

Day 10

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1                               BEFORE THE  
2                               ARMED SERVICES BOARD OF CONTRACT APPEALS

3                               ----- )  
4                               In the matter of:                               ) ASBCA No. 43965  
5                               Appeal of:                                        )  
6                               FREEDOM NY, INC.                               )  
7                               Contract No.                                       )  
8                               DLA13H-85-C-0591                               )  
9                               ----- )

10                              Kings County Criminal Court Building  
11                              120 Schermerhorn Street  
12                              Brooklyn, New York

13                              Friday, May 26, 2000

14                              8:45 a.m.

15       BEFORE:               DAVID W. JAMES, Administrative Judge

16       APPEARANCES:

17                              For the Government:

18                              KATHLEEN HALLAM, ESQ.  
19                              Defense Supply Center Philadelphia  
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23                              For the Appellant:

24                              NORMAN A. STEIGER, ESQ.  
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                                66 North Village Drive  
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                                BRUCE LUCHANSKY, ESQ.  
                                Kellman & Sheehan, P.A.  
                                Sun Life Building  
                                20 South Charles Street, 8th Floor  
                                Baltimore, MD 21201

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1   I N D E X

2

3       WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
4       MARVIN LIEBMAN		1860	1925	1931/1939
5       HENRY THOMAS	1942	1964	1968/2010	1985
6       JORDAN FISHBANE	2014			

7

8   E X H I B I T S

9       Number	Identified	Received
10      FT-450	1976	

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1   P R O C E E D I N G S

2   (8:45 a.m.)

3                              JUDGE JAMES: Let the record reflect that this

4                              is day 10 in the proceeding Freedom New York, Inc., under

5                              ASBCA docket number 43965.

6                              I believe we were in the testimony. Remember,

7                              Mr. Liebman, you are already sworn in.

8                              MR. LIEBMAN: Yes, your Honor.

9                              Whereupon,

10                             MARVIN LIEBMAN,

11                             the witness on the stand at the time of the recess,

12                             having been previously duly sworn, was further examined

13                             and testified as follows:

14                             CROSS-EXAMINATION

15                             BY MR. LUCHANSKY:

16                             Q Mr. Liebman, you would agree, would you not,

17                             that an ACO does not have the authority to alter the

18                             terms of the contract as negotiated by the PCO?

19                             A Yes.

20                             Q And you would also agree that the ACO does not

21                             have the authority to change the cost principals

22                             negotiated by the PCO? Isn't that correct?

23                             A Yes.

24                             Q And the ACO has no authority to reclassify

25                             costs; isn't that correct?

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1                             A Yes.

2                             Q Now, Mr. Liebman, it's true, is it not, that

3                             beginning in approximately August of 1985 that you began

4                             to initiate a series of determinations, of percentage of

5                             physical completion of this contract?

6                             A I'm sorry. Could you please repeat the

7                             question?

8                             Q Beginning in approximately August of 1985 you

9                             required that determinations be made of percentage of

10                            physical completion of this contract; isn't that right?

11                            A No. That's not correct.

12                            Q Isn't it true that you determined that no

13                            progress payments could be made until percentage of

14                            physical completion studies were done?

15                            A I do not recall.

16                            Q All right. If you could turn to F-90, please.

17                            Do you recognize this document?

18                            A Yes.

19                            Q What is it?

20                            A This is a form that's filled out by the

21                            contract's group in my office to request reviews.

22                            Q Well, in this case -- Well, who is Mel Zitter?

23                            A Mel Zitter was my contract administrator at the

24                            time.

25                            Q And so he worked under your authority and at

1 your direction?

2 A Yes.

3 Q Do you agree that this requests and audit and a  
4 percentage of physical completion study to be made?

5 A Yes.

6 Q Do you agree that this memo indicates that "no  
7 payments will be made at least until completion of this  
8 review? Isn't that correct?

9 A Yes.

10 Q And that review that we are talking about  
11 includes a percentage of physical completion study; isn't  
12 that right?

13 A Yes.

14 Q Mr. Liebman, it's true, is it not that DCSR  
15 assisted in the administration of this contract?

16 A I was responsible for administration. DCSR  
17 which is my regional office was involved in the  
18 administration of this contract. Yes.

19 Q And you understood that DCSR was evaluating the  
20 course of this contract by comparing the actual  
21 performance of the contract against the projected cash  
22 flows that Freedom had provided to it?

23 A I'm sorry. We have to differentiate between  
24 DCSR and DCASMA, I worked with DCASMA New York. DCSR  
25 New York --

1 Q I understand. Were you aware that DCSR was  
2 indeed following the course of this contract and  
3 evaluating the actual progress in comparison to the  
4 projected cash flows that were submitted by Freedom  
5 together with its final cost proposal?

6 A I wasn't aware of that. I know DCASMA was  
7 doing that but I don't know if DCSR was doing it.

8 Q I see. So DCASMA was your agency?

9 A I worked for DCASMA New York directly.

10 Q And DCASMA was doing that?

11 A Yes.

12 Q And they were evaluating the course of this  
13 contract using the final negotiated cash flows to gauge  
14 progress, correct?

15 A Yes.

16 Q Mr. Liebman, on October 11, 1986 in connection  
17 with progress payment number two you once again proposed  
18 -- you suspended progress payments at that time, correct?

19 A I'm sorry. Are you talking October 1986  
20 progress payment 22?

21 Q Yes. According to your testimony on direct you  
22 said that the third time that you either suspended or  
23 proposed suspending progress payments, was in connection  
24 with progress payment number 22?

25 A Right. I proposed -- I was considering

1 suspending progress payments on number -- starting with  
2 number 22, yes.

3 Q And, in fact, you never made any payment on  
4 progress payment number 22, correct?

5 A That's correct.

6 Q Did you convene this Board of review at that  
7 time to review your proposed suspension?

8 A No.

9 Q Mr. Liebman, if you will please turn to  
10 government Rule 4 Tab 60.

11 A Yes.

12 Q This is the audit report in which DCAA  
13 concluded that Freedom had an inadequate accounting  
14 system --

15 A I'm sorry. We have the wrong tab. G-60?

16 Q No. Not G-60.

17 A R-60?

18 Q R-60.

19 A Okay. Yes.

20 Q This is the audit report by DCAA in which it  
21 concluded that Freedom had an inadequate accounting  
22 system, correct?

23 A Yes.

24 Q And it was on the basis of this audit report  
25 that you recommended, that you proposed suspension of

1 progress payments to Freedom, correct?

2 A I was considering suspension. Yes.

3 Q And that was on August 23, 1985, correct?

4 A Approximately. Yes.

5 Q And one week after that proposed suspension Mr.  
6 Bankoff issued a cure notice, in part based upon your  
7 proposal, resulting in the actual suspension of progress  
8 payments, correct?

9 A That's not correct.

10 Q Do you recall or are you just saying that's not  
11 --

12 A No. I --

13 Q Do you recall Mr. Bankoff's action on August  
14 30, 1985?

15 A I do not recall the cure notice but I do recall  
16 that there was no suspension of progress payments at that  
17 time. I was considering suspensions of progress  
18 payments.

19 Q Then you obviously misunderstood my question.  
20 Do you, as you sit here today, have any recollection of  
21 Mr. Bankoff's action on August 30, 1985, issuing a cure  
22 notice?

23 A I do not recall.

24 Q Okay. Now, looking at the August 13, 1985  
25 audit report, I'd like you to take a look at paragraph 2.

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1 You see once, again, the conclusions and I'm sorry. When  
 2 I say page 2, I mean page 2 of the exhibit but it's  
 3 actually page 1 of the actual audit report.  
 4 A Yes.  
 5 Q Paragraph 2, "Conclusions."  
 6 A Yes.  
 7 Q Once again, we are still in this mode where  
 8 DCAA is recommending that zero dollars be paid on the  
 9 contract, correct?  
 10 A Yes.  
 11 Q Now do you see toward the bottom of this  
 12 paragraph, toward the middle of the paragraph, "DCAA  
 13 notes that the ACO advised us that progress payment  
 14 monies released under progress payment request numbers 1  
 15 through 3, may have been used for purposes other than  
 16 intended?" Do you see that?  
 17 A Yes.  
 18 Q What were you talking about?  
 19 A I have no idea. I didn't write the report and  
 20 I never made such a statement.  
 21 Q You never said that to DCAA?  
 22 A Absolutely not.  
 23 Q So that statement in this report is false?  
 24 A That's correct.  
 25 Q Did you review this report at the time that it

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1 was issued?  
 2 A Yes.  
 3 Q Did you go on record with DCAA as never having  
 4 made that statement?  
 5 A I do not recall.  
 6 Q Are you aware of any document, either in the  
 7 record or out of the record, that would reflect your  
 8 objection to this statement?  
 9 A I do not recall. I do not remember.  
 10 Q Now, if you will take a look at page 2 of the  
 11 report, which is page 3 of the document.  
 12 A Yes.  
 13 Q You see such objections by DCAA as, once again,  
 14 not entering all of the subcontract costs on books,  
 15 correct?  
 16 A Yes.  
 17 Q If you turn to page 3 of the report you see  
 18 under 4, "Amounts questioned for lack of supporting  
 19 documentation," correct?  
 20 A Yes.  
 21 Q You see on the next page under 7, "Telephone  
 22 bills for new venture services?" Do you see that?  
 23 A Yes.  
 24 Q Are not all of these objections, objections  
 25 that could be resolved if DCAA would have brought this to

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1 the attention of Freedom at the time that they were doing  
 2 the review?  
 3 A I'm not in a position to answer that. I don't  
 4 know.  
 5 Q And do you know, whether Freedom requested an  
 6 exit interview with DCAA for this and/or any of the other  
 7 audits they did?  
 8 A I don't know about number 4 but early-on I  
 9 believe they did ask for exit audits. I think with  
 10 progress payments 1 and 2. Regarding 4 I do not know. I  
 11 do not recall.  
 12 Q And you don't know whether DCAA refused to  
 13 participate in an exit interview?  
 14 A I don't recall exactly what happened. I know  
 15 there was something with progress payment 1.  
 16 Q I'm talking about progress payment 4.  
 17 A No. Number 4 I do not know. I don't know  
 18 anything about that concerning number 4.  
 19 Q Okay. Let's look at paragraph B on page 2 of  
 20 the report. Once, again, this is DCAA denying costs for  
 21 start-up costs, correct?  
 22 A I'm sorry. Are you looking at page 3,  
 23 paragraph B?  
 24 Q Page 2 of the report, paragraph B.  
 25 A Yes.

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1 Q Once, again, this is DCAA denying costs for  
 2 start-up expenses, correct?  
 3 A Yes.  
 4 Q And you knew at the time of this report that  
 5 DCAA was all wet with respect to this objection, didn't  
 6 you?  
 7 A Absolutely.  
 8 Q Because you were tracking the progress through  
 9 the cash flows or your office was and you already knew  
 10 that all these costs had been negotiated to be paid under  
 11 progress payments at the time of negotiations, correct?  
 12 A No. That's not correct. Exclusive of certain  
 13 areas -- that's not correct. That's my answer.  
 14 Q Well, in July of 1985 you got that letter from  
 15 Mr. Montefinese, did you not, in which Mr. Montefinese  
 16 said, "After speaking to Peggy Rowles and Keith Ford, he  
 17 determined that DPSC had said that all start-up costs,  
 18 including these capital type expenses had been negotiated  
 19 to be paid through progress payments." You had gotten  
 20 that letter from Mr. Montefinese, had you not?  
 21 A I did receive that letter. Yes.  
 22 Q Okay. Good. Now, let's turn to page 3,  
 23 please, page 3 of the report. An look at paragraph A.  
 24 A Yes.  
 25 Q Is this the paragraph in which DCAA gave the

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1 opinion that the \$400,000 income that Freedom received  
2 from the sale of its lease option should be offset and  
3 should not be recognized income?

4 A Yes.

5 Q And this is the information that you had on  
6 which you based your decision to subtract the \$400,000  
7 from progress payment number eight, correct?

8 A Yes.

9 Q Now, I'd like you to read this -- Did you read  
10 this paragraph?

11 A Yes.

12 Q Now, you see that DCAA gives as their reason  
13 that number one, "This agreement to sell the option was  
14 informal." Do you see that?

15 A Yes.

16 Q They were informally offered \$400,000 for their  
17 rights. Now, do you see that?

18 A Yes.

19 Q Have you ever informally been offered \$400,000?

20 A Personally?

21 Q Yes.

22 A No.

23 Q Have you ever seen a business transaction in  
24 which a \$400,000 offer was made informally?

25 A It's a matter of how you define informally.

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1 I've seen offers made verbally without anything in  
2 writing at the moment. So I guess one can construe that  
3 to be an informal offer.

4 Q Now, they say they saw no evidence of this  
5 informal agreement. In fact, Freedom did provide  
6 evidence of that agreement, didn't they?

7 A Yes.

8 Q Now, they also note that "This reduction was  
9 treated as other income and not a reduction of occupancy  
10 costs," correct?

11 A Yes.

12 Q And generally one would expect -- let me  
13 rephrase that. Generally you, in your experience as an  
14 ACO reviewing audit reports and being responsible for the  
15 determinations of progress payments, you would agree that  
16 \$400,000 of income for the sale of an option should be  
17 treated as income, correct?

18 A I'm not an accountant. I really don't know.

19 Q Well, it's your authority and your  
20 responsibility to make this determination for purposes of  
21 progress payments, isn't it?

22 A Yes.

23 Q So you have to make this determination whether  
24 you are an accountant or not, don't you?

25 A Yes. My determination was that it was not

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1 income. I considered it a reduced or a reduction of  
2 expenditure or a void cost. That was my interpretation,  
3 my opinion.

4 Q Well, then tell me what this means, that  
5 "Freedom has taken \$400,000 reduction on their books for  
6 this transaction." What does that mean?

7 A Well, that means that it was no longer a cost  
8 on the contract. It was not an incurred cost on the  
9 contract.

10 Q What does that mean with respect to their  
11 books? How was it treated on their books? Did you look  
12 at their books?

13 A I did not. DCAA looked at their books. I did  
14 not look at their books.

15 Q Isn't it true that it would seem that that  
16 statement of being treated on their books as a \$400,000  
17 reduction contradicts the next statement that says that  
18 "it was treated as other income?"

19 A Again, I didn't write the report.

20 Q I'm just asking you if you agree that that  
21 seems to be a contradiction?

22 A I don't know. I'm not an accountant and I'm  
23 not going to speculate on what the auditors intended  
24 here.

25 Q Well, in that case, can we agree that all you

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1 did in deciding to reduce progress payment number eight  
2 by \$400,000 was blindly follow DCAA's recommendation, for  
3 whatever the reason that you didn't understand, that it  
4 be reduced by \$400,000?

5 A You are totally wrong.

6 Q Okay. Did you make an independent determination  
7 as to the propriety of reducing progress payment number  
8 eight by \$400,000?

9 A Yes.

10 Q So now tell me what determination, what  
11 process, what logic you used in reaching that conclusion?

12 A First of all, we had meetings and discussions  
13 and exchange of information between the government and  
14 the contractor for several months --

15 Q You said you based it on this recommendation,  
16 right here.

17 A I did not say that. This was --

18 Q You did say that.

19 A Can I answer the question?

20 Q Well, first I'd like you to tell me, to the  
21 extent that you said that you based it on this  
22 recommendation right here, I want to know what you  
23 understand this recommendation, this paragraph to mean?

24 A My decision concerning this particular matter  
25 was not based solely on this --

1 Q To the extent that it was based on this  
2 recommendation, can you tell me what you understood this  
3 to mean?

4 A I understood this to mean a reduction in cost  
5 incurred on the contract. A reduction in expenditures, a  
6 void costs, \$400,000 was no longer a cost that was  
7 incurred on this particular contract. That was my  
8 interpretation. That was my opinion.

9 Q Now, after your review of this paragraph, the  
10 information that you obtained confirmed that this  
11 \$400,000 option was real, correct?

12 A A formal agreement was shown to me. Yes.

13 Q And that confirmed to you that that  
14 transaction, the purchase of the option, was indeed a  
15 valid actual transaction, correct?

16 A Yes.

17 Q Now, moving on to paragraph 3, accounting fees  
18 are disallowed because they were used to obtain --  
19 because they are accounting fees incurred to obtain  
20 financing, correct?

21 A Could you give me a moment just to refresh my  
22 memory. I just want to read this.

23 Q Tell me when you finish, please.

24 A Yes.

25 Q Now, these are accounting fees that were

1 incurred in connection with obtaining the financing that  
2 you required back in February of 1985, isn't that  
3 correct?

4 A I do not know what financing is referred to  
5 here.

6 Q Well, considering that this is progress payment  
7 number four and before this the only financing that you  
8 required was the \$5 million of financing back in  
9 February, does that refresh your recollection that that's  
10 the financing this is referring to?

11 A I don't know if the financing that's stated  
12 here, in August 1985, refers to the financing back in  
13 February 1985.

14 Q To your knowledge, did Freedom obtain any other  
15 financing before this point?

16 A I do not know.

17 Q If you will turn to page 4 of the audit report,  
18 please.

19 A Yes.

20 Q If you look at paragraph 8, you see that DCAA  
21 objects to the fact that Freedom is still carrying on its  
22 books the cost of computer equipment from AT&T, which was  
23 delivered and repossessed. Do you see that?

24 A Yes.

25 Q Does that refresh your recollection as to the

1 circumstances of that equipment being delivered and  
2 repossessed?

3 A Yes.

4 Q And do you recall now having received a call  
5 from a representative from AT&T?

6 A No.

7 Q To the extent that this continues to be  
8 reflected on Freedom's books, does it not reflect  
9 Freedom's hope that they are going to be able to get this  
10 equipment back?

11 A I can't say what Freedom thought. I don't  
12 know. I really don't.

13 Q Now, this next paragraph is where we begin the  
14 section where DCAA lays out its reasons for declaring  
15 Freedom's accounting system inadequate; isn't that right?

16 A Well, I can't rule out what preceded this  
17 paragraph. I would look at the report in toto. I can't  
18 ignore what is mentioned prior to this paragraph. You  
19 just can't look at the rest of the report and say that  
20 this what the --

21 Q I see. So, is it your understanding that  
22 everything that preceded page 4, beginning with A, all of  
23 that also got rolled into DCAA's decision to declare  
24 Freedom's accounting system inadequate?

25 A Yes. You have to look at the whole report.

1 Q Okay. Can you please tell me out of all of the  
2 items that precede this point, the ones we have already  
3 reviewed, which one of those objections criticizes  
4 Freedom's accounting system?

5 A I'm not in a position to answer that at this  
6 time.

7 Q Do you have any idea what constitutes and  
8 accounting system as opposed to human errors that might  
9 not reflect on the adequacy of the system itself?

10 A Well, of course, an accounting system you have  
11 books, you have to have books, you have to have ledgers,  
12 journals, I'm not an accountant but I just have a general  
13 knowledge of what an accounting system is.

14 Q Okay. So you have to have books that are set  
15 up that record --

16 A Properly record, you know, costs.

17 Q Now, to the extent that costs might not be  
18 entered but indeed there might have been some invoices,  
19 even if they didn't get recorded on the books, does that  
20 reflect the lack of adequate accounting system?

21 A No. By itself, no.

22 Q That could simply be human error, correct?

23 A Yes.

24 Q So as long as the books are in place and are  
25 set up with a system of recording those costs that's

1 proper and the company has designated the personnel to  
2 maintain those books and records, that's what an  
3 accounting system is, right?

4 A Yes.

5 Q So, now, I will ask you again, in light of our  
6 agreement as to what an accounting system is, can you  
7 please tell me which of these items from paragraph A on  
8 page 2 through paragraph number 8 on page 4, reflect and  
9 inadequate accounting system?

10 A My position concerning this whole matter then  
11 and now is taking everything collectively. Collectively.  
12 I can't --

13 Q I just want to know, Mr. Liebman, which of  
14 these paragraphs --

15 A I'm not in a position to answer that here.

16 Q You don't know?

17 A I looked at -- as I said before --

18 Q You don't know?

19 A As I said before, I looked at this report in  
20 toto.

21 Q Are you able --

22 A And I did not make the determination --

23 Q Are you able, are you able to determine whether  
24 any of these paragraphs reflect an inadequacy in  
25 Freedom's accounting system?

1 A The matter -- that is not for my -- I am not an  
2 accountant. I'm not the DCAA auditor. It's DCAA's role  
3 to determine inadequacy of a system.

4 JUDGE JAMES: Okay. Mr. Luchansky, the Board  
5 interprets his answer as he doesn't know. Let's move on.

6 MR. LUCHANSKY: Yes, your Honor.

7 BY MR. LUCHANSKY:

8 Q Mr. Liebman, what about with respect to the  
9 costs -- I'm sorry, not costs. With respect to the  
10 reasons that follow the paragraph on page 4 where DCAA  
11 says, "Based on our review the contract's current cost  
12 accountant system is not considered adequate," is your  
13 answer the same, that you don't know whether any of these  
14 comments actually reflects inadequacy in their accounting  
15 system?

16 A It's the same answer.

17 Q Now, you are aware that Freedom responded to  
18 this progress payment audit, correct?

19 A I don't remember. I presume they did. I just  
20 don't remember.

21 Q If you will turn to H.T., and this is in the  
22 progress payment book, H.T. 422, it's behind progress  
23 payment number 4, PP number 4, Tab D, as in David.

24 A Yes.

25 MS. HALLAM: The report is in the same book you

1 were looking at, Mr. Liebman, at sub tab D, the same tab,  
2 sub tab D.

3 THE WITNESS: Yes.

4 BY MR. LUCHANSKY:

5 Q Do you now recognize this as, it's H.T. PP  
6 number 4, it's actually labeled just PP number 4.

7 A Yes.

8 Q And there should be sub tab D, as in David.

9 A I do not have any sub tabs here.

10 JUDGE JAMES: Try page 3069.

11 THE WITNESS: Oh, yes. I'm sorry.

12 BY MR. LUCHANSKY:

13 Q Mr. Liebman, do you recognize this as a  
14 response that Freedom provided to that audit report we  
15 were just looking at?

16 A Yes.

17 Q And you received a copy of this at or about the  
18 time that it was prepared, correct?

19 A I do not recall.

20 Q But you do, from the fact that you recognize  
21 that you did receive it and review it, correct?

22 A No. When I meant by, recognize it, I thought  
23 you meant what it is based on the title on the top of the  
24 page. I do not recall the report itself. It's been many  
25 years since this report has been shown --

1 Q You don't recall ever having received this  
2 document?

3 A I don't recall.

4 Q If you will please look at R-66.

5 A Yes.

6 Q I'm sorry. That's not the document I was  
7 looking for. That should be the right tab. Do you have  
8 an audit report?

9 A R-66 was an audit report for progress payment  
10 six.

11 MR. LUCHANSKY: I'm sorry, your Honor, my 66  
12 doesn't have the right document. I'll pull it from a  
13 different place. I'm sorry.

14 BY MR. LUCHANSKY:

15 Q Was that an audit report dated September 12,  
16 1985?

17 A Yes.

18 Q Now, this was the next audit report that was  
19 performed by DCAA on Freedom's progress payments?

20 A Yes.

21 Q If you will turn to page 4 of this audit report  
22 and look at the first paragraph, please. Tell me when  
23 you are finished, please.

