didn't say it, but there would be a cost-price  
40       qualifier in the D & F for the low bidder, for the  
41       lowest one with the lowest quantity.

42                   JUDGE GROSSBAUM:   Excuse me.   Are any of  
43       these D & F's in the record?

44                   MR. DETHERAGE:    Yes.   This D & F is in  
45       the record at F-7.

46                   JUDGE GROSSBAUM:   Thank you.

47                   BY MR. DETHERAGE:

48           Q       Mr. Thomas, you described the cost-price  
49       differential.   What do you mean by that?

1           A       One of the problems that I had  
2 throughout trying to get into this program was  
3 trying to figure out -- it's a cost dilemma, okay?  
4 This program is different in that the cost that's to  
5 this program is direct to this program and to the  
6 Government only; and any costs that I'm going to  
7 incur, I either have to incur it directly for this  
8 contract and subsequent follow-on contracts that's  
9 going to be for it since there is no commercial  
10 outlet. So I'm caught in what I call a dilemma.

11                   I wrote a letter to Tom Barkewitz in --  
12 well, to Mike Cunningham in 1983 that described  
13 this economic problem I had, and it was responded to  
14 by Tom Barkewitz to me.

15                   Specifically, the cost-price qualifier  
16 is the dilemma that I was caught in, that I talked  
17 to the Pentagon about, is how does a person come in  
18 with all these heavy start-up costs and is given  
19 only one contract? Does he front-end load all of  
20 his costs on that contract, or does he spread them  
21 over out years for that particular program?

22                   Now if that is the case, that we have to  
23 spread them out, then I need something from the  
24 Government to say that I am going to get contracts

1       in the out years, because I can't use this start-up  
2       and all this stuff for school lunches.

3               The other problem I had as a dilemma was  
4       that this is an industrial mobilization program.  
5       They're telling us that they need all this  
6       mobilization capability under this contract in order  
7       to qualify to be into this thing; that if I can give  
8       them so much during war time, that I would then be  
9       eligible to have a piece of the MRE solicitation. I  
10      could get an award based on me saying that.

11             Well, that turns around to me and I  
12      said, "Well, okay, if that's the case, I'm going to  
13      need a 200,000-square-foot plant that's called for  
14      in the justification for authority to negotiate, or  
15      I believe it says at least a 150,000-square-foot  
16      plant with 3 million cubic feet of contiguous space,  
17      is what I'm going to need.

18             If this is what I need, do I build the  
19      plant to just knock out these 600,000 cases, or do I  
20      build a plant that's going to be for war time in  
21      case war breaks out and I've got to expand right  
22      quick? So I needed the Government to tell me, what  
23      do I do here. So I'm caught in a dilemma.

24             So when I got caught out there with the  
25      Government saying, "Well, Henry's price is too

1 high," the Pentagon turned around and they said,  
2 "Well, okay, we can fix that. We'll give you a  
3 specific cost qualifier." That means -- to me it  
4 meant that if you've got 600,000 cases, your price  
5 should be higher because all of your costs have to  
6 be loaded on on a lesser volume versus these other  
7 guys that were getting 2 million, 1 million, 1.5  
8 million cases and their price was lower. So that's  
9 what that whole exercise at the Pentagon was about.

10 Q When you are talking about these "other  
11 guys," are you referring to SO-PAK Co. and RAFCO?

12 A Yes.

13 Q Okay. They had already established  
14 their own facilities and been through several  
15 contracts at this point in time.

16 A Yes.

17 Q Mr. Thomas, I want to now go to the  
18 MRE-5 solicitation and proposal that you made, okay?

19 A All right.

20 Q Can you describe what the first steps  
21 were that you took in making a proposal on MRE-5?

22 A We got the solicitation. I looked at  
23 it, and I immediately had a time frame to respond.  
24 So I put together a proposal right quick, the best I

1       could, and submitted it to the Government at a price  
2       of about \$25 a case.

3               Q       Was that the \$25 original-offer price  
4       that was discussed this morning in Mr. Barkewitz's  
5       testimony?

6               A       Yes.

7               Q       And what happened to that proposal?

8               A       That proposal was superceded by me  
9       bringing on expert people, such as Pat Marra who is  
10      a CPA from Deloit, Haskens & Sells, who had  
11      experience in start-ups and, you know, putting  
12      together these types of financial proposals.

13              Pat looked at what I had submitted and  
14      said I had made several errors, basically, or that I  
15      didn't build in enough and that he could read in the  
16      solicitation that says that we're supposed to have  
17      the contract continue -- go 90 days after the last  
18      case. If the Government required, it may even go  
19      another 90 days, so it extended out another six  
20      months past its last delivery. He said none of  
21      those costs were in there.

22              He also showed me that, after he  
23      reviewed some specifications, there were certain  
24      quality-control production and specialized equipment  
25      that we were going to be needing that was only for

1       this type of a business and that that had to be  
2       accounted for in some kind of a way.   How was I  
3       going to do this and how was I going to do that?

4               So we wrote a letter to Mr. Barkewitz in  
5       July or June of '84, letting him know that -- and  
6       submitted a new DD 633 to him.

7               Q       What is a DD 633?

8               A       A DD 633 is a cost proposal that has  
9       various elements of support of how you got your  
10      prices; a cost price breakdown; work sheets.

11              Q       Does it break down costs into different  
12      categories?

13              A       Ours did; yes.

14              Q       And generally, just on a general basis,  
15      what categories does it break the costs down into?

16              A       It's broken down into materials; direct  
17      labor -- I think it's called "purchase parts" or  
18      something like that.   Subcontracted items could be  
19      under "materials."   G & A, which is a general  
20      administrative; other costs; manufacturing overhead,  
21      depreciation and profit.

22              Q       As a result of Mr. Marra's advice on  
23      your cost analysis, did you submit a new proposal?

24              A       Yes, I did.

1           Q     Okay. Was that proposal submitted in  
2 connection with the August 2, 1984, deadline that  
3 was described in this morning's testimony?

4           A     Well, first I submitted it. It was sent  
5 back to me by Mr. Barkewitz, saying that I have to  
6 allege a mistake, or something, and he would give us  
7 another opportunity to resubmit, which we did. In  
8 August, I believe, we submitted a \$34-a-case price.

9           Q     Can you describe that proposal that you  
10 made in August of 1984?

11          A     Okay. Based on the dilemma that I  
12 discussed earlier -- that I sent a letter to Tom  
13 Barkewitz and Mike Cunninghame on in '83, and then  
14 in '84 I'm still having the same dilemma with the  
15 Pentagon people and DLA headquarters -- I had to  
16 come back because I wasn't sure exactly what I could  
17 get or what the Government was ready to put up on  
18 the table. So I gave them a Plan A; I gave them a  
19 Plan B; and I gave them a Plan C.

20                Plan A basically was based on \$34 a  
21 case. I don't have it in front of me, but I think  
22 Plan B happens to have been a combination of a  
23 little lesser one; but what I wanted was a one-time  
24 cost that the Government will pick up so that I  
25 don't have to worry about it in the out years. If

1       they would pick that up, that would help me with my  
2       dilemma that I was in.

3                   Plan C was something else.     But they  
4       all, I believe, contained an EPA, an economic price  
5       adjustment, that I saw that the Government had  
6       awarded to Right Away Foods.     They'd given them  
7       economic price adjustments in their contracts.     So  
8       whatever that was, I wanted it, too.

9           Q       Did one of your plans, one of the  
10       alternative plans, include follow-on contracts?

11          A       I believe it did.

12          Q       At the time you made this offer, were  
13       you aware of the L-4 clause?

14          A       Yes, we were.

15          Q       And what was the contract length that  
16       was anticipated at this point in time?

17          A       I believe we had a 22 -- it might have  
18       been 21 months or a 22-month contract time frame.

19          Q       Did that affect your cost analysis?

20          A       Oh, yes.

21          Q       How was that?

22          A       Well, what happened was, when Pat came  
23       back, he built in all these costs.     He extended them  
24       on the front-end, and he extended them on the  
25       back-end of the contract and built up a start-up



1 cost, as well as geared-down costs -- you know,  
2 costs that's over.

3 Now those costs were to be -- if we were  
4 to get a follow-on contract, it wouldn't matter  
5 because we'd have the people there so that you could  
6 chop those off. But if a follow-on contract did not  
7 come, then at least those costs that's required by  
8 the solicitation of being put on the table for the  
9 Government to say yes or no to.

10 Q What about fixed costs, such as rent and  
11 those types of items? Were they impacted, and were  
12 they analyzed in connection with the length of the  
13 contract?

14 A Yes. They were also taken out with the  
15 intent of saying to the Government that if a  
16 follow-on contract is awarded right after to keep  
17 Freedom going as a second contract, then all these  
18 back-end costs can come right off. If there's going  
19 to be no follow-on contract, then the contract's  
20 over at this point, we must have some money out here  
21 to basically cover the six months or so that's  
22 gear-down -- you know, shut-down-type costs.

23 Q What happened after you submitted this  
24 August 2 proposal, the alternative proposal?

1           A       The Government immediately, PCO, threw  
2       us into a pre-award survey mode.

3           Q       Let me stop you before we go into the  
4       pre-award survey, Mr. Thomas. We saw this morning  
5       the comparison of your price to SO-PAK Co. and  
6       RAFCO. How do those prices compare, and can you  
7       describe why they were different?

8           A       Well, seeing it there, I would say that  
9       the difference in prices is because I was a  
10      first-time -- I'm thinking I hear you. I'm going to  
11      try to answer your question. I hope I do.

12                   I was a first-time contractor; and my  
13      price of, let's say, \$34, according to Pat Marra,  
14      was more in line with the first-time price of RAFCO  
15      and SO-PAK Co. Really, I should go to RAFCO,  
16      because if you go back to their initial MRE-1,  
17      MRE-2, and you watch what happened, the Government  
18      gave them a lot more money since they was a small  
19      business coming into this thing, as they did  
20      Southern Packaging. They justified that because it  
21      was development costs. We had gotten all these  
22      documents from the Government and we saw what they  
23      had done.

24                   So in looking at the document that we  
25      was looking at this morning, all I could see the

1 difference is the same thing that I would say that  
2 I'm looking at a first-time supplier, who has not  
3 depreciated or wrote off many of his costs, because  
4 if you stood up our costs, that \$34, back to 1981,  
5 '82, with Right Away's costs, I think they would be  
6 just about the same.

7 Q What about the number of cases in the  
8 contract? Did that impact the price difference as  
9 well?

10 A Oh, yes. The quantity that we had to  
11 spread our start-up costs over was significantly  
12 lower. They only gave us or allowed us 600,000  
13 cases versus, I guess, when Right Away Foods, on  
14 MRE-1 -- I think they all had 600,000 cases. If my  
15 recollection serves me correctly, there was about  
16 \$34, maybe \$45 a case, come to think of it. I think  
17 they were at \$45 a case. But at that point in time,  
18 they had more CFM to procure.

19 Q One more background point before we get  
20 to the pre-award survey. In your Plan A alternative  
21 of \$34 a case, approximately, what was the total  
22 contract price?

23 A It was about \$21 million on that  
24 particular -- it was \$21 million; and it was about  
25 21 months, I believe.

1           Q       Okay.       Now let's go back to the  
2 pre-award survey.   What happened in the pre-award  
3 survey?

4           A       We had to show transportation,  
5 production, quality control, AVI.   Everybody came up  
6 and did an independent survey on me.   I brought in  
7 various people, and we passed all of them.

8                   We got to the financial analysis part of  
9 it and, I believe it was, Bill Stokes says:   "Well,  
10 this solicitation contains a clause of L-4 in it.  
11 That means that the Government is not going to give  
12 you the full 100 percent of 95 percent of progress  
13 payments; that the Government is going to give you  
14 half.   In other words, you're going to get 95  
15 percent on the beginning of the contract, up to this  
16 point, and then stop.   Now what you have to do, you  
17 know, in order to show financial capability to the  
18 solicitation as written, is you've got to come up  
19 with the other back-end of the financing."

20                  Okay.   If that's what I have to do, we  
21 talked to Mike Durso at Dollar Dry-Dock.   We went  
22 down to DLA Headquarters, jumping up and down about  
23 it.   That's when they gave us the exact language to  
24 use.   The November -- I'm sorry, the August 9 letter  
25 and the August 10 letter was the language that came

1 out of DLA Headquarters for us to use and give back  
2 to the pre-award.

3 The Clause L-4 was that where Dollar  
4 Dry-Dock told DLA Headquarters that they would put  
5 up the \$7.2 million and write that letter back to  
6 Tom Barkewitz, since it was their understanding that  
7 the \$7.2 million was to come on the tail-end of the  
8 contract; not in the beginning. Only 5 percent was  
9 to come on the front-end of the contract, whereas  
10 the \$7.2 million was to come at that 50 percent  
11 cutoff; and that, on the back-end of the contract,  
12 was where Dollar would have come to the table at.

13 Q Now you have mentioned an August 9 and  
14 an August 10 letter. Let's start with just the  
15 August 9 letter. I believe it is at F-12. It may  
16 also be at Government's Tab 4. What is your  
17 understanding of the circumstances of that letter,  
18 how it was prepared and what was done with it?

19 A All right. We went to DLA Headquarters;  
20 and right after, I think it was July 30, I wrote a  
21 letter to General Connolly. Right after that, they  
22 gave us a form. They said do it in this -- you  
23 know, they didn't want us to use the exact words,  
24 but they said, "This is basically the format." If a

1 contract is awarded at this price, then we will do  
2 this. Okay.

3 So Mike Durso said okay, and he went  
4 back and talked with Bill Wheeler, Chairman of the  
5 Board; and they ordered Siegert upstairs, which was  
6 Noel Siegert, and told him what to write and to get  
7 it to us.

8 Mr. Siegert wrote the letter. He gave  
9 me a copy. He had one that he was putting in the  
10 mailbox to Tom Barkewitz, and I proceeded down to  
11 the Small Business Administration. Unfortunately,  
12 upon showing them --

13 Q Let me stop you for a second, Mr.  
14 Thomas. What is your understanding of how the  
15 August 9, 1994, letter got to the Government?

16 A Tom Barkewitz -- Noel Siegert mailed it  
17 to him.

18 Q Can you describe the circumstances  
19 surrounding the August 10 letter?

20 A When I got the letter from Noel Siegert,  
21 at the time, Freedom had become an SBA 8-A  
22 contractor. It had been determined by the  
23 Government that we were a socially and economically  
24 disadvantaged small business and that we did not  
25 have the resources or capability to have economic

1 dollars at our beck and call. So therefore the  
2 Government put us in a special program, called the  
3 "8-A Program," that would allow them to help develop  
4 us and give us money and get set-aside contracts in  
5 order to grow.

6 Q Let me just back up to one point. What  
7 is your understanding of what was done with the  
8 August 10 letter? Who prepared it?

9 A Dollar Dry-Dock.

10 Q And what did they do with it?

11 A They mailed it to Tom Barkewitz.

12 Q The August 9 letter and the August 10  
13 letter: what proposal did those two letters relate  
14 to?

15 A Plan A.

16 Q That is the \$21 million or \$21.5 million  
17 contract price?

18 A Right.

19 Q And again, can you describe the reason  
20 you understood that it was necessary to obtain that  
21 financing for that \$21.5 million contract proposal?

22 A All right. At the time, the  
23 solicitation had a Clause L-4 in it. L-4 limited  
24 and put a ceiling on the amount of money the  
25 Government was going to put on. By operation, DAR 7

1       104.35B covered the first and all costs, all direct  
2       costs, allowable and allocable to the contract is to  
3       be paid 95 percent. So therefore, Dollar only had  
4       to put up 5 percent of the operating money.

5               Clause L-4 limited the Government and  
6       stopped them at \$9 million. So that meant, until we  
7       get that ceiling out of the way -- and if we didn't  
8       come back with Dollar, then Bill Stokes was not  
9       going to approve us that we had the financial  
10      capability -- as the contract or as the solicitation  
11      was written on that day, we would not be approved.

12             So when Dollar came and says, okay --  
13      and this is at headquarters -- we will bring and put  
14      the necessary back-end financing on the table, okay,  
15      as long as we know the Government's coming up with  
16      the front-end financing, the beginning, and get this  
17      contract up and running, because once the contract's  
18      up and running, then Dollar's security would be  
19      accounts-receivable financing. It will be all this  
20      kind of financing. So Dollar was coming in with  
21      \$7.2 on the back-end of the contract.

22             Q       Mr. Thomas, what was your understanding  
23      at this time -- and for that matter, at all times --  
24      regarding financing for the other 5 percent and any



1 production or capital-type equipment that was going  
2 to be depreciated?

3 A My understanding with that was that as  
4 long as we got our 95 percent of all costs that was  
5 direct to the contract, that Dollar or anyone else  
6 -- I had some leasing companies, and I've never had  
7 a problem getting equipment. We would take, and we  
8 did take, \$1.5 million as a proposal to the  
9 Government for a full-blown MRE plant. This is for  
10 mobilization.

11 Now we're coming to the table, and we're  
12 going to come out here and build this beautiful  
13 mobilization plant with retorts, Mitsubishi  
14 machines, Traypack machines, SBA. The whole nine  
15 yards is going to be included in that equipment, as  
16 well as the assembly.

17 The \$1.5 million of production capital  
18 equipment is self-collateralizing. Therefore, since  
19 it is self-collateralizing, it's like an automobile:  
20 the bank will give you money on it basically  
21 because of the value of the car, as long as you've  
22 got income. So based on us showing that we could  
23 put \$333,000 on the table out of the Government  
24 toward that payment, then there's no problem in

1 financing the production capitalization equipment,  
2 if that's what you wanted to hear.

3 Q What was your understanding with respect  
4 to your responsibility for outside financing with  
5 respect to the 5 percent and the capital equipment?  
6 You described with the capital equipment that there  
7 was a method to finance that through leasing or  
8 purchase over time. Did you also have a similar  
9 understanding with respect to the other 5 percent of  
10 the progress -- of the unpaid costs and perhaps any  
11 cash flow?

12 A The 5 percent is covered because the  
13 Government, in my contract, allowed that we could  
14 assign this contract. There's an Assignment of  
15 Claims Act, assignment of proceeds. It's an  
16 assignment where you can assign your contract value  
17 to the bank. Based on us having a \$2.2 million  
18 profit sitting back there, the 5 percent of the cost  
19 side of this thing was only \$700,000. So we had no  
20 problem with that particular piece either.

21 JUDGE GROSSBAUM: Did you believe that  
22 the Government was guaranteeing your proposed \$2.2  
23 million profit?

24 THE WITNESS: No. No, absolutely not.

25 BY MR. DETHERAGE:

1           Q       Mr. Thomas, I would like to go back and  
2 focus a little bit more on the pre-award survey.  
3 You described some work Mr. Stokes did. That was on  
4 the financial analysis.

5           A       Right.

6           Q       What was Freedom's financial condition  
7 at the time that Mr. Stokes did his analysis?

8           A       Freedom was about \$2.2 million in the  
9 deficit on the balance sheet. I looked at that as  
10 being a start-up investment, whereas from an  
11 accounting view point, they put it as a negative  
12 number because it hasn't been recouped. Okay, fine.  
13 But that was my start-up monies over in the MRE-3  
14 time frame.

15          Q       And was that disclosed to Mr. Stokes and  
16 to the Government?

17          A       Oh, yes. They knew that. Yes. They  
18 knew that very well because it was dubbed "The Hunts  
19 Point Mess," as a result of the Government not  
20 awarding us any follow-on contracts. They left us  
21 out there, and that's what we called "The Hunts  
22 Point Mess" throughout the negotiations.

23          Q       Mr. Thomas, what ultimately happened  
24 with the pre-award survey?

1           A       What we did with Mr. Stokes, in order to  
2       get past that Clause L-4, was to have Dollar come to  
3       the table with a \$7.2 million letter of commitment  
4       for \$34 a case and with the understanding that we  
5       will go to the contracting officer and see if we  
6       can't get this ceiling lifted out of the  
7       solicitation so that it conformed more to the DAR  
8       regulation than this L-4 clause.

9           Q       Did you receive a recommendation,  
10      positive or negative, on your pre-award survey?

11          A       Yes.     Mr. Stokes dubbed this Dollar  
12      Dry-Dock's money a plug figure.     It was the  
13      difference between the progress-payment cash flow  
14      and cash needed on the back-end of the contract.   So  
15      the plug figure, based on our negotiations, could  
16      have been less, more, whatever.

17                 But we didn't know what it was going to  
18      be until after we sat down and did face-to-face  
19      negotiations or until we reached some sort of an  
20      agreement on what we was going to do with this cash  
21      flow, because only the PCO, I understand, could  
22      accept the cash flows.   Stokes couldn't.   Since he  
23      couldn't accept the cash flows, we had to present  
24      them to the PCO; and it was my understanding that if  
25      we showed him a need -- and that's what L-4 was all

1       about -- if we showed him that there was a need for  
2       progress payments, that he would increase the  
3       ceiling. So therefore, that's what we did.

4               Q       Did you receive a positive pre-award  
5       survey recommendation?

6               A       Yes, we did.

7               Q       And what happened -- I want to move from  
8       the pre-award survey on to the negotiations. What  
9       happened in your negotiations after the pre-award  
10      survey came back positive?

11              A       We immediately went into the Government,  
12      saying that they wanted to get our price down from  
13      \$34 a case. It was not within their negotiating  
14      range; that we should come in with "best and  
15      finals." We had several meetings with the  
16      Government on this issue, going back and forth on  
17      figuring out what these costs should be and how they  
18      should be cut.

19              Q       And did the Government propose any  
20      prices to you during these negotiations?

21              A       We received a telephone call from them  
22      in September, where they offered me a letter  
23      contract for about \$28 a case.

24              Q       And did you accept that proposal?

25              A       No. We turned it down.

1           Q       Was that \$28 a case based on what other  
2       charts? For example, what type of progress payment,  
3       ceilings, what number of months in the contract?

4           A       We don't know. They had worked it up  
5       and down at DPSC, I guess, and they had offered --  
6       called us up and said, "We'll do a letter contract  
7       with you. We'll give you an award right now, but  
8       we're going to put a ceiling of \$28 a case." We  
9       said no because there was too many other things that  
10      was hanging out there that we wasn't sure of. Since  
11      this was our first contract, we didn't know what we  
12      were going to run into.

13          Q       At this point in time, had the  
14      Government agreed to any different time period than  
15      the 21- or 22-month contract you described before?

16          A       No. I don't believe so.

17          Q       And what about L-4? Had they agreed to  
18      any provisions on progress-payment ceilings other  
19      than the L-4 clause that you described?

20          A       No, they had not.

21          Q       Well, after you rejected the \$28, or  
22      approximately \$28-a-case offer, what happened next  
23      in negotiations?

24          A       I believe we had a face-to-face with  
25      them, and we reduced our price to about \$30 a case

1 -- something like that. I'm not sure. I've got the  
2 memorandum of what the meeting was about.

3 Q If you refer to M-2 -- it is in the  
4 supplement file -- that may refresh your  
5 recollection.

6 A M-2?

7 Q Yes.

8 A All right. Okay. Yeah, it does.

9 (Witness reviews file.)

10 Q Mr. Thomas, can you describe the terms  
11 of your September 7, 1984, proposal to the  
12 Government?

13 A Yes. According to this document, we had  
14 had a meeting on September 5 with the Government and  
15 that day, September 7. What we did was we reduced  
16 our price, but we conditioned it on their agreement  
17 "that progress payments will be permitted on a  
18 bi-weekly basis at the rate of 100 percent of  
19 incurred costs, including the purchase of equipment,  
20 machinery and other tangible fixed assets necessary  
21 for the performance of the solicitation." So we had  
22 a conditional offer on the table.

23 Q You described -- maybe you did not  
24 describe. What was the price of that proposal?

25 A This one was \$30.12 a case.

1           Q       Was there any term or provision for  
2 additional cases as well?

3           A       Yes, there was.    It says, yeah, that  
4 we'd get another 200,000 cases that we heard was  
5 coming down the pike at about \$21.   That would  
6 effectively reduce our price, if they gave us the  
7 additional follow-on cases, to about \$27.90.

8           Q       And that would be for a total of over  
9 800,000 cases.

10          A       That's right.

11          Q       What was the contract length proposed in  
12 the September 7, 1984, proposal?

13          A       I believe at the time it was still at  
14 the 21-month stage.

15          Q       Can you describe how you were able to  
16 lower the price in your new proposal?

17          A       In this one?

18          Q       Yes.

19          A       I can't do it this moment, but I have a  
20 breakdown where we went from \$34 to the \$30.12.   I  
21 have it in the file somewhere of exactly what it  
22 entailed.

23          Q       Was it basically an effort of reducing  
24 costs?



1           A       Yes.     It was cutting fat.     We were  
2     refining our costs and getting better estimates and  
3     better handles on what these potential costs were,  
4     you know, by having cost accountants re-look at it,  
5     redefine it and try to give us a best estimate,  
6     based on discussions with the Government.

7                   MR. DETHERAGE:     Your Honor, could I  
8     approach the witness for one second and take a look  
9     at that?

10                  JUDGE GROSSBAUM:    Sure.

11                  (Counsel reviews document.)

12                  BY MR. DETHERAGE:

13                Q       Mr. Thomas, is anyone carboned on that  
14     letter?

15                A       No.       No one is carboned on this  
16     particular letter.

17                Q       Okay.     What was the next thing that  
18     happened in the negotiations?

19                A       The       Government       responded       by  
20     acknowledging the wire.    As a matter of fact, if I  
21     may, I would like to say that M -- I think it's 2  
22     here -- is a letter that was sent or might have been  
23     sent to Tom in this form and letterhead; but I do  
24     know that the mailgram was sent to him.   It contains

1 the exact documents, okay, as the M -- I guess  
2 that's M-3.

3 M-4 shows that the next thing that  
4 happened is that the Government acknowledged receipt  
5 of my revised offer and did not knock out the  
6 conditional nature of the progress payments being  
7 paid 100 percent. Nor did they knock out the  
8 request that equipment be paid in full. They didn't  
9 knock it out at this point.

10 Q However, did they accept it at this  
11 point?

12 A What I believe they said, they were  
13 going to review it; and this came from Capt.  
14 Parsons.

15 Q What happened next in negotiations?

16 A After that, we, I believe, had to submit  
17 -- they asked for "best and final"; so what we did  
18 on October 16 was, we put in a new DD 633 with full  
19 support. The Government then commenced an audit:  
20 DCAA and pricing and everyone.

21 Q Let me back up again. Can you describe  
22 again, just for my perspective, what the DD 633 was?

23 A A DD 633 is a pricing proposal; that it  
24 contains the backup detail of each and every bit of  
25 support necessary to have your proposal audited.

1 MR. DETHERAGE: Your Honor, I believe  
2 that the DD 633 is located at M-6.

3 BY MR. DETHERAGE:

4 Q Mr. Thomas, can you describe the  
5 categories of cost that were set forth in your  
6 October 16, 1984, DD 633 submission to the  
7 Government?

8 A Yes. It contained materials, direct  
9 labor, manufacturing overhead, general and  
10 administrative costs, depreciation and other.

11 Q What types of items were included in the  
12 manufacturing and overhead costs?

13 A I believe that's under line item 3,  
14 which is Schedule Three. It included all of the  
15 executive salaries, accounting salaries, technical  
16 salaries.

17 Q Is it broken down by line item?

18 A Yes, it is on page 30. Oh, I'm sorry,  
19 on M-6, Schedule Three, which at the bottom says 30.

20 Q Does it include line items for any types  
21 of equipment or supplies?

22 A Yes, it does.

23 Q Can you describe those?

24 A Yes. We had plant and ground  
25 maintenance, factory supplies. We had quality

1 control equipment and supplies. We had maintenance  
2 equipment in there. We had receiving and warehouse  
3 equipment. We had building repairs. We also had  
4 automated building, management and control systems.

5 Q And did you have lockers and office  
6 equipment and start-up supplies as well?

7 A Yes, we did, come to think of it. Yes,  
8 it is here.

9 Q Now you also have a schedule for  
10 depreciation, did you say?

11 A Yes.

12 Q What equipment did that relate to?

13 A Only the production equipment, yeah; the  
14 actual production machinery and equipment that was  
15 necessary for production.

16 Q And what was the significance of  
17 including the production equipment under the  
18 depreciation schedule and including all the other  
19 equipment -- for example, the quality control  
20 equipment, the building repairs -- in the  
21 manufacturing overhead, general and administrative  
22 expenses schedule?

23 A The Government could not pay for the  
24 manufacturing/production equipment, but they could  
25 give us a "some-of-the-years method" on five years

1       instead of "help us out on the front-end of this  
2       thing here by giving us this type of a depreciation  
3       method" versus doing a straight line. I believe in  
4       a straight-line method, we would have gotten less  
5       money. Therefore, we put it in depreciation for  
6       those costs there. So the \$1.5 million is for  
7       depreciation of the capital production equipment.

8               Q       Can you describe the significance of  
9       putting the production equipment in the depreciation  
10       schedule, but putting the other equipment in the  
11       general and administrative and manufacturing  
12       overhead expense schedule?

13              A       Well, we put it that way, after talking  
14       with -- well, putting it in there to the Government,  
15       that this is what I considered the unique, one-time  
16       cost that I asked for under Plan B. Under Plan B, I  
17       said give me, as I recall --

18                   MR. DETHERAGE: Your Honor, if I could  
19       approach the witness. I think this will refresh his  
20       recollection.

21                   JUDGE GROSSBAUM: Is this a document  
22       that is in the record?

23                   MR. DETHERAGE: I am not sure if it is,  
24       Your Honor.

1 JUDGE GROSSBAUM: Why don't you show it  
2 to the Government? It is 612. The other side is  
3 entitled to look at any document the witness uses to  
4 refresh its recollection.

5 (Document is proffered.)

6 BY MR. DETHERAGE:

7 Q Mr. Thomas, you are talking about your  
8 alternative proposal. Does that refresh your  
9 recollection?

10 A Yes. Yes, it does. Under this  
11 document, on August 2, we wrote Tom Barkewitz a  
12 letter, basically talking about our cost proposal  
13 and how it's designed. We were basically telling  
14 him we had a cost disadvantage as compared to the  
15 existing MRE prime contractors. But on this, on  
16 page 2, it talks about --

17 JUDGE GROSSBAUM: Are you going to offer  
18 this? He is not going to testify about anything  
19 that he is reading from unless it is in the record.

20 MR. DETHERAGE: Okay, Your Honor.

21 JUDGE GROSSBAUM: If it refreshes his  
22 recollection -- do you want to?

23 MR. DETHERAGE: Yes. Let's go ahead and  
24 offer it. I believe that is eight?

1 MR. MACGILL: Your Honor, did you say

2 A-12?

3 JUDGE GROSSBAUM: This can be A-10.

4 MR. DETHERAGE: Okay.

5 JUDGE GROSSBAUM: A-10, for  
6 identification, is an August 2 copy of a five-page  
7 letter dated August 2.

8 (The document referred to was  
9 marked for identification as  
10 Appellant's Exhibit A-10.)

11 BY MR. DETHERAGE:

12 Q Mr. Thomas --

13 JUDGE GROSSBAUM: Do you want to offer  
14 this?

15 MR. DETHERAGE: I was just going to lay  
16 the foundation for what it was, Your Honor.

17 BY MR. DETHERAGE:

18 Q Is A-10 a letter that you wrote to Tom  
19 Barkewitz, the contracting officer at Defense  
20 Personnel Support Center, on or about August 2, 1984  
21 --

22 A Yes, it is.

23 Q -- in connection with the MRE-5  
24 solicitation and proposal?

25 A Yes.

1 MR. DETHERAGE: Your Honor, we would  
2 offer this at this time.

3 JUDGE GROSSBAUM: Any voir dire?

4 MS. HALLAM: No, Your Honor.

5 JUDGE GROSSBAUM: Any objection?

6 MS. HALLAM: Just the general objection  
7 that we raised before about not being provided with  
8 it prior to trial.

9 JUDGE GROSSBAUM: Apart from them not  
10 identifying it, is this something that the  
11 Government would claim surprises them?

