

BEFORE THE  
ARMED SERVICES BOARD OF CONTRACT APPEALS

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

ASBCA No. 43965

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

Wednesday, May 17, 2000

9:30 a.m.

BEFORE:

DAVID W. JAMES, Administrative Judge

APPEARANCES:

For the Government:

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

For the Appellant:

NORMAN A. STEIGER, ESQ.  
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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

PROCEEDINGS

(9:30 a.m.)

JUDGE JAMES: Let the record reflect that this is day three in the hearings of Freedom, New York, Inc., ASBCA docket number 43965.

Mr. Thomas, please be seated. Remember you are already under oath.

THE WITNESS: Yes, your Honor.

MR. LUCHANSKY: Thank you, your Honor. Whereupon,

HENRY THOMAS,

the witness on the stand at the time of the recess, having been previously sworn, was further examined and testified as follows:

DIRECT EXAMINATION (resumed)

BY MR. LUCHANSKY:

Q Mr. Thomas, yesterday we talked about your providing Mr. Liebman with a newspaper article about Dollar Drydock at the post-award meeting of December 14.

I'll ask you to take a look at FT-73, Bates stamp number 00959 and tell me if that's the article you provided to Mr. Liebman.

A No. This is just Liebman's notes.

Q If you'll look at the last page, 00959.

A Yes, this is it. Yeah, this is just part of

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
HENRY THOMAS, JR.	444			

E X H I B I T S

Number	Identified	Received
NONE		

his notes.

Q Mr. Thomas, we were talking yesterday when we adjourned, about Mr. Liebman's January 4, 1985, proposed suspension letter and the DCAA audit report that it was based upon.

Now the audit report which is found in the record at government's Rule 4, file 15 characterizes all of Freedom's costs as unbooked. Were all of Freedom's costs unbooked?

A No. Absolutely not.

Q When the auditors came out to look at Freedom's records, did they even ask to look at the books?

A No, he didn't. No, that's the problem.

Q When you learned about this alleged problem what did you do?

A Pat Marra and myself grabbed the books, literally, heavy books like these and marched them down to Marvin Liebman's office. That's the snowstorm Pat was talking about that he remembered going through. We carried those books down there and put them on Marvin's desk and said, "We got this report that says unbooked. Here they are in the books here." Marvin looked -- he says, "I'll send DCAA back out again."

Q And was an additional audit performed once they now had the books?

1 A Yes. But they had the books all along. I  
2 mean, the books were available all the time.  
3 Q I understand. Now that you've pointed out to  
4 them, "Look we have the books. The costs are here. You  
5 didn't ask for them before," did DCAA now come out again  
6 and this time, look at the books?  
7 A Yes. Right.  
8 Q Did that take additional time?  
9 A More more time.  
10 Q I want to move on to another topic, Mr. --  
11 JUDGE JAMES: Before you do, could I just raise  
12 one question, Mr. Thomas? Where was your plant located  
13 at that time? We're talking about the end of 1984, is  
14 that right?  
15 THE WITNESS: This is early '85. We're in the  
16 1600 Bronx Dale Avenue in the Tremont section of the  
17 Bronx.  
18 JUDGE JAMES: All right. Now, how far from  
19 that was the DCASMA office with Mr. Liebman?  
20 THE WITNESS: They were in Manhattan on -- I  
21 think, Verrick Street. I would say you could get down  
22 there in about 25 minutes.  
23 JUDGE JAMES: Okay. Go ahead.  
24 BY MR. LUCHANSKY:  
25 Q Mr. Thomas, I want to ask you about financing

1 days.  
2 So therefore, when the progress payments didn't  
3 come, the interference, that was the interference right  
4 there. By not giving confirmation or making the payment.  
5 Q Well, let me ask you, would Mr. Liebman at  
6 least confirm the fact that the Government was supposed  
7 to be making 95 percent progress payments on costs  
8 incurred?  
9 A No. He refused to say that they were going to  
10 make 95 percent progress payments when we said they were  
11 going to be made. He kept telling them that he was going  
12 to make -- he would make a payment once there is direct  
13 labor and raw materials were incurred, then he would  
14 apply a rate and based on some rate, he would then  
15 calculate what I'm doing. And we were saying something  
16 totally different.  
17 We were saying that it's based on the incurred  
18 costs that's on our books and records, and submit it to  
19 him in a progress payment. That's the deal, not some  
20 rate. We had no rate in our contract.  
21 Q Okay. Did Freedom receive a call from Michael  
22 Durso of Dollar Bank, at or about the end of December  
23 1984?  
24 A I'd say it was in the -- yes, around the mid --  
25 yeah, at the end -- near the end. I'd say around the --

1 and your attempts to get financing at or about the time  
2 that Mr. Liebman sent his proposed suspension letter  
3 claiming that Freedom didn't have adequate financing and  
4 was financially unstable.  
5 You testified yesterday about some of the  
6 efforts you'd made -- some of the people you'd talked to.  
7 Did Mr. Liebman interfere with Freedom's efforts to  
8 obtain financing with people?  
9 A Everybody. Yes, he did interfere.  
10 Q How did he interfere with those efforts?  
11 A Mr. Liebman, who is the contracting officer who  
12 is designated by the PCO, Barkewitz, refused to confirm  
13 what the agreements reached were. He refused to tell  
14 them that the cash flows and the memorandum of  
15 understanding that was signed by Tom Barkewitz and  
16 myself, and those cash flows, was the, in fact, the deal.  
17 I was giving the cash flows to everybody saying, "Here it  
18 is. Here's the contract," -- giving everybody a  
19 presentation.  
20 Pat Marra was giving Dollar, Noel Siegert,  
21 everybody, this presentation as to here's what we've  
22 done, this is what it means, these are the cash flows,  
23 here's our progress payment. All you have to do is  
24 Liebman is obligated to pay us, I was saying, in five to  
25 ten days. Pat Marra was saying they'll do it in about 30

1 after the post-award conference. And Mike asked the  
2 question of, "When are you going to incur direct labor  
3 and raw materials?" And we answered him in whenever the  
4 cash flow said. I think it says one in May and another  
5 one in March or something like that.  
6 Q Was that strange to you -- that he would be  
7 inquiring about that?  
8 A Absolutely. Well I mean, it was strange but  
9 the point was we told him when we were going to do it.  
10 Q Did you realize at the time, why he was asking  
11 about that?  
12 A No. I found out later what it was.  
13 Q And what did you find out later on?  
14 A Mike told me that a call had come in from the  
15 Department of Defense to Dollar. He was called in and  
16 but the call was that -- "Where is your," -- this is the  
17 Department of Defense is asking them -- "Where is the  
18 \$7.2 million letter of credit that was for this  
19 contract?"  
20 And Dollar responded that, "Henry Thomas and  
21 Pat Marra have come in here and given us cash flows and  
22 it says it's only \$2-3 million they need with, you know,  
23 with the equipment total." And they were told, "Oh, no.  
24 That's not it."  
25 They were further told that when they said,

1 "Well, we're waiting on a progress payment so we can open  
2 up Henry's bank accounts. That's what we're waiting for  
3 over here, Dollar." And Liebman says, "Well you don't  
4 have to wait for that because progress payments are not  
5 going to be paid until direct labor and raw materials are  
6 incurred." That's what triggered that phone call.

7 Q Okay. Now, Mr. Thomas, you said that Freedom  
8 made efforts to secure financing from Broadway Bank.

9 A Right.

10 Q Can you tell me what Freedom did in that  
11 regard? Let me ask more specifically, did Freedom reach  
12 an agreement with Broadway Bank for Broadway to provide  
13 financing?

14 A Yes, we did. Yes.

15 Q What kind of financing did Broadway agree to  
16 provide?

17 A Contract financing.

18 Q Were any documents drawn up to secure this  
19 financing?

20 A Yes. What happened is --

21 Q What was drawn up?

22 A Contract financing documents. One of my  
23 attorneys, Albirri, had worked that out. Freedom had  
24 borrowed money from Broadway Bank in '80/'81, when we  
25 were doing school lunches. And they were one of our big

1 when you got to Mr. Lanza's office?

2 A All right. Dick Lanza already had the cash  
3 flows. Pat Marra had already briefed him and his staff  
4 on what this was about. And he says, "Okay, Henry, who  
5 do I talk to to confirm all this at the Government?" And  
6 I wanted him to -- I believe I called -- knowing the  
7 story at this time of what Liebman was saying and what  
8 happened I tried to call Philadelphia.

9 Philadelphia told us that you've got to talk to  
10 Liebman. And when Lanza heard that he says, "Okay, fin  
11 What's his number?" He called, we called, I called tried  
12 to get Liebman on the phone and told him that I had Dick  
13 Lanza --

14 Q Let me ask you, were you both on the phone  
15 together?

16 A No. I was in Dick's office. I got on the  
17 phone and --

18 Q Okay. So he was sitting there next to you and  
19 then you got on the phone and called Mr. Liebman?

20 A Yes. And I told Liebman I was at Broadway Bank  
21 and I wanted him to confirm the cash flows that we had  
22 that Pat Marra had just talked to the -- briefed them on.

23 And Liebman says, "I'm not doing that. I'm not  
24 telling them what you want me to tell them."

25 I was floored. I was embarrassed. I tried to

1 banks that financed our contracts.

2 So this was a contract that we knew Dick Lanza  
3 was interested in. He gave us a great rate. So we were  
4 very fine with that. Dante called me up and said,  
5 "Henry, I got the papers ready. Take these over to Dick  
6 Lanza," and --

7 Q Now, the document, do you remember what the  
8 document was that you were taking over to Mr. Lanza?

9 A Yes. I believe it was an assignment of claims.

10 Q If you look at FT-87, is that the agreement  
11 that you took up to Mr. Lanza?

12 A FT? Wait, okay.

13 Q FT-87.

14 A Yes, this is it. Right. Well, yeah --  
15 assignment of -- yes. This is it.

16 Q Now the cover letter is from Dante Albirri to  
17 Mr. Lanza, dated January 17, 1985, and that covers a  
18 notice of assignment behind it.

19 A Right.

20 Q Did you personally -- Is it your testimony that  
21 you personally took this cover letter and the document  
22 behind it up and hand-delivered it to Mr. Lanza?

23 A Yes. I took it over there.

24 Q You said "over" and I guess that's more  
25 accurate since he's in New Jersey. Okay. What happened

1 circumvent that by going to Philadelphia to get them to  
2 confirm it. They said you've got to talk to Liebman for  
3 this process because he wanted to talk about assignment  
4 of claims and the procedure for assignment of claims. He  
5 wasn't even sure we had the right form for the assignment  
6 of claims.

7 Q Now, I note that FT-87, that assignment of  
8 claims was already signed or is signed by you. When did  
9 you sign that document? Was that before or at Mr.  
10 Lanza's office?

11 A I signed -- I had to sign it in front of Dante  
12 before -- I had to sign it because he had to notarize my  
13 signature before I left.

14 Q So you took it up to Mr. Lanza all signed and  
15 ready for him to sign?

16 A All ready to go, right. All he had to do was  
17 just agree, because he has to get the Government -- he  
18 has to get the Government's signature, he does.

19 Q Was Mr. Lanza willing to provide financing on  
20 behalf of Broadway Bank to Freedom, after that phone  
21 call?

22 A After that phone call, no. No, no. He could  
23 get no confirmation from Philadelphia and he couldn't get  
24 any confirmation from Liebman.

25 I was totally embarrassed at this point. I

1 just dropped the issue. I walked out of there and I tell  
2 you right now, I think Dick Lanza -- I've would never  
3 have borrowed money from them again. I was too  
4 embarrassed to even go back and even say anything to him.

5 Q So, Mr. Thomas, you said yesterday, that you  
6 also talked to Richard Penzer about the possibility of  
7 providing financing to Freedom.

8 A Yes.

9 Q When is the first time that you discussed the  
10 possibility of financing with Mr. Penzer?

11 A Back in September of '84, when we entered into  
12 the lease agreement.

13 Q What did you discuss with him at that time?

14 A Well basically, I wanted to know more about  
15 Richard as far as his endeavors as buying and selling  
16 buildings, leasing buildings, did he also lease  
17 equipment? What was his involvement?

18 He says as long as it was involved with a  
19 building that he was involved in, and it was going into  
20 his building and enhanced his income strength, he would  
21 be happy to accommodate. But he has to verify that  
22 everything -- and check it out.

23 Q Now, at that point, were you seriously pursuing  
24 obtaining financing from Mr. Penzer, in September?

25 A In September? No, no.

1 Q Did Mr. Penzer verify with anyone before  
2 providing you with -- Before agreeing to the lease, did  
3 he verify with anyone at the Government about progress  
4 payments, whether this was a contract that they expected  
5 would have progress payments, that sort of thing?

6 A Yes, he did. He did due diligence because  
7 there was a -- everybody knew that there was this  
8 squabble between Freedom and the city so --

9 Q Mr. Thomas, I just want to know --

10 A What he did was, he called Philadelphia. He  
11 called Captain Parsons, who was the point person. Col.  
12 Lolley, and Richard Penzer did a serious due diligence on  
13 why should he give this. Really it's a multimillion  
14 dollar building to Henry Thomas here.

15 And when I told him my plans he called down  
16 there, confirmed the whole IPP program for long-term, and  
17 he agreed on giving us this building on a long-term  
18 basis, based on the fact that we were in this IPP program  
19 and we were negotiating for this contract.

20 Q Now moving forward to -- Well, can you tell me  
21 generally, when you then contacted Mr. Penzer again?

22 A Yes. Richard and I --

23 Q Just tell me when did you talk to him again  
24 about the possibility of his providing financing.

25 A Okay. Well, it had to happen at November, when

1 we didn't give him the rent payment. When I didn't give  
2 him the rent payment because no progress payment came.  
3 Richard said, "Okay, Henry, if you want me to finance  
4 this you have to be in a default mode." And he and I  
5 entered into some agreement about what my rights were or  
6 not my rights were -- as far as some document we signed.  
7 But we shook hands on you are now -- he is now entitled  
8 to 24.9 percent default rate as of that point.

9 Technically, I had not honored the lease  
10 because I had not given him the money that's called for  
11 in the progress payments, so even though we were still in  
12 the building, Richard was now financing, but at a  
13 different rate.

14 Q At that point, what costs was Mr. Penzer  
15 financing?

16 A He financed the building, rent, the taxes, the  
17 electric, the heat, the Conn-Edison, everything, the  
18 insurance.

19 Q And are those costs that you had expected to be  
20 paid through progress payments?

21 A We had billed it in progress payments and it  
22 hadn't come so those costs had -- the lights were on.  
23 They didn't go off. The heat was going. It didn't go  
24 off. This is winter. The insurance was on the building,  
25 people were in there. If someone had gone in there and

1 fell down the stairs, Freedom didn't have it covered.  
2 Penzer had to cover it.

3 So I knew what I -- yes, I entered into a deal  
4 that Penzer -- okay, here's what we're going to do.  
5 We'll shake hands on this deal here. Here is the  
6 document you need for legal coverage let's say, to make  
7 sure that since I'm already -- I was already fighting with  
8 the city on one building -- being evicted because of the  
9 1984 Hunt's Point mess. Richard and I agreed that I  
10 wouldn't give him any problems here.

11 Q Did you later approach Mr. Penzer again, but  
12 this time to provide more financing for this contract?

13 A Yes.

14 Q Approximately when was that?

15 A Right after -- sometime in late December. I  
16 remember that I said to Richard, "Okay, it looks like I'm  
17 going to have to do this. I can't seem to get this guy  
18 in gear in New York. He's got his foot on the brake and  
19 I'm not sure why. But I've got to get this thing moving  
20 -- we've got to get this thing moving." And Richard  
21 agreed to say, "Well, okay Henry, I need to confirm all  
22 this stuff but I don't know what to do here."

23 Q What financing did you ask Mr. Penzer to  
24 provide at that point, or whether he'd be willing to  
25 provide?

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1 A I said -- I told him I would need equipment  
2 financing as well as contract cash flow financing. He  
3 says, "Henry, if what you say is true I'll do it."

4 Q And what do you mean, "If what you say is  
5 true?" What specifically, were you saying to him that he  
6 wanted to confirm?

7 A That the Government is obligated to pay 95  
8 percent of these costs. And my obligation is 5 percent.  
9 Now the fact of the matter that if we paid it all -- it  
10 still did not relieve the Government from making their  
11 payments. So they are obligated to pay it.

12 Q Okay. Now Mr. Penzer obviously knew at this  
13 point that Mr. Liebman wasn't paying yet --

14 A Oh yes, he knew it. He couldn't understand  
15 why. He didn't understand why they wasn't paying.

16 Q So did Mr. Penzer, to the best of your  
17 knowledge, make any efforts to confirm with Mr. Liebman,  
18 whether progress payments would be forthcoming?

19 A Yes. What happened was he says, "Take these  
20 cash flows to Walter Friedman, which was one of his  
21 executive vice-presidents. I set up a meeting, and we  
22 went in front of Mr. Liebman and I got embarrassed again.

23 Mr. Liebman refused to tell Walter Friedman  
24 that this is the deal. He refused to tell him that he  
25 was ready to -- that he was obligated to pay 95 percent

1 I want to ask you now about Zeb Robbins who's,  
2 Zeb is his Hebrew name. William is his English name. I  
3 don't know which way it appears in the record.

4 Mr. Robbins -- You had mentioned Mr. Robbins as  
5 another potential source of financing.

6 A Yes.

7 Q Had Mr. Robbins been involved -- and you  
8 discussed some discussions you had with him back in the  
9 MRE-3 contract, about providing some financing.

10 A Right.

11 Q And he expressed an interest at that time,  
12 correct?

13 A Right.

14 Q Did you approach him now again, during this  
15 time period, January of '85, to ask whether he was still  
16 interested in providing financing?

17 A Yes. I called Bill/Zeb out in California.  
18 This is the same person I had called in an emergency to  
19 run up to Seattle and buy the retorts, which he did. And  
20 I told him that I wanted to execute the equipment lease.  
21 I needed him to buy the equipment and again -- and I told  
22 him the cash flows and that I needed to get him online,  
23 that Dollar Drydock was running flaky on me. And he  
24 says, "Okay, fine Henry. I need to confirm this."

25 Q Did you ask him about both equipment financing

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1 progress payments. He kept saying that he's not going to  
2 pay anything until direct labor and raw materials and  
3 this rate and I got up and I said, "I don't know what to  
4 say."

5 Richard Penzer -- when we got back and Friedman  
6 said "This was a total waste of time," Richard threw his  
7 hands up and says, "This is absurd. I don't know what to  
8 do here." And he wanted to sell the building.

9 Q Okay. And that meeting you just described with  
10 Mr. Liebman and Walter Friedman, that was one that you  
11 attended?

12 A Yes, I was there and Marvin Liebman was there.

13 Q And after that, was Mr. Penzer willing to  
14 provide any contract financing or equipment financing?

15 A No. At that point, Richard says he was just --  
16 he wants to get out of the deal. He felt that the whole  
17 thing that I had told him about this IPP and all this and  
18 the whole thing was working -- was nonsense because the  
19 Government's not honoring it.

20 He put the building up on the market and enter  
21 Kurt Witteck, the new landlord. I mean the guy wanted to  
22 buy the building. So I had to waltz Kurt through this  
23 whole thing.

24 Q Mr. Thomas, we're going to try to narrow the  
25 questions and answers just a little bit.

1 and contract financing?

2 A Yes. He was already doing equipment financing.  
3 Now I wanted him to do the cash flow financing.

4 Q Well, the equipment financing he was doing was  
5 for the retorts he had purchased in connection with  
6 MRE-3, on your behalf.

7 A Right. And they moved right over with me from  
8 my Walsh Healey qualifications. I couldn't let that  
9 equipment go. I had to keep it going.

10 Q So you were still leasing that equipment from  
11 Mr. Robbins?

12 A Oh yes, yeah.

13 Q And now when you approached him, were you  
14 approaching him about financing the new production  
15 equipment for MRE-5?