24 A Yes.

25 Q Do you see that now after having reviewed

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1 Freedom's response to progress payment -- response to the  
 2 audit on the progress payment number four, DCAA is now  
 3 saying, that "Yes. We note some improvement in their  
 4 accounting practices." Do you see that?  
 5 A Well, first of all, I don't know if they  
 6 reviewed your response. I have no knowledge of that.  
 7 Q Okay. Well, you see at this point DCAA is  
 8 noting some improvement in what they want Freedom to do  
 9 with respect to their books, right?  
 10 A Well, they are saying here that they have  
 11 developed -- that they have been noting -- Freedom had  
 12 developed written procedures.  
 13 Q Okay. And, once, again, you don't know whether  
 14 these procedures or whatever has been -- First of all,  
 15 you don't know exactly what changes have been made,  
 16 correct?  
 17 A That's correct.  
 18 Q And you don't know whether these are changes  
 19 that Freedom could have agreed to do if an exit interview  
 20 had ever been granted by DCAA, right?  
 21 A I do not know.  
 22 Q Okay. But you do see that above that what DCAA  
 23 notes as the major deficiencies in the accounting system  
 24 remain, number one, the expensing of capital items, and  
 25 number two the improper treatment of the rental income

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1 credit, meaning the \$400,000, right?  
 2 A Yes.  
 3 Q So at this point, while progress payments are  
 4 still suspended, really the only two items that are  
 5 DCAA's objection are those two items, is that right?  
 6 A No. I'm not prepared to say that. First of  
 7 all, progress payments were not suspended. I was  
 8 considering suspending progress payments. Number two,  
 9 they are just highlighting major items. There were other  
 10 deficiencies involved.  
 11 Q Are you testifying from your knowledge of what  
 12 was going on or just from reading this paragraph?  
 13 A From my knowledge of what was going on. Yes.  
 14 Q And you do agree that these are the two major  
 15 reasons?  
 16 A Yes.  
 17 Q And that once Freedom changed its accounting of  
 18 those capital type costs, changed them from expensed to  
 19 depreciated or asset account items, then DCAA declared it  
 20 to be an adequate accounting system?  
 21 A I cannot draw that conclusion.  
 22 Q I'm not asking you for a conclusion.  
 23 A I do not know.  
 24 Q I'm asking for a recollection.  
 25 A I do not know. That's my answer.

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1 Q Now, Mr. Liebman, you testified yesterday  
 2 regarding progress payment number 18 and you said that  
 3 you had some discussions with Mr. Bankoff and I guess  
 4 with Freedom also about increasing the progress payment  
 5 ceiling based upon number of cases delivered, correct?  
 6 A Yes.  
 7 Q And you remember that at that time Mr. Thomas  
 8 insisted to you -- Well, first of all, the source of  
 9 having any kind of progress payment ceiling on this  
 10 contract is L-4 of the contract, correct?  
 11 A The original source. Yes.  
 12 Q And you are not aware of the origin of L-4, are  
 13 you?  
 14 A No.  
 15 Q Now, at the time, it's true, isn't it, that Mr.  
 16 Thomas insisted that the L-4 clause really doesn't belong  
 17 in this contract at all, didn't he?  
 18 A There was mention of that. Yes.  
 19 Q Mr. Thomas mentioned it, right?  
 20 A Yes.  
 21 Q And he was complaining that L-4 actually  
 22 violated the progress payments clause, didn't he?  
 23 A Yes.  
 24 Q And you will agree that the progress payment  
 25 clause doesn't have any kind of a limitation like this,

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1 does it?  
 2 A That's correct.  
 3 Q The progress payment clause only has two  
 4 limitations, isn't that right?  
 5 A Yes.  
 6 Q One limitation has to do with each progress  
 7 payment request, correct?  
 8 A Well, actually two limitations deal with each  
 9 progress payment request.  
 10 Q Okay. So the first progress payment request is  
 11 limited to 95 percent of the contractor's incurred costs  
 12 plus 100 percent of any subcontractor progress payments,  
 13 correct?  
 14 A You are leaving out progress. There must be  
 15 progress. There must be progress. Paying on costs  
 16 incurred as work progresses. That's the part of it.  
 17 Q Okay. Good. And you will agree that in this  
 18 case work progressed on the Freedom contract from the day  
 19 that the contract was awarded, correct?  
 20 A Well, I'm not sure if it was on the day it was  
 21 awarded but if not surely immediately thereafter.  
 22 Q If not that day then the next day?  
 23 A Well, I can't say the next --  
 24 Q Within a couple of days?  
 25 A I can't pinpoint an exact number of days.

1 Q Well, let me ask you this.

2 A But shortly after award work --

3 JUDGE JAMES: Mr. Luchansky, he said  
4 immediately thereafter. Move on.

5 MR. LUCHANSKY: Yes, your Honor. I'm moving  
6 on.

7 BY MR. LUCHANSKY:

8 Q Now, Mr. Liebman, so with that in mind, then  
9 you will agree that the limitation on specific progress  
10 payment request is what I said, correct, 95 percent of  
11 the contractor's incurred costs, plus 100 percent of  
12 progress payment requests of subcontractors, correct?

13 A And as work progresses. Yes.

14 Q Okay. And number two, the other limitation is  
15 the total amount of progress payment is limited under the  
16 progress payments clause to 95 percent of the total  
17 contract price, correct?

18 A Yes.

19 Q And those are the only limitations in the  
20 progress payment clause, correct?

21 A Are you talking about the DAR progress payment  
22 clause or L-4?

23 Q DAR.

24 A DAR? Yes.

25 Q There's nothing in the DAR progress payment

1 clause that provides for the limitations that L-4  
2 imposes, is there?

3 A I can't say that because when you are dealing  
4 with first articles you run into the --

5 Q Mr. Liebman, we just agreed on what the DAR  
6 progress payment clause provided, did we not?

7 A In general.

8 Q Okay. We are not talking about first articles  
9 here, Mr. Liebman.

10 A All right. We are excluding first articles  
11 completely then from this discussion?

12 Q Yes.

13 A Yes.

14 Q And Mr. Thomas brought that complaint, this  
15 objection to your attention at that time, correct?

16 A I don't know the exact time. But he did bring  
17 it to my attention, yes.

18 Q Now, Mr. Bankoff had some concerns about the  
19 legality of the L-4 clause at that time, didn't he?

20 A I do not know.

21 Q Well, if you please turn to FT-340.

22 A Could you tell me what volume we are --

23 Q Yes.

24 A Yes.

25 Q If you will turn to the sixth page of this

1 exhibit.

2 A Is that page number 02368?

3 Q The copy I have does not have the Bates numbers  
4 at the bottom.

5 JUDGE JAMES: Or any other numbers for that  
6 matter.

7 BY MR. LUCHANSKY:

8 Q Three six seven.

9 A Yes.

10 Q If you look at the first paragraph at the top  
11 of 02367, do you see that Mr. Bankoff told Colonel  
12 Hollins that he was somewhat concerned about the L-4  
13 clause?

14 A Yes.

15 Q And that it placed some limitations that we  
16 might not be able to withstand in a court or board case?

17 A Yes.

18 Q And he notes that the clause was giving us some  
19 flack at the time, correct?

20 A Yes.

21 Q Now, do you recall discussing with Mr. Bankoff  
22 at this time, around progress payment 18, as Freedom is  
23 asking for an increase in the L-4 ceiling and saying that  
24 it doesn't belong in this contract in the first place, do  
25 you remember discussing with Mr. Bankoff concerns about

1 whether this clause was even legal?

2 A I never discussed the legality of the clause  
3 with Mr. Bankoff.

4 Q Now, when it came to an interpretation of the  
5 progress payment clause for paying Freedom's capital type  
6 costs which counsel had told you had been negotiated and  
7 agreed to be paid under progress payment clause, you  
8 refused to pay it that way and went for a DAR deviation  
9 request, correct?

10 A At the recommendation of counsel, which was  
11 recommended in that report.

12 Q Well, that was your interpretation?

13 A That was not my interpretation. That was quite  
14 clear in that report.

15 Q But that's what you did in that case even in  
16 light of your recognition that it was negotiated to have  
17 paid those costs as progress payments?

18 A No. That was never my interpretation.

19 Q But here when you've got an L-4 clause, for  
20 which there's no provision in the progress payment  
21 clause, something that is your responsibility and within  
22 your area of speciality, you didn't raise any legal  
23 concerns about the propriety of the L-4 clause?

24 A I did not raise legal concerns. I discussed  
25 the whole matter with Mr. Bankoff. But I'm not a lawyer.



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1 I did not raise legal concerns with Mr. Bankoff. The  
2 matter of the consent of the clause was discussed between  
3 myself and Mr. Bankoff. Yes.

4 Q And did you tell Mr. Bankoff that you believed  
5 the L-4 clause should be either eliminated or at least  
6 have the L-4 limit increased all the way up to the 95  
7 percent level?

8 A That was my opinion. Yes.

9 Q And indeed even if we set aside the legality of  
10 the L-4 clause and assume for a moment that it is legal,  
11 by the terms of the L-4 clause, itself, all it takes for  
12 a contractor to get an increase of the L-4 clause all the  
13 way up to the 95 percent is a demonstration of need and  
14 submission of cash flows in support of that position,  
15 isn't that right?

16 A I'm sorry. Could you please repeat that?

17 Q We are going to assume for a moment that the  
18 L-4 clause is legal. A position that I don't agree with  
19 but we will assume it for a moment.

20 A Okay.

21 Q By its terms the L-4 clause provides that if a  
22 contractor wants to increase the L-4 limit all the  
23 contractor has to do is show a need for those additional  
24 progress payments and submit cash flows in support of  
25 that need, isn't that correct?

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1 A I would have to refresh my memory by looking at  
2 the L-4 clause. I believe that --

3 Q Well, let's do that.

4 A I believe that is mentioned there but I would  
5 really need to refresh my memory.

6 Q Let's do that. It's at R-2.

7 JUDGE JAMES: All right. Let's go off the  
8 record.

9 (Off the record.)

10 BY MR. LUCHANSKY:

11 Q Mr. Liebman, have you had a chance to look at  
12 the L-4 clause in the solicitation?

13 A Yes.

14 Q And that's on page 66 of R-4?

15 A Yes.

16 Q Having reviewed this clause do you now agree  
17 that pursuant to the terms of the clause itself that as  
18 long as a contractor demonstrates a need for an increase  
19 in the L-4 limitation and submits cash flows to support  
20 that need, that indeed the L-4 limitation must be raised  
21 all the way up to the 95 percent level?

22 A I disagree with the wording must. It says it  
23 here in the L-4 clause, "requests." It's basically a  
24 request. I don't see any indication here that it must be  
25 increased.

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1 Q Okay. Do you see any language here that gives  
2 the PCO or the ACO the right to refuse that request if  
3 the contractor demonstrates that need?

4 A Please bear with me a moment. All I see here  
5 is a request of increase. I don't see anything in here  
6 making it mandatory that the increase be granted.

7 Q Okay. Mr. Liebman, what I'd like you to do now  
8 is answer my question, please. Do you see any language  
9 in this provision that you interpret to be a language  
10 that allows the PCO or ACO to deny that request as long  
11 as the contractor demonstrates a need and submits these  
12 cash flows?

13 A Well, first of all, it's not the ACO. It's the  
14 PCO that makes the determination. But, I see -- all I  
15 see here is one sentence but that just says, "Unless  
16 written approval is received from the PCO," so you --

17 JUDGE JAMES: Are you able to answer, Mr.  
18 Luchansky's question?

19 THE WITNESS: Could he please repeat the  
20 question, exactly?

21 JUDGE JAMES: You heard it twice. Have you  
22 forgotten it now?

23 THE WITNESS: I was just a little confused.

24 JUDGE JAMES: Try again, Mr. Luchansky.

25 MR. LUCHANSKY: Yes, your Honor.

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1 BY MR. LUCHANSKY:

2 Q Mr. Liebman, do you see any provision in the  
3 L-4 clause that provides for a PCO to refuse a request by  
4 a contractor to increase the L-4 limitation if the  
5 contractor demonstrates a need for an increase and  
6 submits cash flows to support that request?

7 A I see no direct wording in that regard.

8 Q You see no limitation, you see no provision  
9 providing for a refusal of that request. Is that right?

10 A That's correct.

11 Q And indeed at the time that you were discussing  
12 this with Mr. Bankoff, Mr. Bankoff reached the same  
13 conclusion, didn't he?

14 A I just don't know. I don't know.

15 Q If you will look at FT-239. Do you see that  
16 after the cover page, after the routing sheet this is a  
17 D&F issued by Mr. Bankoff on January 28, 1986?

18 A Yes.

19 Q This was a D&F issued after the PCO decided to  
20 terminate for default 114,000 cases of Freedom's  
21 contract?

22 A Yes.

23 Q And this was at or about the time that you were  
24 having -- well, turn to paragraph 9, please.

25 A Yes.

1 Q Do you see that in paragraph 9 Mr. Bankoff  
2 refers to the discussions with Mr. Thomas about  
3 increasing the L-4 ceiling?  
4 A Please bear with me a moment. Yes.  
5 Q And, in fact, the issue came up because as a  
6 result of terminating the 114,000 cases that reduced the  
7 total contract price?  
8 A Yes.  
9 Q Resulting in an effect on the L-4 clause which  
10 provides for 50 percent or \$9 million which ever is less,  
11 correct?  
12 A Yes.  
13 Q So there was a direct L-4 had a direct impact  
14 on progress payments as a result of the termination of  
15 114,000 cases, correct?  
16 A Yes.  
17 Q And it was in that context that Mr. Thomas was  
18 saying, wait, I need that money, please increase the L-4,  
19 correct?  
20 A Yes.  
21 Q Now, do you see that after mentioning -- do you  
22 see that Mr. Bankoff refers to the DAR clause which has  
23 the ceiling, only has a ceiling of 95 percent on total  
24 contract value for progress payments?  
25 A Please bear with me.

1 Q I'm in the middle of the paragraph, sir.  
2 A Yes. Yes.  
3 Q But Mr. Bankoff said, But L-4 seems to be a  
4 problem, that would seem to interfere with giving you 95  
5 percent as provided for under the progress payment  
6 clause, right?  
7 A (No response.)  
8 Q Where it says, the DAR allows for a ceiling of  
9 95 percent but the MRE contract uses a local DPSC clause  
10 which limits the ceiling as mentioned to \$9 million or 50  
11 percent, which ever is lesser. Do you see that?  
12 A Yes.  
13 Q Now, at that point Mr. Thomas cited the clause  
14 in the L-4 that you just read which says, increases to  
15 the ceiling must be accompanied by cash flow analysis, et  
16 cetera, correct?  
17 A Yes.  
18 Q And what Mr. Thomas was saying was what we just  
19 discussed which is, Look, if I show you a need and give  
20 you my cash flows, then you've got to increase the  
21 ceiling, right?  
22 A But it was nothing mandatory on the part of the  
23 PCO to increase it.  
24 Q Well, do you see that Mr. Bankoff then states,  
25 The clause does not allow for the PCO or ACO denial of an

1 increase other than for lack of need?  
2 A I don't know if that's Mr. Bankoff saying that  
3 or Mr. Thomas.  
4 Q Well, whoever said it, you would agree that  
5 that is a true statement, isn't that right? You just --  
6 A No. I don't agree with that.  
7 Q You just --  
8 A I do not agree with that.  
9 JUDGE JAMES: You disagree with the subsequent  
10 statement in there?  
11 THE WITNESS: I disagree with the statement  
12 that it's mandatory to increase it.  
13 JUDGE JAMES: I understand that. Now, look at  
14 the next sentence. Do you disagree with that?  
15 THE WITNESS: I'm sorry. Does that start with  
16 the sentence, "The clause does not allow --"  
17 JUDGE JAMES: No. "This was discussed," is the  
18 next sentence.  
19 THE WITNESS: Okay. I'm sorry. I do not  
20 recall discussing this particular situation with Mr.  
21 Bankoff.  
22 JUDGE JAMES: So for all you are concerned  
23 Bankoff has stated it wrong, right?  
24 THE WITNESS: I would say, yes.  
25 BY MR. LUCHANSKY:

1 Q Now, do you see that Mr. Bankoff concluded that  
2 all things considered what he's going to do is increase  
3 the ceiling but no unconditionally, correct? Well, here  
4 it says that since there was a real need for an increase  
5 in the ceiling, that he's going to go and increase it a  
6 little bit, right?  
7 A Yes.  
8 Q Now, he didn't increase it unconditionally, did  
9 he?  
10 A That's correct.  
11 Q Even though the way he increased it was he then  
12 tied it to deliveries, correct?  
13 A Well, yes. It was always tied to deliveries.  
14 Yes.  
15 Q Well, the first \$9 million wasn't tied to  
16 deliveries.  
17 A That's correct. It was not tied to deliveries.  
18 Q So your statement is incorrect, isn't it?  
19 A Yes.  
20 Q Now, if you turn back to -- I hope you still  
21 have open in front of you Mr. Bankoff's statement to  
22 Colonel Hollins.  
23 A Was that FT --  
24 Q FT-340.  
25 A Yes.

1 Q Do you see again, on page 02367, where we were  
2 before --

3 A Yes.

4 Q That even though Mr. Bankoff was concerned  
5 about the legality of the clause, and apparently Mr.  
6 Bankoff agreed that there was nothing in the L-4 clause  
7 that would limit the increase upon a showing of need and  
8 submission of cash flows. Do you see he says here, "I  
9 didn't want to take the L-4 clause out?"

10 A Yes.

11 Q Did he discuss that with you?

12 A I believe so.. Yes.

13 Q Do you remember what reason he gave you?

14 A I believe it was because it was standard for --  
15 I believe, to the best of my recollection, that this was  
16 a standard clause for the Defense Personnel Support  
17 Center. It was a clause that was used by their agency.

18 I had indicated to Mr. Bankoff my experience  
19 with other agencies was that this clause was kind of  
20 unique. I hadn't seen such a clause with other agencies.

21 Q And you expressed your concern to him about  
22 whether that L-4 clause was appropriate or not?

23 A Yes.

24 Q And you told him that you didn't think it was  
25 an appropriate clause to have in this contract, right?

1 he was liquidating at the rate of two million." What  
2 does that mean?

3 A Well, again, I don't understand it myself other  
4 than on face value.

5 Q Well, give me face value because you --  
6 liquidation is within your bailiwick, correct?

7 A I know what liquidation is.

8 Q Well, you are in charge of that because that's  
9 part of the progress payment --

10 A Yes.

11 Q Okay. So explain this to me. What does that  
12 mean?

13 A Well, on the surface it appears that if you --  
14 if the value of the produce say is two million and you,  
15 say, have a 50 percent progress payment ceiling, in other  
16 words, instead of getting 95 percent in costs and you  
17 have a 50 percent limitation and that 50 percent say for  
18 argument sake has a value of \$1 million. Okay, 50  
19 percent. And however you ship the full value of the  
20 product, which is 100 percent, meaning price, that means  
21 \$2 million and when you liquidate progress payments you  
22 are liquidating against total price.

23 Q Okay. I'm not quite sure I got all that. Is  
24 it fair to say, that by linking the increase in the  
25 progress payment limitation to deliveries, this was a way

1 A I just said, my experience was contractors are  
2 allowed the full value of 95 percent of their costs  
3 incurred. This was the first time I had ever seen such a  
4 clause with such a limitation in government contracts.

5 Q Okay. Now, despite that concern, did you raise  
6 the concern with anyone else other than Mr. Bankoff, when  
7 Mr. Bankoff refused to take the L-4 clause out did you  
8 raise the concern with any of his superiors?

9 A No.

10 Q Anyone at DCASMA?

11 A I discussed the matter with some people at  
12 DCASMA?

13 Q Did you raise a concern?

14 A No.

15 Q Now, you see that Mr. Bankoff then says that he  
16 was willing to give the contractor up to 95 percent of  
17 the total contract in progress payments. Do you see  
18 that?

19 A Yes.

20 Q But he would only do it as long as he got  
21 product.

22 A Yes.

23 Q And now this next sentence is the one I want  
24 you to explain to me, "What I did was I figured that for  
25 every million dollars we gave him in progress payments,

1 that the government could get back more of its money that  
2 it could use the L-4 clause to get back more of its money  
3 on the progress payments that it had paid already?

4 A I don't think that was the intent.

5 Q I don't want intent.

6 A I didn't write the clause. So -- that was not  
7 my understanding of the L-4 clause.

8 Q I want your plain reading of this language  
9 because you know what, Mr. Liebman, that's all you and I  
10 have. We are just reading the sentence.

11 A Plain reading, again, plain reading of this --

12 Q Plain reading --

13 A Yes.

14 Q Just answer whether you agree with my  
15 characterization of what that sentence means?

16 A Yes. Well, no. No. Not your  
17 characterization. My -- what I said before that if you  
18 ship more products --

19 Q Well, now that you have agreed with your  
20 characterization, let me ask you again, if you agree with  
21 mine? Isn't that sentence an expression of a way that  
22 the government can use the L-4 clause to get back more of  
23 its money through liquidation for progress payments it  
24 had already paid?

25 A I disagree with that.

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1 Q Now, speaking of liquidation, Mr. Liebman, you  
 2 were aware that Freedom believed that the liquidation  
 3 rate that applied to this contract was 82.6 percent,  
 4 correct?  
 5 A Yes.  
 6 Q You knew that from the time that you reviewed  
 7 those cash flows during the negotiations of this  
 8 contract, correct?  
 9 A Yes.  
 10 Q And you knew that from the time that Freedom  
 11 submitted its first progress payment request and put 82.6  
 12 percent on that progress payment request?  
 13 A Yes.  
 14 Q And yet you rejected that progress payment  
 15 request because it didn't have 95 percent up there even  
 16 though you knew it had been negotiated in the cash flows,  
 17 correct?  
 18 A I rejected the progress payment at 82.6 because  
 19 the contract had a progress payment that had a 95 percent  
 20 liquidation rate and I had to conform to what was in the  
 21 contract and in that progress payment clause that was in  
 22 that contract.  
 23 Q Where in the contract did it provide for a 95  
 24 percent liquidation rate?  
 25 A In the progress payment clause, DAR

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1 7-104.35(b).  
 2 Q Now, did you raise that issue with anyone at  
 3 the time pointing out that, Wait a minute, I see 82.6  
 4 percent was negotiated in the cash flows or that's the  
 5 number that was discussed. I see Freedom is asking for  
 6 82.6 percent but the progress payment clause doesn't  
 7 provide for that, what can we do?  
 8 A I'm governed by the clause. I'm governed by  
 9 the way the --  
 10 Q Did you raise the issue with anyone?  
 11 A I discussed the issue because Mr. Thomas  
 12 objected. Freedom objected to the 95 percent liquidation  
 13 rate.  
 14 Q Correct.  
 15 A I discussed this with the buying command but  
 16 the contract reads 95 percent and I have to adhere to the  
 17 contract.  
 18 Q Now, in fact, on the Monday following the  
 19 post-award, Pat Marra, Mel Zitter on your behalf  
 20 discussed with DPSC the fact that at the post-award Pat  
 21 Marra was complaining that it's an 82.6 percent  
 22 liquidation rate and you are requiring a 95 percent  
 23 liquidation rate. Isn't that right?  
 24 A The contract was requiring a 95 percent  
 25 liquidation rate. Yes.