12 MS. HALLAM: I do not know.

13 (Counsel reviews document.)

14 MS. HALLAM: We have no objection.

15 JUDGE GROSSBAUM: Very well.  
16 Appellant's Exhibit No. A-10 for identification is  
17 admitted as Appellant's Exhibit No. A-10.

18 (The document referred to,  
19 having been previously marked  
20 for identification as  
21 Appellant's Exhibit A-10, was  
22 received in evidence.)

23 BY MR. DETHERAGE:

24 Q Now Mr. Thomas --



1 JUDGE GROSSBAUM: Can I ask the witness  
2 a question about his?

3 MR. DETHERAGE: Sure.

4 JUDGE GROSSBAUM: Mr. Thomas, you  
5 indicated that you were President of Freedom  
6 Industries. Is that correct?

7 THE WITNESS: Yes.

8 JUDGE GROSSBAUM: How long had you been  
9 President of Freedom Industries? When was that  
10 started?

11 THE WITNESS: We started Freedom  
12 Industries, I believe, in 1979 or '80; and I had  
13 been President ever since.

14 JUDGE GROSSBAUM: You were a salaried  
15 officer?

16 THE WITNESS: Yes.

17 JUDGE GROSSBAUM: You had an equity  
18 interest?

19 THE WITNESS: At this time, I think I  
20 had a 5 percent or 10 percent stake in it.

21 JUDGE GROSSBAUM: Who had the major  
22 equity interest in it?

23 THE WITNESS: My wife, Jacine, and  
24 Dollar Dry-Dock. My wife had 91 percent, and Dollar  
25 Dry-Dock had 9 shares. Then SBA, when we went SBA,

1       they wanted me to have some. I think Jacine gave me  
2       10 percent of hers. That knocked her down to 81  
3       percent. I had 10 percent. Dollar Dry-Dock had 9  
4       percent.

5                   JUDGE       GROSSBAUM:               Excuse       the  
6       interruption. Go ahead.

7                   BY MR. DETHERAGE:

8               Q       Now Mr. Thomas, I want to refer you back  
9       to the DD 633 form and your testimony regarding the  
10      relationship of placing equipment in different  
11      schedules to your August 2 proposal.

12              A       Uh-huh.

13              Q       Now you started to describe a proposal  
14      where some costs were going to be paid up-front.  
15      Can you describe that proposal and how that related  
16      to the October 16, 1984, DD 633 proposal?

17              A       Okay. On this document, page 2, it  
18      describes Plan A with a fixed price of \$34.81, with  
19      an economic price adjustment. Twenty-one million  
20      dollars; that's it.

21                   Plan B is where we offered a fixed price  
22      of \$31 and change; and we wanted an economic price  
23      adjustment also, except we also wanted an industrial  
24      preparedness measure -- a one-time industrial  
25      preparedness measure or some other funding from the

1 Government to defray the initial one-time start-up  
2 costs, because this is my dilemma I'm going back to.  
3 I have to keep going back to this dilemma of not  
4 knowing how to treat this contract or what to do  
5 with this thing unless we get follow-on contracts.

6 I believe Plan C basically said the same  
7 thing. I don't think I had an economic price  
8 adjustment in there, but it was a combination -- and  
9 that those two prices be valid if the Government  
10 were to award follow-on contracts under DAR 3 216,  
11 Bow leg 6, thereby assuring there would be no break  
12 in production.

13 So I'm constantly, I think, alerting the  
14 Government to know that I can't just go out here, do  
15 a contract that's in the sole interest of the United  
16 States without them giving me any kind of "where do  
17 I have an outlet to recoup the investment," because  
18 that's exactly what I was already in, in the hole,  
19 as a result of going out here being in good faith,  
20 spending money, firing up the Hunts Point plant, not  
21 getting any assurances that there would be a  
22 follow-on contract. When there was no follow-on  
23 contract, I find myself \$2.4 million in the hole.

24 So I had to cover this in writing to  
25 these guys to let them know, "Take your pick." Just

1 tell me which way we're going to go on this thing,  
2 and I'm ready to go.

3 Q Mr. Thomas, I want to go back and focus  
4 now on the October/November 1984 time period. You  
5 had submitted the DD 633 form that you described.

6 A Right.

7 Q What happened next in the negotiations?

8 A The Government took this and they sent  
9 the auditors out. The auditors came; Pat Marra took  
10 them and did what he had to do. The production  
11 people came out again; quality control people;  
12 transportation. We passed everything and satisfied  
13 everybody; and they were going to take their results  
14 and give them to the contracting officer for their  
15 opinions and suggestions on what we had said:  
16 whether we could support it or we couldn't support  
17 it. So that's what happened next.

18 An audit was done, and I believe Tom Barkewitz  
19 then called us in and talked about it. The audit  
20 wasn't complete; but he had enough that he asked us,  
21 you know, that we could at that point drop our price  
22 from \$30.12 to \$29 and change. I did that right  
23 there at DPSC in a handwritten memorandum to him,  
24 that we went down to \$29 based on further  
25 discussions with them and what could be done here.

1           Q     Did you then at some point enter into  
2 face-to-face negotiations?

3           A     Yes.

4           Q     Okay.   Who were the parties to those  
5 negotiations?

6           A     Tom Barkewitz was there; Keith Fold was  
7 there; Capt. Parsons was there.   Capt. Parsons was  
8 walking in and out of the meeting.   Pat Marra was  
9 there and myself.

10                   JUDGE GROSSBAUM:   Where were they held?

11                   THE WITNESS:   DPSC Conference Room, Wing  
12 E, or one of their work rooms.

13                   JUDGE GROSSBAUM:   What city is that in?

14                   THE        WITNESS:               Philadelphia,  
15 Pennsylvania.

16                   BY MR. DETHERAGE:

17           Q     Approximately       when       did       these  
18 negotiations take place?

19           A     On 6 November 1984.

20           Q     And were they all completed in one day?

21           A     Yes.

22           Q     Can you describe what occurred during  
23 these negotiations?

24           A     The Government took our DD 663; and on a  
25 line-by-line item, they sat down with the audit

1 report and went over where we were high at and where  
2 we could cut.

3 On the materials, on Schedule One, they  
4 showed that we had a -- instead of using a cost  
5 reduction of whatever we were using, I think they  
6 said a 2 percent production loss was about normal.  
7 So since they said it, I had no experience in it, we  
8 wrote down 2 percent loss. "Just use that  
9 calculation." So this is the first information I'm  
10 getting from the Government as far as any guidance  
11 on what the other two contractors are doing.

12 As I understand, the subcontractor's  
13 audits came back that some of these guys were  
14 digging Freedom at a higher profit rate than they  
15 were charging the other two prime contractors. So  
16 they told us that our costs should be about 12  
17 percent only, and we should allow these  
18 subcontractors only 12 percent. So we cut that out,  
19 and we came up with a figure of \$8.193 million,  
20 okay? There.

21 So, I don't know, I got \$50 k. Minus 50  
22 k, SO-Pak -- oh, I know what that is. So on  
23 Schedule A, we negotiated that it would be an \$8.193  
24 cost for materials based on the audits and that they  
25 would provide us with those audits if we have to go

1 beat these contractors over the head when we talk to  
2 them. And that's exactly what we said. "Okay,  
3 fine." We took their word for it.

4 Q And did you continue line-item by  
5 line-item to go through and adjust costs one way or  
6 the other as appropriate?

7 A Yes. On direct labor, we had \$1.086.  
8 We ended up with shaving just about \$200,000. We  
9 ended up with \$811,000, and that's based on instead  
10 of us putting in \$5 an hour, the Government gave us  
11 an average of \$3.75, what they said the auditors  
12 were at. What we did was, we ended up going through  
13 the numbers and the people, and what have you, and  
14 came up with \$811,000. So we accepted that.

15 Q Did you change any of the categories?

16 A No.

17 Q Did any of the equipment move from one  
18 schedule to the other or from one category to the  
19 other?

20 A No.

21 Q What was the final result of your  
22 negotiations on November 6?

23 A The final result -- these schedules were  
24 went over line by line -- was that we ended up with  
25 a \$3.5 or 3.6 million manufacturing overhead, a \$1.8

1 million G & A off of the Schedule Three. So if you  
2 look at Schedule Three, you'll see that there were  
3 some adjustments made in certain categories. In  
4 certain areas where they thought we were too low,  
5 they increased it.

6 On Schedule Four, we ended up with  
7 adding \$91,000 because I think they told me that I  
8 had made a mistake and not put enough in for skids,  
9 or my price for skids was wrong. So they added -- I  
10 believe that was what it was. They added \$91,000 to  
11 that schedule. It raised it from \$71,000 up to  
12 \$163,000. So I checked that off and I put "DPSC,"  
13 because I'm using their schedules, their auditors.  
14 They know better than me. So I said, "Okay, fine."

15 They accepted outright our \$333,000  
16 depreciation. That's how we got to the cost side of  
17 this thing.

18 Q What was the final price that was agreed  
19 upon between Freedom and the Government during the  
20 November 6, 1984, negotiations?

21 A The final price boiled down to \$27.725 a  
22 case or \$17.197 million.

23 Q And this was different than your  
24 Proposal A initially.



1           A       Yes.     This is definitely different.  
2       This is not Proposal A at all.     This is a  
3       combination of Plan B.

4           Q       Had you, at any time since the positive  
5       pre-award survey recommendation, gone through  
6       another pre-award survey?

7           A       No.

8           Q       I notice this price is lower than the  
9       letter contract price you said you had rejected  
10      earlier --

11          A       That's right.

12          Q       -- in the negotiations.   What is that?

13          A       Well, what the Government had done was  
14      satisfied my fears.   I didn't know what \$28 was  
15      going to cover at the time that they was on the  
16      phone, telling me to take \$28.   This gave me some  
17      rationale that I wasn't walking out into outer space  
18      with subcontractors that would not accept \$8.1  
19      million, with the Government telling me \$8.8 is too  
20      high because of what they had done.

21                 By adding all this cost in, I felt  
22      comfortable that I could go back to the auditors and  
23      say to these people that, "We know for a fact that  
24      you're charging me more profit than you are Right  
25      Away or SO-PAK Co., or what have you.   Therefore,

1       you have to give me the same price at your front  
2       door as you're giving them."

3                       So with these kinds of numbers, and  
4       especially on the labor side where they're saying,  
5       "Here's what the other guys are really doing, and  
6       here's what you should be doing," I felt better,  
7       too. So I said, "Okay, if that's what I'm supposed  
8       to line up as, then we're going to get in step with  
9       everybody else." So that's why I accepted a lower  
10      price.

11             Q       Other than the price terms, what were  
12      the other negotiated terms and agreements that you  
13      reached on November 6, 1984?

14             A       What we did was, we cut back on the time  
15      frame from 21 months down to 14 months.

16             Q       Okay. Let's just start with that one.  
17      How did that affect the costs you would incur in  
18      your contract?

19             A       Well, instead of having rent run for 21  
20      months, rent was now going to be cut back by seven  
21      months off the back-end of the contract; not the  
22      front-end. So the back-end of the contract is going  
23      to slide backwards.

24                       Instead of producing a lower number of  
25      cases per month, we're going to jack all the cases

1 up to 100,000 even, okay, and get this thing ready  
2 to go, because we're getting in mobilization mode  
3 basically, okay.

4 So therefore we ended up cutting a  
5 21-month contract down to 14 months; and all the  
6 costs, after you chop them all off, of course, are  
7 what they now consider the "out period,"  
8 out-of-period costs.

9 Also we had moved from September. We  
10 were in November. So we had to knock off September  
11 and October G & A in start-up costs. So they had to  
12 slide forward to November.

13 So when you chop all that cost off and  
14 that, now what they call, "out of period," since  
15 it's no longer there, you end up with the price that  
16 we ended up with.

17 Q Okay. You have now described the length  
18 of the contract and the price. What other terms did  
19 you agree on during these November 6 negotiations?

20 A Oh. What we did was, we told Tom -- Pat  
21 Marra specifically told Tom Barkewitz that he did  
22 not believe that we could finance this devilish  
23 contract without getting rid of this or doing  
24 something on the ceiling; that we had to have

1 something written or some sort of assurances that  
2 the Government was to accept our cash flows.

3 As I was sitting there, Pat was talking  
4 about the cash flows. He was going to, at that  
5 point, factor in all these numbers. We all went to  
6 lunch at this time. Pat was going to factor in the  
7 cash-flow numbers, and we would talk right after  
8 lunch.

9 Well, what we did was, Pat came back and  
10 said to them, "If we can get some money on raising  
11 this ceiling, then we wouldn't need outside  
12 financing -- not to the tune of what they're talking  
13 about, because if he could raise the ceiling on the  
14 back-end while we're in production, then we could  
15 knock off our financing costs: our interest, our  
16 this, our that. And that's exactly what was done.

17 Tom agreed to raise the ceiling after  
18 the first 100,000 cases by \$2 million, and he agreed  
19 to raise the ceiling by another \$2 million after the  
20 second 100,000 cases.

21 Now with the combination of cutting  
22 seven months worth of rent and everything off the  
23 back-end of the contract -- and the back-end of the  
24 contract at this time is what Dollar Dry-Dock is  
25 supposed to be funding -- you really, in essence,

1 say, chop \$3 million off the contract, whatever; \$2  
2 million, whatever.

3 What was left there was, like, \$4  
4 million. That's all that was left when we cut it  
5 down, from a cash-flow view point. Now when you  
6 raise the ceiling by \$2 million and raise the  
7 ceiling by another \$2 million, Dollar Dry-Dock is no  
8 longer necessary for the back-end of this contract.

9 Q Did you have any other agreements? For  
10 example, did you have negotiations regarding the  
11 accounting system?

12 A Yes. Tom Barkewitz, in that same  
13 document, noted to us that we had, in order to lower  
14 our G & A and manufacturing overheads, that we had  
15 people in there, that we had consultants in there,  
16 and we had a computer system in there. Tom said we  
17 were going to have it one way or the other; we  
18 wasn't going to have it both ways.

19 So therefore we eliminated the manual  
20 personnel for doing accounting. We eliminated the  
21 consultant team, the people that we had for  
22 accounting; and he negotiated and we negotiated for  
23 a computerized accounting system that would also  
24 handle the inventory. It would be an inventory  
25 control, automated building management system.

1           Q       Were the costs for that system included  
2       in the G & A and manufacturing and overhead schedule  
3       attached to your DD 663 that you negotiated from  
4       November 6?

5           A       Yes, it is. It's a line item there, and  
6       the line item was discussed in great detail as to  
7       what it was the Government was going to be getting,  
8       as well as that the Government, by paying these  
9       costs on a one-time basis -- that I had to agree  
10      that in the event I got a follow-on contract, that  
11      we would not charge these one-time costs to the  
12      Government; that in the event I got a follow-on  
13      contract, that the Government would have the benefit  
14      of not being charged for something that was already  
15      paid for.

16                    So I think the term was used, that I  
17      first heard, was quid pro quo. So we reached quid  
18      pro quo, whatever Pat was talking about; okay?

19           Q       When you completed the negotiations, I  
20      think Mr. Barkewitz testified about a memorandum of  
21      understanding this morning. Did you sign a  
22      document?

23           A       Yes.

24           Q       And what was your understanding of the  
25      memorandum of understanding?

1           A       The memorandum of understanding covered  
2       the cost categories, okay, that were to be included  
3       in the contract as the cost of the contract. Since  
4       there were no other contracts we had, that all these  
5       were direct costs to the contract, and that all  
6       these costs itself were to be my definition of DAR  
7       7104.35B -- was that these costs would all be as  
8       incurred, okay? They would be allowable for  
9       progress payments.

10                   So therefore all of this is what we call  
11       "specialized equipment," because as I understood the  
12       DAR regulation, defined "specialized equipment" is  
13       equipment that is purchased only for this contract,  
14       is what the DAR says. So since it says that, then  
15       all this equipment was also in the line items in  
16       this thing here; and specifically what the document  
17       said, the memorandum of understanding said that this  
18       is the cost that the Government had to -- where is  
19       that document?

20           Q       I believe it is at F-5.

21           A       F-5?

22                   JUDGE GROSSBAUM: Are you talking about  
23       F-17?

24                   BY MR. DETHERAGE:

25           Q       Excuse me. It is at F-17.

1           A       Do I have the F file here?

2           Q       You have part of it.

3           A       Let me just read what that thing says.

4                   (Witness reviews document.)

5           A       Okay. The language that made me happy  
6       in here, it says, "The break out of cost elements as  
7       determined by the Government's negotiating team is  
8       as follows." So it says they determined that these  
9       are costs. Then all costs are direct to the  
10       contract and this is it.

11                   So since those items are included under  
12       manufacturing overhead at the \$3.6 million, and  
13       they're also included under the G & A as part of the  
14       \$1.8 million, then there's no dispute here. We  
15       finally reached an agreement in advance -- now this  
16       may not be what you call an advance agreement, but  
17       it's at least an advance cost understanding so that  
18       there will be no dispute in the back-end of this  
19       contract as to what was going on here. So we signed  
20       this document.

21           Q       Did you subsequently sign an actual  
22       contract for M-7?

23           A       Yes.

24           Q       It is the supplement file.



1           A       At M-7. I went down to DPSC; and it was  
2       noted that I did not have to sign it because, on box  
3       18, a contractor was not required. But because DPSC  
4       had some photographers there and they wanted to take  
5       some pictures, when Tom and I sat down and the guy  
6       was taking some pictures, and he had already signed,  
7       the guy wanted another picture. So I grabbed the  
8       document and said, "Let me sign to it." They said  
9       fine and I signed.

10                But it was only because of the pictures  
11       that were being taken at the time, but it wasn't  
12       necessary for me to sign it because they had  
13       accepted my -- as they said here, they had accepted  
14       my offer under the solicitation; and that was my  
15       offer. It was what we negotiated.

16           Q       When was that agreement signed by Mr.  
17       Barkewitz?

18           A       On 15 November 1984.

19           Q       Now Mr. Thomas, as you went forward from  
20       this point, what were your progress-payment  
21       expectations based on the negotiations and your  
22       discussions with the Government in terms of what  
23       time period your progress-payment request would be  
24       paid?

1           A       We presented during negotiations, to the  
2       Government negotiating team, documents that were  
3       supplied to us by various people. One of them was a  
4       provision that says the Government is paying  
5       progress payments within 5 to 10 days and that  
6       progress payments was to be considered as invoices.

7                       So we put them on the table; and I think  
8       Tom says, "Well, Henry, I don't know about that.  
9       You have to see Marvin Liebman. But if that's what  
10      the policy is, if that's what our mode is as far as  
11      these progress payments, then we'll do whatever the  
12      policy says we're supposed to do. But Marvin  
13      Liebman is the one that will be paying according to  
14      whatever progress payments is and whatever the rules  
15      and the policy is."

16           Q       The final contract, I believe you said,  
17      was 14 months? Is that right?

18           A       Yes, a 14-month contract.

19           Q       What was the schedule for when  
20      deliveries were to begin?

21           A       If you want, I could show the Judge a  
22      little chart that shows it, but it was from July to  
23      December.

24           Q       So you would begin deliveries in July  
25      and complete it by December.

1           A       Right.

2                   JUDGE GROSSBAUM:     Why do we need a  
3 chart? Did the contract say that?

4                   THE WITNESS:    Beg your pardon?

5                   JUDGE GROSSBAUM:     Why do you need to  
6 show the Board a chart? Did the contract say that  
7 expressly?

8                   THE WITNESS:    Yes. The chart, what it  
9 does, is sort of give you the start of the  
10 production and the delivery periods.

11                   JUDGE GROSSBAUM:    With response to the  
12 question, does the contract tell you when deliveries  
13 were supposed to take place?

14                   THE WITNESS:    Yes, it does.

15                   JUDGE GROSSBAUM:    July to September of  
16 what year -- July to December of what year?

17                   THE WITNESS:    Of 1985.

18                   JUDGE GROSSBAUM:    Was this supposed to  
19 be the first article?

20                   THE WITNESS:    Yes, it was.

21                   JUDGE GROSSBAUM:    When was that supposed  
22 to be approved?

23                   THE WITNESS:    No later than January, I  
24 believe.

25                   JUDGE GROSSBAUM:    Go ahead.

1 BY MR. DETHERAGE:

2 Q Just to follow up on the Board's  
3 question, when was the first article approved?

4 A Sometime in early January, I believe.

5 Q Mr. Thomas, just as a matter for  
6 perspective, at the time you signed the agreement in  
7 November of 1984, what was the physical status of  
8 Freedom Industries? Did you have equipment  
9 operations going; that sort of thing?

10 A No. Freedom had nobody; nothing. It  
11 had Henry Thomas, Pat Marra, maybe Linda and a few  
12 other people. That was it.

13 JUDGE GROSSBAUM: Who is Linda?

14 THE WITNESS: Linda Iglehart was the  
15 Vice President of Administration. She assisted in  
16 all the putting together and formulations of the  
17 proposals and to design the production operation.

18 BY MR. DETHERAGE:

19 Q Could you continue to describe the  
20 status of Freedom? Specifically, I would like you  
21 to describe what work needed to be done before you  
22 could start production.

23 A All right. At that particular time,  
24 when the contract was finally awarded, we could now  
25 finalize all actions. In other words, we had a

1 tentative agreement, or I should say that we had a  
2 lease of the Bronxdale Avenue building. That's all.  
3 It was just a lease. I had to go in there and fix  
4 it up and get it to military standards and USDA  
5 standards.

6 We had to hire personnel. We had to  
7 bring on staff, management staff, that would  
8 negotiate with the subcontractors and people like  
9 that.

10 We had to get a purchasing department, a  
11 contracts department, a quality control department.  
12 We had nobody.

13 We had to bring on all top-level  
14 management; we had to bring on all middle  
15 management; and we had to start training people,  
16 based on specifications that we had in a book.

17 Q Mr. Thomas, you described the facility  
18 that you had leased and that it needed some repairs.  
19 Can you describe what kind of repairs were needed  
20 and why they were necessary?

21 A The building that we had was a  
22 400,000-square-foot plant versus the  
23 200,000-square-foot plant that we had recently left  
24 out of Hunts Point. We had already cleaned up the  
25 Hunts Point plant, put a lot of money into it

1       cleaning it up; and we were now moving over to a  
2       400,000-square-foot plant that was basically the  
3       Gristedes building for 7-11, Southland Corporation.

4  
5               It was dirty, filthy, cracked pipes, not  
6       well lit.       It didn't meet any kind of  
7       government-food specification, and that plant had to  
8       be completely revamped in order to meet the  
9       specifications set down by the U.S. Department of  
10      Agriculture, as well as the AVI, which is the Army  
11      Veterinary Service.

12             JUDGE GROSSBAUM:   Where is Bronxdale?

13             THE WITNESS:   It's in the Bronx.   It's  
14      in the North Bronx -- not North Bronx.   It's in the  
15      middle of the Bronx, right north of Treemont Avenue  
16      versus the South Bronx, which is where the Hunts  
17      Point plant was.

18             BY MR. DETHERAGE:

19             Q       Mr. Thomas, you described some repairs.  
20      Did you do things, for example, like painting and  
21      repairing pipes?   Is that the type of work you were  
22      doing in cleaning up?

23             A       Yes.   Part of the proposal that we had  
49      \*negotiated with DPSC called for us to hire various  
50      maintenance people on the front-end of the contract

1 to basically get this building and get this  
2 equipment set up and get the building in shape.

3 Q Okay. You described that you had to  
4 begin training employees. What was your employee  
5 base at that time? Where were you going to get your  
6 employees?

7 A On the day of award, we had absolutely  
8 no one. We had to go into the Bronx or into the  
9 area and recruit low-paying people because we only  
10 had \$3.75 as an average, so we had to start some  
11 people off at probably \$3.50 and other people off  
12 at, say, \$4 as supervisors and try to train these  
13 people in getting the production, quality control,  
14 packaging and packing and various things in.

15 JUDGE GROSSBAUM: What was the statutory  
16 minimum wage in November of '84?

17 THE WITNESS: I believe it was right at  
18 \$3.25 or something. It was right about that, I  
19 think.

20 JUDGE GROSSBAUM: Go ahead.

21 BY MR. DETHERAGE:

22 Q Now Mr. Thomas, finally, just to wrap up  
23 this picture of where you were when the contract was  
24 signed and what work you needed to get done, what

1        did you have in the way of equipment and what did  
2        you need to procure?

3            A        Okay.    In the way of equipment, I had  
4        retorts that we had purchased under the first MRE  
5        meat contract.    I had giant kettles.    I had all  
6        USDA-approved quality control equipment.    We had  
7        basically a retort operation ready to go.

8            We did not have anything for assembly,  
9        like cracker assembly, vacuum machines; none of the  
10       desiccation equipment that is necessary for the MRE.  
11       We didn't have any of the packaging lines, the  
12       final-assembly conveyor belts, nor the sealing  
13       machines that would be used to seal the meal bag.  
14       We had nothing.

15           Q        I would like to move from where you were  
16        to what you did after you signed the contract.    Can  
17        you describe, just very generally, the first  
18        progress payment, when you submitted it and what it  
19        was for?

20           A        All right.    F-1 is identified as on  
21        11/15.    We went back and gave it to Marvin Liebman  
22        for \$100,000.    That represented 95 percent of just  
23        the rent.    The rent, I believe, was \$120,000; and  
24        Pat had submitted or got something together there



1 and put it together. I signed it and we sent it to  
2 Marvin Liebman. He says okay.

3 We had just signed the lease. We had  
4 just incurred this cost. Here's our progress  
5 payment. Let's get the show on the road -- and he  
6 rejected it. Well, he didn't reject it. What he  
7 said was, "We'll see." And nothing happened.

8 Q Okay. After you submitted the first  
9 progress payment -- this was a Freedom Industries  
10 progress payment, correct?

11 A Right.

12 Q What happened next in the contract?  
13 What was the next major event?

14 A I believe we had a post-award  
15 conference, all right? At the post-award  
16 conference, the Government, all of its various  
17 divisions, came in and wanted to review the  
18 solicitation and what our responsibilities were.

19 One question was asked -- it was from  
20 Marvin Liebman -- if I understood all of the  
21 contract clauses under the contract; and I said  
22 "Yes, I do." I turned around and asked him, does he  
23 understand all the clauses of the contract; and he  
24 said yes, he do. Tom interjected, "Well, if you  
25 don't, he does." I said fine.

1           Q       Before we go further in what happened at  
2       that meeting, can you just describe generally who  
3       was there and where the meeting took place?

4           A       The meeting took place in the conference  
5       room of the Bronxdale Avenue building. There was no  
6       heat. I believe there was water running, but the  
7       heat wasn't. The boiler wasn't going. We had still  
8       to put fuel oil in it. So we had it. The  
9       Government came and it must have been 10, maybe 15  
10      Government people, I would say. It was quite a few.  
11      I think I had about five or six people that I had  
12      mustered up to come to the meeting.

13          Q       Okay. What else was discussed at this  
14      meeting?

15          A       Well, I believe quite a few things were  
16      discussed, but specifically we notified or was  
17      telling the Government that we wanted our progress  
18      payment paid so that we can demonstrate the 95  
19      percent of incurred cost to the bank.

20          Q       At this time, had you resubmitted the  
21      progress payment?

22          A       No.

23          Q       Okay.

24          A       And that if we could get the first 95  
25      percent progress payment, that would show the bank

1       that, yes, what I am telling them is, in fact, true:

2       that the Government will pay 95 percent of incurred  
3       cost, which is their end, and all we have to put up  
4       is our 5 percent of that, which is the 5 percent,  
5       and that we were waiting -- because we had shown the  
6       bank that there was a 5- to 10-day policy that the  
7       Government was going to do, we believed, and that  
8       once they made the payment, made it directly to us,  
9       we would put it in our bank account and then I would  
10      finish my negotiations with the bank.

11               It would either be Dollar Dry-Dock or it  
12      would be Broadway Bank & Trust in New Jersey. I  
13      wasn't sure which one I was going to go with. Even  
14      though Dollar was an equity investor, there was no  
15      requirement that I had to borrow from them, because  
16      their rates were substantially higher than Broadway  
17      had given us in the past.

18           Q       Okay. What other issues were discussed?

19           A       I would say that GFM was discussed, when  
20      it was going to come in. Tom Barkewitz said that he  
21      was going to be sending us a schedule, which he did,  
22      of all the purchases he had made under the prime  
23      contract of GFM, and when the GFM was going to  
24      arrive and who it was going to come from.

1           Q       Was there a discussion at this meeting  
2       of any requirements -- for example, physical  
3       progress -- before a progress payment would be paid?

4           A       It may have been, and we said to him --  
5       I believe it was.   What I said to him was that,  
6       "Physical progress is being made because, one, I've  
7       already started hiring people."

8           Q       Who raised that concern?

9           A       Marvin Liebman.

10          Q       What did you tell him?

11          A       We broke out the cash flows again,  
12       showing him that the physical progress, one,  
13       according to the proposal that we'd put in, was that  
14       we would have rent and we would have some salaries.  
15       That's the physical progress; and we have rent and  
16       we have salaries.   That's it.   That's the physical  
17       progress that we're doing.

18                   The next month, we would do some more.  
19       These people would then get their computers and go  
20       to starting to setting up the accounting systems,  
21       and they would go start setting up the inventory  
22       control systems to manage all this GFM and CFM.  
23       That's in the proposal.

24          Q       And what did Mr. Liebman tell you?

1           A       Mr. Liebman said that until there was  
2       direct labor incurred and direct and raw materials,  
3       that he did not believe that there would be physical  
4       progress. Of course, this sort of shocked us, but  
5       he said that they would look into it further. Their  
6       legal department said they would look into it  
7       further.

8                     In the meantime, I'm standing here  
9       telling the banks that, "My progress payment is in.  
10      I'm ready to borrow some money. I'm going to do an  
11      assignment. The progress payment is coming right  
12      away, according to this contract." And nothing  
13      happened.

14           Q       I do not want to jump ahead too far, but  
15      just on this one issue, the requirement of physical  
16      progress under the contract, when did you first  
17      learn that that issue had been resolved?

18           A       It was not resolved until the DLA  
19      Headquarter's meeting sometime in March, where  
20      Marvin stopped saying that he had to have direct  
21      labor and raw materials. At that meeting is when he  
22      said it was a dead issue. "I'm going to now pay  
23      based on incurred cost."

24           Q       Did Mr. Liebman tell you at any time  
25      during December of 1984 or January of 1985 that he

1       had resolved this physical-progress requirement  
2       issue?

3               A       No, he did not.

4               Q       Were there any discussions at this first  
5       pre-award or post-award meeting regarding financing?

6               A       Say again?

7               Q       Were there any discussions at this first  
8       post-award meeting that was held at the Bronxdale  
9       facility regarding financing?

10              A       Yes.

11              Q       Can you describe those discussions?

12              A       Yeah.       We went over, again, our  
13       understanding of the DAR clause and that DAR meant  
14       that they were going to be putting up 95 percent of  
15       all incurred costs that were allocable and allowable  
16       under the contract. We said that we had taken the  
17       memorandum of understanding, the DD 633 break out,  
18       and that became our accounting system. Those are  
19       the elements that's in our accounting system, and  
20       each and every one of those is what we're going to  
21       bill to.

22                      So as we incurred costs under those  
23       particular line items -- automated building  
24       management, if that's what it's for; if it's for  
25       salaries, G & A; whatever it's for -- we're going to

1 be categorizing them; accounting for them in the  
2 same identical way that they all broke out.

3 Q When you say "broken out," you mean in  
4 the DD 633 form?

5 A That's right; in the DD 633 and in the  
6 memorandum of understanding. The memorandum of  
7 understanding is really a recap of the front of the  
8 DD 633. Those are my line items. You know, you  
9 don't see purchase parts in there, and you don't see  
10 some other various items that's normally in a DD 633  
11 maybe, because I put those in there and that's what  
12 we were working from since it was my proposal. So  
13 that's what we basically discussed. No one had a  
14 problem with it.