16 A Paying for the -- that's right, the Koch  
17 machines, the Do-Boys, and everything else that I had  
18 negotiated with Philadelphia. And I told him how we do  
19 this is, the \$333,000 represents say, 20 percent of the  
20 cost. And I showed him where I could guarantee automa  
21 buyback of the equipment at an 80 percent rate in the  
22 event there's no follow on contract, that the equipment  
23 suppliers will buy it back.

24 Q Did Mr. Robbins express any concern about  
25 financing the equipment?

1 A No. That was no problem.  
 2 Q And why is financing the equipment no problem?  
 3 A Because it's self-collateralizing.  
 4 Q Self-collateralizing meaning, collateralized --  
 5 the equipment itself collateralizes the obligation?  
 6 A Itself, right. Its value of the equipment  
 7 self-collateralizes it. It's like a car.  
 8 Q Okay. And so the Government had agreed to pay  
 9 \$333,000 towards the \$1.5 million of production  
 10 equipment, and the equipment would collateralize that  
 11 obligation for a lender.  
 12 A He'd buy it. That's right. That's right.  
 13 Right.  
 14 Q And then you just referred to a buyback  
 15 provision --  
 16 A That was additional security. That was a  
 17 parachute, let me say it like that.  
 18 Q And just explain very briefly. What do you  
 19 mean by a buyback provision? What does that mean?  
 20 A Well, it's not something that's common. It's  
 21 something that's --  
 22 Q Just, please explain specifically what it is  
 23 and how it secures the obligation for the lender.  
 24 A Okay. The manufacturer, by entering into a  
 25 buyback agreement, is saying that I put so much faith in

1 Q Mr. Thomas, when you were discussing Mr.  
 2 Robbins -- the possibility that Mr. Robbins would provide  
 3 this equipment financing and contract financing, did you  
 4 give the cash flows to Mr. Robbins for his review?  
 5 A Oh, absolutely. He did a complete, complete  
 6 due diligence. He had a lawyer/accountant, Backarach,  
 7 sit with Pat Marra and go over everything. They brought  
 8 in another guy. They went over everything.  
 9 Q So he reviewed the cash flows?  
 10 A Yeah. Everything was approved to his  
 11 satisfaction.  
 12 JUDGE JAMES: Mr. Thomas, frequently in the  
 13 last hour you've mentioned cash flows that were shown to  
 14 this financier or that financier. And I've seen many  
 15 editions of cash flows, so my question is which cash  
 16 flows are you talking about? What date?  
 17 THE WITNESS: The last set of cash flows that  
 18 was attached to the memorandum of understanding.  
 19 JUDGE JAMES: So the November 6, 1984 cash  
 20 flows.  
 21 THE WITNESS: Right, those.  
 22 JUDGE JAMES: You had a copy of that?  
 23 THE WITNESS: Yes, absolutely.  
 24 BY MR. LUCHANSKY:  
 25 Q Mr. Thomas, you said that you had a copy of

1 this equipment that in the event something happens, I  
 2 will purchase it back from you.  
 3 Q Meaning in the event of default or something  
 4 like that?  
 5 A For whatever reason, right. I have so much --  
 6 I'm not trying to push this out here as a one-way trip,  
 7 you know, it's yours and after you get it don't come  
 8 back. We have so much faith in it that we know that this  
 9 is valuable equipment, we will give you in one year, if  
 10 that's what you want, 80 percent of the value of that  
 11 equipment. Now that's something that's not normal.  
 12 That's something I negotiated. You don't find this --  
 13 that trick in every deal.  
 14 Q And what equipment is it that you had  
 15 negotiated this buyback provision for?  
 16 A All my equipment. That's one of my standard  
 17 methods of negotiation.  
 18 Q Which consisted of what? Was it the Do-Boy  
 19 equipment you had talked about before?  
 20 A Do-Boy, the Koch, S & B conveyors, and  
 21 everybody else I deal with. I know how -- I know how to  
 22 handle -- that's my end.  
 23 Q I'm just asking for the benefit of the Board  
 24 and the record.  
 25 A All right. I understand.

1 those cash flows, correct?  
 2 A Yeah, right. Yes.  
 3 Q Was a copy also made for Mr. Marra?  
 4 A Yeah, oh yes. We gave everybody copies of  
 5 those. That's the deal. And that's the deal. That's  
 6 the thing we gave to Dollar Drydock, we gave to Dick  
 7 Lanza. We gave it to Richard Penzer. We gave it to Zeb  
 8 Robbins. I gave it to Warren Rozen. That's the same  
 9 thing that Randy Gross got. Even though when they got  
 10 them, we were late -- as far as everything's got to be  
 11 now shoveled, you know --  
 12 Q Thank you. Okay. Now after Mr. Robbins  
 13 reviewed the cash flows was he satisfied, on paper at  
 14 least, with how the contract was supposed to work?  
 15 A Yes.  
 16 Q Was he willing to provide financing at that  
 17 point, however?  
 18 A Yes.  
 19 Q Right. Right after he reviewed the cash flows,  
 20 willing to provide it?  
 21 A No problem.  
 22 Q Was there anything else he needed to do before  
 23 he was willing to sign on the dotted line?  
 24 A Yes.  
 25 Q What was that?

1 A He had to confirm and with Philadelphia, the  
2 same way he had to confirm with everybody before he  
3 bought the rotor mats, that this contract was real. It  
4 was in force. It was this, and he did.

5 Again, we were referred back to Mr. Liebman. I  
6 get on the phone --

7 Q Okay. And tell me about -- you were about to  
8 say, get on the phone. Tell me the scenario. You are in  
9 the same room --

10 A I'm in New York. I make a conference call. I  
11 get Zeb Robbins on the phone. I call up Marvin Liebman  
12 and I says, "Marvin, I have Mr. Robbins on the phone.  
13 He's the one that helped me out with the rotor mats  
14 before. He's the one that's provided me financing. I  
15 need to confirm -- he needs to confirm with you some  
16 questions. Would you please talk to him?"

17 And the first thing Marvin asks is, "Are you a  
18 bank?" And Zeb said, "No." And I think the phone call  
19 ended.

20 Q Okay.

21 A It was something like that. It was, are you a  
22 bank and the answer was no.

23 Q Was Mr. Robbins willing to provide financing  
24 after that phone call, at that point?

25 A The only thing he was willing to do at that

1 dollars are available. Will you please confirm this  
2 deal?

3 I set up the meeting with Marvin, told him that  
4 I was bringing down Clarence Stanley, from Citi Bank and  
5 we went down to Varrick Street at ten o'clock one day and  
6 we was waiting, waiting, waiting. Marvin says he's busy.  
7 He can't see us.

8 Q Had you already set up that meeting with him?

9 A Yes, we had.

10 Q Okay. Go on.

11 A We left, went to lunch, came back after lunch.  
12 Marvin's busy. He can't see us. So I said, "This is  
13 nonsense." I'm embarrassed now because Clarence says,  
14 "I've got to get back. I can't be up here."

15 I go to the commander's office and says,  
16 "Listen, Marvin, I've got a banker here whom we had an  
17 appointment at 10:00 o'clock, Marvin's not available."

18 So the commander puts me in the commander's  
19 conference room. Clarence and I are sitting in there.  
20 Ten to fifteen minutes later in comes Marvin and whereas  
21 we're sitting at this end of the table Marvin comes  
22 through that door and sits way at the other end of the  
23 table. And I'm telling Marvin, "Marvin, this is Clarence  
24 Stanley. He's here to confirm to you that -- I mean,  
25 we're here because we want you to confirm that this is

1 point was that the equipment I had in there -- he was  
2 willing to leave it in there. But he wasn't willing to  
3 do anything until he could get some confirmation as to  
4 what was going on.

5 Q Did you suggest making some other efforts to  
6 confirm for Mr. Robbins with Mr. Liebman, that progress  
7 payments were going to be paid?

8 A Yes.

9 Q Tell me about those efforts. What did you  
10 suggest?

11 A What I did was I said, "Okay he wants a bank.  
12 Let's call Clarence Stanley."

13 Q Who is Clarence Stanley?

14 A He's the banker we had at Citi Bank.

15 Q Who had at Citi Bank?

16 A Freedom.

17 Q How long had Freedom been banking at Citi Bank?

18 A Since 1986 -- I mean 1976. We had loans at  
19 Citi Bank. Citi Bank had given us loans.

20 Q Was that in connection with the school lunch  
21 program?

22 A Yes. All right. And we called Clarence  
23 Stanley and Clarence agreed to accept \$1 million, \$2  
24 million from Robbins, put it in an account and then to go  
25 to Mr. Liebman as a banker, and tell Mr. Liebman that the

1 the deal. That you're going to put 95 percent, we're  
2 going to do 5 percent. And he says, "I'm not telling him  
3 what you want me to say. I'm not using those words. I'm  
4 not doing that." And that did it for me. I just said,  
5 "I'm out of here."

6 So I get up to leave -- If you don't mind, your  
7 Honor, I get up to leave, I grab my coat that's on the  
8 chair because it's winter, and the chair -- and I  
9 snatched it to get out of here. The chair jumped or  
10 moved, Marvin ran out of the room, and Clarence and I a  
11 sitting there looking at each other. What's wrong with  
12 him?

13 I waited until he came back and somebody came  
14 in there and says, "Were you going to throw a chair at  
15 Marvin?" I said, "No." I said, "Marvin is embarrassing  
16 me here in front of this man here that I bring down here,  
17 representing investment monies and Marvin is just telling  
18 him that he's not going to tell them what I want him to  
19 say." Anyway it was a mess. It was another mess.

20 JUDGE JAMES: Mr. Thomas, let me ask you this.  
21 In all these episodes of trying to confirm what the  
22 contract arrangement was to your various funding sources  
23 you had a copy of the contract by that time, is that  
24 right?

25 THE WITNESS: Yes.

1 JUDGE JAMES: Did you ever show these funding  
2 people the copy of the contract?

3 THE WITNESS: Absolutely. They saw it.

4 JUDGE JAMES: So they could see the terms.  
5 They could see the 95 percent progress payment --

6 THE WITNESS: Sure. But it was based -- they  
7 couldn't understand what triggered it, that was the main  
8 thing. If you read it, nobody understands these things  
9 and they're not looking at it.

10 JUDGE JAMES: I'm just trying to ask you what  
11 you showed these financiers? Did you show them the  
12 contract?

13 THE WITNESS: we showed them the contract. We  
14 showed them the progress payment clauses --

15 MR. LUCHANSKY:

16 Q Okay. Let me ask you this. At the time that  
17 you were talking to these financiers, had Mr. Liebman  
18 been paying the 95 percent progress payments that were  
19 reflected in the contract?

20 A No. That's the problem.

21 Q Did that create a concern on your behalf and in  
22 behalf of these potential financiers?

23 A Yes.

24 JUDGE JAMES: Well, let me follow that up then.  
25 There wasn't any need for Mr. Liebman to say what the

1 the 95 percent? Was that part of these discussions?

2 A The disconnect here is the timing. We say it's  
3 to be paid now. Liebman is saying it's to be paid  
4 sometime in the future when direct labor and raw  
5 materials are -- That's the disconnect. Okay? When does  
6 this thing start? I'm saying right now it is due and  
7 payable.

8 Liebman says, "No, it's not due and payable  
9 until you incur direct labor and raw materials."

10 So all of a sudden -- "When are you going to  
11 incur direct labor and raw materials, Henry?" "Well, in  
12 month seven." "Really. Well, who's supposed to finance  
13 this contract until month seven?" Who? Liebman is.  
14 Well he's saying he's not.

15 Awe oh, Awe oh, we've got a problem. We got a  
16 catch-22. We got another problem. Who goes first? So  
17 that was the biggest problem I had. This wasn't resolved  
18 until Bankers stepped up to the plate later on after we  
19 --

20 JUDGE JAMES: Mr. Thomas, why don't you let  
21 your attorney ask you a question?

22 BY MR. LUCHANSKY:

23 Q Mr. Thomas, in addition to these potential  
24 sources of funding, did you also contact Suburban Bank?

25 A Yes.

1 contract said. It's already written there, right?

2 THE WITNESS: That's right.

3 JUDGE JAMES: Now was the real reason you were  
4 going to see Liebman to say, "Why aren't you paying the  
5 progress payments?"

6 THE WITNESS: Well, the people -- anybody would  
7 like to understand both sides of the story. Everybody  
8 don't have time to go dig through that entire litany of  
9 documents. Especially if some of them are not contract  
10 people. So by me telling them this and showing them  
11 this, they want to hear it and confirm it with the other  
12 side, that this is the way it's going to work more so  
13 than anything else.

14 How does this work? Tell me. I do this, you  
15 do that. I do this, you do that. That what they were  
16 basically trying to confirm. How does it work?  
17 Especially since it wasn't working the way I was saying  
18 it was supposed to work.

19 BY MR. LUCHANSKY:

20 Q Well, I guess to follow-up. The Judge's  
21 question was, were you trying to confirm with Mr. Liebman  
22 either why he wasn't doing -- the question was, why he  
23 wasn't doing what the contract said? And I'll ask you  
24 the follow-up, were you trying to confirm whether he was  
25 planning on doing what the contract said, which is pay

1 Q And were they willing to provide financing?

2 A Yes.

3 Q By the time that they had indicated an interest  
4 in providing had you already obtained financing from  
5 another source?

6 A Yeah. What happened with Suburban is that they  
7 didn't require the confirmation. They were government  
8 contract bankers. They saw it, they read it. The only  
9 thing they wanted was Neal Rodenberg. It was Neal  
10 Rodenberg's bank. By the way, that was one of his. And  
11 they just required that Rodenberg sign something, as I  
12 recall. That he had to sign that this was whatever it  
13 was. It's in the record there. So Quinn Rocusin and  
14 Rodenberg had to sign something for Suburban, and  
15 Suburban did their own due diligence and says, "We've  
16 looked at this here. We've looked at the cash flows.  
17 The maximum amount of money you need is a million and a  
18 half dollars, Thomas. You don't need all this money."

19 Q Okay. And that's what they offered to --

20 A Well, that's what they came up and investigated  
21 my books and records. When they finally did it, they  
22 issued us a \$2 million line of credit and said, "That's  
23 all your books, say you need. The rest of it the  
24 Government is putting up. You don't need any more." And  
25 we said, "We can't accept that because Mr. Leibman is



1 requiring more."

2 Q Did you ever refuse to reveal to Mr. Liebman,  
3 all of your potential sources of financing?

4 A Yes

5 Q Ever hide it from him?

6 A No. No.

7 Q Okay. You told Liebman about all of these  
8 different people and made these direct contacts?

9 A Yeah. They all talked to him, everybody.  
10 Richard Penzer talked to him. Clarence Stanley tried to  
11 talk to him, Zeb Robbins, Dick Lanza --

12 Q Okay. You testified to the specifics. What  
13 was the impact? Now at this point, you hadn't been paid  
14 anything on progress payments.

15 A Nothing.

16 Q And what time frame are we now in?

17 A This is in late December -- I'd say this is in  
18 early January. We're in the January time frame.

19 Q Okay. By the time you got Bankers Leasing to  
20 provide financing and Performance Financial, when was  
21 that?

22 A February, early February. And they also had to  
23 do a due diligence.

24 Q You hadn't been paid at all by Mr. Liebman.  
25 What was the impact on Freedom of not being paid up to

1 the record, the total amount requested then through F-3,  
2 through progress payment request number 3 was \$631,540.  
3 Was Freedom carrying all of these costs by itself at that  
4 point?

5 A Yes. Those costs were being carried by  
6 Freedom.

7 Q Was it able to perform the building renovations  
8 that it needed to?

9 A No.

10 Q Was that because of the money that it wasn't  
11 getting?

12 A Yes. Yes, lack of financing and lack of  
13 confirmation of this. If he had confirmed it but not  
14 paid it, I could have financed it.

15 Q Are you saying that with respect to the  
16 building renovations, you could have financed it through  
17 the vendors directly?

18 A Absolutely. That was the deal. He just had to  
19 confirm that yes, I'm going to do this. Yes, it's my  
20 obligation. Now if you didn't pay it we're gone. All we  
21 wanted to make sure, the vendors wanted to make sure we  
22 that they confirmed it and whatever his administrative  
23 hook-ups or whatever he has to do to get it started we,  
24 you know, we attributed it to, that's government  
25 bureaucracy to get the thing started. It's coming

1 this point?

2 A This is total disruption. I mean, when I say  
3 total disruption, the entire management of Freedom is out  
4 of step. The cash is not flowing. At this point in  
5 time, Pat Marra has gotten bent out of shape. Sometime  
6 in February I think it was. He couldn't understand what  
7 was going on and why the Government wasn't honoring their  
8 end of the bargain. People weren't -- I just --  
9 everything was out of step, out of sync. All the  
10 computers were not coming in although the building wasn't  
11 being renovated. GFM was due to be coming in, in a month  
12 or two.

13 My Gemini contractors were saying, "Henry,  
14 we've committed to give you \$300,000 for the renovation  
15 of this building but that was contingent on confirmation.  
16 We've gotten no confirmation from this guy."

17 Q According to the business plan, what was the  
18 primary focus of Freedom's efforts supposed to be during  
19 this period from November 1984 through February of 1985?

20 A Pre-contract setup for the administration, the  
21 accounting, the lot tracking systems, the building  
22 renovations to meet Health Services Commands to receive  
23 it. Everything was now totally out of whack.

24 Q Now Freedom's third progress payment request  
25 was submitted on February 8, 1985, and as reflected in

1 though.

2 So we've confirmed it's on the way as soon as  
3 you get it through. But he refused to confirm. So even  
4 without having the Government's dollars, just the mere  
5 fact that he confirmed it meant all I could do now is I  
6 could go finance this.

7 Q Did Mr. Liebman's failure to pay you during  
8 this time impact on Freedom's ability to develop the  
9 personnel that it needed to perform the contract for this  
10 time?

11 A Yes.

12 Q In what way?

13 A All systems went out of timing. Personnel that  
14 I had was bringing on Howie Marx, Noel -- what's that,  
15 one of my programming people that was supposed to program  
16 the computers for the lot tracking system, they are  
17 in-house but there's no computers.

18 We got our sanitation crew coming in but we  
19 don't have the machinery. We got a lot of things that  
20 we're moving on but the rest of it is not -- we're not  
21 meeting to give them the tools they need to make this  
22 happen.

23 Q Now, it was around this time that you, I  
24 believe, were introduced to Performance Financial Leasing  
25 Company, correct?