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1 Q Do you recall that when Mel Zitter called he  
 2 Keith Ford of DPSC he said, Well, you know what, if we  
 3 are going to use an 82.6 percent liquidation rate we need  
 4 a contract modification?  
 5 A That's correct.  
 6 Q So there was a way of conforming the contract  
 7 to the negotiations and the expectation of the contract?  
 8 A Yes.  
 9 Q So what steps did you take at that point to  
 10 obtain the contract modification to change the rate to  
 11 what you understood at that time was what was negotiated  
 12 --  
 13 A First of all, I as the ACO am responsible for  
 14 what they call alternate liquidation rates.  
 15 Q What steps did you take? Did you take any  
 16 steps?  
 17 A I discussed this with the buying command, the  
 18 rate in the contract was the rate that I had to utilize  
 19 for progress payment purposes.  
 20 Q Unless there were a contract modification?  
 21 A Unless there was a modification which was may  
 22 call because I had authority over the progress payments.  
 23 JUDGE JAMES: Wait a minute. With whom in the  
 24 buying command did you discuss it, Mr. Liebman?  
 25 THE WITNESS: Mr. Barkewitz, probably Mr. Keith

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1 Ford as well.  
 2 BY MR. LUCHANSKY:  
 3 Q So despite the 82.6 percent being in the cash  
 4 flows, it was your decision not to request a contract  
 5 modification to change the liquidation rate from 95  
 6 percent to 82.6 percent?  
 7 A It was my decision and also the PCO did not --  
 8 Q It was your decision?  
 9 A And the PCO did not want to change.  
 10 Q You said that it's your responsibility,  
 11 correct?  
 12 A It's my responsibility --  
 13 Q Well, then it's your decision, correct?  
 14 A The PCO could also have done it.  
 15 Q I don't care about the input for purposes of  
 16 this question, of anyone who did not have the authority  
 17 to make this decision.  
 18 A The PCO had that authority also.  
 19 Q So let's talk for a moment about your  
 20 authority. You had the authority to make the decision  
 21 also?  
 22 A Yes.  
 23 Q What was the basis for your decision not to  
 24 pursue a modification of the contract to change it from a  
 25 95 percent to an 82.6 percent liquidation rate?

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1 A DAR appendix E, which states that a -- I don't  
2 know if you want me to elaborate on this. But it's DAR  
3 appendix E. That -- do you want me to?

4 Q Yes, please.

5 A Under DAR appendix E, when you are talking  
6 alternate liquidation rates, the contractor must submit  
7 support documentation -- they must request a change.  
8 They must submit a lot of supporting documentation for  
9 government review and for the contracting officer to  
10 lower the liquidation rate the contractor has to  
11 demonstrate that it's realizing a certain percentage of  
12 profit because the table in DAR appendix E are charting  
13 out exactly how much profit is involved, you know, what  
14 the limitation should be. The contract was just awarded  
15 and it was not going to change the limitation at that  
16 point and that's what I explained -- I explained that to  
17 Freedom.

18 Q Okay. Now, you were aware at that time also of  
19 all of the supporting documentation that Freedom had  
20 submitted merely weeks before during negotiations to  
21 support the 82.6 percent liquidation rate, correct?

22 A Yes.

23 Q You saw the price proposals with the DD-633s  
24 and all the supporting documentation there, correct?

25 A Yes.

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1 Q You saw all the cash flows that incorporated --  
2 that based all the projections for this contract on 82.6  
3 percent liquidation rate, correct?

4 A Yes.

5 Q You saw that the projected profit for this  
6 contract was projected using the 82.6 percent liquidation  
7 rate as a basis, correct?

8 A Yes.

9 Q You knew that if you changed the liquidation  
10 rate from 82.6 percent to 95 percent, that that would  
11 have an impact upon Freedom's profit, correct?

12 A Yes.

13 Q Was there any additional documentation that you  
14 believe you required under the DAR to support the 82.6  
15 percent liquidation rate other than all of this  
16 documentation that we just described that was already  
17 considered?

18 A Yes. Demonstrated performance. The contractor  
19 wasn't going to need a liquidation rate until about --  
20 wasn't going to need a reduced rate for five or six  
21 months because he wasn't going to ship product other than  
22 first articles for five or six months. So a lower  
23 liquidation rate was really a moot point at that time.

24 Q So you wanted to see if the contractor could  
25 perform?

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1 A Could perform and realize the profit, whatever  
2 it is. I had to see what profit he was realizing, what  
3 the costs were going to be, to see if the 14.9 percent  
4 profit was still going to be realized, and as I explained  
5 to Freedom, we'll see how things to. There was no need  
6 at that point to raise the liquidation rate. No  
7 shipments were going to be made for several months, maybe  
8 five or six months. And if at that time his costs and  
9 profit were still more or less in line but wasn't  
10 negotiated then I would consider lowering the liquidation  
11 rate. It was just too early at that point to do  
12 anything. And as a result I was going to administer the  
13 contract at -- the progress payments as written, meaning  
14 a 95 percent rate. But it really didn't matter at that  
15 point.

16 Q Even though that deviated from negotiations?

17 A No. It didn't. The negotiation was 95  
18 percent. That was what was negotiated. Well, that --  
19 I'm sorry. That was what was put in the contract, 95  
20 percent.

21 Q And what was negotiated as based on the cash  
22 flows and all the documentation you could see --

23 A Well, I didn't negotiate it but the contract  
24 reads 95 percent. I have to presume --

25 Q Answer my question.

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1 A Yes.

2 Q You drew that conclusion and made that decision  
3 even though all of the information that you had at the  
4 time indicated that the negotiations with Freedom were  
5 all based upon an 82.6 percent liquidation rate? Yes?

6 A Based on what Freedom submitted to the  
7 government. Based on his documents.

8 Q Correct.

9 A What was negotiated --

10 Q Yes? Based upon all those documents, yes?

11 A Based on the documents, yes.

12 Q And to the best of your knowledge, that's what  
13 was negotiated between the parties? To the best of your  
14 knowledge?

15 A I don't know --

16 Q You have no information otherwise?

17 A I have no information about -- can I answer?

18 Q You have no information otherwise?

19 A I have no information otherwise. That's  
20 correct.

21 Q Now, consistent with this point of view of  
22 "let's see if Freedom can perform," isn't it true, Mr.  
23 Liebman, that at that time, during those first couple of  
24 months of the contract, while you were taking this  
25 attitude and while you believing that no progress

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1 payments should be paid until typically direct costs are  
 2 incurred, until raw materials and direct labor is  
 3 incurred, wasn't your attitude at the time that Freedom  
 4 should go out and get its own financing to finance its  
 5 start-up costs?  
 6 A That was part of the need for financing. Yes.  
 7 Q And wasn't that the source of your alleged  
 8 panic in December when you talked to Dollar Drydock and  
 9 you contended that there was no financing, wasn't it  
 10 because you were taking the position that Freedom isn't  
 11 supposed to get any progress payments to pay for the  
 12 renovations of its building?  
 13 A No. That was, as I said yesterday during  
 14 testimony that was just a position I had early-on, maybe  
 15 the first couple of weeks. That was my gut feeling when  
 16 this whole scenario started but I changed that position  
 17 during the month of December 1984.  
 18 Q Mr. Liebman, let's take a look at your  
 19 statement to Colonel Hollins at FT-338. Do you have  
 20 that?  
 21 A FT-338?  
 22 Q Yes.  
 23 A Yes.  
 24 Q If you will turn to Bates stamp 02345.  
 25 A Yes.

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1 Q Do you see that at the bottom of the page  
 2 Colonel Hollins is asking you about the meeting at DLA on  
 3 February 15, 1985 with Mr. Thomas?  
 4 A I don't see that. This is 02345?  
 5 Q Yes.  
 6 A I see it in the middle of the page, the top  
 7 part of the page. Is that where you are referring to?  
 8 Q If you look at the bottom of the page with a  
 9 subheading it says, "Meeting with Thomas."  
 10 A Yes. Okay.  
 11 Q Do you see that this is the section of your  
 12 interview where you are talking about Mr. Thomas' meeting  
 13 with you and DLA on February 15, correct?  
 14 A Yes.  
 15 Q Do you see at the bottom of the paragraph you  
 16 say "That the government also told Thomas that if the  
 17 question came up of direct versus indirect costs that his  
 18 allocable indirects would be paid since this was his only  
 19 contract?"  
 20 A Yes.  
 21 Q Do you see that you say, "This was a new  
 22 position for me?"  
 23 A This was a new position for me in regards to  
 24 Mr. Thomas, yes. In regards to telling Mr. Thomas, yes.  
 25 Q I'm sorry. I don't understand.

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1 A Okay. Let me explain. Because we were so over  
 2 shadowed by the financial situation I did not convey the  
 3 matter of payment of progress payments for, you know, the  
 4 direct and indirect cost matter until the actual meeting.  
 5 Q You are saying you had changed your mind  
 6 earlier, you just didn't bother to tell Mr. Thomas?  
 7 A Mr. Thomas was not told. That's correct.  
 8 Q Okay. And did you expect him to glean that  
 9 change in your mind from the February 6 letter suspending  
 10 progress payments in which you said, "One of the reasons  
 11 it's being suspended is because no physical progress is  
 12 being made?" You figured that might tip him off?  
 13 A No. That's not true.  
 14 Q Well, did you tip off Mr. Penzer or Dollar  
 15 Drydock or Mr. Robbins or any of these people you  
 16 contacted as potential lenders of Mr. Thomas, did you  
 17 tell them that you had changed your mind that all costs  
 18 were direct on this contract?  
 19 A No.  
 20 Q If you turn to the next page you see that even  
 21 as of this point, once DLA comes down on you and says,  
 22 "Wake up all these costs are direct --"  
 23 A Where are you reading from?  
 24 Q The top of page 02346.  
 25 A I see that, yes.

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1 Q Do you see at the end of that first paragraph,  
 2 you said that "you still said that you would not pay for  
 3 capital equipment expenses except on an expensed basis?"  
 4 A Yes.  
 5 Q Now, were you saying that with respect to the  
 6 capital-type-costs we've talked a lot about, those  
 7 expenses at least you are not going to be paying through  
 8 progress payments?  
 9 A Only capital costs for equipment. Equipment  
 10 that had to be depreciated I could not pay the full value  
 11 of progress payments without a DAR deviation.  
 12 Q So am I to understand correctly, at this point  
 13 you knew that you would not be paying progress payments  
 14 on full value of the capital-type-costs, the \$522,000  
 15 worth of costs?  
 16 A Equipment costs, yes. And I think there were  
 17 some start-up costs in there, whatever they were.  
 18 Q Right.  
 19 A Yes.  
 20 Q That list of five or six items we talked about?  
 21 A At the time I was concerned about equipment.  
 22 That was my concern.  
 23 Q What is the full value that you were  
 24 considering at that point?  
 25 A I'm sorry.

1 Q Were you saying that you weren't willing to pay  
2 95 percent progress payments on those costs or were you  
3 saying that you are not willing to pay 100 percent of  
4 those costs?

5 A I'm saying I can't pay anything above and  
6 beyond the depreciable value of capital equipment in the  
7 form of progress payments.

8 Q Now, this is February of 1985, correct?

9 A That is correct.

10 Q And you knew at that point that you needed, at  
11 least according to your opinion, you would a DAR  
12 deviation request to pay those costs?

13 A Yes.

14 Q When did you submit a DAR deviation request?

15 A Around the June, possibly early July 1985 time  
16 frame.

17 Q Well, indeed Mr. Montefinese -- Early you  
18 testified that you first realized that you needed a DAR  
19 deviation request after Mr. Montefinese wrote to you in  
20 July of 1985, correct?

21 A No. That's not correct.

22 Q So you knew back in February --

23 A Way back when, yes.

24 Q So, Mr. Liebman, you knew a DAR deviation  
25 request would take some time to process, didn't you?

1 A Yes.

2 Q And yet you didn't submit -- First of all, you  
3 didn't tell the contractor in February 1985 that you  
4 believed you needed a DAR deviation request to pay these  
5 costs, did you?

6 A That's not correct. The contractor knew during  
7 my discussions with Pat Marra, I had continuous  
8 discussions with Mr. Marra from Freedom and I told them  
9 they would have to submit a request to me and then I in  
10 turn would then evaluate it and then pass it on to higher  
11 headquarters in accordance with regulations.

12 Q Are you talking about a DAR deviation request?

13 A A DAR deviation request, correct.

14 Q Is there any documentation you know of in the  
15 record that reflects any of what you just said?

16 A No. I don't. Not offhand.

17 Q And indeed you didn't submit a DAR deviation  
18 request in February, did you?

19 A I submitted the -- no. I didn't.

20 Q And that's your -- that's something for you to  
21 do, right?

22 A The contractor has to ask me for it. I can do  
23 --

24 Q Do I understand correctly that Freedom didn't  
25 ask for, to be paid on these costs through progress

1 payments?

2 A Right. They did. Okay.

3 Q They did ask it?

4 A Yes.

5 Q And so, now, you've got to change your  
6 testimony and indeed despite the fact that they asked,  
7 you didn't submit a DAR deviation request in February of  
8 '85?

9 A Correct.

10 Q And yet you knew that a DAR deviation request  
11 at best would take months?

12 A Correct.

13 Q Now, you also knew that Mr. Marra wasn't  
14 employed by Freedom in February of '85, don't you?

15 A I believe sometime in February '85 he did leave  
16 the company until around August of '85. I don't remember  
17 exactly when.

18 Q You do remember that he actually left like in  
19 January of '85?

20 A No. I think it was February but I can't be  
21 certain.

22 JUDGE JAMES: Well, Mr. Luchansky, before you  
23 leave that topic, I want to ask the witness just to make  
24 sure I understand because I'm very confused about what he  
25 just testified. I'm still looking at the last sentence,

1 top of the page 02346, "I still said I would not pay for  
2 capital equipment expenses except on an expense basis."  
3 That's what the piece of paper says.

4 Now, as I listen to your testimony what I  
5 thought I heard you say was that what you meant really  
6 was, you wouldn't pay for the requested capital equipment  
7 expenses except on a depreciation basis. Did I hear you  
8 right?

9 THE WITNESS: Yes, your Honor.

10 JUDGE JAMES: So once again, whoever wrote  
11 this, Colonel Hollins or whatever got it wrong. Is that  
12 right?

13 THE WITNESS: Yes, your Honor.

14 JUDGE JAMES: So this is wrong? Who is Colonel  
15 Hollins, by the way, do you have any idea?

16 THE WITNESS: Yes, your Honor.

17 JUDGE JAMES: Who was he?

18 THE WITNESS: He was the chief of procurement  
19 and contracting at the Defense Construction Supply  
20 Center, Columbus, Ohio and he was appointed to do this  
21 review by the -- General Russo, the three star general at  
22 DI headquarters.

23 JUDGE JAMES: Okay. Go ahead, Mr. Luchansky.

24 MR. LUCHANSKY: Thank you, your Honor.

25 BY MR. LUCHANSKY:

1 Q Mr. Liebman, you said that what you decided was  
2 the right way to pay for these \$522,000 worth of expenses  
3 is to pay the depreciated portion through progress  
4 payments and then pay the balance along with deliveries,  
5 correct?

6 A Correct.

7 Q Now, so, therefore, you didn't have any  
8 objection to paying the entire amount over the course of  
9 this contract, right?

10 A That's correct.

11 Q It was just a question of timing in your mind?

12 A That was part of it. Yes.

13 Q And that timing, in your opinion, was dictated  
14 by the strict requirements of 7-10435(b), correct?

15 A And DAR appendix E. Yes.

16 Q Now, it's true, isn't it that the items that  
17 were going to be paid for through these costs, the times  
18 that are these capital-type-costs are the items you said  
19 before were absolutely necessary for production, correct?

20 A Yes.

21 Q While the control equipment, lot tracking  
22 system, correct?

23 A Yes.

24 Q And Freedom absolutely had to do -- had to have  
25 this equipment in order to successfully complete

1 nevertheless, decided to send Freedom to outside  
2 financing instead of receiving the financing that the  
3 government was supposed to provide through progress  
4 payments. Is that right?

5 A That's not completely correct. It is also -- I  
6 had numerous discussions with --

7 Q I'm asking you about the information you  
8 received from Ms. Rowles and your counsel Mr. Montefinese  
9 from whom you requested a legal opinion.

10 A You are only referring to that one document?

11 Q Ms. Rowles, Mr. Montefinese and their  
12 references to their conversations with Mr. Ford. They  
13 told you that these costs were negotiated to be paid  
14 through progress payments, did they not?

15 A This is what --

16 Q Did they tell you that?

17 A They didn't. Mr. Montefinese -- can I answer  
18 the question? Mr. Montefinese told me that in his  
19 opinion.

20 Q Didn't he say factually I've looked into it?  
21 Do we have to get the document?

22 A No. He did look into it. That is based on  
23 what Mr. Montefinese said in the letter.

24 Q Based on his investigation?

25 A Yes.

1 production, correct?

2 A Correct.

3 Q But according to you, in order to be paid the  
4 full value for these items, it would have had to have  
5 completed production and shipped cases, correct?

6 A Correct.

7 Q Now, Mr. Liebman, how did you expect Freedom to  
8 obtain the equipment that it needed to complete  
9 production in order to get paid, if it wasn't first paid  
10 for the equipment that would allow the production?

11 A Well, that's part of the outside financing.

12 Q So you believed that should go out and get  
13 outside financing?

14 A Well, not just for this reason. There were  
15 other reasons involved --

16 Q But this was one of them?

17 A Yes. They needed outside financing to perform.  
18 Yes.

19 Q So even though, at least according to Peggy  
20 Rowles, at least according to Mr. Montefinese, and  
21 according to Mr. Ford, DPSC had negotiated to pay all of  
22 these costs and have them paid 100 percent though  
23 progress payments, which is what Ms. Rowles said and what  
24 Mr. Montefinese said, and they both said they spoke to  
25 Mr. Ford, even though you were told this, you,

1 Q Based on him calling these people, correct?

2 A Correct.

3 Q And that was Ms. Rowles' understanding based on  
4 her calling Mr. Ford, correct?

5 A I'm sorry? Based on --

6 Q She said that she spoke to Mr. Ford and she  
7 also told you, "look, you can pay progress payments on  
8 these costs?"

9 A According to Mr. Montefinese. Yes.

10 Q And despite this information and you do agree  
11 that progress payments, that is government financing,  
12 correct?

13 A Yes.

14 Q Up to 95 percent, correct?

15 A Yes.

16 Q And it's a way of the government loaning money  
17 to the contractor to pay for those costs?

18 A Yes. Not loaning. Not loaning.

19 Q Advancing?

20 A No.

21 Q Paying those costs before the contractor pays  
22 them, paying the contractor for incurred costs before the  
23 contractor pays them, correct?

24 A Yes.

25 Q And, nevertheless, you sent Freedom to get



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1 outside financing to pay for these costs?  
 2 A No. I said a DAR deviation request would have  
 3 to be forwarded through channels and I was going to  
 4 recommend approval of that DAR deviation request.  
 5 Q Mr. Liebman, at some point in this contract you  
 6 began imposing a 100 percent liquidation rate, didn't  
 7 you?  
 8 A Yes.  
 9 Q Do you remember when that was?  
 10 A Late October 1986.  
 11 Q Why did you impose -- Now, you knew the effect  
 12 of imposing a 100 percent liquidation rate was to  
 13 effectively not give the contractor any money, correct?  
 14 A Correct.  
 15 Q Which meant that every penny of the price of  
 16 deliveries that was going to be paid to the contractor  
 17 would then be used to offset outstanding progress  
 18 payments, correct?  
 19 A Correct.  
 20 Q And that would put a financial strangle hold on  
 21 the contractor, correct?  
 22 A Correct.  
 23 Q And the only way at that point the contractor  
 24 would be able to get any money whatsoever, would once  
 25 again be to go to outside financing, correct?

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1 A Correct.  
 2 Q And you did that?  
 3 A Correct.  
 4 Q Why did you do that?  
 5 A Because Freedom laid off most of its -- Freedom  
 6 ceased final case assembly at that time. They laid off  
 7 over 200 workers. The contract was in a loss position of  
 8 about two to three million dollars, closer to three  
 9 million dollars. There was no monies being advanced from  
 10 Bankers Leasing anymore. Creditors would not ship  
 11 contractor-furnished material or CFM to Freedom without  
 12 advance money, without Bankers Leasing advance money and  
 13 then Bankers Leasing advised us that they were tying in  
 14 any more monetary advances to award of an MRE 7 follow-on  
 15 contract.  
 16 It was at that point where I drew the  
 17 conclusion and that Freedom could not complete this  
 18 contract.  
 19 Q So let me ask you this, isn't it true that --  
 20 Are you telling me that Bankers told you that they  
 21 weren't going to advance any more money?  
 22 A Information provided to me that's reflected in  
 23 the various reports that I issued --  
 24 Q Information provided by whom? You said  
 25 Bankers, right?

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1 A Bankers Leasing -- we were told that -- I don't  
 2 remember who exactly provided me information.  
 3 Q Were you talking to Bankers Leasing?  
 4 A No.  
 5 Q So who gave you that information?  
 6 A I don't remember. This information is in the  
 7 various reports that are in the Rule 4.  
 8 Q Well, in fact, you do recall that Bankers  
 9 Leasing was not only willing to continue financing the  
 10 MRE 5 contract but they had issued a commitment letter  
 11 for \$6 million for the MRE 7 contract, don't you recall  
 12 that?  
 13 A I believe there was something to that effect  
 14 during the pre-award survey process around that time.  
 15 Q In other words, yes.  
 16 A I believe there was something.  
 17 Q You do recall that?  
 18 A I said, I believe. That was my -- that's my  
 19 answer.  
 20 Q Now, at that point Freedom closed for lack of  
 21 GFM, didn't it, down at the end of 1986?  
 22 A It was also outages of CFM.  
 23 Q Well, it closed also for lack of GFM, right?  
 24 A What time period?  
 25 Q Toward the end of 1986?