15 As far as submitting the cost, the  
16 progress payments would be billed the same way that  
17 we negotiated it. The 95 percent is what we  
18 expected and that we would be putting up 5 percent,  
19 according to the cash flows that were submitted to  
20 the Government. So since they had the cash flows,  
21 we thought it was okay.

22 Q Were there any demands made of Freedom  
23 at that first post-award meeting?

24 A No.

25 Q What happened next after that meeting?

1           A       We had another meeting down at DCASR,  
2       New York, with Marvin Liebman and with Guy Sansone  
3       and with some other people from DCAA.

4           Q       Okay. Let me stop you here. Who is Guy  
5       Sansone?

6           A       Guy Sansone was an auditor from part of  
7       DCAA.

8           Q       And DCAA is Defense Contracting Auditor  
9       Agency?

10          A       Yes, Defense Contract Audit Agency.

11          Q       And who was present for Freedom?

12          A       Pat Marra was there; myself. I was  
13       there. I believe Linda Iglehart was there. I also  
14       believe that we had the landlord's representative at  
15       that meeting, Walter Freeman. He was there.

16          Q       What happened at that meeting?

17          A       They couldn't find the cash flows that  
18       we had given to Mr. Liebman. He said he had sent  
19       them over to DCAA. They said they'd never seen  
20       them. So we gave them another copy. We gave Mr.  
21       Liebman a copy. He passed them down to DCAA. Guy  
22       Sansone grabbed them and threw them back up to the  
23       other end of the table, to Marvin Liebman, and told  
24       him to send them through official channels.



1           Q       Were there other issues discussed at  
2       that meeting?

3           A       Well, other than we're trying to get  
4       this thing resolved on paying us our progress  
5       payments so that we can show our landlord, who had  
6       promised me \$2 million, as well as all my banking  
7       sources, what the terms of the contract was, that's  
8       basically what we were stuck at. We were stuck  
9       right there, trying to get Marvin, who wanted DCAA  
10      to audit this thing according to the way it was  
11      negotiated, and they, throwing our papers around.  
12      I'm not sure what else was really discussed. It  
13      might have been something else, but that was my main  
14      issue.

15          Q       And when was this meeting?

16          A       This was right after the post-award  
17      conference; maybe the next few days after. There  
18      might be something in the file.

19          Q       What happened next after this meeting?

20          A       The next basic milestone would have been  
21      \$9 million, until I got the first 100,000 cases out.

22                  One of the things I said to people is,  
23      "The Government has to give me \$9 million for me to  
24      get the first case out the door, okay?" That upset  
25      Mr. Liebman to no end. So I said, "Okay, Mr.

1 Liebman, the Government is going to give me \$9  
2 million to get the first 100,000 cases out the door,  
3 then. Okay?"

4 So I got \$9 million to get the first  
5 100,000 cases out the door. Then I get \$2 million  
6 to get the next 100,000 -- when I get the next  
7 100,000 cases out the door. So in essence, the  
8 Government is going to get 100,000 cases. I'm going  
9 to have an \$11 million progress payments ceiling.  
10 On the second one, it goes up another two, to \$13  
11 million.

12 So the basic milestone would be, the  
13 Government would be giving me \$13 million in return  
14 for 200,000 cases, okay? So those are the kinds of  
15 parameters I was working with, according to the  
16 negotiations that we had; and the way that it fell  
17 out by operation; and by operation of the progress  
18 payments clause, when you applied it; when you  
19 applied the L-4 clause in there and the cash flows.

20 So therefore, this is what I was telling  
21 people. People were saying, "Okay. Fine, Henry.  
22 If what you say is true, you've got \$2 million. If  
23 what you say is true, you've got it."

24 The problem is, if what I say is true  
25 was not being confirmed but by one source, and that

1 source was by Tom Barkewitz -- or Keith Fold down in  
2 Philadelphia would say, "Yes, we did negotiate this.  
3 Yes, we did this. Yes, that's my signature. But  
4 see Mr. Liebman." So when Mr. Liebman would be  
5 called, that ended that discussion.

6 So what I did was, I stopped calling Mr.  
7 Liebman and I referred Suburban Bank to Aaron  
8 Recusen, who had taught me in school about Defense  
9 contract financing progress payments and what the  
10 obligations of the Government was. We call him  
11 Professor Recusen. I would send them to that law  
12 firm to confirm what the Government's obligations  
13 were.

14 Based on that, Suburban Bank sent me  
15 \$1.5 million. Then they gave me another increase of  
16 \$2 million.

17 JUDGE GROSSBAUM: Suburban Bank of  
18 where?

19 THE WITNESS: I think they're here in  
20 Virginia. It's in the file right over there. I  
21 think it's a part of one of these documents. I  
22 believe they're here. They're around here some  
23 place. They do government contract financing.

24 BY MR. DETHERAGE:

1           Q       Mr. Thomas, did there come a time in  
2       December that demands were made by Mr. Liebman  
3       regarding financing?

4           A       Yes.

5           Q       Can you describe when that occurred and  
6       what his demands were?

7           A       Mr. Liebman said he does not want to  
8       hear from a Bill Robbins, even though Bill Robbins  
9       may be a millionaire with \$5- or \$6 million in the  
10      Bank of California. He did not want to hear from  
11      Richard Penzer.

12          Q       Before we get to who he wanted to hear  
13      from, did there come a time prior to that that he  
14      described to you what he wanted to hear and what  
15      financing he was going to require?

16          A       Well, what he did was, he said to me  
17      that he was going to Dollar Dry-Dock looking for the  
18      \$7.2 million. Dollar Dry-Dock is not obligated to  
19      put up \$7.2 million, and we sat him down and  
20      explained the entire procedure of what happened. We  
21      told him about Clause L-4 in the solicitation;  
22      pointed to page 7 of 7, where the contracting  
23      officer had raised it to \$4 million, and told him  
24      that basically replaced Dollar Dry-Dock. "So why  
25      are you going to Dollar Dry-Dock looking for \$7.2

1 million? We just left Dollar Dry-Dock, telling  
2 Dollar Dry-Dock that we needed 5 percent, which is  
3 \$700,000."

4 So all of a sudden, my credibility went  
5 out the window. When the Government got on the  
6 telephone and called up Dollar Dry-Dock -- and Noel  
7 Siegert quickly ran up to Bill Wheeler, the Chairman  
8 of the Board, and to Mike Durso, the Senior Vice  
9 President -- they called me up and says, "Henry, the  
10 Government's on the phone saying that you're wrong;  
11 that instead of \$700,000, 5 percent, you need \$7.2  
12 million." I said, "They're wrong."

13 So all of a sudden Bill Wheeler says,  
14 "Henry, I've got to take my hands off of this. I  
15 really got my hands smacked by giving you \$1.4  
16 million." The FDIC smacked his hands for starting  
17 us up in Hunts Point. So he said, "I'm going to  
18 leave this in Noel Siegert's hands because he signed  
19 the thing. Let him go worry about dealing with Mr.  
20 Liebman."

21 So at that point, I sort of got cut off  
22 from the Chairman of the bank. I was left with Noel  
23 Siegert saying that he believed Mr. Liebman; that  
24 Mr. Liebman has much more experienced in these  
25 things; and that Henry Thomas don't know what he's

1        talking about; and that he's not going to get this  
2        bank involved with me, saying that I need 5 percent  
3        of the contract, which is \$700,000; and the  
4        Government saying that they're not going to put 95  
5        percent up until October -- in July, when we started  
6        direct labor.

7                    So I was caught between a rock and a  
8        hard place; that I was just ushered out of the  
9        Chairman of the Board's offices. At that point, I  
10      got to go somewhere else.

11                   JUDGE GROSSBAUM: Let me ask you this --  
12      we will get back to it in awhile -- was there any  
13      direct labor involved in putting together the first  
14      article?

15                   THE WITNESS: There could have been, but  
16      no. The direct labor -- the first articles we did  
17      was we used it all at subcontract. We used our  
18      subcontractors or ready-approved first articles by  
19      Nadick that they was doing for other subcontractors,  
20      other primes. We submitted those, and DPSC approved  
21      the first articles right away.

22                   JUDGE GROSSBAUM: How did you pay for  
23      them?

24                   THE WITNESS: I didn't. What I did was,  
25      I had told the subcontractors to send me a bill. I

1 incurred a cost, and we'll put it in as the progress  
2 payment. When the Government paid me, I'd pay them.

3 BY MR. DETHERAGE:

4 Q Mr. Thomas, at this period of time, when  
5 you describe the conversations Mr. Liebman was  
6 having with the bank, did Mr. Liebman make any  
7 demands on Freedom as to the type of financing or  
8 the amount of financing that they needed?

9 A He didn't do that, I think, until  
10 sometime in February or March time frame.

11 Q All right. You started to describe, and  
12 I cut you off, his request to you or requirements to  
13 you regarding the type of financiers --

14 A Right.

15 Q -- that you acquired. Can you describe  
16 that?

17 A Yes. I was bringing in other investors.  
18 I wanted to get some guys involved besides the bank  
19 in equity in the company, but in a minority status.

20 I was an 8-A contractor, and I knew that  
21 Richard Penzer, who happens to be a  
22 multi-millionaire -- today he's worth \$100 million.  
23 Richard had said, "Henry, if what you say is true,  
24 I'll give you \$2 million for all your equipment and  
25 the building," which he had already purchased for

1 me. He paid \$3 million for the building from  
2 Gristedes, and he gave me the lease.

3 That's the only reason I had the  
4 building for the Government is because I convinced  
5 Richard that we were in line; and I think he had  
6 sent somebody down to DPSC with us also to watch us  
7 when we talked to Tom Barkewitz, Capt. Parsons and  
8 DLA Headquarters. So he knew that something was up  
9 here in the interest of national defense.

10 So he came forward with the building  
11 during pre-award time for me, and he was prepared to  
12 come forward and put up \$2 million.

13 The gentleman who had bought all of my  
14 retort equipment from Hunts Point was Ed Robbins,  
15 out of California. Basically, in 1983 he had gotten  
16 involved with me, and he bought all of the  
17 equipment. He says, "Henry, if what you say is true  
18 and we can confirm it," he says, "my bank, Imperial  
19 Bank in California -- I've got a letter ready to go.  
20 All I need to do is know that you're going to get 95  
21 percent of your progress payments and that that's  
22 it. I'm approving your line of credit for \$2  
23 million." Okay?

24 Unfortunately, I couldn't get the  
25 necessary confirmation on how the program was to



1 work by Mr. Liebman. Unfortunately, Mr. Liebman  
2 told them, and he admits it -- I mean, he told them  
3 that he was not going to pay until he got direct  
4 labor and raw materials in month seven.

5 Q And when did these conversations take  
6 place?

7 A These took place in November, December  
8 and early January. In January, I got so fed up I  
9 wrote that January 18 letter, because I saw what was  
10 going on. I saw that unless I could get Marvin to  
11 understand what he's doing and the impact of what  
12 he's doing to me, that he's going to chase away all  
13 of my finance people, all of my banks. Everybody is  
14 going to just run away because I'm saying one thing,  
15 that it's going to work this way, and he's saying,  
16 "No, it's going to work differently." So my  
17 credibility went right down the tubes.

18 Q Did any of the financiers or the banks  
19 that spoke to Mr. Liebman ultimately provide you  
20 with financing?

21 A No, they did not.

22 Q Mr. Thomas, just for a matter of  
23 perspective, during this January and very early  
24 February time period, what did you do in terms of  
25 submitting progress payments?

1           A       Well, we went back and we incurred some  
2       more costs. We were trying to hire people. I see,  
3       F-2, on the 14th, we submitted another \$299,000,  
4       which basically was something that was crystal clear  
5       on. It was rent, taxes for the rent or real estate  
6       taxes and some salaries.

7           Q       And that was January 14, 1985?

8           A       Right.

9           Q       And then did you also submit another  
10      progress payment in early February?

11          A       I see one there. Yes, we did. It looks  
12      like it went down from \$299,000 -- okay, it's  
13      cumulating, I see. Yes, we submitted another one,  
14      which is \$231,000.

15          Q       And I take it from your testimony that  
16      these three progress payments were not paid.

17          A       No. They was not.

18          Q       After three months of the contract not  
19      having any progress payments paid, what was the  
20      effect on your efforts to start up production and  
21      procure equipment, et cetera?

22          A       Okay. My financing is strictly based on  
23      everybody else's exposure. If the Government is  
24      going to put up 95 percent of the negotiated,  
25      incurred costs, then it's no problem bringing a

1 contractor in to pick up the other 5 percent and  
2 wait for whatever other dollars there are.

3 Equipment suppliers: if they know that I'm  
4 going to be getting 95 percent of the price of the  
5 cost of what they're giving me, and I'm getting it  
6 from the Government, and they're covered under this  
7 contract, they'll finance it one, two, three, okay,  
8 because they know exactly where it's coming from.  
9 It's not coming out of my bank account. I can  
10 negotiate with them to wait for the other 5 percent  
11 down the line, but I will be willing to pay them at  
12 least the 95 percent right now if they want to do  
13 business.

14 If they don't want to do business, I'll  
15 find someone else. I had no problem with suppliers  
16 and everybody rushing to the table.

17 Q At this point, after three months in the  
18 contract, had you been able to procure equipment?

19 A We had procured the equipment. We had  
20 the equipment, but when Mr. Liebman told AT&T in New  
21 Jersey, when they called him up to ask about the  
22 progress payment, when were they going to be paying  
23 it, he told them he wasn't. So they quietly came  
24 back to the plant, picked up their equipment and

1 walked out. They had computers they had delivered  
2 to me.

3 Q And when was that?

4 A That was in the January, I guess -- the  
5 December, January time frame. They had already  
6 delivered everything.

7 Q Now I want to move on to February, 1985,  
8 and focus on the February to April 1985 time period.

9 JUDGE GROSSBAUM: Why don't we take a  
10 recess for lunch and come back here at 1:45 p.m.

11 (Whereupon, at 12:20 p.m., the hearing  
12 was recessed, to reconvene at 1:45 p.m. this same  
13 day, Tuesday, February 16, 1993.)

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## A F T E R N O O N   S E S S I O N

(1:53 p.m.)

JUDGE GROSSBAUM: The hearing will come to order. Resume.

Whereupon,

HENRY THOMAS, JR.

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

## FURTHER DIRECT EXAMINATION

BY MR. DETHERAGE:

Q Mr. Thomas, when we broke, we had covered the time period through January of 1985. Now I want to turn to the February to April 1985 circumstance, okay?

A Okay.

Q What happened in February, 1985, with respect to the progress payments?

A They were suspended. None were paid.

Q Okay. When you say "suspended," can you describe what happened in early February, 1985, with respect to the suspension?

A We had some meetings at DCASMA in New York, where we were telling him again what the contract clause, in our opinion, called for. Also,

1 we was telling him about the condition, because what  
2 he was saying to us is that Freedom was in such  
3 unsatisfactory condition as to endanger the  
4 contract.

5 Q Let me stop you, Mr. Thomas. When you  
6 say "him," who are you referring to?

7 A Marvin Liebman, the ACO.

8 Q Okay. You may continue.

9 A In these meetings, we were trying to  
10 justify our position as being \$2.4 million in the  
11 hole, if you want to call it that, as a deficit --  
12 was as a result of what we called Government action  
13 that had been taken all the way up to the Pentagon  
14 and back down to the DLA Headquarters. This was  
15 well known to everybody; and this contract, as a  
16 result of that action, is why we're here, trying to  
17 get this thing negotiated properly. At that --

18 Q Mr. Thomas, let me interrupt you. What  
19 reason did Mr. Liebman give you for suspending the  
20 progress payments?

21 A Well, since Dollar Dry-Dock was not  
22 coming to the table with up-front \$7 million, he  
23 says that we are in unsatisfactory financial  
24 condition and that he's calling us insolvent. We  
25 was trying to point out that we were in the same

1 identical condition that we were in 19-early-83 -- I  
2 mean, late '83, '84, at the pre-award survey.  
3 Nothing had changed, and he just didn't want to hear  
4 it.

5 Q Had anything changed since the contract  
6 negotiations, other than the expenses that you had  
7 incurred that are referenced in the  
8 progress-payments submissions?

9 A No, nothing changed.

10 Q Did anything change since the contract  
11 award?

12 A Nothing changed since the contract  
13 award; nothing.

14 Q What was the effect of Mr. Liebman's  
15 suspension of progress payments on your progress as  
16 you tried to get production out?

17 A Well, what that effectively did was end  
18 it -- any discussions I was having with any bank.  
19 It also ended discussions we had with suppliers or  
20 creditors or anyone else, because the Government has  
21 now put us in a suspension mode until something  
22 happens. I believe he might have even given us a  
23 cure notice or something. We have to cure this  
24 condition, around that time frame.



1           Q     What happened next in relation to the  
2     contract?

3           A     I believe we were so concerned that we  
4     went down to or called for a meeting with the  
5     Director of Contracting in DLA Headquarters to try  
6     to get them to convince Mr. Liebman that his actions  
7     were, in my opinion, improper, and that something  
8     was wrong here and that we needed to have someone  
9     take a look at exactly what he's doing.

10          Q     Who is the Director of Contracting?

11          A     That was Raymond Chiesa, Executive  
12     Director of Contracting, DLA, Cameron Station.

13          Q     And did you have a meeting with Mr.  
14     Chiesa?

15          A     Yes, we did.

16          Q     And can you tell us when that meeting  
17     was, approximately?

18          A     I would say maybe some time in --

19          Q     February?

20          A     Yes. February time frame, mid-February.

21          Q     And who was present at that meeting?

22          A     Well, the meeting: Ray Chiesa was  
23     there. He had Hal Herman and Billy Williams, I  
24     believe. Matter a fact, the room was a large room  
25     and the Government took up three sides of the Board

1 table. In other words, a very large, large room;  
2 and they took up three sides. I had three seats, I  
3 believe, in that particular meeting.

4 Q You have identified a couple of people:  
5 Mr. Herman and who else?

6 A Herman was a contracting expert, a  
7 Government contracting expert; Hal Herman. Billy  
8 Williams, I believe, was in DLA Headquarters in  
9 something to do with contracts and what have you.  
10 But they had lawyers. There were a lot of people  
11 there.

12 Q Was Mr. Liebman there?

13 A Yes, Mr. Liebman was there.

14 Q And how about Mr. Barkewitz? Was he  
15 there?

16 A I believe Tom was there, although I  
17 can't be for sure because this is basically out of  
18 his area other than what was negotiated, when I say  
19 "other than negotiate."

20 But I do recall at that meeting that Hal  
21 Herman stood up for Freedom and basically solved the  
22 issue of direct cost versus needing direct labor and  
23 raw materials. He point blank told, across the  
24 table to Mr. Chiesa, that Mr. Liebman was basically

1 wrong and that the contract should be paid based on  
2 incurred costs.

3 That's the meeting that Liebman finally  
4 said -- I believe that's the meeting. He finally  
5 said, "Okay, we're going to take it back and  
6 reconsider this thing." I don't think he said it  
7 was a dead issue at that time, but I believe it was  
8 around that time is when he said they was going to  
9 look at it and reconsider it.

10 Q Before we go on to the rest of the  
11 contents of the meeting, who was at the meeting for  
12 Freedom?

13 A I believe I was there. I believe the  
14 new person that bought the facility, Kurt Widdick,  
15 was there. I believe Mac Morris, one of my  
16 subcontractors had come up from Texas. I know he  
17 was standing in the hallway at least, but I think  
18 somehow after, as my back was to the door, I looked  
19 around and he was standing in the room. I might  
20 have had Neal Ruttenburg there; and I'm not sure,  
21 but there is minutes of that meeting. There is some  
22 document here that has that.

23 JUDGE GROSSBAUM: Mr. Widdick was now  
24 the landlord?

25 THE WITNESS: Yes.

1 JUDGE GROSSBAUM: Was he affiliated with  
2 Mr. Penzer?

3 THE WITNESS: What happened was, he had  
4 agreed to purchase the building from Mr. Penzer for  
5 \$6 million. I had brokered that deal basically.

6 JUDGE GROSSBAUM: How much did Mr.  
7 Penzer pay for the building?

8 THE WITNESS: Three million dollars.

9 JUDGE GROSSBAUM: What was the rent that  
10 Freedom was paying?

11 THE WITNESS: One hundred twenty  
12 thousand dollars.

13 JUDGE GROSSBAUM: A month?

14 THE WITNESS: A month; right.

15 JUDGE GROSSBAUM: And Freedom entered  
16 into this lease to pay \$120,000 when?

17 THE WITNESS: In, I would say,  
18 September, October time frame is when we negotiated  
19 --

20 JUDGE GROSSBAUM: Of '84?

21 THE WITNESS: Of '84; yes. Of '84 is  
22 when we entered into the agreement to lease and  
23 didn't probably actually make it real, or the  
24 contract didn't come alive or the beast didn't come

1       alive until we signed the contract with the  
2       Government.

3               JUDGE GROSSBAUM: Who was the owner --  
4       well, did this agreement to lease that you entered  
5       into in September of '84, did that provide for the  
6       \$120,000 a month?

7               THE WITNESS: Yes.

8               JUDGE GROSSBAUM: Who was the owner of  
9       the building at that time?

10              THE WITNESS: Richard Penzer owned the  
11       building through a down payment or something, a  
12       contract that he had with Southland Corporation. So  
13       he owned it.

14              JUDGE GROSSBAUM: The prior owner of the  
15       building had been Southland, the owner of 7-11?

16              THE WITNESS: Yes.

17              JUDGE GROSSBAUM: Okay. Mr. Penzer had  
18       made a down payment, so he had an equitable  
19       ownership of the building --

20              THE WITNESS: Yes.

21              JUDGE GROSSBAUM: -- at the time he was  
22       under --

23              THE WITNESS: It was under contract.

24              JUDGE GROSSBAUM: Okay. And who owned  
25       the building on November 14, November 15 of '85?

1 THE WITNESS: Richard Penzer.

2 JUDGE GROSSBAUM: When was ownership of  
3 the building conveyed to Mr. Widdick?

4 THE WITNESS: Probably in April, I  
5 believe. I think it was either in late March or  
6 April of '85.

7 JUDGE GROSSBAUM: Okay. How long was  
8 your lease for the building?

9 THE WITNESS: The lease was going to be,  
10 I believe, a 10-year lease.

11 JUDGE GROSSBAUM: Please excuse the  
12 interruption. Go ahead.

13 FURTHER DIRECT EXAMINATION

14 BY MR. DETHERAGE:

15 Q Mr. Thomas, you had described that at  
16 this meeting the issue of whether you needed direct  
17 physical labor and progress before progress payments  
18 could be made, that issue was resolved, or at least  
19 it was addressed.

20 A It was addressed; yes.

21 Q What else was discussed at this meeting;  
22 and by "this meeting," we are referring to the  
23 meeting at DLA Headquarters in mid-February, 1985.

24 A What I had done at that time frame is I  
25 had a February 8, I believe, letter, and maybe a

1 February 11 letter from Bankers, that I had with me  
2 from Bankers to Freedom Industries to show them that  
3 I have financing for Freedom Industries. With that  
4 going on the table, the Government basically says,  
5 "Well, we want this thing novated."

6 First of all, they asked me if I had  
7 ever heard of a novation, and I told them no. So  
8 they proceeded to explain to me what a novation was:  
9 where the Government would allow the contract to be  
10 given to someone else. I couldn't have signed the  
11 contract. I can't give it to anybody, but they  
12 would novate the contract to a different entity.

13 Here it is, I'm coming forward now with  
14 Mr. Liebman saying that he wanted a \$5 million line  
15 of credit or he wanted some sort of financing from a  
16 bank. I had Bankers give it to Freedom Industries,  
17 okay, and that was put up on the table at that  
18 meeting.

19 What ultimately happened was, it was  
20 like too late for Freedom Industries. They wanted  
21 the contract novated. They made it very clear they  
22 wanted to novate it; and they wanted this -- at the  
23 time, \$3.8 million worth of money -- outside  
24 financing brought to the table. So that was made  
25 known to us at the time.

1           Q     I think you discussed two specific  
2 things:     the \$3.8 million in financing and the  
3 novation were both discussed at this meeting?

4           A     Yeah. I believe that's the meeting it  
5 was.

6           Q     Whose idea was the novation?

7           A     It came from the Government. It came  
8 from over on Marvin Liebman's side. I believe it  
9 came from a guy named Lusker, Murrey Lusker, that  
10 basically started talking about a novation. He took  
11 over the meeting and started -- he's from New York.  
12 You know, they told me where it was in the DAR,  
13 whatever, and that I could, you know, read it up.  
14 In other words, that came from their side.

15          Q     Did the Government make that a  
16 requirement of going forward?

17          A     Yes, they did.

18          Q     And what reason was given to you for why  
19 the Government was seeking a novation, or I should  
20 say requiring a novation?

21          A     Basically, they were saying that Freedom  
22 Industry had some overhanging debt and that they  
23 were afraid that Dollar Dry-Dock, my equity partner,  
24 was going to -- if they gave me any money, that they



1 would attack the bank account and take the money  
2 out; take the Government's money.

3 I basically told them that that could be  
4 easily arranged; that we'll just get a letter from  
5 Dollar just saying that they're not going to take  
6 the Government's money.

7 Then they said, "Well, it would be  
8 somebody else. Another creditor will come in and  
9 take the Government's money."

10 I said, "They'd first have to go through  
11 the Bronx County Court to get a judgment to come  
12 after us," and I said, "I'm sure that they'd be  
13 hard-put to come and take the Government's money."

14 Well, that argument didn't stand with  
15 them, so I just folded and just left it alone.

16 Q I want to go back to this financing  
17 issue. Who raised the issue of \$3.8 million in  
18 financing?

19 A The Government did.

20 Q What did they tell you about that?

21 A They said that they wanted outside  
22 financing in this contract; and I said to them,  
23 "Fine. If you want outside financing, all you have  
24 to do is raise the contract back to \$34 a case or  
25 \$21 million, and we'll rush right back to Dollar

1 Dry-Dock and put the money up on the table. That's  
2 all you've got to do."

3 They said, "No, we're not going to do  
4 that. The price is what it is. It's going to stay  
5 there, but we want this outside financing."

6 I says, "Well, fine. If you want  
7 outside financing, I need an adjustment in the  
8 contract, because I've got to go and spend money to  
9 get money." And we sort of left it like that.

10 Then they started turning it around and  
11 said, "Well, we want it at no cost to the  
12 Government."

13 Well, I'm not in any position to be  
14 arguing with the people. I've got a contract. I've  
15 got obligations. I've got incurred costs I'm  
16 incurring. I've got people. I'm moving. I'm  
17 hiring. I'm ordering equipment. I'm doing  
18 everything. I'm trying to get going; so I just  
19 folded on that one, too. I just didn't argue with  
20 them. I said I'll try. At the right time, I'll put  
21 it up on the table to them.

22 JUDGE GROSSBAUM: Did they give you a  
23 figure on how much outside financing they wanted?

24 THE WITNESS: I think it was \$3.8  
25 million, is what they used.

1 JUDGE GROSSBAUM: Who from the  
2 Government initiated this?

3 THE WITNESS: That started by Marvin  
4 Liebman. That started right when he was talking.

5 JUDGE GROSSBAUM: This meeting was held  
6 where?

7 THE WITNESS: This is at DLA  
8 Headquarters.

9 JUDGE GROSSBAUM: At Cameron Station?

10 THE WITNESS: Yes, at Cameron Station.

11 JUDGE GROSSBAUM: In Mr. Chiesa's office  
12 or a big conference room.

13 THE WITNESS: I think they call it the  
14 Commander's Conference Room. It was in a big  
15 conference room, with the flags and what have you.

16 JUDGE GROSSBAUM: Who normally chaired  
17 this meeting?

18 THE WITNESS: I had been down there in  
19 July of '84 and Gen. Connolly was there. He chaired  
20 that one. I came down before, and they had Dick  
21 Donnolly or some Donnolly from the Office of  
22 Secretary of Defense that came in.

23 JUDGE GROSSBAUM: Well, how about his  
24 February 1985 meeting? Who would you say was  
25 sitting in this seat that would be occupied?

1 THE WITNESS: I think it was Mr. Chiesa.

2 Mr. Chiesa was there.

3 JUDGE GROSSBAUM: But DLA did not  
4 initiate these requests or demands for outside  
5 financing and the novation.

6 THE WITNESS: They did.

7 JUDGE GROSSBAUM: DLA Headquarters?

8 THE WITNESS: Well, we were in DLA  
9 Headquarters.

10 JUDGE GROSSBAUM: Well, did Mr. Chiesa  
11 initiate this demand?

12 THE WITNESS: No. Mr. Liebman did.

13 JUDGE GROSSBAUM: Mr. Liebman is not --  
14 well, apart from the fact that DCASR, New York, is  
15 under DLA.

16 THE WITNESS: Yes.

17 JUDGE GROSSBAUM: Mr. Liebman was not  
18 DLA; was he?

19 THE WITNESS: Well, yes, he is; but no.  
20 In effect, he is not the headquarters, but he is New  
21 York --

22 JUDGE GROSSBAUM: I mean, you are  
23 capable of differentiating between DCASR, New York  
24 --

25 THE WITNESS: Right.

1 JUDGE GROSSBAUM: -- and DLA.

2 THE WITNESS: Yes.

3 JUDGE GROSSBAUM: Did anybody at DLA  
4 initiate any of these requests?

5 THE WITNESS: No, no.

6 JUDGE GROSSBAUM: All from DCASR, New  
7 York.

8 THE WITNESS: Yes.

9 JUDGE GROSSBAUM: Continue.

10 FURTHER DIRECT EXAMINATION

11 BY MR. DETHERAGE:

12 Q What did you do, Mr. Thomas, in response  
13 to the Government's demand, the first demand, for  
14 financing?

15 A Well, since Marvin had made it known to  
16 me earlier in January, I guess -- that's why I  
17 brought the Banker's letters with me and the  
18 Suburban Bank letters. I had them with me. I had  
19 already shared them with him, because those were  
20 banks. They wasn't Mr. Penzer; they wasn't Mr.  
21 Widdick; or they wasn't Bill Robbins. They wasn't  
22 people. So I brought those letters with me. I may  
23 have even had a letter from Broadway Bank. I can't  
24 recollect, and I can't put my hands on it right now.  
25 But I put those letters on the table.

1                   They didn't want to see the letter from  
2           Suburban Bank because it was \$1.5 million. I told  
3           them I can get it raised to \$2 million. So they  
4           cared about the one from Bankers because it would  
5           cover the whole \$17 million contract.

6                   So what I did was, basically, when they  
7           wanted novation, they didn't want Freedom. So I put  
8           those letters away; called Bankers and said, "I need  
9           this thing issued in HT Food Products' name." On  
10          February 28, I think I did get that, after filling  
11          out some papers or something from Bankers. They  
12          sent me a commitment letter for \$5 million in  
13          accounts receivable financing that I used to put up  
14          on the table for the novation that they wanted.

15                  Q       Now I want to back up for one second.  
16          You used the figure \$5 million. Had the  
17          Government's requirement for a specific amount of  
18          financing changed?

19                  A       No. There was still \$3.8 million up  
20          there.

21                  Q       You said "accounts receivable  
22          financing." Can you describe the way the financing  
23          with Bankers Leasing worked?

24                  A       Yes. If we incurred costs and the cost  
25          is incurred, then that means that the Government is

1       acknowledging, or on my books and records, that this  
2       is a bill that will be due or to become due from the  
3       Government. If it is due or to become due from the  
4       Government, that's financable. That's something  
5       that I am to receive in the future. So therefore, I  
6       can quickly take down dollars instantly -- pay a fee  
7       for it -- for dollars that's going to become due or  
8       that's coming to me.

9               Q       And did you disclose to Mr. Liebman the  
10       amount and the nature of the financing Bankers  
11       Leasing had agreed to provide?

12              A       Sure. Yes.

13              Q       Was that acceptable to him? Did he give  
14       you some acknowledgement one way or the other?

