

Page 1

BEFORE THE  
ARMED SERVICES BOARD OF CONTRACT APPEALS

In the matter of:  
Appeal of: ASBCA No. 43965  
FREEDOM NY, INC.  
Contract No.  
DLA13H-85-C-0591

Kings County Criminal Court Building  
120 Schermerhorn Street  
Brooklyn, New York  
Monday, May 15, 2000  
9:30 a.m.

BEFORE:  
DAVID W. JAMES, Administrative Judge

APPEARANCES:

For the Government:

KATHLEEN HALLAM, ESQ.  
Defense Supply Center Philadelphia  
Defense Logistics Agency  
700 Robbins Avenue  
Philadelphia, PA 19111

For the Appellant:

NORMAN A. STEIGER, ESQ.  
Goldberg & Connolly  
66 North Village Drive  
Rockville Centre, NY 11579

BRUCE LUCHANSKY, ESQ.  
Kellman & Sheehan, P.A.  
Sun Life Building  
20 South Charles Street, 8th Floor  
Baltimore, MD 21201

Page 3

PROCEEDINGS

(9:30 a.m.)

JUDGE JAMES: The hearing will come to order.

This is the time and place set for the Board's notice for the hearing in the appeal of Freedom NY, Inc., under contract number DLA 13H-85-C-0591, docketed as ASBCA number 43965.

The record will show that David W. James, Jr., as duly appointed member of the Board is presiding. I'll ask for appearances. By whom will the Appellant be represented?

MR. STEIGER: The Appellant is represented by Norman A. Steiger, of the firm of Goldberg & Connolly, and Mr. Bruce Luchansky of the firm of Kellman & Sheehan.

JUDGE JAMES: Who will the Government be represented by?

MS. HALLAM: Kathleen Hallam, DSCP.

JUDGE JAMES: All right. The Board acts as a statutorily authorized administrative tribunal to hear and determine appeals by contractors from contracting officer's decisions under the contract disputes clause pursuant to the Contract Disputes Act of 1978.

Since this is an administrative proceeding and we have no jury, the Board does not expect any trivial or technical objections to the evidence offered, or to any

Page 2

INDEX

OPENING STATEMENTS		PAGE	
ON BEHALF OF THE GOVERNMENT		NONE	
ON BEHALF OF THE APPLICANT		18	

  

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
ALAN KOERBER	36	85	97	
PATRICK MARRA	105	148	197	

  

EXHIBITS

Number	Identified	Received
G-1, G-3 through G-95		6
A-1 through A-396, A-398, A-404,		
A-420 through A-447		7
A-448		66

Page 4

other matters at this hearing.

If an objection is made, the moving counsel should state his or her grounds, and the opposing counsel may be asked to reply before a ruling is made.

Oftentimes, testimony in documents will be accepted subject to objection, so that the other judges in my division participating in the decision, may consider the validity of the objection, or as is more usual, consider the objection in determining what weight, if any, should be attached to the evidence.

Smoking, eating and drinking other than water, is not permitted in the hearing room. Counsel should stand or sit, as you prefer while you're interrogating a witness. We will take periodic recesses during the hearing. If for any reason you, a party, believes there's a need for a recess at a particular time, you may request it. If it is at a reasonable time, I will grant it.

The reporter is instructed to interrupt the proceedings if at any time you believe the transcript is going to be unclear. For example, if two or more people are talking at the same time, so that you can get one person talking.

The Board's decision in this appeal will be based on the appeal record, which will include the

1 verbatim transcript of this hearing, the exhibits  
2 received in evidence, and the appeal file, which is here  
3 in the hearing room.

4 The Appellant is going to be given an  
5 opportunity to purchase a copy of this transcript, if you  
6 wish one, from the Court reporter.

7 Now we've got an appeal file, a considerable  
8 appeal file, consisting of the documents submitted by  
9 both the Government and the Appellant throughout the  
10 proceedings. We call these the Rule 4 documents.

11 It is my understanding that the Government has  
12 no objection to any of the Appellant's Rule 4s. Rule 4s  
13 we're talking about now. And the Appellant has no  
14 objection to the Government's Rule 4 documents. Is that  
15 correct?

16 MS. HALLAM: Yes, your Honor.

17 JUDGE JAMES: Furthermore, the Government has  
18 at least 95 proposed trial exhibits, and the Appellant  
19 has some four 477 proposed trial exhibits. We discussed  
20 them before going on the record, I'm going to give a  
21 synopsis of that. Listen carefully to what I'm going to  
22 say, to see if I've erred. If I have, let's correct the  
23 record.

24 What we're going to do is, of the entire  
25 compilation, let's start with the Government Exhibits.

1 I've said?

2 MS. HALLAM: No, your Honor.

3 JUDGE JAMES: All right. Now we've got what,  
4 four 477 Appellant's exhibits? As to those, we have  
5 objections by the Government, to Exhibits 397, 399 to  
6 403, and 405 to 419. I will resolve that objection later  
7 in the hearing, pretty soon. I've got it under  
8 consideration. Those are not in evidence. But the  
9 balance, the balance of the Appellant's exhibits, FT-1  
10 through 396, 398, 404, and 420 through 477.

11 MR. LUCHANSKY: It's actually 447, your Honor.

12 JUDGE JAMES: I'm sorry, 447. My understanding  
13 is that the Government has no objection to those most  
14 recent list that I mentioned. Correct?

15 MS. HALLAM: Correct.

16 JUDGE JAMES: And those are going to be  
17 received in evidence. So 1 through 447 are in evidence,  
18 with the exception of the first group that I mentioned,  
19 which are not in evidence. And I'll repeat those: 397,  
20 399 to 403, 405 to 419. Those are not in evidence, the  
21 rest are.

22 (Appellant Exhibits 1 through  
23 396, 398, 404, and 420 through  
24 447 were received in  
25 evidence.)

1 My understanding is that the Appellant does not object to  
2 any of those exhibits of the Government. However, there  
3 is a question about what constitutes Exhibit G-2, and  
4 between the Appellant's attorneys and Ms. Hallam, you're  
5 going to straighten that out later in the day and let me  
6 know what G-2 consists of. Once you're satisfied about  
7 that, speak up. But right now I'm going to receive in  
8 evidence G-1 and then G-3 to the end, which I believe is  
9 G-95. Is that correct?

10 MS. HALLAM: Yes.

11 (Government Exhibits 1 and 3  
12 through 95 were received in  
13 evidence.)

14 JUDGE JAMES: With the further addition, that  
15 we have here, an additional document submitted by Mr.  
16 Luchansky, we're going to identify it as an August 13,  
17 1985, Plant Visit Request Report. Which I believe you,  
18 Ms. Hallam, are agreeable to adding to Exhibit, what,  
19 G-193?

20 MS. HALLAM: It was a Rule 4, tab 193.

21 JUDGE JAMES: Oh, Rule 4. Rule 4, tab 193.  
22 And you're in agreement with that, correct?

23 MS. HALLAM: Yes, your Honor.

24 JUDGE JAMES: All right. So far on the  
25 Government Exhibits, are there any discrepancies of what

1 JUDGE JAMES: Now the parties have stipulated  
2 that this hearing is to cover both entitlement and  
3 quantum. Those are going to be decided by the Board. Is  
4 that correct, parties?

5 MR. LUCHANSKY: That is correct.

6 JUDGE JAMES: And I want to confirm for the  
7 record. Discovery has been satisfactorily completed. Is  
8 that correct, Ms. Hallam?

9 MS. HALLAM: Yes, your Honor.

10 JUDGE JAMES: Appellant?

11 MR. LUCHANSKY: Yes.

12 JUDGE JAMES: And I want to make sure that you  
13 parties remember that any discovery requests, such as  
14 responses to interrogatories, deposition transcripts, or  
15 whatnot; they are not part of the formal evidentiary of  
16 record unless they are formally offered and admitted into  
17 evidence at the hearing. The circumstance you might have  
18 submitted them as courtesy copies to the Board, doesn't  
19 make them exhibits. All right?

20 Now I understand that you parties do have a  
21 written stipulation that you wish to offer, but it isn't  
22 quite ready right now. It's going to be ready hopefully,  
23 later in the proceeding, maybe even this afternoon. Is  
24 that correct?

25 MS. HALLAM: Yes, your Honor.

1 JUDGE JAMES: That will be a stipulation of  
 2 basic evidentiary facts, correct?  
 3 MR. LUCHANSKY: Yes.  
 4 JUDGE JAMES: Excellent. Now I know you  
 5 parties have exchanged witness lists. My question to you  
 6 now -- let's start with the Appellant. Do you have any  
 7 changes or modifications that you want to let me know  
 8 about in your witness list?  
 9 MR. LUCHANSKY: Your Honor, we provided a  
 10 witness list as we perceived it at the time. We have a  
 11 few witnesses listed that we will not be calling. But  
 12 however, there is one person on that list, isn't that  
 13 right?  
 14 MR. STEIGER: Your Honor, there's one  
 15 additional  
 16 name --  
 17 MR. LUCHANSKY: One additional name.  
 18 MR. STEIGER: -- we had omitted from this  
 19 witness list, whom we may call, we may not. The name is  
 20 John Osterday.  
 21 JUDGE JAMES: Remind me. What is the date of  
 22 your witness list? April 21st?  
 23 MR. STEIGER: April 21, your Honor.  
 24 JUDGE JAMES: All right. I have it here in  
 25 front of me. I have the list. You've got 21 witnesses

1 listed. What is the additional witness?  
 2 MR. STEIGER: John Osterday, O-s-t-e-r-d-a-y.  
 3 JUDGE JAMES: Fact or expert?  
 4 MR. STEIGER: Fact.  
 5 JUDGE JAMES: All right. Now of the other 21,  
 6 which ones are you going to eliminate?  
 7 MR. STEIGER: we are going to eliminate Richard  
 8 Lanza.  
 9 JUDGE JAMES: All right.  
 10 MR. STEIGER: Luke Moore, number ten.  
 11 JUDGE JAMES: All right.  
 12 MR. STEIGER: Jerry Rosenberg, number 15.  
 13 JUDGE JAMES: All right.  
 14 MR. STEIGER: And that's all at this point,  
 15 your Honor, for sure. There may be a few others we may  
 16 or may not call, depending upon how the trial goes.  
 17 JUDGE JAMES: I understand. Now let's turn to  
 18 the Government's witness list.  
 19 MR. LUCHANSKY: Excuse me, your Honor. One  
 20 more thing. One of our witnesses is unable to physically  
 21 come to New York, and we would ask permission to have him  
 22 examined over the telephone.  
 23 JUDGE JAMES: okay, which witness?  
 24 MR. LUCHANSKY: That's David Lambert.  
 25 JUDGE JAMES: All right. So number 16, David

1 Lambert, they are suggesting who can't be here present in  
 2 Brooklyn, be interrogated telephonically. Does the  
 3 Government have any problem or objection to that?  
 4 MS. HALLAM: No. I guess not.  
 5 JUDGE JAMES: Fine. You let us know when we  
 6 need to make the hook-up. And at the time, we'll explore  
 7 the technology and find out from the young lady, the  
 8 reporter, how she can best record his voice.  
 9 All right. Now which is the date of your  
 10 witness list, Ms. Hallam?  
 11 MS. HALLAM: I don't know.  
 12 JUDGE JAMES: April 13, right?  
 13 MS. HALLAM: Yes, April 13th.  
 14 JUDGE JAMES: All right. Now I'm looking at  
 15 it. Are there any changes, alterations, and happily, any  
 16 deletions that you want to suggest to that, Ms. Hallam?  
 17 MS. HALLAM: From the Government personnel, Jim  
 18 LeCollier won't be coming.  
 19 JUDGE JAMES: Jim, who?  
 20 MS. HALLAM: LeCollier.  
 21 JUDGE JAMES: All right. You say he will not  
 22 be coming?  
 23 MS. HALLAM: Correct.  
 24 JUDGE JAMES: Okay. Any others?  
 25 MS. HALLAM: No.

1 JUDGE JAMES: All the rest remain in stead?  
 2 MS. HALLAM: Yes.  
 3 JUDGE JAMES: All right. Thank you.  
 4 Are there any particular witnesses -- let's  
 5 first turn to the Appellant -- that we have to  
 6 accommodate for whatever reason like, gee, they can only  
 7 come here on Tuesday, or on Friday, or some such thing,  
 8 that we need to make sure that you call on a particular  
 9 time for whatever reason?  
 10 MR. STEIGER: Yes, your Honor. Phil Lewis has  
 11 indicated that he's not available this week. That may or  
 12 may not be a problem, depending on how long our case  
 13 goes, of course. But just to point out that he would be  
 14 available first thing next week, but not this week.  
 15 JUDGE JAMES: All right. Let's hope in the  
 16 best case, that earlier than next week like, Friday, or  
 17 Thursday, or Wednesday of this week, you the Appellant,  
 18 complete all your examination of witnesses.  
 19 What is the possibility that Mr. Lewis, who  
 20 can't be here this week, might also be interrogated over  
 21 the telephone like David Lambert?  
 22 MR. STEIGER: I believe he's going to be out of  
 23 town, your Honor. So it's --  
 24 JUDGE JAMES: A bad choice?  
 25 MR. STEIGER: Yes, it's not going to work out.

Page 13

1 JUDGE JAMES: All right, all right. Well, even  
2 in that event, let's suppose now, Ms. Hallam has started  
3 her Government witnesses testifying when next week comes  
4 we could back off for a moment. I'm sure you parties  
5 could agree that, all right, we'll let Mr. Lewis now  
6 testify. All right? If it comes to that, you'll work it  
7 out with Ms. Hallam, all right?

8 MR. STEIGER: Yes, your Honor.

9 JUDGE JAMES: Now, let's turn to your  
10 Government witnesses. Are there any particular people we  
11 need to consider that can only be here at a certain time,  
12 or anything of that sort?

13 MS. HALLAM: Jim Ljutic is not available the  
14 17th and the 26th, otherwise, it might take him up to two  
15 hours to get here, but he can just get up early.

16 JUDGE JAMES: Okay. Mr. Ljutic. How do you  
17 spell his name?

18 MS. HALLAM: L-j-u-t-i-c, I think.

19 JUDGE JAMES: Ljutic?

20 MS. HALLAM: I think so.

21 JUDGE JAMES: Okay. Unavailable which days  
22 now?

23 MS. HALLAM: The 17th and 26th.

24 JUDGE JAMES: The 17th through the 26th?

25 MS. HALLAM: No. The 17th and the 26th.

Page 14

1 JUDGE JAMES: So he's unavailable those two  
2 days. He's available all other days that we're here?

3 MS. HALLAM: Yes. But unless we call him the  
4 night before, it will take him up to two hours to get  
5 here.

6 JUDGE JAMES: Okay. Well, those sorts of  
7 little chores, they're up to you to make the calls and to  
8 get your witnesses in on time.

9 MS. HALLAM: Right.

10 JUDGE JAMES: Okay. So we've covered  
11 scheduling needs. If you come to a witness who has one  
12 of these special scheduling needs, make sure to  
13 coordinate it with your opposing counsel at the time, and  
14 then let me know what the coordination is.

15 We're going to have the Appellant put on his  
16 case first, and you can make an opening statement if you  
17 wish. You don't have to. It's optional, and then at  
18 that point, after you've made an opening statement, if  
19 you choose to do that, then I'm going to give the  
20 Government a number of options.

21 If you want to make an opening statement and  
22 want to follow right after the Appellant, that will be  
23 fine. I'll listen to that. Or you can defer it until it  
24 comes time for your case and reply or you can estue it.  
25 You're not required to do it all if you don't want to.

Page 15

1 So you think about that. It will be your choice.

2 Appropriate opportunity for rebuttal testimony  
3 will be allowed after each party's initial presentations  
4 of testimony are completed. Closing arguments are  
5 reserved normally for post-hearing briefs, although, I  
6 may grant a request for oral argument at the end of this  
7 hearing, in lieu of a written post-hearing brief, if a  
8 party so chooses. You're not going to do both though.  
9 You're not going to have oral argument and a written  
10 brief. It's one or the other.

11 We'll discuss that subject --

12 MR. LUCHANSKY: I'm sorry, your Honor. I  
13 didn't hear what you said. Did you say, that, on your  
14 own you will ask that or does it require our agreement?  
15 I didn't quite hear you.

16 JUDGE JAMES: No. A party can choose to give  
17 me oral argument in lieu of a brief at the end of the  
18 hearing. That's your tactical choice. You don't need  
19 the opponent's approval. You don't need my approval.  
20 You can do it. But I'm telling you that it's either or.  
21 You don't do that plus, then write a written brief.

22 MR. LUCHANSKY: Do the parties have to concur  
23 on that? Or can one --

24 JUDGE JAMES: No. If you choose to do it,  
25 splendid. If Ms. Hallam chooses to do it, splendid.

Page 16

1 Just do it. But that's your shot. Okay.

2 MR. STEIGER: Your Honor, I apologize  
3 sincerely. I know that we addressed documents and  
4 covered them out the whazoo.

5 Mr. Thomas has presented to me, one additional  
6 set of documents that he indicated he had meant to  
7 include in the file. If I could take a moment to show it  
8 to Ms. Hallam, we would propose that this set be FT-448.

9 I apologize that with all of the discussion,  
10 this wasn't included earlier with this file. It slipped  
11 through the cracks.

12 JUDGE JAMES: Show it to Ms. Hallam.

13 MS. HALLAM: I have a little time to look at it  
14 and get back to you after lunch.

15 JUDGE JAMES: Absolutely.

16 MS. HALLAM: Okay.

17 JUDGE JAMES: I don't need to rule on it this  
18 instant. Is that an extra copy, Mr. Luchansky?

19 MR. STEIGER: It apparently is our only copy.  
20 Our only copy right now. I'm giving it to her right now  
21 because we may be asking our first witness about this  
22 document.

23 MS. HALLAM: Your Honor, I object to having to  
24 look through all this before they get to a first witness  
25 unless the witness is going to be on the stand all day.

1 MR. STEIGER: The chances are --  
 2 JUDGE JAMES: All right. Let me make a  
 3 suggestion, Mr. Luchansky: Delegate. Get somebody who  
 4 will reproduce it so that you can have a copy available  
 5 to Ms. Hallam, and I'll give her a reasonable time to  
 6 look at it.

7 MR. LUCHANSKY: Yes, your Honor.

8 JUDGE JAMES: The subject of post-hearing  
 9 briefs. How you are going to do it, whether they are  
 10 going to be simultaneous, sequential, the time schedule,  
 11 page limitations, anything of that sort, we will not  
 12 discuss now. We will discuss it at the conclusion of the  
 13 hearing.

14 Now are there any questions by either party of  
 15 the Board's procedures?

16 MS. HALLAM: No, your Honor.

17 MR. LUCHANSKY: No, your Honor.

18 JUDGE JAMES: Are there any other preliminary  
 19 motions or matters, or anything of the sort that we need  
 20 to consider before we proceed further?

21 MS. HALLAM: No, your Honor.

22 MR. LUCHANSKY: No, sir.

23 JUDGE JAMES: All right. Then it will be the  
 24 opportunity of the Appellant, if you wish, to make an  
 25 opening statement, and I'll be happy to hear that.

1 MR. LUCHANSKY: The Appellant so wishes.

2 JUDGE JAMES: Go right ahead.

3 OPENING STATEMENT ON BEHALF OF THE APPELLANT

4 MR. LUCHANSKY: Good morning, your Honor. May  
 5 it please the Board.

6 First, your Honor, we would like to thank the  
 7 Board for bringing this hearing to the New York area. It  
 8 is appreciated.

9 Perhaps your Honor can understand, if there was  
 10 any rational basis for what some of the Government people  
 11 involved in this case did to the Appellant Freedom, and  
 12 it's president, Mr. Henry Thomas.

13 Mr. Marvin Liebman, the ACO, Mr. Frank Bankoff,  
 14 the PCO, the DCA auditor, and some of the others, managed  
 15 this contract in a way that I have never encountered in  
 16 my 40 or so years in this business as a Government  
 17 contracts lawyer.

18 Perhaps, instead of blaming them for destroying  
 19 his business, the Appellant should be indebted to them  
 20 for teaching him lessons about finances, risks, business,  
 21 and frankly, even arithmetic.

22 Did you know for instance, your Honor, that  
 23 during the course of administering the contract, Mr.  
 24 Liebman decided that 95, a figure representing the 95  
 25 percent progress payments established in this contract,

1 representing the -- that were established in this  
 2 contract, plus five, representing the amount to be  
 3 financed by the Appellant, did not really equal 100?

4 Did you know your Honor, that Mr. Liebman and  
 5 Bankoff, decided that in the 1980s the Government adopted  
 6 a new way to do business with contractors? According to  
 7 them, your Honor, when a contracting officer perceived  
 8 that a contractor who had undertaken to perform a  
 9 contract, including a contract of vital importance to the  
 10 national defense, had little or no money, they would  
 11 resolve the problem by denying its progress payments to  
 12 do the job? I never knew that, your Honor.

13 Did you know, your Honor, that according to  
 14 Messrs. Liebman and Bankoff, the United States  
 15 Government, in the 1980s, was not really a self-insurer?  
 16 That is to say, that the Government would refuse to  
 17 accept the risk of financing contracts, and pushed it all  
 18 on contractors, and then wouldn't want to pay for the  
 19 interest costs resulting from it. I didn't know that,  
 20 your Honor.

21 Did you know that Mr. Liebman, the ACO,  
 22 believed he had the authority to totally abrogate and  
 23 disregard the terms and conditions of the very contract  
 24 that had been turned over to him for administration?

25 Did your Honor know, that Mr. Liebman decided

1 that only banks could assist contractors with needed  
 2 outside financing? Not individual financiers who were  
 3 ready, willing and able to do the job. I had no idea.

4 And, your Honor, did you know that according to  
 5 the DLA, there was a policy in the 1980s, to deny  
 6 contractors their entitlements to price increases and  
 7 delivery schedule adjustments for changes imposed by the  
 8 agency during the performance of contracts? And that it  
 9 was the duty of contracting officers to get contractors  
 10 to waive their entitlements? Frankly, I didn't know  
 11 that.

12 I have always believed, your Honor, that the  
 13 majority of public servants are of the highest character  
 14 and go about their jobs with integrity and compassion.  
 15 Their decisions are sometimes misguided, sometimes even  
 16 wrong, but usually well intended. It saddens me, your  
 17 Honor, to present before you a case that is the  
 18 exception. The case where critical decisions were made  
 19 by public servants without any rational basis, without  
 20 any supporting theory and in fact, your Honor, without  
 21 any sense whatsoever. And that it has to lead, your  
 22 Honor, to only one inescapable conclusion. And that is,  
 23 that acts of bad faith and abuse of discretion were  
 24 perpetrated by Government officials, on the Appellant.

25 We are well aware of the stringent test for bad

Page 21

1 faith and abuse of discretion, your Honor. Frankly, we  
2 believe that your Honor will not be able to find any  
3 legitimate reason for their behavior after you hear the  
4 facts.

5 Let me say at the outset, your Honor, that not  
6 all of the damages we seek requires a showing of bad  
7 faith. The balances in the form of customary relief  
8 under the contract for increased costs incurred as a  
9 result of acts and omissions by the Government which were  
10 inappropriate, and caused extensive and costly program  
11 delay.

12 To help you negotiate in the sea of names that  
13 you will be hearing, associated with the Appellant, just  
14 let me, just for a second say, that the contract was  
15 awarded to Freedom Industries, with Henry Thomas as the  
16 president and CEO. It was novated by the way, for no  
17 legitimate reason, and by demand of the Government, to a  
18 company called H.T. Foods, Inc., also owned and  
19 controlled by Mr. Thomas. Which company subsequently  
20 changed its name to Freedom NY, which is the named  
21 Appellant at the present time.

22 In the next few days, your Honor, we're going  
23 to describe pervasive, unrelenting, and intentional  
24 conduct by Government officials. Primarily too, your  
25 Honor, Mr. Liebman, the ACO, and Mr. Bankoff, the PCO,

Page 22

1 that caused Appellant to spend more than \$8 million more  
2 on this contract than he should have, and which directly  
3 resulted in the complete demise of Appellant's business  
4 as an industrial plan producer of meals ready to eat,  
5 MREs, as they are referred to, and deprived him of his  
6 opportunity to earn profits.

7 We will begin, your Honor, by bringing before  
8 you, Mr. Allen Koerber, one of the principal architects  
9 of the Industrial Plan Producer Program, the IPP as it  
10 was called, for the items procured under this contract.

11 Mr. Koerber will explain in his own way, that  
12 the sole purpose of the IPP and individual MRE  
13 procurements under it, was to establish, develop, and  
14 maintain industrial plan producers of essential items  
15 such as the very MREs that were the subject of this  
16 contract, in order to meet the mobilization needs of the  
17 nation's armed forces in the event of war or national  
18 emergency.

19 He will explain, your Honor, that there is a  
20 significant difference between the overall purpose of  
21 contracts awarded under the IPP, and those awarded under  
22 normal, competitive circumstances.

23 He will explain that contracts awarded under  
24 the IPP, such as the MRE-5, which was what our contract  
25 was called, because it was the fifth MRE contract awarded

Page 23

1 under the program, were intended to establish and  
2 maintain specific designated suppliers so that each would  
3 possess and retain the necessary capability to respond in  
4 time of emergency to the production ramp-up rate that had  
5 been established.

6 These contracts, your Honor, were awarded each  
7 year, to insure that suppliers were kept available and  
8 capable of responding during a time of emergency.

9 Your Honor, Henry Thomas and Freedom, did not  
10 come to the Government with hat in hand, begging for a  
11 contract. Mr. Thomas had been a successful manufacturer  
12 and assembler of foodstuffs in the past, and had brought  
13 with him to this MRE program, the necessary managerial  
14 and technical understanding of what was required to  
15 produce the MRE.

16 He had in fact, successfully performed a school  
17 lunch program and had completed contracts for the  
18 production of the very same components that went into the  
19 MRE package. In other words, he had positioned himself  
20 for the MRE contract and had made a very substantial  
21 investment to do so. And I might add, he overcame  
22 significant and hostile impediments that had been placed  
23 before him, before he was finally allowed to participate  
24 in the program.

25 Now with this background in mind, after Freedom

Page 24

1 got the contract, your Honor, there were continuous  
2 actions and omissions on the part of the Government, that  
3 impacted Freedom's ability to perform in the MRE-5  
4 contract in accordance with the required schedule, and  
5 which also prevented Freedom from controlling cost  
6 expenditures to that amount which the parties had  
7 projected, and which Freedom had reasonably anticipated  
8 would be required to do this job.

9 In each instance, your Honor, he was thwarted  
10 by conduct of individuals in the Government, in the  
11 administration of contract, which violated the terms of  
12 the contract, constituted an abuse of discretion, and  
13 violated the best interests of the Government as set  
14 forth in the IPP program.

15 And what adds to the egregious nature of the  
16 Government's conduct is not that the act, not only that  
17 the actions were carried out for the most part by the  
18 administrative contracting officer, Mr. Liebman, in a  
19 manner which constituted a material breach of the  
20 contract.

21 The fact is, your Honor, Mr. Liebman did not  
22 like, or trust Henry Thomas. According to Mr. Liebman,  
23 Freedom was not the kind of contractor that was entitled  
24 to such an award. He was not like the other contractors  
25 that he had been familiar with. He was not a Sperry, he

Page 25

1 was not a Gruman. These are the companies that Mr.  
 2 Liebman had been familiar with.  
 3 He clearly believed that Thomas didn't belong.  
 4 He made that clear on several occasions. He told for  
 5 example, a Lt. Col. Holler, who was interviewing various  
 6 parties in connection with an investigation of the  
 7 contract shortly before it had been terminated, that he,  
 8 Liebman, believed Thomas was a wheeler and a dealer who  
 9 believed that he could do anything he wanted.

10 He told Holler that Thomas believed he could  
 11 get away with a violation of the normal business  
 12 practices and Government regulations.

13 The only reason why Thomas was there, according  
 14 to Liebman, was because of political clout, he said. And  
 15 that he didn't deserve to be there, and that he can  
 16 leverage through minority status and political clout, and  
 17 that he had a godfather who wanted him to get a contract.

18 These are virtually the exact words Liebman  
 19 told Holler. He also told Holler that there were  
 20 congressmen and state politicians that put pressure on  
 21 DLA headquarters to put Henry in business.

22 Likewise, your Honor, DCA and representatives  
 23 upon whom Liebman relied almost religiously, also had a  
 24 patent, anti-Freedom mind set. Even the financial  
 25 department of DCASMA was prejudiced against Henry Thomas.

Page 26

1 The chief financial analyst, a Mr. Jules Wrubel, said  
 2 publicly at a January 1985 meeting, "You people come down  
 3 here begging for money and looking for a handout. Get  
 4 your own money to do this job," he said. And by the way,  
 5 Mr. Liebman was present when Mr. Wrubel said that, and  
 6 said nothing.

7 Obviously, such a contractor didn't deserve to  
 8 be there, and had to be dispensed with before he did  
 9 irreparable harm to the Government. So early on, they  
 10 took the fast track to ruin him. They knew that his  
 11 entire operation and cash flow was based upon receiving  
 12 timely progress payments. They knew it. So they just  
 13 decided to strangle him. They gave him no money, your  
 14 Honor. That's right, your Honor, no money for seven  
 15 months.