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1 A No. I don't agree with that. No. Not  
 2 completely, now.  
 3 Q You do believe that there was a lack of GFM?  
 4 A There were GFM outages that the PCO allowed  
 5 substitutions for.  
 6 Q Do you have any idea of what the impact is on a  
 7 contractor's ability to assemble cases of providing  
 8 substitutions, operationally?  
 9 A No.  
 10 Q So you don't know what kind of an impact  
 11 providing those substitutions might have had on Freedom,  
 12 do you?  
 13 A No.  
 14 Q And it very well might have had a devastating  
 15 impact, and increased Freedom's costs substantially,  
 16 exorbitantly but you don't know?  
 17 A I don't know.  
 18 Q Now, you did tell Mr. Bankoff at or about that  
 19 time that Freedom didn't have the money to pay for CFM  
 20 and that's why they shut down, isn't that what you told  
 21 Mr. Bankoff?  
 22 A That was part of the scenario.  
 23 Q And you told Mr. Bankoff that, didn't you?  
 24 A Yes.  
 25 MR. LUCHANSKY: If I can just have one minute

1 to check my notes, I believe I'm finished.  
 2 JUDGE JAMES: You certainly may.  
 3 (Off the record.)  
 4 BY MR. LUCHANSKY:  
 5 Q At the time that you were telling Mr. Bankoff  
 6 that Freedom was shut down in part because it didn't have  
 7 the money to pay for CFM, you did have information from  
 8 Ray Troyano, Industrial Specialist, that indeed the  
 9 problem at Freedom was a lack of GFM, correct?  
 10 A Yes.  
 11 Q And, I don't think we need to go to it right  
 12 now, but I believe F-171, you would have gotten -- did he  
 13 tell you that verbally?  
 14 A No. I saw his reports and he might have told  
 15 me that verbally but I saw his reports in the record.  
 16 MR. LUCHANSKY: You referenced F-171, but we  
 17 didn't have to go to it. That's all I have, your Honor.  
 18 JUDGE JAMES: Does the government wish to  
 19 redirect?  
 20 MS. HALLAM: Yes, your Honor.  
 21 REDIRECT EXAMINATION  
 22 BY MS. HALLAM:  
 23 Q You're talking about the \$400 reduction in a  
 24 progress payment relative to the sale of an option or an  
 25 alleged sale of an option, do you recall?

1 A Yes.  
 2 Q You started to tell us what it was that you had  
 3 considered in taking that reduction, you talked about  
 4 certain correspondence letters and then you got cut off.  
 5 Was there anything else?  
 6 A Well, there were numerous meetings. I  
 7 consulted with various people in my office. I  
 8 coordinated things with the buying command. I sought  
 9 outside advice, opinions and then I made my decision. I  
 10 also spoke to the Defense Contract Audit Agency.  
 11 Q Did you tell us the other day that you looked  
 12 at a settlement agreement?  
 13 A Yes. I looked at a settlement agreement.  
 14 Q Look at G-22.  
 15 A Yes.  
 16 Q Is this the settlement agreement that you were  
 17 referring to?  
 18 A Yes.  
 19 Q And where did you get this from?  
 20 A It was provided by Freedom.  
 21 Q As you thumb through here, can you recall if  
 22 there was anything in particular that, I mean, any of the  
 23 provisions in particular that influenced your decision?  
 24 A Yes. On page 8, paragraph 3, towards the  
 25 bottom. May I read what I'm referring to?

1 JUDGE JAMES: It's in the record. Read it to  
 2 yourself.  
 3 BY MS. HALLAM:  
 4 Q Tell us what it is that you have found  
 5 pertinent.  
 6 A Well, it states clearly that Freedom no longer  
 7 has to pay rental related costs in the amount of  
 8 \$400,000.  
 9 Q It's for unpaid rent, right?  
 10 A That's correct.  
 11 Q When Freedom submitted its first progress  
 12 payment, it's revised progress payment in the December  
 13 '94 time frame, were you aware that Freedom didn't have  
 14 any lease at that time?  
 15 A No.  
 16 Q I'd like you to look at G-12. Prior to this  
 17 litigation have you ever seen this document before?  
 18 A Not that I recall.  
 19 Q Did Freedom ever tell you that its lease had  
 20 been revoked?  
 21 A No.  
 22 Q Did Freedom ever tell you that it reached and  
 23 agreement with its landlord that it would not have rent  
 24 payments until a new lease was entered into?  
 25 A No.

1 Q When you said that you looked at a lease  
 2 Freedom provide you with a lease and demonstrated that  
 3 there was sale option in that lease. Are you sure there  
 4 was a sale option?  
 5 A No. I don't know. A lease was shown me but  
 6 the lease was to H.T. Foods. I didn't read -- I don't  
 7 know if there's a sale option in there. No.  
 8 Q You didn't see that there was an option in it?  
 9 A I didn't read the details. No.  
 10 Q Do you recall when the lease was entered into?  
 11 A No.  
 12 Q When Freedom Industries submitted its second  
 13 progress payment did it have a claim for a lease payment  
 14 in there, rent?  
 15 A I believe it did. Yes.  
 16 Q When they submitted that did they tell you they  
 17 didn't have a lease that was in effect and had no lease  
 18 obligation at that time?  
 19 A No.  
 20 Q When Freedom was submitting its third progress  
 21 payment, did it include a lease amount?  
 22 A I believe it did. Yes.  
 23 Q And at that time had they come to you and told  
 24 you at that time --  
 25 A No.

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<p>1 Q -- that there was no lease?</p> <p>2 A No.</p> <p>3 Q They never told you there was no lease in</p> <p>4 effect, did they?</p> <p>5 A Correct.</p> <p>6 MR. LUCHANSKY: I'm going to object to the</p> <p>7 foundation of the characterization of there being no</p> <p>8 lease in effect. It assumes facts not in evidence. This</p> <p>9 document speaks for itself. But in terms of what the</p> <p>10 circumstances were at the time, there hasn't been any</p> <p>11 testimony establishing the assumption that counsel is</p> <p>12 making.</p> <p>13 JUDGE JAMES: Do you want to respond to that</p> <p>14 objection?</p> <p>15 MS. HALLAM: There is evidence in the record</p> <p>16 the lease was revoked. Mr. Liebman was testifying that</p> <p>17 he never saw that revocation of the lease. And he</p> <p>18 testified that they continued to bill for leases.</p> <p>19 MR. LUCHANSKY: Correct. He never saw it and</p> <p>20 there was no evidence whether the lease was immediately</p> <p>21 resumed or what the status was of that document. There's</p> <p>22 no testimony as to whether that document was ever a</p> <p>23 binding document. There's been no testimony about what</p> <p>24 that document means. And Mr. Liebman, who has never seen</p> <p>25 it, is not the one to talk about what it means.</p>	<p>1 Q You certainly don't have any information that</p> <p>2 suggests the DCAA would have had a copy of the document</p> <p>3 at</p> <p>4 G-22 weeks before the document was signed, correct?</p> <p>5 A I have no information. That's correct.</p> <p>6 Q The settlement agreement at G-22, you</p> <p>7 understand that that's a settlement of claims, correct?</p> <p>8 A Yes.</p> <p>9 Q Now, you don't know for a fact whether Mr.</p> <p>10 Penzer ever forgave rent per se, do you?</p> <p>11 A Yes, I do. That was my understanding.</p> <p>12 Q What you have is a document that says that,</p> <p>13 "There will be an offset of claims," correct?</p> <p>14 A Yes.</p> <p>15 Q That doesn't change in any manner your</p> <p>16 conclusion, that the sale of \$400,000 was a valid and</p> <p>17 standalone transaction, correct?</p> <p>18 A It was not a standalone transaction it was part</p> <p>19 of an agreement.</p> <p>20 Q Well, do you know when the sale of the option</p> <p>21 occurred?</p> <p>22 A Well, all I have is the agreement.</p> <p>23 Q You knew that the sale of the option actually</p> <p>24 took place months before, correct?</p> <p>25 A I don't know that.</p>
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<p>1 JUDGE JAMES: That's not a matter for her</p> <p>2 proof. I am overruling the objection.</p> <p>3 MS. HALLAM: I have no further questions, your</p> <p>4 Honor.</p> <p>5 JUDGE JAMES: Any recross?</p> <p>6 MR. LUCHANSKY: Yes. Just very briefly.</p> <p>7 RECROSS-EXAMINATION</p> <p>8 BY MR. LUCHANSKY:</p> <p>9 Q Mr. Liebman, that settlement agreement is dated</p> <p>10 August 16, 1985, correct?</p> <p>11 A I don't have it in front of me anymore. Sorry.</p> <p>12 I know it was the August time frame.</p> <p>13 Q The audit report for progress payment number</p> <p>14 four is dated August 13, 1985, isn't that right?</p> <p>15 A Yes.</p> <p>16 Q So DCAA's conclusions on the propriety of that</p> <p>17 \$400,000, their determination that the \$400,000 should be</p> <p>18 deducted from progress payments, wasn't based upon this</p> <p>19 agreement, was it?</p> <p>20 A I don't know that.</p> <p>21 Q Well, this agreement wasn't in place, didn't</p> <p>22 exist, wasn't signed at the time that DCAA performed its</p> <p>23 audit, correct?</p> <p>24 A I don't know. The time frame is very close. I</p> <p>25 can't say that with any certainty.</p>	<p>1 Q And that's how it gave rise to be part of the</p> <p>2 dispute between H.T. Foods and its landlord about their</p> <p>3 offsetting claims, correct?</p> <p>4 A I don't know that unless it's reflected in the</p> <p>5 agreement. I don't.</p> <p>6 Q Now, you also have no information -- referring</p> <p>7 back to G-12. You have no information whatsoever about</p> <p>8 that document, correct?</p> <p>9 A That's correct.</p> <p>10 Q Now, your counsel characterizes this document</p> <p>11 as creating a situation where Freedom had no lease,</p> <p>12 correct?</p> <p>13 A I'm sorry. Freedom had no?</p> <p>14 Q You counsel was characterizing the situation in</p> <p>15 November of 1984 as being one where Freedom had no lease?</p> <p>16 A Correct.</p> <p>17 Q Freedom was still occupying that building at</p> <p>18 Bronx Dale Avenue, wasn't it?</p> <p>19 A Yes.</p> <p>20 Q And it was still renovating that facility,</p> <p>21 wasn't it?</p> <p>22 A Yes.</p> <p>23 Q And it was still doing everything in that</p> <p>24 facility that was suggested, it was still a tenant at</p> <p>25 that facility, correct?</p>

1 A Yes.  
 2 Q And Freedom was still carrying lease payments  
 3 and occupancy costs and all of the costs associated with  
 4 its lease on Freedom's books, correct?  
 5 A Yes.  
 6 Q And you have no evidence that indicates that  
 7 Mr. Penzer wasn't doing the same on his side of the  
 8 books, correct?  
 9 A That's correct.  
 10 Q And you have no information indicating whether  
 11 indeed despite this document at G-12, whether the  
 12 landlord and the tenant did indeed have an agreement that  
 13 Freedom was still being maintained as a tenant in that  
 14 facility, right?  
 15 A That's correct.  
 16 Q Now, if you will take a look at FT-052. Let me  
 17 know when you have it in front of you.  
 18 A Yes.  
 19 Q Do you recognize that as the lease between  
 20 Penco and H.T. Foods?  
 21 A Yes.  
 22 Q And this is the lease that you reviewed at the  
 23 beginning of this contract, correct?  
 24 A I never saw this.  
 25 Q Well, I assume that at the very least -- I

1 purchase."  
 2 A May I look at it please? Yes.  
 3 Q If you read this you do see that indeed H.T.  
 4 Foods' lease with Mr. Penzer does have an option to  
 5 purchase in it, correct?  
 6 A May I read it? Yes.  
 7 Q Are you familiar at all with options to  
 8 purchase contained in leases?  
 9 A Well, I'm not a lawyer. I just know in general  
 10 what an option is.  
 11 Q So to the extent the you are familiar with an  
 12 option, an option is a right to do something if you want,  
 13 right?  
 14 A Yes.  
 15 Q And so do you agree that this lease between Mr.  
 16 Penzer and H.T. Foods contained and option to purchase?  
 17 A Yes.  
 18 Q Now, you also know at that time, at the time of  
 19 this lease, which is dated September 1984, H.T. Foods  
 20 wasn't the contractor with the government, right?  
 21 A That's correct.  
 22 Q Now, you also know that as of -- strike that.  
 23 Now, having reviewed this option to purchase  
 24 provision, do you have any reason to doubt the validity  
 25 of H.T. Foods' right to purchase this building under the

1 think Freedom submitted it to you early-on but I'm not  
 2 going to waste the Board's time finding it in the record.  
 3 A I disagree.  
 4 Q But, at the time that this issue arose at the  
 5 very least you certainly would have made efforts to check  
 6 a lease to see if there was an option to purchase in  
 7 there, wouldn't you?  
 8 A No. I did not do that.  
 9 Q Don't you agree now that that would have been  
 10 prudent?  
 11 A I relied on the agreement that was provided to  
 12 me by Freedom. The agreement in compromise and other  
 13 related documents. I don't -- I was never shown this.  
 14 Q That agreement and compromise that was signed  
 15 weeks after the DCAA audit -- Well, days after the audit  
 16 report came out which was at least weeks after the audit  
 17 was performed?  
 18 A Around that same time.  
 19 Q Now, if you look at page 42 of the lease which  
 20 is Bates stamped 00739, you do see in this lease between  
 21 Richard Penzer and H.T. Foods --  
 22 A Where are you referring to specifically?  
 23 Q Bates stamp 00739, paragraph 40.  
 24 A Yes.  
 25 Q You know, the one that says, "Option to

1 terms contained herein?  
 2 A No.  
 3 MR. LUCHANSKY: That's all I have. Your Honor,  
 4 may I request a five minute break?  
 5 JUDGE JAMES: Have you completed your  
 6 cross-examination?  
 7 MR. LUCHANSKY: Yes, your Honor.  
 8 JUDGE JAMES: All right. Yes.  
 9 (Off the record.)  
 10 JUDGE JAMES: Please be seated. Mr. Liebman,  
 11 do I recall your testimony yesterday correctly that you  
 12 knew in October of 1984 as a result of your review of  
 13 Freedom's proposal for an M-5 award, MRE 5 award that the  
 14 GNA and the overhead costs were to be expensed and  
 15 allocated directly to a contract if awarded?  
 16 THE WITNESS: At that time I did not know that.  
 17 JUDGE JAMES: So your testimony yesterday was  
 18 incorrect and now you recall better and you don't recall,  
 19 is that right?  
 20 THE WITNESS: I'm not sure what's the context  
 21 but that -- my understanding was that issue did not come  
 22 to my attention until after award of the contract.  
 23 JUDGE JAMES: I'd like you to take a look a  
 24 Rule 4, Tab 9, Mr. Liebman.  
 25 THE WITNESS: Yes, your Honor.

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1 JUDGE JAMES: And in particular I'd like you to  
2 look at the November 8, '84 price negotiation memorandum  
3 of Mr. Barkewitz and Mr. Ford. Do you see that?

4 THE WITNESS: Yes.

5 JUDGE JAMES: What cost details with respect to  
6 equipment do you find recited in this price negotiation  
7 memorandum that were not recited or found in the  
8 memorandum of understanding known as MOU November 6,  
9 1984?

10 THE WITNESS: Yes, your Honor. The details  
11 concerning -- on page, I'm looking now at page 8, your  
12 Honor.

13 JUDGE JAMES: Okay.

14 THE WITNESS: The second paragraph from the  
15 bottom when it talks about depreciation, this provides  
16 detailed information regarding the depreciation element  
17 cited in the memorandum of understanding. May I go  
18 further on this point?

19 JUDGE JAMES: Tell me whatever you want to tell  
20 me.

21 THE WITNESS: Sure at the last sentence of that  
22 paragraph, that I referred you to, based on those  
23 discussions, the government and Freedom agreed on  
24 \$333,333 for the depreciation element.

25 And then the same paragraph lines 4 and 5, the

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1 sentence that reads, "The auditors also felt that  
2 \$333,333 in depreciation would not be unreasonable for  
3 \$1.5 million in capital equipment.

4 JUDGE JAMES: As a result of the Board's  
5 questions to Mr. Liebman does the government have any  
6 further questions of the witness?

7 MS. HALLAM: No your Honor.

8 JUDGE JAMES: How about the Appellant?

9 MR. STEIGER: Just briefly.

10 JUDGE JAMES: Go ahead.

11 FURTHER RE-CROSS-EXAMINATION

12 BY MR. LUCHANSKY:

13 Q Mr. Liebman, you did understand that the  
14 \$333,000 figure that you were just discussion for  
15 depreciation, that was broken out separately in the MOU,  
16 correct?

17 A I'm sorry. That was broken out --

18 Q Separately. There was a separate item in the  
19 MOU for depreciation in the amount of \$333,333, correct?

20 A Yes.

21 Q And you understood that that item applied to  
22 the production equipment, as you said, and the estimated  
23 amount of \$1.5 million, correct?

24 A Correct.

25 Q You understood that that was separate and apart

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1 from the cost items we have been discussing and be  
2 calling capital-type items, such as quality control  
3 equipment, automated data management system, those items,  
4 correct?

5 A Correct.

6 Q Those items that add up to about \$522,000  
7 pursuant to negotiations, were allocated to the GNA and  
8 manufacturing overhead line items in the MOU, correct?

9 A Correct.

10 MR. LUCHANSKY: That's all I have, your Honor.

11 JUDGE JAMES: Okay. Thank you ever so much for  
12 your testimony. You may step down from the witness  
13 stand. I take it that the parties want to take a brief  
14 recess? Off the record; is that correct?

15 MS. HALLAM: Yes.

16 JUDGE JAMES: All right. Let's go off the  
17 record.

18 (Off the record.)

19 JUDGE JAMES: Let's go on the record. Does the  
20 government have another witness you want to call?

21 MS. HALLAM: Henry Thomas.

22 JUDGE JAMES: Okay. Mr. Thomas, please take  
23 the stand again. And remember you are already under  
24 oath.

25 MR. STEIGER: Excuse me, your Honor. I'd like

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1 a point of clarification regarding this witness.

2 Your Honor, we are in no way attempting to  
3 prevent the examination at this point of this witness.  
4 But, you will recall, your Honor, that Mr. Thomas  
5 testified for an extended period of time on virtually  
6 every aspect of this case and this contract. And counsel  
7 was given the opportunity to cross examine, elected I  
8 think to take, maybe not a full cross-examination, I  
9 don't know. But I would think, your Honor, that we would  
10 want to limit the testimony now to matters that were not  
11 within the scope of his original testimony and, of  
12 course, her corresponding cross-examination. Is that a  
13 fair --

14 JUDGE JAMES: I have no reason to believe that  
15 Ms. Hallam is going to simply repeat questions she has  
16 already asked.

17 MR. STEIGER: I just don't want --

18 JUDGE JAMES: If she does, you are perfectly  
19 capable of objecting, asked and answered. And if it's a  
20 valid objection I'll sustain it. If it's not --

21 MR. STEIGER: Okay, your Honor. I just didn't  
22 want to disrupt the proceeding with numerous objections.

23 JUDGE JAMES: Oh, I would not at all assume  
24 that there are going to be numerous or any objections.

25 MS. HALLAM: I thought he was stating that he

1 didn't want me to go outside the scope.  
 2 JUDGE JAMES: No. He's not saying that. He's  
 3 just talking about repetition of prior testimony. You  
 4 are certainly entitled to call him as your witness and  
 5 interrogate him on any matter. And the only thing I  
 6 would share, Mr. Steiger's concern is simply asking him a  
 7 repeat question of something he's already been asked  
 8 earlier in the testimony. And I have no reason to  
 9 believe you want to do that.  
 10 So are you prepared to testify Mr. Thomas?  
 11 MR. THOMAS: Yes.  
 12 JUDGE JAMES: Please sit down then and we'll  
 13 ask away.  
 14 Whereupon,  
 15 HENRY THOMAS,  
 16 called as a witness herein, having been previously sworn,  
 17 was examined and testified as follows:  
 18 DIRECT EXAMINATION  
 19 BY MS. HALLAM:  
 20 Q Mr. Thomas, could you tell us who owned Freedom  
 21 Industries?  
 22 A Jacene Thomas, Dollar Drydock and Henry Thomas  
 23 were stockholders.  
 24 Q Could you tell me what proportion what  
 25 percentage Jacene owned?

1 A About 80 percent.  
 2 Q And what did Dollar Drydock own?  
 3 A Nine percent.  
 4 Q And you owned the remaining?  
 5 A Well, I think she must -- I own 10 percent so  
 6 she had to own 81 percent.  
 7 Q And the State of New York, was that totally  
 8 Henry Thomas?  
 9 A Yes.  
 10 Q I'd like you to look at the red book, Rule 4,  
 11 Tab 24.  
 12 A Tab 24?  
 13 Q Yes.  
 14 A Okay.  
 15 Q The second page, the balance sheet of H.T.  
 16 Foods.  
 17 A Right.  
 18 Q This was submitted, I believe, as a  
 19 demonstration of sources of finance and the financial  
 20 health of H.T. Foods and Freedom Industries, isn't that  
 21 correct?  
 22 A I believe it was H.T. Foods.  
 23 Q If you look down at the current assets  
 24 category. Could you explain what that recounts as  
 25 receivable, Freedom Industries what that figure

1 indicates? What does that mean?  
 2 A About 800,000, yes. That's the money that we  
 3 had arranged for Freedom Industries to provide under the  
 4 contract. H.T. Food Products had actually provided that.  
 5 Q You had given that to Freedom?  
 6 A We certainly made it happen.  
 7 Q Why is an asset?  
 8 A Because it's money due back from Freedom, from  
 9 the government to Freedom and Freedom to H.T. Food  
 10 Products and from H.T. Food Products to its creditors.  
 11 Q And, in fact, you entered into a confession of  
 12 judgment for that amount, or Freedom Industries entered  
 13 into a confession of judgment for that amount; is that  
 14 correct?  
 15 A Yes. I believe they did.  
 16 Q So the purpose of doing that so that H.T. Foods  
 17 would have an asset to reflect on its books?  
 18 A No. The purpose of that was to protect Freedom  
 19 Industries from any outside creditors such as Dollar  
 20 Drydock or anyone else to come up and attack Freedom. So  
 21 we would stand in the way of being the creditor on this  
 22 contract. That's why we could give a subordination  
 23 agreement.  
 24 Q Is that the intent behind the assignment to  
 25 H.T. Foods on April 4?

1 A Absolutely.  
 2 Q I'd like to talk to you a little about the site  
 3 agreement.  
 4 A What was that?  
 5 Q The thing that we were calling, at least during  
 6 the last litigation, the site agreement.  
 7 A Okay.  
 8 Q Do you recall getting a letter from MR. Chiesa  
 9 that was dated the day after MOD 29, I believe May 30?  
 10 A Yes.  
 11 Q Indicating his understanding of what was  
 12 discussed at headquarters?  
 13 A I didn't get the letter.  
 14 Q Do you recall if you ever gave that letter to  
 15 Bankers Leasing, any one at Bankers Leasing?  
 16 A It wasn't addressed to Bankers. It was  
 17 addressed to me.  
 18 Q Did you ever give it to anyone at Bankers  
 19 Leasing?  
 20 A Yes.  
 21 Q Wasn't that in the September time frame?  
 22 A When I gave it to them?  
 23 Q Yes.  
 24 A It could have been.  
 25 Q Do you recall testifying in depositions that it

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1 was in the September time frame?  
 2 A No. I don't recall but it could have been.  
 3 Q You didn't give it to him right away; is that  
 4 correct?  
 5 A No.  
 6 Q Why was that?  
 7 A Basically, Lambert and myself was going over  
 8 exactly what happened and there was correspondence going  
 9 backwards and forwards between me and Lambert in order to  
 10 clarify what the position was and what that meaning was.  
 11 Q And did that take up until the September time  
 12 frame to go back and forth and have those discussions?  
 13 A No. I'm not going to say it was September. I  
 14 know he got that letter prior to our going to Dr. Wade.  
 15 And I think we went to Dr. Wade's office some time in  
 16 August, maybe.  
 17 Q August.  
 18 A So Randy Gross attended that Dr. Wade meeting  
 19 with us that I sat up.  
 20 Q Why wasn't it given to Bankers Leasing before  
 21 the August time frame?  
 22 A I don't have to give it to Bankers.  
 23 Q Were you afraid that they would pull all the  
 24 financing?  
 25 A No. I wasn't afraid they would pull the

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1 financing. I wanted to get it straight with Lambert who  
 2 was telling me one thing and telling Bankers one thing,  
 3 led us down the path that there was this deal and, you  
 4 know, that's why I didn't give it to them yet. But, the  
 5 point was we would wait and see.  
 6 Q Do you recall testifying in depositions that  
 7 the reason you didn't give it to Bankers Leasing was  
 8 because you didn't care if they got the B-8 loan, all you  
 9 wanted was a follow-along contract and you wanted to keep  
 10 them on board?  
 11 A Do I remember testifying like that?  
 12 Q To that effect, yes?  
 13 A That I didn't care? I don't really recall  
 14 saying I don't care. I mean it wasn't my primary  
 15 interest.  
 16 Q Okay. I think you said that it didn't bother  
 17 me, was your exact words. I'll show it to you.  
 18 A Okay.  
 19 MS. HALLAM: I have a copy of this. May I  
 20 stand up here.  
 21 JUDGE JAMES: You may.  
 22 BY MS. HALLAM:  
 23 Q Starting with line 19, why didn't I send a copy  
 24 of Chiesa's letter to Randy Gross right away?"  
 25 A Right.