15              A       Well, it was acceptable to Mr. Stokes.  
16       They did an interview or an investigation, I guess,  
17       on Bankers. They knew what commercial financing  
18       was. It was the same. Government's contracts  
19       financing is something that Bankers specialized in,  
20       and so did Suburban Bank. Government contract  
21       financing, and that's how Government contractors  
22       finance their business.

23              Q       And who is Mr. Stokes again?

24              A       Mr. Stokes is a financial analyst at  
25       DCASR, New York.

1           Q       When you got the issue of the financing  
2 resolved, what happened with the novation?

3           A       We had to, one, find out what a novation  
4 was all about. Did a lot of homework to figure that  
5 out. I had to figure out what Freedom Industries  
6 had to do and to give up and what HT Food Products  
7 had to do.

8                       Since I was the President of both  
9 companies, I'm sitting here, you know, like taking  
10 from one hand and putting it in the other hand. So  
11 I had to get a set of lawyers to represent HT Food  
12 Products and a set of lawyers, which is Al Berry and  
13 them, to represent Freedom, and for them to get two  
14 sets of different accountants to work, putting this  
15 thing together of who gets what transferred to who,  
16 on what books, in order to make this thing work for  
17 the Government. And I set out to do that, with  
18 legal opinions and all the other goodies that go  
19 with that.

20           Q       Approximately how long did it take you  
21 to complete this novation process and get it  
22 approved by the Government, from the time that the  
23 requirement was made until the time the novation was  
24 approved?



1           A       I believe it took us -- we did one  
2       submission, and there was something wrong or the  
3       lawyers couldn't get it together with these opinion  
4       letters. We hadn't done something properly. There  
5       was a lot of Government lawyer interaction with the  
6       two law firms, so that's really what took a lot of  
7       time.

8                       Then the DAR regulations -- the FAR  
9       regulations call for there to be certified financial  
10      statements, whereas the DAR regulations did not call  
11      for certified financial statements. So I had to go  
12      through this whole drill of requesting the  
13      Government to accept my signature on the financials  
14      under the DAR regulations, because we're covered by  
15      the DAR, versus the FAR regulations that requires  
16      that these things be certified by certified  
17      accountants.

18                     So after that was finally resolved, then  
19      we submitted the entire package. I don't think that  
20      it took more than a few weeks after that for it to  
21      be completely pushed through and everybody was  
22      happy..

23           Q       Was that sometime in April that it was  
24      finally approved?

1           A       I think it was done end of March. It  
2       might have been April. End of March of early April  
3       time frame, because we couldn't put the progress  
4       payment in until it was done. So it was holding a  
5       progress payments.

6           Q       And is that progress payment HT Foods  
7       No. 1?

8           A       Yes, it is.

9           Q       And when was that submitted?

10          A       That was submitted on 4/10/85.

11          Q       Okay. So is that about the time that  
12       the novation would have been completed?

13          A       I would say so. Early April. Early --  
14       let's see; yes, that's early April.

15          Q       Now before we get to that progress  
16       payment request, can you describe now, in the  
17       beginning of April, after all the problems you had  
18       and the delays, where was Freedom in terms of its  
19       contract in procuring equipment and getting its  
20       facility started up?

21          A       Well, where we were, we had basically  
22       hired a lot of people. We had promised people, such  
23       as Howie Marks and several others -- Bob Arrington;  
24       Bob was a consultant -- that we would have these  
25       computers -- in fact, we did have computers -- and

1       for them to work on, to start designing the  
2       inventory system, to design the accounting system,  
3       and work on putting this whole matrix together on  
4       computers.

5               When AT&T walked in and walked out with  
6       the computers, I was now scuffling, trying to get  
7       back the equipment that we had lost.

8               I had also had a problem with my  
9       subcontractors, realizing that we had no way to the  
10      contract when they had a contract signed with  
11      Freedom Industries. So we had to go back and try to  
12      continue the dialogue with them and confirm that  
13      these subcontracts, that was actually approved by  
14      the Government, were in fact transferrable and  
15      transferred over to HT Food Products. The IPP plans  
16      and all those things had to be transferred over to  
17      the HT Food Products.

18              So I was in a state of trying to juggle  
19      all acts at the same time, as well as hang on to the  
20      procurement of the equipment, the production  
21      equipment.

22              I had signed a lease with Performance  
23      Financial at the time for them to give me at least  
24      \$1 million worth of equipment that I needed right  
25      away; that I just couldn't wait for the whole \$2

1 million. So I took \$1 million and put out the  
2 purchase orders to the equipment companies.

3 At that particular time, when the  
4 progress payment was finally paid, that's when  
5 everything started to get in gear and we started to  
6 get going. But in the meantime, I was just stalled;  
7 and all the people were incurring costs. I was  
8 incurring salaries for people that I had hired, but  
9 I couldn't give them a computer. I couldn't give  
10 them a quality control tinsel tester or desiccator.  
11 I've got people standing around that I'm paying  
12 because I don't want to lose them because I just  
13 hired them from somewhere else. I've got them.  
14 They're coming in here, and I can't give them the  
15 tools to work with. So I'm losing valuable ground.

16 Q Did you take any action in this time  
17 period, in this March time period, regarding the  
18 delivery schedule?

19 A Well, once I heard Hal Herman stand up  
20 and tell DCASR, New York, that that was not an issue  
21 as far as them paying, and they should have been  
22 paying those progress payments based on incurred  
23 costs versus direct labor and all that, I was pretty  
24 comfortable with saying to the Government, "This is  
25 your fault that I'm delayed. Give me a delivery

1 extension here for at least three months," because  
2 here it is April.

3 I'm supposed to be delivering in July.  
4 So I need some time here, because I've wasted, let's  
5 say, a good three months. You know, really more  
6 than that. I wasted November, December, January,  
7 February, March. I mean, I've got five months  
8 behind me. All I'm looking for is give me three.  
9 I'll make it up. I tried to get an extension at  
10 this time.

11 Q What was the Government's response?

12 A They said it was my fault; that it was  
13 basically my fault. I don't think they wanted to  
14 give a delivery extension. I don't think they gave  
15 it at that time right there, though.

16 Q Did you ultimately obtain a  
17 delivery-schedule extension?

18 A Ultimately, we did get one.

19 Q And did you have to give any concessions  
20 for that?

21 A Yes. I think I offered them about  
22 \$5,000. Unfortunately, it didn't carry the day.  
23 They had a different formula they used. I think we  
24 came up to be about \$200,000 -- oh, \$100,000 or

1 something like that; some number that was considered  
2 to them acceptable. So we went with it.

3 Q I would like to return to the first  
4 progress payment that you submitted, April 10. Just  
5 very generally, can you describe what that HT Foods  
6 Progress Payment No. 1 represented and when you  
7 received payment?

8 A All right. The \$1.7 million, \$1.766  
9 million, represented all of the incurred costs from  
10 15 November to date, up forward. I don't think I  
11 changed anything. It was just an accumulation of  
12 all the progress payments, as well as Progress  
13 Payment F-4 that's not up there. We had the  
14 progress payment; we just didn't submit it because  
15 of novation was going on. So we just took  
16 accumulation of them all and then made them into  
17 become \$1.7 million.

18 On 5/6, May 6, he paid \$1.7 million of  
19 the \$1.766.

20 Q "He," being Mr. Liebman?

21 A Yes, Mr. Liebman. He paid that, so that  
22 gave a clear, clean signal that we was moving; and  
23 he did it based on what he said was incurred costs.

24 JUDGE GROSSBAUM: Okay. How much of  
25 that \$1.766 that you requested was for the

1 subcontractors who had performed the first article?

2 There are records, if you want to look at them.

3 THE WITNESS: Yeah, there is. Matter of  
4 fact, I would like to see my --

5 BY MR. DETHERAGE:

6 Q Let me refer you to F-232 --

7 A Okay.

8 Q -- and, specifically, to the tab for  
9 Progress Payment HT Foods No. 1.

10 A Okay.

11 JUDGE GROSSBAUM: Is that where we are  
12 going to find the backup?

13 MR. DETHERAGE: Yes.

14 THE WITNESS: I do not think the backup  
15 is here.

16 (Witness reviews document.)

17 JUDGE GROSSBAUM: Can you tell from  
18 looking at your --

19 THE WITNESS: I think it is \$540,000, if  
20 I'm looking at line 14D.

21 JUDGE GROSSBAUM: Okay.

22 THE WITNESS: It's \$540,000; yeah. Line  
23 E. I'm sorry.

1 JUDGE GROSSBAUM: Now soon after you got  
2 your check for \$1.7 million did you pay  
3 subcontractors?

4 THE WITNESS: I believe we paid them,  
5 and I can't say for sure, but I think we paid them  
6 right away; as fast as we possible could.

7 JUDGE GROSSBAUM: You had an agreement  
8 with your subcontractors; told them you would pay  
9 them 95 percent?

10 THE WITNESS: Yes. I also had --

11 JUDGE GROSSBAUM: Did you have progress  
12 payment clauses in your subcontracts?

13 THE WITNESS: Yes, we did. Yes, we did.

14 JUDGE GROSSBAUM: Please excuse the  
15 interruption. Go ahead.

16 BY MR. DETHERAGE:

17 Q Mr. Thomas, I would like to now move to  
18 the May to August 1985 period and focus on the  
19 activities that took place during the summer of  
20 1985. As you began the summer of 1985, can you  
21 describe what progress payments you submitted in May  
22 and June of 1985?

23 A Yes. In May, we submitted \$673,000; and  
24 in June, we submitted \$535,000.



1           Q       Let's start with that May 15, 1985,  
2       Progress Payment No. 2.    What happened on that  
3       progress payment?

4           A       Well, we finally got a payment from Mr.  
5       Liebman of \$332,000.  We immediately wanted to know,  
6       "Where's the rest of our money?"  I believe, and I'm  
7       not sure, but he might have said that some of it was  
8       for disallowance and others was for something they  
9       had to audit or something along those lines.  I'm  
10      not quite sure exactly what that called for, but it  
11      wasn't what I requested.

12          Q       Would you take a look at F-74, which I  
13      believe may refresh your recollection.  After you  
14      have had a chance to review that, can you tell us if  
15      that refreshes your recollection on what the  
16      disallowed costs represented?

17          A       F-74 goes back to Progress Payment No. 1  
18      --

19          Q       Okay.

20          A       -- where obviously Mr. Liebman -- we had  
21      put in some general administrative costs, as well as  
22      some manufacturing overhead costs for the office  
23      automation equipment.  That's what Mr. Liebman was  
24      saying, that this did not qualify as a direct

1 expense, and we wanted to make sure that we got it  
2 straight with him.

3 We asked Ms. Rowles, through this  
4 letter, to contact him, or Keith Fold, and let Mr.  
5 Liebman have the benefit of the agreement that we  
6 had reached between us and the PCO; and that this  
7 was an obvious inconsistency with what we had  
8 negotiated versus the way it was being administered.

9 Q Now who is Ms. Rowles at the time?

10 A She is a PCO -- she's the Section Chief  
11 of Tom Barkewitz -- yeah, Tom Barkewitz at the time;  
12 but I think Tom might have just left. This is May.  
13 I think Tom was either there or leaving or had just  
14 left, but she had taken over the responsibility of  
15 PCO.

16 Q And these items that Mr. Liebman had  
17 refused to pay, where were they included? We can go  
18 all the way back to the negotiations in your DD 633  
19 form --

20 A Uh-huh.

21 Q -- and the memo of understanding. What  
22 categories were they included in?

23 A They were either under the automation  
24 building -- let's see, office; might have been in G  
25 & A. It may have been, or it could have been under

1 manufacturing overhead. I just need to see that DD  
2 633 break out.

3 JUDGE GROSSBAUM: Why don't you tell him  
4 where it is --

5 THE WITNESS: Yeah.

6 JUDGE GROSSBAUM: -- so the witness can  
7 answer?

8 BY MR. DETHERAGE:

9 Q I believe it is M-6.

10 A Yeah. That's probably part of the  
11 automated building management control system,  
12 \$177,000. We also --

13 Q Mr. Thomas, that is a line item. What  
14 general category was that in?

15 A Manufacturing overhead.

16 Q Did Ms. Rowles give a response to Mr.  
17 Liebman?

18 A I believe that sometime in June, after  
19 we wrote her another letter -- I think there's  
20 another letter between this one that we may have  
21 written her that talked about all of this: the way  
22 it was negotiated and what was allowed as a direct  
23 cost.

24 Q Let me refer you to F-78.

25 A Okay.

1           Q     Did Ms. Rowles provide you with the  
2     response that she had given to Mr. Liebman?

3           A     Well, she sent us this letter and told  
4     us that she had mailed him a mailgram that would  
5     cover these issues and should expedite the  
6     resolution. Later, I did get a copy of the mailgram  
7     that she sent to him.

8           Q     And what was your understanding of the  
9     direction that she gave to Mr. Liebman?

10          A     Basically, she told him that basically  
11     we had put into our DD 633, dated October 16, that  
12     we had these costs put in there; that it was part of  
13     the negotiation process; that the PCO, knowing the  
14     history of the MRE Program and the uniqueness of the  
15     program, had decided on doing a one-time cost and  
16     pay for these as direct costs at 100 percent of its  
17     value. In other words, not 100 percent of 95  
18     percent of the progress payment, but whatever it is  
19     that they're going to pay for as a one-time cost.  
20     That was part of my Plan B to the proposal, okay; it  
21     was give me this one-time cost.

22          Q     Are these the items, Mr. Thomas, that  
23     the Government had asked you to agree not to submit  
24     as cost items in future contracts?

1           A       That's right. Once they were paid for  
2       in this contract, I could not -- they would already  
3       be paid for and depreciated; so therefore, part of  
4       the quid pro quo that Pat talked about, that was it.  
5       I couldn't charge this off in the future.

6           Q       What did Mr. Liebman then do with  
7       respect to your progress payments after receiving  
8       this response from Ms. Rowles?

9           A       My understanding of what he did was, he  
10      didn't believe it or said that the PCO "screwed up,"  
11      was his words to me; that he had screwed up in  
12      allowing these, and that these are really capital  
13      equipment that should be depreciated, and that he  
14      was going to go get a legal opinion.

15          Q       And what was your understanding as to  
16      the result of those efforts to obtain a legal  
17      opinion? Let me stop you before we get to that.

18                  During this time period where he is  
19      seeking a legal opinion, did he pay progress  
20      payments for those items that he had disallowed that  
21      he calls capital costs?

22          A       No. He started backing down on those.  
23      I don't believe he paid any of them.

24          Q       And what happened after he sought this  
25      legal opinion?

1           A       What happened was that he got the legal  
2       opinion.     It's my understanding that the legal  
3       opinion told him that if these costs were -- that,  
4       first of all, the costs were agreed to by the PCO  
5       and the ACO and that the lawyer had verified it with  
6       Peggy Rowles, Keith Fold, in a telephone  
7       conversation; and that this was a contract in the  
8       interest of national defense; and that they wanted  
9       to start up a third source of supply; and that since  
10      these costs were included in the contract and they  
11      were purchased specifically for this contract, that  
12      they could be paid for as direct costs as progress  
13      payments.

14           Q       Did Mr. Liebman, after he received the  
15      legal opinion, release the monies for these items  
16      that he called capital costs? Did he release those  
17      in the form of progress payments to you?

18           A       No, he did not.

19           Q       What happened next with respect to these  
20      items?

21           A       The legal opinion also went forward,  
22      saying something like, "To the extent that these  
23      costs are not purchased for this equipment, then  
24      they have to be depreciated; and only the  
25      depreciated portion can be paid for progress

1        payments.  If the contractor wants these costs paid  
2        as 100 percent, then he has to go get a deviation;  
3        that if the ACO went for a deviation and none was  
4        given, then we could be put into bankruptcy."

5                    So basically the document was giving him  
6        a method of making a determination:  if these costs  
7        are, the PCO had classified them as direct costs of  
8        the contract, pay them.  If he has not classified  
9        them as direct costs, then you cannot pay them.  So  
10       what Mr. Liebman did, was he turned around, I  
11       understand, and re-classified my costs without  
12       telling me.

13                   Q        What do you mean?

14                   A        Well, we found out later on, during this  
15       meeting we had later on in September, that after Mr.  
16       Liebman had his discussion with the lawyers, that he  
17       made a desk determination that the PCO had screwed  
18       up and that he was going to re-classify these costs  
19       and make them capital costs.

20                   Now once he made them capital costs, he  
21       then determined that my accounting system was wrong  
22       because I had these costs included as direct costs  
23       in my accounting system.  So it was a double whammy  
24       on me.

1                   What happened to me was I got hit with  
2                   costs that were direct, negotiated as direct. He  
3                   pulls them out and puts them in capital; and because  
4                   I'm still refusing to change it from my accounting  
5                   system, from what I had negotiated, he says, "Your  
6                   accounting system is wrong. It don't meet generally  
7                   accepted accounting principles and practices, and I  
8                   think we're going to suspend your progress  
9                   payments." Something along those lines.

10                Q       Before we get to the accounting system  
11                issue, did you come to understand one way or the  
12                other whether Mr. Liebman had sought the DAR  
13                deviation?

14               A       Yes. What happened was, I believe he  
15                did send a letter off, saying to the DLA  
16                Headquarters commander that the contractor wanted  
17                these costs paid as progress payments and he wants a  
18                deviation to the regulations in order to make it  
19                happen; and he did request a DAR deviation.

20                       First he told me I had to request a  
21                deviation if I wanted it. But then he changed his  
22                mind and says, "No, you don't have to do it."  
23                That's for him to do.

24               Q       Had you had any discussions during all  
25                your negotiations with the Government -- prior to



1 signing the contract, did you have any discussions  
2 about a DAR deviation?

3 A No.

4 Q Did you get a quick response to that DAR  
5 deviation request?

6 A No.

7 Q Prior to the time that you got the  
8 response to the request, did Mr. Liebman release any  
9 of these monies he was holding?

10 A No.

11 Q I want to go back. We jumped ahead a  
12 little bit. I want to go back to the June/July time  
13 period. Did you come to learn of any interaction  
14 between Mr. Liebman and Bankers Leasing during that  
15 June/July time period?

16 A Yes.

17 Q What happened?

18 A What happened was Bankers called me up  
19 in a huff. I wasn't there. Linda was explaining to  
20 me that Randy was, what we call, bent out of shape.  
21 Then we got a phone call from Performance Financial,  
22 a Warren Rosen who was also similarly upset. He was  
23 calling the suppliers, telling them that he was out  
24 of the deal.

1           Q       Again, who is Mr. Rosen? He was with  
2       Performance Financial?

3           A       Yeah. Warren Rosen was the President of  
4       Performance Financial, who was our equipment leasing  
5       company who had agreed to quickly lease all of our  
6       production capital equipment and to accept the  
7       \$333,000 portion. Okay? He's going to spend \$1  
8       million and all he's going to get back is \$333,000.  
9       So whatever I needed in leases, he was going to  
10      cover, knowing that he was going to get this back,  
11      as well as he was going to keep the ownership of  
12      that equipment until I paid for it. Okay? So he  
13      had his collateral.

14          Q       Okay. Now can you describe what  
15      happened with respect to Mr. Gross and Mr. Rosen?

16          A       Mr. Gross's office had called up to  
17      DCASR, New York, in a routine call, saying that,  
18      "We're verifying this request from Henry Thomas. He  
19      had sent it in to you, and he told us to send him  
20      money. We've already sent Henry out 'x' amount of  
21      dollars, and we're just verifying that you're going  
22      to be sending in, at some future dates, the money."

23                  Mr. Liebman told a Ms. Parmerry,  
24      according to the letter that we got, that he was not

1 going to pay the progress payment; and he advised  
2 them not to give Freedom any money.

3 Now of course, that upset Bankers. It  
4 upset Performance Financial. It upset me. We all  
5 got sort of turned around as to what's going on here  
6 because Warren was cancelling my purchase orders  
7 with my state-of-the-art equipment: my Doughboys.  
8 Everything that I had on order for the final  
9 assembly is now being cancelled.

10 Now Doughboy had already warned me, and  
11 so did Multi-Vak. I think Koch Multi-Vak or  
12 somebody up there had already warned me that if we  
13 missed the dates and these things got pulled, that  
14 they were going to give this equipment to someone  
15 else, and I couldn't get this equipment until early  
16 next year. So I was quite upset behind losing this  
17 equipment.

18 I couldn't hold Performance Financial.  
19 He said he was a young company; he can't get  
20 involved with this, where first he learns that there  
21 is going to be financing. He's secured. He assigns  
22 it to his bank, and then all of a sudden he comes to  
23 find out, because Bankers was his bank also -- come  
24 to find out that Bankers is pulling back on him.

1       Thus, he pulls back on me, and Bankers is also  
2       pulling back on the other side of my financing.

3               So I was caught between a rock and a  
4       hard place, trying to figure out how to get this  
5       thing resolved.

6               Q       Again, what was the significance of this  
7       equipment?

8               A       This is the state-of-the-art production  
9       equipment, that is, Doughboy packaging machines,  
10      that is used by RAFCO and SO-PAK Co. It's proven  
11      equipment. All right. They know Doughboy had done  
12      the mobilization for World War II. They had used a  
13      lot of various equipment. That wasn't World War II.  
14      It was this last war we had: Vietnamese War, I  
15      think it was -- that they had done a lot of work in  
16      doing something for the Government. Their equipment  
17      was proven, and this was the equipment that I had  
18      negotiated with the Government for, that I needed  
19      the depreciation for and to put on the table as part  
20      of my plan.

21              So when this equipment got blown out of  
22      the water, I didn't know where to turn. But I  
23      couldn't turn back to them because Warren wouldn't  
24      move. Bankers wouldn't move. Nobody would move

1 until we resolved this issue with Marvin Liebman.

2 So we're in a new crisis now.

3 Q Now in this July time period, can you  
4 describe what happened in July, 1985, on the  
5 progress payments you submitted during that time  
6 period?

7 A Yes. What I did was, I submitted  
8 Progress Payment No. 4, which was for \$807,000. We  
9 then submitted Progress Payment No. 5, which we got  
10 bogged down into where the subcontractors were  
11 screaming. We told them they had to call DCASMA in  
12 New York because they're the ones that's holding up  
13 the money; not us.

14 So based on that, Cadillac threatened to  
15 drop the raw materials or give the raw materials to  
16 somebody else. Mr. Liebman decided, "Okay. I'll  
17 cut \$170,000 for Cadillac, but this money is for  
18 Cadillac alone. It cannot be used for Freedom. We  
19 don't want Bankers to give Freedom any money."

20 JUDGE GROSSBAUM: Who is Cadillac?

21 THE WITNESS: Cadillac Products is a bag  
22 manufacturer that makes the outer MRE bag, as well  
23 as the cracker bag and the accessory bags. They do  
24 lamination. The bag is polypropylene foil and

1 polyester. They laminate these bags together to  
2 mil. spec.

3 JUDGE GROSSBAUM: Go ahead.

4 THE WITNESS: So without those bags, you  
5 know, without Cadillac making those bags for us, we  
6 couldn't start any sub-assemblies; nor could we  
7 start any cracker assembly. We couldn't even start  
8 any final assembly. So Cadillac had to get  
9 something.

10 So Liebman told us to resubmit Progress  
11 Payment No. 4 as No. 5, and we did; and he finally  
12 made a payment on that right away. I think if we  
13 submitted it on the 25th, it looks like on the 29th,  
14 four days later, he quickly cut them a check, with  
15 instructions to Bankers to pass it along, and "Don't  
16 give Freedom any of the money." So that's what  
17 happened.

18 Then in Progress Payment No. -- real No.  
19 4, now renumbered 5, has been held. Nothing  
20 happened on that payment. We submitted Progress  
21 Payment No. 6.

22 Q Okay. Before we get into August, I want  
23 to take you back to July on one more item. In light  
24 of everything that had happened, did you take some  
25 steps with respect to Mr. Liebman in July, 1985?

1           A       I believe in either July or -- yeah,  
2       July, right, July 12, I sized up the situation. I  
3       saw what was going on. I realized that there was a  
4       major disconnection here between the ACO, the PCO  
5       and myself. Well, at least the PCO and myself was  
6       in line. There was a major disconnection between  
7       the ACO with this thing.

8                       Since he didn't want to do what the  
9       contract called for, I wrote a letter to Gen.  
10      Babers, and I asked Gen. Babers -- I believe it was  
11      Gen. Babers. I asked Gen. Babers to replace the ACO  
12      or give the contract back to DPSC to administer  
13      since they knew and negotiated it. So let them  
14      administer the contract instead of having the  
15      contract continue to be, what I considered,  
16      mismanaged by the ACO. So I took those steps and  
17      gave a detailed narrative of exactly what had gone  
18      on in the past and that we were truly in danger  
19      right now of blowing this contract if somebody don't  
20      take some action.

21           Q       I would like to refer you to Document  
22      M-60.

23           A       Okay.

24           Q       I just want to ask you if that is the  
25      request that you made to DLA to replace Mr. Liebman.

1           A       There's nothing here.

2                   JUDGE GROSSBAUM:   There is nothing here  
3 either.   The Board does not have anything at M-60.

4                   THE WITNESS:   M-60 is not here.

5                   BY MR. DETHERAGE:

6           Q       All right.   We will come back to that.  
7 What was DLA's response?

8           A       As I recall, DLA took a quick look and  
9 Gen. Adsit responded, saying that the ACO didn't  
10 have authority to make payments for items that was  
11 capital in nature, or something like that is what he  
12 responded, and that a DAR deviation request would be  
13 necessary.   I think one had been initiated by the  
14 ACO.

15          Q       What was Mr. Liebman's reaction?

16          A       I believe Mr. Liebman's was just  
17 basically saying, "Thank you very much, Henry, for  
18 pointing the finger that I was wrong, but my General  
19 and all these people said I was right."

20          Q       Now you had mentioned before, and I cut  
21 you off -- I want to go back to the accounting  
22 system issue.

23          A       All right.



1           Q       What happened in the July/August 1985  
2       time frame with respect to your accounting system  
3       and Mr. Liebman's payment of progress payments?

4           A       What had happened was that in Progress  
5       Payments Nos. 1, 2 and 3, all right, that we did get  
6       the money on and we did get paid on, the auditor  
7       that was there was, I believe, Sam Barkin or  
8       somebody from DCAA.

9           Q       Mr. Thomas, when you talk about Nos. 1,  
10      2 and 3, is that HT Food's Nos. 1, 2 and 3?

11          A       Yes, HT Food's Nos. 1, 2 and 3.

12          Q       Okay.

13          A       Under Progress Payment Nos. 4, 5, 6, 7,  
14      8 and 9, the auditor was Guy Sansone. He was the  
15      same auditor that was auditing Freedom's F-1, F-2  
16      and F-3. He had come back on the scene for some  
17      reason, and he was saying that our accounting system  
18      -- when Mr. Liebman re-classified these costs, I  
19      should say, he's saying that I'm still putting these  
20      costs on my books as direct costs, and he wants them  
21      removed. My accounting system is not adequate for  
22      progress payment purposes.

23                 So I refused to move them off until I  
24      got somebody up here from DLA Headquarters. The new  
25      PCO, Frank Bankoff, I believe, was on the scene at

1       this time and some time around that time. I was  
2       trying to set out, to let him understand, that these  
3       were negotiated and they were part of the accounting  
4       system; and I needed the computers and I needed  
5       everything.

6               The Government was saying that I had  
7       misused the progress payments that were given to me:  
8       the \$1.7 million, the \$300,000, the \$500,000. I  
9       was trying to say, "How did I misuse it?"

10              So of course there was these accusations  
11       flying; and they said, "Well, you're going out,  
12       using the money to buy production equipment. You're  
13       using money to go buy some tinsel testers." And I'm  
14       saying, "It's all for the contract. I'm borrowing  
15       money from the bank."

16              Well, we got into some heated  
17       discussions, and I requested another meeting with  
18       DLA Headquarters.

19              Q       Okay. Before we get to that meeting, I  
20       want to go back to this issue regarding the  
21       accounting system. Mr. Sansone: is he the  
22       gentleman that you had described as one of the  
23       participants in the

24       \*

50       December 1984 meeting?

1           A       Yes.

2           Q       And what positions had he taken in those  
3 meetings?

4           A       Mr. Sansone wanted -- his position was,  
5 "Why is the Government giving Henry Thomas a  
6 contract? Where's my contract?" He wanted to know  
7 where his contract was.

8                   When he asked me that, I said to him, I  
9 said, "Well, what you have to do is go get in line  
10 like I did and become Walsh-Healy, get a big plant,  
11 and you can get a contract, too, if you can show  
12 them that there's a need."

13                   He believed that the PCOs had screwed up  
14 this contract, and he kept telling that to Marvin  
15 Liebman.

16                   He wouldn't look at the pricing  
17 memorandum; nor would he look at the document the  
18 PCO sent him for the file. We asked the PCO Tom  
19 Barkewitz for a copy of the document that he sent to  
20 the DCAA, since they keep saying that they don't  
21 have it in their file. So what he did was, he  
22 referred us to a document, in here some place, that  
23 says that he sent, according to DAR something,  
24 something, something -- it's required that the PCO

1        send the negotiation memorandum to the DCAA,  
2        outlining what the deal is.

3                    So Tom Barkewitz had sent it to them;  
4        and when I called up complaining about their  
5        position, he said, "Henry, they can read. They got  
6        it." So I said, "They say they don't have it." I  
7        think he did give me a copy of the document that he  
8        used to communicate according to DAR, something or  
9        other. As a matter of fact, it is. It's at 61, if  
10       that's the one. It's DAR 3811, is where the  
11       Government PCO must let the Defense Contract Audit  
12       Agency know of the memorandum and the outlines; and  
13       if they had anything that they wanted to say about  
14       it, they could pick up the phone and call Keith Fold  
15       on autobon, which is an internal Government number.

16                Q        Now Mr. Thomas, had anything changed  
17        with your accounting system between the time that  
18        you submitted Progress Payments HT Food's 1, 2 and 3  
19        to Mr. Barkin, auditor, and when you submitted  
20        Progress Payments 4, 5 and 6 that you now had Mr.  
21        Sansone as the auditor?

22                A        No, nothing had changed. The accounting  
23        system stayed the same throughout.

24                Q        You described some allegations that you  
25        understood had been made regarding Freedom's misuse

1 or alleged misuse of progress payments. What  
2 resulted from those allegations?

3 A What resulted was that we immediately  
4 wanted to track an audit and show them exactly where  
5 the money was; that everything was accounted for.  
6 We went out and hired an outside ex-DCAA CPA.  
7 Deloit, Haskens & Sells, who I had; Gwen Jackson,  
8 who I had, these are all CPAs. Pat Marra, who had  
9 been involved in this, he's a CPA.

10 I wanted to get somebody who was DCAA  
11 CPA. So we got an outfit here in Chevy Chase,  
12 Maryland -- I think it's Maryland -- that was a DCAA  
13 auditor, ex, and a CPA; and he had a private  
14 practice. So we asked him to come up and audit our  
15 books right quick. Tell us what we're doing wrong,  
16 and why is the DCAA telling us this?

17 So we went through that whole drill of  
18 hiring someone to come in and take a look at our  
19 books. The DCAA was in there taking a look at our  
20 books. There was this big investigation going on,  
21 and I decided at that point to go back to DLA and  
22 see Gen. Adsit or one of them; somebody. I'm not  
23 sure who it was. I think it was Chiesa who chaired  
24 that meeting.

1           Q       Okay. Let me go back. You described an  
2       investigation. Who performed that investigation?  
3       Was that a DCAA investigation?

4           A       Yes. We wanted DCAA, Washington, who  
5       dispatched a gentleman by the name of Frank somebody  
6       -- Frank somebody from DCAA, Washington. He came up  
7       and met with the gentleman, Jerry Rosenberg, who was  
8       the DCAA ex-auditor who was now working for us as a  
9       private CPA. Those two got together; went through  
10      our books and records at the plant with our  
11      accounting staff; and those two came back and said,  
12      "There's nothing wrong with this accounting system."