1 A Right.  
 2 Q Or Performance Financial Services?  
 3 A Performance Financial.  
 4 Q Okay. And they're a leasing company?  
 5 A They're a leasing and financing company. They  
 6 do small finance. They didn't do the big stuff but they  
 7 did small contract financing.  
 8 Q Were they able to arrange larger financing?  
 9 A Yes.  
 10 Q Through what association?  
 11 A They used several. But one of them was an  
 12 agent for was Bankers. They could bind a deal for  
 13 Bankers. They had signing authority.  
 14 Q And did you talk to Performance Financial about  
 15 providing financing for the contract?  
 16 A Yes.  
 17 Q Both equipment financing and the contract  
 18 financing?  
 19 A Yes.  
 20 Q And did you provide them also with all the cash  
 21 flows and everything you had talked about already?  
 22 A Yes.  
 23 Q And this is approximately what date?  
 24 A This is in January and they confirmed  
 25 everything up and we went down to Washington and met with

1 delay in payment?  
 2 A Yes.  
 3 Q Did the failure to be paid progress payments  
 4 disrupt management's ability to coordinate the operation  
 5 of the company?  
 6 A Yes, it did.  
 7 Q Mr. Thomas, I want to talk to you now a little  
 8 bit about the entry of Performance Financial as a lender  
 9 for production equipment and Bankers Leasing about the  
 10 lender for contract financing.  
 11 At what point -- You had said it was in  
 12 February of 1984, that Bankers first issued a letter of  
 13 commitment?  
 14 A Yes.  
 15 Q To whom was the first letter of commitment  
 16 issued?  
 17 A Freedom Industries.  
 18 Q Was that acceptable to Mr. Liebman?  
 19 A No.  
 20 Q What did Mr. Liebman require?  
 21 A At this time, when we gave it to Mr. Liebman,  
 22 he wanted the contract novated at that point.  
 23 Q Okay. To whom did he want the contract  
 24 novated?  
 25 A Yes. At that point when I gave him that --

1 them at Quinn Rocusin's offices and early February 11th,  
 2 I think they gave us a commitment.  
 3 Q Now at this point Mr. Thomas, you had discussed  
 4 some of the impact, the delay that was caused as a result  
 5 of not getting paid, did that impact result in additional  
 6 costs to Freedom?  
 7 A Yes. Constant delays. Every time you -- for  
 8 every time you delay, you got a day that you've got to  
 9 recover or maybe two days, it depends. It's not an exact  
 10 science. So it -- just because you're delayed one week  
 11 here don't mean that you can just add one week to the  
 12 back end. You might have to add a week and a half to two  
 13 weeks. Because everything is now out of sequence.  
 14 Q So did Freedom incur additional costs as a  
 15 result of this delay?  
 16 A Yes.  
 17 Q Now we'll go into more detail, yes --  
 18 JUDGE JAMES: Would you hold? Let's go off the  
 19 record for just a second.  
 20 (Recess)  
 21 BY MR. LUCHANSKY:  
 22 Q Mr. Thomas, before the break we were talking  
 23 about some increased costs that Freedom incurred as a  
 24 result of the delay in progress payments. Did Freedom  
 25 also incur additional labor costs as a result of this

1 Q I'm sorry. To whom did he want the contract  
 2 novated?  
 3 A To H.T. Food Products. He wanted now -- H.T.  
 4 Food Products who was providing all the financing to  
 5 Freedom, he wanted it novated.  
 6 Q Okay. Can you explain for the Board what role  
 7 H.T. Foods had been playing up until now?  
 8 A H.T. --  
 9 Q Go ahead. Who was H.T. Foods?  
 10 A H.T. Foods was a corporation that was formed by  
 11 an attorney for Zeb Robbins to do business with me. And  
 12 it was called H.T. Food Products.  
 13 And as a result of a deal that didn't go, I got  
 14 control of the corporation and bought it from them  
 15 because it was an expense that they had incurred on my  
 16 behalf. So I took the corporation and put it on the  
 17 shelf.  
 18 Q So what role did it play in connection with  
 19 this contract?  
 20 A In this contract here, we had set up a  
 21 conditional assignment to assist Freedom in the contract  
 22 efforts of the solicitation, the building of the  
 23 proposal, bringing on the financing to assist Freedom in  
 24 getting the proposal and negotiation all the way through  
 25 to contract award.

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1 Q Did this conditional assignment -- what was the  
2 purpose -- This conditional assignment was entered into  
3 in April of 1984?

4 A Yes.

5 JUDGE JAMES: Assignment of what, Mr. Thomas?

6 THE WITNESS: A conditional assignment of the  
7 contract effort.

8 BY MR. LUCHANSKY:

9 Q Let me refer you to, I believe it is actually  
10 G-5. I believe I'm correctly referring to the  
11 Government's trial exhibits. Yes, G-5. Is that the  
12 conditional assignment that we're referring to?

13 A Yes. This is the condition -- this is the, yes  
14 conditional, yes, this is it.

15 Q Now this was entered into at a time when Dollar  
16 Drydock was or was not providing financing to Freedom?

17 A Yes. That's when that was done. In the  
18 interim period when MRE-4 had been -- when the Government  
19 had walked away from us after Dollar had financed  
20 everything, this is the interim period of that.

21 Q And what did this conditional assignment  
22 arrange for?

23 A It basically arranged for H.T. to assist  
24 Freedom in the contract efforts of developing the  
25 technical proposal, the managerial proposal, the cost

1 developed in --

2 A Other things that they worked on, right.

3 Q -- in the MRE-5 effort?

4 A Right.

5 Q Now did Dollar know about and agree to this  
6 conditional assignment?

7 A Absolutely. Yes. That's what I told Bill  
8 Wheeler. I told him, "This is how I'm going to bring in  
9 fresh money."

10 Q Okay. And this provided for -- gave H.T. the  
11 right to arrange for financing in the event that Dollar  
12 Drydock had decided not to provide financing?

13 A Yes. Yes. And it gave Dollar the option or  
14 the right to step back up to the plate, give us our money  
15 back, and keep going full fee.

16 Q So was this arrangement of assistance to  
17 Freedom in its performance of the MRE-5 effort?

18 A Yes. And that's what H.T. Food Products was  
19 doing when it arranged for the lease with Richard Penzer,  
20 and then further gave it to Freedom. H.T. Food Products  
21 made all the arrangements for Broadway Bank -- gave it  
22 them.

23 Q And that was going to be my question. Is that  
24 why H.T. Foods was involved in this contract at all?

25 A Yes. That's right. This whole thing was as a

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1 proposal, and everything during the phase of pre-contract  
2 negotiations.

3 Q Did it permit H.T. Foods to take a first  
4 position financially, with respect to any of the costs  
5 being incurred in connection with the MRE-5 efforts?

6 A Yes. That what this was for. This is strictly  
7 to protect the effort of the MRE-5.

8 Q And did that have the -- and what effect did  
9 that have on protecting Freedom from the existing  
10 creditors?

11 A We believed that -- this is the mechanism I  
12 used to bring fresh money into a deal. It isolates and  
13 protects this particular contract effort from anybody,  
14 from an outside source.

15 Q And in terms of priority, legal priority to  
16 enforce a claim, where would that place the existing  
17 creditors as of April of 1984, with respect to any claims  
18 against assets acquired in the course of the MRE-5  
19 effort?

20 A All right. This is an identified effort.  
21 Identified up front ahead of time, filed out, told to  
22 creditors, told to Dollar Drydock. It places us in first  
23 place, first position.

24 Q It places H.T. Foods in first position ahead of  
25 the existing creditors in connection with assets

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1 result of the, what we called the Hunt's Point mess,  
2 caused by Philadelphia walking away from us at MRE-4,  
3 not giving us an award. And Dollar Drydock had put all  
4 that money in the Hunt's Point plant in anticipation of  
5 being in the industrial preparedness program. So when  
6 this thing crashed we had a mess on our hands.

7 Q Was it your understanding that as a result of  
8 this conditional assignment -- Were the existing  
9 creditors -- The creditors who were on Freedom's books  
10 of April 1984, would they have been able to proceed  
11 against any of the assets Freedom would develop in  
12 connection with the MRE-5?

13 A No.

14 Q Now did the Government -- did you make the  
15 Government aware of this arrangement with H.T. Foods,  
16 during the negotiation of the MRE-5 contract?

17 A Yes. Yeah, everybody knew this. I mean, I was  
18 telling everybody how I'm going to handle this Hunt's  
19 Point mess, as we called it, because it really created a  
20 -- It just created a mess out there, when we was  
21 disconnected.

22 Q Did anyone at the Government object to this  
23 arrangement?

24 A No.

25 Q And indeed the progress payment request backup

1 that you submitted with your progress payment request  
2 that reflected this billing from vendors to H.T. Foods,  
3 and then H.T. Foods to Freedom?

4 A Right. This is the vehicle I was using.

5 Q And this arrangement is the incurred costs that  
6 were eventually paid by Mr. Liebman in May of 1985?

7 A Yes, that's right. In other words, everything

8 --

9 Q At least up to the novation to H.T. Foods?

10 A All pre-contract costs on this effort is  
11 trackable. From the contract proposal, all the way up to  
12 and including everything. This is where it starts at.

13 Q Now you had begun to discuss the novation.

14 A Right.

15 Q Once Freedom obtained financing from Bankers,  
16 to Freedom Foods, did you obtain the amount of financing  
17 from Bankers for Freedom that Mr. Liebman had been asking  
18 you to obtain?

19 A Yes. That was the reason for using Bankers.  
20 Because Bankers was a government contract bank. They  
21 understood government contracts. They said you don't  
22 need nowhere the amount of money, but we'll be glad to  
23 lend you the money and we'll charge you a fee. So if the  
24 man wants it, fine. So Bankers didn't care what it was.

25 Q And did Mr. Liebman release progress payments

1 Dante Albirri Freedom's lawyer. And between the two,  
2 they had to now transfer assets. They had to do  
3 something, whatever the rules called for and we had to  
4 have Board meetings and --

5 Q Were you required to produce additional  
6 documentation?

7 A Yes.

8 Q Board minutes and resolutions?

9 A Yes.

10 Q Attorney opinion letters?

11 A Yes. Financial statements -- everything.

12 Q Did that cause additional delay in  
13 accomplishing the novation?

14 A Absolutely.

15 Q Was this delay disruptive to Freedom?

16 A Absolutely.

17 Q What are the things that Freedom couldn't do  
18 during this time, as a result of not getting paid during  
19 this time?

20 A The subcontractor agreements were in Freedom's  
21 name. I mean, the IPP agreements was in Freedom's name.  
22 Everything had to be switched over. The Government had  
23 to come out and switch IPP plans, everything. It was  
24 just a total mess. Everything was going wrong. We  
25 hadn't planned on doing any of this and it was just --

1 at that point, after you got Bankers to issue a  
2 commitment letter to Freedom?

3 A No. He still wouldn't. He wouldn't do it, no.  
4 Even though there was a commitment to Freedom for heavy  
5 financing, he still wouldn't release any progress  
6 payments.

7 Q Did Mr. Liebman insist on a novation before he  
8 would release progress payments?

9 A Yes. One of the conditions was, he wanted the  
10 contract novated.

11 Q Even though he was the one who was requiring  
12 the novation, did he require that Freedom actually  
13 request the novation?

14 A Yes. He said that I should write him a letter  
15 requesting the novation, which I did.

16 Q And when did Freedom submit the original  
17 novation package?

18 A I believe in March or, sometime in March.

19 Q Was that novation package approved right away?

20 A No.

21 Q What had to be done before it would be  
22 approved?

23 A They required H.T.'s lawyers, which at that  
24 point, I shifted, I think to Quinn Rocusin and Rodenberg  
25 -- made them H.T.'s lawyers. And I split up and made

1 costs rolling up while nothing -- it was spinning our  
2 wheels going nowhere.

3 Q What were the things that you had been planning  
4 on doing at this point, that you weren't able to do  
5 because you were not being paid and you were busy  
6 novating the contract?

7 A By March we should have had equipment in, the  
8 building should have been finished, we should have had  
9 the GFM marching in the door, the computers would have  
10 been installed, the quality control system, the lot  
11 tracking system, everything would have been on schedule.  
12 But nothing had even been -- everything's out of  
13 sequence. I've got a complete chaotic staff not knowing  
14 what to do or when to do it or who to do it with. I've  
15 got people that need computers to do the lot tracking.  
16 with no computers. I managed to get the computers in  
17 there.

18 Q Indeed when was the first delivery scheduled to  
19 be made under the contract?

20 A July.

21 Q What did Mr. Liebman say as to why he wanted  
22 the novation?

23 A He wanted to make sure that the creditors of  
24 Freedom could not attack the progress payments. And I  
25 told him, "Well they can't attack the progress payments.

1 I'm assigning it to Broadway Bank. Broadway Bank will  
 2 then make all the payments to everybody. So it will go  
 3 from you to the bank. The payments will be made. It's  
 4 an assignment. Nobody can walk in and grab this."  
 5 Q And once the assignment would be made to a  
 6 bank, what did you anticipate would happen to H.T. Foods?  
 7 A H.T. Foods would still play a role as far as  
 8 doing things for Freedom and there was no fee involved in  
 9 that by the way. H.T. Foods would still be acting  
 10 management, agent and then doing a lot of things to  
 11 assist Freedom.  
 12 Q And who would have first position at that  
 13 point?  
 14 A Broadway Bank.  
 15 Q Okay. When did Mr. Liebman finally sign the  
 16 novation agreement?  
 17 A After all these papers and lawyers and  
 18 everybody was squared away and he was happy with it and  
 19 he went and got it blessed by everybody including the  
 20 janitor, he then signed it. I think it was sometime in  
 21 April.  
 22 Q During this period of time, had you told Mr.  
 23 Liebman that his failure to pay you was interfering with  
 24 Freedom's ability to renovate the building and get it  
 25 ready to receive GFM and advise him of all these

1 Desmond and his boys was ready to roll.  
 2 Q And who's responsibility did you believe it was  
 3 that the building wasn't ready to go?  
 4 A It was the Government's. They caused the  
 5 problem. This was beyond the contractor's control as far  
 6 as I was concerned.  
 7 Q Nevertheless, do you remember a cure notice  
 8 being issued to Freedom on April 9, 1985?  
 9 A A cure notice was issued to Freedom Industries.  
 10 But once the novation came along, the cure notice I  
 11 thought was to Freedom. And since he novated it, I got a  
 12 clean bill and we should be going.  
 13 Q What was the cure notice for? What was the  
 14 Government asking you to cure? What was the problem?  
 15 A The Government was bent -- had a problem  
 16 because they couldn't stop that marching army. They had  
 17 a marching army out there. When I say a marching army  
 18 mean they had all the GFM suppliers was shipping produc  
 19 on schedule. And it was headed for the Bronx, except the  
 20 Bronx wasn't ready. That meant --  
 21 Q The Bronx, meaning Freedom's plant?  
 22 A Right. Our plant wasn't ready. That meant  
 23 Peggy Rowles and everybody at DPSC had to start divertin  
 24 GFM to other places and they're now all mad at me. And  
 25 I'm telling them, "It's not my fault. Tell Mr. Liebman

1 problems?  
 2 A We started -- I started telling everybody, the  
 3 PCO, Captain Parsons, I've been talking to the White  
 4 House and we're going to the Congress. We are doing  
 5 everything but nobody can interfere because it's a  
 6 contract.  
 7 Q I just want to know if you told Mr. Liebman?  
 8 A Oh yeah, of course, yes.  
 9 Q Now finally, April 17, 1985, Mr. Liebman has  
 10 said no progress payments until the novation agreement is  
 11 signed and you have financing in place.  
 12 A Right.  
 13 Q It's now April 17, the financing is in place,  
 14 the novation agreement is signed. At this point did Mr.  
 15 Liebman now pay you?  
 16 A No. We had the horses ready to come out the  
 17 gate. We was ready to roll. Everybody had been  
 18 reorganized. We had everything set again. We was ready  
 19 to go. All of a sudden Liebman didn't pay again. And  
 20 was like, "What's the problem now?"  
 21 Q Now the building wasn't ready at this point, to  
 22 receive GFM?  
 23 A No. But that's what I said. We had  
 24 restructured. We got from -- Gemini had walked away. We  
 25 had Sante Fe we brought in. Sante Fe Construction,

1 -- make him move."  
 2 Q And had Freedom received a penny in progress  
 3 payments?  
 4 A Not a dime -- not a dime. So the point is,  
 5 with this massive amount of movement, tractor trailers  
 6 rolling toward my plant, we had to go to Barkewitz and  
 7 Ms. Rowles, and say "Hey, you all have got to move. I  
 8 can't accept this stuff."  
 9 So that's the cure notice. The cure notice  
 10 came from DPSC as, "You're not ready and the contract  
 11 says you should be ready." And I came back at them tha  
 12 "I'm not ready because your man -- you didn't make Ma  
 13 Liebman move."  
 14 Q Okay. Now on April 18, the day after the  
 15 novation agreement, did H.T. Foods -- Now, the company  
 16 which the contract was novated, did H.T. Foods submit i  
 17 first progress payment request?  
 18 A We submitted a progress payment. We expected  
 19 to be paid in five to ten days and nothing happened.  
 20 Q At this point, and if you can refer to -- if  
 21 you don't know off the top of your head, if you refer to  
 22 FT-422, the progress payments exhibit. Perhaps the  
 23 easiest thing to do for our purposes now would be to  
 24 simply refer to the progress payment chart, which is the  
 25 first Tab behind FT-422.

1 A Right.  
2 Q And this chart summarizes all of the progress  
3 payments that Freedom and H.T. Foods submitted to the  
4 Government?  
5 A Freedom, yes. This chart is showing that from  
6 F-1 to F-4 --  
7 Q Those are the Freedom progress payment  
8 requests?  
9 A These are Freedom Industry's progress payments  
10 and its incurred costs. And up to that point of April  
11 16, Freedom Industries itself, had financed \$1.7 million  
12 -- that's Freedom Industries, okay?  
13 Q Okay. And then comes contract novation on  
14 April 17, and then the one following contract novation on  
15 the --  
16 A That's the contract. That's the first progress  
17 payment in H.T. Foods' name. And all H.T. Foods did was  
18 take the same financing, or the same documentation and  
19 create a cover sheet and give it to Liebman.  
20 Q And when was that, when was any portion of that  
21 progress payment finally paid?  
22 A He paid on 5/6/85 date of check. He paid \$1.7  
23 million and he shorted us \$66,000.  
24 Q Now in response to -- and we're going to talk  
25 about why he -- Well, do you know what he "shorted you

1 in time was --  
2 JUDGE JAMES: That the answer to my question.  
3 Go ahead, Mr. Luchansky.  
4 BY MR. LUCHANSKY: Thank you, your Honor.  
5 BY MR. LUCHANSKY:  
6 Q And simply to follow-up and confirm that the  
7 Board's question and Mr. Thomas' answer -- behind H.T. PP  
8 number one, which is at Bates stamp 03032, that's a copy  
9 of the actual progress payment request itself, which  
10 reflects --  
11 A Say that again.  
12 Q Behind the Tab that says H.T. PP number one --  
13 A Oh, I see it -- A?  
14 Q A, at Bates stamp number 03032, Mr. Thomas, can  
15 --  
16 A Yes, that's it.  
17 Q -- can you point out for the Board what the  
18 gross amount -- where the gross amount is recorded and  
19 where the 95 percent progress payment amount is recorded?  
20 A No. I don't think I can. No. This shows the  
21 95 percent.  
22 Q Okay. Mr. Thomas, now in response to the cure  
23 notice from Ms. Rowles, did you tell Ms. Rowles what was  
24 going on with respect to not being paid?  
25 A Yes, I certainly did. We was telling her

1 for?"  
2 A He shorted us the lot tracking equipment, the  
3 quality control testers, the computers. Everything that  
4 I needed he took from me. He says, "I'm not paying for  
5 that. Go get your own money and do it."  
6 Q Okay. We're going to talk about that in more  
7 detail in a moment. But now in response to Ms. Rowles'  
8 cure notice to you, of April 9, 1985, which for the  
9 record is the Government's Rule 4 file document, Tab 44.  
10 A Which one is that?  
11 JUDGE JAMES: Before you continue I just want  
12 to make sure the Board understands one thing. I'm still  
13 looking at this history chart, all right? I'm looking at  
14 the progress payment number one, under novation. The one  
15 that he just testified to for approximately \$1,700,00 and  
16 change. Do you see that Mr. Thomas?  
17 THE WITNESS: Yes.  
18 JUDGE JAMES: What I'm wondering is, is that  
19 \$1,700,000 number -- is that the gross amount of the  
20 progress payment, i.e., 100 percent of costs incurred at  
21 that time, or is it 95 percent or some other percent?  
22 What percent is it?  
23 THE WITNESS: This is 95 percent. I think we  
24 were at a million eight or something. This is 95  
25 percent of what we gave him. But Freedom at this point

1 exactly what was going on but she was getting a different  
2 story from Mr. Liebman. So the problem was that they  
3 were listening at officials, listening to Liebman, but  
4 not listening to the contractor.  
5 Q Did you ask her for an extension of the GFM  
6 delivery schedule?  
7 A I believe I did.  
8 Q Did she agree to give it to you?  
9 A No. Based on them believing that the cost --  
10 the problems was caused by me and not Mr. Liebman. Mr.  
11 Liebman was saying it was my obligation to go do these  
12 things. And I'm saying it's his obligation. And so  
13 they're listening to him. He was redefining the terms of  
14 the contract.  
15 Q Did DPSC demand that you pay to get a delivery  
16 schedule extension?  
17 A I believe we offered them something in order to  
18 keep the peace, and we told them that we reserve, you  
19 know, we will talk about this at a later date.  
20 Q Okay. Do you remember how much it was that you  
21 had to pay them?  
22 A I think I initially offered them a hund--  
23 Q I don't want to -- don't talk about a --  
24 A No. I don't recall.  
25 Q Do you recall that it was \$100,000?