16 They must have said, oh, we could find ways of  
 17 avoiding to pay him. And if we can't find them, we'll  
 18 make them up. We'll say things like, he deceived us  
 19 about a so called 7.2 million dollars worth of financing  
 20 that he represented he had. Although, at one point in  
 21 the early negotiations, and based on receiving a much  
 22 larger contract, that was a commitment that was made.  
 23 But it had no bearing on the eventual contract that was  
 24 awarded where no such representation had been made, nor  
 25 did the Government rely on it. Not only that, your

Page 27

1 Honor, the figure of 7.2 million dollars was ridiculous  
 2 in the first place, as we will point out.

3 Well, Freedom and Mr. Thomas did not die, they  
 4 survived. Perhaps they took Dilan Thomas' advice to  
 5 heart, they did not go quietly into the good night. Mr.  
 6 Thomas found ways of getting ready to perform this  
 7 contract and he began to manufacture and assemble MRE  
 8 units albeit late, because his progress payment funding  
 9 was shut off from the beginning. But he was ready to  
 10 perform. And of course, this could not be tolerated by  
 11 Messrs. Liebman and Bankoff, so they embarked upon a  
 12 further course of conduct that sought to set him up to  
 13 fail.

14 You will hear much, your Honor, about the fact  
 15 that Freedom was insolvent, or heavily undercapitalized.  
 16 Liebman used these terms to explain his early actions on  
 17 the contract by refusing to pay progress payments. That  
 18 set in motion, your Honor, a hole that Freedom never  
 19 really was able to climb out of. Frankly, I don't  
 20 know the final condition of Freedom -- I'm sorry, the  
 21 financial condition of Freedom at time of award, your  
 22 Honor. But whatever it was, the Government knew, knew  
 23 that, when they awarded him the contract. They based a  
 24 pre-award survey -- and they knew it, they knew it well,  
 25 but they needed him, your Honor.

Page 28

1 He was one of the few select contractors  
 2 capable of successfully performing under this program.  
 3 So they knew his exact financial condition and they made  
 4 provision for it and nothing they did, your Honor,  
 5 violated any rules or regulations. What they did was  
 6 structure a package, your Honor, that would not -- one  
 7 would not ordinarily see in a regular supply contract.  
 8 But of course, this was not a regular supply contract.  
 9 It was an MRE contract, awarded as part of an IPP program  
 10 with a purpose not of merely delivering and supplying the  
 11 product, but with a main principle of establishing and  
 12 retaining plan producers with production capabilities for  
 13 continued participation in the program. They knew it, so  
 14 they negotiated certain provisions that were somewhat  
 15 unusual but not unique mind you, your Honor, because  
 16 these same provisions had been made available to the  
 17 prior MRE contractors without any question and without  
 18 any trouble, as Mr. Koerber will testify.

19 What were they? The program administrators at  
 20 DPSC at the time, knew that this was the only contract  
 21 that Freedom had. In fact, they told him that if he was  
 22 to work on this one, he couldn't even do any other work.  
 23 So they looked at his proposed expenditures and they  
 24 decided that because there was no other contracts and no  
 25 other cost objectives, it made sense to consider all the

Page 29

1 costs incurred under the contract as direct costs,  
2 including some costs that were usually treated as  
3 indirect costs in other contracts. It made perfect sense  
4 from an accounting and cash flow point of view. Why not  
5 consider them direct? Wasn't there an accounting  
6 preference for treating costs as direct? And if progress  
7 payments are authorized at 95 percent, what possible  
8 theory could you come up with that would prevent progress  
9 payments from being made on these costs?

10 Well, your Honor, I must tell you, Mr. Liebman  
11 never found any legitimate reason not to pay, yet  
12 continued to withhold progress payments. Your Honor, the  
13 very first payment, the very first progress payment was  
14 denied because DCA said, and Liebman agreed without  
15 objection, that they were for indirect costs and that  
16 progress payments could only be made on direct costs.

17 For goodness sake, your Honor. There were no  
18 indirect costs on this job since there was only one  
19 contract. Every penny could be matched to the single  
20 cost objective, the contract. We're not talking about  
21 the exercise of poor judgement. We're talking about no  
22 judgement. And what we're talking about is the beginning  
23 of a course of conduct that was designed to ruin my  
24 client.

25 Your Honor, we will be able to show by the

Page 30

1 testimony of Mr. Pat Marra, the executive vice-president  
2 of Freedom, and Mr. Thomas himself, that the anticipated  
3 cash flow projections based on the 95 percent progress  
4 payments to be received within a reasonable time after  
5 submission, and a liquidation rate of 82.6 percent, were  
6 an integral part of the contract that was awarded,  
7 including the treatment of costs that are as direct, that  
8 I just outlined.

9 Our witness will lay out for your review, the  
10 negotiation spreadsheets that were created in support of  
11 the contract that was awarded, that formed the basis of  
12 the negotiated settlement.

13 In the early months of the contract, Mr.  
14 Liebman withheld progress payments and even suspended  
15 them. How can you suspend progress payments that were  
16 never made? But, he found a way. He chose to ignore the  
17 agreements that had been made and that were an integral  
18 part of the contract.

19 Please your Honor, do not believe him if he  
20 says he was forced to suspend progress payments because  
21 of financing that didn't materialize, nor were any  
22 available.

23 We will put before you successful financiers,  
24 Mr. Penzer, Mr. Robbins, Mr. Stanley, who will testify  
25 that they were there, ready, willing and able to advance

Page 31

1 money against this job, but that they were rebuffed, your  
2 Honor, by Liebman. I told your Honor that they set  
3 Freedom up to fail and we will prove it.

4 The list of outrageous events that occurred is  
5 long. The testimony and documents will serve to support  
6 our assertions. Suffice it to say, your Honor, the  
7 Government imposed an unnecessary novation agreement.  
8 They imposed unreasonable and unnecessary financing  
9 requirements and they made arbitrary rejections of our  
10 financing sources. They arbitrarily refused to reimburse  
11 negotiated allowable costs. They wrongfully interfered  
12 with Freedom's lenders and subcontractors. They imposed  
13 an incorrect liquidation rate. They wrongfully refused  
14 to pay invoices for goods delivered and accepted. They  
15 wrongfully imposed a 100 percent liquidation on goods  
16 that had been delivered and accepted.

17 DPSC and DLA induced Freedom and Henry Thomas  
18 to sign a particular modification, you'll hear all about  
19 it, containing all kinds of promised goodies, and induced  
20 him to waive a legal claim against them; a legitimate 3.4  
21 million dollar legal claim. In return he ended up  
22 getting nothing for it, your Honor, nothing.

23 Knowing that he needed \$2.7 million in  
24 additional funds to complete the contract, DLA made a  
25 good faith commitment to process a guaranteed loan on his

Page 32

1 behalf, when in fact they knew, or should have known,  
2 that he didn't qualify and that he could never get one.

3 The PLO and the ACO withheld progress payment  
4 monies without any rational basis and released only a  
5 small portion, and only then did Freedom agree to sign  
6 away other rights that they had. Other legitimate  
7 claims, your Honor, for increased compensation.

8 The Government steadfastly refused to pay over  
9 \$1,500,000 for MRE units that were completed, delivered  
10 and accepted. These remain unpaid to this date. They  
11 failed to provide the Government -- they failed to  
12 provide the contractor with Government-furnished material  
13 as required under the contract, your Honor, to enable  
14 Freedom to complete the full quantity under the contract.  
15 In fact, we will prove, your Honor, they never even  
16 intended to buy the GRM to give to the contractor.

17 Then in the crowning touch your Honor, they  
18 wrongfully terminated Freedom for default, by failing to  
19 deliver that final quantity. Finally, their actions on  
20 this contract forced him to close down his operation.  
21 Thus denying him the opportunity to obtain future MRE  
22 contracts that were a virtual certainty that he would  
23 have obtained. And the list goes on and on.

24 Just a couple of brief words and I'll stop  
25 talking, your Honor. For quantum, we will show our



Page 33

1 entitlement in three areas. We will prove that we should  
2 pay -- be paid approximately \$8,000,000 for additional  
3 costs as a result of acts and omissions by the Government  
4 and the loss of over \$2,000,000 in profits.

5 These will include additional labor costs for  
6 the inefficient operation caused by having to start and  
7 stop and replace workers and rehire and retrain. It will  
8 include additional borrowing costs, not contemplated when  
9 the contract was awarded, that were forced on us. It  
10 will include the full impact of Government-caused delay,  
11 such as escalation, support costs, and close-out costs.

12 The second thing we will do is to seek damages  
13 for unrecovered program costs. Costs that were invested  
14 specifically by the Appellant for the MRE program that  
15 were excluded from the contract price, to be recovered by  
16 Freedom in the future. Future MRE contracts that Freedom  
17 was denied.

18 And finally, your Honor, we will seek lost  
19 profits on the contracts designated MRE-7 through MRE-12.  
20 These lost profits, your Honor, are as a direct  
21 consequence of the actions of the Government taken under  
22 the MRE-5 contract. These are quite easy to calculate,  
23 your Honor, since Freedom was replaced by another  
24 contractor and the awards made to that contractor, are a  
25 matter of public record. And by simply applying a modest

Page 34

1 rate of profit to those contracts, Freedom will be able  
2 to show what it would have earned, had it had -- had that  
3 opportunity not been taken away from it.

4 Let me close with just a couple of statements.  
5 One, there are a couple of ironies here your Honor,  
6 really. In spite of everything that was done to this  
7 company, the company delivered every single MRE unit that  
8 it possibly could, except for those that it couldn't  
9 because of GFM that hadn't been supplied to it. Every  
10 single unit albeit late, albeit at a horrendous cost, but  
11 every single unit.

12 And the second irony is, they needed him. They  
13 desperately needed him. They needed him as a supplier.  
14 There were so few. When Operation Desert Storm came,  
15 they sought him out asking him to return to the program.  
16 But of course, that was no longer possible. Thank you,  
17 your Honor.

18 JUDGE JAMES: What's the pleasure of the  
19 Government? Do you want to make an opening statement on  
20 your behalf or do you want to defer that, or what is your  
21 thought?

22 MS. HALLAM: I don't want to make anything  
23 right now, thank you.

24 JUDGE JAMES: All right. I want the record to  
25 reflect that at my request, and at the promise of the

Page 35

1 Government, the Government has submitted an opposition to  
2 Appellant's motion for summary judgement on this  
3 particular appeal, and I've received that this morning  
4 from Ms. Hallam.

5 Her objection is dated 5/11 of this year, 2000.  
6 And I just want to verify that you the Appellant, have  
7 received a copy of her opposition. Yes -- no?

8 MR. STEIGER: Yes. Not, not for a summary  
9 judgement on this particular hearing, if I understand you  
10 correctly.

11 JUDGE JAMES: Well, it's captioned Appeal of  
12 Freedom NY, ASBCA No. 43965, respondent's opposition to  
13 Appellant's motion for summary judgement. Do you have  
14 that document? I'm assuming you've provided a copy to  
15 the Appellant.

16 MS. HALLAM: Yes. It relates to the DD-250  
17 issue.

18 MR. LUCHANSKY: Yes, your Honor. We, I, I  
19 didn't receive a copy of it. I mean, Mr. Steiger just  
20 got one this morning. We haven't had a chance to review  
21 it obviously, but yes, we do have it.

22 JUDGE JAMES: All right. Now, we're going to  
23 start testimony of witnesses. As we've discussed before  
24 going on the record, we're going to have exclusion of  
25 witnesses, so called sequestration, so now I would

Page 36

1 appreciate you attorneys, you of course the Appellant,  
2 select your first witness and then let's exclude all  
3 other witnesses if any be here in the Courtroom, from the  
4 Courtroom.

5 MR. LUCHANSKY: Yes, your Honor. We call Alan  
6 Koerber, and we've already asked our other potential  
7 witness to leave and he has.

8 JUDGE JAMES: Okay. And I'm assuming you, Ms.  
9 Hallam, have done the same for your Government witnesses  
10 if any be here?

11 MS. HALLAM: Yes, your Honor.

12 Whereupon,

13 ALAN KOERBER,

14 a witness, was called for examination by counsel for the  
15 Government and, having been duly sworn, was examined and  
16 testified as follows:

17 DIRECT EXAMINATION

18 JUDGE JAMES: Let me first just ask this  
19 gentleman to state for the record your full name. spell  
20 your last name, and give us your address.

21 THE WITNESS: It's Alan Koerber, K-o-e-r-b as  
22 in boy, e-r.

23 JUDGE JAMES: Okay.

24 THE WITNESS: My address is 527 Mission Viejo.

1 V-i-e-j-o, San Antonio, Texas 78232.  
 2 MR. LUCHANSKY: Thank you, your Honor.  
 3 Administratively, perhaps to make it easier on the Board  
 4 and on the witness, I just want to point out, I'll be  
 5 asking Mr. Koerber about three documents located in FT-4,  
 6 FT-11, and FT-442. If I may approach the witness and  
 7 move the documents that are in his way that I won't be  
 8 asking about --?

9 JUDGE JAMES: That will be splendid. What I  
 10 will appreciate your doing, and also all the witnesses  
 11 doing, is speak up a bit, project your voice, so that we  
 12 can hear you over the background sounds, okay?

13 MR. LUCHANSKY: Thank you, your honor.

14 BY MR. LUCHANSKY:

15 Q Mr. Koerber, what is your current occupation  
 16 please?

17 A I'm a consultant to various companies in the  
 18 MRE industry.

19 Q And how long have you been doing this line of  
 20 work -- this consulting to the MRE industry?

21 A For five years.

22 Q Did you ever work directly in the MRE industry?

23 A Yes. After I left the Government, I worked for  
 24 Sopakco, one of the assemblers. And then I went to work  
 25 for Star Foods Processing, who is a retorter.

1 I worked at Sopakco from 1983 to 1986, as their  
 2 manager of technical services, and at Star Foods  
 3 Processing, from 1986 to 1995, as their vice-president of  
 4 administration and operations.

5 Q When did you first begin working directly in  
 6 the MRE industry?

7 A With the MRE, or in the industry?

8 Q Well, with MRES?

9 A With MRES? Actually, it was on MRE-1, back in  
 10 1979. I started with the Government in 1978, as part of  
 11 a training program for acquisition specialists. It was  
 12 the first year of that program and it involved intensive  
 13 training, both classroom and on the job at DPSC for  
 14 acquisition individuals.

15 After the first year, we were assigned to  
 16 various buying or administrative activities and I was  
 17 assigned to the MRE section.

18 Q Before you describe for the Board what your  
 19 involvement was in the MRE program, can you describe  
 20 briefly, what the agencies are that are involved in this  
 21 program? And, and if I may illustrate on the Board while  
 22 the witness testifies?

23 JUDGE JAMES: I'd prefer just to hear his  
 24 testimony.

25 MR. LUCHANSKY: Yes, your Honor.

1 THE WITNESS: DPSC is actually an agency of the  
 2 defense logistics agency, which is under the Department  
 3 of the Defense, so if you take a top down line drawing,  
 4 you would have the Department of Defense and then DLA,  
 5 which is part of the services -- the same level. Under  
 6 that is DPSC itself. Under DPSC, you would have a  
 7 subsistence directorate, as well as medical and clothing  
 8 and textiles. And then in that directorate, you would  
 9 have the PCOs and the buyers.

10 BY MR. LUCHANSKY:

11 Q And the PCOs and the buyers -- is there a term  
 12 that's referred to that group?

13 A Well, the particular one involved in this was  
 14 the MRE ration section.

15 Q Now that line of agencies underneath DLA, that  
 16 line that comes under DPSC, what is their primary  
 17 responsibility with respect to MRE contracts?

18 A They're responsible for the acquisition and the  
 19 technical services side of the MRE. Under DLA also, is  
 20 the defense contract administration services regents as  
 21 it was called back then, and then the local DCASMAS.  
 22 Those were the administrative activities.

23 Q And the ACO, the administrative contracting  
 24 officer, where does he fall in that scheme?

25 A Under the DCASMA.

1 Q Now if you would, Mr. Koerber, if you could  
 2 describe for the Judge, what your involvement was. Were  
 3 you involved in the establishment of the MRE program for  
 4 the Government?

5 A Yes. When I started working there, we were  
 6 still in negotiations on the first MRE procurements. It  
 7 was a test procurement to see if this ration would  
 8 actually work. Everybody at that time was using the old  
 9 -- what they called C-rats, or canned rations. The MRE  
 10 was a new package, a new concept for individual rations.  
 11 And we were -- we had three contractors at the time,  
 12 American Pouch Foods, Sopakco, and Right Away Foods, that  
 13 were testing whether this program would actually work or  
 14 not. And then as we found out that the ration was  
 15 producible, and that we could substitute it for what had  
 16 been used since World War II, we decided that it was time  
 17 to initiate a planning for wartime purposes for this  
 18 ration as well. And we handled that in our section.

19 Q And Mr. Koerber, can you describe for the Judge  
 20 --

21 MR. LUCHANSKY: and, and your Honor, I would  
 22 like Mr. Koerber to describe the MRE, we have a unit and  
 23 show it to the Board if he could, if this would be of  
 24 assistance to the Court. I'm not sure whether the Board  
 25 has ever seen an MRE before and understands the

1 processing, if that's acceptable to the Board.

2 JUDGE JAMES: It's acceptable. I've not seen  
3 one. If you want to show me one I'll be happy to look at  
4 it. Be sure to show Ms. Hallam as well.

5 BY MR. LUCHANSKY: Yes, sir.

6 Q Mr. Koerber, is this a case of MREs?

7 A Yes, this is a case of twelve meals, individual  
8 meals for a soldier. And it has a protective sleeve over  
9 the case itself. Inside here, would be twelve  
10 individually packed meals.

11 Q If you would take it apart and as you're taking  
12 it apart, describe for the Board the process. I know  
13 you're going in reverse order but the process of  
14 constructing or assembling, manufacturing one of these.  
15 Starting with the casing, the sleeve.

16 A Let me stand up to do this. This would be  
17 strapped. They would have strapping around it as part of  
18 the protection. The sleeve would go onto the box. This  
19 box would be glued shut. Prior to that, twelve of these  
20 meals would have been packed into the case. Each of  
21 these meals contains individual components that would  
22 have to be packaged into there.

23 Q Now Mr. Koerber, if you could explain as you're  
24 opening up this pouch -- Can you describe what's the name  
25 of this pouch? What is that called, that you're taking

1 out now?

2 A This is the actual MRE. This is a meal ready  
3 to eat. This particular one is diced beef with gravy.

4 Q Is that the meal pouch?

5 A No. This is a meal bag, is what we called it.  
6 And this is one meal for one soldier with one third of  
7 his daily requirements.

8 Q What step does an assembler have to do to make  
9 one of these pouches, put the things in, and seal it?  
10 What's involved in that?

11 A Okay. There are subassembly operations  
12 initially. Because some of these components for example,  
13 the crackers come individually and have to be packed --  
14 or in bulk I mean, and have to be packaged individually  
15 by the assembler. So he would have to do that in his  
16 subassembly, and also put together the accessory bag that  
17 has the components such as matches, chewing gum, toilet  
18 tissue in there. He would package those along with the  
19 other components into the meal bag.

20 One of the other things that the assembler  
21 would have to do -- this is the actual entree that the  
22 soldier would eat -- and the assembler would produce at  
23 least a portion of these entrees in another separate  
24 section of his plant, or another facility.

25 So these would all be put together into the

1 bag. The bags would then be sealed, put into the case.  
2 the case would be glued shut, the sleeve would be put on.  
3 and then it would be strapped shut and then put onto a  
4 pallet. And that's how it's shipped out to the various  
5 warehouses and depots.

6 Q Mr. Koerber is now describing, about how much  
7 space would --

8 JUDGE JAMES: Mr. Luchansky, you're going to  
9 have to stay by your microphone or they're not going to  
10 pick up your questions.

11 MR. LUCHANSKY: Yes, your Honor.

12 BY MR. LUCHANSKY:

13 Q Mr. Koerber, about how much space would an MRE  
14 assembler need in order to do all of the operations they  
15 needed to do in order to qualify as an assembler?

16 A In order to do the retort operations, the  
17 assembly operations, subassembly, and warehousing, it  
18 would take probably between one hundred fifty and one  
19 hundred eighty thousand square feet total.

20 Q Now, you described the process of making one of  
21 the entrees. what is that process called?

22 A The entrees are done by a process called retort  
23 sterilization, or retorting. And it's essentially a  
24 pressure cooker.

25 The food is prepared, diced, chopped, sliced,

1 and cooked partially or fully, and it's put into this  
2 pouch and the pouch is sealed. Then it goes into the  
3 pressure cooker where, through heat and temperature, it's  
4 sterilized. That allows the pouch to remain shelf-stable  
5 for five or more years. It's essentially the same thing  
6 as a can, except that it's flexible.

7 The pouch then is put into a cardboard carton  
8 that protects it from further damage.

9 Q In order to qualify as an assembler, does an  
10 MRE contractor have to be able to do retort capability?

11 A Yes. He would have to either do retort or,  
12 back in the early days of the program, they were able to  
13 do some of the freeze dried. But they had to be a  
14 manufacturer of some of the components.

15 Q And is that in order to satisfy the Walsh  
16 Healey requirement that an assembler be a manufacturer,  
17 in order to be an MRE assembler?

18 A That's correct. These were supply contracts so  
19 they had to be a Walsh Healey manufacturer.

20 Q You described the retort process that an  
21 assembler has to satisfy. I believe when you were going  
22 through the box, you also indicated that there was a  
23 subassembly area for the accessory packets and the  
24 crackers, correct?

25 A That's correct.

Page 45

1 Q What additional responsibilities does an MRE  
2 assembler have, that it would need to do, in order to  
3 assemble one of these cases? What other areas of a  
4 facility?

5 A Well, first of all, in addition to what we just  
6 talked about, the retorting subassembly and main assembly  
7 areas, you would have a quality assurance lab because  
8 there are -- In the specifications there are required  
9 tests that have to be done on all of these items.

10 You would have to have an inventory control  
11 area within your warehouse because the Government  
12 required that all of the products be used on a first in,  
13 first out basis. So you would have to be able to keep  
14 track of what components came in at what date and where  
15 they were, so that you could use those before any others  
16 that had come in.

17 And then you would have office space. The  
18 spaces that you have -- the retort area, or the food  
19 processing area, would have to be approved and under the  
20 establishment seal of the U.S. Department of Agriculture.  
21 So that you could produce satisfactorily, the retort  
22 products.

23 The Army Veterinary inspection activity was  
24 responsible for the subassembly, the main assembly, and  
25 the warehouse areas, to make sure that they met with the

Page 46

1 sanitary requirements for the rations.

2 MR. LUCHANSKY: Your Honor, if I may approach  
3 just to remove the MRE case.

4 BY MR. LUCHANSKY:

5 Q Mr. Koerber, in transporting the case itself, I  
6 noticed that the case itself seems to be a very thick,  
7 heavy-duty cardboard. Does, does that require any  
8 special type of equipment in order to box up MREs, as  
9 opposed to normal packaging?

10 A It's a solid fiber rather than a corrugated,  
11 like is normally used for food. But all it really  
12 requires is a machine that can fold it over and glue it.

13 Q Mr. Koerber, with respect to the procurement of  
14 MREs, what's special about MREs as opposed to the  
15 procurement of other military items?

16 A The biggest thing about the MRE is that because  
17 it's a front line feeding for the troops, it has certain  
18 logistic requirements that it has to meet.

19 It has to be air-dropable, because that's  
20 sometimes the only way that they can deliver it. It has  
21 to have a five-year shelf life, and it has to be able to  
22 protect the MRE itself from any type of contamination,  
23 whether it's insects, or biological/ chemical  
24 contamination.

25 Q Now, is the MRE considered to be a mobilization

Page 47

1 essential item?

2 A Yes. Just about everything that's purchased to  
3 support the troops, including boots and uniforms. Any  
4 type of food is considered mobilization essential because  
5 you need that to have troops in the field.

6 The MRE though, is a little bit different  
7 because the military services designate certain items as  
8 War Stopper items. And those are items that if you don't  
9 have them available, you can't go into a battle  
10 situation. Ammunition would be one, guns would be  
11 another, and MREs is one of those War Stopper items.

12 Q So do I understand correctly that, mobilization  
13 essential items span a large scope, and then among those  
14 mobilization essential items -- they're the ones you just  
15 listed, which are also deemed to be War Stoppers?

16 A Yes.

17 Q And the MRE is a War Stopper?

18 A Yes.

19 Q How do you do planning -- mobilization planning  
20 for the MRE, or for War Stopper items?

21 A Well, the military services generate their  
22 requirements based on the planning for battles that are  
23 done at the Pentagon. Depending on what the current  
24 scenario is, and what they think will, will happen in  
25 wartime, they generate a number of cases per month that

Page 48

1 will be required to feed the troops.

2 They pass that down through the agency to DPSC  
3 and currently, there's a group within the agency that  
4 does all of that planning. They go out to the  
5 contractors, they find out what capability is out there,  
6 how quickly they can go from normal peacetime production  
7 to a wartime production, and what it will take in some  
8 instances for both the MRE and one of the other rations  
9 that they plan. The Government has even purchased  
10 equipment and puts it into contractor's facilities so  
11 that they can meet their mobilization needs.

12 Q Okay. Mr. Koerber, what, what steps does DPSC  
13 take to secure procurement of these items if they're  
14 commercially available elsewhere?

15 A If it's a normal commercial item, for example  
16 in the medical area, a lot of the over-the-counter drugs  
17 are required when you go out into the field. Things like  
18 Tylenol or Advil would be a good example. And if that's  
19 something that's required, all they would do is go to the  
20 company that manufactures it and say, "Look, we need four  
21 million bottles a month. You already manufacture eight  
22 million a month, and we want you to guarantee us that  
23 you'll give us four million when we go to war."

24 The company signs a mobilization agreement with  
25 them, and if they have to divert from their commercial to

Page 49

1 the military usage during mobilization, they'll do that.

2 If it's a non-commercial item, like the MRE,  
3 because there is no commercial market, no real  
4 substantial commercial market -- campers and hunters may  
5 use a few of them, but nothing that's worth talking about  
6 -- then we have to find specific sources for those items,  
7 and hopefully maintain those sources.

8 Q Okay. Now Mr. Koerber, are there any sources  
9 out in the country that make any product other than MREs,  
10 but which can be adapted to production for MREs in the  
11 event of war?

12 A No. The pouch itself -- the retort pouch,  
13 which is the principal component of the MRE, that's what  
14 holds the entree, the fruits and some of the other  
15 desserts, is not commercially made in this country. It  
16 requires a specific machine to fill and seal it, and most  
17 companies would not have that machine available. And the  
18 lead time to buy that machine from Europe or from Japan  
19 would be six months or longer.

20 Q Then what does DPSC do to get sources for these  
21 MREs?

22 A Well, over the years, from MRE-1 until now,  
23 we've developed essentially three assemblers and now,  
24 it's three retorters. There used to be six. At one time  
25 there was eight. It's narrowed it down to three now, and

Page 50

1 we use an exception to competitive contracting.

2 We did it back then and they still do it today.  
3 It was -- when I was there it was under 10 U.S. code  
4 2304, A-16. Now it's the C-3 exception. And that allows  
5 you to award multiple contracts at other than the low  
6 response at a responsible offer.

7 Q So once DPSC identifies these potential sources  
8 of MREs -- and we'll talk in a moment how it went at  
9 MRE-1 -- but theoretically identify these sources of  
10 MREs, and then a contract is awarded to them to -- in the  
11 first instance, get them to be able to produce MREs. Is  
12 that right?

13 A That's correct.

14 Q Now once an MRE contractor can produce these  
15 MREs, what is the DPSC's position? Well, does DPSC just  
16 go, "Okay, well now I see that you're able to produce  
17 MREs. We'll call you if there's a war?"

18 A No. We've tried to maintain and they have  
19 tried to maintain, the sources of supply, because the  
20 planning that we did was based on what we call, warm  
21 base. Meaning that the assemblers are already producing  
22 and the retorters are producing.

23 In order to go from peacetime requirements --  
24 which when I was there, the highest we had was about  
25 three and a half million cases a year, to a mobilization

Page 51

1 requirement of four and a half million cases a month  
2 rather than a year and be able to go from zero to that  
3 amount in 90 days, as the services required. We had to  
4 keep the contractors producing during peacetime.

5 Also because at that time these contractors had  
6 no other commercial business, the MRE essentially was  
7 their only business. If we did not give them a contract  
8 there was -- we felt there was a better than average  
9 chance, probably a really good chance that they would go  
10 out of business. They had nothing else to support their  
11 production. So if they didn't have a contract from us,  
12 they would close down the plant -- probably sell off the  
13 equipment.

14 Q Once an MRE contractor is qualified as an  
15 assembler, what was the expectation annually? What was  
16 DPSC's expectation annually with respect to making awards  
17 of MREs -- MRE contract awards to the three contractors?