13                 So Guy Sansone was overruled. They was  
14      recognizing the fact that our books and records were  
15      only charging off what we had negotiated as direct  
16      costs. The depreciation item for capital equipment  
17      were still classified as capital equipment, and only  
18      the depreciation was where it belonged. So we  
19      couldn't figure out what it was that they were all  
20      saying is wrong with my accounting system.

21                 So on a point-by-point basis, I asked  
22      him, I said, "Well, so that we don't have this  
23      anymore, tell me exactly what it is. If they're  
24      going to nitpick, tell me what it is. I need to fix  
25      it right now so I can get on with my production."

1                    Basically, they went through it.    Guy  
2       Sansone is saying, "Well, Henry didn't pick up his  
3       New York City taxes on his rent."    I said that  
4       nobody from the city ever sent me a bill.    He says,  
5       "Well, they don't have to send you a bill.    You're  
6       supposed to know to pick it up."

7                    I said, "Well, now all of a sudden I've  
8       got a problem, because earlier Guy Sansone had said  
9       that I was putting things on my books that I had no  
10      documentation for.    So now all of a sudden I'm not  
11      putting something on that I don't have documentation  
12      for."    So I was caught between a rock and a hard  
13      place with trying to deal with Guy on that issue.

14                   So again I think I documented some of  
15      these things; and I went back and said to the PCO  
16      and to Marvin Liebman that, "Until New York City  
17      sends me a bill, am I to put it on my books?    The  
18      DCAA says yes; the DCAA says no.    I don't know what  
19      to do."    So anyway, it went on along those lines and  
20      things like that.

21                   I think the other thing they were  
22      nitpicking me on or picking on me, saying that I  
23      didn't put subcontractor invoices on my books, but I  
24      submitted it as a progress payments.    Yes, I did.    I  
25      haven't received the material yet.    So since I

1 haven't received the material from the  
2 subcontractor, am I to pick this thing -- I didn't  
3 know what to do with these costs. I mean, but they  
4 was tiny, I mean, in comparison to what we had to  
5 get accomplished.

6 They were administrative, and I didn't  
7 think they should have held up the show.

8 Q Did you ultimately get the issues  
9 resolved?

10 A What we did was, we finally went to  
11 Chiesa. We had big meetings at DLA. Frank Bankoff  
12 came up to New York and spent some time down there.  
13 Frank Bankoff came up to the plant and spent some  
14 time there. Finally, Frank Bankoff interpreted for  
15 me in the meeting that the contract did allow for  
16 these costs to be picked up as direct costs under  
17 the contract; but he then qualified it and said,  
18 "But we're going to go for a deviation."

19 So I was trying to explain again that  
20 these costs were purchased only for this contract  
21 and no deviation is necessary. So therefore,  
22 nobody's listening at me. They want to go for their  
23 deviation. All I could do was just stay in tow with  
24 them.



1           Q       However, was the accounting issue  
2 resolved?

3           A       At that point in time, we believed that  
4 the accounting issue was then resolved, okay? What  
5 we had to do to resolve it was to back all of those  
6 capital -- all those direct costs out; and we did.  
7 We backed them out; put them over into a capital --  
8 we reformed our own contract. We backed off of it  
9 and put them in capital where Liebman said they  
10 belonged. Then all of a sudden, everything was  
11 okay.

12          Q       When you say "okay," it was resolved  
13 with DCAA and Liebman.

14          A       DCAA and Liebman, because we relented  
15 and gave them where they said it should go. I just  
16 told them I'd claim it later.

17          Q       Did you later learn of any other  
18 investigations that were initiated during 1985  
19 relating to these allegations of misuse of progress  
20 payments?

21          A       Yes. I understand that the F.B.I. was  
22 called in to review me, Bankers Leasing, for what  
23 they felt we were taking Government-funded progress  
24 payments and using it to pay salaries for our  
25 indirect labor: our forklift operators, our

1 painting, our fixing the building -- all these kinds  
2 of things that they said I shouldn't be using  
3 progress payments for that was negotiated.

4 Q And did you ever learn the results of  
5 that investigation?

6 A Yes. I found out that the F.B.I.  
7 basically said that this was a squabble between two  
8 Government agencies; it had nothing to do with the  
9 contractor. Until the two Government agencies get  
10 their act together, there's nothing the F.B.I. can  
11 do to me, because I'm being pulled between two  
12 agencies here. So that's what the F.B.I. basically  
13 said.

14 Q Okay. Mr. Thomas, I want to move back  
15 to the resolution of the accounting issue. Until  
16 that accounting issue was resolved, did you receive  
17 any progress payments?

18 A No.

19 Q Okay. When did you next receive  
20 progress payments?

21 A We had to submit on September 9 -- after  
22 we had everything all nice and splivey, we submitted  
23 a combined progress payment, Nos. 4, 5, 6 and 7,  
24 which is my 4, 6 and 7, okay? I don't know what it  
25 is at this point, but we called it 5, 6 and 7 for

1       \$2.9 million. We had incurred all these costs and  
2       hadn't gotten all this money. Liebman waited a  
3       full, another month before he would even pay it,  
4       even though we told him we needed it right away. So  
5       on October 10, he gave us \$1.9 million, and he  
6       shorted us by over \$1 million.

7               Q       Okay. Now I want to look just for a  
8       second at the September 1985 time frame. You  
9       described in this time frame you had not received  
10      any progress payments from Mr. Liebman. What was  
11      the effect on Freedom? Where was Freedom in its  
12      status?

13             A       Freedom, at that point, lost all of our  
14      production -- state-of-the-art production equipment.  
15      S & B had cancelled; Doughboy had cancelled; Koch  
16      Multi-Vac cancelled. Everybody cancelled the  
17      equipment on me at that point in time.

18                    I had to then figure out -- because I've  
19      got a delivery schedule now and I've got to deliver  
20      sometime, I guess, starting in November, December --  
21      where am I going to get some production equipment?  
22      So even though some of the production equipment  
23      people were still hanging in there waiting, the  
24      major proven production equipment with high speed

1 was gone. So all the Doughboys that was being used  
2 by RAFCO and SO-PAK Co. was gone.

3 I had to go get some SSB 552's, which  
4 was antiquated, not proven for the food industry. I  
5 think this stuff was used to seal up something else.  
6 It wasn't Doughboy's. It didn't have the pressure.  
7 It didn't have it. But that's all I could get my  
8 hands on in order to vindicate myself that at least  
9 I could produce this ration.

10 So I went to work, and I told the  
11 Government that it was going to be much slower. It  
12 was not going to have the speeds that I wanted, and  
13 it was going to require that I hire a lot more  
14 people.

15 Q What effect had all this had on  
16 suppliers and vendors?

17 A All the subcontractors, at this point  
18 here, should have been delivering maybe their third  
19 or fourth delivery to me. Since progress payments  
20 was backed up, everybody's production planning, from  
21 Sterling Bakeries to Oregon Freeze-Dried, to you  
22 name it, everybody was now all backed up out of  
23 sequence, causing all kinds of problems.

24 We just caused problems for everybody  
25 with this one; and because we were now overlapping

1 with other production that they had to get done  
2 because we hadn't been in a timely manner, getting  
3 them up to speed with whatever it is we were  
4 supposed to do, everybody was just crunched for  
5 time.

6 Q And how about in terms of your employees  
7 and training new employees?

8 A Okay. In the July time frame, we had  
9 planned on a June time frame, we had planned on  
10 hiring people. That all went forward. We hired  
11 people. We had gotten in some test equipment. We  
12 was training these people on it, and Quality Control  
13 was teaching them how to do desiccation. We were  
14 showing them how to read mil. specs., exactly what  
15 the tests were, what to look for. We did  
16 everything. So we had a beautiful classroom setting  
17 going on, with people coming in and stipends being  
18 paid to them. The City of New York kicked in about,  
19 oh, I don't know, maybe \$80,000 or more; some number  
20 they gave us for stipends for the people.

21 All of a sudden, we had to, because we  
22 just started production in July -- we didn't start  
23 in August. We didn't start in September there. We  
24 had to lay off people. So after we done trained all  
25 these people, we laid them off. When we finally

1       recalled them, I think about 25- or 30 percent might  
2       have showed up. Everybody else had found something  
3       else to do; and this up-and-down, up-and-down type  
4       of "Are we here? Are we there?" just wasn't for  
5       them. So we lost a lot of our trained personnel.

6               Q       You described that Mr. Bankoff, during  
7       this time period, was new on the scene as the PCO.  
8       I think you described that he sought a DAR  
9       deviation. Did he take any other action regarding a  
10      cure notice to Freedom?

11             A       Yes. I found that he also -- Mr.  
12      Liebman had talked him into or convinced him that he  
13      needed to send a DAR deviation as well. So there  
14      was a DAR deviation that he sent, and then I believe  
15      I did get a cure notice. I got another cure notice  
16      put up on me that I'm the problem.

17             Q       Do you remember the subject matter of  
18      the cure notice?

19             A       No, I don't.

20             Q       Could you refer to Government 63 and  
21      tell us if that refreshes your recollection.

22             A       Yes.

23             Q       Can you describe for us, after reviewing  
24      that document, what was the subject matter of the  
25      cure notice and when it was issued?

1           A       This is a 30 August 1985 letter  
2 addressed to me from Frank Bankoff, telling me that  
3 the ACO had advised me that they were considering  
4 suspending progress payments because the audit  
5 reports -- that my accounting system and controls  
6 were not adequate for proper cumulating contract  
7 costs in support of progress payments and that  
8 progress payments were vital to the company to  
9 perform.

10                   They also noticed, in a 23 August, that  
11 I hadn't had all my production equipment. It wasn't  
12 in-house. They was making it known to me that the  
13 production equipment has a long lead time for  
14 assembly of the MRE and that the probability, since  
15 I don't have it in-house -- it's not ordered -- that  
16 I won't be able to make these delivery schedules.  
17 So they must construe that I was unwilling to go  
18 forward, and they put me on cure notice here that I  
19 was doing something -- my action was endangering the  
20 contract.

21           Q       Do you recall what your response to the  
22 cure notice was?

23           A       I know I responded. I tried to respond  
24 in a very positive light. I don't have my response,  
25 what I said to them, but I do think that I was

1       frightened by this letter; and I was trying to put  
2       the best foot forward possible.

3               Q       I want you to refer to Freedom 94, F-94,  
4       and tell us if that refreshes your recollection as  
5       to what your response to the cure notice was.

6               A       Yes, this does.

7               Q       Okay.     Can you describe what your  
8       response to the cure notice was regarding the status  
9       of your production equipment and the reasons for  
10      that status.

11              A       It looks like this is a five-page,  
12      highly condensed document to Frank Bankoff, letting  
13      him know that we strongly felt that the erroneous  
14      statements of our accounting system by DCAA was due  
15      to Government failure to express in the contract  
16      what PCO and myself had basically negotiated and for  
17      a third-party benefit, and that it was causing  
18      confusion.

19                    I go on to say that we totally disagreed  
20      with the DCAA, and I started to go back and talk  
21      about how Mr. Liebman's inability to verify to AT&T  
22      and to others about what the real negotiation,  
23      Government obligation was.   I let him know that I  
24      was caught in the middle of two branches of the  
25      Government and that I went to Gen. Babers, you know.



1 I think I then started to get off of  
2 that and start talking about that there was  
3 outstanding -- I wanted him to know that through all  
4 these progress payments up to this date, outstanding  
5 was over \$3 million, okay?

6 Q When you say "outstanding," what do you  
7 mean?

8 A In other words, the Government had not  
9 paid us over \$3 million at that time because even  
10 though we had incurred -- I showed them of the  
11 \$1.766 million, they only paid \$1.7 and left a  
12 balance of 22. We had to adjust that, the reason  
13 why it's not \$66,000.

14 We go down and we cumed it for him to  
15 show what Liebman had not paid, and he specifically  
16 had not paid -- he had taken something out of  
17 Progress Payment No. 2. He had not paid Progress  
18 Payment No. 5; not paid Progress Payment Nos. 6 or  
19 7. So with all of this not paying me, I felt it was  
20 Government action, not Freedom action, and that our  
21 bank had lost all kinds of confidence. This is the  
22 Bankers now that was in, had lost confidence.  
23 Dollar Dry-Dock definitely wasn't coming to the  
24 table and neither was Suburban.

1                   This contract just had me in a pickle.  
2       I was in a Catch 22. I didn't know what to do  
3       between this government agency and that government  
4       agency.

5           Q       What was the status of your equipment as  
6       of September 13, when you wrote that letter? Did  
7       you have it in-house?

8           A       I'd have to read this thing in detail,  
9       and this is not such a good copy; all right? I  
10      think I have a much better copy somewhere. But I  
11      would say that we told him that we had basically  
12      laid off all our production personnel, okay; that  
13      our building repair and renovation had slowed down  
14      to a crawl; that our plumbing contractors had walked  
15      off the job; that suppliers lost confidence in the  
16      progress-payment system. They put us on C.O.D.; and  
17      in 30 days, they don't want to know about the  
18      progress-payment system no more because it doesn't  
19      work.

20                   So what I did was, after telling him all  
21      of this, I then turned around and said, "Okay, I'm  
22      ready to go forward. Here's Plan One, so we can  
23      redistribute the production with no slip in the  
24      schedule. Plan Two calls for the time of the  
25      computerized tracking with these various plans. I

1 put some plans on the table and told them that this  
2 is in good faith to show them we're willing to  
3 comply, but that we could basically do it in a  
4 timely fashion.

5 I think there was another schedule. It  
6 says something about "See Attachment F." I don't  
7 see Attachment F here, but I believe I know what it  
8 was.

9 Q Okay. Mr. Thomas, after you sent that  
10 response, you described that you had some meeting at  
11 DLA Headquarters. Was that a meeting that occurred  
12 in early October, 1985?

13 A I believe it was, yeah, October.

14 Q And who was at that meeting?

15 A At that meeting, I believe it was Ray  
16 Chiesa.

17 Q He was the one who chaired the meeting?

18 A I believe it was Ray Chiesa.

19 Q And were other Government officials  
20 there?

21 A Again, we had a crowd of people in  
22 there.

23 Q Who was at the meeting for Freedom?

24 A I know I was there.

25 Q Okay.

1           A       I'm sure I had Joe Clark, probably.

2           Q       What did Mr. Clark do?

3           A       Joe was a contracting officer. He was  
4       an ACO. He was a former ACO, I should say. He used  
5       to work for the Army as an ACO, and he knew this  
6       thing like the back of his hand. He was always  
7       telling me where the Government was wrong at and  
8       that, you know, he could talk to Liebman and  
9       Government officials. Even with him going down  
10      there, talking with Mr. Liebman, nothing would  
11      persuade Liebman.

12          Q       Was Mr. Liebman at this meeting?

13          A       I don't know. I don't know.

14          Q       How about Mr. Bankoff?

15          A       I don't know at that one there. I know  
16      Chiesa was there. They might have had Capt. Parsons  
17      and them up there, because I do know that right  
18      after that they dispatched them to New York. They  
19      came up to New York at Liebman's shop down at  
20      DCASMA, New York, and then they came to our  
21      facility.

22          Q       And did you have additional meetings?

23          A       We had meetings, rapid meetings one,  
24      two, three; rapid, right behind each other to get  
25      this thing resolved.

1           Q     All right. Let's start with the DLA  
2 meeting. What happened at the DLA meeting?

3           A     I recall complaining to them that I was  
4 caught between a rock and a hard place; that I had  
5 negotiated one thing with the PCO; I had had the  
6 next PCO, Ms. Rowles, confirm to the PCO -- to the  
7 ACO that this was true; that now I'm being accused  
8 of misusing Government money as a result of me  
9 trying to apply the memorandum-of-negotiation format  
10 to my accounting system, and I needed some help.

11                     I needed straightening out on this thing  
12 because I was going nowhere, and all I was doing was  
13 incurring heavy expenses and not getting any  
14 production done. It was just holding me back while  
15 I spin my wheels.

16           Q     And what was the response?

17           A     That they were going to send up the DPSC  
18 people to straighten this thing out once and for  
19 all. That's why Capt. Parsons, Frank Bankoff and a  
20 host of others, and DCAA Frank Smothers -- Frank  
21 Summers, I think his name was -- this guy from DCAA,  
22 Frank Summers, came up. They had meetings at  
23 DCASMA, New York, and finally they came up to look  
24 at this bad accounting system and to see what had I  
25 done with all the money.

1                   As a result of that, all the money was  
2                   accounted for.   Everything was fine.   DCAA, New  
3                   York, was told that there was nothing wrong with our  
4                   accounting system and they should cut the nonsense  
5                   out, basically.   But they continued to insist that  
6                   they look for the DAR deviation.

7                   So in order to not be hard-headed or  
8                   whatever, I decided to say, "Let me reverse my  
9                   accounting costs that we agreed to until they get  
10                  this deviation.   I'll pull it back, and that would  
11                  solve Sansone's problem and it would solve Mr.  
12                  Liebman's problem.   Maybe at this point we can get  
13                  on with production."   And that's what happened.

14                 Q       Okay.       What happened at these two  
15                  subsequent meetings:   the first, I believe you said,  
16                  at DCASMA, New York, and then the one at Freedom?

17                 A       Yes.

18                 Q       Let's start with DCASMA, New York.   What  
19                  occurred at that meeting?

20                 A       I don't believe I was at that meeting.  
21                  I know that Jerry Rosenberg came up and went down  
22                  there with them.

23                 Q       Who is Mr. Rosenberg?

24                 A       He's the auditor from Chevy Chase who's  
25                  an ex-DCAA auditor, who was our CPA now --

1 Q Okay.

2 A -- verifying my costs to the DAR  
3 regulations. It's a DAR 15. I think it's cost  
4 principles. I wanted that done because I wanted to  
5 make sure that I wasn't putting some sort of claim  
6 up on the -- I mean, I wasn't doing nothing wrong.

7 Now they went to that meeting. They  
8 said I was too emotional over this thing; so I said  
9 okay, fine, I wouldn't go.

10 The next day they came up, and I did sit  
11 in on part of the meeting with Frank Bankoff and  
12 what have you. Another part of the meeting I did  
13 not.

14 Q And this is the meeting at Freedom,  
15 then?

16 A Yeah.

17 Q What happened at that meeting?

18 A That's the meeting that they decided to  
19 -- I asked them pointblank, so that there's no  
20 further discussion on what was agreed to between  
21 Frank, Tom Barkewitz and myself, to tell me what  
22 this contract means and interpret the contract.

23 So the Government had their own meeting  
24 or something; and they came back and said, "Okay, we  
25 interpret this to mean that you were allowed to

1       expense these things as direct costs to the  
2       contract." They identified them; and it was written  
3       down that these were costs that were direct to the  
4       contract, although they were going to continue to  
5       seek a DAR deviation. That's what happened.

6               Q       Was there any discussion of your  
7       financing at any of these meetings?

8               A       Yes. I think they wanted an additional  
9       -- on top of the \$5 million I had from Bankers, they  
10      wanted another \$500,000 for some reason. Why, I  
11      wasn't sure what the \$500,000 was for. Whatever  
12      they wanted, Randy says, "Okay, fine. I'll give you  
13      an additional \$500,000." So he amended our lending  
14      agreement to include an additional \$500,000 would be  
15      added on.

16              Q       At any time, did Bankers Leasing provide  
17      financing different than the accounts receivable  
18      financing that they had agreed to back in February  
19      or March of '85?

20              A       The only thing they did in that respect  
21      was to give us leasing of the equipment.  
22      Performance Financial ran away. So we had to come  
23      to the table with a different leasing mechanism,  
24      which we did. They did that, too. So they did the



1 leasing; they did the receivable financing; and then  
2 they did private loans.

3 Q At any time during any of these  
4 meetings, did Bankers Leasing agree to provide what  
5 is called an "unrestricted line of credit"?

6 A I've heard that used, and I think it may  
7 be a difference of opinion or a difference of, what  
8 do you call it, semantics on the wording. The  
9 unrestricted line of credit, as I understand it --  
10 what the Government or Liebman wanted was something  
11 that wasn't available. I mean, I think he wanted me  
12 to have access to my signature.

13 Again, you know, I'm a socially and  
14 economically disadvantaged person. He wants me to  
15 just go and sign my name, and I could just walk in  
16 and pick up \$5 million. It just doesn't work that  
17 way, so I didn't have that kind of signature  
18 authority.

19 Q Mr. Thomas, was there a discussion  
20 during any of these meetings regarding Freedom  
21 waiving any rights against the Government?

22 A Yes.

23 Q Can you describe that discussion?

24 A I believe it was in the October meeting  
25 that Capt. Parsons and Frank Bankoff said to me, "We

1       want you to waive your rights against the Government  
2       here, and we could get on with doing business  
3       together," and things like that.

4               I basically said no, I can't waive  
5       anything because there's too big a screw-up and I  
6       don't know what's down the road for me as far as how  
7       am I going to finish this contract with all these  
8       costs that are piled up on me and all these -- it  
9       looks like I'm going into out months now. I'm  
10      foreseeing that I'm not going to be able to maybe  
11      get through this thing in this September/October  
12      time frame here; that I'm not going to make it by  
13      December/January. So I don't know what these costs  
14      are going to be incurred and are going to pile up on  
15      me, so I need to have room to claim it against the  
16      Government.

17             Q       Mr. Thomas, we had talked a little bit  
18      earlier about a cure notice that you had been given  
19      with respect to the production equipment and the  
20      accounting system. Was that issue ultimately  
21      resolved?

22             A       Yes. What happened was, we did get the  
23      accounting system -- how we resolved it was, I told  
24      my people to back out the direct cost capital-type

1 equipment from the accounting system so that nobody  
2 could say that there's no more dispute.

3 The leasing of the equipment was  
4 resolved when Bankers heard that the Government was  
5 going to release Progress Payment Nos. 4, 5, 6 and  
6 7. So Randy got cranked up again, and that's when I  
7 started to seek out new suppliers, new sources of  
8 equipment. But unfortunately the equipment was  
9 renewed. It would run at 50 percent of the capacity  
10 of the other, at best.

11 Q Okay. What I want to focus on is just  
12 the cure notice. Was there a Mod. that was executed  
13 as a result of that cure notice or an agreement  
14 regarding the delivery schedule?

15 A I'm pretty sure it was.

16 Q I mean, let me refer you to Government  
17 Exhibit 85, if you could tell us if that refreshes  
18 your recollection as to the resolution of that cure  
19 notice and the delivery schedule.

20 A Okay. Yes.

21 Q Mr. Thomas, can you describe why, up to  
22 this point in time -- we are now into early  
23 November, 1985 -- you had been unable to meet the  
24 delivery schedule?

1           A       Basically because we did not have the  
2       financing that was projected during negotiation time  
3       to pull this off; and we didn't have the  
4       confirmation from the Government side that they  
5       were, in fact, going to provide us with the  
6       financing at 95 percent of those costs. I couldn't  
7       confirm that they was going to do the leasing of  
8       equipment in time; and when we did finally, this  
9       other new alleged accounting system screw-up made  
10      Warren Rosen run away, which collapsed my deliveries  
11      of my July/August deliveries of Doughboy production  
12      equipment for final assembly and doing  
13      sub-assemblies and cracker assemblies.

14                So until I got new equipment coming in  
15      in the October/November/December time frame, I was  
16      just stuck.

17           Q       In light of all these problems you had  
18      with the progress payments and with Mr. Liebman  
19      holding back progress payments, did the Government  
20      agree to extend the delivery schedule on a no-cost  
21      basis in Mod. 18?

22           A       I see that we went out from October. We  
23      had went to January of '86. We now go out to May of  
24      '86.

25           Q       And did you have --

1           A       I'm sorry. We went out from March of  
2       '86 to May of '86.

3           Q       Did the Government require you to give  
4       consideration for that extension?

5           A       Yes. There was \$100,000 given --  
6       \$99,100; yes.

7           Q       Mr. Thomas, when was it that you were  
8       able to get the production started and in place in  
9       your plant?

10          A       We got production getting ready to  
11       really boom, I guess, sometime in late October,  
12       early November time frame that I finally got in  
13       some, what I call, struggle-buggy equipment. It  
14       wasn't the state-of-the-art equipment, but it was  
15       something that we hoped would get the job done,  
16       maybe even if it was going slow. But it would prove  
17       to the Government that we could at least get this  
18       system, this MRE package, packed up and in a  
19       configuration to their liking and get it out the  
20       door.

21          Q       Mr. Thomas, how many months had it taken  
22       you since Mr. Liebman released payment, his first  
23       progress payment, until the time that you got the  
24       production up and ready to start?

1           A       Just about six months -- just about six  
2       or seven months.

3           Q       And how much time, under the original  
4       contract schedule, did you have from the time you  
5       signed the contract until you had to start making  
6       deliveries?

7           A       Just about six or seven months.

8           Q       If you start in November through July --

9           A       Yeah, that's seven. Six and a half.

10          Q       Can you describe the plant in the  
11       production process as it finally got started?  
12       Before you do that, can I ask you, is there an  
13       exhibit or demonstrative exhibit that would help you  
14       to describe the plant and the production process?

15          A       Yes. We have a layout of the plant that  
16       I can show you where the various systems and  
17       production sub-assemblies were going on and final  
18       assemblies.

19               MR. DETHERAGE: Your Honor, if we could,  
20       we would like to use a demonstrative exhibit and  
21       have Mr. Thomas just describe the layout of the  
22       plant and the production as it started in  
23       October/November of 1985.

24               JUDGE GROSSBAUM: Was this demonstrative  
25       exhibit listed?

1 MR. DETHERAGE: I do not believe so.

2 JUDGE GROSSBAUM: Well, you can let Mr.  
3 Thomas look at it; and if the Government wants it  
4 in, the Government can offer it.

5 MR. DETHERAGE: Okay.

6 BY MR. DETHERAGE:

7 Q Mr. Thomas, can you go ahead and  
8 describe the production process without the exhibit,  
9 and --

10 JUDGE GROSSBAUM: He can look at it. I  
11 mean, he can take it and put it on the desk. But it  
12 is not coming into the record unless the Government  
13 puts it in.

14 THE WITNESS: I can put it over there if  
15 you want, if the Judge wants to see it. Do you want  
16 me to see it?

17 JUDGE GROSSBAUM: The Board is not  
18 interested in looking at it. The Board is  
19 interested in your words, Mr. Thomas.

20 THE WITNESS: Okay. The process,  
21 basically, in that time frame consisted of us  
22 starting up the cracker sub-assemblies, the  
23 accessory sub-assemblies, as well as the making of  
24 final meal bag assemblies.

1 JUDGE GROSSBAUM: Excuse me just a  
2 second. Has the Government had an opportunity to  
3 see this, what it is that Mr. Thomas is going to be  
4 referring to?

5 MR. DETHERAGE: Your Honor, I do not  
6 know. It has been sitting here, but probably not.

7 JUDGE GROSSBAUM: Well, why don't we  
8 take a recess of 15 minutes and give the Government  
9 an opportunity to familiarize themselves with the  
10 exhibit or with what it is that Mr. Thomas is using  
11 to refresh his recollection. We will resume here at  
12 3:45 p.m.

13 (Whereupon, a short recess was taken.)

14 JUDGE GROSSBAUM: The hearing will come  
15 to order. Please continue.

16 FURTHER DIRECT EXAMINATION

17 BY MR. DETHERAGE:

18 Q Mr. Thomas, we are focusing here now on  
19 the late October/early November time period, when  
20 you were able to finally get the production started.  
21 What I would like you to do is just generally and  
22 briefly describe the layout of the plant and the  
23 production process that you had implemented at this  
24 time.



1           A       All right.    The plant is basically a  
2       400,000-square-foot building.   What we had in the  
3       back of the building was two production rooms.   One  
4       of them was a cracker room; the other was an  
5       accessory room.

6                   The cracker room had to be like a clean  
7       room, a hospital room.   It had to be reversed  
8       ventilation in order that we didn't want to suck in  
9       any foreign matter.   So it had to be AVI-approved  
10      reversed ventilation.   We did vacuum packaging of  
11      crackers and open food stuffs in that particular  
12      room.

13                   What we had to do at that particular  
14      time, because we wasn't using a Koch Multi-Vac  
15      machine -- which basically would have allowed us to  
16      get away with maybe anywhere from 20 to 30 personnel  
17      -- we had to end up having maybe 50 or 60 different  
18      people in that room.   As a result of us not having  
19      the accessory production equipment that we had  
20      ordered, we also had to double our manpower now.

21                   We also had to use what we call  
22      antiquated round tables, spinning tables, in order  
23      to get this production going, since the lead time  
24      for the state-of-the-art production equipment had  
25      already passed.   We couldn't get it, so we started

1       to use some sort of sealers and turn tables to  
2       accumulate and put it in the bags, which meant  
3       massive use of manual labor. So we did that.

4               We also, over on the final assembly, we  
5       kept the basic configuration because we did find  
6       some equipment, some band sealers, that was similar  
7       in style to the Doughboy machines; but they didn't  
8       have the strength, they didn't have the heat, nor  
9       the pressure spent on them in order to keep up.  
10      These machines were maybe running at 50 percent  
11      capacity, at maximum. So we had to crank these  
12      things backwards, down, in order to get the product  
13      out.

14             So at this time frame here, all this  
15      equipment, some of it was homemade. We actually  
16      made some of this stuff in a local machine shop. It  
17      didn't have what I would call OSHA approvals on it.  
18      It had some burrs and some things that we had to put  
19      shrouds on and various safety equipment. We started  
20      to commence production using this equipment that we  
21      finally got organized here.

22             So as we started the production, we was  
23      experiencing -- we got the first couple of batches  
24      out okay, all right, as we was retraining people,  
25      because now we had to bring people back and retrain

1       them at the same time we're gearing up for  
2       reproduction. Some of the people we had trained  
3       earlier in the June/July time frame, we had made  
4       them supervisors.

5               Now they may not have been supervisor  
6       material, but they were all we had that knew  
7       something about the specifications, the mil. specs.,  
8       and an idea of what I was trying to get  
9       accomplished. So we was using those people as some  
10      sort of line leaders and as we were trying to hire  
11      and keep other personnel coming in.

12             Now operating in this condition meant  
13      that this was a tedious job sitting there; that some  
14      people would come in and work a half a day, and at  
15      lunch time they wouldn't come back. So I was caught  
16      between that type of a situation.

17             Q       Mr. Thomas, where did you obtain the  
18      labor force? Where did most of the people live who  
19      worked for you?

20             A       I'd say 90 percent of the people who  
21      worked came out of South Bronx. Some came out of  
22      Mount Vernon, where I live. They were former  
23      employees of Freedom and various other factories  
24      that I had; that we brought them in. We recruited  
25      people from as far away as various other

1       ration-assembly plants. We got some other retort  
2       plants. We got guys come out of Canada from Magic  
3       Pantry who came down and worked with us.

4               So it was a massive effort by a lot of  
5       people that wanted to see this thing really become  
6       real, and we got production going.

7               We immediately ran into a snag or a  
8       specification problem with the AVI.

9               Q       Can you describe what happened?

10              A       Yes. As we began to do final  
11       assemblies, cracker assemblies and sub-assemblies,  
12       the AVI was interpreting the specifications  
13       differently than what we had negotiated or what we  
14       thought the rules were. So we had to adjust,  
15       quickly, production to what they said the rules  
16       were, because they came from a different  
17       ration-assembly plant, some of them, and they knew.  
18       We didn't. This was our first time, so we made  
19       certain adjustments and procedures to conform to  
20       their wishes.

21              One of the problems we ran into was when  
22       we finally did the final assembly and put it on the  
23       pallet, we said, "Okay, this is being offered to you  
24       for inspection." They said to us, "Well, we're not

1 inspecting that pallet until it's capped and  
2 strapped."

3 That's when I went into them and said,  
4 "Well, if it's capped and strapped, that means  
5 you've got to cut the strapping a loose in order to  
6 get to the cases to do your sampling." I mean,  
7 you've got a statistical sample here. You've got to  
8 pull one case from this lot, and one case from that  
9 skid, and two cases from the other, and various  
10 layers. They've got to go back and do it. They  
11 basically says, "Well, that's the way it is. We're  
12 going to do it that way."