1 A It possibly could have been.  
2 Q What would have happened if you didn't agree to  
3 pay the Government \$100,000 to get that delivery  
4 extension at that point?

5 A They wouldn't have accepted a deal. They  
6 wouldn't have went forward.

7 Q And what would have happened?

8 A I guess I was in default of that cure notice or  
9 the deal we was trying to hammer out.

10 Q Mr. Thomas, I want to talk to you now in a  
11 little bit more detail about the specific items you just  
12 discussed that you needed and were trying to get at this  
13 point, and had difficulty getting.

14 Let's talk about the computer equipment. Is  
15 there something you wanted to clarify, Mr. Thomas?

16 A Yes. You asked me about the gross amount on  
17 progress payment number one.

18 Q Okay.

19 A The gross amount is \$1,831,452. What you do --

20 JUDGE JAMES: How do you know that, Mr. Thomas?

21 THE WITNESS: You take the line 11, which is  
22 the total costs eligible for progress payments -- let's  
23 see I think that's the line, no -- yeah, that's the line  
24 -- it's \$1,290,573. Then you have to add the eligible  
25 subcontractor progress payments because that's a separate

1 item 6-A," which is your 95 percent progress payment  
2 rate, correct?

3 A That's line 6, little a.

4 Q Right.

5 A Yeah, I see rate, 6, right A, okay. Yes,  
6 that's how you do it.

7 Q And so that \$1,226,044 is the net --

8 A Right that's the net 95 percent. So you've got  
9 your gross in there.

10 Q Net progress payment amount for the H.T.  
11 Foods/Freedom cost incurred other than subcontractor  
12 costs?

13 A Right. Because subcontractors are getting at a  
14 separate rate than we do. So you have to separate the  
15 two when you give them the subcontractor.

16 Q So the company is reimbursed 100 percent for  
17 the subcontractor costs?

18 A That's right.

19 Q Mr. Thomas, what arrangements had you made to  
20 purchase computers for the company, the computers that  
21 you needed for the automated tracking system and the  
22 automated accounting system?

23 A We had cut a deal with AT&T itself. And AT&T  
24 had agreed to give me a deep discount on some computer  
25 and they were going to do the automated building

1 line, that's \$540,879.

2 So what you have to do is you take line 11 plus  
3 line -- this is so little -- line E, 14-E, I think it is,  
4 yeah, 14-E. You add those two together and you get the  
5 total amount, those two equal a million eight.

6 BY MR. LUCHANSKY:

7 Q I see -- actually, I'm not sure I follow it  
8 exactly. Is it that you take the number of total costs  
9 incurred to date on line 12, which is \$1,290,573.

10 A I think it's line 11. Oh yeah, okay. I see  
11 it, yeah right, line 12 right.

12 Q And then apply 95 percent to those costs  
13 because --

14 A Right. You apply 95 percent to those costs and  
15 we get that.

16 Q Because those are the costs that had been  
17 incurred by Freedom/H.T. Foods?

18 A Right. And then you take the 100 percent of  
19 the subcontractor --

20 Q And I'm sorry to interrupt. And that 95  
21 percent should work out to this figure on line 13, which  
22 is \$1,226,044?

23 A Yeah. You have to go to 6-A to see what that  
24 is.

25 Q Because line 13 says, "Item 11 multiplied by

1 management system as well. To include security, all  
2 kinds of things. It had a complete automatic system that  
3 we had told them that the magnitude of this program. An  
4 AT&T had said, "Okay, we're going to bring the resources  
5 our resources are going to come in here and do this as is  
6 this was an AT&T operation."

7 Q Okay. What was special about this computer  
8 system? Was this a network system?

9 A Yes.

10 Q Was that important to Freedom's operations?

11 A Yes. You had millions and millions -- you had  
12 millions of units of items that was coming into our  
13 plant. Also I'm building for DPSC and for DLA and for  
14 the IPP program. If we was to mobilize, I would have --  
15 and I believe it's almost like 400 and -- about 450  
16 itemsm lcts' say, went into one case. All right? And  
17 all these items according to the lot tracking system, has  
18 to be tracked. I have to know and be able to tell to  
19 DPSC or anybody, where sugar or if anything is  
20 contaminated or something has got a recall, I have to  
21 tell them, track that lot number from the manufacturer  
22 all the way to the case and where that case was shipped.

23 Q Is that tracking requirement required by  
24 government regulation?

25 A Yes, it is. It's part of the solicitation.

1 Q Okay. Go on.

2 A All right. So in the case of a recall of  
3 anything, we have to tell them -- be able to tell them,  
4 where this lot is in this.

5 In mobilization you have millions of units  
6 moving at such a fast pace that we would have to get out  
7 600,000 cases in a month. Now, if you multiply 600,000  
8 cases by say, 500 units in every case, you can imagine  
9 the magnitude of items that are coming at you. It's  
10 flying at you.

11 Q And the system that you had arranged to  
12 purchase from AT&T, was this system designed to  
13 accomplish everything?

14 A Absolutely. AT&T said to us, "We've got the  
15 solution to your problem. Here it is. We're going to  
16 install the AT&T computers, their network -- they talk to  
17 each other. They do this that and the other and the  
18 software."

19 So the first thing we was going to get in here  
20 was the hardware. And we was working with them and their  
21 engineers. My guys, like Bob Arrington and Howie Marx  
22 and them, was also whizz kids on these computers and  
23 networks to extract the data we needed out of the  
24 requirements of the mil standards of the specs for this  
25 and develop it.

1 Q So was some of the software that you would need  
2 to run this system, to be acquired from AT&T with the  
3 hardware?

4 A It was part of the automatic building  
5 management system.

6 Q Would that have been adequate stand-alone, the  
7 way purchased to be able to perform all of the tasks you  
8 described?

9 A Yes. Not by itself. We would have to modify  
10 it to fit these mil specs. I mean, to take these numbers  
11 and you know, plug it in so they're trackable.

12 Q So that's the question. After the system,  
13 hardware and software was to be delivered, how much time  
14 would Freedom need or H.T. Foods to work with the system  
15 in order to make the modifications and actually get the  
16 system up and ready and useful for Freedom's work?

17 A We believe that we needed at least three to  
18 four months. I believe that, that's why we brought on  
19 Howie Marx and we brought on Arrington and that whole  
20 team up front. And we scheduled them like that. The  
21 hardware was coming in. They was going to be over in the  
22 corner working on that with AT&T, dealing with  
23 Philadelphia and coordinating certain numbers and  
24 contract numbers into the system so that we can give them  
25 back where it is either in the truck out there or in the

1 warehouse where it is, or from the warehouse what stage  
2 of subassemblies is that, all the way around to final  
3 assembly and to incorporate it into the final lots and  
4 where we shipped it off to the Government.

5 Q Mr. Thomas, did AT&T actually deliver the  
6 system initially?

7 A Absolutely, delivered it. I accepted it and  
8 then told them --

9 Q Do you remember approximately when they  
10 delivered the system?

11 A I think it came in March of '85.

12 Q Was it ordered at that time in order to give  
13 you this lead time that you're talking about?

14 A Oh, yes.

15 Q What happened after the system was delivered?

16 A Jim McGowan called Marvin Liebman.

17 Q Who's Jim McGowan?

18 A He's one of the executives at AT&T.

19 Q Was he the person at AT&T from whom you bought  
20 the system?

21 A Yes, yes.

22 He was one of the executives that was lining up  
23 all of his engineers and all of AT&T's powerhouse of  
24 troops to come interface with us because I told him  
25 here's how it works. By telling him how it works is that

1 he is to deliver me the equipment. Once I've got the  
2 equipment in-house I post it on my books. I can then  
3 apply for the progress payment for it. Once I apply for  
4 the progress payment the Government will then be  
5 obligated to pay it.

6 Q Did the Government require you to have this  
7 stuff in-house before they would let you bill for it?

8 A Yeah, you had to receive it. If anything you  
9 had -- it couldn't be out there. You had to literally  
10 say, it's here and you've accepted it. It's in your  
11 house.

12 Q Okay.

13 A So now, that's an incurred cost. We put it on  
14 our books and records. Now that it's on my books and  
15 records I'm including it in the progress payment. "Jim  
16 you should expect your money in thirty days or whenever."

17 He calls downtown to Marvin Liebman to confirm  
18 my story but I already had the equipment. I mean, I've  
19 already got it and Liebman said, "No. I'm not paying for  
20 that." McGowan came right back and they repossessed it.  
21 They went right -- marched right in there unplugged that  
22 equipment, boxed it up, and his boys was walking out the  
23 door. And I called Mr. Liebman and said, "What are you  
24 doing? Why did you do that?"

25 Q Do you remember what his response was?



1 A "I'm not paying. Go get your own equipment.  
2 Go get your own money to finance that." And I said, "But  
3 we agreed with Philadelphia. This is part of the cash  
4 flows, Mr. Liebman."

5 Q Were you able to get this AT&T computer system  
6 back?

7 A No. I tried to. What I did was I quickly  
8 maneuvered and said, "Hold it Jim. Hold the horses."

9 I called up Warren Rozen and I said to Warren,  
10 "I need you to add to the equipment list. I need you to  
11 add this AT&T." And I called Jim McGowan and says,  
12 "McGowan, I'll tell you what you do. We're putting it on  
13 our other equipment production equipment. Write a letter  
14 to Performance Financial and Performance Financial will  
15 pay you for it." So he said, "Okay, fine."

16 So he sent a letter then to Performance  
17 Financial giving them the same 35 percent discount so  
18 it's a flow back to me. So I'm still getting it at a  
19 discount but now whatever Warren Rozen is going to charge  
20 me for doing this, instead of the Government doing it, is  
21 going to cost me more money.

22 Q So you arranged basically, to finance the same  
23 equipment but through Performance Financial?

24 A Right. Yes, I maneuvered quick on my feet.

25 Q And then what happened with that arrangement?

1 A We was going through with that and Warren Rozen  
2 said, "Okay, fine." Okay. I then got some of the AT&T  
3 equipment back, but not all of it, okay? Because Jim  
4 McGowan had not gotten paid yet. But due to the fact of  
5 Warren saying, "Yes, I will include it," he said "Okay,  
6 fine." And we picked up a couple of pieces of equipment  
7 at least for Bob and Howie to work. They didn't have the  
8 network. They didn't have the super staff of troops of  
9 engineers and all these guys that clearly understand the  
10 logistics of all this stuff coming at us. They didn't  
11 have that. But we did have something for them to work  
12 on.

13 All this other time, these guys are sitting in  
14 an office writing code, reading books, or doing something  
15 to make it happen but didn't have the hardware to  
16 actually work on it.

17 Q Okay. And what happened to the arrangements  
18 with Performance Financial?

19 A Ultimately?

20 Q Yes.

21 A The same thing happened. After progress  
22 payment three or four or somewhere around there, Marvin  
23 Liebman called up Bankers and said to them, "I don't  
24 trust Henry Thomas. If I was you, I wouldn't give him  
25 any more money. I'm going to offset costs here."

1 Now with that, Bankers called Performance  
2 Financial and Performance Financial pulled the string.

3 Q Now, Mr. Thomas, is this information in the  
4 record? How do you know --

5 A Yes.

6 Q How do you know this information?

7 A Randy Gross told me.

8 Q Okay. Did Mr. Rozen, who is the Head of  
9 Performance Financial, did he write to you with any  
10 concerns?

11 A Yes, he did too. Warren Rozen wrote us a  
12 letter after he pulled the string. See he didn't tell --  
13 once he got that he immediately, without even contacting  
14 me, called up Do-Boy, Koch, this one, that one, and says,  
15 "Freeze my purchase orders. Freeze, don't budge on  
16 them."

17 Now when he told them to freeze, they didn't  
18 freeze. What they said is, "Hey, we've got other  
19 customers that want this." They just shoved ours out of  
20 line. We're no longer in the six week or whatever  
21 sequence of getting ready to ship. Pack up and ship to  
22 Freedom. We have to now go to the foot of the line.  
23 They just kicked us right out of line. Our purchase  
24 orders got dismissed.

25 So Warren Rozen's actions or Marvin Liebman's

1 -- what happened -- pulled out -- I'm a mess in this  
2 industry.

3 Q I'm going to clarify for the Board in just a  
4 moment about these purchase orders for Do-Boy and Koc  
5 because we hadn't discussed it in this line of testimony.  
6 But just to finish the sequence, Performance Financial,  
7 their financing was primarily for purposes of financing  
8 that Do-Boy and Koch production equipment?

9 A Yes. Now -- yes, they were the ones. The  
10 second cut because the first people to finance it was Zeb  
11 Robbins.

12 Q Okay. Moving ahead --

13 A -- then Richard Penzer.

14 Q Okay. But fine. But by the time we got around  
15 to Performance Financial and you had made arrangements  
16 with them, that was back --

17 A Well, Liebman then interfered and told them a  
18 different story.

19 Q Okay. And we're going to cover the details in  
20 just a moment. But now proceeding from where we left  
21 off, Performance Financial wrote you a letter and told  
22 about their concerns about Marvin Liebman.

23 Was there then a meeting that took place at  
24 DCASMA about Performance Financial's concerns about  
25 Liebman's comments? When did that take place, if you

1 remember?

2 A Right. May or June. What we did was --

3 Q Okay. I'll direct you to Tab F-81, and ask you

4 --

5 A F-81?

6 Q Yes.

7 A Oh, oh, I see what you're saying.

8 JUDGE JAMES: This is a Wednesday, June 19,  
9 1985, conference. Is that what you're referring the  
10 witness to?

11 MR. LUCHANSKY: Yes, your Honor.

12 JUDGE JAMES: Okay. Go ahead.

13 BY MR. LUCHANSKY:

14 Q Mr. Thomas, to the best of your knowledge, is  
15 this an outline of a meeting that took place on June 19,  
16 at DCASMA to discuss these matters?

17 A Yes.

18 Q Did you appoint anyone on behalf of H.T. Foods  
19 to be present at this meeting?

20 A Yes. At this point, Pat Marra had --

21 Q Well, let's -- If you'll turn to page three and  
22 see the list of attendees, you see it reflects H.T. Food  
23 Products, Inc., Vince Ferrandino, executive  
24 Vice-President and Dante Albirri.

25 A Right.

1 Q Are those the people H.T. Foods sent to this  
2 meeting?

3 A Yes.

4 Q And as executive Vice-President, what was Mr.  
5 Ferrandino directly involved in these matters?

6 A Yes.

7 Q And who is Mr. Albirri?

8 A He was one of our local attorneys.

9 Q Okay. Your Honor, with my apologies may I  
10 request a very brief two-minute break? I know we're  
11 right in the middle of things but I think it would be of  
12 great assistance. Nobody even has to dismiss if they  
13 don't want.

14 JUDGE JAMES: All right. Let's go off the  
15 record momentarily.

16 (Recess.)

17 JUDGE JAMES: Back on the record. Go ahead,  
18 Mr. Luchansky.

19 BY MR. LUCHANSKY:

20 Q Okay. And Mr. Thomas, your representatives for  
21 H.T. Foods, did they report back to you about that  
22 meeting?

23 A Yes.

24 Q And did they report back to you that  
25 Performance Financial's concerns as we had discussed

1 before, were discussed at this meeting?

2 A Yes.

3 Q And were the people at the meeting, people from  
4 DCASMA, anyone who attended the meeting, were they able  
5 to satisfy Performance Financial, or convince them to  
6 stay, remain as a lender?

7 A Yes. There was a -- the meeting was -- my  
8 report that came back, is that Liebman had agreed to give  
9 them a list of routine costs that he would normally pay  
10 all the time. And that he would list it out in detail.

11 Q And did he do that?

12 A No.

13 Q And what affect did that have on Performance  
14 Financial?

15 A After the meeting he sent a letter to  
16 Ferrandino, directing Ferrandino to DAR-15 cost  
17 principles and telling Ferrandino that it's Marvin  
18 Liebman who has the discretion to make payments on the  
19 progress payments, it's at his discretion.

20 JUDGE JAMES: Who's Ferrandino?

21 THE WITNESS: Vincent was my executive  
22 Vice-President. He replaced Pat Marra.

23 MR. LUCHANSKY: He was the individual  
24 identified as attending the meeting on behalf of H.T.  
25 Foods in this exhibit we were referring to, which is

1 F-81.

2 BY MR. LUCHANSKY:

3 Q As a result of this Mr. Thomas, did H.T. Foods  
4 lose Performance Financial as a lender?

5 A Ultimately, yes. Yes, ultimately yes.

6 Q And was H.T. Foods ever -- and for the record  
7 I'm going to -- Did H.T. Foods eventually change its name  
8 to Freedom New York, Inc.?

9 A Yes.

10 Q So, I'm going to continue to refer to Freedom,  
11 if that's consistent with everybody's understanding as to  
12 whom I'm referring to.

13 Was Freedom ever able to get back a computer  
14 system either from AT&T or from anyone else that had all  
15 of the capability and all of the functions and the  
16 networking capacity that you had described that the  
17 original system had?

18 A No. Never got the tremendous corporate  
19 resources behind this effort again.

20 Q What impact did that have on Freedom?

21 A That's like the blind -- We were blind, let's  
22 say, and the impact was that we were like, out here on  
23 our own now trying to figure out how to do this when we  
24 had AT&T behind us who have millions of units of  
25 inventory all over the world and can tell us easily how

1 they do it and can track all their inventory. I'm on my  
2 own. I've got to figure out how to get this thing done  
3 now. It totally disrupted me.

4 Q Did it take longer for Freedom to put any kind  
5 of lot tracking system into place?

6 A Yes. We had no lot tracking system.

7 Q Did that Freedom's ability to develop its  
8 production capacity in a timely manner?

9 A Yes.

10 Q Did that affect your labor costs at all?

11 A Yes.

12 Q Did it require you to train and re-train  
13 employees with respect to these, the lot tracking  
14 matters?

15 A Yes. We were geared one way. Phil Lewis, one  
16 of my trainers let's say, or one of my other guys, had  
17 set his curriculum for training people based on a system  
18 being in place. When this system wasn't in place, all of  
19 a sudden everybody has got to now try to fly this thing  
20 by the seat of their pants. In other words, everybody's  
21 not in step like we should be. Everybody's out of step.

22 Q Okay. I want to go back and discuss briefly,  
23 the other production equipment that you had referred to,  
24 but we'd picked up kind of on the tail end when we lost  
25 the equipment.

1 A The tensile test that has to be done -- all  
2 this is such -- no other product that we know of in the  
3 world from your potato chips and all this here, needs  
4 this kind of rigidity. The Do-Boy machine is the only  
5 machine that really has the background has the capability  
6 to heat, cool, heat, cool as its moving. Everybody else  
7 heats because the speed is not necessary. You can heat  
8 it up and it can just lay there. Once it's sealed nobody  
9 tries to rip it apart.

10 Q And what is that component of the equipment  
11 that does the actual heating and cooling? Are those  
12 called  
13 band --

14 A It's part of this Do-Boy continuous band  
15 sealer. It's something that's special, unique, that's  
16 built for this MRE program.

17 Q Okay. And what problems had contractors had  
18 with the alternative equipment? The alternative  
19 equipment only had the heating capability?

20 A Yeah. Basically heating and pressure. No real  
21 cooling and it just didn't heat hot enough fast enough.  
22 The recovery rate wouldn't work.

23 Q And what kind of problems did contractors have  
24 with the alternative equipment on the market? Would the  
25 bags open up?

1 I want to go back to the Do-Boy equipment and  
2 the Koch equipment. I believe in previous testimony  
3 yesterday you also referred to International Paper  
4 equipment. Today you referred to S & B Conveyors  
5 equipment.

6 A Right.

7 Q I believe you testified yesterday that the  
8 Do-Boy equipment and the Koch equipment were multi-band,  
9 I'm sorry, they were sealers, correct?