18 A Well, once we had three, after Freedom got into  
19 the program, we anticipated awarding three contracts  
20 every year.

21 Initially we awarded two contracts. After  
22 American Pouch Foods dropped out of the program, it was  
23 Sopakco and Right Away. And we would award to them each  
24 year. Once Freedom got in we anticipated three because  
25 that gave us full support for our mobilization

Page 52

1 requirements.

2 Q At what level of award was it anticipated that  
3 each of the contractors would get an award?

4 A We determined through some studies, what we  
5 called the minimum sustaining rate. And essentially,  
6 that's the rate that a contractor can produce on a  
7 monthly basis without increasing the cost of the ration  
8 over what we would normally pay during peacetime. If he  
9 dropped below that, then he would have to increase the  
10 cost. So we determined the minimum sustaining rate for  
11 each one of the three contractors and used that to  
12 determine what portion of our peacetime requirement each  
13 contractor would be eligible for.

14 Q Now I understand, Mr. Koerber, that with each  
15 year's MRE award that there would be a determination in  
16 findings issued to authorize DPSC to negotiate for that  
17 MRE. Is that right?

18 A That's correct. Anytime that you do an  
19 exception to competition, for example under the A-16  
20 exception, you would have to get approval from the  
21 Department of Defense.

22 Q Mr. Koerber, I'm going to ask you to look at  
23 FT-4.

24 A Okay.

25 Q If you'd just give us one moment for the Judge

Page 53

1 to --

2 JUDGE JAMES: Don't worry about the Judge. You  
3 just ask your witness.

4 BY MR. LUCHANSKY:

5 Q Mr. Koerber, if you look at FT-4, is that the D  
6 & F that was issued with respect to MRE-2?

7 A It's a D & F, yes, for MRE-2.

8 Q And the D & F provides the authority to DPSC  
9 for the negotiations -- the procurement that you were  
10 just describing?

11 A Yes.

12 Q Is there anything in the D & F that reflects  
13 the policy you were just talking about -- that DPSC's  
14 authority and expectation was not only to develop these  
15 sources of MRE supply, but to maintain them and continue  
16 to award contracts to them every year? Is that reflected  
17 in the D & F itself?

18 A Well, paragraph two talks about the fact that  
19 it's mobilization essential, and the difference between  
20 peacetime requirements and mobilization requirements.  
21 And then in paragraph five it says, "Procurement is  
22 necessary in order to maintain Southern Packaging and  
23 Storage Company --," which is Sopakco, "and Right Away  
24 Foods, as viable producers of MRES, thereby maintaining  
25 employee skills developed under the production test

Page 54

1 contracts. And in order to limit competition to plan  
2 producers with whom the Department of Defense has  
3 negotiated industrial preparedness agreements."

4 Q And if you turn to FT-11, is that the  
5 equivalent D & F for MRE-3?

6 A Yes.

7 Q Does this similarly reflect DPSC's  
8 authorization and expectation to not only establish, but  
9 maintain the MRE sources of supply by awarding them  
10 contracts every year?

11 A Yes, it is. It has the same paragraph, at  
12 paragraph five that I just read. And in paragraph six it  
13 says that, "Use of formal advertising is impractical  
14 because such a method may not result in an award to each  
15 of these plan producers, whose capabilities are need by  
16 the DOD."

17 Q Now, Mr. Koerber, I know that you left DPSC  
18 just before Freedom got its MRE-5 contract. Is that  
19 correct?

20 A That's correct.

21 Q Do you however -- Through your work at Sopakco  
22 and then at Star Foods, do you have personal knowledge as  
23 to whether DPSC has continued to award MRE assembly  
24 contracts to the same contractors every year from then on  
25 -- from after Freedom on?

Page 55

1 A Once Freedom's contract was terminated and  
2 Cinpac was brought into the program, that's a third  
3 assembler that was developed in I think, 1985/1986.  
4 Those three assemblers have received awards every year  
5 except one. And in that particular procurement, Sopakco  
6 did not receive an award. But the Government later took  
7 steps outside of the normal procurement cycle to provide  
8 them with some business.

9 Q During that period, Mr. Koerber, in addition to  
10 awarding contracts annually to those three MRE  
11 contractors, did the Government actually take any steps  
12 to even further limit competition?

13 A Yes. At some point -- I'm not sure exactly  
14 when it occurred -- the Government started to list the  
15 names of the only contractors who were able to offer.  
16 They would send out the solicitation possibly to more  
17 than those three firms. But only, under the terms of the  
18 contract, only Sopakco, Right Away, and Cinpac were  
19 permitted to offer on that solicitation.

20 Q And although you don't remember the specific  
21 time, was it shortly after Freedom's contract was  
22 terminated?

23 A It would have been in the, I think, the late  
24 80s, early 1990s, somewhere in there.

25 Q Mr. Koerber, has the country's mobilization

Page 56

1 requirements remained sufficient -- great enough to be  
2 able to maintain all three of these contractors?

3 A Well, mobilization requirements have changed  
4 off and on during the years depending on the scenarios  
5 but obviously, they've maintained the three. The  
6 peacetime procurements have dropped but at the same time,  
7 the three contractors have also developed during the 20  
8 years, some other commercial businesses now with  
9 different types of packages. For example, jars or cans  
10 that allow them to exist on smaller quantities of MRES.  
11 But yes, they still support all three assemblers.

12 Q Mr. Koerber, I'd like to ask you a few  
13 questions now about the benefits that were contracted to  
14 the original three MRE assemblers. And before I do that,  
15 let me just clarify.

16 We talked about an MRE assembler, and you  
17 mentioned in passing, there are also three MRE retorters.  
18 Can you just explain briefly what the difference is  
19 between an MRE assembler and an MRE retorter?

20 A Actually, right now they're the same companies.  
21 Just operating out of, usually different facilities.  
22 But, a retorter is the food processor. He packages the  
23 food into the pouch, seals it, sterilizes it, and sends  
24 it to the assembly operation for inclusion in the MRE.

25 The assembler is the area that actually does

Page 57

1 the subassembly and the main assembly and then ships out  
2 the final case of MRES.

3 Q Is it fair to say though, that a retorter does  
4 only retorting, but an assembler also must do retorting  
5 in order to be a manufacturer and meet Walsh Healey  
6 requirements, and then in addition, does the assembly  
7 you've described?

8 A At the time that, that Freedom was trying to  
9 get in, that was true. Because we were still trying to  
10 develop sources and brought Freedom in. But again,  
11 because they were supply contracts rather than service  
12 contracts, any assembler had to be able to do retort  
13 operations. Since that time though, it's compressed down  
14 to where assemblers and retorters are exactly the same  
15 now. There's only three companies that -- and they do  
16 both.

17 Q Mr. Koerber, now let me ask you about those  
18 original contract awards. Back at MRE-1 you said that  
19 the three contractors at the time were American Pouch  
20 Foods, Sopakco, and Rafco.

21 A Correct. Yes. Yes!

22 Q Can you please describe for the Board, what  
23 start up benefits DPSC awarded to American Pouch Foods,  
24 in order to establish them as a source of MREs?

25 A American Pouch was the first of the MRE

Page 58

1 producers that we had. They received the first MRE  
2 contract. They were a start up business, a small  
3 minority firm out of Chicago, who had three different  
4 facilities. Two of them in south Chicago, one outside in  
5 the suburbs. And their contract was, again, the only  
6 contract that they had in any of those facilities at the  
7 time. So when we negotiated that particular contract,  
8 again, the costs were all direct because it was the only  
9 thing that they had, and we agreed to pay for the lease  
10 on their facilities as a direct cost. We agreed to pay  
11 for their equipment, their quality control facilities,  
12 any of the ancillary equipment such as conveyors or other  
13 sealing machines that they would need. We paid for all  
14 those as direct costs.

15 Q So is that production equipment you were just  
16 describing?

17 A Production equipment as well, yes.

18 Q Okay. Quality assurance equipment?

19 A Quality assurance equipment.

20 Q Inventory tracking equipment?

21 A Yes. Their computer system.

22 Q Was A.P.F. permitted to expense all of these  
23 costs to the contract rather than depreciate them?

24 A Yes. Because again, we were trying to bring  
25 them in as a source of supply.

Page 59

1 Q Were progress payments paid on all of these  
2 costs? Or was it negotiated that progress payments would  
3 be paid on 100 percent of these costs?

4 A They received about \$13,000,000 in progress  
5 payments and it was paid on all the costs that we had  
6 negotiated.

7 Q So, okay. Is the answer yes, that there was a  
8 contract to pay?

9 A Well, I would -- I can't really answer it  
10 because the progress payments were done by the ACO out of  
11 Chicago, but there was never any complaint to us from  
12 A.P.F., that they were not getting paid for costs that  
13 were associated. Complaints were on our side because  
14 they never delivered anything.

15 Q Let's indeed -- and that brings us to Freedom's  
16 entry into the program, which we'll probably talk about  
17 very briefly after lunch.

18 What about Rafco? What benefits were provided  
19 to Rafco to start them up as an MRE assembler?

20 A Rafco was an existing supplier as in  
21 freeze-dried operations, but they had never done any  
22 assembly work. So when they leased the building that  
23 they were going to do the assembly in, it required  
24 substantial lease hold improvements. And we agreed to  
25 pay those lease hold improvements as a direct-expensed

Page 60

1 cost for that particular contract -- the MRE-1 contract.

2 The stipulation we had of course was, that  
3 those costs once paid for, would not show up in  
4 depreciation at a later date. So when they did things  
5 like, poured the hardened concrete in the truck-loading  
6 docks, put in some offices, and some of the other lease  
7 hold improvements, we paid for those directly.

8 Q Now assuming for a moment, Mr. Koerber, and I  
9 understand that you don't -- I don't believe you have  
10 first-hand knowledge of the award to Freedom, although  
11 you probably heard a lot about it when you were at  
12 Sopakco and Star Foods but assuming that the PCO in this  
13 case negotiated with Freedom for the MRE-5, that all of  
14 its costs would be considered direct to the contract.  
15 That all costs except for the production equipment would  
16 be expensed, and that 95 percent progress payments would  
17 be paid on 100 percent of its costs.

18 Would those terms be consistent with the terms  
19 that were agreed to with A.P.F. and Rafco?

20 A I don't think they, they would be. I'm not  
21 sure if we ever talked -- agreed on 95 percent progress  
22 payments, but that was in the regulations. So it's  
23 something we wouldn't have to necessarily agree to.

24 Q Okay. So A.P.F. you say, got progress payments  
25 on all their costs?

Page 61

1 A It would have been 95 percent if that's what  
2 they requested.

3 Q Okay. And Rafco got progress payments on their  
4 costs?

5 A At 95 percent because they were a small  
6 business as well.

7 Q Okay. Now you mentioned just a moment ago,  
8 that A.P.F. never delivered. That's because A.P.F. went  
9 out of business, right?

10 A That correct. We terminated their contract for  
11 default. They went out of business.

12 Q Now when A.P.F. went out of business in 1981,  
13 was there a lot of competition in the industry for  
14 A.P.F.'s production equipment?

15 A For a long time it was tied up in legal battles  
16 so nobody could get it. But once that freed up, I know  
17 that Sopakco -- because I was down there at the time  
18 trying to get the equipment. And I knew that we were  
19 competing against Rafco and Freedom, because the people  
20 that were trying to sell it, told us that they were also  
21 offering on the equipment.

22 Q Now your Honor, it's at this point that the  
23 additional Exhibit 448, is the one that I would show to  
24 the witness. I'll obviously work around it for right  
25 now. I'm hoping that after lunch that Ms. Hallam has the

Page 62

1 opportunity to review it. Perhaps we can make a  
2 stipulation at that point.

3 But Mr. Koerber, without having the list of  
4 equipment in front of you, let me just ask you. You were  
5 at Sopakco at the time, correct?

6 A That's correct.

7 JUDGE JAMES: At what time, Mr. Luchansky?

8 BY MR. LUCHANSKY:

9 Q When was this Mr. Koerber?

10 A This was 1985, early 1986.

11 Q Okay. So in 1985/1986, when you were at  
12 Sopakco, your company Sopakco, was one of the companies  
13 trying to get this equipment?

14 A That's correct.

15 Q Do you remember generally, what equipment we're  
16 talking about?

17 A There were -- I'm not sure of the number. I  
18 think it was four retorts, because that was the important  
19 thing to us at the time. That was what would increase  
20 our capacity. That was usually -- The road block in  
21 production was the retort capacity.

22 And they also had a lot of support equipment  
23 that went with it. They had food processing equipment.  
24 They had some bag-sealing machines, pouch-sealing  
25 machines and fillers. All that support equipment that

Page 63

1 would help us to fill the retorts.

2 Q Was there an advantage to MRE assemblers, to  
3 having more retort capability?

4 A There was at that time. Because the way that  
5 the solicitations were written, there was a table in each  
6 solicitation. And the amount of award that you were  
7 eligible for was based on your industrial preparedness  
8 capability that was committed to the Government.

9 So if you committed between -- at the top  
10 level, you would be required, or eligible for a higher  
11 percentage of the peacetime award, than if you were  
12 committed at the lowest level. I don't remember how many  
13 there were but there were four levels I think, of  
14 peacetime -- of IPP capability commitments. And  
15 therefore, four percentages that you could receive.

16 Q Do you remember who succeeded in getting this  
17 equipment from A.P.F. back in 1986?

18 A Freedom did.

19 Q Now if Freedom had two retorters at the time,  
20 these additional four retorters would bring Freedom up to  
21 a total of six retorters with the supporting assembly  
22 capability.

23 Do you remember how many retort machines  
24 Sopakco had at this time?

25 A We had five.

Page 64

1 Q Were you aware of how many retort machines  
2 Rafco had at the time?

3 A They had three.

4 Q Now Freedom was trying to get into the MRE-1  
5 program. Now going back to 1981, when you were serving  
6 as a buyer back at DPSC, Freedom was trying to get into  
7 the MRE program as an assembler since MRE-1. Isn't that  
8 right?

9 A Actually, since the re-procurement of the  
10 A.P.F. contract, is when Freedom first started trying to  
11 get in.

12 Q Okay. And Freedom submitted a bid for the  
13 re-procurement of A.P.F.'s portion of MRE-1?

14 A That's correct.

15 Q Did you award a contract to Freedom for MRE-1  
16 or  
17 MRE-2?

18 A No. We did not.

19 Q Why not?

20 A Mostly, it was because at that time we were in  
21 a battle. DPSC was in a battle with the Pentagon. There  
22 were a lot of people up there that did not want the MRE  
23 to succeed. They liked the old canned ration. They felt  
24 that there was sufficient capability for the canned  
25 ration rather than bringing in this new item. And we



Page 65

1 didn't want to take a chance on having another contractor  
2 come in and fail. We'd already had it with A.P.F.

3 MR. LUCHANSKY: Being mindful of the Court's  
4 prior commitment, I might suggest this as an appropriate  
5 breaking point -- if that's appropriate for the Board,  
6 and I could pick up here after lunch. I won't be too  
7 much longer with this witness.

8 (Whereupon, at 12:15 p.m., the hearing was  
9 recessed, to reconvene at 1:15 p.m., this same day.)  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page 66

## AFTERNOON SESSION

(1:15 p.m.)

3 JUDGE JAMES: Back on the record. What is the  
4 position of the Government with respect to Appellant's  
5 Exhibit FT-448?

6 MS. HALLAM: No objection.

7 JUDGE JAMES: Excuse me.

8 MS. HALLAM: No objection.

9 JUDGE JAMES: Great. Let's let the record  
10 reflect then, that Appellant's Exhibit FT-448 is received  
11 in evidence.

12 (Appellant's Exhibit 448 was  
13 received in evidence.)

14 JUDGE JAMES: Do you want to proceed with your  
15 examination then?

16 MR. LUCHANSKY: Thank you, your Honor.

17 BY MR. LUCHANSKY:

18 Q Mr. Koerber, I've handed you a set of documents  
19 which has been marked and admitted into evidence as  
20 FT-448. I'm only going to refer you to the documents in  
21 this stack that are found beginning with the third page  
22 of the document.

23 I've numbered it for our purposes and will  
24 number the Government's version with our Bates numbers  
25 from the FT file, starting with 4291. So if the first

Page 67

1 page is 4291, the second page is 4292. I'm going to ask  
2 you to look at the pages starting at 4293, the third page  
3 into the document. And look at that eight pages from  
4 4293 to 4300.

5 Do you recognize -- can you identify what  
6 information is reflected on these pages?

7 A It's equipment that would be necessary for  
8 processing of food, and it looks like -- in retort  
9 pouches.

10 Q You testified before, that in 1985 and 1986,  
11 that the company you were working at at that point,  
12 Sopakco, was pursuing equipment that had been owned by  
13 A.P.F. when it went out of business. Is this the  
14 equipment that Sopakco was pursuing from A.P.F.?

15 A It would seem to be. I know they had stock  
16 retorts and some of the equipment listed back under pouch  
17 machines, the Acma pouch machine. A.P.F. was the only  
18 one that had an Acma pouch machine.

19 Q So to the best of your recollection --

20 A It, it seems like it is. Yes, sir.

21 Q You can put that aside. Those are the only  
22 questions I had about FT-448.

23 Mr. Koerber, when we finished talking before  
24 lunch, I believe that you had testified that you and the  
25 other members of the procurement team at DPSC did not

Page 68

1 award an MRE-1 or 2 contract to Freedom because you  
2 wanted to protect the supply being provided by -- protect  
3 Rafco and Sopakco, who were producing MRES at the time.

4 A That's correct.

5 Q Now what about MRE-3? You personally awarded a  
6 contract or two contracts to Freedom for MRE-3. Isn't  
7 that right?

8 A They were contracts for retort pouch items  
9 rather than assembly.

10 Q Okay. So did Freedom submit a bid for an MRE-3  
11 contract as an assembler?

12 A I believe so.

13 Q And did you, meaning the DPSC procurement team,  
14 did you award Freedom an MRE-3 assembler award?

15 A No.

16 Q Same reasons as you didn't give them one for  
17 MRE-1  
18 and 2?

19 A I know that we were still trying to protect  
20 Sopakco and Rafco as our sources of supply.

21 Q Now at that point, Freedom kicked up a fuss,  
22 didn't they?

23 A Yes.

24 Q And after that, in fact you personally awarded  
25 these retort pouch contracts to Freedom?

Page 69

1 A That's right.

2 Q Why did you award these retort pouch contracts  
3 to Freedom?

4 A We were under pressure to give Freedom a chance  
5 to produce something under the MRE program. And we felt  
6 if we gave him some contracts to do the retort pouches,  
7 it would not hurt us enough that if he didn't produce  
8 them it would damage the program. But it would also give  
9 him a chance to prove that he could produce at least the  
10 retort pouch, which was the most complicated of the  
11 production aspects.

12 Q Now were the two suppliers, Rafco and Sopakco,  
13 the two assemblers, were they capable of producing all of  
14 the mobilization capacity, all the mobilization  
15 requirements that the Government needed at that point?

16 A We weren't -- In MRE-1 and MRE-2 we really had  
17 not started planning. MRE-3 was when we first started to  
18 do the planning and at that time, no, they weren't  
19 capable of meeting our requirements.

20 Q And, nevertheless, you did not award an MRE-3  
21 assembler award to Freedom?

22 A That's correct.

23 Q Now what was Freedom's financial condition at  
24 this time? And now at this time I'm talking about -- I  
25 believe it was in 1983?

Page 70

1 A Yes.

2 Q Specifically the time I'm talking about is  
3 after Freedom was not awarded and MRE-3 prime assembler  
4 contract, but then you did award them the retort pouch  
5 contract. Do you know what Freedom's financial condition  
6 was at that time?

7 A We did a determination of responsibility that  
8 would have included his financial capability.

9 Q Okay. And since he got an award did --

10 A I would, you know, I don't remember the  
11 details, but I would assume that he was -- we found him  
12 financially capable.

13 Q Now with respect to the retort contract, the  
14 retort contracts, two that you did award to Freedom, did  
15 the Government pay for Freedom's start up costs in the  
16 same way that you described payment to the assemblers?

17 A No. The retort contracts were awarded more  
18 under competitive process, and we did not get into cost  
19 negotiations on those contracts. We only looked at the  
20 prices and based our award on the price itself, rather  
21 than what went into that. So I couldn't say that we paid  
22 for his start up costs.

23 Q Okay. So Freedom had to bear the cost of  
24 investment to do the retort contracts?

25 A As far as we were concerned, yes.

Page 71

1 Q To the best of your knowledge, would that have  
2 been a substantial investment?

3 A Probably to do retorts, somewhere in the  
4 neighborhood of around \$3 million -- \$2 to \$3 million.

5 Q Mr. Koerber, was Marvin Leibman involved in the  
6 administration of Freedom's MRE-3 contracts?

7 A Yes.

8 Q What was his involvement?

9 A He was the ACO for those contracts.

10 Q He was the ACO for Freedom's contracts?

11 A Yes. For the two retort pouch contracts.

12 Q Would it have been part of Mr. Liebman's duties  
13 as the ACO, to review the financial information that was  
14 part of the pre-award for Freedom, at the time of his  
15 administering those contracts?

16 A The report would have been available to him and  
17 part of his duty would have been to monitor the financial  
18 capability of any of his contractors. So yes, he would  
19 have been. He should have looked at that pre-award  
20 survey.

21 Q Would it have been within the scope of his  
22 duties and responsibilities to be aware that Freedom was  
23 bearing the costs of investment for these contracts?

24 A I don't know if it would have been within the  
25 scope of his duties, but when he knew what type of

Page 72

1 contract was awarded, he would know that we weren't  
2 paying for anything outside of just the price of the  
3 product that we were buying.

4 Q So he would have known that, as a function of  
5 performing his duties?

6 A Yes.

7 Q With Freedom bearing its own start up costs on  
8 those two contracts, would this contract have been  
9 profitable for Freedom?

10 A Probably not, if that was the only one he had.  
11 It would have taken follow on contracts to realize a  
12 recoupment of all that initial investment.

13 Q And is that something that you knew, at the  
14 time that you awarded these contracts to Freedom?

15 A Yes.

16 Q What happened with Freedom's MRE-3 contracts?  
17 How did they do?

18 A He produced pouches and delivered pouches under  
19 those contracts.

20 Q So you had said that part of the reason that  
21 you gave these contracts to Freedom was to see if they  
22 could produce. Did they meet your expectations or --  
23 expectations might be the wrong word. Did they produce  
24 to your satisfaction?

25 A Yes.

Page 73

Page 75

1 Q As a result of its work under this contract,  
2 did Freedom qualify as a manufacturer under Walsh Healey?

3 A Yes.

4 Q And did their Walsh Healey qualification under  
5 these contracts, then qualify them to be an assembler for  
6 MREs?

7 A Yes. It would have qualified them as a  
8 manufacturer.

9 Q Now you were still at DPSC when the  
10 solicitation went out for MRE-4, right?

11 A That's correct.

12 Q And you were still at DPSC when the MRE -- when  
13 the pre-award survey -- Well, let me back up. Freedom  
14 bid for MRE-4, correct?

15 A That's correct.

16 Q And they bid for the MRE-4 assembly contract?

17 A That's correct.

18 Q And you were at DPSC when the pre-award survey  
19 was conducted for Freedom, correct?

20 A Yes. That would have been early in '83.

21 Q Okay. Well, I'll ask you to take a look at  
22 FT-442, which is the pre-award survey performed of  
23 Freedom with respect to the MRE-4 solicitation.

24 If you take a look at that and let me know what  
25 determination was made about Freedom's capability for

1 recommended that Freedom get an MRE-4 assembler award.  
2 correct?

3 A That's correct.

4 Q Did Freedom get an MRE-4 assembler award?

5 A Not to my knowledge. I don't think they did.

6 Q Mr. Koerber, I want to ask you -- I want to  
7 shift focus a little bit and I want to ask about some  
8 events occurring in 1985 and 1986 with respect to Cinpac

9 A Okay.

10 Q You had mentioned before that Cinpac was  
11 another assembler who was brought into the MRE program in  
12 around 1985 or 1986, correct?

13 A That's correct.

14 Q Now in 1985 -- and during that time you were  
15 working at Sopakco, correct?

16 A That's correct.

17 Q And as part of your duties and responsibilities  
18 at Sopakco, did you have first-hand knowledge of the  
19 awards to the other prime assemblers, solicitations.  
20 these issues?

21 A Yes. The solicitation I would have to review  
22 because we would offer on it and competitors in a small  
23 industry like that, you try to keep up on what happens to  
24 them as much as possible. So we knew what awards they  
25 had gotten -- what quantities.

Page 74

Page 76

1 purposes of MRE-4 assembly.

2 A They recommend award based on the pre-award  
3 survey.

4 Q Are the comments throughout the pre-award  
5 survey favorable and supportive of Freedom's ability to  
6 perform an MRE-4 contract?

7 A Looks like the only unsatisfactory comment they  
8 had was factor number twelve on performance record. And  
9 they say that, "He has failed to meet scheduled  
10 commitments on existing contracts. The company has grown  
11 slowly in its ability to deal with the problems of  
12 starting and running a new enterprise."

13 Q Let me ask you Mr. Koerber, with respect to all  
14 contractors, particularly in the MRE program, was it  
15 unusual or common for contractors to have performance  
16 problems?

17 A It's common.

18 Q Is that something that the other assemblers --  
19 are performance problems -- did the other assemblers,  
20 Sopakco, Rafco, have performance problems?

21 A Yes.

22 Q What about the retorters, Star Foods and other  
23 retorters?

24 A Yes.

25 Q You said that the pre-award was positive and

1 Q Now in 1985, Mr. Bankoff approved Walsh Healey  
2 certification for Cinpac as a new assembler and gave  
3 Cinpac awards for MRE-6 and MRE-7, correct?

4 A Yes.

5 Q Now on May 23, 1986, in a letter that's found  
6 in the record at FT-278, the Department of Labor  
7 concluded that Cinpac was not Walsh Healey qualified  
8 because it was leasing its facility from Star Foods.  
9 Again, this is FT-278.

10 MS. HALLAM: I believe there is a reference to  
11 that already in the record. I thought it was our  
12 understanding that we would refer to the documents that  
13 were already in the record, rather than to the FT series.

14 MR. LUCHANSKY: If it's already there, I  
15 overlooked it, and if you want to bring it to our  
16 attention I'll be happy to refer to it under its previous  
17 designation. I'm going through -- I hadn't seen that  
18 this was already in the record.

19 MS. HALLAM: What is the number we're looking  
20 at again?

21 MR. LUCHANSKY: FT-278.

22 Your Honor, may I approach the witness to give  
23 him the correct notebook?

24 JUDGE JAMES: Well, save your time. I'll just  
25 put it in front of him.

Page 77

MR. LUCHANSKY: May I proceed, your Honor?

JUDGE JAMES: Proceed.

MR. LUCHANSKY: Thank you.

BY MR. LUCHANSKY:

Q Mr. Koerber, you became aware of this letter at or about the time that it was issued? Is that something that came to your attention when you were at Sopakco?

A Yes.

Q And the Department of Labor letter says that, "After carefully examining the evidence submitted, including information submitted by the protestors in Cinpac, it is our determination that Cinpac, Inc. did not qualify for award under the Public Contracts Act and 41 CFR 50-201.101A1. In this regard, the firm did not show that it had made all necessary prior arrangements for manufacturing space, equipment and personnel to perform on its own premises, the manufacturing operations required for fulfillment of the contract." And then it said specifically, "The lease agreement with Star Food Processing didn't allow Cinpac to complete and non-restricted use and control, of the manufacturing space and equipment."

JUDGE JAMES: Well, Mr. Luchansky, this is a perfect example of what I didn't want to do during this hearing. There's no need to re-read into the record

Page 78

things that are already there.

MR. LUCHANSKY: Yes, your Honor. I apologize. Halfway through that quote your Honor, I realized that and I apologize.

BY MR. LUCHANSKY:

Q Mr. Koerber, did you have -- After you left Sopakco and went to Star Food, did you have first-hand knowledge of the lease arrangements between Star Food and Cinpac?

A Yes. As part of my duties as vice-president of administration, I was responsible for all contracts, leases, or any other type of commitments that Star Food had.

Q Okay. Can you please describe for the Court -- summarize for the Court what those arrangements were? Was Cinpac doing any production itself at Star Food's facility?

A They weren't. The way the lease was written is, they were supposed to use Star Food's personnel and equipment at specified periods of time to produce their -- their production.

But the way that it really worked out is we would -- At Star we would produce the items, and at times we would produce a day's production lot and part of it would be shipped as Cinpac's product that supposedly they

Page 79

had produced, and the rest of that would be shipped under Star's contract or subcontracts, to Sopakco and to Rafco.

Q Now based upon your training and experience, in the procurement division of DPSC -- well, first of all, based on your training, were you trained about Walsh Healey requirements?

A You had to learn about the Walsh Healey Act and what it required, yes.

Q And according to your training and experience, did this arrangement meet Walsh Healey requirements?

A Definitely not.

Q Now was Cinpac's Walsh Healey qualification questioned? After Mr. Bankoff determined that they were Walsh Healey qualified, was that questioned by anyone?