13 Well, we continued production. We  
14 called DPSC. We told them that we was having a  
15 problem: that the AVI would not inspect; that they  
16 was interpreting that an end-item was a capped and  
17 strapped pallet ready to go on the truck instead of  
18 a case of MREs that's just a case strapped.

19 So we started producing; and I guess we  
20 produced almost maybe 30,000 to 40,000 units before  
21 AVI started to inspect. We finally got DPSC to say,  
22 "Yes, the end-item is a case of rations. As it  
23 comes off the line, that's what an end-item is." So  
24 AVI then started to inspect. So everything that we

1 had produced by 40,000 boxes, they started finding  
2 defects.

3 Now what happened was, we had already  
4 had our inexperienced, trained Quality Control  
5 personnel looking at this, trying to figure out  
6 whether we were right or wrong. We felt we were  
7 right. What we found is that we ran into an area in  
8 the desiccation where one of the machines, or a  
9 couple of the machines, is cutting the bag when it  
10 was sealing it. It was putting a dent in it, or  
11 something, or nicking it. So therefore, when the  
12 AVI did their inspection, they found a lot of  
13 leakers, what they call "leakers."

14 Now I blame that specifically on not  
15 having the Doughboy machines, but having some  
16 struggle-buggy machines that was used for sealing up  
17 non-food items, maybe. But the Doughboys would not  
18 have nicked and cut, and they wouldn't have had  
19 these rough burrs and things on it.

20 So we got into a discussion with the AVI  
21 that I said to them, "Had you people been inspecting  
22 this as I was producing it, perhaps after the first  
23 or second time or lot, we would have found out what  
24 the problem was, instead of us sending all this  
25 stuff through, you know, 10 or 15 days, whatever it

1       was, that they wasn't inspecting this product; and I  
2       would have caught this early on. I might have only  
3       had 4,000 or 5,000 cases to rework instead of trying  
4       to have the whole 40,000 cases."

5               So all of a sudden, I had already  
6       shipped the first lot to Nadick Labs and another one  
7       to DPSC, and I got this 40,000 cases that now is  
8       nonconforming. So doing this is a dispute, and I'm  
9       saying I'm going to put a claim in because the AVI  
10      wasn't inspected. We decided to ship this stuff to  
11      what we call the "dead zone," and we would deal with  
12      it later through a claim mechanism with the  
13      Government and figure out what are we to do at this  
14      point.

15             So what we did, we slowed down and  
16      figured out where the machine was that was cutting  
17      the bags and creating the leakers on the meal bags  
18      that was causing the desiccation test to fail. As  
19      we found it, we then got production going. AVI was  
20      doing it, and we steady started to climb. We  
21      started to move out right sporty.

22             Q       Mr. Thomas, during this November time  
23      period, did you submit some progress payments; and  
24      can you describe what happened on those?

1           A       In the November time frame, Marvin  
2       Liebman paid, I would say, just about all of them.  
3       I think I see up there that that's Progress Payment  
4       No. 9. We submitted a \$979,000 payment. He paid  
5       about \$895,000. He took something out; for what  
6       reason, I don't know.

7           Q       How about Progress Payment No. 10?

8           A       Yeah. No. 10 looks like -- I don't have  
9       my glasses on.

10          Q       How long did it take him to pay Progress  
11       Payment No. 10?

12          A       That took awhile, it looks like. That  
13       took a good while, for some reason. We submitted a  
14       progress payment for \$353,000. Oh, I know what  
15       happened.

16                 What happened was, he again stopped  
17       paying progress payments because we were under cure  
18       notice, or something had happened during that  
19       50,000-case time frame that we didn't meet the  
20       December schedule. DPSC had a meeting with us,  
21       saying that there was a war reserve level violation,  
22       or there would be a violation of other war reserve  
23       levels, and that they needed to re-procure some  
24       cases -- take these cases from us at that point



1       because they didn't want to violate war reserves, or  
2       something along those lines.

3               Q       What do you mean by "re-procure"?

4               A       In other words, we should have had  
5       50,000 to 60,000 cases delivered by a certain time.  
6       Had we had them delivered, they would be into the  
7       stock system where the Government's readiness  
8       capability would not be impacted.

9               So basically what they needed to do was  
10      to get some cases to the stock point, to the caves  
11      or wherever the warehouses was, in order to not  
12      violate the Government's mission of being ready:  
13      war reserve levels, something like that. Other  
14      material; something.

15              Q       So what happened with respect to these  
16      cases and Freedom's failure to meet the delivery  
17      schedule during this time period?

18              A       The cases were put into what I call the  
19      "dead zone"; okay? We continued, then, to start  
20      making fresh cases, with the AVI overseeing or, I  
21      should say, monitoring and inspecting as we're  
22      producing, okay -- as we are producing.

23              Q       What did DPSC do -- Mr. Bankoff, in  
24      particular -- with respect to this war reserve level  
25      problem?

1           A       They called a meeting in December -- I  
2 believe it was in December -- with DPSC and with us,  
3 and told us basically: that they needed our  
4 assistance in getting and not violating, I should  
5 say, the war reserve levels; and that they would  
6 like to get these things procured from someone, one  
7 of the other prime contractors, right quick; that  
8 they would need the GFM in our plant to get it.  
9 They had already shipped in quite a bit of GFM for  
10 these cases; and if I didn't cooperate with them and  
11 they terminated, I may not give them the GFM back  
12 because I'm protesting the termination of the cases.

13

14                       They asked for our assistance. We said,  
15 "Fine. I'll do anything you want. Tell me what you  
16 want."

17                       It was agreed that they would terminate  
18 the first 50,000, and I think another 64,000 or  
19 something like that, and it came to 114,000 cases,  
20 with the basic understanding that if Freedom was to  
21 produce in a January/February/March time frame a  
22 certain level, and we kept to the schedule, that  
23 they'd give me those cases back at the discretion --  
24 good faith discretion, I should say, of the  
25 Government. It was their sole discretion.

1           Q       Was this ultimately formalized, this  
2 agreement, in a Mod.?

3           A       I think that's Mod. 20. I believe it  
4 is. I think that's Mod. 20 where we discussed -- we  
5 did not discuss that it was being done to help the  
6 Government's war reserve levels; nor that I was  
7 going to assist them in giving them the GFM that's  
8 in my plant. You know, pack it up, ship it out and  
9 all that kind of stuff.

10                   Joe Clark was saying that we could  
11 charge the Government for all of the overtime,  
12 forklift operators, truck loaders and all that kind  
13 of stuff as a result of, you know, this not being in  
14 the contract to pack it up and ship it out. We  
15 should charge it to the Government. I told him to  
16 keep records of it and we'll settle up with the  
17 Government at some later date.

18           Q       So as a result of this Mod., what  
19 happened? Was CFM affected as well?

20           A       Unfortunately, yes. We didn't know  
21 that; nor did I agree to it. The Government had  
22 terminated our cases, 114,000. I think it was  
23 re-procured for about \$10 a case less. I think it  
24 was re-procured for about \$17 from Right Away Foods.

1                   So in order for Right Away to make the  
2 cases, they had to have GFM. We packed it up and we  
3 shipped it to them, cooperating with the Government.  
4 Then when we found out later on as we're going --  
5 we're calling down to Sterling Bakeries and says,  
6 "Sterling, ship our cakes up here. Ship our  
7 brownies." "Well, we just shipped them over to  
8 Right Away Foods."

9                   So all of a sudden, we had to shut down  
10 production because our CFM that we had ordered under  
11 our subcontract had somehow been allowed by the  
12 Government to be incorporated into the Right Away  
13 Foods contract. So I asked Sterling to send me  
14 something that says that the Government allowed you  
15 to take my subcontracted materials, as made for my  
16 contract, because all these cases that he had for me  
17 had my prime contract number on it.

18                  I didn't know this was going on. Had I  
19 known it, I would have said to the Government, "Hey,  
20 listen. You can take those two, but you've got to  
21 give me some more relief. Give me some room on the  
22 back-end. Don't have me spinning up production and  
23 all of a sudden come to find out you're going to  
24 then blame me for not having CFM."

1                   So the Government says that they didn't  
2     do it. I said, "Well, RAFCO must be in violation if  
3     they're putting CFM product from my contract in this  
4     new contract that you guys are allowing."

5                   So anyway, it was like an argument. But  
6     the point is, other CFM guys were allowed -- RAFCO  
7     was allowed to commandeer, is what I call it --  
8     that's the word I used. They commandeered our CFM  
9     from our suppliers, and it caused disruption and  
10    slow-down of my schedule again.

11                  Q     And the GFM that was taken was for the  
12    114,000 cases.

13                  A     Yes. Whatever it was to support the  
14    114,000 shipped out.

15                  Q     I want to focus just a little bit now on  
16    what was the effect of Mod. 20 in this partial  
17    termination. How many cases were left in the  
18    contract after this partial termination?

19                  A     I believe we had 505 -- 505,000 cases.  
20    I believe that's the number.

21                  Q     And what was the effect of this partial  
22    termination on the contract price?

23                  A     The contract price dropped from \$17  
24    million down to about \$13.8 million or \$13 million  
25    and change, which caused a different problem.

1 Q Okay. What problem is that?

2 A Well, due to the fact that we had at  
3 this time here incurred a lot of costs, that Clause  
4 L-4 kicked back in again. All of a sudden, instead  
5 of us having, let's say, a \$9 million ceiling, we  
6 had now a \$13.8 million contract, so therefore we  
7 slid down to about a \$6.5- \$7 million, a little less  
8 than \$7 million ceiling, which the ACO had already  
9 paid up to all but maybe \$50,000 or \$60,000. So  
10 until we got some relief from this L-4 clause, he  
11 wasn't going to budge.

12 Q Did Mod. 20 also provide for a new  
13 delivery schedule?

14 A I believe --

15 Q Let me refer you to Government Exhibit  
16 104.

17 A Yes. I'm looking at Mod. 20. The only  
18 problem I have with this is it usually says this is  
19 page 1 of what, "1 of 2," "1 of 3," "1 of 5." It  
20 doesn't say that. I guess this third page is the  
21 last page.

22 Q Okay. Does that refresh your  
23 recollection as to the new delivery schedule?

24 A Yes, it does.

1           Q       What other terms were included in Mod.  
2       25; and specifically, was there any term relating to  
3       this reinstatement you described? I am sorry. Let  
4       me start again.

5                   Was there any provision in Mod. 20  
6       relating to the reinstatement of these cases that  
7       you alluded to earlier in your testimony?

8           A       Yeah. Number three, on the last page.  
9       It basically talks about that in the event that the  
10      contractor meets the January through April  
11      increments, as set forth in paragraph 2, that the  
12      Government may reinstate the 114,000 cases to be  
13      delivered in the 31 August 1986, based on its sole  
14      discretion, and that the reinstatement had to be by  
15      9 May 1986.

16          Q       What was your understanding regarding  
17      that provision in whether those cases would be  
18      reinstated?

19          A       My understanding was that if we came  
20      along and delivered the 20,000 cases in January,  
21      30,000 in February, 50,000 in March, and I believe  
22      going up to the 80,000 in April, the Government  
23      would have, in good faith, given them back to us.

24          Q       What other provisions were made  
25      regarding the specific cases that were going to be

1 reinstated, if any? Was there any mention of the  
2 configuration of those cases?

3 (Witness reviews document.)

4 A This was in the beginning. One second.

5 Q In paragraph 3, is there any mention as  
6 to what configuration those cases will be in?

7 A I don't think so.

8 Q Okay.

9 A No, not that I can see.

10 Q What was the importance of the  
11 reinstatement of those cases to Freedom?

12 A Without these cases, we would drop from  
13 a \$17- or a \$16.9 million contract down to \$13  
14 million contract that was not economically feasible  
15 without a cost price adjustment. It just wasn't  
16 going to work.

17 Q As you went forward during the  
18 January/February time period, did anything happen  
19 with respect to the MRE-6 solicitation?

20 A Yes. What happened was, as a result of  
21 us being, I would say, bogged down and the contract  
22 being delayed, MRE-6 was awarded to CINPAC, a  
23 company out of Ohio. We didn't get any follow-on  
24 contracts that I had basically asked for in my Plan  
25 B.



1           Q     So at that point, then, how many  
2 industrial planning producers were in the program?

3           A     There were still three, as far as I was  
4 concerned, because CINPAC was found by the  
5 Department of Labor to be not in compliance with the  
6 Walsh-Healy Manufacturing Act; and knowing the  
7 industry like I knew, and I picked up the telephone,  
8 I realized that CINPAC had not gotten all of the  
9 subcontractor planning schedules in time.

10                   So talking with the various  
11 subcontractor entities, I knew that CINPAC -- I  
12 don't know how they got in there. It was just what  
13 I considered always a wrong award. Something went  
14 wrong here. They didn't do what I had -- they  
15 wasn't being made to do what I had to do.

16           Q     Ultimately, did CINPAC perform under the  
17 MRE-6 contract; and I am not interested in whether  
18 they fully performed or partially, but did they  
19 become part of the IPP Program?

20           A     Yes. I understand they did.

21                   JUDGE GROSSBAUM: Now do you remember  
22 when the MRE-6 solicitation was issued?

23                   THE WITNESS: It was sometime in '85.

24                   JUDGE GROSSBAUM: Okay. Did Freedom  
25 submit a proposal?

1 THE WITNESS: Yes.

2 JUDGE GROSSBAUM: Do you recall what  
3 happened to Freedom's proposal?

4 THE WITNESS: We were not negotiated  
5 with. I believe they told me that CINPAC beat me by  
6 18 cents a case. So when they beat me by 18 cents a  
7 case, I said, "Well, they got a 50,000-square-foot  
8 building. I've got a 400,000-square-foot building.  
9 Why don't you add some 350,000-square-feet to their  
10 building cost or either let me skinny down to a  
11 50,000-square-foot building, and I think I'll beat  
12 them by \$1 a case." So unfortunately, that's what  
13 was going on at the time.

14 JUDGE GROSSBAUM: Who told you about  
15 CINPAC beating you out? Who told you?

16 THE WITNESS: Well, one of them, I got a  
17 call from Jansen, George himself, who basically told  
18 me, "Henry, I told you so. I told you I'd get in  
19 this program without Walsh-Healy." He had came to  
20 my plant earlier in 1984. He told me that  
21 Walsh-Healy was a bunch of crap and that whatever  
22 they made me do in Hunts Point, he wasn't going to  
23 do. He didn't have to do it, and he was going to  
24 make sure of it. So I told George, "It's a bet."  
25 We had a bet that he was not going to get in this

1       program until he actually produced retort pouches,  
2       became Walsh-Healy, because I've got the entire,  
3       complete record from DLA that shows that you've got  
4       to be Walsh-Healy first. So when he got put in the  
5       program and got an award, George called me up and  
6       said, "What did I tell you?" I didn't know what to  
7       say to the guy.

8               JUDGE GROSSBAUM:    You did not protest  
9       that award, did you?

10              THE WITNESS:       Oh, I -- yes.     I  
11       protested. I did everything. I jumped up and down  
12       about it. I went to Federal Court. I tried  
13       everything to overturn this. It just didn't work.

14              JUDGE GROSSBAUM:    Who else, apart from  
15       Mr. Jansen, who I take it was a principal of CINPAC,  
16       who else told you that CINPAC had beaten you by 18  
17       cents a case?

18              THE WITNESS:   Frank Bankoff. I think it  
19       was Frank. Yeah. Frank said that they'd won out,  
20       beat us out in price. It was strictly price.

21              So at that point, an argument basically  
22       ensued as to the justification for authority to  
23       negotiate, where we pointed out that CINPAC needed  
24       at least a 3-million-cubic-foot contiguous space;

1       that the solicitation says that they have to at  
2       least take in 70 percent of GFM.

3               I was totally confused as to how CINPAC  
4       could get into this program without having a retort  
5       pouch or ever made a retort pouch. He said to me  
6       that the DCASMA, Cincinnati, had passed them and  
7       that was good enough for them.

8               So there was nothing else we could do  
9       other than to protest it to GAO, protest to -- you  
10      know, try to get it overturned, because without that  
11      follow-on contract, there I was caught in that same  
12      dilemma that I had talked to them earlier about of  
13      how do I -- I need some follow-on contracts in order  
14      to lay these costs over.

15              I felt specifically hurt because we had  
16      agreed with them that we're going to take all these  
17      costs, put them up on -- take them out of our  
18      accounting system, put them back into capital costs  
19      that was originally negotiated as direct costs,  
20      because we says now, "If that's the case, then you  
21      guys was telling us we're going to get some  
22      follow-on contracts in order to depreciate this  
23      stuff over." When we didn't get MRE-6, now I'm  
24      really stuck. I just didn't know what to do.

25              JUDGE GROSSBAUM: Go ahead, counsel.

1 BY MR. DETHERAGE:

2 Q What happened during January of 1986  
3 with respect to the MRE-7 solicitation?

4 A It was announced that they was only  
5 going to have three contractors. So with four  
6 people being in the program now and only three  
7 contractors, that meant somebody was going to be out  
8 of the program; and I wanted to know who. So it was  
9 in my best interest to get CINPAC's award reversed.  
10 We had to get that thing reversed.

11 Q And do you remember the quantity of that  
12 initial solicitation?

13 A I think it was a little over 800,000  
14 cases. Are you talking about MRE-6?

15 Q No. I am sorry. On MRE-7 --

16 A Okay.

17 Q -- do you remember approximately the  
18 total quantity that was announced in January, 1986,  
19 to go along with the three contractors?

20 A I believe it was about 4.2 million  
21 cases; something like that.

22 Q Okay. Did you receive any response in  
23 February of 1986 to the DAR deviation request?

24 A I believe that's when we first heard  
25 that the Department of Defense DAR Council or

1       somebody had rejected the Government's request for  
2       deviation. I believe it was found that -- this is  
3       my understanding -- the PCO had correctly classified  
4       these things, and they was already classified as  
5       direct and didn't need to be re-classified. So no  
6       deviation was necessary.

7               Q       What happened as a result of that DAR  
8       deviation ruling, if anything?

9               A       Well, the Government didn't -- they just  
10       told me that it wasn't approved. Liebman didn't  
11       come to the table right away and pay me any money.  
12       They just left us out there at that point in time,  
13       and I believe that's when I started talking about  
14       putting in my claim. Yeah, I think we started  
15       having meetings on that.

16              Q       All right. Before we get to that, can  
17       you just describe the status of production through  
18       the January/February/March time period?

19              A       We started to really get good at making  
20       these cases. We started solving all our little  
21       technical problems, all our little quality control.  
22       The people started getting in the swing of things,  
23       and production started to pick up rapidly.  
24       Everybody got happy because they was making

1 conforming products. So I would say that we picked  
2 up and really started a nice spin.

3 All of a sudden, we got hit with, one  
4 day, an AVI order to halt production because there  
5 was some sort of a zyglo or micro holes being found  
6 at other assembly plants in the MRE Program, and  
7 that they wanted to verify all retort pouches that  
8 was found to be swelling up in, I think it was,  
9 CINPAC's plant and maybe Right Away's plant. I  
10 can't recall that I had any problem with my product,  
11 but they told us to halt. So we were caught between  
12 a -- okay, we halted.

13 We found out what the problem was. I  
14 quickly flew down to Ft. Sam Houston; got with one  
15 of the colonels down there and looked at the problem  
16 of what was going on and what was happening out of  
17 the Star Foods processing facility. They were, at  
18 this time, a GFM subcontractor for the Government, a  
19 GFM contract under MRE-6; and they had,  
20 unfortunately, not processed some food or had a bad  
21 system and let some food get past their retorts.

22 The food was not processed correctly and  
23 was swelling up. There was no tractability of where  
24 it was and where it went, so we had to halt and  
25 investigate our entire inventory to see if we had

1 any in our plant and if we had incorporated any of  
2 this stuff into some cases that we had already  
3 assembled.

4 Q When did this occur?

5 A I would have to go back and really just  
6 do some homework over there to do it. I would say  
7 it was sometime in maybe the March/April time frame;  
8 somewhere around in that time frame.

9 Q Okay. Let's look at Freedom again in  
10 the March time frame. Can you describe economically  
11 and financially what was happening?

12 A In the March time frame, again, we were  
13 looking at and putting in progress payments of one  
14 number, looking for it all; and Mr. Liebman was only  
15 paying a part of it.

16 Specifically, let's say, on Progress  
17 Payment No. 14, we put in a \$2.1 million progress  
18 payment. Now we are getting ready now to really  
19 spin up in production, and we've already got our  
20 financing out in front of us in forms of letters of  
21 credits to subcontractors. Our bank had went  
22 forward and given them advanced LC's against our  
23 lines of credit. He comes back and only pays us \$1  
24 million. It's like we're a million dollars short.  
25 Somebody's getting shorted a million.



1                   The bank is very concerned about this.

2           I'm very concerned about what's going on. I don't  
3           think I got any real satisfaction, but here I am  
4           with a progress payment ceiling of, at this point, I  
5           guess it's \$7 million or something -- it might have  
6           been raised at that time -- but with a contract  
7           that's still only \$13.8 million.

8                   At this point, I'm spinning up  
9           production, incurring costs that's going over the  
10          \$13 million in anticipation that I'm going to knock  
11          out these cases for the Government and they're going  
12          to give me back the 114,000 to take me back to a,  
13          what we call, "not a loss mode," but a \$17 million  
14          contract.

15                   So that's where we were in that time  
16          frame.

17                  Q       All right. I want to go back before  
18          that Progress Payment No. 14. Prior to that time,  
19          you had testified about a problem with the DAR  
20          deviation request --

21                  A       Right.

22                  Q       -- and you mentioned something about a  
23          claim.

24                  A       Right.

1           Q     Describe, just very generally, what that  
2     was.

3           A     In that time frame, we had sat with the  
4     Government, and I think we told them that we needed  
5     to -- that we projected that there was going to be  
6     some losses here and that we needed some way of  
7     getting back some of the money that, had it been  
8     expensed in overhead and standing-still time and DAR  
9     deviation and a dispute on the accounting system,  
10    and that all these overhead and salary items had  
11    caused us to go into out months. We were now in --

12          Q     Let me stop you for a second. You said  
13    "into out months." What do you mean?

14          A     Okay. An "out month" happens to be, as  
15    described to me, is if a contract called for it to  
16    be 14 months, when you go to month 15, you're in an  
17    "out month."

18          Q     So you had already gone beyond --

19          A     We were past -- we were at month 15, 16,  
20    17; and we only had costs to cover for the first 14  
21    months.

22          Q     And how did that lengthening of the time  
23    of the contract beyond 14 months affect you in terms  
24    of costs incurred; for example, rent and those types  
25    of costs?

1           A       When you look at that, the rent was now  
2       over budget by two months or whatever.   We had  
3       incurred the entire -- if I'm going to just use my  
4       negotiation memorandum as a budget, I had a million  
5       twenty for 14 months in there, and it was probably  
6       \$1.2 million or something, whatever the number is.  
7       By going in these out months, I now have to plug on  
8       that budget line a number more than that budget  
9       line.   So either I can adjust it; take it from  
10      another area.

11                   I did not go over budget on anything  
12      such as a fixed cost, such as my raw materials, my  
13      "other." Those kinds of things were not over budget  
14      and wasn't approaching, because they wasn't tied to  
15      a time frame. But anything that was tied to a time  
16      frame, such as rent, salaries -- I guess they call  
17      that "variable costs," I believe, okay -- variable  
18      cost was.

19                   Direct labor, I believe, usually is a  
20      fixed cost, I think. But it became a variable cost  
21      because we had to take it into out months because we  
22      have to now do this production in an out-month time  
23      frame of beyond the 14 months that was originally  
24      planned.

1           Q       Did you eventually file a formal claim  
2 with Mr. Bankoff?

3           A       We sent a claim down for \$5.7 million to  
4 DPSC.

5           Q       And what was done with that claim?

6           A       I believe the claim was held up at DLA  
7 Headquarters and talked about between my  
8 representatives and the Government, and it was  
9 skinned down to about a \$3.4 million claim.

10          Q       Was that claim formally filed with Mr.  
11 Bankoff?

12          A       I believe that claim did go to Mr.  
13 Bankoff.

14          Q       And what happened as a result of filing  
15 that claim?

16          A       As a result of filing the claim, there  
17 was some meetings held. The Government wanted to  
18 settle all matters by offering me the deviation  
19 monies, okay; and I basically responded to them that  
20 the deviation was never necessary, and it should  
21 have been included. We've asked for the money over  
22 and over again, and you're still holding it. They  
23 wanted to give me more time on the contract, and I  
24 think something else they wanted to give. Whatever  
25 it was, I told them no.

1                   That was not going -- that little bit  
2           would not solve the problem of the out-month costs  
3           that's looking at me. That little problem is not  
4           going to solve the fact that I have no follow-on  
5           contract; the fact that as a result of me being  
6           delayed in '84, '85 time frame, that they brought a  
7           third contractor to the table that now has to be  
8           maintained.

9                   So I wanted some assurances that I was  
10          going to get another contract; and as long as I'm in  
11          the program and I'm going to get another contract to  
12          work myself out of this hole, there would be no  
13          deal. I could not, and I wouldn't give up, and I  
14          wouldn't settle this claim.

15                 Q       Who did you have these negotiations  
16                 with?

17                 A       Frank Bankoff.

18                 Q       And yourself?

19                 A       Myself. Marvin Liebman was there.  
20                 Several people from DCASMA had come down to DPSC  
21                 when we was having these discussions in the, I would  
22                 say, March time frame -- March/April time frame.

23                 Q       I take it you and Mr. Bankoff were not  
24                 able to reach an agreement.

25                 A       No.

1 Q What happened next in the negotiations?

2 A Mr. Bankoff said that due to the fact  
3 that this being a DLA problem, that he was going to  
4 bump it up to higher authority or higher  
5 headquarters to resolve it, and that he was going to  
6 refer the whole thing up to Mr. Chiesa for  
7 resolution. So once he said he was going to --  
8 since the contracting officer was transferring  
9 authority from himself up to them, then, "That's  
10 okay; fine. I'm ready to go up there and talk with  
11 these fellows about what my problem is and the claim  
12 and everything else." So that's where it landed.

13 Q Before we move on to those negotiations,  
14 I want to go back, just for one second, to Progress  
15 Payment No. 14. I think you described the shortfall  
16 in the payment. Do you have any idea why Mr.  
17 Liebman made a reduced payment to you?

18 A No. I can't at this moment. I'm just  
19 going to take a quick look, if you don't mind, at  
20 Progress Payment No. 14.

21 Q Okay.

22 A Looking at it, there's absolutely no  
23 explanation as to why he --

24 Q Did there come a time when Mr. Liebman  
25 applied a lost ratio to your contract?

1           A       I believe Mr. Liebman was applying  
2 something else to the contract that we was in sharp  
3 dispute about. It was my understanding that Mr.  
4 Liebman was sending in Ray Troiano to do a  
5 percentage-of-completion analysis.

6                   They was using a progress payment work  
7 sheet which -- back in, I think, October of '85, we  
8 had a meeting with the DCASMA people and put it in  
9 writing to them that our contract was not a ship  
10 building; nor was it a construction contract. The  
11 percentage-of-completion, progress-payment work  
12 sheets are for those kinds of contracts; not for  
13 this one. We told him that ours was strictly  
14 incurred costs, and they shouldn't be doing what  
15 they're doing.

16                   They said, "Well, we just want to  
17 measure anyway just to see."

18                   "Well, if that's what you want to do,  
19 then do whatever you have to do."

20                   I didn't realize it was going up to Mr.  
21 Liebman for some sort of a weighted analysis that he  
22 may have been using.

23           Q       What did you understand Mr. Liebman's  
24 concern to be in that time period -- and I am

1 talking about the March '86 time period -- with  
2 respect to progress?

3 A I think Mr. Liebman, if this is the  
4 correct time frame, was saying that we had incurred  
5 maybe 60- or 70 percent of our costs versus 20  
6 percent of our production cases he had gotten, or  
7 some number like that. It was a disparity between  
8 progress and cost or shipments and cost. So I think  
9 I might have addressed that issue in one of my  
10 letters to him -- I believe I did -- but I thought  
11 it was resolved.

12 Q All right. Just generally, what was  
13 your response to that concern?

14 A Well, my whole response was that Mr.  
15 Liebman, if he wanted to use that type of an  
16 analysis, would have to go back to their original  
17 negotiation and would have to see where we were at  
18 the time that we negotiated for certain things to  
19 happen; such as, when we got to the progress payment  
20 ceiling of, say, \$9 million, we would have been at  
21 50 percent, or say \$9 million, and the Government  
22 would have had 20 percent of the cases or 100,000.

23 The next month, I believe we would have  
24 moved to, say, 60 percent -- 65 percent of the cost



1       versus the Government having 20 percent; so on and  
2       so on right down the line.

3               So as soon as we got to the 400,000 case

4       \*

29       mark, I believe everything washed out.       The  
30       Government would have been out of the  
31       progress-payment business. They would have gotten  
32       all theirs back. We would have been in a cash-flow  
33       positive mode, and we would have been receiving  
34       profits. That's the way it was negotiated.

35               So if he's now using some sort of  
36       weighted averages based on where we are, then he  
37       needs to go back and say, "Well, where are they to  
38       cases versus money," that his obligation was  
39       supposed to give. So I was trying to make that kind  
40       of an analysis versus whatever he was trying to do  
41       with this loss ratio.

42               Again, the loss ratio was thrown out  
43       because of this L-4 clause and the fact that they  
44       had dropped the contract from \$17 million to \$13.8  
45       million.

46               Q       Now I want to focus back now in the  
47       April/May time period and these negotiations that  
48       had been sent up to DLA on your claim.

49               A       Uh-huh.

1           Q       Let's first start with who was involved  
2       in those negotiations.

3           A       What happened was, people -- I guess DLA  
4       and DPSC -- felt that I was pretty emotionally  
5       involved in this thing, so we decided to send a  
6       lawyer up there and a retired colonel to talk with  
7       Mr. Chiesa. Mr. Chiesa brought in Mr. Kobeisman and  
8       said that they were going to be the official  
9       negotiating team for the PCO.

10          Q       Who is Mr. Kobeisman?

11          A       He's a person in the Defense Logistics  
12       Agency named Carl Kobeisman. I believe he's the  
13       Chief Counsel or the Chief Deputy Counsel. He's the  
14       head of it at this point, I believe. I think he's  
15       the Chief Counsel of DLA Headquarters. He was  
16       brought in with the Executive Director of  
17       Contracting, and I think that's the highest we could  
18       go at DLA as far as resolving a contract dispute and  
19       having the Executive Director of Contracting and the  
20       Chief Counsel for the Government.

21          Q       And who was involved in those  
22       negotiations on behalf of Freedom?

23          A       An attorney by the name of David Lambert  
24       and Mr. Frank Francois, former colonel in the Army.

1 JUDGE GROSSBAUM: Was Col. Francois ever  
2 affiliated with Freedom as an employee?

3 THE WITNESS: Yes.

4 JUDGE GROSSBAUM: At what time and what  
5 was his employment relationship?

6 THE WITNESS: Col. Francois was the Vice  
7 President of Freedom Industries when we were in the  
8 Hunts Point facility.

9 When we was doing the retort pouches, he  
10 was the Vice President and basically helped bring  
11 Dollar Dry-Dock to the table by showing them and  
12 telling them how the Industrial Preparedness Program  
13 worked, how the Government had to maintain specific  
14 companies in the Industrial Preparedness Program in  
15 a readiness posture, how Congress had mandated that  
16 this happen, and only certain suppliers that was  
17 designated by the Secretary of Defense by name could  
18 be included in this program. He educated us all.

19 So based on his vast experience working  
20 in the Pentagon, in the industrial area and putting  
21 together the Industrial Preparedness Program for the  
22 Pentagon, he knew exactly what we had to do, when we  
23 had to do it; and it was Col. Francois that  
24 basically walked us through, in 1982 and '83, to get  
25 our IPP plans done, as well as to get our

1 subcontractor plans done in conformance with what  
2 DPSC wanted done.