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1 Q And what is your response?  
 2 A The question is yes.  
 3 Q No.  
 4 A Oh, right here?  
 5 Q Yes. Can you read that?  
 6 A Sure. "Well, thinking about Bankers interests  
 7 and my interests were different."  
 8 Q And you continue. Read this part here.  
 9 A Yes. "I think I would have jumped up and down  
 10 because my interest in the settlement was to make sure  
 11 that we got a follow-on contract in order to go forward  
 12 and have some money to pay people in the out years."  
 13 Q Continue.  
 14 A "And we knew that we could get that financed  
 15 whether or not Gross had a guaranteed loan or not. That  
 16 didn't bother me."  
 17 Q Isn't the reason that you are sending all these  
 18 so-called site agreement letters to everybody was because  
 19 you were telling Bankers Leasing that you had a concrete  
 20 deal and you wanted to keep them on board?  
 21 A I believe that Dave Lambert handled Bankers.  
 22 Q Does that mean you don't know why the letters  
 23 were sent out all over the place, purportedly sent out?  
 24 A What letters sent all over the place?  
 25 Q Let's look at a few of them. The blue

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1 binders.  
 2 A Sure.  
 3 Q G-40.  
 4 A Okay.  
 5 Q Is this something that you prepared or was this  
 6 something that Mr. Lambert prepared or somebody else?  
 7 A Mr. Lambert prepared this.  
 8 Q That's dated May 28, is that correct?  
 9 A That's correct.  
 10 Q You also recall that there is another letter  
 11 dated May 13?  
 12 A Yes. I do.  
 13 Q And another letter dated May 15?  
 14 A No. I don't know about anything dated May 15.  
 15 Q Do you remember a May 13 with date crossed out?  
 16 A No.  
 17 Q Why were so many copies of this letter made  
 18 with various dates?  
 19 A When -- The computer system we had called  
 20 WordStar has an automatic system date in it that  
 21 obviously we weren't familiar with. And someone popped  
 22 the system date in there instead of the current date. So  
 23 any time you bring that letter up it automatically  
 24 changes the date to the date it's opened. So when it was  
 25 printed on the 28th of May, the day before I was going

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1 down to see the PCO that letter, that's the date I took  
 2 with me.  
 3 The earlier one or the later one, dated June  
 4 25, was the same problem. It's the same identical letter  
 5 in words but the date of print changed because that's the  
 6 date it was printed out and it changes automatically.  
 7 That's the system date in the computer.  
 8 Q Did you personally ever send any of those  
 9 letters to the person that they were addressed to?  
 10 A I believe -- no. What happened was, I gave it  
 11 to -- Mr. Lambert told us to give it to him so he could  
 12 take it to the meeting and give it Mr. Chiesa.  
 13 Q But you don't know that he ever did that, do  
 14 you?  
 15 A It is my understanding he did do that.  
 16 Q Were you at the meeting?  
 17 A No. I wasn't.  
 18 JUDGE JAMES: Mr. Thomas, the Board is not  
 19 understanding this fully. I'm looking at G-40 which is  
 20 what Ms. Hallam was asking you about dated May 28, '86.  
 21 THE WITNESS: Right.  
 22 JUDGE JAMES: should the Board understand that  
 23 on or about May 28, '86 that Freedom, yes, sent this  
 24 letter to Mr. Chiesa?  
 25 THE WITNESS: No. This is the letter that was

1 correct?  
 2 A That's correct.  
 3 Q Did you discuss that assignment with Mr.  
 4 Liebman on the January/February time frame of 1985?  
 5 A I may have.  
 6 Q In response to Mr. Liebman's letter advising  
 7 that he was considering suspending progress payments, you  
 8 had sent in a response indicating, among other things,  
 9 other sources of finances, of financial support; isn't  
 10 that true?  
 11 A Say that again?  
 12 Q There's it January 25 letter you sent in  
 13 indicating other sources of financing. Do you remember  
 14 that letter?  
 15 A No. I don't.  
 16 Q I believe it's at Rule 4, Tab 24. Sorry. This  
 17 is not the one I'm looking for.  
 18 MS. HALLAM: I'm sorry, your Honor. I'll go on  
 19 to something else.  
 20 JUDGE JAMES: Well, how about Rule 4, Tab 13.  
 21 MS. HALLAM: I'm sorry. Yes. I've got it.  
 22 Thank you.  
 23 THE WITNESS: Okay. Yes. I remember this  
 24 letter.  
 25 BY MS. HALLAM:

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1 printed out on that day for me to go to Philadelphia with  
 2 the bank with the modification. That's what was printed  
 3 out.  
 4 JUDGE JAMES: So Mr. Chiesa never got a May 28  
 5 letter stating that --  
 6 THE WITNESS: No. He never did.  
 7 JUDGE JAMES: So far as you know did Mr. Chiesa  
 8 get any letter from Freedom?  
 9 THE WITNESS: Yes. We believe that the May 13  
 10 letter was given to Mr. Chiesa by Mr. Lambert because Mr.  
 11 Lambert said to print it out, change the name from the  
 12 PCO of the May 2 letter, because that's what this was, to  
 13 Mr. Chiesa and send it to him so he can go to the  
 14 meeting. And he went.  
 15 JUDGE JAMES: Go ahead, Ms. Hallam.  
 16 BY MS. HALLAM:  
 17 Q I'd just like to ask you a question or two  
 18 about the novation agreement. Prior to the contract being  
 19 novated Freedom Industries had an assignment to H.T.  
 20 Foods; is that correct?  
 21 A Conditional assignment, yes.  
 22 Q And under that assignment, one of the  
 23 provisions allowed for H.T. Foods actually to take over  
 24 contract performance in the event that Freedom Industries  
 25 for one reason or another could not perform; is that

1 Q And in respect to this letter you were, on the  
 2 second page, you indicated that there would be financing  
 3 direct from H.T. Foods.  
 4 A Right.  
 5 Q Do you recall discussing with Mark Liebman in  
 6 this time frame assigning the contract or the assignment  
 7 of the contract from Freedom to H.T. Foods?  
 8 A I believe he knew that a long time ago.  
 9 Q Well, in this context you were talking about it  
 10 with respect to an assignment, direct bank financing  
 11 through assignment of claims to H.T. Foods. Do you  
 12 recall that?  
 13 A To H.T. Foods' bank.  
 14 Q Do you recall talking to him about the  
 15 assignment between H.T. Foods and Freedom Industries?  
 16 A Yes.  
 17 Q And you were explaining to him that in the  
 18 event Freedom failed to perform H.T. Foods was going to  
 19 step in; is that correct?  
 20 A No. I don't recall it in that vein.  
 21 Q It's what the assignment provides for, isn't  
 22 it?  
 23 A It also provides for H.T. to provide all of the  
 24 dollars to Freedom, so Freedom will not default.  
 25 Q You were speaking to Mr. Liebman about this



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<p>1 arrangement, did Mr. Liebman at that time let you know</p> <p>2 that the only way H.T. Foods would take over performance</p> <p>3 is through a novation; isn't that correct?</p> <p>4 A We didn't ask to take over performance.</p> <p>5 Freedom was not in default, the government was.</p> <p>6 Q Isn't that what Mr. Liebman told you and that's</p> <p>7 where you got the notion and branded it that Mr. Liebman</p> <p>8 demanded that you novate?</p> <p>9 A No. It's not. Absolutely not.</p> <p>10 Q Okay.</p> <p>11 A I never knew what a novation was.</p> <p>12 Q With regard to your claim, I believe some</p> <p>13 portion of your claim alleges that there was a delay in</p> <p>14 the novation process caused by the government.</p> <p>15 A Okay.</p> <p>16 Q Is that your claim? Do you believe the</p> <p>17 government delayed the novation process?</p> <p>18 A Yes. I do.</p> <p>19 Q Do you recall testifying previously, giving a</p> <p>20 deposition in the case of Bankers Leasing against David</p> <p>21 Lambert, wherein you said, "No one put any blocks in the</p> <p>22 way of the novation and they moved it rather rapidly?"</p> <p>23 Do you recall that testimony?</p> <p>24 A Well, I believe I did. Yes.</p> <p>25 Q Well, I don't want you to believe you did. I</p>	<p>1 A No.</p> <p>2 Q Sorry. I have a wrong reference here. I'll</p> <p>3 also get back to that.</p> <p>4 You were talking about the meeting with Dr.</p> <p>5 Wade on August 26, 1986.</p> <p>6 A Right.</p> <p>7 Q Was Bankers Leasing also at that meeting?</p> <p>8 A Yes.</p> <p>9 Q And one of the topics discussed was, among</p> <p>10 other things, the loan?</p> <p>11 A Right.</p> <p>12 Q And Bankers Leasing heard Dr. Wade say that the</p> <p>13 appropriation hadn't been given or something to that</p> <p>14 effect; is that correct?</p> <p>15 A Something to that effect.</p> <p>16 Q Bankers Leasing didn't have any information</p> <p>17 about that prior to that because you hadn't been keeping</p> <p>18 them in the loop; is that correct?</p> <p>19 A Neither did I.</p> <p>20 Q After that point, after that August 1986</p> <p>21 meeting isn't it true that Bankers Leasing did not</p> <p>22 free-up much more money under the contract?</p> <p>23 A No. That's not right.</p> <p>24 Q Do you know how much they freed up after that</p> <p>25 meeting?</p>
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<p>1 want you to remember. Do you recall?</p> <p>2 A No. I don't remember.</p> <p>3 Q This is testimony given on February 6, 1989.</p> <p>4 Do you want to look at that?</p> <p>5 A Please.</p> <p>6 Q Would you read the question starting at line</p> <p>7 24?</p> <p>8 A "Nobody put any blocks in your way or tried to</p> <p>9 accomplish that end."</p> <p>10 Q Answer.</p> <p>11 A They moved it rather rapidly.</p> <p>12 Q Rapidly?</p> <p>13 A Rapidly.</p> <p>14 Q Do you recall some time in the July/August 1985</p> <p>15 time frame that Freedom hired a CPA to review it's</p> <p>16 progress payment request?</p> <p>17 A Yes.</p> <p>18 Q And, in fact, Freedom hired that CPA at the</p> <p>19 request of Bankers Leasing; isn't that correct?</p> <p>20 A No.</p> <p>21 Q Do you recall your deposition again in 1989</p> <p>22 where you testified that you hired Gerald Rosenberg, a</p> <p>23 CPA because Bankers wanted an independent opinion about</p> <p>24 what should be paid on the progress payments; do you</p> <p>25 recall that?</p>	<p>1 A No. I don't. But they did give a \$6 million</p> <p>2 line of credit after that meeting.</p> <p>3 Q Well, that was after you got a negative</p> <p>4 pre-award survey, isn't it?</p> <p>5 A No. It's not.</p> <p>6 Q With regard to the February 5, 1986 time frame</p> <p>7 is it your position that if did relate to lack of</p> <p>8 contractor-furnished material?</p> <p>9 A Say again.</p> <p>10 Q The February 5, 1986 shut down, that related to</p> <p>11 the lack of contractor-furnished materials; isn't that</p> <p>12 correct?</p> <p>13 A It may have. I don't remember.</p> <p>14 Q You don't remember?</p> <p>15 A No.</p> <p>16 Q Do you remember testifying that the November</p> <p>17 1986 shut down was due to lack of subcontractor material?</p> <p>18 A It may have.</p> <p>19 Q Because all the subs wanted cash on delivery?</p> <p>20 A If we had progress payments then we would not</p> <p>21 have had that problem.</p> <p>22 Q Well, that's -- your testimony is Bankers would</p> <p>23 not send any money in that time frame; isn't that</p> <p>24 correct?</p> <p>25 A I don't know. I'd have to look at the records.</p>

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1 Q You want to look at this? Starting with your  
2 testimony on 2/8/89.  
3 "QUESTION: Mr. Thomas, can you tell us what  
4 was the event that caused you to close your doors on  
5 November 7, 1987."  
6 I believe the date is wrong, can you confirm  
7 that it was 1986?  
8 A I'm sorry? What is the date you are talking  
9 about?  
10 Q In the deposition it has 1987.  
11 A What is the date that you believe it should be?  
12 Q You are asking me?  
13 A Yes. You're the one who just said --  
14 Q '86.  
15 A Pardon?  
16 Q '86.  
17 A February 6, '86?  
18 Q November '86.  
19 A November '86.  
20 JUDGE JAMES: More important what does Mr.  
21 Thomas believe that he intended to testify at that time?  
22 THE WITNESS: The answer is that it's lack of  
23 subcontractor supplies, is what it says.  
24 BY MS. HALLAM:  
25 Q And why was there a lack of subcontractor

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1 supplies?  
2 A Possibly no insurance on the building. I have  
3 no idea what that means.  
4 JUDGE JAMES: The Board is still confused.  
5 What is the time frame in which the so-called shut down  
6 is occurring?  
7 THE WITNESS: Well, it says November 7, '87. I  
8 would assume that it meant '86.  
9 BY MS. HALLAM:  
10 Q You weren't occupying the building in that time  
11 frame in '87, correct?  
12 A No. I wasn't.  
13 Q Okay. That was your testimony back in 1989,  
14 that the close down was due to lack of subcontractor  
15 supplies; is that correct?  
16 A Well, if I'm talking to someone who doesn't  
17 know what GFM is, a subcontractor is a, subcontractor for  
18 me or a subcontractor to the government. Subcontractor  
19 supplies.  
20 Q Okay. Can you continue reading down here.  
21 A It wasn't shipping for a lack of dollars  
22 flowing.  
23 Q All subcontractors wanted C.O.D.'s is that what  
24 that says?  
25 A That's right.

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1 Q They wasn't shipping for lack of dollars  
2 flowing?  
3 A From the government. No dollars flowed from  
4 the United States government.  
5 Q Okay. But you agree this doesn't relate to GFM,  
6 because GFM would not depend on dollars flowing?  
7 A Of course, it does.  
8 Q Are you now trying to explain this by saying  
9 you believe that the subcontractor supplies include  
10 government-furnished material?  
11 A Well, subcontractors are subcontractors that do  
12 ship GFM and CFM, they are a subcontractor.  
13 Q The subcontractors referred to here, do you  
14 believe they are subcontractors for Freedom?  
15 A I don't recall what it was at the time.  
16 Q Well, what other subcontractors would there be  
17 under the contract?  
18 A As a prime contractor to the government any  
19 body shipping stuff under a contractor to the government  
20 all to me is a subcontractor. Whether it's a government  
21 furnished subcontractor or contractor supplied  
22 subcontractor, they are still subcontractors.  
23 Q The government was shipping product to you,  
24 weren't they?  
25 A No.

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1 Q No?  
2 A Nothing came in.  
3 Q So you considered the vendors of GFM to also be  
4 your subcontractors?  
5 A I had to trace everything. They were  
6 subcontractors on my books and records as far as  
7 inventory coming into the plant.  
8 Q Okay. So I'm just trying to clarify that you  
9 were considering the government's providers of GFM to be  
10 your subcontractors?  
11 A No. They are not a contractor-furnished  
12 material subcontractor but for building material purposes  
13 I have to have who the contractor is from the government  
14 as a subcontractor in order to accept product.  
15 Q Okay. So your testimony here, when you are  
16 talking about lack of subcontractor supplies, and they  
17 all wanted C.O.D.'s, why would the government GFM  
18 suppliers want C.O.D.'s?  
19 A They wouldn't want C.O.D. from me.  
20 Q And the government GFM providers would ship to  
21 you regardless of your financial situation because you  
22 didn't pay the government providers of GFM, did you?  
23 A That's the problem. Nobody was -- nothing was  
24 shipping in to Freedom at that time.  
25 Q You didn't pay --

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1 JUDGE JAMES: Answer Ms. Hallam's questions.  
 2 You didn't pay for GFM coming from the government, did  
 3 you?  
 4 THE WITNESS: No. I didn't.  
 5 BY MS. HALLAM:  
 6 Q So your statement that they wasn't shipping for  
 7 lack of dollars flowing doesn't apply to government  
 8 vendors of GFM, does it?  
 9 A No.  
 10 Q No. And your comment that all subcontractors  
 11 wanted C.O.D.'s, doesn't apply to government vendors of  
 12 GFM?  
 13 A No. It doesn't.  
 14 Q Do you recall taking personal loans out of  
 15 Freedom New York?  
 16 A Yes.  
 17 Q Do you recall the total amount that you took  
 18 out over the years from Freedom New York?  
 19 A Yes.  
 20 Q The amounts that you took out?  
 21 A About \$100,000.  
 22 Q In October of 1986 time frame, you had taken  
 23 out \$95,000?  
 24 A Yes.  
 25 Q And to this day or at least until the time

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1 frame of February 1989, that money had never been  
 2 replaced; is that correct?  
 3 A Bankers is the one that authorized and allowed  
 4 it. So if you say that it hasn't been taken out or  
 5 replaced I've continued to work for Freedom and it's been  
 6 basically offset.  
 7 Q So that money was taken out as a personal loan?  
 8 A It was.  
 9 Q And it was not put back into the company as of  
 10 February 1989; is that correct?  
 11 A No.  
 12 Q Not correct? When was it paid back?  
 13 A No. You said it wasn't put back. I said, no.  
 14 It wasn't.  
 15 Q And that money was taken out in October of '86;  
 16 is that correct?  
 17 A Yes.  
 18 Q That's the same time frame when subcontractors  
 19 would not ship CFM to you because they wanted C.O.D.; is  
 20 that correct?  
 21 A It may be.  
 22 Q Well, that's what you just testified to, isn't  
 23 it?  
 24 A You said, October?  
 25 Q October/November time frame, when you closed

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1 down, closed down because you didn't have subcontractor  
 2 supplies; isn't that what we just went through?  
 3 A Yes.  
 4 Q And the subcontractors weren't shipping because  
 5 they wanted C.O.D., that means cash on delivery?  
 6 A Right.  
 7 Q And in that time frame, is the time frame that  
 8 you took \$95,000 out of the company for a personal loan;  
 9 is that correct?  
 10 A Right.  
 11 MS. HALLAM: No further questions, your Honor.  
 12 JUDGE JAMES: Appellant wish to cross examine?  
 13 MR. STEIGER: Yes, your Honor.  
 14 CROSS-EXAMINATION  
 15 BY MR. STEIGER:  
 16 Q Concerning the need for a B loan, is it true  
 17 that in order to complete this contract you need  
 18 additional financing via the B loan that you believed was  
 19 being processed?  
 20 A We believed -- yes. We believed the B loan was  
 21 the vehicle that was going to give us money above and  
 22 beyond the contract price.  
 23 Q So indeed you could not have completed the  
 24 contract at the price set forth therein without either  
 25 the claim that you waived in MOD 25 or the equivalent,

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1 which in this case was believed to be by you a B loan in  
 2 the amount of \$2.7 million?  
 3 A That's correct.  
 4 Q Now, concerning the novation and  
 5 notwithstanding the fact that you may have said that it  
 6 moved ahead rapidly, whatever that means, I would like  
 7 you to restate for us because there's now some confusion,  
 8 how long did it delay your operation, this novation  
 9 process and tell us briefly in what way?  
 10 A The novation process delayed from the time it  
 11 was told to us in February that that was something that  
 12 the DLA wanted, all the way up until the time that actual  
 13 payment was made. So, the process of novation delayed  
 14 us, say, from November all the way up to April when  
 15 payment was made.  
 16 Q Mr. Thomas, in your responses to questions of  
 17 Ms. Hallam concerning the meeting with Dr. Wade and the  
 18 issue of the B loan, you confirmed that Bankers Leasing  
 19 was hearing about the demise of the B loan at that time  
 20 for the first time. But, you also said, and I'm not sure  
 21 anybody heard you, except me, you said, "neither did I."  
 22 Do you recall saying that?  
 23 A That's right.  
 24 Q Now, would you like to expand a little bit, I  
 25 say a little bit, on that point?

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1 A Yes. We were told and we believed that the B  
2 loan process was going forward. We had no reason to not  
3 believe it. On occasions when we went to DPSC and asked  
4 them about the B loan they told us it was at the  
5 congressional level. So we had no need to be alarmed.  
6 And it wasn't until afterwards when we found out that  
7 there was nothing going back, we couldn't get Frank  
8 Bankoff to basically give us an indication so that we  
9 could send back what has been categorized as a rejected  
10 application from Bankers by Ms. Hallam. Which, in fact,  
11 it was not rejected, they asked us point blank and  
12 basically put us in a catch-22, says that they wanted us  
13 to provide the letter from the Defense Logistics Agency  
14 which we couldn't provide because they weren't  
15 cooperating.

16 So the package could not be resubmitted to the  
17 loan.

18 Q But my question relates to when you found out,  
19 you know, approximately what time did you find out that  
20 this was heading nowhere?

21 A Right after we decided to run up there to Dr.  
22 Wade's office. That's what prompted me. People don't  
23 walk into Dr. Wade's office just because you pick up the  
24 telephone. So this had to be a very high powered phone  
25 call I made, say I need to see you. There's something

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1 going on here.

2 Q So it was around that time that you, yourself,  
3 found out about the ultimate demise of the B loan  
4 process?

5 A Right.

6 Q Thank you. Counsel through her questioning is  
7 creating the impression that it was a lack of CFM that  
8 caused you to permanently to close down your production  
9 line. Is this correct?

10 A No.

11 Q In fact, did you not continue after that time,  
12 on a limited basis to produce units and make shipments  
13 until the end of November?

14 A Yes. We fired production in January on a  
15 limited basis. And brought in more CFM and then when we  
16 found out, we even shipped some CFM back out to our  
17 subcontractors in order to reduce debt. So, yes. We  
18 continued.

19 Q Thank you.

20 JUDGE JAMES: Now, Mr. Thomas, when you say,  
21 January, which year are you referring to?

22 THE WITNESS: '87.

23 JUDGE JAMES: Thank you.

24 MR. STEIGER: I have no further  
25 cross-examination questions for Mr. Thomas.

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1 JUDGE JAMES: Government have any further  
2 redirect?