10 A Right. High tech. Yeah, these are high tech  
11 sealers, yeah.

12 Q Okay. And what was special about them? Did  
13 they require less labor to operate?

14 A Yes, absolutely.

15 Q Were they more reliable than the alternatives  
16 available on the market?

17 A Yes. You've got to understand. The MRE is a  
18 very unique product. Nobody has to have anything that  
19 they have, sealed in a bag like that. That pouch bag is  
20 so thick that you can drop it out of a helicopter and  
21 that bag will not break open.

22 Q Is that what Mr. Koeber was referring to as  
23 being air dropable?

24 A Yes, it is, yes.

25 Q Okay. Go ahead.

1 A Yeah, absolutely. They'd pop open, yeah. They  
2 wouldn't seal properly.

3 Q Now, in addition to reliability, were these  
4 Koch and Do-Boy, and in addition to the fact they  
5 required less labor, were they also faster than the  
6 alternatives?

7 A Absolutely. The speed of the Do-Boy was  
8 running at maybe 425 inches a minute. And the struggle  
9 buggy equipment that I ultimately had to get as a result  
10 of missing my place in line for the Do-Boys, we had to  
11 get some 552s. Their speed was maximum, two hundred  
12 inches a minute. So my whole production is cut way bac  
13 My whole capability is cut way back.

14 Q The International Paper -- Well, let's talk  
15 about the International Paper equipment.

16 A Right.

17 Q What was that equipment for?

18 A International Paper makes the V-2 box, okay?  
19 So does Crown-Zellerbach --

20 Q What is a V-2 box?

21 A That's this case right here.

22 Q Is there anything special about that MRE box?

23 A I don't think -- I don't know anything that's  
24 packaged in anything that tough. I mean, you know, as  
25 far as in food products. That V-2 box is very tough.

1 It's hard to open. It's very stiff and that V-2 box is  
2 made by International Paper. So they've got machines to  
3 actually cut it, make it, form it, flatten it out, and do  
4 everything. So they also have the machineries to pop it  
5 open, form it, seal it, glue it, close it and do  
6 everything else. We lost the International Paper  
7 machinery that we had ordered for this contract.  
8 Q And in addition to the forming of the box and  
9 the sealing of the box, which is what the International  
10 Paper equipment you had ordered was supposed to do, was  
11 there also a machine that was to put the band around it?  
12 When we show the MRE there was a slip case over it.  
13 A Yeah, the sleeve.  
14 Q The sleeve?  
15 A Yeah, yeah. It would have been an automatic  
16 sleever.  
17 Q That's called an automatic sleever?  
18 A Yes, sleever, right.  
19 Q And was that International Paper automatic  
20 sleever --  
21 JUDGE JAMES: Are you catching his voice over  
22 there? All right.  
23 MR. LUCHANSKY: I had forgotten, I'm sorry.  
24 I'll return to the table.  
25 BY MR. LUCHANSKY:

1 Q And was that International Paper sleever  
2 designed specifically to be able to handle something of  
3 this thickness and strength?  
4 A Yes, it was.  
5 Q Now, what did you have to get -- and you said  
6 you lost the equipment and we were about to step through  
7 when and how and why -- but just to complete the thought.  
8 You said for the sealing machines you had to get some  
9 552s/  
10 A Yeah, 552s.  
11 Q What you called struggle buggy equipment?  
12 A That's right, struggle buggy.  
13 Q Who made those 552s?  
14 A Packaging Aids, I think it was. Packaging  
15 Aids, I think made those.  
16 Q Were you able to get all of the sealing  
17 equipment that you needed from one company?  
18 A No.  
19 Q What other company did you have to buy some  
20 from?  
21 A We got caught outside the production loop of  
22 Koch. We couldn't go back to Koch. I didn't want to  
23 trust Terimat. We couldn't confirm anything so I ended  
24 up buying used equipment. Getting used equipment from  
25 Flex-vac 69s and I got some snorkel-vac machines that are

1 used in food packaging, but they're not used in military,  
2 heavy military, heavy-duty packaging like I needed the  
3 Koch and I needed the Do-Boys for.

4 Q Was the fact that the equipment -- Actually,  
5 that equipment that you got used, was that actually  
6 manufactured privately?

7 A It was manufactured -- I'm not sure how that --  
8 it was manufactured by Flex-vac, I believe.

9 Q Did the fact that you got that equipment from  
10 two different sources cause any additional problems in  
11 terms of their ability to work together?

12 A It was a mis-match. In other words, I've got  
13 people now that I've got to train to use this thing, and  
14 then I've got the same end items that have got to be used  
15 and done in a different way. So I've got snorkel-vacs  
16 over here and flex-vacs over there. So your whole -- the  
17 training of your people and your timing of your drops,  
18 are all different.

19 Q And did that equipment only have that heat  
20 capability, the heat-sealing capability, and not the  
21 cooling capability?

22 A No, that's the 552s. This ability here is the  
23 amount of time they use to pull a vacuum on the crackers,  
24 okay? That's the flex-vac and the snorkel-vac. What  
25 they're doing is evacuating the air. So when you are

1 using this equipment, the equipment if it's not timed  
2 properly, then you slow down. If it takes longer to pull  
3 a vacuum then you're losing time on every stroke it pulls  
4 a vacuum.

5 Q Okay. Let me just make sure that we're clear.  
6 Initially we were talking about the Koch and Do-Boy, are  
7 these called multi-band sealers?

8 A Yeah, the Koch, okay.

9 Q Is that what they're called, multi-band  
10 sealers?

11 A The Do-Boy is a multi-band sealer.

12 Q Okay. When you lost the multi-band sealers --  
13 that was for purposes of sealing the meal pouch itself?

14 A Right. Right, the bag itself.

15 Q And you talked about replacing that with 552s?

16 A Yes, 552s, right.

17 Q Now when we're talking about the equipment you  
18 were just describing, you're talking about equipment that  
19 was used to seal the cracker assembly?

20 A Crackers, and that's the Koch multi-vacs, okay?  
21 The Koch. The Koch machines that we were going to use  
22 was a horizontal form-filled seal which pulls a pocket --  
23 you place it in and it seals it quickly, very rapidly.  
24 It moves out right sporty. The old machines that I  
25 ultimately -- when I lost that high tech equipment what I

1 had to do was then go to a pre-formed bag operation where  
2 the bag is pre-formed, it has to be manually filled, it  
3 has to then be moved again, inserted, a vacuum has to be  
4 pulled, and while it's taking time to pull the vacuum, it  
5 is then heated and sealed.

6 Q How much slower is that than the Koch  
7 multi-vac?

8 A I'd say maybe it's two-thirds slower. Yeah.  
9 We lost a lot of speed by using that stuff.

10 Q And what about the equipment you had planned to  
11 use for the accessory pouch?

12 A We was going to use the Koch for that as well.

13 Q Okay. And what did you have to use instead for  
14 the assembly pouch?

15 A That got worse. We ended up using round  
16 tables, lazy Susans.

17 Q Tell me first, how the Koch machine was going  
18 to fill the assembly pouch.

19 A Okay.

20 Q How was that going to work?

21 A The Koch machines we was going to operate  
22 similar to the way you mass produce --

23 Q I'm sorry. If I said assembly pouch, I meant  
24 accessory pouch. And the accessory pouch has the toilet  
25 paper and the --

1 Susan.

2 Q When you say a lazy Susan, do you actually mean  
3 at a table, a round platform that spins around?

4 A Right. It's moving very slowly around. It's  
5 called a lazy Susan. If you move it too fast, everything  
6 will shoot off the table. So you've got to slow it down  
7 and this way we can see whether or not all the components  
8 are now sub-assembled and unitized as a unit, and then we  
9 shove it into the bag.

10 This is something that I had not even planned  
11 on. I didn't want to do it. But this is as a result of  
12 Liebman chasing away my finance people, and chasing away  
13 the equipment people, and knocking me out of my scheduled  
14 time.

15 People that's going to give us this equipment  
16 tell you they need two to three months lead time so that  
17 they can put you in the production line-up.

18 Q With this lazy Susan arrangement, once each  
19 pocket is filled, then what has to be done in order to  
20 get that into the accessory pouch?

21 A Then it has to be all, as a unit, moved into  
22 the accessory pouch and the accessory pouch sealed. This  
23 was a totally manual system now.

24 Q Meaning that required additional labor?

25 A We must have -- instead of having, let's say,

1 A The matches, the chewing gum and everything.  
2 And what that does, it also pulls a pocket. I had  
3 ordered, as you see if you want to look at the Koch  
4 machines, I had ordered a double extra wide lift so that  
5 I could pull up, for mobilization purposes, more people.  
6 But the lift -- the space that we would have normally  
7 used might have been ten feet. I wanted it 22 feet  
8 between, end-to-end. So, therefore, I could get more  
9 troops and more product to the line as it's moving, a lot  
10 faster before it's closed.

11 That was something that's an open pocket. It  
12 pulls a chamber in it and then all that you do is pop  
13 each accessory in it and you can see it as it's moving,  
14 if the accessory is missing. You can see before it's  
15 closed, whether or not it has all the components.

16 Q Is that like an assembly line conveyor belt?

17 A Yes, completely. Quick, quick, fast, right  
18 moving. What we ultimately ended up getting was a  
19 pre-formed bag. If somebody put a item in it, or didn't  
20 put an item in it, the next person would not know because  
21 they can't stop and look down to see if it's there. So  
22 by the time it got down there, if some item was missing  
23 we wouldn't know that it's missing. That became a  
24 problem.

25 So what we had to do was create this lazy

1 ten people, we must have needed 85 people, okay?

2 Q To do the same amount of production? The same  
3 amount of production that --

4 A To do less production. Let me say it like that  
5 -- not the same amount. The amount of production we  
6 could have done with those Koch machines by just hitting  
7 a button and bringing on more people, if you follow me,  
8 would have been just a matter of doubling the speed and  
9 just bringing on more suppliers of the line. I could  
10 have just booted up production real quick, just turning  
11 up the knob, turning up the tempo.

12 Q Instead of the International Paper machines  
13 that you've referred to, both the boxer and the  
14 boxer-sealer and the sleever, what kind of equipment did  
15 you have to get when you lost the International Paper  
16 machines?

17 A We went out and got MarQ equipment. We did a  
18 quick industry study to find out who had some equipment.  
19 And they had some equipment that they modified for us,  
20 was going to modify to handle this International, handle  
21 the V-2 box, which they did. But their equipment was not  
22 specifically designed for this.

23 Q For this meaning, what?

24 A For that stiff box.

25 Q Okay. What was that equipment designed to

1 handle?

2 A Theirs? Basically corrugated. Corrugated is  
3 easy. It's softer and you know, you can handle it and  
4 what have you. So they was going to reinforce certain  
5 things that would flex as its trying to and they did  
6 reinforce. But it didn't work that well.

7 Q What happened as a result of using equipment  
8 that was designed to handle only corrugated materials  
9 when you tried to use it on something as thick as the MRE  
10 cases and sleeves?

11 A We found out later on that it wouldn't move as  
12 fast. It was much slower. It it flexed, let's say,  
13 after awhile. It heated up and flexed and it started  
14 mis-forming the boxes. MarQ sent their repair man. He  
15 tells us we just can't move as we want to. Give the  
16 machine a chance. And we're trying to -- we need to  
17 move.

18 Q What happened as a result of the boxes being  
19 not perfectly formed?

20 A If the box is not perfectly formed, then the  
21 sleeve won't go on after it's sealed at the other end.  
22 So you have sleeving problems.

23 Q And is that what happened as a result of using  
24 the MarQ equipment?

25 A Yes. That's exactly what happened.

1 Q It sounds like you had to call MarQ or needed  
2 to call MarQ pretty regularly to come out and repair its  
3 machines?

4 A Right. We had to call them because of the  
5 machine would get out of adjustment because of the mere  
6 strength of the boxes and its fighting with it.

7 Q Were there times during that period when you  
8 needed to call MarQ to come out and repair that they  
9 wouldn't come out and repair because you weren't being  
10 given the money from the Government on progress payments  
11 to allow you to pay for the service calls?

12 A Well, not only the service but the spare parts.  
13 We was supposed to have spare parts, maintenance parts  
14 and things like that and by the cash flow being impacted  
15 by no money coming from Liebman and no confirmation of  
16 money, impacted on our management's ability to keep  
17 enough spare parts. We had to divert dollars to other  
18 things like keeping the lights on.

19 Q How early had you initially put in your  
20 purchase orders for the Koch and Do-Boy equipment, well,  
21 for all of this equipment in order to make sure that you  
22 had it in time to perform the MRE-5 contract?

23 A We cut all these purchase orders in January of  
24 '85. So within a month or say within forty-five days  
25 let's say, of contract award, I had ordered the Do-Boys,

1 I had ordered the Koch machines, we had -- everything was  
2 rolling. Everything that we had planned and told  
3 Philadelphia we were going to do, we had it moving.  
4 Everybody was marching.

5 Q Through whom did you then arrange the  
6 financing? Once you had placed those purchase orders,  
7 did that have the effect of holding that equipment for  
8 you so that it would be available?

9 A The moment I shook hands on a deal I obligated  
10 them and I obligated myself.

11 Q And did these companies tell you that as a  
12 result of placing that purchase order, that they would  
13 have those machines available for delivery when you  
14 needed them?

15 A Yes. Within, some of them a few months. Some  
16 of them six weeks or whatever it was when they were  
17 supposed to, but we had to get in line to be the next  
18 person at that time, to receive it.

19 Q In other words, because the high tech,  
20 state-of-the-art nature of these, they weren't fungible,  
21 they weren't just sitting on the shelf?

22 A Right. This is not shelf -- right. This is  
23 not something you're going to just pull off the shelf  
24 right away. They've got to be put in their production  
25 sequence for you.

1 Q And they required, as you said, anywhere  
2 between six weeks and four months, depending on which  
3 equipment?

4 A Right. Depending on what it was, yeah. They  
5 would then tell you their timing and their backlog. They  
6 had their own backlog of production.

7 Q Did you then arrange for financing for all of  
8 this equipment, the Koch, the Do-Boy, the International  
9 Paper machines, and the -- I know I'm missing something,  
10 I'll think of it -- all of the equipment that you'd  
11 planned on using.

12 A All the production equipment.

13 Q All the equipment you've just described that  
14 you were planning on using, did you arrange for financing  
15 for that through Performance Financial?

16 A Well, before that I had arranged for financing  
17 with Robbins in California. Then I had Penzer in New  
18 York here, was ready. And then I had -- what's that bank  
19 out there -- I had another supplier. Then the -- at last  
20 Performance Financial.

21 Q But after February of 1985, Performance  
22 Financial actually stepped in and started to arrange to  
23 take over the financing for this equipment?

24 A Right. Performance Financial had done this  
25 before with government contracts, so had Bankers. They

1 didn't need to go to Liebman to get a no. So they jumped  
2 in here because of the contract. They could read, they  
3 understood what the terms were and they moved, outright  
4 sporty.

5 Q And they arranged for that financing?

6 A Yes. They arranged for it. Yeah, they did it.  
7 They financed it, or at least they attempted to, was  
8 getting ready to.

9 Q And then you described before, about the  
10 problems that Warren Rozen and Performance Financial had  
11 with Mr. Liebman, in terms of the representations Mr.  
12 Liebman made about Freedom, and then an agreement to pay  
13 routine costs and reneging on that agreement. And you  
14 said that Performance Financial pulled out because of  
15 that. Was this equipment that we just discussed  
16 affected?

17 A We lost it. It was totally affected. Once  
18 Performance pulled the plug the last time, we lost all  
19 credibility in the industry. I couldn't go back to Koch.  
20 Bob Ruff from Do-Boy says, "Henry, I don't know what the  
21 heck is going on over there. You've got a problem --  
22 something's -- I'm out of here," you know.

23 I couldn't -- he can't get me back into the  
24 front of the line to meet my new delivery schedule that  
25 I'm going to have to now negotiate with the DPSC. So I

1 Q That was the category of items that everyone  
2 was referring to as capital type equipment or that Mr.  
3 Liebman was referring to --

4 A Yeah, he was classifying it as something that  
5 we, at the negotiation with Philadelphia, had classified  
6 it as equipment necessary for this contract.

7 Q Now these are costs that you had agreed with  
8 DPSC would be expensed to this contract, correct?

9 A Absolutely.

10 Q Why did Mr. Liebman say that he wasn't going to  
11 pay you on those costs?

12 A Mr. Liebman said progress payments were at his  
13 discretion. Now that was a big problem for Warren Rozen  
14 --

15 Q Okay. Did you have something new to add to our  
16 discussion about Mr. Liebman's actions on how it impacted  
17 Mr. Rozen?

18 A Well, yeah. Because Warren, would tell them,  
19 "I want it in writing from him that it's at his  
20 discretion." All right? So he ultimately put a letter  
21 -- and I told Vincent Ferrandino, "Get a letter from him  
22 that says that," all right? So somewhere in these files  
23 you're going to see a letter written directly to  
24 Ferrandino from Liebman saying progress payments are at  
25 his discretion, subject to pre-payments audits or

1 can't meet -- they cannot meet that schedule. So there's  
2 no use in me even going back. I have to now get  
3 something else to try and meet that schedule.

4 Q Let's move on to a different topic if we could,  
5 Mr. Thomas.

6 Going back to May 6, 1985, when Mr. Liebman  
7 finally released the first dollars in progress payments.  
8 You said that Mr. Liebman did not pay the entire amount.

9 A No.

10 Q He paid approximately 1.7 million of the  
11 request, correct?

12 A Right, correct.

13 Q And now I'm referring back to the progress  
14 payment chart just for simplicity sake. And he did not  
15 pay \$66,193?

16 A Right.

17 Q And you said that that amount was the costs  
18 incurred by Freedom for purchasing the capital type  
19 equipment. Things like -- and I don't know specifically  
20 what was incurred in this particular payment but  
21 equipment like quality control equipment and supplies,  
22 maintenance equipment, building repair, automated  
23 building management and control systems, lockers, and  
24 office equipment. Is that right?

25 A That's right.

1 something. But what he told them in the meeting, to  
2 Warren Rozen and Col. Francois and them, is progress  
3 payments are at my discretion. So he's going to check  
4 everything before he let a progress payment go out the  
5 door. So we found that to be a problem.

6 Q Let's move on.

7 A All right.

8 JUDGE JAMES: But before we do I want to ask  
9 this one question.

10 MR. LUCHANSKY: Sure.

11 JUDGE JAMES: In this progress payment number  
12 one where roughly \$65-66,000 didn't get paid.

13 THE WITNESS: Right.

14 JUDGE JAMES: Is there something in the  
15 paperwork there that explains why the Government didn't  
16 pay that money?

17 THE WITNESS: We didn't know at first, no.

18 JUDGE JAMES: There's nothing in the paperwork?

19 MR. LUCHANSKY: That explains why it wasn't  
20 paid?

21 JUDGE JAMES: You've been asking him questions.  
22 I want to see if there's anything in the paperwork that  
23 says, "We've deleted the \$65,000 because of this, this,  
24 this or this? And the answer he's given me is, "No,  
25 there's nothing in the paperwork."