3 JUDGE GROSSBAUM: He was the Vice  
4 President of Freedom Industries as far back as 1982?

5 THE WITNESS: I believe we brought him  
6 in in '83; he became a V.P.; right. Before that, he  
7 was just a consultant to us. Once we got the IPP  
8 and the contracts rolling, we brought him on as a  
9 vice president.

10 JUDGE GROSSBAUM: Okay. Now the  
11 contracts you were referring to were the two meat  
12 contracts.

13 THE WITNESS: Yes.

14 JUDGE GROSSBAUM: Okay. And did he  
15 remain as a full-time employee with Freedom?

16 THE WITNESS: No. What happened was,  
17 when we didn't receive MRE-4, the whole plant had to  
18 close down. So he went and had to go back to  
19 Washington. He started a little consulting practice  
20 while we tried to figure out why we got sort of  
21 disconnected from the Industrial Preparedness  
22 Program. So he continued to work with me, although  
23 I didn't have the dollars to pay him. So he, you  
24 know, started building a little side practice there.

1 JUDGE GROSSBAUM: Excuse the  
2 interruption. Go ahead.

3 FURTHER DIRECT EXAMINATION

4 BY MR. DETHERAGE:

5 Q Mr. Thomas, can you describe what  
6 Freedom sought in those negotiations with DLA?

7 A Yes. The same thing that I told Frank  
8 Bankoff I wanted was, I wanted a guaranty that we'd  
9 get a follow-on contract -- the same thing that I  
10 had basically said to him in Plan B of my proposal.  
11 We wanted a follow-on contract. We wanted to make  
12 sure we were treated just like everybody else; that  
13 these costs that were negotiated up-front with the  
14 ACO should be adjusted upwards to include all of the  
15 various delays of the Government.

16 I basically was telling him that our  
17 contract did, in fact, have a Government  
18 delay-of-work clause in our contract, so when people  
19 were saying to me, "We cannot go over the contract  
20 price," my argument, of course, was that, "Well,  
21 they should not do anything to increase the contract  
22 price by delaying the contract, because specifically  
23 it says that they can increase the contract if an  
24 act of the Government increases the contract."

1                   Therefore, I was looking at that clause  
2           in my contract for them to live up to it. Of  
3           course, they were saying they had done nothing  
4           wrong. I'm saying that the DAR deviation was never  
5           necessary in the first place, and it proves it now  
6           that the Pentagon has spoken.

7                   So I wanted an adjustment to the  
8           contract, as well as I wanted to be maintained in  
9           the Industrial Preparedness Program because they  
10          were saying to me that there's only going to be  
11          three people in it. Well, unless I heard CINPAC was  
12          leaving town or that CINPAC's contract was going to  
13          be taken from them and they was going to be put out  
14          of business, then I still was on a mission to bump  
15          CINPAC.

16                   I wanted them to know that the PCO Frank  
17          Bankoff, I believe, had erred in allowing them in  
18          the program without being a Walsh-Healy manufacturer  
19          and that he had erred in the provisions of the  
20          justification for authority to negotiate; that they  
21          did not have a 3-million-cubic-foot plant; nor did  
22          they have 150,000-square-foot contiguous plant.

23                   So I was really going to town on this  
24          CINPAC business, and I put it on the table with DLA  
25          Headquarters.

1           Q       Was there other relief that you, on your  
2           behalf, and Mr. Francois and Mr. Lambert sought in  
3           negotiations with DLA?

4           A       Yes.

5           Q       Could you describe that?

6           A       I was specifically concerned about those  
7           40,000 or 50,000 cases that was produced in the  
8           early time frame. I didn't know what to do with  
9           those cases. Once it's packed up and sealed up, in  
10          order to open them back up, I have to destroy the  
11          material. I have to tear open the cases; I have to  
12          cut open the bags. All that's money. Who is going  
13          to pay for all this manpower, this labor and  
14          everything to this nonconforming product as a result  
15          of lack of Government inspection?

16                 So that was an issue that I wanted, and  
17          I needed somebody to show me what do I do, how do I  
18          do it, because I just didn't know what to do.

19                 Yes, I could go and start all over from  
20          scratch, tear everything down, but that's not  
21          considered rework, okay, when they were saying to  
22          me, "Rework those cases."

23                 "Okay, if somebody will show me just how  
24          to do that, I'll do it." Without it, the only way I  
25          knew how to do it was to tear those cases down, take

1 all the components back, separate them, sort them,  
2 put them back, reinspect them and start all over  
3 again.

4 Q Did Freedom seek any relief relating to  
5 the SBA?

6 A Yes. We had basically wanted the  
7 Government, since they had novated the Government  
8 from Freedom Industries, which was an approved 8A  
9 contractor, we wanted the Government to make  
10 Freedom, N.Y., or give us some contracts to the SBA  
11 for Freedom, N.Y., so that we could become an SBA  
12 contractor, because Freedom Industries, we felt --  
13 and it was always my feeling -- we were right for  
14 the SBA Program.

15 We were in the SBA Program as an 8A  
16 contractor; that the novation took the contract away  
17 from Freedom Industries. Thus, Freedom Industries  
18 was sitting there with nothing. It didn't have a  
19 home anymore. It didn't have a lease. They had no  
20 contract. It was just a bad scene at the SBA. So I  
21 wanted them to support the application of Freedom,  
22 N.Y., to become a SBA 8A contractor.

23 Q Finally, did Freedom seek any relief  
24 relating to the guaranteed loan?



1           A       Yes. What had happened was, Mr. Lambert  
2           and Col. Francois came back and said, "The  
3           Government says they cannot go over the contract  
4           price. They're willing to reinstate the 114,000;  
5           they're willing to give you back the \$200,000;  
6           they're willing to include you in MRE-7. By the  
7           way, they're already coming out with a modification  
8           to the MRE-7 where they're going to have four  
9           contractors so you're included."

10                   I said, "Okay. Now that I'm included in  
11           MRE-7, I've got to get this contract adjusted or  
12           something. If they can't go over the contract  
13           price, tell me what do they suggest I do."

14                   "Well, how about a guaranteed loan?"

15                   Well, after I thought about it, I says,  
16           "Well, that means that if I take a guaranteed loan,  
17           that means I've got to work in out years to pay it  
18           back."

19                   "Yes. But guess what? You'll be in  
20           business."

21                   "Well, okay. If somebody screwed up at  
22           the Department of Defense and did something wrong,  
23           then I'll just have to think about that and let me  
24           do it."

1                   So I called up Randy Gross at Bankers  
2                   and said, "Randy, the only way we're going to get  
3                   out of this thing is that the Government is offering  
4                   to do a guaranteed loan. If you'll come up with the  
5                   \$2.7 million in losses, I can see how I can go past  
6                   the next progress payment."

7                   Since I was already at \$16 million in  
8                   incurred costs, or close to \$15 million in incurred  
9                   costs, it only took one more month before I hit the  
10                  magic \$17 million. So the Government had me where I  
11                  was at \$13 million in a contract. My accounting  
12                  books, I had already incurred over \$15 million.

13                  "What do we do, Randy?"

14                  "Well", he says, "if we can get some  
15                  assurances that the Government is, in fact, going to  
16                  give the guaranteed loan -- you've already got your  
17                  documentation that the Government has increased  
18                  MRE-7 to four contractors -- get me some assurance;  
19                  and what I'll do is, I'll go along with the  
20                  guaranteed loan if you're willing to work in out  
21                  years."

22                  I told him I didn't have any choice. So  
23                  basically we decided to tell them, "Let's get this  
24                  confirmed," and "How was it going to be?"

1           Q     Let me go back before we go on to that.  
2     You   described   what   Freedom   sought   in   the  
3     negotiations with DLA.   Can you describe what the  
4     Government sought?

5           A     The Government wanted a release of all  
6     claims if they was to go forward with giving us the  
7     original \$522,000 of expensed, specialized equipment  
8     costs, okay, basically.   So they was going to give  
9     us   that.     They   were   also   going   to   help   us  
10    technically with the 50,000 cases:   send somebody  
11   down from Nadick Labs to work with us to figure out  
12   how to rework those cases.

13          Q     Again, all I want to know is what the  
14   Government was seeking at that time.   You described  
15   a release of all claims.

16          A     Right.

17          Q     Was that the extent of it?

18          A     Well, I know they wanted a release of  
19   the claims.

20          Q     And that was in relation to the \$3.4  
21   million claim you had filed.

22          A     Yes.   So as long as we had agreed that  
23   they were going to put me and keep me in business  
24   and maintain me in the future, and when this deal  
25   was originally talked about, I said to them that the

1 Government had only put out an amendment that they  
2 were thinking about going to four.

3 So Dave Lambert and Col. Francois came  
4 back a little later and says, "Well, the  
5 solicitation is going to be issued very shortly.  
6 It's going to have four. That's final and that's  
7 the solicitation. So once the solicitation comes  
8 out, there's no such thing as they're going to  
9 switch up and say that they're going to go back to  
10 three."

11 So "Okay," I says. "Once the  
12 solicitation is issued, then I'll know that's for  
13 real."

14 Q Well, what happened in April, 1986, with  
15 respect to the MRE-7 contract?

16 A In April, the Government did in fact --  
17 I believe it was April 17. I think it was, or May.  
18 Sometime in April or May, they came out with the  
19 solicitation. It did have an increase from three  
20 contractors to four.

21 Dave Lambert called me up and told me  
22 that the Government had officially acknowledged that  
23 they're going to keep me in business; they're going  
24 to keep me in the Industrial Preparedness Program;  
25 and that I just don't have to worry about the CINPAC

1 issue anymore; and that he had reached an agreement  
2 with the Government for a guaranteed loan. He had  
3 also reached an agreement with Bankers Leasing that  
4 Bankers would put in a \$2.7 million request to the  
5 Federal Reserve Bank and that the Government would  
6 process that loan real quick and fast.

7 Q Can you describe, in this late  
8 April/early May time frame, what was the financial  
9 status and condition of Freedom?

10 JUDGE GROSSBAUM: We have to take time  
11 out. There will be a ten-minute recess. We will be  
12 back at 5:00 p.m.

13 (Whereupon, a short recess was taken.)

14 JUDGE GROSSBAUM: This hearing will come  
15 to order.

16 FURTHER DIRECT EXAMINATION

17 BY MR. DETHERAGE:

18 Q Mr. Thomas, I would like to take you  
19 back for a moment to Progress Payment Nos. 14 and  
20 15. Can you describe what was happening in the  
21 April/May time period with Progress Payment Nos. 14  
22 and 15 in terms of what you requested and what you  
23 were paid?

24 A In that particular time frame, we had  
25 requested \$2.1 million. Unfortunately, we were only

1       paid \$1.1 million, which is just about a \$1 million  
2       shortfall.

3               Q       That is on Progress Payment No. 14?

4               A       Yeah, that's on Progress Payment No. 14.

5               Q       How about on Progress Payment No. 15?

6               A       On Progress Payment No. 15, we were just  
7       about -- we were at \$791,000. We got \$615,000.  
8       That's just about a ninety-some odd thousand dollars  
9       shortfall or close to \$100,000 shortfall.

10              Q       Mr. Thomas, these shortfalls occurred  
11       during the time that you were still negotiating with  
12       DLA; is that correct?

13              A       Yes. Yes, they were.

14              Q       Can you describe in this late  
15       April/early May time period, as these negotiations  
16       were going on -- you have already described what was  
17       happening with the progress payments. Can you  
18       describe for us now what the financial condition of  
19       Freedom was in light of everything that had  
20       happened?

21              A       We were in a real end-of-the-plank type  
22       of situation. Our bank was at -- and I need to say  
23       that we were at just about the top of the contract  
24       as far as the contract that we were looking at,  
25       because we believed that we had conformed to the

1 Mod. 20 specification as you adjusted for the Zyglo  
2 AVI shut-down, okay? If you adjust for that, we  
3 felt that we had met it; so therefore the Government  
4 would be giving us back \$17 million.

5 If the Government did not give us back  
6 the 114,000 and we was left at the \$13.8 million,  
7 then we had a ceiling problem. The bank is saying  
8 that we need to get this corrected and fixed so that  
9 the banker can advance more money. He's perfectly  
10 willing to advance monies, but he wants this  
11 contract conformed.

12 We want to also get -- how do we go to  
13 the next step, because if you really notice in that  
14 time frame, my next progress payment on May 9 is for  
15 \$2.9 million; almost \$3 million.

16 With that sitting there, and we've  
17 reached an agreement with the Government as far as  
18 Dave Lambert and Col. Francois had reached an  
19 agreement up at higher headquarters, DLA, and that  
20 the fact of the matter that they have included four  
21 contractors in the MRE Program, and that there's  
22 this understanding that we're going to get the  
23 guaranteed loan, everything started looking rosy;  
24 and the Government had basically agreed to give back  
25 the 114,000 cases.

1 All I really wanted now was definite  
2 verification that this was going to happen. You  
3 know, I stalled doing anything on signing the  
4 modification until more verification actually came.

5 Q What was your perspective, at this time  
6 period, as to what would happen if you did not get  
7 the MRE-7 contract and/or a guaranteed loan?

8 A Without an MRE-7 contract, there was no  
9 use in going forward. I mean, that's the whole  
10 reason why we're here. We're here to mobilize in  
11 the event of war. We're here to be maintained.

12 Just to be going down to finish up and  
13 make a few hundred thousand cases at the price we're  
14 doing it at without developing, and this was going  
15 to be the end of it, then we could end this contract  
16 right now, you know, with the claims that we had  
17 against the Government. But since the Government  
18 wanted us to continue into the program and be a  
19 viable plan producer, then we said, "Okay, fine.  
20 We'll work with you."

21 We extracted from our bank a guarantee  
22 or a letter that said that they would also give us  
23 additional equipment. Around that time frame,  
24 you'll find a letter from Bankers to me, and it was  
25 given to DLA Headquarters, that once this agreement



1 is signed, that Bankers is going to spend at least  
2 another \$200,000 or \$300,000 on Mitsubishi equipment  
3 for retort pouches to give us expanded capability,  
4 as well as some other bottleneck equipment.

5 We found we were having a bottleneck  
6 within our production on the case erector and case  
7 sealer. That was a real bottleneck that we had as a  
8 result of not having the original production  
9 equipment that we had negotiated.

10 Our bank says, "Okay. Since DLA is  
11 showing good faith that they're going to put you in  
12 the program and keep you in the program, this bank  
13 is going to go forward and give you the necessary  
14 money."

15 Randy wrote me the letter, and we made  
16 sure that the Government got a copy of it, that  
17 "We're ready to go and to live up to our side of  
18 this deal."

19 JUDGE GROSSBAUM: Which bank are you  
20 talking about?

21 THE WITNESS: Bankers.

22 JUDGE GROSSBAUM: Bankers Leasing?

23 THE WITNESS: Yes.

24 JUDGE GROSSBAUM: Okay. This is jumping  
25 way ahead, but the Board just has this curiosity

1       that may not even be relevant to the outcome, but  
2       did you ever get this Mitsubishi equipment?

3                   THE WITNESS:   We sure did.

4                   JUDGE GROSSBAUM:   About when did you get  
5       that?

6                   THE WITNESS:   I believe it came in in  
7       June.

8                   JUDGE GROSSBAUM:   June of 1986?

9                   THE WITNESS:       Right.       We got the  
10       Mitsubishi; we got the retorts installed; we got all  
11       kinds of check weighers, automatic check weighers.

12                   JUDGE GROSSBAUM:   How did this equipment  
13       compare to the so-called state-of-the-art equipment  
14       that you had ordered back in 1985 that, for a  
15       variety of reasons, you were unable to acquire?

16                   THE WITNESS:       This    is    the  
17       state-of-the-art retort pouch side of it.  Now this  
18       equipment here is for the food production side.

19                   What I had decided with DPSC to do in  
20       1985, when we didn't get the state-of-the-art  
21       equipment -- that was for the assembly of the  
22       packages in their final cases.  The Mitsubishi  
23       machines sealed up the food itself.  So this was  
24       part of the ongoing Walsh-Healy manufacturing  
25       requirement that one must have in order to be

1 qualified as a Walsh-Healy manufacturer. I had  
2 some, I think, other type of sealing equipment that  
3 was not as state-of-the-art.

4 JUDGE GROSSBAUM: You had referred  
5 earlier, among the state-of-the-art equipment, to  
6 some Doughboy equipment.

7 THE WITNESS: Right.

8 JUDGE GROSSBAUM: Did that relate to the  
9 assembly process?

10 THE WITNESS: Yes. The Doughboys are  
11 for final assembly and sub-assembly.

12 JUDGE GROSSBAUM: Okay. Did you ever  
13 get anything like that?

14 THE WITNESS: No. No, we didn't.

15 JUDGE GROSSBAUM: Please excuse the  
16 interruption. Go ahead.

17 BY MR. DETHERAGE:

18 Q Mr. Thomas, you have referred to an  
19 agreement at various times. I would like you to  
20 describe now what you understood the entire  
21 agreement to be between Freedom, on one hand, and  
22 the Government, on the other hand.

23 A All right. Modification 25, as is being  
24 dubbed, was an agreement where the Government would  
25 include us in the MRE-7 solicitation. They would

1       give us a guaranteed loan. They would give us a  
2       Nadick Labs -- I forgot what they called those  
3       people, but they'd come down and assist us; as well  
4       as we'd get some SBA Traypacks or retort pouches put  
5       under the SBA Program. So they'd give us some  
6       assistance there.

7               In addition to those, the Government was  
8       willing to give back the 114,000 cases; give back  
9       the \$200,000 of what we had to give the Government  
10      as consideration costs.

11             Q       Is that \$200,000 the consideration that  
12      was given for these for the extensions in delivery  
13      schedules that you described back in late summer and  
14      early fall, 1985?

15             A       Yes. That's what that was for.

16             Q       Okay.

17             A       So it was my understanding that the  
18      Government recognized that there was some fault  
19      there as far as the pricing and that we should have  
20      been given some consideration for that, as well as  
21      something else. But for whatever reason, they  
22      claimed they couldn't go above the contract price.  
23      As far as the budget was concerned, they were  
24      willing to give a \$2.7 million guaranteed loan.

1                   So with those things incorporated, okay,  
2           in the understanding that I had, that's when I says,  
3           "Okay, fine. I'm ready to do business." Okay?

4           Q       How did you learn that that was the  
5           agreement, as you understood it?

6           A       Col. Francois, Dave Lambert had  
7           basically written letters early on. Well, I  
8           shouldn't say "written." They had drafted -- Dave  
9           Lambert had drafted the letter for me to send to  
10          Frank Bankoff and then drafted the same letter to go  
11          to Ray Chiesa.

12          Q       All right. Mr. Thomas, I want to refer  
13          you to F-1, Exhibit No. 2.

14          A       All right.

15          Q       Mr. Thomas, can you describe what that  
16          is?

17          A       This is a letter that's checked with my  
18          name at the bottom. This is a copy that I received  
19          from David Lambert to Mr. Chiesa on May 6, where he  
20          gave me an enclosure of the letter that he was  
21          talking about, the draft letter, the Freedom letter,  
22          which would be sent to the contracting officer,  
23          along with the modification with some minor changes  
24          in schedule.

1                   So this is the letter that they were  
2           telling me had been agreed to with Chiesa. They had  
3           worked it up and that Frank Bankoff had been, you  
4           know -- that they understood it had been discussed  
5           with Frank Bankoff.

6           Q       This May 6 letter refers to the Freedom  
7           letter and a draft of the Mod. What was your  
8           understanding of the Freedom letter?

9           A       The Freedom letter was going to contain  
10          the understanding that they had reached up there, as  
11          well as the modification that was prepared down at  
12          DPSC Headquarters.

13          Q       Okay. I want to slow down and be real  
14          specific here. You say that the Freedom letter was  
15          going to contain what understanding?

16          A       Okay. All of the understandings that  
17          was reached upstairs with Mr. Chiesa and Kobeisman,  
18          okay, and they was to be addressed to Frank Bankoff.

19          Q       Is that the MRE-7, the guaranteed loan  
20          and the SBA matters --

21          A       Yes.

22          Q       -- that you described?

23          A       Yes.

24          Q       And what was your understanding was  
25          going to be in the Mod.?

1           A       What was going to be contained in the  
2       Mod. were the various things that the Government had  
3       already put on the table since they already had the  
4       Mod. structure.

5           Q       And are those the matters you described  
6       earlier:    the \$200,000, the \$522,000 in capital  
7       costs and the reinstatement of the 114,000 cases?

8           A       Yes.

9           Q       What happened next?

10          A       What happened next is that we get a  
11       letter back from Mr. -- I think it was Mr. Capellian  
12       [phonetic]. Not a letter, but I understand from Mr.  
13       Lambert that Frank Bankoff's lawyer says that since  
14       it wasn't negotiated with Frank, that it had to be  
15       directed to Mr. Chiesa, with a copy to Frank  
16       Bankoff.

17                    So I then took my letter -- and that's  
18       why you've got it like this; this is my check mark  
19       -- and I had Linda scratch out Frank's name, write  
20       in Mr. Chiesa's name, make the necessary changes  
21       that we was instructed to by Mr. Lambert, and then  
22       we commenced the letter dated May 13 -- there's  
23       another letter here somewhere -- to Mr. Chiesa.

24          Q       I would like you to refer to document  
25       F-1, Exhibit 1.

1           A       Okay.

2           Q       Is that the May 13 letter to Mr. Chiesa  
3       that you just described?

4           A       Yeah, that's the letter with Mr. Chiesa,  
5       and there's a "CC" to Mr. Frank Bankoff, like we  
6       were instructed to do. I just so happens to throw  
7       in Ms. Leftwich as well.

8           Q       Okay. And what did you do with that  
9       letter at the time that you prepared it?

10          A       I signed it and I sent it back to Dave  
11       Lambert, who was going back to see Mr. Chiesa -- for  
12       him to deliver it to Mr. Chiesa. I was going to  
13       deliver one copy to Mr. Bankoff, and I was going to  
14       deliver another copy to Ms. Leftwich at the  
15       Pentagon.

16          Q       Who was Ms. Leftwich?

17          A       Ms. Leftwich was the Director of Small  
18       and Disadvantaged Utilization at the Pentagon. She  
19       was responsible and reported directly to Secretary  
20       Weinberger. She was responsible for the drafting, I  
21       would say, of the D & F that Dr. Wade signed as a  
22       result of what we felt that we had been mistreated  
23       by DPSC in not being awarded any contracts under  
24       MRE-3 and 4.



1                   So Ms. Leftwich was quite concerned, and  
2                   we had kept them abreast of what was going on and  
3                   how we were being treated in our participation in  
4                   the MRE Program. So I wanted them to know, "Okay, I  
5                   struck a deal here. Here it is and I'm going  
6                   forward. I'm not fighting with anybody. If this is  
7                   what they want, I'm ready to do business and go  
8                   forward."

9                   JUDGE GROSSBAUM: Continue.

10                  BY MR. DETHERAGE:

11                  Q       What happened next?

12                  A       Well, right after that, I believe that's  
13                       the time frame when I received a phone call from the  
14                       White House. I think it was from Lt. Col.  
15                       Menarchick.

16                       I had basically talked to a person named  
17                       Cicero Wilson, from the American Enterprise  
18                       Institute, who was developing programs to create  
19                       jobs in the inner cities. This program was one of  
20                       the programs that was basically a Cicero Wilson  
21                       development where, you know, we could show that  
22                       inner-city youth and inner-city people could  
23                       actually participate in military contracts and  
24                       create some jobs.

1                   Cicero -- I told him of my concern about  
2           how the Government had, what I considered, snaked me  
3           out in the past; and I was concerned about verifying  
4           that Mr. Cicero was really going to do what my  
5           people say he was going to do; and I wanted a little  
6           bit more comfort that there's something back there  
7           that was real.

8                   So Cicero, having an entree with the  
9           Vice President's Office, got hold of Lt. Col. Doug  
10          Menarchick and told him the entire story. Lt. Col.  
11          Menarchick called me from the Vice President's  
12          Office, who was dispatched from the military section  
13          of it, and said that he had talked to DLA  
14          Headquarters and that there was a guaranteed loan in  
15          the pipeline coming down the pike for us. He had  
16          just verified that the guaranteed loan was coming  
17          and that I could rest assured that it would be  
18          processed in accordance with the understandings that  
19          my people had reached; that he had just verified it  
20          with DLA Headquarters. So that sounded good to me,  
21          coming from the Vice President's Office, you know.

22                  So I called Randy Gross and told him  
23          that I had just gotten a call from the White House,  
24          from Lt. Col. Menarchick, who confirmed that the  
25          discussions that Mr. Chiesa and Mr. Lambert and Col.

1       Francois had has been confirmed.   It was good as  
2       gold as far as I was concerned.   So all I have to do  
3       now is go and confirm this with the contracting  
4       officer and we'd be okay.

5               So in my travels, I set up an  
6       appointment to see -- went to the Pentagon and  
7       talked with Ms. Leftwich and told her, basically,  
8       "Here's the letter that we've negotiated with the  
9       Government."

10              JUDGE GROSSBAUM:   What was the date of  
11       your meeting with Mr. Leftwich?

12              THE WITNESS:    I can't say for sure  
13       exactly when it was, but it had to be maybe between  
14       the 20th of May and the 29th.   It was right in --

15              JUDGE GROSSBAUM:   It was before you  
16       signed the --

17              THE WITNESS:    Oh, yes.

18              JUDGE GROSSBAUM:   -- the Modification  
19       25?

20              THE WITNESS:    Yes.

21              JUDGE GROSSBAUM:   Okay.

22              THE WITNESS:    So with that confirmation,  
23       I then set up a meeting with Frank Bankoff; told him  
24       I'm coming in; that I needed to get that \$2.9

1 million kicked out of the basket because Mr. Liebman  
2 said he wasn't going to pay anything.

3 BY MR. DETHERAGE:

4 Q Okay. I want to back up on one point.  
5 Before we get beyond the May 20 time frame, what  
6 happened with respect to the MRE-7 solicitation on  
7 May 16, 1986?

8 A It, in fact, did come out in the  
9 solicitation. MRE-7 was sent to us by DPSC, showing  
10 that there was four contractors -- would-be awarded  
11 contracts under MRE-7. So with that confirmation to  
12 me, with the Vice President's Office calling, saying  
13 that the guaranteed loan was, in fact, in place, I  
14 was ready. My banker was satisfied. I knew I was  
15 going to go forward and get another contract -- at  
16 least there's a space open for me to get another  
17 contract. I was ready to go.

18 Q What happened next?

19 A That's when we set up a meeting with  
20 Frank Bankoff on May 29, I believe it was. I  
21 travelled to Philadelphia. I met Col. Francois  
22 there. He met me there.

23 We went into a conference room with the  
24 PCO Frank Bankoff; and I told him pointblank that,  
25 "Here's my understanding." Since he had bumped this

1 thing upstairs to higher headquarters for  
2 resolution, here comes the resolution; that I was  
3 satisfied with, you know, the deal. I mean, at  
4 least I know -- he had already increased the  
5 contract. I just asked him if he did. He says,  
6 "Yes. It's in the solicitation." So since he had  
7 increased it to four contractors, I was satisfied  
8 with that.

9 I asked him about the guaranteed loan.  
10 He says he understands that that's going to be  
11 handled up at DLA Headquarters. Col. Francois went  
12 to talking to him.

13 I had pulled out a copy of the May 13  
14 letter that I had with me.

15 Q Is that Exhibit F-1, page 1?

16 A No. The one that I had with me was  
17 dated May 25, that I had printed. In other words, I  
18 had a new word processor that automatically inserts  
19 a new date anytime you go to print it out. The  
20 girls were using this new function. So when I told  
21 them to print me a copy of the letter for me to go  
22 down to DPSC, I think it was dated May 25 or  
23 something like that. I never noticed a change of  
24 date.

1                   So when I finally got down there, Col.  
2           Francois says, "That's not it. I don't know about a  
3           May 25 letter. It's a May 13 letter."

4                   So we took the May 25 letter away from  
5           the modification; and we stapled the May 13 letter,  
6           the one that actually went to Mr. Chiesa, to the  
7           modification.

8                   What I said was that, "This is my  
9           understanding of the modification. If this is not  
10          your understanding of the modification, then there's  
11          no deal. But if there is, then we've got a deal.  
12          Let's go. Because these two documents are attached.  
13          They're one document as far as I'm concerned. If  
14          you've got a problem with it, then say something.  
15          If not, let's go."

16                  Mr. Bankoff advised me that he'd be  
17          right back. He left the room and said he had to go  
18          fax this thing off to DLA Headquarters, which he  
19          did.

20                  I subsequently got a copy of that fax  
21          dated that same date, around 10:59, from Bob  
22          Appellian to Ed Neal, with the May 13 document  
23          attached to it, going to DLA Headquarters, just like  
24          he said he was going to do.

1                   So when he came back in the room -- he  
2                   left for about a half hour or so -- when he came  
3                   back, him and I then signed the Mod., with it  
4                   attached to this May 13 letter. So that was my  
5                   understanding of what the deal was, and we kept on  
6                   going.

7                   JUDGE GROSSBAUM: Did Mr. Bankoff say  
8                   anything to you after he came back a half hour  
9                   later?

10                  THE WITNESS: No, other than he had sent  
11                  it up to DLA Headquarters. He sent it on up there.  
12                  It was a confirming letter of our understanding.

13                  JUDGE GROSSBAUM: Had that letter ever  
14                  been previously sent to DLA Headquarters?

15                  THE WITNESS: As far as I --

16                  JUDGE GROSSBAUM: F-1, Exhibit 1, the  
17                  May 13 letter.

18                  THE WITNESS: I had sent that letter to  
19                  Mr. Lambert to be delivered to Mr. Chiesa. The only  
20                  one I know about is the letter from -- that earlier  
21                  letter that we pulled back, where Mr. Kobeisman --  
22                  I'm sorry, Mr. Appellian said that we should send it  
23                  instead of to -- it's the same letter, in other  
24                  words, that was sent to Mr. Chiesa on, I think, May  
25                  2. I don't have it. But anyway, it's the same

1 identical letter, except instead of being addressed  
2 to Frank Bankoff, it's addressed to Mr. Chiesa.

3 JUDGE GROSSBAUM: This is the letter  
4 that you testified about that shows a "CC" to Mr.  
5 Bankoff and Ms. Leftwich?

6 THE WITNESS: Yes.

7 JUDGE GROSSBAUM: And who actually  
8 transmitted this letter, the copies, to Mr. Bankoff  
9 and Ms. Leftwich?

10 THE WITNESS: I took it to them both. I  
11 took it and put it in his hand, and took it and put  
12 it in her hand.

13 JUDGE GROSSBAUM: On the 13th? Ms.  
14 Leftwich is in Washington --

15 THE WITNESS: Right.

16 JUDGE GROSSBAUM: -- is that correct?  
17 Mr. Bankoff was in Philadelphia?

18 THE WITNESS: Right.

19 JUDGE GROSSBAUM: Were you in both  
20 cities on the 13th of May?

21 THE WITNESS: No, no. I didn't get to  
22 Frank Bankoff with this May 13 letter until I went  
23 to see him on the 29th of May, when we signed the  
24 Mod.



1 JUDGE GROSSBAUM: Okay. So although he  
2 was "CCed" on the May 13 letter to Mr. Chiesa, that  
3 letter was not actually transmitted to him at the  
4 time?

5 THE WITNESS: No.

6 JUDGE GROSSBAUM: But on May 13, where  
7 were you?

8 THE WITNESS: I was in New York.

9 JUDGE GROSSBAUM: How did you happen to  
10 carry the May 13 letter to Ms. Leftwich, who is also  
11 "CCed" on the letter?

12 THE WITNESS: I set up an appointment  
13 with her, and I think I went down there around the  
14 20th.

15 JUDGE GROSSBAUM: So although the letter  
16 purports to be dated the 13th of May --

17 THE WITNESS: Right.

18 JUDGE GROSSBAUM: -- it purports to have  
19 been transmitted to Mr. Chiesa on the 13th of May,  
20 and shows "CCs" for Mr. Bankoff and Ms. Leftwich,  
21 the letter was, in fact, not mailed to Mr. Chiesa;  
22 and the "CC" copies were not, in fact, mailed to Ms.  
23 Leftwich and Mr. Bankoff. Is that correct?