A It was questioned by Freedom, by Rafco, and in a round about way by Sopakco. The first two protested the award to Cinpac, and Sopakco protested an award to Star Food saying if Cinpac was qualified, then Star couldn't be.

Q Now based on your training and experience, what obligation did the PCO have at that time, once the protest was issued, what obligation did the PCO have to verify their Walsh Healey qualification?

A When self-certification is questioned, it should have been referred to the Department of Labor for

Page 80

a determination.

Q To the best of your knowledge, was it Mr. Bankoff, who then requested a DOL opinion?

A Not that I can tell from this. The letter is addressed to Vera Zapilli, who is with the office of small business at DPSC.

Q If Mr. Bankoff did not seek a DOL opinion, is that something that according to your training and experience, he should have done?

A Yes.

Q If a DOL opinion like this is obtained after an award is made and the opinion shows that the contractor who received the award is not actually Walsh Healey certified, based upon your training and experience, what action should the PCO take?

A If the Department of Labor determines that they are not Walsh Healey qualified and they haven't cured it by that time, then the contract should have been terminated.

Q To the best of your knowledge, did Mr. Bankoff do that with respect to the Cinpac contract?

A No.

Q We're talking about Cinpac, and we've talked about retort capability before. I want to talk just very briefly about capability of the four assemblers in

1 1985/1986, with respect to their assembly and warehouse  
2 space. Now that's an important part of a contractor's  
3 capability. Isn't that correct?

4 A Yes.

5 Q Do you know how much space Cinpac had in that  
6 first MRE-6 contract, the first one that Cinpac was  
7 awarded, the one we were just discussing? Do you know  
8 how much facility space they had for assembly and  
9 warehouse?

10 A I've been to their facility and it was roughly  
11 fifty thousand square feet.

12 Q How much capability did Sopakco have at that  
13 time, during the MRE-6 contract?

14 A We had a total of a hundred and fifty thousand  
15 square feet plus two other plants.

16 Q What about Rafco?

17 A They were in the same building as during MRE-1,  
18 so they were about a hundred thousand square feet.

19 Q And what about Freedom?

20 A Freedom had the same building from when I went  
21 up on the retort pouch contracts, and that was about four  
22 hundred thousand square feet.

23 Q Just a couple of more questions for you, Mr.  
24 Koerber. I want to now bring you forward in time, and  
25 ask you whether there was an actual national emergency

1 whether you had it or not. After this, when you planned  
2 for your industrial preparedness capability, you had to  
3 only include equipment that you either owned or had  
4 possession of under a lease arrangement. But it actually  
5 had to be in your possession and had to be operational.

6 Q So do I understand that prior to Desert Storm,  
7 the contractors Cinpac, Rafco, and Sopakco, as part of  
8 their planning could represent -- "Well, we will be able  
9 to acquire this production capacity," and that was  
10 accepted as part of their planning?

11 A Yes.

12 Q And that after Desert Storm, that was no longer  
13 acceptable?

14 A That's correct.

15 Q And that the contractors actually had to have  
16 in house, the production capability?

17 A That's correct.

18 Q Last question for you, Mr. Koerber. Taking you  
19 back to your time at DPSC, in the early 80s. When DPSC  
20 was developing its sources of MRE contractors, its  
21 sources of MRE supply in the early 80s, early to mid-80s,  
22 was the main purpose of the annual MRE procurements, the  
23 actual production of the MRE cases themselves?

24 A Yes and no. We wanted the cases. We needed  
25 the cases. But at the same time, because we were trying

1 mobilization during Operation Desert Storm in 1990?

2 A I would say, yes. I don't know if there was  
3 ever an official declaration of war or mobilization, but  
4 in all the actions that were taken by the Department of  
5 the Defense, there was mobilization.

6 Q Okay. So with respect to the MRE contracts and  
7 the MRE assemblers, did DPSC go into mobilization mode  
8 for purposes of procuring MRE contracts at that time?

9 A Yes.

10 Q Were the MRE contractors at that time, Rafco,  
11 Sopakco, and Cinpac, able to produce the MREs that they'd  
12 said they could produce during those years prior, in the  
13 event of mobilization?

14 A During the period that we were in mobilization  
15 nobody ever achieved the levels that they had stated that  
16 they could achieve.

17 Q What action did the Department of Defense take?

18 A They did a couple of things. Mostly in the --  
19 during Operation Desert Storm, they had to go out to try  
20 to find alternatives, and they looked at a commercial  
21 version that really didn't work very well, but tried to  
22 get them through Desert Storm with that.

23 After the Operation Desert Storm contracts were  
24 finished, their planning changed in that, prior to that  
25 time, you could include equipment that was available,

1 to do our mobilization planning for the first time and be  
2 able to meet the service's requirement, we were also  
3 paying for excess capability -- that four and a half  
4 million a month versus our peacetime requirement of  
5 maybe, three or four million cases a year. We paid  
6 higher unit prices on the first three or four MREs  
7 because the industry was trying to build up that  
8 capability.

9 There have been studies done on the program  
10 itself that show in later years the prices actually  
11 declined because all of that was in place and it was paid  
12 for by that time. So all we were really paying for later  
13 in the years was the -- or that the Government was paying  
14 for because by that time, I was charging them for it, but  
15 they were paying only for the product that they were  
16 getting.

17 Q And at the time that you were at the DPSC, are  
18 you able to say which was the higher priority?

19 A To us it would have been establishing the  
20 capability because we could always go to these people and  
21 buy our peacetime requirements. We had enough with the  
22 equipment that they had in place from the production  
23 tests, to support peacetime. But we did not have, after  
24 the production tests, enough capability out there to  
25 support our mobilization base.

Page 85

1 MR. LUCHANSKY: Thank you. That's all I have.  
 2 JUDGE JAMES: Opportunity for the Government to  
 3 cross examine if you wish.  
 4 MS. HALLAM: Yes.  
 5 CROSS EXAMINATION  
 6 BY MS. HALLAM:  
 7 Q You had spoken about the A.P.F. contract.  
 8 Could you tell us what happened to that MRE contract?  
 9 A The contract itself was terminated and then  
 10 re-procured.  
 11 Q It was terminated and A.P.F. dropped out of the  
 12 mobilization program -- the MRE mobilization program?  
 13 A Well, at that time there was no MRE  
 14 mobilization program.  
 15 Q Excuse me.  
 16 A At that time, there was no MRE mobilization  
 17 program.  
 18 Q Were you ever contractor officer?  
 19 A No, ma'am.  
 20 Q You were always the buyer at DSCP?  
 21 A DPSC, back then. Yes, ma'am.  
 22 Q And that's essentially an assistant to the  
 23 contracting officer, isn't it?  
 24 A Yes, ma'am.  
 25 Q And you never had a warrant did you?

Page 86

1 A No. I was a technical, contracting  
 2 officer/technical representative but that's -- I left  
 3 just before I got my warrant.  
 4 Q So all those questions that Mr. Luchansky led  
 5 you into that referenced you personally awarding a  
 6 contract, you didn't personally award anything did you?  
 7 A Well, I didn't sign it, you're right. I did  
 8 the evaluation.  
 9 Q You didn't have the authority to personally  
 10 award anything, did you?  
 11 A That's correct.  
 12 Q Could you tell us what some of the performance  
 13 problems of Sopakco were, you indicated Sopakco had  
 14 performance problems?  
 15 A Well, there's numerous ones. They had problems  
 16 with seals in the pouches, they had problems initially  
 17 with what we used to call "alligatoring", which was just  
 18 a defect on the outside of the pouch that made it look  
 19 like a checkered surface.  
 20 They had problems with drained weights, which  
 21 is the amount of solids left after you wash all the  
 22 liquid off of the product. They had problems meeting  
 23 delivery schedules at various times. They had problems  
 24 in rejected lots from the USDA.  
 25 Q Were you aware of any contracts they had been

Page 87

1 terminated for default on prior to getting involved in  
 2 the MRE contracts, assembly contracts?  
 3 A Sopakco, to the best of my knowledge, did not  
 4 have any terminations for default.  
 5 Q Could you tell us about any terminations for  
 6 default that Rafco experienced prior to coming into the  
 7 MRE program?  
 8 A They only had some contracts, small contracts  
 9 for dehydrated product, and I didn't buy that so, I don't  
 10 know if there were any or not. I couldn't tell you.  
 11 Q But you are aware that there were terminations  
 12 with Freedom's retort contracts, aren't you?  
 13 A Yes, ma'am.  
 14 Q How many terminations?  
 15 A One.  
 16 Q And what happened to that contract?  
 17 A It was re-procured to -- and Freedom got the  
 18 re-procurement.  
 19 Q And what happened after Freedom got the  
 20 re-procurement?  
 21 A To the best of my knowledge, they performed  
 22 that contract.  
 23 Q It was subcontracted out to Sopakco, wasn't it?  
 24 A That I don't know.  
 25 Q So was the other retort contract that Freedom

Page 88

1 had, wasn't it? It was subcontracted out to Sopakco?  
 2 A If it was, by that time, I wasn't involved with  
 3 Freedom's contract.  
 4 Q You were talking about the MRE history. You  
 5 indicated that Sopakco at one time was squeezed out. Is  
 6 that correct?  
 7 A Yes, ma'am. In 1993.  
 8 Q Can you point to anything, anywhere that  
 9 obligates the Government to award an MRE assembler a  
 10 contract in any given year?  
 11 A When you use the word, obligate, there's  
 12 nothing that obligates them in the regulations.  
 13 Q Are you aware of any time where the Government  
 14 actually guaranteed anybody, told them in writing or  
 15 verbally, that they were going to get a contract?  
 16 A That would have had to have been something that  
 17 someone else would have said. As you mentioned, I wasn't  
 18 a contracting officer so I couldn't have been in that  
 19 position to guarantee anybody anything.  
 20 Q You also testified with regard to certain  
 21 allowances that the Government had made to supply Rafco  
 22 with certain production equipment?  
 23 A The lease hold improvements.  
 24 Q Lease hold improvements?  
 25 A Yes, ma'am.

Page 89

1 Q Did they give anything other than lease hold  
2 improvements to Rafco in expensing the contract, that  
3 you're aware of?  
4 A Not that I'm aware -- Well, anything unusual,  
5 that should not have been expensed, I'm not aware of  
6 other than the leasehold improvements.  
7 Q Well, what would those other unusual things be?  
8 Production equipment, for example?  
9 A Production equipment is something that you  
10 could -- you would normally think about depreciating. So  
11 yes, if it was expensed, it would be something out of the  
12 ordinary.  
13 Q And did we do that for Rafco?  
14 A For Rafco, no ma'am.  
15 Q Did we do it with regard to any office  
16 equipment, computer equipment, anything in the nature of  
17 capital equipment?  
18 A I'm trying to remember what we did when we  
19 negotiated that contract. The leasehold improvements I  
20 remember, because we were questioned strongly about those  
21 as to why we did it. We may have. I can't answer you  
22 definitely yes or no. But it seems to me we may have  
23 paid for some of the computer equipment.  
24 Q Are you aware of a GAO decision that came out  
25 after we did that, that criticized that?

Page 90

1 A I know there was a draft decision. I don't  
2 know if there was ever a final version of that decision.  
3 Q You were also speaking with respect to the  
4 space needed -- the generally -- the space needed?  
5 A Yes, ma'am.  
6 Q You indicated a hundred and fifty thousand, to  
7 a hundred and eighty thousand square feet?  
8 A Total. Yes, ma'am.  
9 Q And that was for the MREs and the retort  
10 operations?  
11 A That would include food processing, assembly,  
12 subassembly and warehouse, yes.  
13 Q And isn't it true you got that figure from a J  
14 & F?  
15 A No, ma'am. That's based on my experience.  
16 Q What experience is that? Have you been an  
17 industrial specialist?  
18 A No, ma'am. But I was a contractor who had to  
19 make sure they had enough space to do all of that.  
20 Q Are you here as an expert?  
21 A No, ma'am.  
22 Q Do you know how many square feet Cinpac  
23 actually performed in?  
24 MR. LUCHANSKY: Objection. At what time?  
25 MS. HALLAM: For the MRE-6.

Page 91

1 THE WITNESS: The facility that I know that  
2 they had and that I visited later was about 50 thousand  
3 square feet.  
4 BY MS. HALLAM:  
5 Q And did they perform in that facility?  
6 A They performed the assembly operations and  
7 subassembly operations.  
8 Q Did they have storage in that facility?  
9 A Very limited. They used outside warehouse.  
10 Q So they got along with the fifty thousand  
11 square feet facility?  
12 MR. LUCHANSKY: Objection.  
13 MS. HALLAM: On what basis?  
14 JUDGE JAMES: Objection's overruled.  
15 THE WITNESS: They got by with it plus the  
16 outside warehousing, plus the production at Star Food.  
17 BY MS. HALLAM:  
18 Q Are you aware of any performance problems that  
19 Cinpac had during its MRE-6 contract?  
20 A I don't remember. Since I wasn't involved in  
21 it, I don't remember anything specific.  
22 Q With regard to the Walsh Healey determination.  
23 Isn't it true that the Government relies on the  
24 certifications submitted by contractors?  
25 A Unless it's questioned, yes, ma'am.

Page 92

1 Q And when it's questioned, where is it funneled  
2 to, to get to the Department of Defense? The question  
3 is: What does the contracting officer do with those  
4 questions?  
5 A It depends on the contractor that's being  
6 questioned.  
7 Q Well, you indicated that the question is  
8 ultimately the determination of the Department of Labor,  
9 isn't it?  
10 A That's correct.  
11 Q And it's not a contracting officer's  
12 determination. Is that correct?  
13 A Well, a contracting officer has the  
14 determination of the responsibility of the contractor.  
15 The Department of Labor makes a determination as to their  
16 Walsh Healey eligibility.  
17 Q The contracting officer does not make a  
18 determination as to Walsh Healey eligibility. Is that  
19 correct?  
20 A That's correct.  
21 Q The contracting officer merely relies on the  
22 certification of the contractor. Is that correct?  
23 A Unless it's questioned, yes, ma'am.  
24 Q And when it's questioned, where does the  
25 question go from the contracting officer, in order to get

Page 93

1 to the Department of Labor?

2 A Again, it depends on which contractor is

3 involved.

4 Q If it's a small business involved where would

5 the question go?

6 A Then it would go to the small business office,

7 and from there to the Department of Labor.

8 Q And that determination by the Department of

9 Labor that you testified with regard to, actually came

10 through the small business administration, or the small

11 business office, did it not?

12 A Yes, ma'am.

13 Q Does the contracting officer have any

14 obligation to do an independent investigation of a Walsh

15 Healey certification?

16 A Unless it's questioned he doesn't, no.

17 Q Well, even if it's questioned, is it his

18 responsibility to do anything with that?

19 A It's his responsibility to refer it to the

20 Department of Labor. Yes, ma'am.

21 Q And that's where his responsibility ends?

22 A Until he gets that determination back.

23 MS. HALLAM: Your Honor, I lost a piece of

24 paper. Can we take a five minute break while I look

25 through my stuff and find something I have some

Page 94

1 scribbling on?

2 JUDGE JAMES: All right. Let's go off the

3 record for a few minutes.

4 (Off the record.)

5 BY MS. HALLAM:

6 Q You had also testified with regard to Freedom

7 Industries storage capacity. That storage capacity was

8 with respect to their Hunt's Point location, was it not?

9 A Yes.

10 Q They didn't perform at that location did they?

11 A No. I think when they got the award they had

12 actually moved to their north Bronx plant.

13 Q Do you know if progress payments were

14 authorized in Freedom's retort contracts?

15 A I don't remember, but I don't think they were.

16 Q You also testified with regard to ACO's

17 functions and duties. Have you ever served as an ACO?

18 A I worked with ACOs as part of my training.

19 Q Have you ever functioned as an ACO?

20 A No, ma'am.

21 Q And could you tell us what the basis of your

22 information for the anticipated profit on the retort

23 contracts that Freedom had, what's the basis for that

24 knowledge?

25 A The basis is my experience between the last

Page 95

1 twenty years that I've been involved in the MRE program.

2 I know what it takes to set up a retort plant, what the

3 investment would be, and I know from his price versus the

4 other prices we were getting from contractors and later

5 on I went to Sopakco and Star, so I knew what our profits

6 were. He would not have made enough profit off of one

7 contract to recoup the initial investment.

8 Q You were talking at one point about the lease

9 arrangement between Cinpac and Star Foods?

10 A Yes, ma'am.

11 Q In your testimony with regard to how everything

12 was going to work, that wasn't how it was written down in

13 the lease, is it?

14 A The way the lease was written was that Cinpac

15 would lease the employees, the space, and the equipment,

16 and actually produce their own products at a specified

17 time.

18 Q And that's the information that the contracting

19 officer had at the time, isn't it?

20 A Yes.

21 Q I just wanted to go over some of your testimony

22 with regard to Desert Storm. Do you know what the

23 Government's obligation -- the quantities it was

24 obligated to surge to for Desert Storm and Desert Shield?

25 A The numbers I don't know off the top of my

Page 96

1 head. I can tell you that at Star we had a contract for

2 eighty million pouches to do in a nine-month period. And

3 that was only a portion of the pouches necessary to

4 support the cases. I don't remember the numbers. I've

5 seen them, but I don't remember the numbers for the

6 cases.

7 Q Does 20 million sound --

8 A Is that per month?

9 Q Twenty million over a ten-month period?

10 A Sounds low, but it could be. Twenty million

11 would have been 240 million pouches.

12 Q Cases.

13 A Yeah, I'm trying to translate it into pouches

14 so I can take it from there. That it could be. I don't

15 know.

16 Q Isn't it true that Desert Storm was over before

17 the surge was even supposed to reach its height?

18 A Are you talking about under planning, or under

19 the contracts? Under the contracts, no. The contracts

20 asked for surge immediately. And so Desert Storm was not

21 over before the contracts were to meet their surge.

22 MS. HALLAM: That's all the questions I have,

23 your Honor.

24 JUDGE JAMES: Any redirect by the Appellant?

25 MR. LUCHANSKY: Yes, your Honor.



JUDGE JAMES: Go right ahead.

REDIRECT EXAMINATION

BY MR. LUCHANSKY:

Q Mr. Koerber, Ms. Hallam was asking you about the fact that you are a buyer and not a PCO. Can you please describe for the Court what you did as a buyer in connection with the procurements that were made to contractors including Freedom?

A The buyer would actually write up the solicitation, issue the proposal, receive the offers, evaluate the offers, write up the pre-award negotiation memorandum, conduct most of the negotiations, write up the determination of responsibility, write up the price negotiation memorandum based on any negotiations that were done, put together the entire procurement package and award package, and then pass it on to the contracting officer for signature and review after the buyer had obtained the legal review of the package.

Q At the time that you were a buyer at DPSC, to what extent did the PCO rely upon your work in his making a decision?

A I would say 100 percent. I was never questioned.

Q Ms. Hallam asked you about whether Sopakco and Rafco had ever had one of their contracts terminated.

around, we made the award.

Q Based upon what you learned after the termination, about the confusion you were just describing, is it your opinion that at the time of termination, the DPSC had all accurate information? Was it your opinion that the termination was based upon accurate information?

A Based on what we found out after the termination, no. But we thought it was accurate at the time that we terminated.

Q I understand. I was asking afterwards. And you did the investigation, at that point did you change your mind as to whether you had accurate information at the time of the termination?

A Yes.

Q Was it DPSC's expectation -- was it part of the MRE program when you were there that DPSC, while it couldn't guarantee a contract, was it part of the MRE program that DPSC could simply substitute a new MRE contractor for an existing MRE contractor?

A At the time I was there, there was no other existing MRE contractors. After American Pouch was terminated, we only had the two. And then once Freedom came in they would have had three. But we couldn't have substituted. We didn't have anybody to substitute.

Did either Sopakco or Rafco have any of their contracts administered by Marvin Liebman?

A No.

Q Who was the ACO for Freedom, when Freedom's MRE-3 retort contracts got terminated for default?

A That would have been Marvin Liebman.

Q Are you familiar with the circumstances of that termination and as you said, re-procurement to Freedom?

A Since I was the buyer during that termination re-procurement, yes.

Q What happened there?

A There were a lot of things that were going on but there were a lot of problems with the USDA and misinterpretation of specifications, so that Freedom had a lot of product produced but was not being accepted by the USDA. Once we got that cleared up, that allowed the positive determination of responsibility on the re-procurement that was issued by DCASMA, New York.

Q How quickly did you re-procure? Did you re-procure the entire contract back to Freedom?

A To the best of my knowledge, yes.

Q How quickly after determination was it re-procured back to Freedom?

A It was -- we terminated. We issued a solicitation and as quickly as we could turn the package

Q You testified about Rafco and the fact that Rafco was not given in their contract -- the Government didn't pay for production equipment and office equipment and maybe some other capital equipment. Did Rafco ask for the Government to pay for these things?

A No, they didn't.

Q To the best of your knowledge, why didn't they ask for this equipment to be paid for?

A I'd have to try to speculate, but I would say that they had enough private financing to take care of that, and that's why they only asked us to pay for the lease hold improvements which were an unusual circumstance for them.

Q And did the Government pay for everything that Rafco asked them to pay for?

A Say that again.

Q Did DPSC pay Rafco all of the start up costs that Rafco had asked for?

A We paid for all the lease hold improvements that they requested.

Q Ms. Hallam referred to the a GAO decision or at least a draft report of GAO decision, criticizing the award to Rafco. That decision is found at FT-10. Before I ask you to pull that out. Did you review that decision?

Page 101

1 A It came when I was still at DPSC, yes.  
 2 Q Do you recall what that decision says?  
 3 A I remember that it criticized us for the way  
 4 that we handled a lot of the Right Away contract  
 5 negotiations. The lease hold improvements were part of  
 6 it. They also, if I remember, criticized us because the  
 7 building was being leased from the owner of the company,  
 8 and that it was not an arm's-length agreement in their  
 9 opinion, and a few other things that we negotiated like  
 10 that.  
 11 Q Well, let me ask you this. Do you recall, and  
 12 if you don't, we can pull out the document and you can  
 13 refresh your recollection. Do you recall whether the  
 14 criticism was the fact that DPSC had paid for those lease  
 15 hold costs, or simply whether the prices that were  
 16 accepted by DPSC, were prices given to it by the  
 17 contractor without sufficient checking on whether those  
 18 prices were the lowest that could be obtained?  
 19 A Most of it, especially in regard to the lease  
 20 of the building itself, was in regard to the price that  
 21 we paid. Because they said that we could go out and find  
 22 warehouse cheaper, and essentially, that's what it was, a  
 23 warehouse space.  
 24 On the leasehold improvements, I think they  
 25 chastised us for expensing those rather than having them

Page 102

1 depreciated.  
 2 Q Did anything come of this GAO draft report?  
 3 Was there any formal action taken?  
 4 A I've never seen any final report or heard of  
 5 any action taken because of it.  
 6 Q And when you were at DPSC?  
 7 A We responded to the draft but that was it.  
 8 Q Now Mr. Koerber, when you were at Sopakco --  
 9 I'm now talking to Walsh Healey certification and that  
 10 line of questioning. When you were at Sopakco, were you  
 11 involved in a protest of the awards to Star Food that  
 12 related to the Cinpac lease?  
 13 A Yes. Freedom and Rafco had already protested  
 14 the award to Cinpac and that was under the assembly side  
 15 of it. Star was a competitor of Sopakco on the retort  
 16 side, and when they made the award to Cinpac and said,  
 17 "Yes, they are Walsh Healey," then it was my opinion at  
 18 Sopakco, that if Cinpac had total control of that  
 19 facility that Walsh Healey required, then Star couldn't  
 20 have total control.  
 21 So, either one or the other had to, and if the  
 22 DPSC had already said that Cinpac did, I protested an  
 23 award to Star saying, "You've already made this  
 24 determination, you can't determine that both have control  
 25 of the facility."

Page 103

1 Q Because in your experience, was it possible for  
 2 both Cinpac and Star Foods to be Walsh Healey qualified  
 3 under the lease arrangement they had?  
 4 A Well, I think if you read the Walsh Healey Act,  
 5 it says that you have to have -- it has to be on your  
 6 premises. You have to have total control at all times of  
 7 the equipment, the facilities, the personnel. And so  
 8 both of them could not use the same equipment, same  
 9 facility, and still be Walsh Healey qualified.  
 10 Q As a buyer for DPSC, were you familiar with the  
 11 regulations -- the FAR regulations that applied to Walsh  
 12 Healey qualification?  
 13 A It was DAR back then, and I was. And primarily  
 14 because we had had a question on Rafco early in MRE-1.  
 15 They did not have retort capability. They were a  
 16 freeze-drier, and there was a question as to whether they  
 17 would meet the Walsh Healey requirements or not. And it  
 18 was determined that freeze-dried items were enough of the  
 19 menu components that they would qualify as a  
 20 manufacturer.  
 21 Q Mr. Koerber, I'm going to ask you to look at  
 22 FT-252, and if it's not in front of you, it would be in  
 23 the notebooks behind you.  
 24 A No. It's not in this one.  
 25 Q Okay. Right behind you are notebooks that are

Page 104

1 sequentially numbered with the FT numbers.  
 2 A 252? All right.  
 3 Q Exhibit 252 is a letter from attorneys for  
 4 Sopakco that was written in response to a letter you had  
 5 received from the contracting officer at DPSC, in  
 6 connection with Sopakco's protest of Star Foods award,  
 7 correct?  
 8 A Yes.  
 9 Q And you see at the bottom of the first page and  
 10 onto the second page, some citations to the FAR,  
 11 regarding a contracting officer's obligations to  
 12 investigate Walsh Healey certification, correct?  
 13 A Yes.  
 14 Q To the best of your training and experience,  
 15 are these citations accurate?  
 16 A Yes.  
 17 MR. LUCHANSKY: That's all I have, your Honor.  
 18 JUDGE JAMES: Any re-cross by the Government?  
 19 MS. HALLAM: No, your Honor.  
 20 JUDGE JAMES: All right. Thank you so very  
 21 much, Mr. Koerber, for your testimony. You may step  
 22 down.  
 23 THE WITNESS: Thank you.  
 24 JUDGE JAMES: Does the Appellant have another  
 25 witness you want to call?

1 MR. LUCHANSKY: Yes, sir, we do. We call Pat  
2 Marra.  
3 Your Honor, I presume that after a witness has  
4 been dismissed, that he may remain in the courtroom?  
5 JUDGE JAMES: It's not the procedure, no.  
6 MR. LUCHANSKY: No? Even after his testimony  
7 has been completed? Okay.  
8 Whereupon,  
9 PATRICK G. MARRA,  
10 a witness, was called for examination by counsel for the  
11 Government and, having been duly sworn, was examined and  
12 testified as follows:  
13 DIRECT EXAMINATION  
14 JUDGE JAMES: What I'd like you to do sir, is  
15 state for the record, your full name, spell your last  
16 name, and give us your address.  
17 THE WITNESS: Patrick G. Marra, M-a-r-r-a, 55  
18 Tall, T-a-l-l Oaks, O-a-k-s Court, C-o-u-r-t, Stanford,  
19 Connecticut 06903.  
20 BY MR. STEIGER:  
21 Q Good afternoon, Mr. Marra.  
22 A Good afternoon.  
23 Q Would you tell us what your present occupation  
24 is?  
25 A I'm a CPA basically, but I'm in a strong period

1 companies were at that particular point.  
2 Q Yes. And when did you start to work for  
3 Freedom?  
4 A The exact date was June something or other,  
5 1984, and the last date -- and there were a couple --  
6 there was an interim period there, a down period. But  
7 the last date I believe, was December 19, 1985.  
8 Q Thank you. What were your duties that you  
9 performed for the Appellant?  
10 A Well, chief financial -- they would be your  
11 typical chief financial officer variety type things, in  
12 terms of in this case, budgeting, money, anything  
13 connected with money, contracts, major contracts, the  
14 whole, the whole shebang. And I'll be presumptuous  
15 enough to say, probably Henry's right-hand man in  
16 everything of a financial and some other nature.  
17 Q Did you have any role in the preparation of  
18 proposals for work?  
19 A From the point I got on, up to the point of the  
20 initial contract -- the final contract that was issued --  
21 yeah, and that was pretty much 95 percent of my work up  
22 to that point.  
23 Q Could you give us some details of what you did?  
24 A Well, doing one -- when I first got in, there  
25 was a proposal on the table at some point, that was a

1 of semi-retirement.  
2 Q Semi-retirement. Would you tell us what your  
3 educational background is, Mr. Marra?  
4 A Starting with the beginning, or university?  
5 Q With university, yes.  
6 A With university? Well, I'll start out. I grew  
7 up two blocks away from here, went to school locally,  
8 went to Brooklyn Tech, was President of Brooklyn Tech.  
9 Q Please speak up, Mr. Marra.  
10 A Was President of Brooklyn Tech. Went on to St.  
11 John's University, right down on the corner -- when it  
12 was on the corner, won a six-year scholarship, went to  
13 NYU, finished my undergraduate at NYU, major in  
14 accounting, and then went on to graduate school at NYU  
15 also.  
16 I then got a second degree from Brazil, the  
17 University of Sao Paulo, Brazil, being the first American  
18 to ever have gotten a degree from that university.  
19 Q Thank you. What is your connection in terms of  
20 employment, with the Appellant company and its  
21 predecessors?  
22 A I basically had the title -- I'm not sure for  
23 the whole time -- but Executive Vice-President/Chief  
24 Financial Officer of Freedom Industries, Freedom, New  
25 York, HD -- whatever you want to -- whatever the

1 little inadequate and Henry -- when I came on -- we had  
2 to go through that proposal again, come up with another  
3 proposal, and submitted that to the Government in terms  
4 of detail, costing and pricing analysis.  
5 And from that one we went to another one, and  
6 then to another one until November 6, 1984, we finally  
7 got a contract.  
8 Q Did you --  
9 MS. HALLAM: Your Honor, I'm sorry. Could we  
10 ask the witness to speak up? We're having a hard time  
11 hearing him. I don't know if it's because that's  
12 blocking his voice or what.  
13 MR. STEIGER: It's not a microphone,  
14 microphone.  
15 THE WITNESS: It's not a microphone? I guess  
16 not.  
17 JUDGE JAMES: It's recording your voice, Mr.  
18 Marra, so she's probably getting your voice recorded, but  
19 please speak up so that the attorneys can hear you.  
20 THE WITNESS: Okay.  
21 JUDGE JAMES: And one thing I'd like you to  
22 clarify if you could, Mr. Steiger, is what contract he's  
23 talking about when he's talking about a proposal.  
24 MR. STEIGER: Yes. I was just about to ask  
25 that.