3 MS. HALLAM: One question.

4 REDIRECT EXAMINATION

5 BY MS. HALLAM:

6 Q Isn't it true that when you started up the  
7 production in the January time frame, the end of January  
8 I believe it was two or three weeks, there was no final  
9 assembly production; is that correct?

10 A That's right. There was no final assembly.

11 Q It was crackers and accessory?

12 A That's right.

13 Q And at that point in time the crackers that  
14 were being used were actually CFM crackers rather than  
15 GFM crackers; is that correct?

16 A No. That is not correct.

17 Q You had to go out and buy your own crackers?

18 A No. We did not have to do that.

19 Q Oh, so the government had provided you GFM  
20 crackers?

21 A We had some -- as a matter of fact, there may  
22 not have been any cracker production. It may not have  
23 been. It might have been just accessory production that  
24 we started.

25 Q You're not sure right now?

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1 A Well, I can check the files to see but come to  
2 think of it, it may just have been accessory. I remember  
3 we had the round tables going and it was a subcontractor  
4 had given with the deal for the blind or the handicap  
5 people we had in there doing that.

6 MS. HALLAM: I have no further questions.

7 JUDGE JAMES: Any recross?

8 MR. STEIGER: No, your Honor.

9 JUDGE JAMES: Thank you ever so much, Mr.  
10 Thomas, for your testimony.. You may step down from the  
11 witness stand.

12 THE WITNESS: Thank you.

13 JUDGE JAMES: Does the government have any  
14 further witnesses you want to call through your case in  
15 reply?

16 MS. HALLAM: No, your Honor.

17 JUDGE JAMES: So then you have concluded your  
18 case in reply?

19 MS. HALLAM: Yes.

20 JUDGE JAMES: Does the Appellant have any  
21 rebuttal evidence you wish to offer?

22 MR. STEIGER: Yes, your Honor. We do.

23 JUDGE JAMES: Okay. Do you wish to call a  
24 witness?

25 MR. STEIGER: It is very close to lunch time,

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<p>1 your Honor, may we take our break now and resume first</p> <p>2 thing?</p> <p>3 JUDGE JAMES: We may, certainly. We're off the</p> <p>4 record. Let's resume at ten till 1:00.</p> <p>5 (Whereupon, at 12:00 noon, the hearing was</p> <p>6 recessed, to reconvene at 1:00 p.m., this same day.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 document familiar to you?</p> <p>2 A Yes. It is.</p> <p>3 Q I would like to call your attention to a</p> <p>4 particular portion of that document and that is the</p> <p>5 portion that appears in appendix B, page 4 of the</p> <p>6 document.</p> <p>7 A Yes.</p> <p>8 Q And, again, quickly what is that list that you</p> <p>9 see there?</p> <p>10 A This is the government-furnished material that</p> <p>11 is required in order for Freedom to complete the MRE</p> <p>12 contract.</p> <p>13 Q Required as of what date?</p> <p>14 A The date of this is -- the date of this letter</p> <p>15 is 1/15 but we required it no later than the 23 of</p> <p>16 January or the 30 January, I should say.</p> <p>17 Q In some cases?</p> <p>18 A Right.</p> <p>19 Q Mr. Thomas, did you ever receive this material?</p> <p>20 A No. We did not.</p> <p>21 Q Had you received this material from the</p> <p>22 government, were you ready, willing and able to continue</p> <p>23 and complete production of the contract?</p> <p>24 A Yes. We were.</p> <p>25 Q Did you have your work force marshaled and</p>
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<p>1 AFTERNOON SESSION</p> <p>2 (12:50 p.m.)</p> <p>3 JUDGE JAMES: Let's go back on the record.</p> <p>4 Does Appellant have any rebuttal evidence you wish to</p> <p>5 introduce?</p> <p>6 MR. STEIGER: Yes, your Honor. We call as our</p> <p>7 first rebuttal witness, Henry Thomas.</p> <p>8 JUDGE JAMES: Remember you are already under</p> <p>9 oath, Mr. Thomas.</p> <p>10 MR. THOMAS: Yes.</p> <p>11 Whereupon,</p> <p>12 HENRY THOMAS,</p> <p>13 the witness on the stand at the time of the recess,</p> <p>14 having been previously duly sworn, was further examined</p> <p>15 and testified as follows:</p> <p>16 REDIRECT EXAMINATION (resuming)</p> <p>17 BY MR. STEIGER:</p> <p>18 Q Mr. Thomas, were there instances during the</p> <p>19 performance of the contract where GFM or any</p> <p>20 substitutions were not provided to enable you to meet the</p> <p>21 production schedule?</p> <p>22 A Yes.</p> <p>23 Q The last time you looked at a document</p> <p>24 designated in the file as F-193, I wondered if we could</p> <p>25 just take a quick look at that document again. Is that</p>	<p>1 available to return to the job to do this?</p> <p>2 A Yes. We did.</p> <p>3 Q What steps did you take to do that?</p> <p>4 A We stayed in constant contact with and had</p> <p>5 people call us up as far as when they were to report back</p> <p>6 to production.</p> <p>7 Q Did you not, in fact, have a substantial core</p> <p>8 of people still working at that time?</p> <p>9 A At that time we had a good -- yes. A good core</p> <p>10 of people working.</p> <p>11 Q What kind of people, if you can just give me an</p> <p>12 idea?</p> <p>13 A Well, we had all the security people. Some of</p> <p>14 the maintenance people were there. We had administrative</p> <p>15 people in the offices. We kept on, I believe, at that</p> <p>16 time the payroll, the supervisory people.</p> <p>17 Q Mr. Thomas, you heard, I think it was</p> <p>18 yesterday, maybe the day before, you heard Mr. Bankoff in</p> <p>19 answer to a question, did he have these items or</p> <p>20 substitutions of these items available at the time you</p> <p>21 heard him say, yes.</p> <p>22 A Yes. I did.</p> <p>23 Q Is that true?</p> <p>24 A No. It's not.</p> <p>25 Q How do you know that's not true?</p>

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1 A Because he said -- As I recall, I believe, he  
2 said that he could have brought the product in from other  
3 assembly plants. When the fact of the matter was, they  
4 were taking stuff from our existing inventory to ship out  
5 in an emergency basis to the other prime contractors.

6 Q Mr. Thomas, I'd ask you to hold up one second.

7 MR. STEIGER: Your Honor, I have one additional  
8 piece of evidence, and documents that I would like to  
9 present, for the record which supports the statements  
10 that are now being made. This is rebuttal evidence. It  
11 was not intended to be brought in. I never thought I  
12 would need it. But, we are specifically using it to  
13 refute contention of Mr. Bankoff. May I present that?

14 JUDGE JAMES: Are you offering this into  
15 evidence?

16 MR. STEIGER: I am, sir.

17 JUDGE JAMES: What's the position of the  
18 government?

19 MS. HALLAM: We object to it. It's not  
20 rebuttal. Mr. Thomas testified with regard to the  
21 shipping out in Appellant's case. All he's doing is  
22 repeating his testimony earlier.

23 MR. STEIGER: Your Honor --

24 JUDGE JAMES: We are not talking about his  
25 testimony. I'm talking about this document, or these

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1 documents.

2 MS. HALLAM: This document does not rebut  
3 anything that Mr. Thomas did not address during their  
4 case. There's no reason why they could not have had this  
5 document in evidence when documents were submitted, since  
6 Mr. Thomas in his initial testimony testified with regard  
7 to things going out of Freedom.

8 MR. STEIGER: Your Honor, if I may respond.  
9 His testimony should have been sufficient to prove that  
10 point. However, Mr. Bankoff specifically denied it. So  
11 the documents are offered to rebut that denial.

12 JUDGE JAMES: Okay. These are all Freedom DD  
13 250; is that correct? These are

14 MR. STEIGER: These are DD 250s evidencing the  
15 shipment of GFM out of Freedom to other suppliers.

16 JUDGE JAMES: And these are no where else in  
17 the record?

18 MR. STEIGER: No, sir. They are not. They  
19 were obtained on discovery from the government's files.

20 JUDGE JAMES: And why weren't they on your  
21 exhibit list?

22 MR. STEIGER: It wasn't felt that it was  
23 needed, your Honor. We believed that a simple statement  
24 by Mr. Thomas of what actually happened would have been  
25 sufficient. But, we could not predict that it would be

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1 blatantly denied by Mr. Bankoff.

2 JUDGE JAMES: And when did you first make  
3 available or group of documents to the government?

4 MR. STEIGER: Just now is when I'm making it  
5 available.

6 JUDGE JAMES: Okay. I'm going to sustain the  
7 government's objection.

8 By the way, although you have called this  
9 FT-449 --

10 MR. STEIGER: Just scratch it, your Honor.

11 JUDGE JAMES: I'm going to call it FT-450 and  
12 call it DD 250s just so that the record keeps straight.  
13 FT-449 was a DLA letter of March 26, '99 which was also  
14 objected to and which I also sustained the objection.

15 (Exhibit FT-450 was marked for  
16 identification.)

17 BY MR. STEIGER:

18 Q Mr. Thomas, were there occasions where you were  
19 directed by the government to remove and ship GFM in your  
20 possession to other suppliers?

21 A Yes.

22 Q When did this begin?

23 A Sometime in November of '86.

24 Q And how long did it continue?

25 A All the way up through April, when we were

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1 evicted, they were still telling us to ship out GFM to  
2 the other prime contractors.

3 Q And at the time you wrote the government the  
4 letter that we have just been talking about, the letter  
5 of January 15, had there been significant quantities of  
6 GFM that had been removed?

7 A Yes.

8 Q Let me ask you this, what manner or method have  
9 been used to ship this GFM out of your facility?

10 A The method was that it had to be done quick,  
11 fast in a hurry. They were using an expedited method.  
12 Told us it had to be done right away to accommodate  
13 trucks that were on the way to pick up GFM so that the  
14 other primes would not be shut down for lack of GFM.

15 Q So it is your belief then that this GFM was not  
16 moved for storage purposes or to establish inventories or  
17 anything like that?

18 A No.

19 Q What was its purpose?

20 A As I understood it the purpose was for them to  
21 use, for them not to shut down their production.

22 Q Now, after this they began to remove GFM from  
23 your premise, were you supplied with any further GFM?

24 A No. It was never replaced and no further GFM  
25 came in.

Page 1978

1 Q When you ultimately had to shut down your  
2 operation, could not proceed any further, what do you  
3 attribute the cause of that to?

4 A An abandonment of the financing by the  
5 government on October 29, 1986 and no GFM to complete the  
6 contract.

7 Q What do you mean by abandoning of the  
8 financing?

9 A Well, Mr. Liebman had advised us verbally, we  
10 asked him to put it in writing, but he told us verbally  
11 that he was not going to give us anymore progress  
12 payments and he was holding them in abeyance until a  
13 contract was awarded and that he was liquidating all  
14 payments to us at 100 percent.

15 Q Is it your understanding, Mr. Thomas, that the  
16 government just didn't have enough GFM or substitutions  
17 to support the entire program at that time?

18 A That's right. That's right.

19 Q And is it not your understanding that after you  
20 were reinstated, the 144,758 cases were reinstated, the  
21 government never took the steps to acquire additional GFM  
22 and give it to you?

23 A That's right. Mr. Bankoff said that they had  
24 never purchased it.

25 Q And is it not a fact then that with respect to

Page 1979

1 the units that you shipped and delivered the only ones  
2 that you could not complete were these MRE 6  
3 configurations for which you had no GFM?

4 A Right.

5 Q I would like to call your attention to FT-436.

6 A Okay.

7 Q I'd first like to ask you, Mr. Thomas, did the  
8 government divert contractor-furnished material that you  
9 had ordered from vendors and that had been manufactured  
10 to your order?

11 A Yes. They did.

12 Q What CFM was diverted?

13 A Product that we had ordered and put on hold at  
14 Sterling Bakery specifically.

15 Q Was there any other CFM that had been diverted?

16 A We believe that there was some that had been  
17 made for our contract that was but that we made it up  
18 quickly.

19 Q Mr. Thomas, does this letter that is written  
20 from the president of Sterling Bakery to Mr. Bankoff,  
21 does that letter confirm your understanding that CFM had  
22 been diverted to another contractor?

23 A It clarified what was going on at the time.  
24 When I got this out of PCO's file during discovery I then  
25 realized what had happened to my order to ship-in-place.

Page 1980

1 I had no idea that Frank Bankoff and Liebman had talked  
2 to my subcontractor in order to countermand my order to  
3 ship-in-place.

4 Q So units had, in fact -- units of CFM had, in  
5 fact, been ordered by you, manufactured to your order,  
6 shipped-in-place and set aside for you at the time?

7 A And we had accepted it. In order to be a  
8 ship-in-place I have to accept it. So our people went to  
9 Texas, shipped-in-place, accepted it, took the papers,  
10 and, you know, it was our product.

11 Q And it is your testimony that they came in Mr.  
12 Liebman and who else did you say?

13 A Bankoff.

14 Q Countermanded your ship-in-place direction and  
15 ordered or directed Sterling Bakery --

16 A They allowed it to go -- they allowed product  
17 that had our contract number on it to go to Rafco.

18 Q And this had been designated for you for use in  
19 future orders for MRE product?

20 A Yes. Specifically for us to meet the needs  
21 under the MOD 20 deal.

22 Q Mr. Thomas, you heard Mr. Bankoff's explanation  
23 regarding the signing of MOD 25 on May 29, 1986.

24 A Right.

25 Q So you agree with his testimony?

Page 1981

1 A No.

2 Q Would you expand on that briefly, please?

3 A Mr. Bankoff is confusing two meetings. One of  
4 them that was held earlier when they basically pulled  
5 back the May 2 letter that we had sent to him and the  
6 meeting that him and I and Colonel Francios attended.

7 The meeting that earlier meeting that he,  
8 Colonel Francios, Dave Lambert and all of this happened  
9 as a briefing down there at the commander of DPSC to find  
10 out what went on up at DLA headquarters as a result of  
11 Frank Bankoff referring my team up to DLA headquarters to  
12 say, resolve the claim issue, Lambert and Francios came  
13 back to give them a briefing on what was going on. At  
14 that meeting, it was my understanding that Mr. Bankoff's  
15 lawyers objected to the letter being addressed to Mr.  
16 Bankoff since Mr. Bankoff wasn't up in Washington.

17 Q Is it your belief then that Mr. Bankoff was  
18 confused when he talked about a big show or some words to  
19 that effect?

20 A Yes.

21 Q He was not, in fact, referring to the May 29  
22 meeting?

23 A No.

24 Q What meeting was he referring to, the other one  
25 that you mentioned?

1 A He's referring to the one where there was the  
2 briefing with the big show. In other words, Lambert and  
3 Francios was coming back to tell everybody what the deal  
4 was the had struck.

5 Q And at the May 29 meeting where in you brought  
6 MOD 25 in to be signed, who was again at that meeting?

7 A At that meeting there, that's when I came,  
8 Colonel Francios came, and Frank Bankoff. We were in a  
9 little room off from his office and I had the printed  
10 copy of the May 13 letter to Chiesa with me and at that  
11 point Colonel Francios whipped a 13 May dated letter of  
12 it, that version, and said, "This is the one that you  
13 have to use because this is the one we gave to Mr.  
14 Chiesa." So that's the one I grabbed and said, "Okay.  
15 Fine." And attached it to the modification and then  
16 signed it and gave it to Mr. Bankoff who left the room,  
17 came back and then signed the MOD. Gave us a copy and we  
18 left.

19 JUDGE JAMES: Before you proceed, the Board is  
20 confused about the sequence here. Do you know the date  
21 of the so-called previous meeting? Not the May 29  
22 meeting but the one, next prior that you were just  
23 testifying to?

24 THE WITNESS: It was some time after May 2 and  
25 before -- it had to be around the time --

1 JUDGE JAMES: Somewhere between May 2 and May  
2 29?

3 THE WITNESS: It was before May 29 because  
4 Chiesa wrote Mr. Apellea a letter around the 15.

5 MR. STEIGER: Just answer the Judge's question.

6 THE WITNESS: Yes. Sometime between there.

7 JUDGE JAMES: Now, were you at that meeting?

8 THE WITNESS: No. I was not.

9 JUDGE JAMES: Go ahead.

10 BY MR. STEIGER:

11 Q Now, Mr. Thomas, I just want to straighten out  
12 one point about the versions, the dates of these letters.  
13 With the exception of the dates of these versions were  
14 they not, in fact, the same letters?

15 A Yes. They were.

16 Q Do you recall that in modification number 20  
17 you were to get 114,758 cases that had been terminated  
18 for default, reinstated if you met delivery schedules for  
19 January, February, March and April 1986?

20 A Yes.

21 Q And do you remember that that was based upon an  
22 agreement that you had made back in December --

23 A Yes.

24 Q -- with the PCO?

25 A Yes.

1 Q Were you able to meet those schedules?

2 A No.

3 Q Would you briefly give the reasons why you  
4 could not?

5 A One of the reasons was that the CFM that we  
6 were planning on using in our production had been  
7 diverted and we couldn't use it and we had to shutdown  
8 production, slow it down, whatever we did at the time.

9 The second reason was that there was this  
10 medical hold that was put into place that caused all kind  
11 of confusion and we were told by DPSC, basically, to  
12 produce at your risk. But even though the specifications  
13 of the medical hold was not a part of our contract and we  
14 had no idea of how to look for holes with our eyes, or I  
15 should say micro-holes with our eyes, as if our eyes were  
16 some sort of microscopes. It was baffling. How do we  
17 find micro-holes or Zyglo, we had no idea what was going  
18 on. So that whole thing impacted on us unbelievable.

19 Q That medical hold was that caused by anything  
20 that Freedom had done?

21 A No.

22 Q Now, is it your belief that the diversion of  
23 CFM that you just discussed with us, with respect to  
24 Sterling Bakery had any bearing on your ability to meet  
25 the delivery schedules for January, February, March and

1 April of --

2 A Yes. It did.

3 Q It did?

4 A Yes.

5 Q And is it that belief based on the fact that it  
6 was this very product that would probably have been  
7 incorporated into those shipments?

8 A Yes. It was.

9 MR. STEIGER: I have no further questions.

10 JUDGE JAMES: Any cross?

11 MS. HALLAM: Yes. May I have five minutes,  
12 your Honor?

13 JUDGE JAMES: Go ahead. Get yourself set.

14 (Off the record.)

15 RE-CROSS-EXAMINATION

16 BY MS. HALLAM:

17 Q I'd like to ask you a few questions about the  
18 letter here at FT-436. Do you know what the question of  
19 shipping in place related to, it says, "As required by  
20 Freedom?" What question did you ask them about shipping  
21 in place?

22 A I'm sorry. Say that again.

23 Q This letter says, "Regarding my question of  
24 shipping in place as request by Freedom New York."

25 A Well, obviously he had a question.



Page 1986

1 Q What did you request with regard to shipping in  
2 place?

3 A To me this would mean, if that's what you mean,  
4 that Roy Terrasina had been asked by Rafco to ship  
5 product that he had in-house. And Roy Terrasina had to  
6 tell them that this has been shipped-in-place by Freedom  
7 and it has Freedom's numbers on it. So what had to  
8 happen here was Bankoff had to do a waiver or give them  
9 some sort of waiver to use product manufactured prior to  
10 the award of the contract to Rafco so that stuff that  
11 Rafco needed that was located at Rafco's plant or at a  
12 subcontractor of Rafco which Sterling was as well, they  
13 could take anything out of that subcontractor's plant as  
14 well. So his authorization for them to use any product  
15 that's located prior to this contract at one of their  
16 subcontractor's plant all of a sudden included mine.

17 JUDGE JAMES: When you say "his authorization,"  
18 who is "he?"

19 THE WITNESS: Frank Bankoff. He authorized a  
20 -- he told Mr. Chiesa in the memorandum when he was at  
21 DLA headquarters that they had authorized this to Rafco  
22 and it necessary in order to produce the 114,000.

23 JUDGE JAMES: Now, Mr. Thomas, I'm really lost  
24 with your explanation and your answer to Ms. Hallam's  
25 question. I'm looking at that very first sentence in the

Page 1987

1 January 7 letter. Where does that say anything about  
2 Rafco?

3 THE WITNESS: All right.

4 JUDGE JAMES: Or anywhere in the letter.

5 THE WITNESS: It doesn't.

6 JUDGE JAMES: Then how does that even get into  
7 it?

8 THE WITNESS: Because this is the time frame  
9 where our CFM was diverted to Rafco and we had challenged  
10 and told DLA headquarters that our stuff had been  
11 diverted.

12 Now, as a result of that diversion at a meeting  
13 with DLA headquarters, Frank Bankoff and Peggy Rowles, I  
14 believe it is, telling Mr. Chiesa that they did, in fact,  
15 authorize diversion of product that was manufactured  
16 prior to the award of that contract that was located --

17 JUDGE JAMES: Prior to the award of what  
18 contract?

19 THE WITNESS: Prior to the award of the  
20 procurement contract to Rafco. When they terminated  
21 Freedom's 114,000 cases they had to procure it from  
22 Rafco.

23 JUDGE JAMES: What product did Sterling Bakery  
24 provide your company?

25 THE WITNESS: GFM cakes, cookies and brownies.

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1 JUDGE JAMES: If that's so, what has that got  
2 to do with CFM?

3 THE WITNESS: That is the CFM.

4 JUDGE JAMES: Oh, you didn't mean then GFM.  
5 You meant CFM?

6 THE WITNESS: Right. This is CFM product.

7 JUDGE JAMES: Okay. Some sort of cakes and  
8 brownies?

9 THE WITNESS: Yes.

10 JUDGE JAMES: All right. Go ahead, Ms. Hallam.

11 BY MS. HALLAM:

12 Q You said that it was around this time of this  
13 letter that you believe shipments were diverted.

14 A Yes. They were.

15 Q How could the government divert material it  
16 didn't own -- this is CFM; is that correct?

17 A Yes.

18 Q How could the government divert that? How were  
19 these diversion accomplished?

20 A By allowing Ride Away foods to use product  
21 manufactured earlier than the contract award date to  
22 Rafco, Frank Bankoff authorized them to use CFM produced  
23 at the subcontractor's plants.

24 Q Okay. So he authorized the Data Pak provision  
25 to allow them to use previously produced materials?

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1 A Right. As well as he --

2 Q What did you mean by diversion? He made it  
3 possible for Rafco to perform the contract and that in  
4 your mind equates to a diversion of CFM?

5 A No. What equates to the diversion is when this  
6 was locked up by Freedom at that plant and Terrasina  
7 called Bankoff and Liebman on this conference call and  
8 Bankoff said he's not authorizing a ship-in-place for me.  
9 So what he's doing it countermanding my order to hold it  
10 in a ship-in-place for Freedom.

11 Q Why would the government have anything to do  
12 with shipping-in-place of CFMs?

13 A They don't have anything to do with it. But,  
14 that's why the problem is when Terrasina saying, I'm  
15 confirming a three-way phone call between Bankoff and  
16 Liebman that they are not authorizing Freedom to have a  
17 ship-in-place of this product. They have nothing to say  
18 about it. They should have had nothing to say about it.

19 Q Isn't it that Sterling wanted its money from  
20 the government and that's what it wanted authorized by  
21 way of a shipment-in-place, they wanted the government to  
22 pay for that material on your behalf?