1 THE WITNESS: Yes. It is now, sir.  
 2 JUDGE JAMES: Where is it?  
 3 THE WITNESS: Okay. Ultimately --  
 4 JUDGE JAMES: Do know. I just want a number.  
 5 Where am I looking, Mr. Thomas?  
 6 THE WITNESS: Is it the document that --  
 7 MR. STEIGER: We will be covering that in a few  
 8 minutes your Honor, in the questioning.  
 9 JUDGE JAMES: All right. Go ahead.  
 10 MR. LUCHANSKY: Thank you, your Honor.  
 11 BY MR. LUCHANSKY:  
 12 Q Now, you told Mr. Liebman that these costs had  
 13 been negotiated to be expensed at the time of contract  
 14 negotiation, didn't you?  
 15 A Right. We told him they were part of the  
 16 spreadsheets. These are the computers that's in this  
 17 spreadsheet. These are the computers that's the 80,000  
 18 that's making up part of the \$1.8 million. That's making  
 19 up that number. These are the details. This is what I'm  
 20 supposed to incur as direct costs.  
 21 Q Now, again, these spreadsheets are the  
 22 spreadsheets for the November 6, 1984 memorandum of  
 23 understanding?  
 24 A Negotiation, right. This is the cost buildup.  
 25 Q And did Mr. Liebman have those spreadsheets at

1 to DPSC to explain to Mr. Liebman. Ask Ms. Rowles. I  
 2 sent her a letter, I sent her a mailgram. I called here  
 3 on the phone. I got Keith Ford on the phone and she  
 4 says, "Okay, Henry, I got a battery of your letters --"  
 5 Q Okay. When did you contact -- first of all,  
 6 Rowles is R-o-w-l-e-s?  
 7 A I believe so.  
 8 Q Okay. And who is Ms. Rowles, at this point?  
 9 A She's the contracting officer.  
 10 Q Mr. Barkewitz previously was the contracting  
 11 officer?  
 12 A Yes.  
 13 Q He had left at this point?  
 14 A He moved up to another department, yes.  
 15 Q He had left at this point?  
 16 A Yes.  
 17 Q Ms. Rowles, what was her position before Mr.  
 18 Barkewitz left, if you know?  
 19 A She was the chief of contracting, I believe.  
 20 Chief of that division or something or -- hold on a  
 21 second. Chief rations provision or something. She was  
 22 over him.  
 23 Q Now as of June of 1985, when these events are  
 24 occurring, was Ms. Rowles filling in temporarily for Mr.  
 25 Barkewitz?

1 the time of the negotiations?  
 2 A Yes.  
 3 Q And did you provide -- Did you, Freedom,  
 4 provide him with another set of those spreadsheets just  
 5 before the post-award meeting in December of 1984?  
 6 A Yes.  
 7 Q And did you specify to Mr. Liebman, at that  
 8 time, encourage him to have both Freedom and Mr. Liebman  
 9 proceed pursuant to the expectations set forth in those  
 10 cash flows?  
 11 A Absolutely. We certainly did.  
 12 Q So now, moving forward to June of 1985, when  
 13 you're again telling him, "Look those costs are broken  
 14 out in the cash flows." Are these specific categories  
 15 and the specific expenses adding up to \$522,218 broken  
 16 out in those cash flows?  
 17 A Yes, they are.  
 18 Q At that point, did he agree to pay progress  
 19 payments on those costs?  
 20 A No.  
 21 Q What did you do? Did you contact DPSC?  
 22 A Oh, yes. What I did was when we finally  
 23 flushed out what his problem was that he had taken  
 24 \$66,000 out of progress payment one -- something else out  
 25 of another progress payment. I wrote a series of letters

1 A Yes. She was the contracting officer.  
 2 Q She was serving as contracting officer until a  
 3 new contracting officer was assigned?  
 4 A Right.  
 5 Q And she is the person you contacted to tell her  
 6 that Mr. Liebman wasn't paying progress payments on costs  
 7 that had been agreed to be expensed?  
 8 A No. I called Captain Parsons. And he's the  
 9 one that got Peggy Rowles, she's the contracting officer.  
 10 And he said, "She'll fix it. She'll get them straight."  
 11 Q And did Ms. Rowles contact Mr. Liebman about  
 12 this issue?  
 13 A Yes. She called him on the phone and she also  
 14 wrote him letters explaining to him that the negotiation  
 15 included as direct costs and DPSC had allowed as direct  
 16 costs and did not insist upon depreciation on these  
 17 costs.  
 18 So therefore, the contracting officer, knowing  
 19 the industry, understanding this type of equipment,  
 20 understanding that this is for this contract, like  
 21 specialized equipment only for this type contract,  
 22 allowed it as 100 percent cost without insisting on  
 23 depreciation.  
 24 JUDGE JAMES: How do you know that?  
 25 MR. LUCHANSKY: I was just going to ask --



1 BY MR. LUCHANSKY:

2 Q Mr. Thomas, I'm sorry, Mr. Thomas, did Ms.  
3 Rowles provide you with a copy of the letter she sent to  
4 Mr. Liebman?

5 A Yes. She gave me a letter -- she gave me a  
6 copy of the letter to shut me up. I mean, I was going  
7 through the roof on this one.

8 So, the letter that -- she sent me back a  
9 letter saying, "Mr. Thomas, we have recently, based on  
10 your calls to me, gone back," you know, her and Keith  
11 Ford, "and told Marvin Liebman what time it was," let's  
12 say, "and provided him with a telegram explaining that  
13 these payments were negotiated by the PCO."

14 Q Mr. Thomas, I'll ask you to take a look at the  
15 F series, beginning with F-74.

16 Is F-74 one of the letters that you wrote to  
17 Ms. Rowles about this issue?

18 A Yes, it is.

19 Q Is F-75 another letter that you wrote to Ms.  
20 Rowles about this issue?

21 A Yes, another one I sent.

22 Q Is F-77 a Telex dated June 5, 1985, from Ms.  
23 Rowles to Marvin Liebman, the letter or communication you  
24 were referring to?

25 A Yes. This is it. But she also sent me a

1 October, which was the DD-633 with all the supporting  
2 data, which included the spreadsheets, these items were  
3 -- and she broke them out.

4 Q Okay. And I don't want you to read from the  
5 document, sir.

6 A Okay. I just said she broke them out.

7 Q Is F-78 a letter that you received from Ms.  
8 Rowles about this issue?

9 A Yes. Because we was talking about direct costs  
10 for progress payments.

11 Q And in this letter does she refer to the costs  
12 that are at issue, as being costs costs you were  
13 inquiring about for progress payment purposes?

14 A Yes. In other words, she's saying that the  
15 issue of me purchasing certain equipment as direct costs  
16 for progress payment purposes, and that's what it was  
17 for, and she's advising me that she has now fixed it,  
18 like Captain Parsons said she would, that for me  
19 purchasing direct cost equipment as direct costs, it  
20 says, for progress payment purposes. And she's provided  
21 Liebman with --

22 Q What was your understanding as to what she told  
23 Mr. Liebman?

24 A She said to date she's mailed a telegram to Mr.  
25 Liebman --

1 letter which is at F-78.

2 Q Okay. Well, first I'm just asking you, is F-77  
3 the letter that she sent to --

4 A This is here communication to Marvin Liebman.

5 Q And this is the one where she tells Mr. Liebman  
6 that these costs were negotiated as direct to the  
7 contract, correct?

8 A Yes.

9 Q And she informed him that DCAA didn't take  
10 exception to these costs being expensed?

11 A Yes. We identified the ones that I had  
12 concerns about.

13 Q Okay. And they're right there in the letter.  
14 Did you receive a copy of that letter, F-77?

15 A Yes, I did.

16 Q From Ms. Rowles?

17 A No.

18 Q Where did you get a copy of that letter?

19 A DCASMA, New York.

20 Q The items that Ms. Rowles talked about in her  
21 letter to Mr. Liebman, are those the costs that had been  
22 negotiated to be paid through progress payments in your  
23 negotiations with the Government?

24 A Yes. What she did in this letter says that as  
25 a result of the negotiations, based on our offer of 16

1 Q I don't want you to read the document, sir.

2 A I'm sorry. What did you say again?

3 Q I just wanted to know what your understanding  
4 was conceptually, as to what she was telling Mr. Liebman.

5 A She went back to the contract file. She and  
6 Keith Ford pulled out the documents contained in the  
7 contract file, extracted these items and said to Mr.  
8 Liebman, "These were negotiated by the PCO as direct  
9 costs for this contract for progress payment purposes and  
10 Henry Thomas is to be paid."

11 Q Okay. Did Mr. Liebman then pay progress  
12 payments on these costs?

13 A No. Mr. Liebman says he doesn't -- he told me  
14 he didn't care what DPSC says. They screwed up the  
15 contract and he's not doing it.

16 Q What's the next thing that you became aware of?  
17 Did you continue to submit progress payment requests for  
18 these costs included in the \$522,000 worth of costs?

19 A I continued to do this and when he rejected us  
20 again, we hit the ceiling again, and we called for a big  
21 meeting with everybody. Because everything is in total  
22 disarray. I can't schedule anything. I can't schedule  
23 people. I don't know what to -- I've got product coming  
24 in the door that I've got to do a quality control test on  
25 millions of units here. Here's a sampling of this stuff

1 and I don't even have a tensile tester in-house.

2 Q And let me ask you about that. A tensile  
3 tester is quality control equipment?

4 A Yes. It's part of my receipt inspection. As  
5 the product is coming in the door, we're supposed to do  
6 certain weights, weighting, weighers, check weighers to  
7 weigh a batch to say okay, it's represented a sample of  
8 this.

9 If this box weighs this amount, then the rest  
10 of it weighs that amount. Everything was -- all my  
11 automatic check weighing equipment -- nothing was coming  
12 in-house now.

13 Q So was Freedom able to get quality control  
14 equipment timely, as it had anticipated?

15 A No.

16 Q What about maintenance equipment?

17 A Nothing. Everything I tried to do, I was out  
18 of step, out of sequence. The marching army was moving  
19 in front of me. I had halted certain things. Everything  
20 was just a mess.

21 Q Building repair?

22 A Again, everything was behind schedule.

23 Q Automated building management and control  
24 system?

25 A Non-existent at this point.

1 Q What is that automated building management and  
2 control system?

3 A It's a lot things. It's a whole system for  
4 security, tracking, lot tracking, everything. It's what  
5 AT&T said, "We could fix you, Thomas," to -- you won't  
6 have, you know -- "for your mobilization purposes."

7 Q Did that cost Freedom any additional money?

8 A It cost -- not having the system jeopardized  
9 our entire contract. If we mobilized, I couldn't figure  
10 out manually where chewing gum that's contaminated went  
11 in what box and where it went. I couldn't figure nothing  
12 out anymore.

13 Q Mr. Thomas, please, listen carefully to my  
14 question. Did Freedom incur additional costs as a result  
15 of not being paid for these items as it had anticipated?

16 A Yes, absolutely.

17 Q Did it delay Freedom's ability to obtain these  
18 items that were listed?

19 A Yes.

20 Q Did Mr. Liebman tell you how these amounts, the  
21 \$522,000 worth of items, cost items, were to be paid if  
22 they weren't going to be paid under progress payments?

23 A Yes. He said, "You go out and get your own  
24 money. DPSC screwed up this contract. You  
25 out-negotiated the Government. I'm taking this to my

1 legal department. They're wrong." That's what he told  
2 me. He says, "I'm taking it to my legal department. I  
3 don't care what the PCO is saying. He's wrong. He don't  
4 know what he's doing."

5 Q Did he explain to you how Freedom would be paid  
6 for these costs if at all?

7 A We're not going to be paid. He says, "You go  
8 get your own money to do this. The Government is not in  
9 the business of putting anybody in business. Go get your  
10 own equipment."

11 Q You testified that Freedom incurred additional  
12 costs as a result of this problem. What were the types  
13 of additional costs that Freedom had to incur, do you  
14 know? And if you don't know, do you know where that  
15 information would be collected?

16 A Yeah. The kind of costs that we say is in one  
17 of our claims, early claims there that we gave them. We  
18 spelled it out in detail to Mr. Bankoff, I believe it  
19 was, exactly what went on. We told him in that claim of  
20 March of April of '86 -- I think it was when we gave him  
21 the claim -- when we told him this thing had cost us  
22 about 3.5 million to \$4 million or it was really 5.7 but  
23 whatever.

24 Q So although you don't know what those costs are  
25 at the moment, you were aware of them at the time?

1 A Oh yeah. We were telling him all of the  
2 problems that this thing had caused and all of the delay  
3 it had caused and we gave it to him on a silver platter.

4 Q Now did Mr. Bankoff become the PCO for this  
5 contract somewhere around I think, July or August of  
6 1985?

7 A Right around this time in June, he stepped up  
8 to the plate I believe it was. It must have been July,  
9 July time frame. He stepped up to the plate and this was  
10 the mess we were in when he came to the table.

11 Q Did Mr. Liebman ever tell you that he wouldn't  
12 pay these costs at all unless he got a DAR deviation?

13 A What he said to me -- yes, he did. But what he  
14 said was he was going to go to his lawyers because DPSC  
15 had screwed up and that's when I had my attorney I  
16 believe it was or they got into a discussion about direct  
17 costs, indirect costs, all kinds of things, and Liebman  
18 claimed that we were saying that DPSC was doing something  
19 special for us and we said that everything was just  
20 classified as direct costs. It's nothing special.

21 Q Okay. Did you learn whether this DAR deviation  
22 request was actually submitted by Mr. Liebman?

23 A Ultimately, yes. He went and got Frank Bankoff  
24 also to submit something without you know, also to ask  
25 for a deviation from the regulations.

1 Q Okay. Did you learn whether that DAR deviation  
2 request was approved or denied?

3 A It was denied. It wasn't necessary.

4 Q It was denied?

5 A It was denied.

6 Q Do you know from the time of Ms. Rowles June 5,  
7 1985, letter to Mr. Liebman, how long it was before Mr.  
8 Liebman actually submitted a request for a DAR deviation?

9 A No. I don't know when he did it. Maybe, I  
10 don't know. Maybe a couple of months later or something,  
11 a month. I don't know.

12 Q After you learned that the DAR deviation  
13 request had been denied, did Mr. Liebman, to your  
14 knowledge take any other action at that time to try to  
15 pay you for these costs? Strike that.

16 Were you ever paid in a lump sum for -- let me  
17 start again.

18 At this point we've been talking about \$522,000  
19 worth of costs. I believe the record reflects that Mr.  
20 Liebman at some point says that he accidentally had paid  
21 about \$100,000 worth of these costs. So now as of June  
22 and beyond 1985 -- June 1985 and beyond, we are actually  
23 talking about approximately \$399,000 worth of costs, is  
24 that correct?

25 A Yeah, that would be correct.

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

3 (Whereupon, the hearing was recessed, to  
4 reconvene later this same day.)  
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1 Q Okay. \$399,000 --

2 A But at the time we didn't know that. We didn't  
3 know it because we didn't know what he was deducting at  
4 the time.

5 Q He hadn't broken it out for you and told you --

6 A He wouldn't tell us. He was just sending  
7 money. He didn't or short -- he shorted the progress  
8 payment, sent it with no explanation.

9 Q And was it your position throughout this  
10 period, from the time you started incurring these costs,  
11 that Freedom should be paid in a lump sum for these costs  
12 as incurred through progress payments?

13 A Repeat that question.

14 Q I'm sorry. Was it Freedom's position during  
15 this entire period, that it was entitled to be paid in a  
16 lump sum, so to speak, through progress payments for  
17 these costs as they were incurred?

18 A Yeah. It was our position that as we incurred  
19 these costs, booked them on our books and records,  
20 submitted a progress payment to him, and we were to be  
21 paid 95 percent of those costs.

22 Q The Court's indulgence for a moment, your  
23 Honor. Your Honor, at this point I'm finished with my  
24 segment of examination of Mr. Thomas, and I believe that  
25 Mr. Steiger will be picking up from here.

1 AFTERNOON SESSION

2 JUDGE JAMES: Let's go on the record.  
3 Whereupon,

4 HENRY THOMAS,  
5 the witness on the stand at the time of the recess,  
6 having been previously sworn, was further examined and  
7 testified as follows:

8 BY MR. STEIGER:.

9 Q Mr. Thomas, you testified this morning that  
10 with respect to the first progress payment that had been  
11 made to you some sixty-six, approximately \$66,000 had  
12 been withheld?

13 A Yes.

14 Q Were you told at the time what the reason was  
15 for that withholding?

16 A No.

17 Q Now with respect to progress payments that had  
18 been submitted subsequent to that time, after that time,  
19 were there also disallowances or reductions made?

20 A Yes.

21 Q Were you told on those instances, what the  
22 reasons were for the reductions?

23 A No. We weren't. We wrote to Peggy Rowles and  
24 we found out that these costs were -- and that's what  
25 those letters are about. But his reasons were that they

1 weren't -- they shouldn't be included in this and that  
2 his main reason to me was that the PCO screwed up in  
3 allowing these costs.

4 Q But eventually you did find out?

5 A Eventually, yes.

6 Q You found out specifically what the nature was  
7 of these disallowances?

8 A Eventually, yes.

9 Q I want to call your attention to a document  
10 provided by the respondent as a matter of fact, as part  
11 of its documents. And it is a portion of what is labeled  
12 as G-93. I believe it is at end of that segment of  
13 documents in G-93 and it is entitled, "Freedom Summary of  
14 Progress Payments." I'm sorry. It's not in there?

15 A They moved it. Bruce corrected it yesterday,  
16 Bruce. Do you remember --

17 Q I'm sorry. G-95, is it?

18 A I think they put it as a new number. The Tab  
19 was missing.

20 Q G-95 then. Do you see it, Mr. Thomas.

21 A Yes, G-95.

22 Q Now until you received these documents from  
23 Respondent, had you ever seen this document before?

24 A No.

25 Q Have you reviewed or looked over this document?

1 A Yes.

2 Q With respect to the information concerning  
3 progress payment number, date received, et cetera, the  
4 first line of each one of these progress payments, is it  
5 your understanding that this is correct?

6 A Yes, this is.

7 Q Now with respect to the items called comments,  
8 is it your understanding that these are correct?

9 A From what I see, yes. It looks like this is --

10 Q You can verify what it says as far as the  
11 reasons and stuff?

12 A As far as what his reasons were.

13 Q Is this the first time you've seen that?

14 A Yes. And I read this.

15 Q I'd like to call your attention to the progress  
16 payment number one re-submission, the one dated April 10,  
17 1985.

18 A April 10th?

19 Q Yes.

20 A Oh, I see it, okay.

21 Q Do you see it?

22 A Yes.

23 Q It follows progress payment three. Is that not  
24 the progress payment we were talking about that you  
25 submitted after the novation was signed?

1 A Yes, it is.

2 Q And does that not confirm what your  
3 understanding was as to the reason for the reduction of  
4 \$66,192?

5 A Yes, that's what it is.

6 Q Okay. I want you to take a look at some of the  
7 other progress payment information that is contained on  
8 these sheets. Would you focus for a second on progress  
9 payment number five on the next page?

10 A Yes.

11 Q Now that does show a rather substantial amount  
12 requested?

13 A Yes.

14 Q And could you explain, based on this comment,  
15 what you believe is the reason why only \$6,687 and change  
16 was paid?

17 A Yes. At this point in time, Marvin was  
18 challenging our accounting system for including capital  
19 costs or what he called capital costs, in the progress  
20 payment request.

21 Q Are these the same capital costs that we have  
22 been talking about?

23 A These are the same costs that was agreed to  
24 with the PCO, Tom Barkewitz. And these are same costs  
25 that was reviewed by the DCASMA, a pricing team before --

1 during the pre-award process, and they're the same costs  
2 that DCAA did not have any objection to as being included  
3 in this contract, during the pre-award process.

4 Q Now had DCAA, it says in there, said that your  
5 accounting system was inadequate?

6 A Yes.

7 Q Had you made any changes to your accounting  
8 system essentially, since you had been awarded the  
9 contract?

10 A No. This is the same contract -- accounting  
11 system that we used to bargain for those costs. The same  
12 accounting system.

13 Q And you recall what the findings were in the  
14 pre-award survey regarding that accounting system?

15 A It was adequate for progress payment purposes  
16 and they even said we could get a computerized equipment  
17 -- system.

18 Q Thank you. To the best of your understanding,  
19 were there any serious deficiencies in your accounting  
20 system?

21 A No. There was -- no, no.

22 Q What was the result? Can you tell from here  
23 what the result was of the conclusion of Mr. Liebman,  
24 that the system was inadequate?

25 A This allowed Mr. Liebman to now, pay nothing.

1 In other words, he was looking for a way of paying no  
2 money. By paying nothing he could say, "If your  
3 accounting system is not right it's some inequity against  
4 the Government, so therefore, I'll pay you nothing." You  
5 will either fix it his way -- In other words, he wanted  
6 us to back out the costs that he said that I  
7 out-maneuvered the Government with -- that I, what did he  
8 say? I out-negotiated the Government for these costs.