BY MR. STEIGER:

Q Do you know what the contract is, that is the subject of this appeal?

A I presume the contract that was issued on November 6, 1984. Not that we --

Q It's okay. How did that contract come to be called? Do you recall? In terms of MRE number? And again, would you tell us what you did specifically with respect to the proposal for MRE-5? What did you do specifically with respect to the proposal for MRE-5?

A Anything that instituted that proposal is in my handwriting, I believe 100 percent. I can see a document that is handwritten showing balance sheet, cash flow, pricing, detailed analysis of all the costs, financing. I forget how many schedules there are. That is all in my handwriting.

Q Did you participate in the negotiation and settlement of the price of that contract?

A Yes, I did. I was in Philadelphia on that date, and the time leading up to November 6, I was very much involved in making the various proposals and keeping in contact either by letter or mailgram up to that point.

Q Mr. Marra, do you recall the requirements in the solicitation in the RFP for the furnishing of data, financial and management data with the proposal?

statements.

Q You mentioned cash flows. Would you explain what they are please?

A Well, cash flows is a means of taking what you expect to be your sales and your costs and any other factors, inventories, financing and trying to show how much money you're going to get, when you're going to get it, when you're going to spend it, what's left over and just run it from like you would -- I look on it as like a bank account. You start out with a balance, if you got a balance, all of the ins and all of the outs and an ending balance. Well, how do you get from point A to point B?

In this case, point A was the beginning of the contract or in fact, originally prior to the contract, and point B would be the end of the contract. And originally we had anticipated time beyond that in fact.

Q Did you prepare these items in connection with the MRE-5 proposal?

A I did. Exclusively, I --

Q And do you know what happened --

A I can't think of anything in the final package that is not in my hand.

Q Was there more than one proposal submitted? Give us the history of the proposals?

A Well, from the time -- there was a proposal I

A Pretty much. The package that I finally put together might have been a little bit more sophisticated. It might have been required, but it was all basically required as I remember.

Q Now from your memory, and I could refresh it by showing you the RFP document. But from your memory, do you recall what the individual items of data and information that you were required to submit?

A Well, top to bottom, and not necessarily in the right order. Cost and pricing data, labor, manufacturer's overhead, cash flow statements --

Q You're running on ahead. Let's take them one at a time please. You mentioned cost and pricing data.

A Yes.

Q What was on that data? What was on that information?

A Well, that would be an accumulation of materials, what types of materials were going in, other types of materials, boxing and things of that nature. Direct labor, how much labor you have going in, the number of people, what their functions were and hourly rates, et cetera, general administrative expenses, manufacturing overhead, financing costs, typical budget, anything you would see on any typical P & L statement, profit and loss statement, or any full package financial

can't remember the date before I got there, around the \$25 category level, which we considered inadequate, and then when I --

Q What do you mean by the \$25 category?

A \$25 per case for the number of cases that were being bid on by Freedom Industries, at that point. From the \$25 I think I put together the first proposal at a \$34 and change level -- a full package I think -- running over a 24-month period or thereabouts. That one went to \$31 and change, as I remember, with a shorter period, I'm going to say 21 months from memory. And then it went down to \$29.90, a little shorter, a little bit meaner, a little bit leaner. And then it went down to the final one on November 6th, \$27.725.

Q Do you recall a provision in the solicitation that was referred to as L-4? Does it strike a bell? If not, I will pull the provision to refresh your memory.

A Well, you probably don't have to refresh my memory. But I don't like to think in terms of clauses, and if the L-4 -- if that is the so-called limitation on the amount of progress payments that could be conceded -- if that's L-4, I am, --

Q Would you tell us about that provision?

A The original proposal at -- well, I won't say the original proposal. Whatever the specs called for, a

1 50 percent, I think -- a 50 percent limitation on the  
2 progress payments. Although, one of our proposals, I  
3 think it was either the \$34 or \$30 proposal -- we had  
4 requested in our proposal -- made it contingent on  
5 receiving 100 percent progress payments.

6 Eventually, in -- we got the L-4 clause at 50  
7 percent, \$9,000,000 up to \$13,000,000, and extended  
8 beyond that at a later point in the progress of the  
9 contract. But we did get it up to \$13,000,000  
10 conditioned on delivery of 100,000 cases -- 200,000  
11 cases.

12 Q Mr. Marra, do you know the purpose of that L-4  
13 clause?

14 A The purpose as I understood the whole concept  
15 of what was called progress payment, was to help a  
16 producer get from A to B without requiring an undue  
17 burden on his part if he was not an ongoing contractor at  
18 that point.

19 Q Wasn't there a progress payment clause in the  
20 solicitation?

21 A There was. There was.

22 Q And do you recall what the percentage of  
23 progress payments was?

24 A 95 percent. We got it to 95 percent.

25 Q So if there was a 95 percent progress payment

1 I didn't see ceilings, no.

2 Q Was there a provision for increase?

3 A It was a stated limitation at that point. But I  
4 don't see it as a ceiling.

5 Q I'm sorry. Was there provision in the clause,  
6 do you recall, for increasing it?

7 A I think if we could show the need, yes. If we  
8 had -- if we could demonstrate need, we could get it.

9 Q Thank you.

10 A I mean that's -- it's logical you're not going  
11 to be left out there alone.

12 Q Do you recall the Government attempting to  
13 impose some kind of outside financing requirement?

14 A Yes. Very clearly. When I came on board  
15 Freedom Industries, part of its ownership was a bank.  
16 Because of prior experiences with the Government, that  
17 company was not profitable. I think there was pressure  
18 right from the beginning on the Government's side, to  
19 keep a bank involved in Freedom whether we needed it or  
20 not, very honestly.

21 I remember the earlier projections we had,  
22 going back to that \$34 a case, to \$30 a case, to \$29 a  
23 case. There were cash flows put together that even  
24 showed an amount of financing required at that point of  
25 \$7,000,000 conservatively, which in the earlier

1 clause, how did that -- how did L-4 affect that, as you  
2 saw it?

3 A Well, as the contract came out eventually --  
4 finally the price was close to \$18,000,000. The 50  
5 percent limitation on the progress payment that was in  
6 that clause would have limited us to receive only  
7 \$9,000,000 during the period of the -- of the contract.

8 In other words, we would accumulate cost, get  
9 \$9,000,000 from the Government when those costs were  
10 proper, and then when we deliver, that \$9,000,000 advance  
11 would be reduced. We didn't think that was an adequate  
12 financing arrangement for our situation.

13 In fact, if there is anything that I  
14 personally, as chief financial officer, was cognizant of,  
15 going into the meeting on November 6th, it was that I was  
16 personally less concerned about the price of what we were  
17 going to come out of the meeting with per case, than I  
18 was with the solidity of the financing arrangement with  
19 the Government. And that we finally attained on that  
20 date, a 95 percent progress payment up to \$13,000,000.

21 Q Did you perceive of that \$13,000,000 as being a  
22 ceiling that could not be changed?

23 A No. I didn't really see it as a ceiling. I  
24 honestly say, too many changes from the beginning to the  
25 end in this thing, that I don't, I well -- I don't see --

1 proposals, we looked upon as coming from the Government,  
2 coming from the bank.

3 As we got on in time -- and I think if you took  
4 a look at the track record on these proposals, if memory  
5 serves me right, one of the last proposals before the  
6 final proposal, showed the financing coming from Dollar  
7 Drydock Saving Bank.

8 In the final proposal, we dropped that and  
9 showed financing without demonstrating that it was Dollar  
10 Drydock. Even though, at that point, I think we still  
11 had a commitment from Dollar to help in the financing, we  
12 did not need near \$7,000,00 at that point.

13 Because of the raising of the limit from  
14 \$9,000,000 to \$13,000,000, and the 95 percent progress  
15 payment, and the most important concession in my mind, we  
16 finally got agreement from I thought -- everybody, that  
17 since Freedom was only consisting of this one contract,  
18 one and only contract at this point and the contract  
19 period was only a thirteen-month or so, production period  
20 -- we looked upon this as, in accountant's terms they'd  
21 use the word, job order. One job, one project, one  
22 financing package and we -- I felt -- we had 95 percent  
23 of that guaranteed by the Government. Guaranteed in  
24 terms of, they were the major source of financing.

25 In fact, I have a piece of paper, a handwritten

Page 117

1 piece of paper, in my black bag, that I believe when I  
2 went to Philadelphia that day, the most important thing I  
3 had down was, make sure of the financing on the 95  
4 percent. And I believe we attained that.

5 Q Did you have discussions with your boss, Mr.  
6 Thomas, concerning the financing requirements?

7 A Probably about ten times a day.

8 Q And do you recall what his feelings and  
9 thoughts were with respect to the financing requirements?

10 A Yeah, well, Henry -- Mr. Thomas, his approach  
11 right from day one was, what the Government doesn't  
12 finance, I finance. He always looked upon it, the  
13 Government's going to put 95 percent on the table. I'm  
14 going to put five percent on the table.

15 Q Did you agree with him?

16 A In essence yes. However, my training as an  
17 accountant always has to have a little bit of a fudge  
18 factor, if you want to use that word -- a little bit more  
19 conservatism.

20 If Henry says, "Ah, we're going to get the  
21 money in five days", I say, "Yeah, maybe we're going to  
22 get it in thirty days, and maybe forty-five days," things  
23 of that nature, to a point that, it was always a bone of  
24 contention between the two of us.

25 Henry would always say, "Hey, so what do you

Page 118

1 mean, I only need five?" And I would say, "Henry, we need  
2 a little bit more of that because things happen, you  
3 know, the big 'S' happens."

4 Q But if you said you agreed with him?

5 A But in essence, the theory is right. But the  
6 theory in practice I had a -- I -- we didn't need  
7 \$7,000,000, number one. Even my numbers  
8 super-conservatively, I think, show a million four, and  
9 that includes some payback on financing of fixed assets.

10 But, in Henry's terms, he says, we need \$700  
11 less some financing on fixed assets that was in there,  
12 probably \$4- or \$500,000. And I know from experience  
13 with Henry, seeing him day- to-day, we could have gotten  
14 that job done without a penny financing from anybody, if  
15 the Government had paid its 95 percent at -- on the dates  
16 we thought, and on the conditions we thought -- were led  
17 to believe were right.

18 Q Thank you.

19 A And I mean that in all sincerity.

20 Q I'd like --

21 MS. HALLAM: Do you mind if I move over here?  
22 I just can't hear his voice because this is going up a  
23 little higher and it must be blocking it.

24 THE WITNESS: well, maybe if I -- maybe if I  
25 move over. Or maybe I'm blocking it with this. Can you

Page 119

1 hear me Judge?

2 JUDGE JAMES: I can hear you. Ms. Hallam, feel  
3 free to move elsewhere but don't --

4 BY MR. STEIGER:

5 Q You referred earlier to a proposal for, in the  
6 \$30 range I believe?

7 A Yeah, \$30 and change.

8 Q \$30 and change. I'm going to pull that  
9 proposal now and show it to you and ask you some  
10 questions about it. That would be FT-060. You have the  
11 books in front of you.

12 A I have the --

13 Q Yes. They're right to your left. This batch  
14 underneath you.

15 A Oh, here?

16 Q Right. If you don't mind, would you go to the  
17 volume that says FT-060? It could be the very first one.

18 A It says what?

19 Q FT-060. These are all numbered.

20 JUDGE JAMES: It would be in book three.

21 THE WITNESS: Oh. I see FT-051, 064. FT-062?

22 BY MR. STEIGER:

23 Q FT-060 is the particular --

24 A I see FT-061.

25 Q Okay. We're going to help you. We're going to

Page 120

1 help you.

2 MR. LUCHANSKY: Excuse me, your Honor. May I  
3 give the witness some water?

4 JUDGE JAMES: Sure.

5 THE WITNESS: what I have in front of me says a  
6 letter of October 16th?

7 BY MR. STEIGER:

8 Q Yes. Now let me ask you some questions please.  
9 First of all, when you referred to the proposal for \$30  
10 and change, were you talking about this proposal?

11 A Definite. Definitely.

12 Q Okay. Now, would you describe -- well, let me  
13 put it this way. The attachments to this proposal, the  
14 schedules and attachments to this proposal, who prepared  
15 them, why were they prepared?

16 A Okay. All right. Well, obviously, the ones  
17 that are typed beyond it, I didn't prepare. But they  
18 were prepared --

19 MS. HALLAM: Excuse me. Could you move back  
20 over where you were?

21 THE WITNESS: The items that are typed in the  
22 attachments, I didn't type them. But they were prepared,  
23 typed under my supervision. All of those schedules --

24 BY MR. STEIGER:

25 Q How do these schedules relate, Mr. Marra, to

1 the items that we talked about before that were in the  
2 RFP?

3 A Well, in my mind, all of them required, or if  
4 not specifically worded as required, necessary supporting  
5 documentation to our proposal.

6 Q Would you mind taking a look at the spreadsheet  
7 for projected cash flow?

8 A Yes.

9 Q Now would you take us through this briefly,  
10 regarding where, when the cash flow was to be generated,  
11 and how?

12 A Okay.

13 JUDGE JAMES: Well, Mr. Steiger, there's a lot  
14 of spreadsheets. Which one are we looking at?

15 MR. STEIGER: The very -- 00820, on the bottom  
16 right.

17 JUDGE JAMES: Okay.

18 THE WITNESS: Just to make sure. The last  
19 number on the bottom of the page shows 1435760? The last  
20 column, last number on the page?

21 BY MR. STEIGER:

22 Q Yes.

23 A Okay. Now, everything on that page is in my  
24 handwriting with the exception of the date 16 October  
25 '84, and the price, \$30.12. That I know, is not my

1 handwriting. But I agree with it.

2 Now in effect, to run you through it quickly.  
3 This shows that from the period September '84 through  
4 January '86, this is what would have happened under the  
5 proposal of \$30.12 and the financing including the  
6 \$9,000,000 limitation on progress payment, and the return  
7 of working capital of about \$4,061,000.

8 We would have required \$4,000,000 in financing  
9 from somebody, plus \$9,000,000 from the Government, plus  
10 some financing for fixed assets. That's what that  
11 showed, to accomplish this.

12 The month-to-month all the way across, that  
13 shows what would have happened each one of those months,  
14 in -- for each of the items listed in the written out  
15 portion to the extreme left.

16 Q May I ask you to take a look at the first  
17 month's?

18 A Yes.

19 Q You show nothing in September. Why do you show  
20 nothing in September?

21 A I think that we were considering that  
22 pre-contract period, even though, my reading of the  
23 solicitation at that point indicated pre-contractual  
24 costs were permissible under a contract, we dropped them  
25 out.

1 Q You didn't think that the contract would be  
2 awarded then, if I understood you?

3 A Exactly, exactly.

4 Q Okay. So let's go on to the next month. That  
5 month of October, did you project a cash flow for that  
6 month?

7 A Yes. We assumed we projected to get \$549,000  
8 in, spend \$449,000, and end up with a cash balance that  
9 we would try to maintain, of \$100,000.

10 Q Did you anticipate receiving progress payments  
11 in that first month?

12 A In that first month, yes, \$102,812.

13 Q Do you recall what the anticipated costs were  
14 that were going to be billed out for that amount?

15 A Yeah. Roughly, yeah.

16 Q Give us an idea.

17 A Well, they show it down at the bottom here.  
18 Manufacturing we anticipated -- manufacturing overhead  
19 and general administrative expenses backed up by other  
20 sheets, of \$449,000. The detail of them are in backup  
21 sheets.

22 Now if you notice, there is nothing being  
23 produced at this point. What we're saying here is, the  
24 first month of operation we are going to have a structure  
25 -- set up a manufacturing structure and a general

1 administrative structure and pay rent, and do the normal  
2 things you've got to do before you start getting into a  
3 production mode. Did I answer you?

4 Q Yes. I believe you did. So in essence, are  
5 you saying that this cash -- projected cash flow analysis  
6 shows progress payments to be received from the beginning  
7 of the job? Is that correct?

8 A Well, from the beginning -- at the point -- As  
9 soon as we incur the costs and can prove to the  
10 Government these are proper costs and incurred under this  
11 contract, yes, we would get progress payments.

12 Q Did you believe that the \$102,812 was incurred  
13 cost?

14 A Definitely. I believe further than that.

15 Q Now you mentioned the fact earlier, that  
16 because this was a single contract, it had been  
17 determined that all costs would be charged direct against  
18 this job? Am I correct in that's what you said?

19 A Yes, yes.

20 Q Is that reflected on this sheet?

21 A Definitely. The only --

22 Q Tell us where?

23 A Well, this shows, in summary, the last column.  
24 The -- presumably, the total activity of Freedom. It  
25 showed we would have a contract \$18,683,000. We would

Page 125

Page 127

1 acquire fixed assets of \$1,500,000, that's machinery --  
 2 major machinery. And we would need \$4,061,000 of working  
 3 capital. And we would spend it as indicated in the lower  
 4 part of that next section from materials on down,  
 5 including repayment of the working capital loan,  
 6 including repayment of the progress payments including  
 7 interest. And it shows no other sources of income to  
 8 Freedom. It shows no other business activity other than  
 9 directly related to this contract. There was nothing  
 10 else.

11 Q Okay. Now this proposal -- as reflected in  
 12 these sheets, what percentage of progress payments did it  
 13 contemplate?

14 A 50 percent. Roughly 50 percent of the --

15 Q No, no. You didn't listen to my question.  
 16 What was the percentage rate of progress payments  
 17 contemplated by this proposal?

18 A I believe 95 percent, but let me check it.

19 Q Check it out. Hold on Mr. Marra, we're  
 20 reloading. We're done. Would you answer the question  
 21 again? May I give you the question?

22 A Go ahead.

23 Q What percentage of progress payments was  
 24 contemplated by this proposal?

25 A 95 percent of incurred costs.

Page 126

1 Q And how is that reflected in here?

2 A On what is -- what I have hand-written page  
 3 three.

4 Q Page three?

5 A Right.

6 Q Is that three, with the number 3 on the top?

7 A That's called Financing -- that's called  
 8 Financing, Working Capital/Progress Payments MR.

9 Q Right.

10 MS. HALLAM: What page are we looking at.

11 MR. STEIGER: We're looking at page -- on the  
 12 bottom, 00823.

13 THE WITNESS: Oh, I see that, yes.

14 BY MR. STEIGER:

15 Q Now again, would you take us through this  
 16 briefly to tell us how it shows what you just said?

17 A All right. The first part, I can't read it too  
 18 well because of the copy. But that's the extent of --  
 19 the financing we would require from Dollar Drydock and  
 20 how it -- and the interest that would be paid upon it. I  
 21 cannot read the third column there, I guess that's the  
 22 balance.

23 Q Well, okay. If you can't read it doesn't --  
 24 it's not very productive for us.

25 A Right. I think it says, "Draw down payback

1 balance," is -- that's my guess. Right.

2 Q All right. I'm going to perhaps get to  
 3 something now that's a little clearer to read.

4 A Well, I think I know what it is. If a -- it's  
 5 draw down, payback balance interest.

6 Q Are you looking -- are we looking at the same  
 7 page now, 00823?

8 A Yes, we are. There are two sections to it.  
 9 It's bank financing and DPSC financing/progress payments.  
 10 Are we looking at both?

11 Q That's on the right side.

12 A Yes.

13 Q The columns.

14 A The left side -- excuse me, the left side is  
 15 Dollar Drydock's financing, and the right side is DPSC  
 16 financing.

17 Q Mr. Marra, does this sheet, or do any of these  
 18 sheets reflect the liquidation rate that was contemplated  
 19 in this proposal?

20 A Yes.

21 Q Where would that be reflected?

22 A On the sheet 000823, on the right-hand side  
 23 that -- where it says, "DPSC Progress Payment 1," first  
 24 column is allowable incurred cost. Second is Progress  
 25 Payment, Progress. The third is Sales 84.9 percent.

Page 128

1 This -- this is the liquidation rate. Meaning,  
 2 when Freedom delivered and priced its cases of delivery  
 3 out at \$27.725, the Government would take back money from  
 4 that instead of paying the whole invoice to us, to recoup  
 5 the amounts that it had lent us under the progress  
 6 payment, up to \$9,000,000, or 95 percent of incurred  
 7 cost.

8 Q And that rate, you say was --

9 A 84.9 percent as determined by the DAR, as I  
 10 remember it.

11 Q Right. Okay. Thank you very much. Let me go  
 12 on.

13 I would like you to tell us what happened to  
 14 this \$30.12 proposal? How did it -- what happened to it?

15 A The \$30.12 proposal went down in the next offer  
 16 to \$29.12 -- you'd have to refresh my memory right now.  
 17 I'm not as young as I used to be -- \$29 and change.

18 Q Then what happened? What happened after that?

19 A After that, it went down to the final proposal  
 20 of -- final proposal and contract -- negotiated contract  
 21 of \$27.725.

22 Q Okay. And do you remember the date of that  
 23 final negotiation?

24 A November 6, 1984. I still have -- I still have  
 25 the train tickets in my possession.



1 Q Thank you.

2 A I have Henry's too because I had to pay for

3 him.

4 Q I would like to refer you a document concerning

5 that negotiation, and that would be FT-060, which I

6 believe is in the same volume that you have.

7 A Give it to me again. It -- it's what?

8 Q FT-060, no. FT-062, I'm sorry, FT-062.

9 A Well, I don't know how you get to it. I mean,

10 I got the -- Oh, FT what, 062?

11 Q Yes.

12 A I got it, I got it. It's near the end?

13 Q Is that document familiar to you?

14 A Yes. Oh, yeah, unfortunately, yes. It's

15 familiar to me.

16 Q Okay. Tell me what it is and what your role

17 was in connection with it.

18 A My role again, was to be Henry's chief

19 financial advisor in negotiating this contract, under the

20 title Chief Financial Officer/Executive Vice-President.

21 This document came out of what was termed by -- I believe

22 both parties -- Government and Henry, "Freedom

23 Face-To-Face Negotiations." I remember that phrase,

24 because that was basically the terms used in all of the

25 proposals that were out.

1 The last proposal we had at \$29 is this, and

2 then we were invited to go to Philadelphia -- Henry was

3 -- to negotiate the final contract, which this was it.

4 Q I'm sorry your Honor. Is --?

5 JUDGE JAMES: Just, just pause patiently.

6 It'll stop.

7 THE WITNESS: Could it be a fire?

8 JUDGE JAMES: No.

9 MS. HALLAM: Maybe somebody really is trying to

10 get a hold of you.

11 MR. STEIGER: Is that the phone that's on the

12 desk there? I think it's on the desk.

13 THE WITNESS: It's down here. Shall I -- that

14 did it -- that did it -- I think it did.

15 MR. STEIGER: Huh, huh, magic.

16 THE WITNESS: That did it.

17 JUDGE JAMES: Thank you for your patience

18 ladies and gentlemen, proceed.

19 BY MR. STEIGER: Thank you.

20 Q Let us backtrack a minute because I'm not sure

21 how much of this testimony we heard or didn't hear. But

22 let's go back to your -- your analysis document. You

23 were telling us what it was.

24 A All right. At the last proposal prior to this

25 document, was a proposal at \$29.90, as I remember it.

1 That was our offer, which we mailed in and, or sent in by

2 mailgram to the Government.

3 Based on that, the Government said to us, "Come

4 down to Philadelphia, so we can have face-to-face

5 negotiations to determine what the final contract will

6 be, based on your last offer of \$29.90."

7 Q Excuse me. Do you remember if you submitted a

8 new set of spreadsheets for that \$29.90?

9 A Yes, we did.

10 Q You did?

11 A I presume, yeah, \$29.90.

12 Q You're sure? Let's -- let -- let's take a

13 look.

14 A It's my handwriting. Next page.

15 Q My documents don't reflect it, so let's go on

16 from here.

17 A Okay. Well, I have them as part of this, very

18 honestly.

19 JUDGE JAMES: What's this?

20 THE WITNESS: This, the next page a -- 00909, I

21 have something in a --

22 BY MR. STEIGER:

23 Q The next page after the one we've been

24 discussing?

25 JUDGE JAMES: No, 909, he said.

1 A After, I'm sorry -- after 00907, which is the

2 memorandum of understanding, my next page is 00908.

3 Q Right. Now, explain to us -- well, let's go

4 back to this 907 document. I'd like to ask you a few

5 more questions.

6 The particular items in -- that are listed

7 here, do they -- were they finite items -- bottom line

8 items? What were they? How did you arrive at those

9 items -- at those numbers?

10 A Well, these, well -- the budget prior to this

11 again, was at \$29.90 and whatever the dollar equivalent

12 of that was, instead of \$17,000,000, the same categories

13 were in there. The same spreadsheets were in there.

14 Totally, whatever the equivalent of \$29.90 times the

15 number of cases was.

16 All that detail that we just have looked at in

17 the prior example, that was furnished to the Government.

18 We sat down with them in Philadelphia, and concessions

19 were made. Reduce materials by such and such, reduce

20 direct labor by such and such, why the rate goes from

21 this to this, and so forth, and so forth. Line, by line,

22 by line of the budgeted hand-written numbers we had

23 backing that last proposal up, were negotiated to arrive

24 at these final numbers.

25 Q Let me ask you this. The figure for

Page 133

1 manufacturing overhead, \$3,627,530.  
 2 A Right.  
 3 Q Is that a finite number or a rate?  
 4 A Finite.  
 5 Q The figure for G & A that's set forth here. Is  
 6 that a finite number, or a rate?  
 7 A All of the -- all of them are finite -- finite.  
 8 Q I call your attention to the documents that are  
 9 -- that follow, or come after the memorandum of  
 10 understanding. Which has -- there are ten documents with  
 11 an index in the first -- as the first page. What are  
 12 these documents?  
 13 A These are the backup documents. These  
 14 documents were the -- let me check now. Okay. These are  
 15 the final numbers backing up page 00907.  
 16 JUDGE JAMES: Well, should the Board understand  
 17 sir, those are your documents? Or are those Government  
 18 documents?  
 19 THE WITNESS: These -- these papers here were  
 20 -- let me put it in my terms, as I see it -- an integral  
 21 part of page one.  
 22 JUDGE JAMES: But -- but you authored them. Is  
 23 that -- should I understand that? That's your writing?  
 24 THE WITNESS: Well,, I'm going to -- yeah,  
 25 they're in my handwriting, but what I'm saying is this:

Page 134

1 When we went to Washington, we had a higher set of  
 2 numbers. Each one of those were negotiated. I can tell  
 3 you line by line, item by item that was negotiated down.  
 4 I still have them in a black bag. I got the handwritten  
 5 notes on them. Then based on that, this set of documents  
 6 was put together to back up what had been agreed. It was  
 7 just a formalization of what was done, line by line.  
 8 JUDGE JAMES: Okay.  
 9 BY MR. STEIGER:  
 10 Q But they were put together by you? That's what  
 11 the Judge wants to know.  
 12 A Put together by us -- handwritten by me.  
 13 Q Right.  
 14 A When I say put together -- negotiated by both  
 15 parties.  
 16 Q And what happened to these numbers in these  
 17 papers, right after that?  
 18 A What happened to them?  
 19 Q Yes.  
 20 A I believe the Government had a set, we had a  
 21 set and then we went off to the wars and tried to  
 22 accomplish meeting these objectives.  
 23 Q Okay.  
 24 A And the Government was supposed to use this and  
 25 monitor our success or not.