23 A Well, what happens as a ship-in-place is, when  
24 we ship-in-place we get the product title and we pass it  
25 on a progress payments. That's what happens.

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1 Q But you do acknowledge or admit that the  
2 government has no authorization with regard to shipping  
3 in place of materials that don't belong to the  
4 government; isn't that correct?

5 A And that's why I was scratching my head as to  
6 why Frank Bankoff is saying that he is not authorizing  
7 Freedom to do a ship-in-place. He has nothing to do with  
8 it. He shouldn't even be talking to Ride Away about  
9 this.

10 JUDGE JAMES: Mr. Thomas, this sentence doesn't  
11 say that Bankoff or anyone else is authorizing Freedom to  
12 do anything. It says that apparently Bankoff is not  
13 authorizing Sterling Bakery to ship-in-place, isn't that  
14 what it says?

15 THE WITNESS: In other words, when I tell  
16 Sterling Bakery I want you to do a ship-in-place for  
17 Freedom of my product right there, which we had done in  
18 the past, Bankoff is not now allowing another  
19 ship-in-place on behalf of Freedom.

20 JUDGE JAMES: All this letter says is that  
21 Bankoff doesn't authorize shipping in place. How does  
22 that countermand your statement, ship-in-place? That's  
23 what I don't follow.

24 THE WITNESS: Because this is the product that  
25 we had told them to ship to us.

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1 JUDGE JAMES: I got that part. And it's cakes  
2 and brownies, right?

3 THE WITNESS: Right. Cakes and brownies. And  
4 when we finally ordered it, we found out that he said, I  
5 shipped it over to Rafco.

6 JUDGE JAMES: Okay. That's the part that I'm  
7 missing. Is there some other document in here that  
8 establishes the second point that you are now making?

9 THE WITNESS: The only document that would  
10 establish that is that our complaint to DLA headquarters  
11 in the memorandum of some time in January or February  
12 where DLA asked Bankoff, Freedom has said that you people  
13 allowed their product to be diverted.

14 JUDGE JAMES: Specifically Sterling Bakery's  
15 cakes and brownies, right?

16 THE WITNESS: That's right. Specifically.

17 JUDGE JAMES: Can you help him counsel, what  
18 document is he talking about? Can anybody help him.

19 THE WITNESS: I can find it.

20 MS. HALLAM: I think it's in the FT's I'm no  
21 sure. Do you know, Mr. Thomas?

22 JUDGE JAMES: well, if you know, Mr. Thomas,  
23 and can point the Board to what this document is that  
24 establishes this other statement here, I'd most like to  
25 see it.

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1 THE WITNESS: Okay.

2 MS. HALLAM: I'm almost positive it's in FT.  
3 If you give me a time frame I can find it on an index.

4 THE WITNESS: It's a DLA memorandum that Frank  
5 Bankoff wrote.

6 MS. HALLAM: Like a month/year?

7 THE WITNESS: It had to be in either January or  
8 February of '86.

9 MS. HALLAM: Okay.

10 THE WITNESS: As a matter of fact it's 26  
11 February '86. I'm not sure where it is but it's 26  
12 February '86, is what I'm looking for.

13 MS. HALLAM: I believe it's FT-255. No,  
14 actually it looks like it's also G-32.

15 JUDGE JAMES: Okay. What I'd like you to do,  
16 if you're able, Mr. Thomas, is point the Board where in  
17 this FT-255 document Mr. Bankoff says that he's diverted  
18 cakes and brownies from Sterling outfit from Freedom to  
19 Rafco.

20 THE WITNESS: All right. On paragraph 4 is  
21 where the complaint came in from Freedom. Mr. Chiesa --

22 JUDGE JAMES: The document is in the record.

23 THE WITNESS: All right.

24 JUDGE JAMES: Where does it say what I'm asking  
25 about.

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1 THE WITNESS: It says here that, DPSC personnel  
2 explained that due to the urgency of the requirement of  
3 the repurchase --

4 JUDGE JAMES: I see all of that. Where in  
5 paragraph 4 does it talk anything about Sterling Bakery  
6 cakes and brownies.

7 THE WITNESS: It doesn't say -- Freedom's  
8 intended CFM-support had diverted.

9 JUDGE JAMES: Okay. So we have tried here. Is  
10 there somewhere else that talks about Sterling cakes or  
11 brownies being diverted?

12 THE WITNESS: No. This is what we meant when  
13 we told them that. It was Sterling's cakes and brownies  
14 that had been diverted.

15 JUDGE JAMES: All right. Go ahead, Ms. Hallam.

16 BY MS. HALLAM:

17 Q I'd like you to look at G-28.

18 JUDGE JAMES: Did you say G-28, ma'am?

19 MS. HALLAM: I'm sorry. Yes, your Honor. G-28.

20 JUDGE JAMES: All right. Government Exhibit  
21 G-28.

22 BY MS. HALLAM:

23 Q It's the letter that was sent out by your  
24 attorney to Sterling Bakery and I see that you are cc'd  
25 in it?

1 A Right.  
 2 Q Are you familiar with this letter?  
 3 A Excuse me.  
 4 Q I'm assuming you are familiar with this letter;  
 5 is that correct?  
 6 A That's right.  
 7 Q And this letter states that the problem in the  
 8 January '86 time frame is that Sterling Bakery will not  
 9 ship to Freedom because it doesn't believe that Freedom  
 10 New York, that it is required to ship to Freedom New York  
 11 because it's original contract was with Freedom  
 12 Industries. Is that correct? There was a dispute as to  
 13 whether the contract that Sterling Bakery had with  
 14 Freedom was valid?  
 15 A We knew it was valid.  
 16 Q Well, isn't that what the dispute is, Sterling  
 17 took the position that they had no contract with Freedom  
 18 New York?  
 19 A I believe they did. They didn't want the  
 20 novation. They thought that the novation disrupted the  
 21 earlier contract between Freedom Industries and them and  
 22 they said that H.T. Food Products, in other words, they  
 23 are not privy to it.  
 24 Q And the reason that they latched on to that as  
 25 an excuse to get out of the contract was because Freedom

1 was not paying them on a regular basis; isn't that  
 2 correct?  
 3 A Because Mr. Liebman wasn't paying us on a  
 4 regular basis.  
 5 Q And there was at least one bounced check to  
 6 Sterling Industries, wasn't there?  
 7 A There was, basically a payment where I didn't  
 8 put the money over into the account so that it could -- I  
 9 could give him back the GFM. Yes.  
 10 Q It was an incident where Bankers Leasing  
 11 bounced a check to Sterling; isn't that correct?  
 12 A I don't think it was Bankers. I think it was  
 13 my check.  
 14 Q It bounced twice, didn't it?  
 15 A I specifically did not put the money into that  
 16 account so that I could give him back the CFM because we  
 17 weren't getting any progress payment monies had been  
 18 suspended. So I had no asset with which to leverage the  
 19 money anymore. So I wouldn't place it over there.  
 20 Q Isn't it correct that in this January 19, '86  
 21 time frame your problems with Sterling were related to  
 22 nonpayment of the bills and had nothing to do with the  
 23 alleged diversion by the PCO?  
 24 A Yes. It did. We just didn't realize why he  
 25 didn't have our material. And I asked Neal Ruttenberg to

1 force it and now we found out that he had shipped it  
 2 away. That's why our complaint went up to DLA  
 3 headquarters that DPSC had allowed it to be diverted.  
 4 Because it was no longer at our subcontractor's plant.  
 5 Q And diversion you mean that the PCO authorized  
 6 Rafco, amended the contracts data pak provision to allow  
 7 Rafco to use materials that were manufactured prior to  
 8 the award date of their contract?  
 9 A Located at their subcontractors which were  
 10 Freedom's subcontractors.  
 11 Q They allowed them to use any CFM and GFM  
 12 available to them that was packed prior to the date of  
 13 contract?  
 14 A That's right. And that included my contract  
 15 number.  
 16 Q You also talked about a micro-holes problem.  
 17 A Yes.  
 18 Q Do you recall that products were put on medical  
 19 hold because of the micro-hole problem?  
 20 A Quite a few. It initially started as a result  
 21 of everything I believe in Star Food processing in the  
 22 whole industry. Wherever Star had shipped or any product  
 23 that has Star's name on it throughout the system was put  
 24 on medical hold.  
 25 Q There were three products put on medical hold

1 at your facility. One was meatballs and barbecue sauce;  
 2 is that correct?  
 3 A Yes.  
 4 Q And is that GFM or CFM?  
 5 A CFM.  
 6 Q And another one was apple sauce, I believe?  
 7 A Apple sauce.  
 8 Q And that is what, GFM or CFM?  
 9 A CFM.  
 10 Q And do you recall what the third one was?  
 11 A Beans Tomato sauce.  
 12 Q And is that GFM?  
 13 A CFM.  
 14 Q So they are on medical hold, they are CFM, they  
 15 belong to you; is that correct?  
 16 A Yes.  
 17 Q And your -- the most logical thing to do in  
 18 that situation would be return them to the vendors; is  
 19 that not correct?  
 20 A There was nothing wrong with them.  
 21 Q They were put on medical hold, if you could use  
 22 them, you could send them back to the vendors; isn't that  
 23 correct?  
 24 A There was nothing wrong with them in our  
 25 specification of the contract for them to be on medical

1 hold. They were all released --  
 2 Q I thought you said they had micro-holes?  
 3 A No. I said that's what they alleged they had.  
 4 Something that we couldn't see.  
 5 Q And they were put on medical hold and there was  
 6 no reason why you needed to keep them in your facility;  
 7 isn't that correct?  
 8 A Yes. There was. Because we had no defect in  
 9 our contract called micro-holes.  
 10 Q The decision to keep them in your facility was  
 11 your decision to keep them there, there was nothing  
 12 stopping you from returning them to you vendor?  
 13 A Yes. It was.  
 14 Q Based on them being on medical hold?  
 15 A Yes. It was.  
 16 Q Isn't it true that this happened in the early,  
 17 around March of '86?  
 18 A That's right.  
 19 Q And your subcontractors they are getting a  
 20 little fed up with Freedom at that point in time, weren't  
 21 they, not getting paid?  
 22 A We were fed up with the government for not  
 23 getting paid as well.  
 24 Q Well, your subcontractors were also getting fed  
 25 up with Freedom; is that not true?

1 A Yes. Under the ripple effect I believe it was.  
 2 Q Isn't it true that if you had sent this product  
 3 back to your subcontractors you were afraid that they  
 4 would never replace it, weren't you?  
 5 A No. I wasn't. Freedom had its own productive  
 6 capability of retorts to make its own.  
 7 Q You testified that substantial amounts of  
 8 material, GFM, was going out of the plant starting some  
 9 time in, what, some time in November of '86?  
 10 A Yes.  
 11 Q I forget the adjective you used, was it  
 12 substantial?  
 13 A Well, any time it hits thousands and thousands  
 14 of units.  
 15 Q Thousands and thousands of units. So you do  
 16 admit that at one point in time prior to it leaving the  
 17 end of November or whatever you said, that these  
 18 thousands and thousands and thousands of units, were  
 19 in-house; isn't that correct?  
 20 A Sure.  
 21 Q And they were in-house on November 5, when you  
 22 shut down; isn't that correct?  
 23 A Yes. But that was not the items that we were  
 24 missing that caused the shut down. We were still missing  
 25 the same items that caused the shutdown. Like, no beef

1 slices, turkey, whatever it was, those were never given  
 2 to us. And what we had in inventory they started to  
 3 deplete. Take that away as well.  
 4 Q When you started up again in January, started  
 5 your accessory line and possibly the cracker lines, in  
 6 the accessory packets aren't all the components GFM?  
 7 Putting aside the bag, everything that goes into the bag  
 8 is GFM, isn't it?  
 9 A Other than ketchup.  
 10 Q Other than the ketchup?  
 11 A Right.  
 12 Q So you were able to start up even as late as  
 13 late January and February with GFM in that plant; isn't  
 14 that correct?  
 15 A We knew we had enough to do some accessory  
 16 packs to show good faith at PCO that we meant business.  
 17 We also had a lot of accessory packs prepacked that was  
 18 waiting to start final assembly. Accessory packs and  
 19 crackers is not what was holding up the show. We  
 20 couldn't start final assembly because we didn't have GFM  
 21 items for the final assembly case to commence. We can  
 22 get plenty of GFM as far as the accessory pack and  
 23 crackers, subassembled, ready to go into the final cases.  
 24 Q Do you recall specifically what GFM entrees  
 25 were missing in the February 5 time frame?

1 A I'd say the letter of January that we just  
 2 referred to, wherever it is gave a list of everything  
 3 that we needed to complete the contract. Those are  
 4 things that were missing.  
 5 Q What was missing in the November 5 time frame?  
 6 A Yes. Whatever we told them we shut down for.  
 7 Q I don't believe there's been anything in the  
 8 testimony with regard to the shutdown on November 5, you  
 9 letter is written in January where you say you need this  
 10 and that. What did you need on November 5?  
 11 A Whatever we needed on October 22 that caused us  
 12 to shut down, Frank Bankoff authorized some  
 13 substitutions. We started back up the plant. Mr.  
 14 Liebman notified me that he was not going to pay any more  
 15 money. He was placing all progress payments on 100  
 16 percent liquidation and he was holding everything else in  
 17 abeyance and that the PCO agreed with that.  
 18 I took a trip on the 7th I think of November,  
 19 which was my last day --  
 20 MS. HALLAM: Your Honor, will you give him  
 21 direction to answer the question asked.  
 22 JUDGE JAMES: Mr. Thomas, you are getting away  
 23 from her question. Let's strike that. Let's go back to  
 24 the question which had -- what was the list of GFM items  
 25 that prevented you from producing around 5 November 1986?

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1 I believe that's Ms. Hallam's question. Can you answer  
2 that?

3 THE WITNESS: Okay. Well, I may not be able to  
4 answer it all the way. But, he authorized some  
5 substitutions.

6 JUDGE JAMES: Right. To the best of your  
7 recollection, what was missing of GFM?

8 THE WITNESS: I would say that the October 22  
9 letter notifying them that we are shutting down for lack  
10 of GFM to complete the contract. He ordered some  
11 substitutions which would allow us to go for a few days.  
12 That's it. The substitutions were what he was trying to  
13 get us to go with. We did that.

14 BY MS. HALLAM:

15 Q I'd like you to look at G-57.

16 A G-57.

17 Q Yes. It's the blue book. Sorry. Who was Mr.  
18 Seraan?

19 A Kevin Seraan is one of my administrators.

20 Q Was he authorized to give this information to  
21 the body or the procurement agent?

22 A He was authorized. I don't know if he did or  
23 not.

24 Q Well, that's what this memorandum says, doesn't  
25 it?

Page 2003

1 A Yes.

2 Q And this memorandum is dated 28 October '86; is  
3 that correct?

4 A Right.

5 Q And it's about a week prior to your shut down?

6 A We shut down on 22 October.

7 Q Prior to the November 5 shut down, I'm sorry.

8 A Yes. It is. Yes. This would be.

9 Q And you do agree that the government had  
10 absolute and unlimited right to make substitutions; isn't  
11 that correct?

12 A Sure.

13 Q Sure. Okay. Could you tell me between October  
14 28, 1986 and November 5, 1986, what one of these  
15 government GFM meats did you run out of entirely?

16 A Ours is ground beef.

17 Q Okay. And the government could have  
18 substituted some of that 160,000 frankfurters, couldn't  
19 it?

20 A Well, did it? That's the question. I can't do  
21 it myself.

22 Q Do you have any reason to doubt that what Mr.  
23 Seraan had provided to Jim LaCollier is not correct?

24 A No. I'm not saying it's not correct. I'm just  
25 saying I don't know if they authorized any substitutions

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1 of frankfurters for the ground beef. I have nothing in  
2 my records that says, you are authorized to take this CFM  
3 and put it over in that bag for that. That's the  
4 question, did he do it?

5 Q Well, I just want to get your stories straight.

6 Back in 1989 you said you shut down for lack of CFM  
7 because your vendors or subcontractors could not provide  
8 it because of lack financing. Earlier you were saying  
9 you were shutting down because of lack of GFM, earlier  
10 today. Now, it's because you didn't have substitutions,  
11 is that

12 A No. What I said to them was that we were shut  
13 down for two reasons. No GFM and no GFMM,  
14 government-furnished money. Not only CFM. He could give  
15 me the CFM but if Mr. Liebman does not give me the money  
16 I cannot move. The fact that he put on a suspension of  
17 progress payments or he stopped progress payments is an  
18 item of default under my loans with Bankers.

19 Q At this point in time do you know how many  
20 units you had to produce, cases you had to produce?

21 A About 107,000 more.

22 Q A hundred and seven thousand?

23 A Right.

24 Q Could you show me on your list of CFM where you  
25 have anywhere near 107,000 meat entrees?

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1 A We are on a just in time inventory. I was  
2 keeping enough in every week to produce for that week and  
3 bring in the next week.

4 Q Do you have anywhere near 107 meat entrees here  
5 that are CFM?

6 A Say again?

7 Q On this list?

8 A Yes. This could have been what we had on hand  
9 to continue production on that day. We weren't out of  
10 our product. We had enough to commence. The point is we  
11 didn't have any GFM to commence. The CFM was coming in  
12 prior to this on a weekly basis.

13 Q Did you ask for a substitution, if that's what  
14 was holding you up on November 5, was the lack of a  
15 substitution?

16 A I don't know what -- I was down there with Mr.  
17 Bankoff on the 7th when he said to me that he was not  
18 going to overrule Marvin Liebman. And when he said he's  
19 not going to overrule Marvin Liebman, as far as  
20 restarting progress payments and lifting the 100 percent  
21 liquidation, I said, Fine. Then we'll just sit and wait  
22 like Mr. Liebman until an award of an MRE 7 is made.

23 Q Okay. So now the reason that you shut down was  
24 you needed the award of an MRE 7?

25 A No. We needed the lifting of the money from

Page 2006	Page 2008
<p>1 Mr. Liebman to continue.</p> <p>2 Q I'd like you to look at F-180.</p> <p>3 A Okay.</p> <p>4 Q It's a memo that Mr. Marra wrote to you on</p> <p>5 November 5, 1986; is that correct?</p> <p>6 A That's right.</p> <p>7 Q On the first page there, down towards the</p> <p>8 bottom, about 60 percent down.</p> <p>9 A Yes.</p> <p>10 Q It indicates what Mr. Marra -- the reasons Mr.</p> <p>11 Marra gave to Mark Liebman for the shut down.</p> <p>12 A Yes.</p> <p>13 Q The first reason is, shortage of GFM,</p> <p>14 eventually covered by substitutions.</p> <p>15 A Okay.</p> <p>16 Q And this is written on November 5, right?</p> <p>17 A Right.</p> <p>18 Q So on November 5 there were substitutions</p> <p>19 authorized to cover that lack of ground beef or anything</p> <p>20 else that was short on GFM; is that correct?</p> <p>21 A On November 5. But we shut down on -- on</p> <p>22 November 7. The end of November 7 is when we shut down.</p> <p>23 We couldn't commence production back on the 8th or that</p> <p>24 following, whatever that product day was. It wasn't the</p> <p>25 5th.</p>	<p>1 Q No it's not correct or no they haven't</p> <p>2 delivered?</p> <p>3 A Beg your pardon?</p> <p>4 Q No that is not correct or no Freedom hand not</p> <p>5 delivered the quantity?</p> <p>6 A I believe we had not delivered the quantity. I</p> <p>7 believe so. But the record shows what we had, in fact,</p> <p>8 delivered or not delivered.</p> <p>9 Q Well, do you remember being told that the PCO</p> <p>10 was considering a T for D at that time?</p> <p>11 A Yes. In other words, if we didn't sign MOD 20</p> <p>12 that we could be terminated the next day. If I didn't</p> <p>13 sign that MOD on 29 May, obviously on the 30th we were</p> <p>14 back in default again or we would have been in default.</p> <p>15 So, therefore, I had to either sign that MOD or die.</p> <p>16 JUDGE JAMES: Mr. Thomas, the Board is getting</p> <p>17 confused. As Ms. Hallam is asking you about MOD 20 and</p> <p>18 you are talking about May 29, which to me means MOD 25.</p> <p>19 So where have I lost --</p> <p>20 THE WITNESS: MOD 20 takes us up to MOD 25 as</p> <p>21 far as the delivery schedule.</p> <p>22 JUDGE JAMES: Yes. What date was MOD 20</p> <p>23 signed?</p> <p>24 THE WITNESS: I think some time maybe Jan.</p> <p>25 JUDGE JAMES: Okay. So then refusal to sign it</p>
Page 2007	Page 2009
<p>1 Q Are you sure of that?</p> <p>2 A Our last production day was the, I believe the</p> <p>3 7th.</p> <p>4 Q Okay. Let's talk a little bit about the May 29</p> <p>5 signing of MOD 29.</p> <p>6 A Yes.</p> <p>7 Q I think you testified that the only people</p> <p>8 present at the signing was you, Colonel Francios and</p> <p>9 Frank Bankoff?</p> <p>10 A That's right.</p> <p>11 Q Don't you remember Bob Apellean was there?</p> <p>12 A No. He was not.</p> <p>13 Q Do you remember Walt Walsh there?</p> <p>14 A No. He was not.</p> <p>15 Q Let's talk a little bit about MOD P20. Do you</p> <p>16 recall that the delivery schedule required that was put</p> <p>17 into MOD 320 for delivery by the end of May?</p> <p>18 A Yes. I recall.</p> <p>19 Q And how many cases were required by the end of</p> <p>20 May when MOD P20 was --</p> <p>21 A I have no idea. I have to look at P20 to see.</p> <p>22 But whatever you say, I guess would be right.</p> <p>23 Q And Freedom had not delivered that quantity</p> <p>24 though, is that correct?</p> <p>25 A No.</p>	<p>1 by May 29 is an irrelevant question, right?</p> <p>2 THE WITNESS: No. You mean to sign MOD 20?</p> <p>3 JUDGE JAMES: Sign MOD 20.</p> <p>4 THE WITNESS: MOD 20. All right. Go ahead.</p> <p>5 BY MS. HALLAM:</p> <p>6 Q You said you believed that Freedom was not able</p> <p>7 to meet the delivery schedules set down in MOD 20; is</p> <p>8 that correct?</p> <p>9 A Right.</p> <p>10 Q And at that time after MOD 20 was signed,</p> <p>11 didn't the PCO tell you that he was considering</p> <p>12 terminating the contract for default at that period?</p> <p>13 A For the period?</p> <p>14 Q After MOD 20 when you didn't meet the delivery</p> <p>15 schedule.</p> <p>16 A After MOD 20's delivery schedule takes me up to</p> <p>17 MOD 29; am I correct?</p> <p>18 Q Right.</p> <p>19 A So, therefore, what I said earlier was correct.</p> <p>20 That I was told that if I didn't sign MOD 25 on May 29</p> <p>21 the very next day I was in default. And the PCO could --</p> <p>22 Q Was there a cure notice issued, do you recall?</p> <p>23 A No. No cure notice had not been because they,</p> <p>24 I guess they knew that we were going to be signing this.</p> <p>25 MOD.</p>

1 MS. HALLAM: I have no further questions.  
 2 JUDGE JAMES: Any redirect?  
 3 REDIRECT EXAMINATION  
 4 BY MR. STEIGER:  
 5 Q Mr. Thomas, I don't want to beat a dead horse  
 6 and I'm not going to.  
 7 A All right.  
 8 Q But I just want to revisit for just a couple of  
 9 minutes FT-436 because of the confusion.  
 10 A All right.  
 11 Q Mr. Thomas, I think the problem is you just  
 12 didn't answer counsel's question. So I'm going to ask it  
 13 myself.  
 14 A All right.  
 15 Q If you will notice in the third line it refers  
 16 to -- starting in the second line, "Regarding my question  
 17 of shipping in place as requested by Freedom New York,  
 18 Inc.," did you either tell them or request them, either  
 19 one, to ship-in-place?  
 20 A Yes. We did.  
 21 Q So isn't that what they are referring to when  
 22 they say "As requested by Freedom New York?"  
 23 A Yes. It is.  
 24 Q Okay. Now, let's go on. Is it not from this  
 25 language clear to you that Mr. Terrasina is confirming

1 his understanding that Liebman and Bankoff have to  
 2 authorize shipments in place?  
 3 A That's what he's saying here.  
 4 Q That's what he's saying, yes or no?  
 5 A Yes.  
 6 Q Okay. And is he confirming here that the  
 7 particular shipment in place was not, in fact, authorized  
 8 by these two guys, isn't that what he's saying there?  
 9 A That's what he's saying.  
 10 Q Now, whether you agree or not that is what this  
 11 letter says?  
 12 A That's right. And this talks about under the  
 13 current contract with Freedom New York.  
 14 Q Is it then not your conclusion that based on  
 15 this letter Sterling Bakery believed that you did not  
 16 have the authorization to ship-in-place, so it could, in  
 17 fact, do whatever it wanted with those goods or whatever  
 18 it was told to do with those goods?  
 19 A That's right.  
 20 Q Thank you. Now, one more thing. If you or  
 21 your Mr. Seraaj send the government a letter that shows  
 22 zero inventory on a CFM item --  
 23 A No. We have not.  
 24 Q Well, did we not look at something that had  
 25 zero on hand, do you recall we looked at a letter of an

1 inventory that --  
 2 A That was something that was prepared by DPSC.  
 3 Q Yes. But let us assume for a second it was  
 4 correct?  
 5 A Okay.  
 6 Q Do you recall it?  
 7 A No.  
 8 Q You don't?  
 9 A No.  
 10 Q Well, if you gave the government an inventory  
 11 of on-hand stuff of CFM or GFM, rather, that showed zero  
 12 on it, would that not be sufficient to put them on notice  
 13 that something had to be done and that substitutions  
 14 might not be needed or rather substitutions might be  
 15 needed?  
 16 A Right.  
 17 Q So the fact that you did not send a formal  
 18 letter that says, "I hereby want this substitution,"  
 19 wouldn't matter, would it, because they would be on  
 20 notice by looking at that zero, big zero there, that you,  
 21 in fact, needed substitutions?  
 22 A Right.  
 23 Q One more thing. When this GFM began to be  
 24 taken away from you in November, at that time did you  
 25 have the full complement of GFM to do the job?