9 So what he was going to do was make me take the  
10 costs out of my accounting system as direct costs away  
11 from the manufacturing overhead categories. He wanted  
12 them out of the G & A categories, and he wanted me to put  
13 them over in a special accounting package called capital.

14 Once I put them in capital, then he says, "I'm  
15 going to pay you the depreciation portion only." And I  
16 says, "No. That's not the way it goes."

17 Q Did he ever pay you the depreciation portion,  
18 just --

19 A No. Because he says I have to first, change my  
20 accounting system, put it over there, then properly  
21 capitalize it, then submit a progress payment for the  
22 depreciation portion only.

23 Q Let me ask you a question. I know you're not  
24 an accountant. Let me ask you this. Is depreciation, in  
25 your understanding, a cost that can be incurred?

1 costs were paid to you?

2 A Yes. We were in a cost overrun or in an  
3 out-period of the cost. The contract should have been  
4 completed in fourteen months which meant the contract  
5 should be over in December of 1986.

6 Q Excuse me but, let me restate the question  
7 because you're going too broad into what I'm asking and I  
8 would like it focused a little more.

9 Do you remember in what particular contract  
10 document that this amount was paid?

11 A MAR-25.

12 Q Was there a DAR deviation granted?

13 A No.

14 Q Do you recall getting a letter from Mr. Liebman  
15 saying that he was considering suspending progress  
16 payments?

17 A Yes, I got several from him.

18 Q Well, do you recall one around the time of this  
19 progress payment number five, that we had been talking  
20 about? Or let's focus in on it if you don't.

21 A Yes.

22 Q Did he tell you why he was considering  
23 suspending progress payments?

24 A Yes. He said that due to the fact that we have  
25 an inadequate accounting system, he is going to now

1 A Yes.

2 Q You believe it is?

3 A A depreciation is something that you bill the  
4 Government for -- the depreciation portion along the line  
5 and they will give you -- we're going to incur in  
6 depreciation, \$333,000 with this contract.

7 Q What is depreciation, in your mind?

8 A Depreciation is a form of giving you back money  
9 that you've spent now, for something that you're going to  
10 use later on.

11 Q Do you actually take that money out of your  
12 pocket?

13 A No. Well, you'd -- no.

14 Q Now, let me ask you this. If it's not a finite  
15 amount that you take out of your pocket then how could,  
16 in your understanding, progress payments be made on a  
17 depreciated value?

18 A I have no idea. These accountants have got  
19 their own formulas.

20 Q Okay. Now Mr. Luchansky asked you what  
21 happened to these costs with respect to the DAR  
22 deviation. Now let me ask you. Were these costs ever  
23 paid to you?

24 A Yes.

25 Q Do you remember under what circumstances these

1 suspend progress payments and basically, that is a reason  
2 that he can officially suspended it but he has to first,  
3 find something wrong with the accounting system.

4 Q Right. So he said he was considering  
5 suspending?

6 A Right.

7 Q To the best of your understanding, did he in  
8 fact, suspend progress payments at that time?

9 A When he didn't pay he suspended progress  
10 payments. But did he --

11 Q Are you aware of a procedure of some kind  
12 within the agency that requires that a board be convened  
13 in the event that progress payments are to be suspended?

14 A I believe there's a requirement for him to  
15 convene a board and at the same time let me, the  
16 contractor, talk -- or have some input into this system.

17 Q Was not that the concept or process that was  
18 utilized the first time that progress payments were  
19 suspended -- right after you got the job?

20 A No. We found that -- no he didn't. We found  
21 out that Marvin had convened a board or quick panel, he  
22 said, over the weekend. He came back and hustled  
23 everybody in. It was an emergency. He had to suspend  
24 progress payments. But I was never given an opportunity  
25 to go in there to that board and say -- to tell them my

1 side of the story. He just bum-rushed them, I guess.  
 2 Q Well, how did you find out?  
 3 JUDGE JAMES: Wait a second. What time period  
 4 are you talking about now, Mr. Thomas?  
 5 THE WITNESS: In the January 4th time frame,  
 6 right after Christmas time frame, Marvin Liebman wrote me  
 7 a letter on January --  
 8 JUDGE JAMES: Okay, fine. That's the first  
 9 suspension episode, right?  
 10 THE WITNESS: That's the first time, yes.  
 11 JUDGE JAMES: All right.  
 12 BY MR. STEIGER:  
 13 Q How did you find out about that?  
 14 A I got a letter later on --  
 15 Q No, no. How did you find out about the Board,  
 16 this board thing?  
 17 A I didn't find out about the Board until later.  
 18 He never told me that he was doing it. It was done.  
 19 Q Did someone tell you that there was a board  
 20 convened or how do you know whatever happened?  
 21 A Only because Liebman told us that he had done  
 22 this in order to do it.  
 23 Q Right.  
 24 A And we looked up the, I think, the regulations  
 25 where it says that he can do this but he has to give the

1 get this thing going again.  
 2 Q And why did you do that?  
 3 A It was obvious that nobody was listening to  
 4 what the real deal was or what the story was and had  
 5 everybody in there but nobody was seeing the trees or  
 6 really what was going on.  
 7 JUDGE JAMES: Mr. Thomas, what is this phrase,  
 8 backed costs out mean?  
 9 THE WITNESS: Okay. What that means, Judge, is  
 10 that we had in our proposal with the Government, these  
 11 costs charged as direct. These are the same costs that  
 12 Ms. Rowles, Peggy Rowles, had sent in her memorandum, in  
 13 her Telex to Mr. Liebman, saying that these costs were  
 14 allowed as one-time costs direct to the contract. And  
 15 these costs were in the G & A and manufacturing overhead  
 16 pools. They were right in there as a direct line item  
 17 negotiated line-by-line by the PCO.  
 18 So I had mimicked my accounting system to that  
 19 negotiation. So my accounting system, as we accounted  
 20 for everything, was blown out in the progress payment and  
 21 in our accounting system.  
 22 JUDGE JAMES: That's what backed costs out  
 23 means?  
 24 THE WITNESS: No. Backing --  
 25 JUDGE JAMES: Please tell me what does it mean?

1 contractor a chance too.  
 2 Q Now on this second one that we're talking about  
 3 now.  
 4 A Right.  
 5 Q In this new time frame, are you aware if such a  
 6 board was convened?  
 7 A No. He hasn't told us or we have seen no  
 8 indication that he has convened a board of inquiry, or  
 9 whoever they are to look at this.  
 10 JUDGE JAMES: Mr. Thomas, what time period are  
 11 we talking about now when we're mentioning the second  
 12 suspension episode?  
 13 THE WITNESS: This is July -- July time frame  
 14 now, 1985, around progress payment number five.  
 15 BY MR. STEIGER:  
 16 Q What happened to these allegations or these  
 17 statements that were being made concerning the inadequacy  
 18 of your accounting system? Did it ever change? Did you  
 19 ever become adequate?  
 20 A Finally, yes. There was an agreement with --  
 21 this whole episode ended up in a D & F and an agreement  
 22 with Frank Bankoff here, where I refused to change my  
 23 accounting system but I acquiesced and just said, "Okay,  
 24 fine. I'll do it." But I ultimately ordered my  
 25 accounting department to back the cost out so that we can

1 THE WITNESS: Okay. Backing the cost out means  
 2 reversing the entry. Taking it out of the progress  
 3 payment. Going to my books and records, removing that  
 4 cost, then placing it up in the asset category on the  
 5 other side, and I have to -- I can't get those costs.  
 6 Those costs were just removed as if they had never  
 7 existed.  
 8 So I had to change my entire accounting system  
 9 for incurred costs to comply with Mr. Bankoff here,  
 10 saying that I need to move these costs and segregate them  
 11 to a different area.  
 12 BY MR. STEIGER:  
 13 Q Was that Mr. Bankoff or Mr. Liebman?  
 14 A Mr. Bankoff is the only one that I would do  
 15 this for. He came in there and says, "Henry, you've got  
 16 to segregate these costs. Move them to wherever Marvin  
 17 wants them so we can move ahead." He's sitting here.  
 18 That's what I did and that's the only reason why because  
 19 I told him we're going to have to get to the bottom of  
 20 this.  
 21 He was going to now try to chime in and get a  
 22 DAR deviation for this and I looked at that, your Honor,  
 23 as being something is wrong here. But from my  
 24 understanding, Marvin Liebman was claiming that DPSC's  
 25 PCO screwed this up, should not have allowed this and

1 without Frank Bankoff standing his ground with Liebman, I  
2 was caught between a rock and a hard place. I didn't  
3 know which way to go. Maybe the PCO did screw up but  
4 Frank Bankoff here, the new PCO, did not insist on it  
5 like Peggy Rowles told him. I was at a loss.

6 Q Mr. Thomas, I'd like you to just take a look at  
7 the information on progress payments five, six and seven,  
8 as depicted in this attachment that we've been looking  
9 at.

10 A Right.

11 Q In five and six the amounts withheld, would you  
12 say that, that was as a result of the allegations of  
13 Freedom's accounting system not being adequate?

14 A Absolutely.

15 Q Now, in the course of performance of your  
16 contract at that time, was this an important period as to  
17 what you were doing?

18 A Absolutely.

19 Q What was happening in the job at that time, can  
20 you recall?

21 A All right. We were already behind schedule.  
22 We had already had a cure notice. We already gave DPSC a  
23 new schedule of when we were going to have windows done  
24 --

25 Q When was that to begin, do you remember?

1 A Well everything was going to begin on a  
2 schedule as soon as we received the first progress  
3 payment in April.

4 Q No, I'm talking about the schedules that had  
5 been incorporated into the contract at that time, when  
6 did the contract say you were to make your first delivery  
7 at that time, do you remember?

8 A That had been already moved back to a different  
9 time frame. I'm not sure.

10 Q Yeah, but you don't remember the particular  
11 date?

12 A No. I don't remember the exact time. I'd have  
13 to now do it.

14 Q Okay. So you started to tell us why was that a  
15 critical period in terms of what you were doing in the  
16 performance of the contract. Would you explain?

17 A As a result of the first withholding of  
18 progress payments for the first six months, then the  
19 novation, I was in acceleration mode. I had to now  
20 accelerate everybody at whatever cost it was going to  
21 cost me to try and come up on line and get this thing  
22 moving.

23 As soon as I pressed the gas peddle to  
24 accelerate, Marvin hit the brakes with this new problem  
25 because as I'm accelerating, I'm asking him for these

1 payments, I'm asking him for everything that I need for  
2 quality control equipment, I'm asking him for the  
3 accounting system, I'm asking him for the computers. I'm  
4 asking for all costs so that I can get my troops moving  
5 and so that I can give them the tools they need.

6 Marvin slammed on the brakes with this trick  
7 here of saying something's wrong with my accounting  
8 system.

9 Q And did these acts cost you additional monies?

10 A It cost the -- it blew the contract period for  
11 a second time and I can't move. I couldn't move. I  
12 couldn't talk to my banker. I couldn't talk to nobody.

13 Once he suspended these progress payments, the industry  
14 got spooked. Everybody, all my subcontractors changed  
15 the deals of the subcontract agreement because they

16 should have been delivering this product right now and  
17 I'm over here stuck -- dealing with an administrative,

18 "Dot the i, cross the t, put this over here, put that  
19 over there, and I'm not giving you no money. Go get your  
20 own money to finance this stuff."

21 Q Is it your understanding that these additional  
22 costs and impacts were documented by you in the claim you  
23 mentioned some time this morning?

24 A Yes. Where we picked this up at is when we was  
25 talking to DPSC in December. We told them we was going

1 to map this out and put the claim in.

2 Q Mr. Thomas, I asked you a simple question. Is  
3 it your understanding that the additional costs you  
4 referred to were documented in the claim you submitted  
5 that you referred to this morning?

6 A Yes.

7 Q Thank you. Now would you focus a little bit on  
8 progress payment number eight, Mr. Thomas --

9 A Oh, yes.

10 Q -- where you requested \$869,000 and change and  
11 you got less than three hundred fifty. Would you look at  
12 that comment? Now it refers to a deduction of \$400,000.  
13 I wonder if you succinctly could describe to us, I say  
14 succinctly, Mr. Thomas, the circumstances concerning that  
15 deduction?

16 A Yes. The \$400,000 deduction that Marvin had as  
17 rental expense was his way of recouping or taking back  
18 money that was paid in early progress payments. We  
19 picked up the \$400,000 as income to us because we had  
20 sold our option to buy the building, in order to allow  
21 Mr. Penzer to escape or to move on. He wanted to sell  
22 the building and I had an option on the building. So  
23 what I did was, I agreed -- and him and I agreed, that he  
24 would pay me \$400,000 so he could sell the building for  
25 \$6 million. Mr. Penzer had purchased the building for \$3

1 million for me, put me in it, and then all of a sudden my  
2 plan of what I told him was going to happen wasn't  
3 materializing. And he threw his hands up and says, "I  
4 want out of this deal." It looked like he was trapped  
5 into a problem.

6 So when a new buyer came out -- because they  
7 took my contract and the building, and this is a big  
8 asset. So what happened was in order for me to sell him  
9 that option, I said to him, "Okay. I want four hundred  
10 grand and this is H.T. Food Products, this is not  
11 Freedom.

12 H.T. Food Products cut the deal with him and  
13 Freedom had the contract. So he said to me, okay -- we  
14 shook hands on the deal. He was then allowed to enter  
15 into a sale of the building with Kurt Witteck, Tyler  
16 Realty. He could not enter into a sale of the building  
17 as long as I had the option. I could have sold the  
18 building to Kurt Witteck, not Richard.

19 JUDGE JAMES: So the Board should understand  
20 then that this transaction you're talking about happened  
21 before the novation?

22 THE WITNESS: Yes, it did. It was a deal  
23 before the novation. Absolutely.

24 BY MR. STEIGER:

25 Q So in essence, you're saying he paid you

1 needed to get the product out the door to the Government.

2 Q And you explained this all to Mr. Liebman?

3 A Yes, absolutely. This was a legitimate deal.  
4 Everybody's hands were on top of the table. There's  
5 nothing wrong here.

6 JUDGE JAMES: where the Board is losing track  
7 here, Mr. Thomas, is this. I'm looking at progress  
8 payment eight in this list. Did your progress payment of  
9 \$869,000 and so forth, include an item that said \$400,000  
10 rentals?

11 THE WITNESS: No, it did not. In other words  
12 Judge, this was paid in progress payment number one the  
13 way it was actually paid to Mr. Penzer.

14 JUDGE JAMES: You've answered my question.  
15 Please if you could, try to tie together how \$400,000  
16 rentals, according to Mr. Liebman, which this man knew  
17 about April of 2000, if I'm listening to his testimony  
18 right, somehow gets equated with rental costs.

19 MR. STEIGER: Allow me to try to clarify with  
20 the witness.

21 JUDGE JAMES: Try your best.

22 BY MR. STEIGER:

23 Q Are not progress payments cumulative in the way  
24 they are handled by the Government?

25 A Cumulative?

1 \$400,000 to buy out your option?

2 A That's right. That's what it was called.

3 Q And the lease agreement and other pertinent  
4 documents to the best of your knowledge, are they in our  
5 file here?

6 A Yes, they are.

7 Q Now what happened? How did Liebman get word of  
8 this and how did it end? How did it result in this?

9 A What happened was, I had told Liebman in the  
10 December letter that -- he wanted to know where am I  
11 going to get money. In one of the letters I told him  
12 that Freedom was going to get money from H.T. Food  
13 Products and it showed \$400,000. I think that was  
14 probably December 26, or some letter. I forgot what it  
15 is, but anyway in one of the letters to him I told him  
16 that \$400,000 is coming because I just sold my option to  
17 Richard Penzer and Penzer's going to pay me at the  
18 closing.

19 So I'm going to use that money in order to  
20 guarantee that Freedom has more money. In other words,  
21 I'm not taking it out going to the Bahamas with it. I'm  
22 going to plow that money right back into this contract to  
23 make it happen.

24 So H.T. Food Products sold its option and was  
25 using this money for whatever expenses that Freedom

1 Q Yeah. In the sense that if the Government  
2 doesn't look at necessarily, the specific cost of the --  
3 that are set forth in the invoice, but looks that  
4 everything that has also taken place before that.

5 A They have a way. But the way that I looked at  
6 it -- I focused in on whatever the cost is to that  
7 progress payment and say, we will deal with this cost at  
8 that time. I was keeping track of debits and credits  
9 that way. They're doing it on a broad scale and it looks  
10 like they did do it here with these audit reports that  
11 they did. They accumulated everything and lot bached  
12 it.

13 Q Right. So it's not unusual for them to make a  
14 deduction from a progress payment based upon a cost that  
15 was charged by you months earlier?

16 A Yes, but I disagreed with that and told --

17 Q I didn't ask you --

18 JUDGE JAMES: First of all, how did you know  
19 that. What I want to know is how did you know that?

20 THE WITNESS: We knew that Liebman had taken  
21 the \$400,000 because he told us that I'm going to offset  
22 earlier costs against these costs, against new costs.

23 JUDGE JAMES: When did he tell you that?

24 THE WITNESS: He told us that -- matter of  
25 fact, he told that to Bankers as early as August of '85.



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1 BY MR. LUCHANSKY:  
 2 Q When did he tell it to you?  
 3 A I found out about it when he was going to do  
 4 it. Approximately October of '85, I would say.  
 5 Q When you received you check for progress  
 6 payment number eight, which was approximately \$500,000  
 7 less than you asked for. Did you make inquiry to him as  
 8 to why such an amount less than you asked for was paid?  
 9 A Yes.  
 10 Q Did he at that time tell you about this?  
 11 A Yes. And we immediately told him -- the first  
 12 thing I told him was, this contract is assigned to  
 13 Bankers and once Bankers was paid the progress payment  
 14 number one, you can't go back and take that from them.  
 15 Q In other words, he was at that time offsetting,  
 16 or taking away from you an amount that he had previously  
 17 paid to you?  
 18 A That's right, paid to Bankers, previously paid.  
 19 Q Right. Under a previous progress payment  
 20 invoice?  
 21 A Right.  
 22 Q Now did there come a time around the October  
 23 time frame -- October 1985, where Mr. Liebman demanded  
 24 that you go out and get additional financing?  
 25 A Yes.

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1 Q Again, succinctly, what was the reason he said  
 2 that you had to do that all of a sudden?  
 3 A Mr. Liebman's whole premise, as I remember, was  
 4 that I am to finance this contract, not him.  
 5 JUDGE JAMES: And how did you know that  
 6 premise, Mr. Thomas? Did he tell you that?  
 7 THE WITNESS: Yes. He said go -- yeah, they  
 8 told us on numerous occasions, "Go out and get your own  
 9 money to do this contract." And then basically, that's  
 10 what he was doing. So when they said to us -- they  
 11 called us in -- and he wants more financing. They had  
 12 some calculation that they used to figure out what I need  
 13 to do this contract. And they took a worse case scenario  
 14 he used, it's called the worse case scenario and the  
 15 worse case scenario is, "The United States government is  
 16 not going to give you no progress payments. Now how are  
 17 you going to go do it?"  
 18 BY MR. LUCHANSKY:  
 19 Q A, "what if," they don't give you any progress  
 20 payments scenario?  
 21 A There's a calculation in there called the worse  
 22 case scenario, a backwards induction. That's what they  
 23 called it.  
 24 Q Is that calculation in the file? Is that  
 25 document in the file?