Page 135

1 Q Okay. Now let's talk about these numbers. Are  
 2 they the same or similar in concept to the proposal  
 3 backup that we talked about a few minutes ago?  
 4 A In all material respects, yes. With changes  
 5 for circumstances such as, materials were going to be  
 6 reduced, labor was going to be reduced, the rate of labor  
 7 per hour that we thought we'd pay certain employees would  
 8 be reduced. But in essence, it's the same form and  
 9 content of the prior, just with adjustments that were  
 10 made by the two parties.  
 11 Q To accommodate, would you say -- the reductions  
 12 in the, in -- in the various line item -- line items that  
 13 were negotiated?  
 14 A Yes. Each one was negotiated line by line.  
 15 Q So I will ask you again, because it -- I  
 16 believe it's important. First, what is the progress  
 17 payment rate reflected in this set of documents?  
 18 A I'm well -- I know it from heart, but I want to  
 19 call your attention, 95 percent.  
 20 Q What is the liquidation rate reflected in these  
 21 documents?  
 22 A Eighty-two point six.  
 23 Q When does it contemplate that progress payments  
 24 would be received by the contractor?  
 25 A The contract was received November 6th. The

Page 136

1 first progress payment calls for receipt in December.  
 2 Q What were the nature of the costs that were to  
 3 be in that first progress payment invoice?  
 4 A The exact nature?  
 5 Q How did they relate to what you previously said  
 6 with respect to the earlier?  
 7 A Pretty -- pretty much the same, the types of  
 8 expenses that were in the other. Manufacturing overhead,  
 9 general administrative, and most of that was basically I  
 10 have to believe, rent. I can read them off if this is  
 11 what I'm seeing here. Salaries \$9,000, utilities are  
 12 \$12,000, pest control, garbage and snow removal, plant  
 13 and ground maintenance, occupancy costs, I mean, there  
 14 are about twenty -- twenty or so categories, including  
 15 down to as low as a line item of \$400 for training.  
 16 Q What did these papers reflect with respect to  
 17 the treatment of costs incurred on this job?  
 18 A I you'll have to give that question to me  
 19 again.  
 20 Q It's not a trick question, Mr. Marra. I'm  
 21 sorry if you -- I'll rephrase it if you don't understand.  
 22 A Yeah, I lost something there.  
 23 Q Considering that this was a contract with only  
 24 a single cost base -- with only a single cost objective  
 25 -- what did these papers reflect with respect to the

1 treatment of costs on this job?

2 A That all -- all the costs that we intended to  
3 incur. These were -- this is what we intended to incur.  
4 This is what we budgeted to occur. And that these costs  
5 were direct costs -- only direct costs against this  
6 contract, and they were properly incurred.

7 We budgeted them as properly incurred -- to be  
8 properly incurred, and that the Government -- upon our  
9 incurrence, and upon their verification would advance us  
10 95 percent of those costs so that we could pay them, and  
11 get onto the next month.

12 Q Thank you. Now, just a couple of more  
13 questions, Mr. Marra.

14 Regarding the direct labor costs projected.  
15 When did our proposal show that we were going to start  
16 incurring direct labor?

17 A Direct me.

18 Q Can you find that?

19 A I know it was a couple of months down the line.  
20 I don't know the exact line. Can I take these out of  
21 this?

22 Q Certainly, certainly.

23 A May 1985.

24 Q Right. Which would be -- approximately --  
25 which would be how many months after a November award,

1 provide?

2 A Down -- down to the individual number of  
3 people, what particular lines they would be working on,  
4 what particular rates they would have, and even the -- I  
5 can't remember the exact number -- but off the top of my  
6 head I'm going to say fifteen -- between fifteen and  
7 sixteen percent -- bare minimum fringe benefits, which  
8 wasn't a fringe benefit. It was just basically taxes,  
9 unemployment taxes, social security.

10 Q What about -- what about equipment? What did  
11 we -- what did we say about equipment in this proposal?

12 A Equipment, well. Two types of equipment. One,  
13 fixed, fixed, fixed assets. Things that we know of as  
14 machinery. Things that are important that you need  
15 operators on. Things that have a long life, \$1,500,000.

16 Other types of equipment that Freedom  
17 essentially would not buy, the -- except to perform this  
18 contract -- and considering this is the only contract it  
19 had. And, we're not talking major amounts of projected  
20 costs. These costs were considered to be direct costs  
21 under this contract. In fact, on November 7th, I believe  
22 I have a note some place, I personally spoke to Keith  
23 Ford twice during that day.

24 Q Who is Keith Ford?

25 A He was part of the DPSC structure overwriting

1 Mr. accountant?

2 A Including November? Two, three, four, five,  
3 six. In the seventh month.

4 Q Thank you. What does our proposal show about  
5 incurring direct material costs?

6 A Basically the same, -- same, May, -- May.

7 Q May? Take another look.

8 A No. Well, one second now. From a profit  
9 standpoint, we would incur the materials in the same  
10 month as labor. We would need those materials earlier so  
11 we could have them there, to work on there.

12 Q When would we start billing -- when would we  
13 start -- we start the accounting for costs for that  
14 direct labor?

15 A February.

16 Q Which would be the -- what month after award?

17 A In the fourth month.

18 Q Thank you.

19 A The difference between the two is, you have to  
20 build up inventory. And you can't build up the inventory  
21 unless you pay the bills, and we had to do that. And to  
22 do so, we have to pay. And where was the money coming  
23 from?

24 Q Now how detailed was our proposal with respect  
25 to the labor to be performed? How much detail did we

1 this. He confirmed it to me on his own. We spoke later  
2 in the day. He said he had spoken to Mr. Barkewitz, and  
3 he confirmed it. All costs under this contract are  
4 direct -- are direct under this contract.

5 Q Now let's see, one last attempt on financing.  
6 This is a new contract, this is -- on this latest offer  
7 here -- this last offer.

8 What is your -- what accommodations were --  
9 were made for financing. Could you summarize that for  
10 us?

11 A In total or what the Government --?

12 Q No. This proposal. This last one.

13 A This proposal?

14 Q Right.

15 A Well, to do the \$17,000,000 contract now that  
16 has been agreed to by both parties, we would need --  
17 obviously you don't need \$17,000,000, because we got a  
18 profit factor. We would have needed \$1,500,000 in fixed  
19 asset financing. We would have needed progress payments  
20 which were authorized under the contract, and I have a  
21 number here of \$13,326,775, if I'm reading it right. And  
22 working capital of \$1,798,936, which we would have to get  
23 financed from somebody other than the Government.

24 Q But going back to your -- the discussions we  
25 had concerning your -- concerning Mr. Thomas' reaction to

1 all of this. What did it mean in terms, in -- in -- in  
 2 -- in -- if everybody had done their job? What did the  
 3 financing mean if everybody had done their job?  
 4 A In -- in my terms -- well, I'm going to put it  
 5 in terms that, if everybody had done their jobs -- we  
 6 would have needed in my terms -- \$1.7 million financing  
 7 from somebody other than the Government, \$13,000,000 from  
 8 the Government, and a million and a half in fixed assets.

9 Q How do you figure that?

10 A It's on -- it's on schedule --

11 Q I know. But how do you figure that -- that  
 12 figure? Where does that figure come from?

13 A It comes from when are the costs? We talked  
 14 before, labor is going to be incurred here, materials  
 15 have to be bought up here, we have to hire accountants  
 16 and other people, personnel back here.

17 As those costs are being incurred and they're  
 18 being paid for, let's say in the same month or the --  
 19 shortly thereafter, the next month -- you know what your  
 20 cash requirements are month, to month, to month.

21 It's like -- you know what, if we're starting  
 22 at the beginning of the month, we know what our mortgage  
 23 payment is, we know what our food payment is, we know  
 24 what our telephone bill, we know what our Conn-Edison  
 25 bill is, we know we have to pay them within thirty days.

1 You add them up -- you know what you need in the next  
 2 thirty days.

3 This is exactly what that projected cash flow  
 4 is. It shows where it is, what we need, when we need it,  
 5 and how we're going to get it. Who's going to -- who's  
 6 going to give it to us.

7 Q But didn't -- didn't weren't we supposed to get  
 8 95 percent progress payments?

9 A The 95 percent is in here. That was the  
 10 \$13,000,000 I believe I talked about.

11 Q 95 percent of \$17,000,000 is \$13,000,000?

12 A No, no. It's not 95 percent of \$17,000,000.  
 13 They don't finance the sales price, they finance the  
 14 cost.

15 Q Right.

16 A The \$13,326,775, I believe is 95 percent of  
 17 the --

18 Q Wouldn't there have been --?

19 A Up to -- up to -- the limitation. The L-4  
 20 limitation of the -- about the --

21 Q Wouldn't there have been liquidation? And  
 22 wouldn't additional monies have come in as we began to  
 23 deliver?

24 A Yes. That's separate. That's --

25 Q Would that not have reduced the need for

1 financing?

2 A It would have reduced it to some extent but,  
 3 this -- that -- that liquidation is also brought into  
 4 account in here. We still would have needed this  
 5 \$13,000,000 from the Government.

6 Q From the Government?

7 A Yes. Plus up to \$1,700,000 from other sources.

8 Q Let me ask you this.

9 A Roughly, what I'm saying is, if -- if the total  
 10 cost of this project -- if you want to -- if you want to  
 11 go back to the memorandum of understanding, you -- you  
 12 can see with undertaking the contract at \$17,200,000,  
 13 we're going to have a profit of \$2,200,000. Somebody has  
 14 got to finance \$15,000,000.

15 We say \$13,000,000 from the Government and the  
 16 balance from outside. The \$1,500,000, \$1,400,000 -- give  
 17 or take the fixed assets repayment, that's the financing.

18 Am I -- am I not making it clear? And you have  
 19 to have financing all the way through. Even though  
 20 you're liquidating with the Government, of every case,  
 21 when we finally get around to delivering it, even -- even  
 22 though it's going to be billed out at \$27.725, we're only  
 23 going to keep fourteen -- roughly 14 percent, because the  
 24 Government's going to recover to pay off the progress  
 25 payments that they gave us in the beginning.

1 Q Did we need \$7.2 million?

2 A No. 1.4, roughly 1.4. From the outside, 1.4.

3 Q Do you recall how we handled production  
 4 equipment in this proposal?

5 A Production equipment. I'm going to call it the  
 6 one million five.

7 Q One million five?

8 A Yeah.

9 Q And were we intending to get anything from  
 10 that?

11 A We were going to go out and finance that from a  
 12 bank.

13 Q Yes.

14 A At least for this proposal. It was our  
 15 objective, "Let's go borrow the money, put up the  
 16 machinery as collateral. That'll be a separate  
 17 arrangement for the one million five, and we will only  
 18 charge the Government the depreciation."

19 Q Which was approximately?

20 A \$333,333 based on accelerated appreciation.

21 Q So we had the reasonable expectation then, that  
 22 we would be paid \$333,000 depreciation costs?

23 A Unequivocal. In fact, in Henry's terms it was,  
 24 "Well, if we can lease it, we can -- if we can lease this  
 25 equipment, we know we've got \$333,000 that the

Page 145

1 Government's agreed to pay. I mean the Government's  
2 supplied." Whether you leased it or you buy it, same  
3 thing.

4 In fact, I have to say, if there's a flaw in  
5 the essence of anything here, it is in this one area of  
6 the fixed assets in this one regard. Because of the  
7 complexities of leasing, and capitalized leasing and all  
8 that, we decided to go for the fixed asset which  
9 everybody could understand and it wasn't an issue. We  
10 said, "Let's go. We need a million and a half equipment,  
11 all right. Let's just calculate depreciation, give or  
12 take, rather than go through what was then, a complicated  
13 concept of capitalized assets, tax values, benefits and  
14 etcetera."

15 Q Were there any aspects of the negotiated  
16 settlement in these spreadsheets that you were a part of,  
17 that indicated that perhaps some future contracts might  
18 realistically be awarded?

19 A No doubt about it.

20 Q Give me an example of what was in here that  
21 would have led us to that conclusion.

22 A What was in here?

23 Q Yeah.

24 A Well, I just think that the whole concept of  
25 buying one and a half million dollars of equipment --

Page 146

1 you're only going to buy that much equipment and lay that  
2 -- finance something of that nature. And if I'm not  
3 mistaken back then, inflation was high and the interest  
4 rates I think we calculated about 16 percent maybe,  
5 including about 1 or 2 percent over prime. That's how  
6 expensive money was back then.

7 So, you're not going to go buying equipment  
8 unless you think you've got a good probability of having  
9 this equipment go on for the period intended. We do know  
10 we were considered an IPP producer, so the only thing --  
11 it was a gamble. We were gambling that all we have to  
12 show is that we can do the job. We do the job, we know  
13 we've got the work out there, period. In fact, I think  
14 that came into a consideration on both parties that they  
15 were hoping and looking for us to be around for as long  
16 as the program was, and so were we.

17 Q Is it your understanding that the Government  
18 understood what you just said?

19 A Well, I should hope so, because the first thing  
20 that went in was a ten-year leasing contract. I mean,  
21 you don't go leasing a factory for ten years unless you  
22 think you've got some probability of work, hopefully.

23 Now, sure, had we, you know, things can happen.  
24 But once we felt sure that we could get this stuff out  
25 the door, and we weren't talking, you know, getting

Page 147

1 spaceships up to the moon. We were talking about putting  
2 crap in boxes -- excuse the expression for MRES. My son  
3 ate them in the Gulf, incidentally.

4 Q Let me ask -- okay. I'm sorry, you're not  
5 finished?

6 A It's not a complicated thing. It's take the  
7 things off the racks, put them in the box, get them out  
8 the door. You need a lot of people, you need a lot of  
9 equipment, but it's not a complicated thing regardless of  
10 what people think.

11 Q One more question. You told us about treatment  
12 of costs, you told us about the progress payment rate,  
13 you told us about liquidation rate, you told us about  
14 everything. Is it your understanding that the Government  
15 understood these things in its agreement to the award  
16 price?

17 A At the date the contract was awarded. And, the  
18 next days, up to the point that the first progress  
19 payment was put in, let's put it that way. There is no  
20 base that I thought we left untouched.

21 Q But did the Government -- did you understand at  
22 time of award that was also the Government's  
23 understanding?

24 A If the Government is considered the person that  
25 signed this contract, yes. If the Government is

Page 148

1 considered somebody that didn't sign the contract, but  
2 has a responsibility to some other place, other than the  
3 people that signed it, then you've got another matter  
4 there.

5 Q Thank you very much.

6 A But I had no doubt about it. The meeting of  
7 the minds between the man that signed the contract and  
8 the Government that signed the contract, was one and the  
9 same.

10 MR. STEIGER: Thank you. I'm finished, your  
11 Honor.

12 MR. LUCHANSKY: May I request a very brief  
13 two-minute pause?

14 JUDGE JAMES: Sure. Let's go off the record.  
15 Let's take more than two minutes. Let's take five or ten  
16 minutes, let everybody --

17 (Recess.)

18 JUDGE JAMES: Back on the record.

19 CROSS EXAMINATION

20 BY MS. HALLAM:

21 Q Mr. Marra, you said at one point that you felt  
22 that Freedom Industries only needed 1.4 million dollars  
23 of outside financing, or to finance it themselves?

24 A Let me explain the one million four, if I can.  
25 The million four, number one, includes other than costs,

Page 149

1 if you'll look at the cash flow. It has a payback of the  
2 capital equipment. I forget how many installments, but  
3 at least one.

4 It also has all of the interest. So the one  
5 million four is inflated to that extent. It is also  
6 prepared basically, on a scenario of no risk. For  
7 instance, if I had said we can get credit from our  
8 creditors, of 60 days or a 120 days, that line, if it  
9 didn't disappear, would virtually disappear. It would be  
10 zero. We wouldn't need it. We could have -- one of --  
11 I'd phrase it another way. The whole contract could have  
12 been done conceivably and realistically, without a penny  
13 of outside financing if the progress payments had flowed  
14 in the amount and on the conditions that we were led to  
15 believe.

16 Q Okay. For 13 million, exactly how would you  
17 obtain the capital equipment then?

18 A The one million five?

19 Q Right.

20 A The one million five was a separate financing  
21 of the equipment with the equipment as collateral.  
22 However, because this contract took one year thirteen  
23 months, the first is we envisioned -- at least the first  
24 installment on the one million five, to be paid back.  
25 And to have it paid back, it's got to go into this cash

Page 150

1 flow. Even though, from a cash flow standpoint, somebody  
2 would have to pay that installment. Do you understand?

3 Q Who was going to pay that installment?

4 A The cash flow from the whole project. A dollar  
5 is a dollar.

6 Q If production equipment was not expensed under  
7 the contract, did you anticipate using progress payments  
8 to pay for the installments of the sale for the purchase?

9 A You'd have to give me that again.

10 Q The production equipment was not expensed under  
11 the contract. Is that correct?

12 A The production equipment was expensed to one  
13 extent.

14 Q It was not part of the \$17.1 million. Is that  
15 correct? Only a portion -- only the depreciation?

16 A That's not only. That's, 20 percent.

17 Q It was \$333,000.

18 A That's over 20 percent.

19 Q Where was the money coming from to pay the rest  
20 of the 1.5 million dollar bill for the production  
21 equipment?

22 A That would only be paid down the line. It was  
23 going to be collateralized. I forget, I think, a 5-year  
24 loan. It was -- if I'm not mistaken, there's a schedule  
25 in there indicating how the fixed assets of one million

Page 151

1 five were going to be financed. You finance long-term  
2 assets on a long-term basis. Short-term assets on a  
3 short-term basis.

4 Q Where was the money coming from?

5 A The money that eventually would --

6 Q Right.

7 A That would have had to come from a source  
8 beyond this contract. Most likely, add-on contracts.

9 Q So at the time you entered into this contract,  
10 you did not have that source to pay for the 1.5 million  
11 dollars, other than the depreciation?

12 A No. And I have to say in accountant's terms,  
13 it's a misleading question. It's like saying, I need a  
14 -- I'm going to buy an airplane so I can get from here to  
15 there in one year, but we know this airplane's going to  
16 last us 40 years. And then you're going to ask me, well  
17 how come you're not putting the whole cost of that  
18 airplane in here. Who's going to pay for it? Well it's  
19 going to be paid for by all of those people who are going  
20 to travel on that airplane over the next 40 years.

21 Q Well, where did Freedom get the money to pay  
22 for the \$1.5 million?

23 A They didn't have to get the money. They just  
24 had to make a deal. Go buy a piece of equipment, get a  
25 bank to finance that equipment. They wouldn't have to

Page 152

1 put up a penny of that equipment until the --

2 Q Is that what happened under the contract?

3 A Excuse me?

4 Q Is that what happened under the contract?

5 A What do you mean? As in reality?

6 Q Yes. As in reality. Is that what happened --  
7 that they didn't put a penny into the equipment?

8 A Well as it happened, most of the equipment  
9 wound up being leased instead of acquired, with the  
10 Government's acceptance of that. So we knew going in  
11 that some of the equipment instead of being acquired,  
12 would be leased. And the equip -- oh, I'm sorry.

13 Q And the lease payments on that equipment, where  
14 did the lease payments come from?

15 A The 33, the equivalent of the \$333,000. To the  
16 extent that equipment was leased and not bought,  
17 depreciation would have been less.

18 Q Well, actually you wouldn't get depreciation  
19 unless you showed a bill of sale would you?

20 A We wouldn't have depreciation but we would have  
21 leased. We wouldn't charge you depreciation. We didn't  
22 charge depreciation until we had the assets. If we  
23 leased them we wouldn't charge any depreciation.

24 Q Fine. And you can put in the bills for the  
25 leasing and get progress payments on it?

1 A No. We can only put--

2 Q For the lease?

3 A Only if we lease them. If we lease them, we  
4 put the lease in. But if we lease it then we can't  
5 charge depreciation.

6 Q But when you negotiated the contract there  
7 wasn't anything in the contract price for leasing the  
8 equipment. Is that correct?

9 A There was. The equivalent of the \$333,000 was  
10 the amount that was -- could have been used either  
11 leasing or acquisition. It's the same thing. We --

12 Q No. Mr. Marra, when you put in for progress  
13 payments for leasing, you are getting the amount of money  
14 that you say you leased the contract for or the equipment  
15 for. Is that correct?

16 A Essentially yes, yeah.

17 Q And that sum of money comes from the pool of  
18 progress payments. Is that correct? The \$13,000,000  
19 that, that --?

20 A Yes. Yeah, if I understand your question, yes.

21 But I'm having trouble --

22 Q And to the extent that any portion of those  
23 lease payments exceed the contract price by \$333,000,  
24 you're creating a situation where progress payments that  
25 are earmarked for some other item, are being used for the

1 lease. Is that correct?

2 A Well this is the same thing as.

3 JUDGE JAMES: Can you answer the question, sir?

4 THE WITNESS: I am. I'm trying to answer it.  
5 I am trying to answer it.

6 Within the contract as we saw it, you have the  
7 flexibility of substituting one type of expense for  
8 another type of expense.

9 BY MS. HALLAM:

10 Q We're not arguing that. We will stipulate that  
11 there was nothing wrong with doing that. I'm not trying  
12 to trap you. I'm just asking you --

13 A Then I'm misunderstanding the question, I'm  
14 sorry.

15 Q If the lease agreements required \$500,000 a  
16 year, the Government would pay \$500,000 a year.

17 A Yes.

18 Q But in doing that, Freedom is then taking  
19 progress payments that were supposed to go to some other  
20 items that were expensed under the contract. Is that  
21 correct?

22 A In that specific context, yes. However, there  
23 would be other costs that would be going another way,  
24 conceivably.

25 Q Okay. Do you know what the total amount was

1 that Freedom paid for leased equipment under the  
2 contract?

3 A Off hand, I don't. I don't have --

4 Q Are you familiar with the Teknic lease?

5 A To some extent, yes.

6 Q Do you know how much was billed under that  
7 lease for production equipment?

8 A I don't have that number in my head. But I  
9 could -- if you show me something I could -- I don't --

10 Q There is also retort production equipment  
11 billed under the contract too. Is that correct?

12 A I presume so, but I don't know. I don't know  
13 the individual items, I don't. I don't.

14 Q Do you know who owned Teknic?

15 A I think it was a related company, I believe.

16 Q Well you know for a fact, that the Thomas' --  
17 Henry Thomas or Jacene Thomas, individually or jointly  
18 had an interest in Teknic, don't you?

19 A I believe so, yes. I don't know it for a fact,  
20 but I believed it.

21 Q Do you know that through Teknic, Mr. Thomas was  
22 also leasing a car for just under \$1,000 a month?

23 A The car that he was driving?

24 Q A white Lincoln?

25 A I believe, If that was through -- I don't

1 remember. But if it was through Teknic, yes, yes.

2 Q And there were cars that were included in the  
3 overhead when the contract was negotiated, wasn't there?

4 A Yes. I believe there was. If there was  
5 something in their automobile expense. I don't know if  
6 it was strictly leasing, or mileage or whatever. But  
7 there was automobile expense in there, yes.

8 Q Well, all total, under the contract Freedom was  
9 billing for three cars, weren't they?

10 A Under the contract, you mean as proposed?

11 Q No. Under the contract when they were  
12 submitting progress payments, they were submitting  
13 progress payments for leases on three cars.

14 A One, two, I know of three.

15 Q There may have been more?

16 A I don't know. I can identify three that come  
17 to mind.

18 Q And they were being paid progress payments for  
19 those leases, weren't they?

20 A Yes.

21 Q When the contract was negotiated, how much was  
22 planned initially for leasing those cars?

23 A If you can refer me to a -- oh, I got it -- I  
24 got it.

25 Q What are you looking at, Mr. Marra?

Page 157

1 A I'm looking for something -- G & A -- I'm  
2 trying to find out where it would be under general  
3 administrative expenses.  
4 Q You could look at a Bates stamp on the document  
5 and tell us what number.  
6 A Well, if I can find it I'll let you know. The  
7 best I can tell you is under general and administrative  
8 expenses.  
9 Q I'm sorry, Mr. Marra. Could you identify the  
10 Bates stamp number on that document?  
11 A 00917.  
12 Q Give me a minute to find it. Okay, sir. Go  
13 ahead.  
14 A You have it? Is it called Manufacturing and  
15 Overhead/General Administrative? Is that the title? Are  
16 we looking at the same thing?  
17 Q Yes, I see it.  
18 A Down, I think line 6011, about two-thirds of  
19 the page down, Transportation \$28,000.  
20 Q I'm sorry, I see \$2,000. You see 28?  
21 A Two thousand a month.  
22 Q Two thousand a month. Did that also include  
23 like, airplane tickets for out-of-town travel, or was  
24 that just exclusively for car leases?  
25 A The travel, I have to believe, is up above on

Page 158

1 6003, Travel and Sustenance, \$72,000? If I'm looking --  
2 if I'm reading, I can't -- I'm having trouble following  
3 the lines across.  
4 Q Yes, I see it.  
5 A Yes, \$72,000. I don't have the detail of what  
6 was in each one of these line items to that extent. But  
7 there was travel in there and there were the cars down  
8 below, to answer your question.  
9 Q Do you know how much was being paid out every  
10 month for car leases?  
11 A From memory, I don't, no.  
12 Q Was one of the cars assigned to you?  
13 A Yes, it was.  
14 Q Do you know how much was paid out for that car?  
15 A Off-hand I don't, but you give me a document  
16 and I'll recollect it.  
17 Q And there was another car that was assigned to  
18 Mrs. Thomas. Is that correct?  
19 A To Mr. Thomas.  
20 Q Mrs. Thomas -- Jacene Thomas?  
21 A I thought it was Mr. Thomas. Well, is it the  
22 one that Henry was driving?  
23 Q There were two other cars. Wasn't there a  
24 Lincoln Continental and a Firebird?  
25 A I had a Firebird.

Page 159

1 Q Was there one other car for Mrs. Thomas?  
2 A The three cars that I thought were being  
3 leased, now maybe I'm wrong, I thought it was my car,  
4 Henry's car -- we're going back sixteen years -- and  
5 Philippe, I thought had a car. Maybe I'm -- I think so.  
6 Q Okay.  
7 A In fact, there was a bad experience with my car  
8 but --  
9 Q I'm sorry. I didn't hear that.  
10 A There was a very bad experience with my car,  
11 but, go ahead. I thought there were three. But those  
12 are the three that come to my mind.  
13 Q Were they all being leased through Teknic?  
14 A I'm fuzzy on the car lease through Teknic, but  
15 I'll accept that for this purpose. Mine was not through  
16 Teknic. Mine was direct from Oldsmobile something or  
17 other, and I thought the other one was direct from a car  
18 distributor, an automobile distributor.  
19 Q Could you tell us what the purpose of setting  
20 up the equipment lease for the retort equipment and the  
21 MRE production equipment -- why did you go through  
22 Teknic, rather than lease it directly?  
23 A I didn't do it. I don't remember. And I did  
24 not, I was not party -- direct party to the setting up of  
25 Teknic.

Page 160

1 Q And you don't know why that was set up like  
2 that?  
3 A Factually --  
4 Q I'm sorry?  
5 A Factually, that I can attest to? No.  
6 Q No? Do you recall the Teknic lease -- the  
7 problems with the Teknic lease? The Government's saying  
8 it was a capital lease and it being revised a number of  
9 times, do you have any recollection of that?  
10 A Vaguely, I remember conversations on the  
11 capitalized and how it should be treated and yes, I do.  
12 But I don't remember specifics on it other than, it was a  
13 bone of contention.  
14 Q Do you know who set up the Teknic leases  
15 originally?  
16 A Who set up the Teknic leases? I thought Henry  
17 did, but I don't recall. Henry, or people that he was  
18 involved with, the lawyers, or whoever, the Bankers  
19 Leasing. I know I didn't set it up. I don't think I  
20 did. Do you have a date on the setting up of that lease?  
21 Q I'm looking.  
22 JUDGE JAMES: Let her ask the questions, you  
23 just answer.  
24 THE WITNESS: I can guarantee you that I had  
25 nothing to set up the original lease if it took place



1 after February of '84 -- February of '85. I'm sure I  
2 wouldn't have had anything to do with it.

3 BY MS. HALLAM:

4 Q If it took place after what?

5 A February, March, April of '85 -- I don't. If  
6 it took place there, I didn't have anything to do with  
7 it.

8 Q How do you know that you wouldn't have anything  
9 to do with it in that time frame?

10 A I have a good memory, I have a good memory.

11 Q Did your job duties change in any way in that  
12 time frame?

13 A Well, they didn't change. There was a break in  
14 there for some personal reasons and other reasons.

15 Q I'd like you to look at Rule 4. And the Rule  
16 4s are the red binder, the red files, Tab 81.

17 A What's red, down on these?

18 JUDGE JAMES: Go ahead and help him if you'd  
19 like.

20 THE WITNESS: Let me have that again please?

21 BY MS. HALLAM:

22 Q Rule 4, Tab 81. As a matter of fact, you could  
23 probably move all the Appellant's exhibits off of there  
24 because I probably will be only referring to one or two  
25 of them.

1 A This one?

2 Q Yeah. We'll just leave this one close because  
3 I might refer to this one, but all these you can put  
4 aside. You don't mind if I put these up closer to you.  
5 Were you responsible for preparing the progress  
6 payment submissions?

7 A I didn't sign them.

8 Q I'm sorry?

9 A I didn't sign any progress payments.

10 Q Did you prepare the progress payment  
11 submissions?

12 A No. I personally didn't prepare them. But  
13 they were prepared through the accounting department  
14 which reported to me.