1 A No.  
 2 MR. STEIGER: I don't have anymore questions,  
 3 your Honor.  
 4 JUDGE JAMES: Any recross?  
 5 MS. HALLAM: No, your Honor.  
 6 JUDGE JAMES: Thank you ever so much, Mr.  
 7 Thomas, for your testimony. You may step down.  
 8 THE WITNESS: Thank you.  
 9 JUDGE JAMES: Anyone have any further witness  
 10 you want to call?  
 11 MR. STEIGER: Yes, your Honor. I do and with  
 12 your permission I shall retrieve him. I may need five  
 13 minutes, your Honor.  
 14 JUDGE JAMES: I'm patient. I'll wait until he  
 15 comes.  
 16 (Off the record.)  
 17 JUDGE JAMES: Whom do you wish to call?  
 18 MR. STEIGER: I'd like to call as our next  
 19 rebuttal witness Mr. Jordan Fishbane.  
 20 JUDGE JAMES: All right. Mr. Fishbane, please  
 21 remember you are already under oath.  
 22 MR. FISHBANE: Yes, sir.  
 23 JUDGE JAMES: Go ahead, Mr. Steiger.  
 24 MR. STEIGER: Thank you.  
 25 Whereupon,

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1 JORDAN FISHBANE,  
2 called as a witness herein, having been previously sworn,  
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. STEIGER:

6 Q Mr. Fishbane, in direct testimony government  
7 witness reviewed the progress payment requests and  
8 payments beginning with the second resubmission of  
9 progress payment number one, which was submitted, you  
10 will recall, after the novation agreement.

11 MS. HALLAM: I object, your Honor. We did not  
12 review that. We started with F.T. Foods number 1.

13 JUDGE JAMES: Objection is sustained.

14 MR. STEIGER: I'll rephrase the question.

15 BY MR. STEIGER:

16 Q We began with the review of progress payments  
17 with the resubmission of progress payment number one for  
18 F.T. Foods. Do you understand where I'm starting from  
19 now?

20 A Yes. After the novation.

21 Q Now, we looked at -- each one was questioned  
22 and discussed, I'm only going to ask you about a few  
23 entries and I would like your opinion on those. And I'm  
24 talking about instances where DCAA recommended certain  
25 deletions or questioning of costs which were, in fact,

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1 accepted by the administrative contracting officer. In  
2 progress payment number eight, for example, some \$333,807  
3 of alleged excess legal and accounting fees were  
4 challenged, set aside, disallowed, whatever you'd like to  
5 call it, and in other progress payment invoices as well.  
6 Would you care to comment on that?

7 A Yes. When you say excess legal fees, the  
8 excess is over quoted amounts, amounts included in the  
9 proposal that was finally negotiated and result in the  
10 November 6 memorandum of understanding. Now, to say that  
11 they are disallowing legal expenses because they exceeded  
12 the estimate is rather illogical because in any proposal  
13 all direct costs, direct material, direct labor,  
14 manufacturing overhead, general administrative expenses,  
15 other costs are merely estimated. Some would be higher.  
16 The actuals on some would be higher. On some they will  
17 be lower than what was estimated if you -- I've never  
18 ever heard of a situation where an excess of a given line  
19 item was disallowed without taking into account variances  
20 on any and every estimate.

21 What would you do if the actual of one line  
22 item was less than what was quoted would you sent out,  
23 give the company a premium for that? You know, how do  
24 you do that? It just all seemed very illogical to me.

25 Q So if, in fact, the baseline for determining

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1 whether something is excessive or not is -- goes back to  
2 original estimated numbers then that is not a legitimate  
3 baseline for establishing what is excessive or not; is  
4 that correct?

5 A Of course. I'll give you a very simple  
6 example. Let's say a company quoted x-number of dollars  
7 for direct materials and y-number of dollars for direct  
8 labor, and if, let's say they decided to rather than  
9 purchasing something they would do it themselves  
10 in-house. Well, you would find an increase in direct  
11 labor from the estimate but the overall cost might have  
12 been a lot lower, that being sort of the basis for making  
13 the decision to make in-house rather than purchase an  
14 item.

15 Q So then in your opinion what would be a better  
16 baseline, shall we say, or bases upon which to determine  
17 if legal and accounting fees are too high or not?

18 A Well, I'm not certain that one should ever  
19 measure any individual expense item. However, when you  
20 look at professional fees the major thing you usually  
21 look for, particularly from DCAA perspective is whether  
22 or not the numbers are reasonable. If an accountant  
23 charged \$10,000 an hour it would be unreasonable. But to  
24 say it was more or less than quoted doesn't really make  
25 much sense at all.

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1 Q Mr. Fishbane, in that same progress payment  
2 number eight there was rather substantial disallowance,  
3 as expressed in the direct testimony it was \$42,657 for  
4 manufacturing salaries. Do you recall seeing that?

5 A Yes. I do.

6 Q Do you have anything to say about that?

7 A Well, the disallowance -- First of all, the  
8 reason for the disallowance is that the auditors said  
9 that these salaries were used for building maintenance  
10 and building improvement. Now, literally of that total  
11 amount, from a report I reviewed that was issued by Mr.  
12 Rosenberg of Yeoman and Rosenberg, only \$2,000 of that  
13 total number of salaries, manufacturing salaries, that  
14 you mention really had to do with building improvements,  
15 let's say.

16 Now, whether or not it's \$2,000 or the total  
17 amount it's still illogic because in the manufacturing  
18 overhead expenses that were part of the memorandum of  
19 understanding memorialized therein, was building  
20 maintenance expenses that approximated \$200,000. So  
21 that, you know, whatever the amount was, whatever the  
22 interpretation was, \$200,000 of such costs were approved  
23 as a one-time charge to the contract. It really wasn't  
24 \$200,000 it was like 197, but I rounded it off, I'm  
25 sorry.



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1 Q In progress payment number 14 there's a rather  
2 substantial deduction of \$335,000 which the government's  
3 summary in a particular exhibit that is located at G-95,  
4 it's not important for you to look at it now, but  
5 referred to as occupancy costs \$335,000 I believe. Could  
6 you throw a little light on that?

7 A Yes. I'm familiar with that also. The  
8 \$335,000 evolved from an amended lease. Because of the  
9 fact that the building had been sold, equipment that was  
10 being used basically free of charge were included in the  
11 rent of the original lease were now not -- the next  
12 landlord is not willing to let those be used free of  
13 charge. So in the amended lease the amount of \$335,000  
14 was inserted as rent increases over a four-and-a-half  
15 month period from November 15, '84 to March 31, '85.

16 But, let me correct you. The four month's rent  
17 was \$74,000 and a half month's rent was like \$37,000. I  
18 think you add that up that will come to \$335,000. So the  
19 DCAA classified it as occupancy costs so maybe that's a  
20 correct characterization, but the reason for the  
21 disallowance is they said that this is really capital  
22 asset purchases. Which is something we discussed a lot  
23 when I was on the stand the other day, and, you know,  
24 that the capital assets should have been depreciated over  
25 to useful life of the forklifts.

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1 Literally if that were a correct interpretation  
2 one would think that depreciation on these forklifts  
3 should have been allowed. The forklifts were in use from  
4 beginning of November of '84. So one with think that a  
5 fair amount of depreciation should have been allowed and  
6 paid almost immediately. You know interpretation, I feel  
7 is more proper is that when a company -- I'm repeating  
8 testimony of the other day but I'll be succinct. When a  
9 company only has one contract really it is logical to  
10 consider all capital asset acquisitions as one time  
11 charges to the contract because you can't really  
12 anticipate additional contracts.

13 Q Now, given what you know about this contract,  
14 would you then say that or conclude that the deduction of  
15 \$335,000 was unreasonable?

16 A I definitely do.

17 Q Now, through the progress payments I see  
18 references or at least as summarized by the government, I  
19 see references to deductions for something referred to as  
20 prior period costs. For example, there are a lot of  
21 substantial -- progress payment number 17, for example,  
22 has about over two hundred and a quarter million dollars  
23 worth. Do you have any idea what's being referred to  
24 there?

25 A I think I do. Basically, what they refer to as

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1 prior period costs are costs that were incurred previous  
2 to the specific progress payment and disallowed  
3 previously and the company added these costs to  
4 subsequent submissions. Candidly my feeling is that  
5 wasn't the right way for the company to handle it, you  
6 know, basically just to give you a simple illustration.  
7 If a company requested \$1,000 worth of progress payments  
8 and the government only paid \$500 that would be taken  
9 care of without even referring to the cost again because  
10 in the next payment you basically have -- the next  
11 progress payment request paragraph, if you can visualize  
12 a progress payment form, you list the total cost  
13 cumulatively incurred to that day and you deduct the  
14 payments that have previously been made and the  
15 difference is the amount then requested.

16 Now, literally even though Freedom, I don't  
17 think, prepared the progress payment requests in  
18 conformity, do I think it is proper form, I reviewed  
19 every progress payment request as well as a DCAA audits  
20 and the like. With most of them as far as I can remember  
21 when they carried forward these costs they said, the  
22 progress payment is for x-dollars but 75 percent of  
23 x-dollars isn't really a new cost. Only 25 percent is.  
24 And that's all we are requesting. And you know, most  
25 important, obviously, the government never paid twice the

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1 costs that were added, you know, carried forward from  
2 prior progress payments.

3 Q You anticipated my next question. So there's  
4 really no intent to receive double payment on these  
5 things?

6 A No. Not at all.

7 Q Now, in progress payment number 21 a \$23,750  
8 deduction for lease of equipment. Does that strike a  
9 bell?

10 A I know the number.

11 Q You know the number. If you don't remember.  
12 That's quite all right.

13 A Well, I tell you what I remember about it. I  
14 think it was disallowed because the company said it was  
15 an equipment lease payment that they felt should have  
16 been capitalized. I don't know if those facts are  
17 correct or incorrect. I never looked at the equipment  
18 lease that they may have been referring to.

19 The specific, you know, let's assume there was  
20 a capital lease and the government's position was that it  
21 should have been capitalized. You then again raise the  
22 question of should costs, let's say if this was for  
23 general purpose equipment that might in most cases be  
24 depreciated over a number of years, might they not be  
25 charged as a one-time charge to the contract.

1 If that isn't a correct calculate, why in the  
2 world wasn't depreciation allowed on these equipment  
3 lease costs that the government says should have been  
4 capitalized?

5 Q So in various instances the government took the  
6 position that particular items should have been  
7 capitalized but yet made no provision for reimbursing or  
8 paying the costs associated with depreciating those  
9 items?

10 A Correct.

11 Q Mr. Fishbane, there was testimony, direct  
12 testimony by government witnesses, or maybe one witness  
13 that Freedom's accounting system was inadequate for the  
14 purposes of paying progress payments and that the system  
15 had to be tested and this term was used in connection  
16 with the rejection of the very first progress payment for  
17 \$100,000 or so.

18 Do you have any idea why the system would have  
19 to be tested at that point?

20 A I think I testified to this point the other  
21 day. Firstly, the government in pre-award surveys one I  
22 think in response to Freedom proposal dated August 4,  
23 '84, ran in connection with an October 16 or 19 '84  
24 proposal said the system was adequate. The final audit  
25 report issued by DCAA which was, I think, the October 19

1 things. Pre-contract costs, and you have to be certain  
2 that there are no pre-contract costs included in the cost  
3 incurred on progress payments because very candidly, I  
4 think it was in connection with the termination claim  
5 which also excluded pre-contract costs, I wondered why  
6 they were being excluded? Because, and I understand that  
7 of course there are contracts that you can't incur costs  
8 prior to the start of a contract without approval of  
9 anticipatory costs. But it's not my understanding that  
10 was the case where if you took a risk and decided to  
11 start a contract early, a firm/fixed price contract, why  
12 would they be pre-contract.

13 But, the real sense of point, I'm sorry that I  
14 was sort of verbose, those were not included. Now, not  
15 recording an item or duplicating an item, entering it  
16 twice, are not system flaws they are human errors.

17 Q Human errors, you said?

18 A Yes.

19 Q Give me an example of what a real system  
20 inadequacy is, for progress payment purposes.

21 A Well, you talk adequacy of system, an  
22 accounting systems has to have the ability to record all  
23 transactions that take place by the company in a manner  
24 that's consistent and in a manner that is documented.  
25 Now, whether or not it's for progress payments or for any

1 proposal and was called into DPSC on November 5, '84, I  
2 think the actual report is dated December that one said  
3 the system was adequate but it was a double entry  
4 accounting system.

5 I think I may have mentioned in testimony the  
6 other day, the things that I saw the government saying  
7 reflected that the system was inadequate via progress  
8 payments really had no system impact. They really were  
9 human errors, classification of things incorrectly and  
10 that kind of thing.

11 As a matter of fact, I remember I referred to  
12 the government saying invoices were entered net of  
13 discounts and they said that this is a system for it. It  
14 really wasn't at all. Frankly, I agree that the discount  
15 shouldn't have been anticipated. The invoice should have  
16 been entered gross. But if anything, it understated the  
17 amount of costs that were included as costs incurred on a  
18 progress payment.

19 Q Would you included in that category of  
20 nonsystem related problems, for example, others that were  
21 mentioned such as costs that were not booked? There was  
22 something mentioned about pre-contract costs and  
23 duplicative costs, would you put them in a similar  
24 category?

25 A Well, you mentioned three different kinds of

1 other purpose, you know, if there were items entered in  
2 the accounting system versus no documentation I would be  
3 a little bit concerned about the system.

4 In this particular case I think I mentioned the  
5 other day that the company when they issued progress  
6 payments they not only submitted the progress payment  
7 form but they supported it with each document that  
8 supported every penny of cost that was included in the  
9 progress payment. And also, you know, to satisfy myself  
10 years later we redid the transactions that appeared in  
11 the company's books with a current software program  
12 called QuickBooks and we were able to tie-in to,  
13 literally to the penny with every progress payment that  
14 was submitted by the company. So, you know, I think it's  
15 sort of indicative that it's a pretty adequate system.

16 Q Mr. Fishbane, the statement was made by a  
17 government witness that accounting deficiencies were  
18 pervasive during the life of the contract. Is this a  
19 correct statement?

20 A That these are accounting deficiencies?

21 Q For progress payments, accounting deficiencies  
22 were pervasive during the life of the contract. Is this  
23 a correct statement?

24 A Well, I don't know -- I not only don't think  
25 it's a correct statement. But, you know, I just

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1 mentioned that with each progress payment submitted the  
2 company supported it with documents covering each and  
3 every item of expense that was included in the progress  
4 payment. So what would the deficiencies be? I don't  
5 really understand.

6 Q Thank you.

7 A Were the deficiencies -- maybe the witness was  
8 thinking that since the company didn't agree with the  
9 accounting interpretation as to how things should be  
10 handled, maybe they are referring to that as  
11 deficiencies. But, I don't think there are any system  
12 deficiencies at all, really.

13 MR. STEIGER: Thank you. I have no further  
14 questions, your Honor. Oh, I'm sorry. One more. I  
15 apologize. One more.

16 BY MR. STEIGER:

17 Q Just as an aside, with respect to this  
18 disallowed accounting and legal fees, you testified that  
19 you had reviewed the termination proposal that had been  
20 submitted to the government and the audit report of that  
21 termination proposal. Do you recall how now years later  
22 in the audit of the termination proposal, what the audit  
23 findings were with respect to these costs?

24 A I think they were approved.

25 MR. STEIGER: Thank you. No further questions.

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1 JUDGE JAMES: Any cross-examination?

2 MS. HALLAM: No, your Honor.

3 JUDGE JAMES: I want to ask you this, Mr.  
4 Fishbane, as I recall your prior testimony you are a CPA;  
5 is that correct?

6 THE WITNESS: True.

7 JUDGE JAMES: Now, from an accounting point of  
8 view, is it permissible to capitalize a lease payment?

9 THE WITNESS: Is it permissible?

10 JUDGE JAMES: Yes.

11 THE WITNESS: Yes. Not to get too technical  
12 but there are two different kinds of leases, one is  
13 called an operating lease and one is called a capital  
14 lease. The distinction is if the company -- a  
15 capitalized lease is one in which the company can at the  
16 end of the lease acquire the equipment nominally and  
17 probably significantly less than the market value of the  
18 equipment at that time.

19 JUDGE JAMES: In other words, a lease with an  
20 offer to purchase?

21 THE WITNESS: Correct.

22 JUDGE JAMES: You call that a capital lease?

23 THE WITNESS: In most instances. I wouldn't  
24 necessarily call it capital lease if -- just to give you  
25 an idea -- if the purchase price was \$50,000 and the

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1 market value at that time of the equipment would have  
2 been \$50,000. You know, most of them are really down to  
3 a \$100, those are capital leases.

4 JUDGE JAMES: And what's the other kind of  
5 least?

6 THE WITNESS: It's an operating lease.

7 JUDGE JAMES: Okay.

8 THE WITNESS: The distinction is in an  
9 operating lease it's almost always proper to expense the  
10 lease month-by-month, lease payment month-by-month. In a  
11 capital lease, the lease is treated as if you purchased  
12 the equipment, either by paying cash that I borrowed from  
13 the bank, and it may have been depreciated, maybe for tax  
14 purposes deducting interest and the like. The number is  
15 going to come out to be almost the same but from an  
16 accounting standpoint you really -- you record an asset  
17 on the books, you depreciate it and you, you know, treat  
18 it as if you had bought it outright at the store.

19 JUDGE JAMES: So if I'm understanding your  
20 testimony you're telling me it's permissible to  
21 capitalize what you call a capital lease which as I  
22 understand your testimony is one which is an option to  
23 purchase for a small or negligible amount. Is the sum of  
24 it?

25 THE WITNESS: That's a good impression.

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1 JUDGE JAMES: Now, did you review the leases in  
2 issue here of the Appellant Freedom Industries and/or  
3 under various names, as SOS novation and other change of  
4 names, did you investigate whether there were any capital  
5 lease there involved, as you just describe them?

6 THE WITNESS: I did not look at any of the  
7 capital leases.

8 JUDGE JAMES: Does that mean there weren't any  
9 or does it mean --

10 THE WITNESS: No, no, no. I didn't look at  
11 any.

12 JUDGE JAMES: Did you review the least payments  
13 that were challenged by the DCAA to find out if they are  
14 what you call operating leases?

15 THE WITNESS: No. I didn't look at any lease.

16 JUDGE JAMES: As a result of my questions, do  
17 you have any further questions of Mr. Fishbane?

18 MR. STEIGER: He's Mr. Fishbane.

19 JUDGE JAMES: I know but do you have any  
20 further questions of Mr. Fishbane?

21 MR. STEIGER: No, sir. I do not.

22 JUDGE JAMES: None?

23 MR. STEIGER: I do not.

24 JUDGE JAMES: Okay. Government?

25 MS. HALLAM: No.

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1 JUDGE JAMES: Thank you ever so much, Mr.  
2 Fishbane, you may step down from the witness stand.  
3 Appellant have any further rebuttal witnesses?  
4 MR. STEIGER: We have, your Honor, we have one  
5 more witness right now designated as a rebuttal witness  
6 but as I indicated to your Honor, he had to make a plane  
7 to get back to Louisiana, he is no available right now.  
8 We are amenable to completing his testimony in your  
9 facilities.  
10 JUDGE JAMES: What's the name of the  
11 individual?  
12 MR. STEIGER: Leon Caves.  
13 JUDGE JAMES: That's C-a-v-e-s?  
14 MR. STEIGER: Yes. And, also, your Honor, we  
15 believe that we will call Frank Francois, which is also  
16 located there.  
17 JUDGE JAMES: Is Mr. Francois here, in  
18 Brooklyn?  
19 MR. STEIGER: No. He is not.  
20 JUDGE JAMES: All right. Let's go off the  
21 record.  
22 (Whereupon, at 3:00 p.m., the hearing was  
23 recessed, to reconvene on Thursday, June 1, 2000.)  
24  
25

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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 Friday, May 26, 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 Ken Gerber,  
13 Official Reporter, on the aforementioned date, and have  
14 verified the accuracy of the transcript by comparing the  
15 typewritten transcript against the verbal recording.  
16 Date: 7/24/00  
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