24 THE WITNESS: Not on the 13th; no.

1 JUDGE GROSSBAUM: Were they mailed to  
2 them on any date?

3 THE WITNESS: No. They wasn't mailed.  
4 I hand-delivered them to them.

5 JUDGE GROSSBAUM: And the May 13 letter  
6 was never mailed to Mr. Chiesa.

7 THE WITNESS: I can't say that.

8 JUDGE GROSSBAUM: You do not know.

9 THE WITNESS: No. I was told to give it  
10 back to Mr. Lambert so he could take it over to him.

11 JUDGE GROSSBAUM: And as far as you know  
12 -- you had signed the letter on the 13th of May.

13 THE WITNESS: Yes, I did.

14 JUDGE GROSSBAUM: Okay. And as far as  
15 you know, Freedom never mailed that letter out to  
16 anybody.

17 THE WITNESS: No. But I did mail the --  
18 no, not that letter.

19 JUDGE GROSSBAUM: And you do not know  
20 whether or not Mr. Lambert ever mailed the "CC"  
21 copies.

22 THE WITNESS: I don't know if he mailed  
23 it, but I understood he had a meeting with them and  
24 gave it to them -- is my understanding.

1 JUDGE GROSSBAUM: When you say "them,"  
2 the addressee is Mr. Chiesa; a "CC" is Ms. Leftwich  
3 and another "CC" is Mr. Bankoff. Who is the "them"  
4 that he gave this letter to?

5 THE WITNESS: Mr. Lambert would have  
6 given it to Mr. Chiesa and, say, Mr. Kobeisman. You  
7 know, that's when I said Chiesa and them.

8 JUDGE GROSSBAUM: And he would have  
9 hand-carried it.

10 THE WITNESS: Yes. Those were my  
11 instructions, when he told me to change it and to  
12 get it down to him so he could take it back into a  
13 meeting with them and he'd give it to him. So I  
14 said fine.

15 JUDGE GROSSBAUM: Please excuse the  
16 interruption. Go ahead.

17 FURTHER DIRECT EXAMINATION

18 BY MR. DETHERAGE:

19 Q Mr. Thomas, I would like to now turn to  
20 the June/July time period, after the modification  
21 was signed.

22 A Okay.

23 JUDGE GROSSBAUM: I just want to  
24 understand two things about the modification. You  
25 personally, apart from you having signed the letter,

1 the letter that was first dated May 2 and addressed  
2 to Mr. Bankoff --

3 THE WITNESS: Right.

4 JUDGE GROSSBAUM: -- which is Exhibit 2,  
5 F-1 --

6 THE WITNESS: Right.

7 JUDGE GROSSBAUM: -- that was not  
8 prepared by you. There were some hand markings on  
9 it, but the draft of the letter itself was not  
10 prepared by you.

11 THE WITNESS: No. The drafting of the  
12 letter was not.

13 JUDGE GROSSBAUM: Okay. The same is  
14 true for the letter of May 13 that is F-1, Exhibit  
15 1. Is that correct?

16 THE WITNESS: Right. That was prepared  
17 by Mr. Lambert.

18 JUDGE GROSSBAUM: Okay. So you  
19 explained earlier that because it was felt -- I do  
20 not know if you felt this, but it was felt that you  
21 had an emotional connection with the events that  
22 were transpiring or unfolding; that it would be best  
23 that you not deal directly with DLA Headquarters.  
24 Is that correct?

25 THE WITNESS: Yes.

1 JUDGE GROSSBAUM: Okay. Therefore,  
2 whatever agreement is reflected in either the May 2  
3 draft letter or the May 13 letter is not an  
4 agreement to which you personally were a party. Is  
5 that correct?

6 THE WITNESS: No. I was not a party to  
7 those discussions.

8 JUDGE GROSSBAUM: I mean, you did not  
9 hear Mr. Chiesa make any of the promises that are  
10 alluded to in the May 13 letter.

11 THE WITNESS: No, I didn't hear them. I  
12 only verified it through the Vice President's  
13 Office. That's all I did. I mean, as far as I'm  
14 concerned, I had a third party who I thought was  
15 reliable check it out. But I did mail the May 2  
16 letter to Mr. Bankoff.

17 JUDGE GROSSBAUM: Okay.

18 THE WITNESS: It did get mailed to him.

19 JUDGE GROSSBAUM: Had you previously  
20 known this Lt. Col. Menarchick?

21 THE WITNESS: No.

22 JUDGE GROSSBAUM: Excuse the  
23 interruption. Go ahead.

24 BY MR. DETHERAGE:

1           Q     Mr. Thomas, I would like to go to the  
2     June/July time period, after the modification was  
3     signed. What happened on July 1, 1986, with respect  
4     to the MRE-7 solicitation?

5           A     I believe that that's the time when we  
6     found out that DPSC had all of a sudden lowered the  
7     MREs from four contractors back to three.

8           Q     And in this same time period, what  
9     happened with respect to your payment on Progress  
10    Payment No. 16, which I believe had been submitted  
11    before the modification and paid sometime after?

12          A     Yeah. What happened was, we needed that  
13    money desperately at Mod. 25. We needed it. Our  
14    back was against the wall. We looked like we were  
15    shorted. We were shorted quite a bit of money  
16    there.

17          Q     Well over a million dollars?

18          A     I'd say well over a million:     \$1.7  
19    million; yeah.

20          Q     And when was that payment made?

21          A     June 18, 1986.

22          Q     Did you have any understanding as to why  
23    Mr. Liebman had "shorted," to use your words, you on  
24    that progress payment?

1           A       No. I can't recall right this moment  
2       what it was, but it looked like the pattern was the  
3       same. Even though we had just reached an agreement,  
4       he just didn't change.

5           Q       What was your understanding as to  
6       whether he was applying some type of loss ratio  
7       during this time period to your progress-payment  
8       request?

9           A       Well, I believe he might have been  
10      applying it as long as we were at the \$13.8 million  
11      level. But once we rose to the \$17 million or \$16.8  
12      million back and they added those cases back, you  
13      know, that's not a loss.

14                    So therefore, what we did was we sent  
15      him an invoice saying that, "Okay. Over the last --  
16      from Progress Payment, say, Nos. 12, 13 and 14, you  
17      cut us so much money in this loss that you was  
18      applying. Now that the contract has been  
19      readjusted, give us back all the money that you  
20      withheld." So we sent him an invoice, and I don't  
21      believe he ever addressed it. He just avoided it.

22           Q       You described the increase in the  
23      contract price. That was a result of the --

1           A       The add-back of the 114,000 cases; the  
2       increase to the 200,000 consideration that was being  
3       given back.

4           Q       What about the progress-payment ceiling?  
5       How was that affected?

6           A       I believe the progress-payment ceiling  
7       was either at \$13 million, or it might have been  
8       slightly a bit raised by that time.

9           Q       How was it affected by the increase in  
10      the contract price?

11          A       The ceiling?

12          Q       Yes.

13          A       Well, what it would do was allow us --  
14      it would give more money to the contract so that we  
15      could now get -- Mr. Liebman could give us some of  
16      the progress payments without fear of bumping into a  
17      purported ceiling.

18          Q       Did that progress-payment ceiling cause  
19      any problems?

20          A       Oh, yes. Oh, yes. We thought that by  
21      signing the Mod. 25, that that was going to end the  
22      issue and that all we had to do was show a cash  
23      flow.

24                   I had said to the Government that it was  
25      my understanding of Clause L-4 that the only



1 restriction was that if I showed the Government a  
2 cash flow, that we needed money above and beyond the  
3 ceiling; that the Government had to give it to me.

4 This was discussed with the Government  
5 back in 1985, where they agreed with me that the  
6 ceiling itself that contained -- or the language of  
7 L-4 contained no language that allowed the ACO or  
8 the PCO to deny progress payments. All the  
9 requirement was that if the contractor needed it and  
10 showed a cash flow, that the Government would give  
11 it to us.

12 So therefore, when they started applying  
13 this ceiling again, I started telling them that they  
14 can't do that. But they did it anyway.

15 Q You referred to this ability to request  
16 a change in the ceiling by submitting cash flow  
17 information. Where did you come up with that?

18 A Well, basically, if you look at the DAR  
19 regulations, DAR 7 104.35B, it allows for progress  
20 payments to be billed up to 95 percent of the entire  
21 contract. So on a \$17 million contract, we could  
22 really go up to \$16 million and change -- \$16.8  
23 million or 16 and change. So that's the only limit  
24 that the DAR regulation places on us.

1 JUDGE GROSSBAUM: You mean the clause in  
2 the contract.

3 THE WITNESS: Say it again?

4 JUDGE GROSSBAUM: The clause in the  
5 contract.

6 THE WITNESS: Yeah. The DAR clause;  
7 right. The DAR clause let us go all the way up to  
8 the full \$16 million, okay, in progress payments.  
9 So there's no limitations.

10 JUDGE GROSSBAUM: Is there any right to  
11 question whether or not you should get paid, or is  
12 this some kind of an absolute right that a  
13 contractor has to go up to the 16 and a fraction?

14 THE WITNESS: No. If the costs are  
15 allowable, allowable to the contract, incurred under  
16 the contract, then I believe that's the right of the  
17 regulation that the contractor should get that. Of  
18 course, if there's a problem --

19 JUDGE GROSSBAUM: What if you are not  
20 paying costs or performance in the ordinary course  
21 of business, even if you have booked these costs?

22 THE WITNESS: Okay. If you've booked  
23 these costs and you're not paying, and you had the  
24 money to pay, then that would be probably a reason.  
25 But if you haven't gotten the costs and the

1 Government is behind, say, \$5 million, and then  
2 trying to force you to pay costs in a normal course  
3 of business when they, themselves, are not paying  
4 costs in the normal course of business, it creates a  
5 standard for us that they, themselves, are not  
6 living up to.

7 So if the Government had given me the  
8 full 95 percent of my money that I requested, and  
9 then turned around and said, "Henry, you're not  
10 paying the 95 percent to the contractors," I think  
11 they'd have a right to jump on me.

12 But if they say, "You've incurred \$15  
13 million. We've given you \$10 million, but we want  
14 you to pay the full \$15 million, Mr. Thomas," then  
15 what they're in effect doing is making me a large  
16 business. That means that based on incurred costs,  
17 I get paid based on paid costs. So we're not  
18 getting reimbursed based on costs that's paid; we're  
19 getting reimbursed based on costs that are incurred.

20

21 So since the Government was not giving  
22 us -- or holding back, say, close to over \$5 million  
23 at this time, if there was a cumed figure on that  
24 chart, we'd see, at Mod. 25, I had incurred maybe  
25 \$15 million. The Government had only paid about \$10

1 million. There was a \$5 million spread. So to  
2 force me to make payments on money that I had not  
3 received is not right; is not fair to me.

4 JUDGE GROSSBAUM: Continue.

5 BY MR. DETHERAGE:

6 Q Mr. Thomas, you mentioned again a  
7 reference to an ability to seek an increase in the  
8 progress-payment ceiling by providing a cash flow  
9 analysis. I would like you to take a look at  
10 Government Tab 2, page 66 of 96 of the solicitation.

11 A I've got it.

12 Q Now I would specifically like you to  
13 refer to the L-4 clause.

14 A In Government Tab 2?

15 Q Yes. Page 66 of 96 of the solicitation.

16 A Okay.

17 Q Is there language in the L-4 clause, as  
18 you understood it, that made it possible for you,  
19 with a cash flow analysis, to request an increase in  
20 the progress-payment ceiling?

21 A Yes, it is.

22 Q Can you describe it?

23 A Yes. Basically, it says that, "Requests  
24 for increases beyond this 50 percent ceiling rate  
25 must be accompanied by a cash flow analysis,

1 detailing the necessity of the increase by showing  
2 the impact on progress payments on operations over  
3 and above the impact on profit."

4           It goes on to say further, "Increases to  
5 this ceiling must be accompanied by a cash flow  
6 analysis..." again it says the same thing, "...  
7 detailing impact over and above that on profit, as  
8 noted previously." Also, "Requests for increases  
9 for long lead time, materials, must also be  
10 accompanied by a similar cash flow statement."

11           Q     Mr. Thomas, you had described that you  
12 had, I believe, a problem with the ceiling. Did you  
13 request relief during the June/July time period from  
14 Mr. Bankoff with respect to the progress-payment  
15 ceiling?

16           A     Yes, we did.

17           Q     And what was his response?

18           A     Mr. Bankoff basically says, "Okay.  
19 We'll do that, but we're going to have to tie this  
20 to cases delivered."

21                 Of course, I said, "Well, ours is  
22 incurred costs; not cases delivered." I think he  
23 wrote me back a letter saying something like, "Thank  
24 you for your comments, but here's what we're going  
25 to do." He tied it to cases.

1           I looked at that as being, "Well, even  
2       though it's not what I want, if I deliver these  
3       cases, that means that Mr. Liebman has to pay. So  
4       if I deliver 470,000, I've got the Government with  
5       us, and they're going to give me this much money.  
6       So all I've got to do is get to 470,000. I've got  
7       the money. It's in the modification. So it's not  
8       what I want, but at least now I've got the  
9       Government by the toe." Okay? "Now they've got to  
10      hup to when I do this."

11           Q       Okay. Before we get to Modification 28,  
12      which I believe you were referring to, can you  
13      describe what happened with respect to Progress  
14      Payment No. 17?

15           A       Progress Payment No. 17: we put in a  
16      request for \$3.8 million. The Government gave us  
17      \$1.3 million. Now I must say to you that these \$2.9  
18      million, the \$3.8 million, is really nothing new.  
19      In other words, we're already at the \$17 million  
20      level, the \$17 million mark on progress payments.

21                    If you look at the progress-payment  
22      requests, you'll see that they constantly stop at  
23      17, and all we're doing is resubmitting  
24      progress-payment requests from the prior Mod. 25  
25      days. We're not increasing or including, basically,

1       any of the out months. We're still trying to recoup  
2       the \$5 million we're behind. So we're giving him  
3       his choice of what he wants to pay. They're all  
4       incurred costs. They're all, at this point, meeting  
5       certain criteria; so we're just basically  
6       resubmitting them.

7               Q       What happened with production during the  
8       June and July time period?

9               A       I believe that production was constantly  
10       booming. All of a sudden we experienced our first  
11       outage of GFM that caused a plant shut-down during  
12       that time frame.

13              Q       Approximately when was that?

14              A       I believe it was sometime in July. I'm  
15       not quite sure exactly what day it was at this  
16       point, but it was sometime -- I believe it was in  
17       July. We had notified the Government that we were  
18       running close out of, I think it was, GFM jelly or  
19       something. It might have been another product.

20              Q       So what happened as a result of that GFM  
21       shortage? You shut down the plant. What happened  
22       then?

23              A       Okay. Once we shut down the plant, we  
24       basically got into a discussion with Mr. Bankoff  
25       over notification and what happened to the jelly.

1       What actually started happening was that the jellies  
2       and the GFM that we had shipped out into the 114,000  
3       cases early on in early '86 was now coming back to  
4       haunt us. The Government had increased our contract  
5       price by 114,000 cases in May, but they had never  
6       shipped me any GFM to support those 114,000 cases.

7               Q       Did you receive a cure notice sometime  
8       in July regarding your compliance with the delivery  
9       schedule?

10              A       I believe it was an anticipatory cure  
11       notice that we were going to not make a delivery  
12       schedule sometime in the future as a result. That's  
13       what I believe it was.

14                      That's when we had the discussion with  
15       Mr. Bankoff on this, and he agreed that there was  
16       some liability of the Government on GFM and he would  
17       allow us so much time to extend the contract. But  
18       what he would not do is give us any money as a  
19       result of the overhead and G & A that was caused by  
20       the extension of this lack of jellies.

21              Q       Mr. Thomas, at this point in time, how  
22       many months had you been performing the contract?

23              A       I would say this may be month -- I'm not  
24       for sure, but it might be month 18 or 19 maybe;  
25       month 20 of the contract of a 14-month contract.



1           Q       What was the effect of the additional  
2       four or five or six months that you had been under  
3       the contract at this point longer than what was  
4       anticipated?

5           A       Well, the total effect was that this was  
6       a real disaster from a budgeting standpoint. We had  
7       budgeted a 14-month contract. We'd budgeted, say,  
8       \$1.2 million of \$1.3 million in rent, so much in all  
9       these budgets; and what we were now doing is blowing  
10      these budgets right out of the water because we  
11      still have only one contract.

12                 The impact of lack of award of MRE-6  
13      really, really hurt. So if we had a backup  
14      contract, we would have sort of spread the case cost  
15      or this cost overrun over something else, but we  
16      didn't have that luxury to do that. We were stuck  
17      with putting all costs on this one little contract  
18      and trying to make this one contract carry this  
19      weight.

20           Q       Were you continuing to produce cases in  
21      June and July?

22           A       Oh, yes. We didn't stop. We were going  
23      right along, even though we wasn't getting the money  
24      that we requested. But we was knocking them out.

1           Q     Can you describe just generally the  
2     production level as compared to prior periods?

3           A     I would say the production level was  
4     leveling off at 3,000, 4,000 cases. I think we  
5     either --

6           Q     Three to four thousand cases --

7           A     A day; 3,000 to 4,000 cases a day. We  
8     had reached the maximum output of those machines  
9     that we had, the 552 band sealers and the box sealer  
10    and what have you. Since we didn't have the  
11    state-of-the-art high-production, high-speed  
12    equipment, we had now maxed out right at about 3,000  
13    to 4,000 cases a day.

14               JUDGE GROSSBAUM: How many day shifts  
15    were you running?

16               THE WITNESS: We were running a long one  
17    shift. We couldn't get AVI to really agree to a  
18    second shift, other than for rework.

19               JUDGE GROSSBAUM: How many days a week  
20    were you operating?

21               THE WITNESS: Five days.

22               BY MR. DETHERAGE:

23           Q     What happened next with respect to Mod.  
24    28 in this GFM shortage?

1           A       Frank Bankoff and I basically -- and Pat  
2       Marra -- had discussions on the impact of this  
3       thing; how it was going to impact on us and how we  
4       were going to get through to the end of the  
5       contract. We needed to be assured that progress  
6       payments would flow.

7                   At this time frame here, sometime in the  
8       July/August time frame, we had another meeting up at  
9       the Office of the Secretary of Defense with Dr.  
10      Wade.

11           Q       What happened at that meeting?

12           A       Well, I was concerned that the  
13       Government had rolled back from four contracts under  
14       MRE-7 to three contracts under MRE-7. I felt  
15       somebody was playing fast and loose with the  
16       Government regulations; and we went up there to see  
17       about the MRE-7 solicitation, why is it rolled back,  
18       and what's going on with the Government loan  
19       application.

20                   You know, we put it in back in May or  
21       June -- May sometime or June/July -- June time  
22       frame, and we wanted to know what was going on.

23                   The meeting was set up. Dr. Wade  
24       received us and said to us that we should not count  
25       on a guaranteed loan; that the Government, that

1       those guys, couldn't support a guaranteed loan; and  
2       that we should do something else other than look for  
3       a guaranteed loan.

4               I was sitting there; my banker was  
5       sitting there; Dave Lambert was sitting there; Ray  
6       Chiesa; Col. Francois -- and that was like news to  
7       us. We said, "Well, what are we going to do?"

8               He said that he would support us on SBA  
9       contracts; that we should continue in the process of  
10      the solicitation of MRE-7; that he understands that  
11      we have a proposal in that's being considered; and  
12      we should march forward toward meeting the goals of  
13      winning that contract. And that's what we set out  
14      to do at that point in time.

15              Q       And what happened next after that  
16      meeting with respect to Mod. 28?

17              A       With respect to Mod. 28, Frank Bankoff  
18      had put up a modification that basically increased  
19      the time frame and allowed us to go out another 10  
20      or 15 days, or whatever the Mod. called for, but he  
21      gave us some more time on it; extended the delivery  
22      schedule.

23              Q       Let me refer you to Government Exhibit  
24      No. 144. See if that refreshes your recollection as

1 to the new delivery schedule provided for in Mod.  
2 28.

3 JUDGE GROSSBAUM: Why do we have to  
4 refresh his recollection? This is a matter of  
5 record.

6 MR. DETHERAGE: Okay.

7 JUDGE GROSSBAUM: There is no dispute  
8 about it.

9 BY MR. DETHERAGE:

10 Q Mr. Thomas, what other provisions were  
11 included in Mod. 28?

12 A That there would be no claim that we  
13 would have against the Government as a result of  
14 lack of Government-furnished material jellies during  
15 the 16, 28 July 1986 time frame. He also included  
16 in here the increase to the \$13 million ceiling,  
17 whereas when we got to 330,000 cases, 410,000 cases,  
18 490,000 cases, it would be, say, \$15 million; and  
19 570,000 cases, the ceiling would be \$15 million  
20 eight. So if we hit those particular milestones,  
21 that the ACO would be paying us.

22 Q What was your understanding, under the  
23 modification, as to what would happen if you had  
24 partial shipments that met part of the deliveries,

1 part of those milestones, but not the entire  
2 milestones?

3 A That the incremental payment would be  
4 allowed by the ACO.

5 Q Who prepared that modification?

6 A Frank Bankoff.

7 Q And was there any provision regarding  
8 any future modifications of the contract?

9 A Yes. It was agreed that no subsequent  
10 modification of this agreement shall be binding  
11 unless reduced to writing and signed by both  
12 parties.

13 Q What was the effect of Mod. 28,  
14 particularly with respect to the progress-payment  
15 ceiling, on delays of shipment of GFM?

16 Let me ask you a better question.

17 A Yeah, okay.

18 Q After you had signed Mod. 28, did  
19 shortages of GFM cause any additional problems?

20 A Yes.

21 Q Okay. Can you describe what those would  
22 be?

23 A We started to experience massive  
24 shortages of GFM. We started reporting this to  
25 Frank Bankoff and DCASMA, New York, but mainly to

1 Frank, and Mr. Ray Troiano was -- we're all  
2 concerned about the lack of GFM that's coming in at  
3 this time. We did have other shut-downs as a result  
4 of no GFM.

5 Q After Mod. 28 went into effect, what was  
6 the effect of the shut-down in terms of the  
7 progress-payments ceiling?

8 A If we shut down the plant, that means  
9 that we could not -- we had ongoing costs still  
10 climbing; fixed costs climbing all over us. We had  
11 no GFM to continue production. We had people that  
12 we couldn't just pay them to stand around, so we  
13 would tell them not to come in or come in in the  
14 morning. We'd pay them for a couple of hours and  
15 ask them to come back the next day; that we expected  
16 the truck to come in. We lost a lot of personnel.

17 We had to start shifting people from  
18 various rooms in the back, pulling them out of  
19 accessories or crackers, to fill in where people  
20 wouldn't show up as a result of them not having a  
21 phone or us not telling them that production was  
22 starting again, or they just walked off and said  
23 they don't need this nonsense. So we was  
24 experiencing all kinds of problems with that lack of  
25 GFM.

1           Q     All right. Now I would like to focus  
2     now, during this August/September 1986 time period,  
3     on the progress payments. What was happening in  
4     terms of payment of progress payments, particularly  
5     Nos. 18 and 19, during this time period?

6           A     Even though we had put in a  
7     progress-payment request on Progress Payment No. 18  
8     for, say, \$3 million -- yeah, \$3.7 million -- the  
9     ACO only paid us \$704,000. The same thing on  
10    Progress Payment No. 19, where he only paid us  
11    \$200,000.

12                Now we had told the Government in  
13    several letters from our financial staff -- Pat  
14    Marra and myself to Frank Bankoff -- that this  
15    contract would become impossible sometime in October  
16    unless Mr. Liebman released those progress payments.

17

18                We could not make it unless the progress  
19    payments were made or a follow-on contract was  
20    awarded. If he awarded a follow-on contract, we'd  
21    instantly finance it. Our bank said it would give  
22    us an additional \$2 million to clean it up and push  
23    everything through, as long as everybody was  
24    comfortable that there was going to be some life  
25    after this contract.



1           Q       Now in this August/September time  
2 period, after Mod. 28 had been signed, you described  
3 some GFM shortages. Can you describe specifically  
4 what kind of shortages you had and what the effect  
5 of those were in terms of production?

6           A       Once again, we started experiencing  
7 either diced beef with gravy or turkey or some  
8 entree that wasn't there; and I had to shut down the  
9 plant, I think it was, October 22 time frame, was  
10 one time.

11          Q       I want to go back to before that, in  
12 August and September.

13          A       All right.

14          Q       Were these shortages of fruit mix and  
15 cream substitute?

16          A       Yes, there was.

17          Q       And how did that effect your production?

18          A       Once again, we had to shut down the  
19 accessory room. We had to shut down production as a  
20 result of not having GFM.

21                 JUDGE GROSSBAUM: Could you explain --  
22 perhaps the Board lacks some understanding or  
23 appreciation as to how the production is affected by  
24 a shortage of one GFM. Why does the whole plant  
25 have to be shut down when there is one or two

1 components, even if it is an entree component, let's  
2 say -- which is jumping ahead to a period that you  
3 are not being asked about. But whether it is the  
4 fruits or whether it is a meat-entree component that  
5 is not being supplied, why can't you go on with  
6 production of other MREs without having to shut down  
7 the whole plant?

8 THE WITNESS: What happens is that the  
9 components is in the menu, and the final case  
10 contains 12 menus. So if one component from one of  
11 those 12 menus is missing, then the case is not  
12 complete.

13 So the same with mobilization. If we  
14 had a million units that we had to knock out in one  
15 month, and the Government only gave us a lacking of,  
16 say, 600,000 units, due to the specification, unless  
17 we get a spec. change, we could only pack the  
18 limited item we have. So if we have a million of  
19 everything else and only 600,000 worth of diced beef  
20 with gravy, then that means that we can only have  
21 600,000 cases.

22 You can't backlog the other 400,000  
23 cases, waiting on one component to come in and just  
24 shove it in there. The way the configuration of the  
25 production was such that as it goes down the line.

1 It has to pick up one of everything. Otherwise,  
2 that's where it stopped at.

3 JUDGE GROSSBAUM: Okay. What you have  
4 just described, though, suppose that you did have a  
5 shortage of one of the components. Are we saying  
6 that we are dealing with a total shortage or just a  
7 shortfall of the quantity of GFM that you are  
8 supposed to get? Let's say it was these fruit  
9 items, or let's say it was, later on, the meat  
10 entrees.

11 THE WITNESS: Those, it was just that we  
12 ran out of them. We didn't have them anymore.  
13 There was none in the plant.

14 JUDGE GROSSBAUM: I see. Once you run  
15 out of them, you have to stop your entire  
16 production.

17 THE WITNESS: Right. And we have to  
18 send the Government a notice of shut down. The  
19 contract requires for us to give them some time  
20 frame of notification that we are running short so  
21 that they can make moves to get the components to us  
22 in a timely fashion, which we did; and it just  
23 didn't happen. The Government didn't get it to us,  
24 and the plant shut down just like we were supposed  
25 to.

1 JUDGE GROSSBAUM: Please continue.

2 BY MR. DETHERAGE:

3 Q Mr. Thomas, did you seek some relief  
4 from the delivery schedule in light of these GFM  
5 shortages that you had incurred during September?

6 A Yes. We went back to Mr. Bankoff again  
7 and let him know that we were again having shortages  
8 that's beyond our fault and that we needed to  
9 basically be given some slack time on getting this  
10 product in. Once again, I believe he may have  
11 complied with it.

12 Q When did these discussions take place?  
13 Was this late September/early October?

14 A Yes. There was ongoing letters.  
15 There's a barrage of letters from Pat Marra and  
16 myself to Frank Bankoff and to Mr. Liebman, letting  
17 them know -- everybody know -- that, one, we need  
18 these progress payments that's not coming; two, our  
19 bank is very concerned about this lack of progress  
20 payments coming in. We've already been told that  
21 there's no guaranteed loan coming down the pike.  
22 MRE-7 had been changed from three back to four.

23 You know, it's like, what's going on  
24 here? What are we doing, and why are we out here  
25 doing this?

1           Q     And     were     these     negotiations     that  
2     ultimately ended up in Mod. 29?

3           A     Yes, in Mod. 29.

4           Q     During this time period, what happened  
5     in late September, 1986, on MRE-7?

6           A     I     believe     that's     when     MRE-7,     the  
7     Government came back and increased it to four  
8     contractors again.     The Government basically was  
9     saying, "Okay, we made a decision.     You're back in."  
10    Well, it's not "you," but, "There's going to be four  
11    contracts awarded, so you don't have to worry."  
12    Okay?

13                   So again I feel comfortable that the  
14    Government is going to maintain us in the MRE  
15    Program.     We believe we've shown them that we can  
16    produce these cases if we're giving the components  
17    and if we're given the money to do it; that our  
18    quality of cases is just as good as anybody else's.  
19

20                   So at that point in time, I believe we  
21    may have also gotten some sort of a resolution that  
22    had come out as well, supporting the fact that there  
23    should be four contractors in the MRE Program.

1           Q       What was the significance to you, at  
2       that specific time period, of the increase of awards  
3       from three to four?

4           A       Well, it let me know that out of four  
5       contractors, prime plan producers in the program,  
6       that all four were now going to be negotiated with  
7       for a contract. Therefore, I felt comfortable; I  
8       felt good. Then let's get on with business and  
9       let's keep going.

10           JUDGE GROSSBAUM:    About how much more  
11       direct do you expect tonight?

12           MR. DETHERAGE:    Probably an hour to an  
13       hour and a half.

14           JUDGE GROSSBAUM:    Why don't we do it  
15       tomorrow?

16           MR. DETHERAGE:    Okay.

17           JUDGE GROSSBAUM:    I have one question  
18       for you. This is in connection with Modifications  
19       28 and 29.

20           THE WITNESS:    Uh-huh.

21           JUDGE GROSSBAUM:    You attribute the need  
22       for the time extensions, particularly in the time of  
23       Modification 28. Your testimony was that your  
24       production was booming before the shortfall of GFM  
25       jelly. Is that correct?

1 THE WITNESS: I believe so.

2 JUDGE GROSSBAUM: Is the Board correct  
3 to understand that you have testified that you had  
4 known all along that the \$27 -- what was it, \$27 and  
5 72 1/2 cents --

6 THE WITNESS: Right.

7 JUDGE GROSSBAUM: -- case price was  
8 predicated on a 14-month contract --

9 THE WITNESS: Right.

10 JUDGE GROSSBAUM: -- and that stretching  
11 the performance period beyond 14 months necessarily  
12 puts you over budget on what you have characterized  
13 as certain variable overhead costs, such as rent --  
14 the Board might not characterize that as variable --  
15 and also salaries for your G & A-type people.

16 THE WITNESS: And manufacturing  
17 overhead; right.

18 JUDGE GROSSBAUM: Okay. And so that  
19 with every time extension, every extension of the  
20 stretch out of the contract period, this is costing  
21 Freedom money. Is that correct?

22 THE WITNESS: That's right.

23 JUDGE GROSSBAUM: Okay. Knowing this,  
24 you agreed, in Mod. 28, even knowing that the  
25 Government was at fault for the delay --

1 THE WITNESS: Uh-huh.

2 JUDGE GROSSBAUM: -- you agreed, in Mod.  
3 28, not to pursue any monetary relief, any equitable  
4 adjustment under the contract; didn't you?

5 THE WITNESS: Yes.

6 JUDGE GROSSBAUM: Okay. And you knew  
7 that every time extension was going to cost Freedom  
8 money.

9 THE WITNESS: Yes, we did.

10 JUDGE GROSSBAUM: Okay. And the same is  
11 true with Mod. 29?

12 THE WITNESS: Yes.

13 JUDGE GROSSBAUM: Okay. We will recess  
14 now, and we will resume at 9:15 a.m. tomorrow. I  
15 want to talk to both counsel.

16 (Whereupon, at 6:10 p.m., the hearing  
17 was recessed, to reconvene on Wednesday, February  
18 17, 1993, at 9:15 a.m.)

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