15 Q Did you review them before they left the plant?

16 A Yes, I did.

17 Q And that was with regard to all the progress  
18 payments that were submitted under the contract?

19 A No.

20 Q When did you leave, again?

21 A I'm going to say, anything between February '85  
22 and roughly, August '85.

23 Q Between February '85 and August '85, you did  
24 not review progress payments?

25 A That's right.

1 Q And then after August '85, you reviewed them  
2 again?

3 A Pretty much so.

4 Q And when did you leave Freedom?

5 A During that -- oh, what final date did I leave  
6 Freedom?

7 Q Yes.

8 A I believe, December 19, 1986.

9 Q Eighty-six? And why did you leave?

10 A When, finally?

11 Q Yes.

12 A Well a couple of my checks bounced, to me, and  
13 the Government was closing up the contract as I  
14 understood it. We had laid off all the employees. I'd  
15 like, if I can add too, just to it.

16 JUDGE JAMES: Before you do, let me get this

17 straight. When you first testified on direct, you

18 testified you left the employment of the company December  
19 19, 1985.

20 THE WITNESS: I'm sorry.

21 JUDGE JAMES: Now you're saying 1986.

22 THE WITNESS: I'm sorry.

23 JUDGE JAMES: which was it, Mr. Marra?

24 THE WITNESS: '86 your Honor, '86.

25 JUDGE JAMES: It was '86?

1 THE WITNESS: Yes. What I -- yes, '86. That  
2 was a mental block.

3 BY MS. HALLAM:

4 Q Between February '85 and August '85, you did  
5 not work for the company?

6 A That's right.

7 Q And why was that?

8 A Personal and other reasons.

9 Q I'm sorry?

10 A Personal and other reasons. If I -- let me  
11 correct my answer. I don't remember the exact date I  
12 started with Freedom -- June '84, okay.

13 Q Right.

14 A Okay. Let's call it June '84. From June '84,  
15 all the way through the signing of the contract and  
16 beyond, up to February '85, I received not a penny from  
17 Freedom. My salary was fixed at \$120,000. I received  
18 not one penny out of Freedom. In fact, laid out money  
19 out of my own pocket to pay expenses, including for Henry  
20 Thomas, including travel, and including a whole bunch of  
21 other things, without receiving a penny remuneration.

22 When the proverbial -- started to get  
23 complicated in February, with the non-payment of invoices  
24 I had, had enough. I had, had enough. So I got out.  
25 Came back in August.

Page 165

1 Q Came back in August?  
 2 A Yes.  
 3 Q Okay. Well, look over this document at Rule 4,  
 4 81. Does this refresh your memory as to any of the  
 5 dispute regarding the Teknic Corporation lease?  
 6 A I don't remember the details of the lease. But  
 7 I, you know, this letter looks very familiar to me.  
 8 Q Well, you wrote it. Is that right?  
 9 A Yeah, I read it and signed it. Looks like we  
 10 reduced the progress payments seven and eight, and just  
 11 looks like we were correcting something for the Teknic  
 12 lease, period. Is there something specifically you want  
 13 me to answer regarding this?  
 14 Q No. Looking at the Schedule A.  
 15 A Next page?  
 16 Q Yes.  
 17 A Yes.  
 18 Q Do you know if this is the payment schedule  
 19 that was accepted in the -- or that was set forth in the  
 20 lease that was finally accepted by the Government?  
 21 A I believe so. I see nothing -- yes.  
 22 Q And to the extent that these payments add up to  
 23 over \$333,000, you agree that monies that were earmarked  
 24 for some other purpose would be used to pay this?  
 25 A I'm having trouble with the last part of that.

Page 166

1 Q For everything under the Teknic lease, it went  
 2 through under a progress payment request. Is that  
 3 correct?  
 4 A Yes.  
 5 Q So to the extent that the progress payment  
 6 requests exceeded \$333,000, do you agree that any  
 7 progress payment would actually be money that was  
 8 originally anticipated to go to some other item?  
 9 A Well to some extent, but again, the original  
 10 project called for 13 months. At this point here, we're  
 11 probably in the 28, 29 month. And the reason we're that  
 12 far back down is because things didn't happen in the  
 13 beginning the way they were supposed to.  
 14 Q When you came on in June, what was the status  
 15 of the negotiations of the contract?  
 16 A In June of '84? I -- either a proposal had  
 17 just gone in or had just been rejected. I don't  
 18 remember. It was \$25 or thereabouts. It's the first one  
 19 I remember, which I had nothing to do with but, it just  
 20 happened at the time I got in, that prior proposal was  
 21 sitting out there.  
 22 Q When you came on board, did Freedom Industries  
 23 already have one pre-award survey?  
 24 A I believe it did.  
 25 Q What was the results of that pre-award survey?

Page 167

1 A You'd have to refresh my memory in terms of the  
 2 award. I could say it was accepted, or unaccepted and I  
 3 wouldn't be basing that on a clear recollection right  
 4 now.  
 5 Q It was not accepted. Do you recall that?  
 6 A Well, okay. I'll accept that.  
 7 Q Well, look at Rule 4, the red book, Tab 1.  
 8 A Tab 1.  
 9 Q Page 34.  
 10 A Tab 1. You're losing me again on the tabs. Is  
 11 this the same book?  
 12 JUDGE JAMES: It's a different book.  
 13 BY MS. HALLAM:  
 14 Q The red book.  
 15 A The red book, a different book.  
 16 Q There's Tab 1. One book goes from Tab 1 to 40.  
 17 A Okay. I hear you, I hear you. Tab 1, okay.  
 18 Yes? Which Tab 1? Okay, what are we looking at?  
 19 Q Yes. Page 34. Does that document refresh your  
 20 memory as to the events that were occurring around in the  
 21 June time frame, when you came on board? I know it's not  
 22 a Freedom document.  
 23 A I don't remember seeing at least page -- you  
 24 said page 34?  
 25 Q Yes. I don't want you to testify as to the

Page 168

1 document. I just want you to look at it to refresh your  
 2 memory as to the events that were occurring in the June  
 3 '84 time frame.  
 4 A Sounds all right to me. This pretty much is  
 5 the situation when I got into Freedom, if that is the  
 6 question, yes.  
 7 Q So at the time you came to Freedom, Freedom  
 8 already had one negative pre-award survey. Is that  
 9 correct?  
 10 A Yes.  
 11 Q And it was referred to the SBA for a CHC. Is  
 12 that correct?  
 13 A That's right.  
 14 Q And Freedom never submitted the information  
 15 that SBA requested. Is that also correct?  
 16 A I believe it to be right.  
 17 Q I'm sorry, I didn't hear that.  
 18 A The specific, I believe it to be right. But  
 19 It's not registering that clearly. I believe it to be  
 20 right, yes.  
 21 Q And the two points that were found to be  
 22 deficient was the fact that there was an uncertain status  
 23 in the Hunt's Point facility, and there was also a  
 24 problem with getting a firm commitment from Dollar  
 25 Drydock. Is that correct?

1 A The two circumstances you just mentioned, yes.  
2 MR. STEIGER: Excuse me, your Honor, I don't  
3 know where counsel is going with these questions. I  
4 can't figure it out. Talking about June 19--, months  
5 before the contract was awarded. I don't understand the  
6 relevance of these questions. Where is she going with  
7 them?

8 MS. HALLAM: Your Honor, excuse me for  
9 mentioning it. But I think that's a rather self-serving  
10 attitude to have for an Appellant, who has documents in  
11 the record going back to 1971. So what if it's before  
12 the contract period? So was all the negotiations that  
13 you spent an hour going over, talking about.

14 MR. STEIGER: Yes. But the documents that we  
15 have, refer to a pattern of behavior leading up to what  
16 we were saying.

17 JUDGE JAMES: Please gentlemen. What relation  
18 does all of this have to the man's direct testimony?

19 MS. HALLAM: Excuse me.

20 JUDGE JAMES: What relation does your  
21 questioning now, have to do with this man's direct  
22 testimony?

23 MS. HALLAM: Mr. Marra is on our witness list,  
24 your Honor. I didn't realize he was objecting to going  
25 outside the scope.

1 MR. STEIGER: Well then he should be called  
2 separately as a witness.

3 MS. HALLAM: Well, if we want to drag him back,  
4 that's fine with me. I thought I was doing the man a  
5 favor.

6 JUDGE JAMES: Well, all right, okay. Listen,  
7 here's my ruling. Do it either way. If you're going to  
8 go beyond the direct and in effect, regard him as your  
9 witness, do that after you complete your  
10 cross-examination.

11 MS. HALLAM: Okay, your Honor.

12 JUDGE JAMES: So we don't get them  
13 intermingled, all right?

14 MS. HALLAM: Yes. I think you imposed the same  
15 rule on the Sopakco case.

16 JUDGE JAMES: Probably, I did.

17 MS. HALLAM: Yes, okay.

18 BY MS. HALLAM:

19 Q Well, getting back to the negotiations then.  
20 I'm sorry to switch topics on you.

21 A Okay.

22 Q Do you recall what was the amount that was  
23 expended for plant rehabilitation and repair?

24 A Recall, no. I'd have to find that.

25 Q Do you recall it being in the vicinity of

1 \$145,000?

2 A Is that the number that's shown on the  
3 projection?

4 Q I'm not looking at anything.

5 A Let me have the question again, if I might.  
6 You mentioned building repairs?

7 Q Yes. I'm not asking for what was proposed. I  
8 was asking for the final amount that was allowed by DPSC.

9 A Maintenance of -- okay, building repairs, I  
10 think I see \$187,500 but -- \$187,500 building, strictly  
11 building repairs, \$187,500. Plus the building  
12 maintenance of an automated building management system.  
13 if you want to talk about that. It would be another  
14 \$75,000, and lockers \$25,000 and --

15 Q You don't have go through all those items.  
16 Just building repair and rehabilitation. You said  
17 proposed was a hundred and what?

18 A Well, the word, rehabilitation, I don't  
19 remember of hearing in any of this. So I don't know what  
20 you're referring to as rehabilitation. But building  
21 repairs, \$187,000, building maintenance system, an  
22 automated system --

23 Q That's actually equipment, right?

24 A Yeah, \$75,000. And lockers, another \$25,000.

25 Q Do you know how much Freedom actually sought in

1 progress payments for building repairs?

2 A Final total? Well in total, no, I don't.

3 Q Is it over a half a million dollars?

4 A I would doubt that if -- it's over that amount  
5 in the time period projected.

6 Q Was it over a hundred million, or, a half a  
7 million dollars during the contract that Freedom  
8 submitted as costs for progress payment purposes for  
9 building repair and rehabilitation. Isn't that correct?

10 A It could be. I don't know the final number. I  
11 don't.

12 Q Well, would you agree that if it were \$300,000  
13 over what was expensed, that those extra costs would come  
14 from something else that was expensed under the contract.  
15 Is that correct?

16 A No. I would imagine it would come from the  
17 damages. The Government should pay for dragging this  
18 contract out thirty months, instead of the original  
19 fourteen.

20 Q Excuse me. How does the delay impact on  
21 rehabilitation. Rehabilitation is something that had to  
22 be done. How does the delay impact on that?

23 A Well, because of the --

24 Q It's not an occupancy cost. It's not a tax.

25 A No. But it took time. it went beyond the time

Page 173

1 period that we first took over that factory. I'm just --  
 2 if for nothing else, the cost of money during this period  
 3 was 16 percent. I presume the inflation rate was  
 4 reflected in there, so that, any day, any month it's  
 5 going to add additional cost down the line. If we  
 6 couldn't start that project when we anticipated starting  
 7 it, November 7th. And even by the time I'd left in  
 8 February, there still hadn't been a penny flown. So  
 9 there couldn't have been much done during that 4 or  
 10 5-month period. So when it finally got done it was -- it  
 11 had to cost the equivalent of the inflation for that  
 12 short period.

13 Q Well, is 16 percent of \$187,000, does that  
 14 drive the bill up another \$300,000?

15 A No, on its own it wouldn't. And I don't know  
 16 what availability of supplies were around. I don't know  
 17 availability of workmen, I don't know. In fact, I --

18 Q Well the renovations were, to a good extent  
 19 done by Gemini, wasn't it?

20 A I believe that to be true because I remember  
 21 when I came back, that's who had done it. Gemini, yes.  
 22 I do not -- I was not part of any of that period.

23 Q I'm sorry?

24 A I was not part of it. I do know there were  
 25 bills on the books that had been charged during that

Page 174

1 period while I was away. I do know, not one penny was  
 2 paid.

3 Q Did Henry Thomas own an interest in Gemini?

4 A If so, this is the first I'm hearing it. I was  
 5 not aware of it.

6 Q And you were not aware, the bills that were  
 7 submitted were in a time period that you were away. Is  
 8 that correct?

9 A Yeah, I remember discussions with Gemini. But  
 10 I don't remember any substantial work. Well, I can't  
 11 remember any substantial work being done or it would have  
 12 been in that first progress payment. I think that  
 13 happened slightly after. I do know that Gemini was  
 14 getting ready to come on board. But I don't remember any  
 15 work really getting done at the point I had left. If so,  
 16 it was minor at that point.

17 Q About legal fees and accounting fees. Do you  
 18 know what was earmarked for the contract for that? Was  
 19 it under a hundred thousand?

20 A Probably. Seventy thousand or so, my guess,  
 21 Seventy, seventy-two thousand.

22 Q And do you know what the legal and accounting  
 23 fees were that were incurred during the period of the  
 24 contract?

25 A Just, I'd be surprised if they didn't hit four

Page 175

1 or five million dollars. I'm sarcastic but I mean, there  
 2 were enough lawyers around during this process from the  
 3 beginning. They were through the ceiling.

4 Q Through the ceiling.

5 A Yes. All types.

6 Q Is this proposal based on getting financing  
 7 through Dollar Drydock?

8 A Excuse me?

9 Q Was your final proposal and all these costs  
 10 sheets at FT-62 -- were they based on getting some  
 11 financing through Dollar Drydock?

12 A Dollar was one of the many that I believe Henry  
 13 had arranged, or was hoping to get money from. If he  
 14 could keep Dollar out, I think he was hoping for that.  
 15 In fact, I do remember a discussion, and I don't remember  
 16 who it was with. I'm going to say Mr. Barkewitz. And it  
 17 was communicated that as soon, if we can work out some  
 18 type of a credit deal with Dollar, in terms of what was  
 19 owed to them, this was when Freedom Industries was still  
 20 the only thing around.

21 If we could, whatever credit arrangement we  
 22 could work out with Dollar, we would try to get that same  
 23 arrangement with the other creditors. And that kind of  
 24 lets me believe that we weren't looking for an awful lot  
 25 from Dollar at that point.

Page 176

1 Q Well you actually knew before the contract was  
 2 awarded, that Dollar Drydock already pulled out of  
 3 financing Freedom, didn't you?

4 A At the point, November 6th, are you talking  
 5 about?

6 Q Yes.

7 A I don't know if it was right before, or right  
 8 after. I don't know, I don't remember. I do know, only  
 9 because the relationship was shaky at various points with  
 10 Dollar. Obviously, because of the size of the loss. But  
 11 Dollar had extended its commitments to us as late as  
 12 August or so -- November, I -- whatever that \$7 million  
 13 letter was there. And we were hoping that with the  
 14 reduced level of financing, that Dollar would jump in.  
 15 If we needed a lot less, sure. We'd have Dollar in. We  
 16 wanted Dollar in. If we could have them. If not, we'd  
 17 go with someplace else. Dollar was one of many.

18 Q Well, where was it that you were going to go?  
 19 Freedom had a debt of two point something \$2.1 million,  
 20 didn't it?

21 A Yes. Well, I thought, at that point there were  
 22 other options. One conditional assignment through what  
 23 eventually became H.T. Foods. And I think the Government  
 24 finally wound up putting it under a novation under H.T.  
 25 Foods.

1 Q But that conditional assignment was put in  
2 place before you even came to Freedom, wasn't it?  
3 A No. I don't think it was put in place. I had  
4 something to do with getting it ready. But I don't think  
5 it ever got into place. I could be wrong. It was a  
6 mechanism. I thought the Government's preferred  
7 mechanism was a novation, which took place while I was  
8 not there.  
9 Q Would you look at G, the blue books, 5.  
10 A G-5. Yes, yes.  
11 Q This is dated April 4th. Is this the  
12 conditional assignment to H.T. Foods, that you were  
13 talking about?  
14 A Wait a second. April 4th?  
15 Q Yes. It's pretty fine print up a -- the second  
16 sentence of the document on the first page.  
17 A I'm reading something the fourth day of April  
18 1984.  
19 Q Right. That's April 4, right?  
20 A I know nothing of this document at this point.  
21 I thought -- I know nothing of this document at this  
22 point.  
23 Q Okay. So this is not the conditional  
24 assignment you were talking about?  
25 A No, no, April 4th, no. 1984, oh boy, no. This

1 I don't -- this I didn't know.  
2 Q Okay. Could you tell me what it was that we  
3 were talking about -- what Freedom's options were, in  
4 lieu of Dollar Drydock on not extending credit?  
5 A I don't have it committed to memory, but I --  
6 at one point there was a list of creditors. I've seen  
7 the letter, but I don't know what date it is, and I don't  
8 know what it -- the exact contents.  
9 Q A list of financiers you mean?  
10 A Yeah. Something that showed -- something that  
11 there was alternate financing of about four or five  
12 million dollars from various sources, including Mr.  
13 Penzer, what else? Maybe a bank --  
14 Q Okay. I'm sure that's somewhere in the January  
15 '95 time frame in there. I'll find it.  
16 A There was six, seven, or eight financing  
17 sources, maybe more.  
18 Q Okay. It's Rule 4, Tab 13. The red book, Tab  
19 13.  
20 A Tab 13?  
21 Q Yes.  
22 A I think that's what I -- that's exactly what I  
23 thinking about. Now, there was a question, wasn't there?  
24 Q Yes. I was asking for Freedom's option and you  
25 referred to this letter. Let's turn to page two.

1 A Yes.  
2 Q Can we just treat the rest of this as direct?  
3 JUDGE JAMES: Please, let's don't. However,  
4 financing is surely part of the direct, so I have no  
5 problem with your cross examining the man on financing.  
6 MS. HALLAM: All right.  
7 BY MS. HALLAM:  
8 Q With regard to the first entry, Dollar Drydock?  
9 A Yes.  
10 Q \$750,000? At this point in time, in December  
11 of '84, Freedom was already well aware that Dollar  
12 Drydock was not going to come across with any financing  
13 until some arrangement was in place for repayment of the  
14 outstanding indebtedness. Is that correct?  
15 A I'm not, I can't say that clearly. I don't  
16 think hope ever was that clear --  
17 Q Okay.  
18 A -- in the, in the context you put it, no.  
19 Q All right. We'll move on to 1-B. Could you  
20 explain what this direct bank financing through  
21 assignment of claims to H.T. Foods would be?  
22 A That was the assignment of claims that I  
23 thought we were expecting to be, it says, "Freedom would  
24 have assigned," I'm reading this as -- Henry thought he  
25 had some banks -- I'm going to say Broadway Bank

1 something or other -- that he thought he'd be able to get  
2 some financing if the contract was assigned to the bank.  
3 Q Could you explain to me, how H.T. Foods was  
4 going to get financing when it didn't have any credit  
5 history -- didn't have any assets?  
6 A At this point in December, I think we were  
7 looking at a possibility of some type of transferring of  
8 the contract, essentially from Freedom into H.T. Foods.  
9 Q Who was looking at that possibility?  
10 A Henry.  
11 Q I'm sorry?  
12 A Henry and the banks.  
13 Q Freedom?  
14 A Freedom -- the banks.  
15 Q So, 1-B -- the information in 1-B is based upon  
16 the anticipation of novating the contract to H.T. Foods?  
17 A Now wait a second. Let me read this again.  
18 Q Okay.  
19 A "Direct bank financing through assignment of  
20 claims." It's really bad guessing on my part. I can't a  
21 -- the wording is confusing to me right now on it.  
22 JUDGE JAMES: Mr. Marra, who drafted this  
23 letter? Do you know?  
24 THE WITNESS: I might have. I don't know.  
25 JUDGE JAMES: Do you think Mr. Thomas himself,

1 drafted it?

2 THE WITNESS: We might have worked on it  
3 together. I don't know. I see some, well, see I can  
4 recognize a little bit of some styling here but others,  
5 not. I can't see my style in this, from this standpoint.

6 MR. STEIGER: Excuse me, your Honor. Counsel  
7 appears to be forcing the witness to speculate as to what  
8 this letter really says and means.

9 MS. HALLAM: Your Honor --

10 JUDGE JAMES: Is that an objection to a recent  
11 question?

12 MR. STEIGER: Yes, it is.

13 JUDGE JAMES: Okay. The objection is to the  
14 question on 1-B. You're saying that he's speculating?

15 MR. STEIGER: Yes, right.

16 JUDGE JAMES: Do you have a reply to that  
17 objection?

18 MS. HALLAM: Yes, your Honor. When I asked  
19 about the finance thing, Mr. Marra indicated that there  
20 was a list of possibilities in the letter and I had to  
21 search for the letter. He confirmed that this is the  
22 letter. So I'm assuming he's familiar with it, since he  
23 brought it up. I didn't approach him about this letter.

24 THE WITNESS: I am familiar with it.

25 MS. HALLAM: Okay.

1 THE WITNESS: I just don't -- I can't recall  
2 the specifics on 1-B. In terms of the question --

3 JUDGE JAMES: Excuse me. I've got to rule on  
4 your counsel's objection. I overrule the objection.

5 THE WITNESS: In terms of the question that I  
6 believe you asked me, your Honor --

7 JUDGE JAMES: Okay. Let, let Ms. Hallam ask  
8 you the question. Do you have another question for the  
9 witness?

10 MS. HALLAM: My original question with regard,  
11 or, my question with regard to each of these. I  
12 anticipate to go down the list and ask him what they  
13 felt, how they felt that these forms of financing was  
14 going to satisfy their financing needs so, it's  
15 essentially my question with regard to number 2 also.  
16 Financing direct from H.T. Foods.

17 BY MS. HALLAM:

18 Q Do you know what kind of financing was being  
19 anticipated from H.T. Foods?

20 A I'll take a stab. But I mean it as a stab and  
21 a speculation sixteen years later.

22 JUDGE JAMES: Well, Mr. Marra, we're not  
23 interested really in hearing your speculation. If you  
24 know the answer, please answer Ms. Hallam's question. If  
25 you don't know, just say, I don't know.

1 THE WITNESS: I don't know on that specific  
2 one.

3 BY MS. HALLAM:

4 Q Do you know what H.T. Foods financial situation  
5 was at this time?

6 A H.T. Foods, at this time, if -- would have had  
7 virtually no assets, no liabilities, a clean company.  
8 And it probably had a lease at this point, that it was  
9 subcontracting -- subleasing to Freedom. And \$400,000  
10 rings a bell only because I believed it was Henry's  
11 intention or somebody's intention, to sell an option on a  
12 lease -- the lease it had. And I'm guessing that, that  
13 \$400,000 would have been fed back to Freedom to finance  
14 -- help finance the contract. That's the closest I can  
15 come to it.

16 Q And do you have any recollection of what the  
17 subcontractor financing was?

18 A Yeah. This would be the normal -- well, this  
19 would be a normal type of a retention. We would  
20 withhold, with the contractors permission, acceptance --  
21 we would hold 10 percent of what we were buying from  
22 them, until the contract got completed. It's a -- kind  
23 of helping them to come in with the financing to help us  
24 get the job done.

25 Q Was that part of Freedom's subcontracting

1 contracts? The retention -- was that part of their  
2 contracts that they had?

3 A Well, I don't know if we had them all signed up  
4 as of December 26. This would have been an expectation  
5 at least, as of that date.

6 Q About item number 6, equipment financing. What  
7 was on board at this particular point in time for  
8 equipment financing?

9 A Equipment financing direct from manufacturers.  
10 Well, this was I believe this was the original \$1.5  
11 million that was projected for working capital. That  
12 would have been one million of it. I think what we're  
13 kind of saying here in this letter is that we originally  
14 thought we needed a million five for capital, now we're  
15 saying we'll go through one million for leasing, etcetera  
16 and the others are either up above or let me see this  
17 last -- item seven, second mortgage equipment -- and item  
18 seven.

19 So it looks to me like we're saying we might be  
20 able to cut the one million five down to, one million.  
21 three seventy-five, if I'm reading that correctly.  
22 Instead of needing one million five, we need only now  
23 maybe, one million, three seventy-five. At least that's  
24 what we had expectations of financing at this point.

25 Q Could you explain to me what this money from

1 the second mortgage is. Was it Freedom's expectation  
2 that they were going to finance -- go out and buy  
3 production equipment -- then immediately, go out and get  
4 a second mortgage on it?

5 A Yeah, I'm -- the job -- yeah, this was a  
6 program Henry might have been familiar with. I wasn't  
7 familiar with this particular program but reading it, it  
8 must have been one of the New York City, New York State  
9 programs that we thought might have been available.

10 JUDGE JAMES: Okay. Mr. Marra, use your magic  
11 finger and see if you can shut that off.

12 THE WITNESS: Do you want me to lift it though?

13 JUDGE JAMES: Do whatever you did before that  
14 was successful. Thank you.

15 THE WITNESS: Well, at least temporarily. I'm  
16 sorry, did I not answer the question?

17 BY MS. HALLAM:

18 Q And this final item down at the bottom, Working  
19 Capital Equipment. That would be the things that were  
20 actually expensed under the contract?

21 A All right. Okay. That I think again -- this  
22 goes back, and Henry -- if you go back to page one and  
23 the essence of this is \$14,000,000 in costs estimated --  
24 \$14,900,000 in costs. Of that, the Government -- Henry's  
25 anticipating the Government financing 14.2 and he's

1 saying his share is going to be \$748,000 to get this job  
2 done. He's also saying, the \$748,000 includes  
3 depreciation which you don't need money for as  
4 depreciation, so out-of-pocket, he's going to have to  
5 come up with \$415,000 in working capital.

6 Q Do you agree with this assessment?

7 A I agree this is -- from the bottom of his  
8 heart, this is how Henry has seen it from day one, all  
9 the way through. That he could get this thing done day  
10 one, with \$400,000 and in fact, it's not the way I  
11 personally would budget it, but I also know that Henry  
12 has got magic in financing. He could have financed this  
13 thing without a penny of outside financing, I honestly  
14 believe, if the Government had come across with those  
15 progress payments from day one. I believe that from the  
16 bottom of my heart. I couldn't have done it but Henry  
17 could have. I wouldn't have done it but Henry would  
18 have. But I have no doubt that was the understanding he  
19 had, and I have no doubt that the concept of how this was  
20 presented to the Government in terms of direct costs that  
21 we were financing and where it was basically coming from,  
22 I have no doubt that there was a meeting of the minds on  
23 that.

24 Q Well you were present during the negotiations,  
25 weren't you, in Philadelphia?

1 A Yes and that's why I say -- that's where I saw  
2 the meeting of minds.

3 Q And did you see a meeting of the minds with  
4 regard to the 82.5 percent liquidation rate?

5 A Yes.

6 Q Who talked to you about the liquidation rate?

7 A I can't -- I don't remember. That came out of  
8 a DAR -- it's a consequence of using the profit rate, I  
9 believe and I can't remember.

10 Q What was said about it?

11 A What was said by whom?

12 Q The Government.

13 A I don't remember any objection to that at all.

14 Q What was said about the Government promising to  
15 give an 82.5 percent liquidation rate for progress  
16 payments?

17 A I presume -- that they would do it.

18 Q Well what was that presumption based on if they  
19 didn't say anything?

20 A The presumption was based on the prior one. We  
21 had come in with the 86.4 percent -- there was no  
22 objection there, so we used the same mechanism coming in  
23 with the next one. And sitting down with the  
24 negotiation, all of the cash flows and everything else in  
25 the prior projection were running around 80-something

1 percent on the \$29.90, and this was another consequence  
2 that followed directly from that.

3 Q Was the progress payment clause that's  
4 incorporated into the contract ever modified to reflect  
5 that 82.5 percent liquidation rate?

6 A No. Specifically in the specs are you saying  
7 -- in the contract?

8 Q In the contract now?

9 A No, no. But I don't think it says any -- I  
10 don't think -- I don't remember. But to answer your  
11 question, no. I don't believe it was adjusted directly  
12 in the contract. We saw it as the backup -- those  
13 schedules were an integral part of the memo of  
14 understanding. I'd like to see --

15 Q The memorandum of understanding, I don't recall  
16 seeing anything in there about a liquidation rate.

17 A No. But I'm saying we're going back again --  
18 what I tried to get across this morning -- that one-page  
19 memorandum of understanding with the seventeen million,  
20 the whole -- that is all backed up by all of these sheets  
21 that support how do we get to that \$17 million contract  
22 price? That's how we got to it including the profit  
23 rate, which the Government got involved with calculating  
24 leading us to come up with a number -- with the 95  
25 percent -- with the liquidation. That's the only way you

Page 189

1 get to that number, seventeen million. That's the only  
2 way.

3 Q Did any Government personnel at the negotiation  
4 say that they would amend the contract to reflect a 92.5  
5 liquidation rate?

6 A I don't remember if anybody said they would do  
7 it or wouldn't do it. I don't remember either way. No,  
8 I don't remember. I didn't -- I wasn't even aware that  
9 it would have required it -- going, you know, looking  
10 back.

11 Q Do you know what the standard liquidation rate  
12 is?

13 A 95 percent? I'm guessing -- on a 95 percent  
14 progress payment, I'm guessing. I would presume that you  
15 liquidate at a lower rate as a means of helping a  
16 producer -- ease the financial burden on a producer --  
17 and I can't imagine of easing the financial burden on a  
18 producer more in need, than a first-time -- essentially a  
19 first-time producer in something called IPP, where this  
20 is supposed to be super critical and get this food  
21 ferried all over the world so that when we have to send  
22 people abroad, it's got to be there.

23 My impression from the beginning has been,  
24 there was kind of like a crisis or a need. If there  
25 wasn't a need, he shouldn't have been in the program.

Page 190

1 Q What do you recall with regard to any  
2 discussions during negotiations, specifically that  
3 related to costs that could be reimbursed under progress  
4 payments? Was there any specific discussion as to that?

5 A Well, all I can think of is, they have to be  
6 properly incurred under the contract.

7 Q Isn't it true that you and Mr. Thomas just  
8 assumed they would be reimbursed through progress  
9 payments because they were direct costs?

10 A Definitely not. Definitely not. My  
11 discussions were not that way, not with Philadelphia. In  
12 fact, I alluded to conversations I had with Mr. Ford that  
13 said all of the costs on his contract are direct and came  
14 back to me that afternoon -- after a conversation  
15 supposedly with Mr. Barkewitz -- and he confirmed it to  
16 me.

17 Q So you said to Mr. Ford, "Are all the costs  
18 under this contract direct?" And he confirmed that?

19 A I don't remember, but I have a note in that  
20 bag. If I can be permitted to take it out and read it.

21 Q Oh no, I'm not questioning -- the Government  
22 will stipulate to that. We don't care --

23 A I can read -- what I'm saying -- I will read  
24 what my memo was written on that date. That's all I can  
25 do.

Page 191

1 Q Okay. But based on that confirmation, that's  
2 what you feel entitled Freedom to progress payments on  
3 those costs. Is that correct?

4 A If the question is, do I believe that if costs  
5 are properly incurred on this contract will the  
6 Government -- was the Government going to give a 95  
7 percent progress payment, the answer is yes.

8 If you're also asking, do I believe that the  
9 Government intended to give us progress payments before  
10 we incurred direct labor and direct material, damn, yes.  
11 Damn, yes. No doubt about it or I wouldn't have been  
12 there November 7 -- 6th for the review. No doubt about  
13 it.

14 What I do -- and I'll extend it further, maybe  
15 to anticipate some things -- I never saw any objection  
16 from where we thought the contract was in my  
17 conversations, as far as what Philadelphia thought, it  
18 was always what the New York office thought.

19 Q Did the Government agree to amend the progress  
20 payment with regard to recouping costs for capital  
21 equipment?

22 A To recouping costs for capital equipment.

23 Q --through progress payments?

24 A I'm -- you lost me, it's a heavy question, I  
25 don't -- I'm not heavy in terms of --

Page 192

1 Q During the negotiations, when the subject of  
2 the capital equipment came up and the Government agreed  
3 to expense certain capital equipment under the contract  
4 --

5 A Other than a million five, you're talking  
6 about?

7 Q No, we're not talking about production  
8 equipment. Well, yeah, other than the million five,  
9 okay, yeah.

10 A Yes. Those costs were specifically -- yes,  
11 specifically yeah -- there were things, and I think I was  
12 talking about these earlier -- they were not necessarily  
13 long-life, like the machinery was intended to be. They  
14 weren't big value type things. And these were what we  
15 looked upon as equipment that was going to be directly  
16 necessary for this contract.

17 In fact, I was under the impression or was told  
18 that in prior contracts, the Government had even bought  
19 some of this equipment for some for the manufacturers --  
20 the IPP suppliers so, in fact, they were laid out in the  
21 spreadsheets -- identified as what they were in terms of  
22 oh, I don't remember the titles. But it said something  
23 along the lines that would indicate that it wasn't just a  
24 normal type expense.

25 They were highlighted as showing they were more



Page 193

1 than an expense I think. It was of a longer capital type  
2 nature, but would be considered part of the contract.  
3 Just by the definition of the wording that was in there.

4 Q When these items were discussed with regard to  
5 being expensed under the contract, did anyone at DPSC  
6 specifically say you can go ahead and submit the costs  
7 for payment under progress payments?

8 A I thought so. I can't remember otherwise. I  
9 thought so, yes.

10 Q Who would have said that?

11 A Whoever was negotiating or whoever had the  
12 right to negotiate. I'd have to say Mr. Barkewitz or Mr.  
13 Ford -- whoever was at the table -- Captain Parsons --

14 Q And they agreed to modify the contract to allow  
15 them to be recovered through progress payments?

16 A Well again, we're talking about modifications.  
17 I saw this, and I thought everybody saw this here -- that  
18 these sheets laid it all out and these were again, an  
19 integral part of the contract that was going to be the  
20 guidance of both parts.

21 In fact, I thought right after -- initially,  
22 something became an issue of these type expenses and I  
23 remember hearing the expression, "they can read," meaning  
24 what's the matter, doesn't New York office understand the  
25 -- what can be done -- what's supposed to be done. We're

Page 194

1 supposed to follow this contract. If it says capital,  
2 it's capital. If it's expense, it's expense.

3 Q Do you equate expensed with the ability to  
4 recover the costs under progress payments?

5 A I see it all together for this reason: We went  
6 in with a price of \$29.90. It got down to \$27.725 and I  
7 believe it was a trade-off of a price getting down closer  
8 to the Government's price objective, whatever it was, I  
9 thought of \$28. In exchange for that, they would give us  
10 what we were looking for -- was a higher support in the  
11 financing of this contract.

12 In fact, the most important thing -- I stated  
13 this earlier this morning -- when I was on my way to  
14 Philadelphia, my important note was, we have to get all  
15 costs direct in the progress payments -- this is what we  
16 had to come back with.

17 If you had said \$30, \$28 or \$29 with 50 percent  
18 progress payment, I would have said, "You can't do it."  
19 If you said we have to get \$7,000,000 financing from  
20 outside, I'd say, "You can't do it." But knowing what was  
21 put together on those sheets from all aspects was  
22 extremely doable if everybody did their part.

23 Q Is it your position that those spreadsheets  
24 somehow became part of the contract as negotiated?

25 A Yes. I use the word again -- I believe they

Page 195

1 became an integral part of this contract. I honestly do.  
2 And at the first point the day before -- a day or two  
3 after -- with Marv Liebman I remember trying to send them  
4 -- and get them and -- we were kind of shocked that he  
5 wasn't accepting it in the same frame that I thought we  
6 had negotiated.

7 Q Well, now that you've brought up the first  
8 progress payment, isn't it true that you -- the first  
9 progress payment initially had to go back for correction.  
10 Is that correct?

11 A As I remember the first progress payment, the  
12 corrections were, we used dashes instead of zeros, and I  
13 can't remember anything else that was wrong.

14 Q Then it was revised thereafter, is that  
15 correct?

16 A Something was revised. You have to give me the  
17 date of when it was revised, I don't remember.

18 Q And it was actually hand-delivered to Mr.  
19 Liebman during the post-award meeting. Isn't that also  
20 correct?

21 A I'm not sure if it was at that meeting or -- I  
22 know there was a point there, there was a hell of a  
23 snowstorm and Henry --

24 Q December 18th?

25 A Huh?

Page 196

1 Q December 18th?

2 A I don't remember the date. But whatever the  
3 date is I know we went through snow piles like this --  
4 bringing down a book and progress payment -- to a Varrick  
5 Street, I remember. And I remember it severely.

6 Q And at that meeting -- that was the meeting at  
7 which point Freedom revealed to the Government that they  
8 didn't have any financial backing from Dollar Drydock.  
9 Isn't that correct?

10 A I don't remember that. It might have been, but  
11 I don't remember if that was the meeting. I don't  
12 remember.

13 Q Well would you agree that if it were at the --  
14 that meeting, and that was the date that you submitted  
15 your progress payment, that Freedom's financial situation  
16 -- well, I'll withdraw that question.

17 A Let -- if I can --

18 JUDGE JAMES: There's no question pending.

19 THE WITNESS: Okay. Then I won't answer the no  
20 question.

21 I'm going to do a few direct.

22 BY MS. HALLAM:

23 Q Do you have any --

24 JUDGE JAMES: Well, before you do. Have you  
25 completed your cross-examination?

1 MS. HALLAM: Oh, Yes.  
 2 JUDGE JAMES: Do you have any further re-direct  
 3 examination questions you'd like to ask?  
 4 MR. STEIGER: I'm a little confused, your  
 5 Honor. I thought that some of this was direct.  
 6 JUDGE JAMES: No. That was against my  
 7 instructions. Do you have any redirect examination  
 8 questions you'd like to ask?  
 9 MR. STEIGER: Related to the past  
 10 cross-examination?  
 11 JUDGE JAMES: Correct.  
 12 MR. STEIGER: I do.  
 13 JUDGE JAMES: Go ahead.  
 14 REDIRECT EXAMINATION  
 15 BY MR. STEIGER:  
 16 Q Regarding this lease agreement. May I show you  
 17 a document please, FT-427?  
 18 A Blue, red, green -- which sets are we looking  
 19 at?  
 20 Q We'll help you.  
 21 A FT -- what number?  
 22 Q FT-427.  
 23 A Yeah, FT -- I'm sorry.  
 24 Q Do you have it in front of you?  
 25 A Yes.

1 Q Does this refer to a piece of the production  
 2 equipment that was intended to be purchased for the 1.  
 3 million?  
 4 A I believe so but I'm, you know, equipment is --  
 5 if this were another piece I can't, yeah, I believe it  
 6 was but I'm not an equipment guy.  
 7 Q Do you recall that we were offered this  
 8 buyback?  
 9 A I remember the name. February 24, 1985 was the  
 10 dead period, so I don't know.  
 11 Q So to recap, what was the total amount that we  
 12 planned to expense for this capital equipment during the  
 13 course of the contract?  
 14 A Well during the course of the thirteen months  
 15 -- not during the contract --  
 16 Q Yes.  
 17 A During that period we were looking at expensing  
 18 \$333,000 for depreciation of capital equipment.  
 19 Q Okay. Now if we were going to do that and we  
 20 had an option for a buyback at 80 percent, would we have  
 21 needed any additional financing for that equipment, as  
 22 you see it?  
 23 A You are losing me.  
 24 Q Well, take a look at this. Is this not an 80  
 25 percent buyback? Would they not give us 80 percent back

1 of our money?  
 2 A Oh, okay. I stopped -- I didn't see the --  
 3 Q Oh, I'm sorry. Were you looking at the wrong  
 4 thing?  
 5 A Yeah, I just had the paper. I didn't get down  
 6 to the -- I'm sorry.  
 7 JUDGE JAMES: Mr. Steiger, of all the pages  
 8 here in this document, which one would you like him to  
 9 look at?  
 10 MR. STEIGER: 04208.  
 11 JUDGE JAMES: All right.  
 12 THE WITNESS: 04208. Okay. Now I have it.  
 13 BY MR. STEIGER:  
 14 Q Would you take a second just to look at that?  
 15 A Well this calls for an 80 percent payback --  
 16 buyback. Yeah, that's what it says.  
 17 Q Of what kind of equipment?  
 18 A Multi-vac R51000, if this is all connected.  
 19 Q Right. Was this the equipment contemplated to  
 20 be purchased for the \$1.5 million -- for production  
 21 equipment?  
 22 A This might have been one of them, yes, yes. I  
 23 recognize the multi-vac, I -- you know, Henry was the  
 24 equipment guy.  
 25 Q Now let's get back to something you said

1 because it might have been confused. You said that --  
 2 how did you say it was planned to pay back the 1.5  
 3 million dollars?  
 4 A The \$1.5 million -- if we can -- the schedule  
 5 of the -- I got it, I got it.  
 6 Q Well, you explained it to counsel. I just  
 7 didn't understand it.  
 8 A No. I know I explained it but -- want to --  
 9 Q Explain it to us conceptually, if you don't  
 10 mind.  
 11 A I obviously didn't explain it adequately  
 12 enough. There is a schedule attached to the sheets that  
 13 shows the payback of the equipment. If I may -- it is  
 14 something called 00913. It shows that we were going to  
 15 get the one million five equipment expected.  
 16 Q I can't hear you.  
 17 A We were trying to get one million five, in  
 18 equipment. we budgeted -- we presumed and we were going  
 19 to repay it over one, two, three, four years, that's  
 20 right.  
 21 Q So how much would that have been per year?  
 22 A We would have paid \$187,000, presuming we were  
 23 going to pay it semiannually \$187,500 every six months,  
 24 \$375,000 a year.  
 25 Q Now we were going to get three hundred and --

Page 201

1 contemplated to get \$333,000. So are you talking about  
2 the net amount of having to pay that back?

3 A In the period of this contract, we would have  
4 had to pay back I believe, \$375,000 if my math is right  
5 -- \$375,000 in this contract we would have had to pay as  
6 an -- in these first two installments of this equipment.  
7 That would have come out of profits, working capital, the  
8 bank account. It's all the same money, profits  
9 substantially.

10 Q So there was no requirement to pay \$1,500,000  
11 back during the period of performance on this job?

12 A No. We anticipated that the final payments  
13 were going out June '88 or later, I can't think, yeah,  
14 yeah -- June '88. And presumably, we would have been  
15 using this equipment on further contracts or something  
16 else.

17 Q Okay. Counsel brought up the question of legal  
18 fees which she referred were earmarked under \$100,000.  
19 Do you acknowledge that we spent more than \$100,000 in  
20 legal fees on this job?

21 A Oh, no doubt -- no doubt about it. We spent a  
22 lot more than that.

23 Q And do you recall the nature of those services  
24 and what they were spent on?

25 A Well a lot of it was involving getting the

1 contract. But there was always a stormy relationship,  
2 period. But we expected we'd have Dollar there. But we  
3 were hoping we didn't need them very much.

4 Q You said that there were other sources of  
5 financing or you said that you had others, six or seven.  
6 Did that mean also, potential financiers? Who might they  
7 have been? Do you know? Do you remember?

8 A Well, I had -- even I had gone out to a couple  
9 of banks even out in Long Island and tried to arrange  
10 things. It didn't go through but, I mean, there's a --

11 Q Did you know of any private financiers that  
12 might have been in the wings?

13 A There were. I had contacts who could have been  
14 brought in but unfortunately, we were in the New York  
15 area and these were Connecticut development money, so  
16 they were unavailable. Henry had all types of money.  
17 He's never had a problem of generally, finding people to  
18 bankroll him. I don't know if they'd bankroll me, but I  
19 think they'd bankroll him. I'll tell you one thing. I  
20 know one person that bankrolled him to about \$70-80,000  
21 on just his word, and that was me. I mean, I still have  
22 not been paid for those early days.

23 Q If I may --

24 JUDGE JAMES: Mr. Marra, what I'd like you to  
25 do is please confine your answers to the questions the

Page 202

1 lawyers to help us break open some of these funds that we  
2 thought would flow freely. That was required -- you have  
3 the normal contractual law that was -- with all the  
4 contracts that had to be signed.

5 In fact, we -- I don't remember if we had it  
6 budgeted in the payroll -- in the overall structure. We  
7 even went out and hired somebody internally to help this  
8 area, to keep cost down -- Kevin Seraaj, who is a  
9 contract person. And we had, you know, the normal  
10 lawyers. We were doing business in New York City --  
11 south Bronx, the Bronx is an easy place to do business,  
12 it's not.

13 Q Did any of the legal fees have to do with our  
14 concerns about not getting progress payments?

15 A Yes. I mentioned that, yes. Opening up the  
16 free flow of money.

17 Q Thank you.

18 A Lawsuits and -- related to the contract. There  
19 were bundles of those.

20 Q Now I was a little confused on one point.  
21 Counsel appeared to be putting words in your mouth, that  
22 Dollar pulled out before the award of the contract. Is  
23 that -- are you saying that Dollar pulled out before the  
24 award of the contract? I might not have heard it.

25 A I do not remember Dollar pulling out before the

1 attorneys are asking you.

2 THE WITNESS: I will do that.

3 BY MR. STEIGER:

4 Q Mr. Marra, counsel indicated -- or tried to get  
5 you to say that we spent more for building repairs than  
6 was intended or established, I'm not sure. However, let  
7 me ask you this question. With respect to the amount of  
8 building repairs that we spent, the costs that were  
9 incurred on that, do you recall DCAA or Marvin Liebman  
10 questioning the amount that was incurred for this effort?

11 A That specific item I don't recall one way or  
12 another. I honestly don't.

13 Q Okay. Do you know for a reasonable certainty  
14 that we spent more than what the Government agreed to for  
15 building costs -- building improvement costs?

16 A I don't know it for a fact but I have to  
17 presume they were pretty high expenses because that was a  
18 pretty tough factory we wound up in.

19 Q Were you present at a meeting at DPSC on the  
20 5th of November? I'm sorry, the 5th of September 1984,  
21 when Freedom asked for progress payments? A meeting  
22 attended by Captain Parsons? Do you recall that at all?

23 A September '84?

24 Q Maybe I can refresh your memory.

25 A There couldn't have been any progress payment

Page 204

Page 205

1 in September '84.  
 2 Q Well, just hold your answer until you -- until  
 3 I do the refreshing. FT-050A please, page four.  
 4 MS. HALLAM: 0508?  
 5 MR. STEIGER: 050A. FT-050A, we just had it.  
 6 It's a memorandum for the record.  
 7 THE WITNESS: Give me the number -- FT?  
 8 MR. STEIGER: Yes, we'll give it to you. It's  
 9 document number 00683.  
 10 JUDGE JAMES: Page 683?  
 11 MR. STEIGER: -86.  
 12 JUDGE JAMES: Page 686?  
 13 MR. STEIGER: Right.  
 14 JUDGE JAMES: The Board has page 686. But  
 15 that's in FT-051 in the compilation I have.  
 16 MR. STEIGER: Okay. Then I stand corrected.  
 17 It is FT-051. Excuse me, your Honor. I suggest we press  
 18 on because Mr. Marra has some personal business and is  
 19 not available tomorrow. If it's all right with the other  
 20 side and yourself.  
 21 JUDGE JAMES: It may not be because the other  
 22 side wants to continue examining the man in effect, as  
 23 their  
 24 witness --  
 25 MR. STEIGER: Yeah, I understand that. That's

Page 206

1 why I'm saying it now.  
 2 JUDGE JAMES: -- with further direct  
 3 examination. So all I can say is that you attorneys work  
 4 out when you want to bring the man back. If you don't  
 5 want to bring him back tomorrow, bring him back some  
 6 other day when he is available.  
 7 MR. STEIGER: Perhaps it's a good time to break  
 8 with him if you are going to -- because you haven't  
 9 started your direct testimony yet.  
 10 MS. HALLAM: Okay. What time is it?  
 11 MR. STEIGER: It's already a quarter after  
 12 5:00. I'm finished in a few minutes.  
 13 MS. HALLAM: My car's in a lot that they say  
 14 they lock at 6:00.  
 15 MR. STEIGER: Well, I'm only going to be a few  
 16 more minutes unless you know, you have re-direct.  
 17 JUDGE JAMES: You're doing re-direct. She may  
 18 have some re-cross that's going to be very brief.  
 19 MR. STEIGER: Thank you, thank you.  
 20 BY MR. STEIGER:  
 21 Q Okay. Just a few more questions.  
 22 A Yes.  
 23 JUDGE JAMES: Okay. You have a question  
 24 pending then on page 686 counsel?  
 25 MR. STEIGER: Yes, actually I wanted to refer

Page 207

1 Mr. Marra to the first page of that memorandum, which is  
 2 a few pages before 683.  
 3 THE WITNESS: Yes.  
 4 BY MR. STEIGER:  
 5 Q Now does that refresh your memory a bit as to  
 6 that meeting?  
 7 A Yes.  
 8 Q And does it show -- it does show, of course,  
 9 you were there. So I want to call your attention to --  
 10 go back to the page I was talking about, 686, page 4 of  
 11 the memo, and I'd like to key your attention to the third  
 12 paragraph.  
 13 A Yes, I see it.  
 14 Q And do you recall the circumstances under which  
 15 Captain Parsons said that Freedom could receive 100  
 16 percent of the progress payment, of allowable costs?  
 17 That's a long time ago, Mr. Marra, I understand.  
 18 A Yeah, I know. I know what's in the front of my  
 19 head but my head is not that clear. I'm going to say to  
 20 be an 8-A eligible small business type thing, but I don't  
 21 remember. I don't -- I think if you show -- well, I know  
 22 we had asked for 100 percent in quite a few of the  
 23 proposals. And I thought it was a question of if we  
 24 could demonstrate need -- I thought. I can't -- need, I  
 25 don't know. That's it.

Page 208

1 Q If you don't remember, you don't remember. I'd  
 2 like to go back for a minute to a letter referred to by  
 3 counsel, Rule 4, Tab 13, I'd like to put this in  
 4 perspective.  
 5 A Which one?  
 6 Q It's Rule 4, Tab 13, which is -- I don't know  
 7 if you'll be able to find it again.  
 8 MS. HALLAM: The red book.  
 9 MR. STEIGER: The red book.  
 10 THE WITNESS: I didn't go to law school. Thank  
 11 you, yes.  
 12 BY MR. STEIGER:  
 13 Q I call your attention to the first page and ask  
 14 you to tell us what kind of private financing you were  
 15 asking for here? What are we talking about here?  
 16 A Let's get accurate. I'm not asking for it  
 17 here. This is Mr. Thomas' letter.  
 18 Q All right. Whatever you're doing. Use your  
 19 own words.  
 20 A Henry was asking for essentially 95 percent of  
 21 all costs under the contract.  
 22 Q What do you mean, Henry was asking? The  
 23 contract didn't say that?  
 24 A At this point, the ceiling --  
 25 Q December 26, 1984, Mr. Marra.

1 A At this point, I thought we had the ceiling up  
2 to thirteen in the contract --  
3 Q I can't hear you.  
4 A I thought the ceiling was thirteen --  
5 Q No, no. We're talking about the progress  
6 payment percentage.  
7 A I've got a blank here, really. If the question  
8 is -- I know what we're asking here. We're asking for 95  
9 percent of all costs. That's what we're asking.  
10 Q Didn't the contract, didn't the contract call  
11 for 95 percent progress payments?  
12 A It called for 95 percent, but I thought the  
13 limitation was --  
14 Q I didn't ask you about any limitation.  
15 A It called for 95 percent, yes.  
16 Q Okay. And what is the amount of working cap --  
17 of private financing that we are advising the Government  
18 is needed by this letter that you signed?  
19 A The balance of the costs -- 5 percent.  
20 Q Give me the amount.  
21 A \$748,000.  
22 Q What is the net amount?  
23 A It's \$415,000 after depreciation.  
24 Q So this whole letter involves \$415,000 worth of  
25 financing. Is that right?

1 A What is involves is that Henry is saying, "Hey,  
2 I only need \$415,000 of financing." Yes. In simple  
3 language, yes.  
4 Q Okay. What was the amount of the contract? Do  
5 you remember?  
6 A \$17,000,000.  
7 Q So we're talking about \$415,000 of financing on  
8 a \$17,000,000 contract. Is that what we're talking about  
9 in this letter -- is that what Henry is talking about in  
10 this letter?  
11 A Yes.  
12 Q Thank you. I'd like to call your attention to  
13 F-114.  
14 A What color?  
15 Q Good question. We'll get it for you in a  
16 second. Okay. Does everybody have it?  
17 A I don't.  
18 Q Do you want to help him, please?  
19 JUDGE JAMES: It's in your volume five. Well,  
20 Mr. Steiger, I don't believe there are any F series. The  
21 original series is just simply numbers in the  
22 Government's Rule 4. Their exhibits are G numbers. Your  
23 exhibits are FT numbers. Are we referring now to your  
24 supplementary Rule 4s? Okay.  
25 MR. STEIGER: Supplementary Rule 4, yes.

1 MR. LUCHANSKY: These are the original Rules  
2 4s, your Honor.  
3 MR. STEIGER: Well, they're not the originals.  
4 They're the supplementary originals, Bruce.  
5 MR. LUCHANSKY: Oh, sorry.  
6 THE WITNESS: Yes.  
7 MR. STEIGER: Well, we're going to have to wait  
8 for your Honor.  
9 BY MR. STEIGER:  
10 Q Now, Mr. Marra, do you recall the circumstances  
11 under which you wrote this letter and what its purpose  
12 was?  
13 A Well, looking at the letter, yes. I would  
14 believe so.  
15 Q Would you speak up, sir?  
16 A I would believe I remember the circumstances.  
17 The circumstance is by December '85, Freedom was in a  
18 delivery mode and we were expecting that the invoices  
19 that we were billing were going to get liquidated at the  
20 82.6 percent rate, as we believed was negotiated and now  
21 they were getting liquidated at the 95 percent rate. And  
22 that's what provoked this letter, I've got to believe --  
23 reading it.  
24 Q So where did this 82.6 percent rate come from?  
25 A That again, is the backup sheets in the budget,

1 backing up the integral part of the memorandum of  
2 understanding that we went through this morning.  
3 Q Okay. May I call your attention to one of the  
4 exhibits of your letter? The one which is an extraction  
5 of E-512.3 of the DAR.  
6 A That's it. That is it.  
7 Q What is it?  
8 A This letter is an extraction of that -- those  
9 backup sheets to the memorandum of understanding, circled  
10 82.6.  
11 Q And what does that show with respect -- I'm  
12 sorry -- what is it?  
13 A 82.6 percent liquidation rate.  
14 Q In other words, if we run down the line on the  
15 left of the profit rate that had been negotiated. If we  
16 look at the progress payments that was called for, that  
17 is the rate you come up with?  
18 A Exactly.  
19 Q So did you ever get an answer to this letter?  
20 A I don't remember. The answer was obviously, no  
21 because we didn't get --  
22 Q The answer was, I don't remember. One more,  
23 your Honor, one more.  
24 During the course of your examination by  
25 counsel, you were asked whether or not there were

Page 213

Page 215

1 specific references during the negotiation session as to  
2 whether progress payments were to be paid on the direct  
3 costs that were agreed to.

4 She even said she would stipulate as to the  
5 first part but was questioning you as to whether or not  
6 that meant that progress payments would be allowable.

7 May I call your attention to F-078. It's -77  
8 and -78. Let's look at -78 first. It's our  
9 supplementary Rule 4 file, F-78. Who is Ms. Rowles? Am  
10 I pronouncing -- do you know if I'm pronouncing it right?

11 A Rowles.

12 Q Rowles.

13 A I never met the person but --

14 Q Do you know who she was?

15 A By title here -- I know nothing more than is  
16 written here as a title.

17 Q Okay. Let's go back to the exhibit right  
18 behind it.

19 A I have none.

20 Q Have you ever seen this document?

21 A I don't have any exhibit behind -- you're  
22 talking F?

23 Q I'm talking about one behind it 77, F-77.

24 JUDGE JAMES: Behind it means before it.

25 THE WITNESS: Oh.

Page 214

1 MR. STEIGER: Before it. I'm sorry -- before  
2 it.

3 BY MR. STEIGER:

4 Q Have you ever seen that document? Is it  
5 familiar to you?

6 A It's not ringing a bell, no. It's not,  
7 honestly.

8 Q I can't hear you.

9 A It's not ringing a bell. I'm sure I've seen it  
10 but I don't remember it.

11 MR. STEIGER: Okay. As I promised, sir, I am  
12 finished.

13 JUDGE JAMES: Any recross by the Government?

14 MS. HALLAM: No, your Honor.

15 JUDGE JAMES: No? All right. Then let's  
16 adjourn for the day. We're off the record. We'll  
17 recommence tomorrow.

18 (Whereupon, at 5:30 p.m., the hearing was  
19 recessed, to reconvene, Tuesday, May 16, 2000.)  
20  
21  
22  
23  
24  
25

## 1 CERTIFICATION OF TRANSCRIPT

2  
3 This is to certify that the attached  
4 proceedings before Administrative Judge DAVID W. JAMES,  
5 Department of Defense, Armed Services Board of Contract  
6 Appeals, in the matter of FREEDOM NY, INC., at Brooklyn,  
7 New York, on Monday, May 15, 2000 were had as therein  
8 appears, and that this is the original transcript thereof  
9 for the files of the Department of Defense.

10 We, the undersigned, do hereby certify that  
11 this is a true, accurate and complete transcript prepared  
12 from the tape made by electronic recording by Donna  
13 Hughes, Official Reporter, on the aforementioned date,  
14 and have verified the accuracy of the transcript by  
15 comparing the typewritten transcript against the verbal  
16 recording.

17 Date: 7/3/00  
18

19 \_\_\_\_\_  
20 Transcriber

21 \_\_\_\_\_  
22 Proofreader  
23  
24  
25