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1 A Yeah, it's in there somewhere.  
 2 Q And how did you -- was it made known to you?  
 3 A Yes. I mean, I went down there and I watched  
 4 Bill Stokes give me a lesson in accounting or in business  
 5 accounting that I never knew existed.  
 6 So this backwards induction, the worse case  
 7 scenario, I told him point blank. I says, "All you're  
 8 doing is withdrawing progress payments that's guaranteed  
 9 to me under this contract." So your worse case scenario  
 10 is, we're giving you no progress payments, period. So do  
 11 it yourself.  
 12 JUDGE JAMES: Who is Mr. Stokes?  
 13 THE WITNESS: Mr. Stokes was Marvin Liebman's  
 14 -- he was a financial analyst for the Government.  
 15 JUDGE JAMES: For the DCASMA?  
 16 THE WITNESS: Yeah, for the DCASMA. So I told  
 17 him he's basically, just reversing the DAR clause  
 18 7-104.35B.  
 19 BY MR. LUCHANSKY:  
 20 Q Let me ask you this. How much additional  
 21 financing was being required of you at that time?  
 22 A I think they wanted an additional \$3.5 million  
 23 or something. The number came up to about \$3.5 million.  
 24 But the calculation they used is that -- they said that  
 25 Henry -- that I had \$2 million -- \$2.1 million in costs.

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1 The Government owed me \$3.1 million. So they're going to  
 2 take the 3.1 million away. They're going to put zero on  
 3 the money they owe me. And they want me to finance that  
 4 number.  
 5 Q When you say, "owe you," you meant in progress  
 6 payments that had not been paid to you?  
 7 A Right. They was withholding the 3.1 million  
 8 that's due me. They're moving it off to the side, put  
 9 zero and says, "Here's the new number you've got to show  
 10 us to bring funds to this contract."  
 11 Q What were you told if you didn't get this  
 12 financing?  
 13 A You'd be defaulted.  
 14 Q Defaulted?  
 15 A Yeah. They're not going to re-start financing.  
 16 They're not going to give us anything. You have to put  
 17 this up there --  
 18 Q So you're mistaken. They didn't say you'd be  
 19 defaulted. They said they would not continue progress  
 20 payments?  
 21 A Right. When they say their not going to  
 22 continue, that means I'm stopped. I'm dead in the water.  
 23 I can't move.  
 24 Q Now, who did you approach to get that  
 25 financing?

1 A Well, I didn't know this but they told me that  
2 my banker had agreed to this.  
3 Q Who's they?  
4 A Liebman and Stokes. They said that they had  
5 already talked to my banker and he has no problem with  
6 it. And I'm like, "What do you mean he has no problem  
7 with it?"  
8 Q Wait -- wait a minute. You're telling me that  
9 they told you, they contacted your banker on their own?  
10 A Yes, they did. What they did really is put a  
11 gun to his head and tell him, "If you don't finance  
12 Henry,"  
13 Q Answer my question, on their own?  
14 A On their own.  
15 Q Did they ask for your permission to do this?  
16 A No, they did not.  
17 JUDGE JAMES: Which banker are we talking  
18 about, Mr. Thomas?  
19 BY MR. LUCHANSKY:  
20 Q Which banker are we talking about?  
21 A Bankers Leasing.  
22 Q Bankers Leasing.  
23 A Right. Randy Gross was contacted by Stokes  
24 before I was told what they were going to do.  
25 Q Let's retract a minute for the Judge's sake.

1 when progress payment one was paid. I got \$1.7 million.  
2 I paid off Bankers \$900,000 I had borrowed. I'm sitting  
3 here with a line of credit but the cash flow I had was  
4 government money. Plus I had, thought I had, my own  
5 \$400,000 in financing, which was later taken from me.  
6 Q Thank you. Mr. Thomas, we had talked about  
7 what was happening in October. Let us move ahead in the  
8 chronology a little bit, and talk about a little bit  
9 later. It's now December. Are you continuing to work on  
10 this job?  
11 A Yes.  
12 Q Did at any time you ever stop working on this  
13 job until the very end?  
14 A No. When everybody was running in all  
15 different directions, I continued to either go get  
16 another supplier, another this. I went and got more  
17 equipment. When Mr. Robbins didn't do anything, I went  
18 and got Penzer. When Penzer decided to bail out, I went  
19 and got Performance Financial on the equipment leases.  
20 When Performance Financial bailed out, I organized Teknic  
21 Corporation and got Teknic kicked into gear to pick up  
22 the pieces.  
23 Q Do you recall a meeting that you had in  
24 December, with the Government, where you held discussions  
25 and you were telling them what your problems were on the

1 Had you already had financing arrangements with Bankers  
2 Leasing at that time?  
3 A Absolutely.  
4 Q Approximately when, in the past, had you gotten  
5 it?  
6 A Yes. Bankers was financing us then. We had  
7 also did the novation financing that was called for by  
8 Liebman. Everything was there. The only problem is that  
9 when progress payments was paid correctly, the money we  
10 had borrowed from Bankers was able to liquidate out of  
11 the progress payments.  
12 So what that showed everybody is, Henry can do  
13 this contract with 95 percent progress payments. And  
14 that scared Marvin. Because he saw that I cashed Bankers  
15 out right away, in the first progress payment. The  
16 second progress payment Bankers wasn't even -- I didn't  
17 need their money.  
18 Q Was this in effect, an additional requirement  
19 for financing that was imposed upon you?  
20 A Right.  
21 Q If in fact, the Government had made progress  
22 payments as they were, in your view, required to do,  
23 would you have needed such financing?  
24 A Absolutely not. And it bore it out right here.  
25 And that's what scared Marvin. When he realized that

1 job? Do you recall that?  
2 A Yes.  
3 Q And do you remember what the date was?  
4 A Yeah. It was December 9, 1985.  
5 Q And who was in attendance besides you, I mean  
6 do you remember some of the participants?  
7 A Frank Bankoff was in attendance. Captain  
8 Parsons, we did this in Philadelphia. The exact problem  
9 that we discussed in September 1984, on mobilization  
10 costs and what the mission was -- so that they would not  
11 violate war reserve levels. And the reason why we were  
12 going to do this was now, resurfacing right back at us.  
13 So I was -- they were now having the problem that they  
14 said they wanted me in here to do this so they wouldn't  
15 have this problem.  
16 Q Okay. Now, during that meeting -- and I think  
17 I would like us to take a look at a particular document  
18 here, and that is, FT-220.  
19 A Yes.  
20 Q Can you identify that document?  
21 A This is our, Freedom's memorandum on the  
22 meeting that we had with DPSC on December 9th.  
23 Q Is that the meeting that you just referred to  
24 --  
25 A Right.

Q -- in your discussion?

A Yes.

Q And let me ask you a question. Who prepared this document?

A Joe Clark.

Q Do you know off hand, if you made this document available -- oh, I'm sorry. Who is Joe Clark again?

A Joe Clark was our contract administrator. He is also a former ACO for the United States Army, Col. Clark.

Q Do you recall if you or Col. Clark made this document available or sent it to the Government? Do you know? Do you recall?

A Yes. This document was made available to Captain Parsons, as to our take on the meeting and what we agreed to.

Q Okay. Now at that time, were you aware that you had, it refers to two months of reserves, 115,000 MRE cases, you'll see in the meeting objective. Do you recall what two months that it was talking about there?

A I believe it's the November/December, or December/January quantities.

Q Right. And were those the two months -- first two months scheduled for your deliveries?

A Yes.

A Yes, they was aware of it.

Q -- at that time?

A Yes.

Q So was there a plan established with respect to what would happen as a result of that? Could you explain that again succinctly, in your own words?

A What had happened was, Captain Parsons brought us down and they knew that they had to not violate war reserve levels. Violation of war reserve levels is something that absolutely cannot happen. And that was discussed with us, as I said, in September of 1984. They made a big issue of it and we told them we would not -- it would not be our fault if anything happened like that.

And when this December 9th meeting came, and Captain Parsons was telling us that so that we wouldn't -- the Government wouldn't violate war reserve levels, they needed my help. And I says, "I'm ready to help you. What do you need? But I want you to help me, okay?" And it was laid out to them because they sat down and allowed Marvin Liebman to slam his foot on the brake, the repercussions are, we have now compromised our war reserve levels for mobilization.

Q So what happened? What was the deal that you just mentioned?

A All right. The deal is, we will allow you to

Q What was your condition of performance with respect to being able to meet those two months worth of deliveries?

A Freedom was in a totally reduced production mode as a result of equipment that we had not planned on getting. We're trying to figure out how to use this. We were in a backwards mode, I would call it.

Q Do you recall what the quantities were that you were scheduled to deliver for November and December?

A I think it was about fifty thousand cases in one month and about sixty, the other.

Q These were your first deliveries, were they not?

A Yes, they were, 65,000.

Q And was it apparent at that time, that you could not make those deliveries?

A It was apparent to us all along as we was telling them, that we're having all these problems that going to impact down the line. But nobody was listening as we were telling them. There's numerous letters in here of us putting the PCO on notice of Marvin Liebman's slamming his foot on the brake.

Q But at that time of this meeting, all parties were certainly aware that you were not going to be able to make those two deliveries --

remove the GFM. We will help you remove the GFM. We will help you give it to whichever contractor you want, Rafco or Sopakco. We'll help get it over there. Let them make it up real quick because we know we don't have the production equipment capable of coming up to speed like we had planned and I understood the sensitivity of the problem, if I had refused to assist them with the GFM, they would have definitely violated war reserve levels. If I got hard headed --

Q Tell me about this, you mentioned GFM three times. What did you mean by GFM?

A Government Furnished Material. Had to be taken -- that was earmarked for this contract. Had been delivered to my contract for incorporation into these cases. Were now sitting here, in my care, custody, and control.

Q These were intended to be used for those two deliveries?

A Right. They were.

Q Okay. Please go on.

A Now, all of the sudden, they got a production problem that they allowed to happen. And I clearly made it sure that they understood. "You people allowed Marvin Liebman to slam his foot on the brake, twist me around,

1 not pay me. And now look what happened."  
2 Q Please, continue with the deal.  
3 A The deal was that, in order for them not to  
4 violate war reserve levels, I would then give them the  
5 GFM. we will let the fork lift operators work overtime.  
6 I will put all my muscle in helping them get that. In  
7 return, put this on the back end of the contract and give  
8 me an equitable adjustment. I want these cases back.  
9 They said, "We can do that. No problem if you do this."  
10 I said, "Fine."

11 Q In essence, are you saying then that they had  
12 agreed to reinstate the cases later on?

13 A Yes.

14 Q They were going to take them away from you and  
15 reinstate them. Is that what your saying?

16 A That's right. They're going to be reinstated.

17 And that was the understanding we had with them.

18 Q Was there any conditions to the reinstatement?

19 A What happened was, one of their lawyers said,  
20 "Well, it's going to be our option." And I said, "No  
21 deal. No options. Not your option." We rejected that.  
22 In other words, it should say it here somewhere that  
23 Henry Thomas outright rejected that the Government do it  
24 at their option.

25 Q Well, was there any condition put on that?

1 Q Take a close look.

2 A Okay. This reinstates it but it puts a  
3 condition in here.

4 Q Yes. Just tell me what you think what the  
5 purpose of the overall agreement was. What was its  
6 relationship to the December 9 meeting?

7 A Its relationship is to, I guess, document it.  
8 To document it. Yes.

9 Q To document it. Right. What had been agreed  
10 upon?

11 A Right.

12 Q On December 9.

13 A Right.

14 Q Is that right?

15 A Yes.

16 Q Okay. Well, let's take a look at it. If  
17 you'll turn over to the page 2. What's the first thing  
18 we see there? What's the first thing we see the top?

19 Page 2. Right after the cover page.

20 A Right.

21 Q What's in there? What is that?

22 A This is a new delivery -- this is a schedule of  
23 delivery dates.

24 Q Right. Is that a new schedule?

25 A Yes. This a -- hold on a second. No. This is

1 A No.

2 Q In other words, if you were not performing,  
3 would you of expected the reinstatement of the 114,000  
4 cases?

5 A I expected to have the 114,000 cases put back  
6 on the end of this contract so that I could keep my  
7 economics. Without the economics, if that's gone, then  
8 the whole economics of the contract disappears. The 17  
9 million becomes 13 million. My cost that I've incurred  
10 -- I've got a problem right here. This is a real mess.  
11 So it was imperative that the 114,000 cases be included  
12 for economic purposes to make this thing happen.

13 Q Okay. I'd like us to take a look at Rule 4,  
14 document 104, please.

15 A That's the red book?

16 Q Are you familiar with this document?

17 A Yes. This is Mod. 20.

18 Q And what was the purpose of this modification?

19 A This modification reduced the level from 17  
20 million -- 69 million to 13 million.

21 Q What did this modification have to do with the  
22 meeting? Did it have anything to do with the meeting  
23 that you described on December 9?

24 A Well, this is the document that reduces it.

25 Hold on a second.

1 the one, I think, that it should have been. This is the  
2 old one.

3 Q This is the old schedule.

4 A This is the old schedule.

5 Q You're right. This is the old schedule. Let's  
6 turn the page to the next page. What do we see there?

7 Number two.

8 A Okay. That's the new schedule.

9 Q That's the new schedule.

10 A Right.

11 Q For modification provided for a new schedule.

12 A Yes.

13 Q Starting when?

14 A January of '86.

15 Q Two months later than the previous schedule set  
16 forth in --

17 A Eighty-six.

18 Q Right. Now I call your attention to the third  
19 "Whereas clause" on the second page.

20 A Yes.

21 Q That document confirms -- it says that the  
22 language confirms something. What was it confirming  
23 there that "Whereas" clause and the "Whereas" clause that  
24 follows?

25 A Which was confirmed by Modification 19, dated

1 23 January?

2 Q No. No. You have two "Whereas" clauses on  
3 that page. "Whereas" clause number three and "Whereas"  
4 clause number 4. You see "Whereas" clauses?

5 A Yes.

6 Q Clauses beginning with the word, "Whereas." If  
7 you count down, there's the first one, there's the  
8 second, if you count to the third and the fourth. What  
9 in your -- as you see it, what do these confirm? What do  
10 these two "Whereas" clauses?

11 A It said that we've agreed to revise delivery  
12 schedules.

13 Q Well, okay. I am not --

14 A Oh, you want me to go to the one at the top?  
15 The very first "Whereas" on the very top?

16 Q No. I'm talking about the third one down.  
17 "Whereas, by telegram --" You see that?

18 A Yes.

19 Q And the next one is, "Whereas by telegram --"  
20 What was it confirming that was contained in those  
21 telegrams? What did those telegrams say that this  
22 confirmed?

23 A It's confirming, one, that the terminated  
24 quantity for \$49,000, I mean, 49,000 cases by  
25 Modification 19. It's talking about the termination for

1 A No. We rejected it being at the sole  
2 discretion of the Government because we told them it was  
3 not our fault. We wanted it to be for our help. To get  
4 that product out the door so that they wouldn't violate  
5 war reserve levels. We said, "We rejected that. You got  
6 to do this for us. We'll do this for you. You've got to  
7 do something for us." So it was a quid pro quo.

8 Q Now, sit that aside for a minute. Let's look  
9 at the operating aspects here. The very first sentence  
10 of paragraph three. Now was it your understanding of  
11 that sentence alone?

12 A Of number 3?

13 Q Yes.

14 A In the event of -- If we meet it.

15 Q Meet what?

16 A We meet the delivery schedule.

17 Q For what months?

18 A Of January through April. In the increments  
19 set forth above.

20 Q And what would happen?

21 A We wanted the cases -- the cases should be  
22 reinstated.

23 Q Right.

24 A That's right.

25 Q That's what it says there.

1 default of the 65,000 cases for the undelivered portion  
2 of December.

3 Q So these two are talking or confirming  
4 previously noted terminations for default.

5 A Right.

6 Q Is that right?

7 A Right. Termination for default.

8 Q Of two quantities totaling --

9 A One hundred fourteen -- should be about 114,000  
10 cases.

11 Q One hundred fourteen-thousand seven-hundred  
12 fifty-eight?

13 A Right.

14 Q Okay. Now, let us turn the page and let us  
15 look at the last page of this modification. Paragraph  
16 three. Now, what is your understanding of that, Mr.  
17 Thomas?

18 A If in the event that I meet the delivery  
19 schedules from January through April, the Government may  
20 reinstate the 114,000 cases terminated for default.

21 Q Okay. Now, look at the last sentence.  
22 Reinstatement will be at the sole discretion of the  
23 Government. Does that comport to be exactly what you  
24 discussed and thought you had agreed upon the December 9  
25 meeting?

1 A The cases would be reinstated. Right.

2 Q Okay. Now, could Freedom have been able to  
3 meet those conditions for delivery? Could you of  
4 delivered? Was it possible for you to meet that delivery  
5 of January, February, when you signed this modification?

6 A Yes. We could have met that. We was on, well  
7 on our way to meeting those delivery schedules.

8 Q Now, in fact, did you meet them?

9 A Yes.

10 Q Those two?

11 A We met January and February delivery schedules  
12 ahead of time. We believe the Zyglo testing came into  
13 play sometime in March which had shut down the plant  
14 which had nothing to do with us.

15 Q Okay. But you're saying that you did not meet  
16 all the delivery increments set forth in this schedule?

17 A No.

18 Q Why not?

19 A We didn't meet it because of various reasons.  
20 One of them was that we found out that in January to meet  
21 the 20,000 that our GPM had been commandeered from our  
22 subcontractors.

23 Q What does that mean?

24 A That means that they took from me the GPM that  
25 I agreed to give them. And then I found out that I had

1 ordered a ship-in-place at one of my subcontractors and  
2 Frank Bankoff countermanded my order and told Sterling  
3 Bakeries that he's not allowing a ship-in-place. So  
4 Sterling Bakeries had the product sitting there and Frank  
5 Bankoff issued an okay or modification or waiver or  
6 something to the people in Texas that we'd shipped the  
7 GFM to for them to use products other than from this --  
8 from another contract.

9 Q It's a little confusing. Even to me. And I  
10 know this stuff. So I'm going to ask you to clarify it a  
11 little bit for the Judge. What is CFM as opposed to GFM?

12 A Contractor Furnished Material is something that  
13 we have and have given sometime deposits or letters of  
14 credit for that we have control of. It's part of our  
15 subcontracting that everything that's made down there at  
16 the time has to be made either per schedule and I have  
17 the right to ship some of my quality control and  
18 production people.

19 Q What is it in relation to this contract that  
20 you were performing?

21 A This was the cakes, brownies, cookies, and  
22 things that were necessary for my production in order to  
23 meet the first month's schedule. These are the  
24 ingredients that were supposed to be shipped to me in  
25 order for me to meet that schedule.

1 your own use to meet that schedule? Is that what you're  
2 saying?

3 A Absolutely.

4 Q And you're saying that something happened to it  
5 that you could not -- that it would not get to your  
6 plant?

7 A Right. It was shipped to Right-Away Foods.

8 Q And it was shipped by the vendors. Is that  
9 what you're saying?

10 A That vendor was --

11 Q And who ordered that shipment to the vendors?

12 A The vendors shipped it when Right-Away was  
13 given permission to use my product or product other than  
14 what was made for him in the cases. Frank Bankoff gave  
15 him that order, authority, or approval.

16 Q So the CFM earmarked for you to do the job was,  
17 in fact, sent somewhere else. Is that what you're  
18 saying?

19 A Yes. Certainly was.

20 Q Okay.

21 A And it impacted on my schedule. It shut me  
22 down.

23 Q Right.

24 JUDGE JAMES: When did it shut you down, Mr.  
25 Thomas?

1 Q These, in other words, you were to supply.

2 A That's right. This is what I had to supply to  
3 meet the schedule that we had just agreed to.

4 Q Right. As opposed to GFM?

5 A GFM, right.

6 Q Okay.

7 A We had given the GFM to the Government. The  
8 Government, obviously, needed CFM. Which we didn't  
9 realize they -- he never came to me and said, "Henry, I  
10 need some of your CFM that's sitting down there that's  
11 got your contract number on those boxes. I need that  
12 stuff to give to Rafco."

13 Q Now, what were these -- this CFM? How was it  
14 intended to be used in terms of the schedule that had  
15 been set forth in Modification 20?

16 A Once we got everything we would have packaged  
17 it up and met the schedule, one, two, three. What it did  
18 was it shut us down. Because when Sterling told us they  
19 didn't have the product and that it was allowed to be  
20 shipped to Rafco, I'm trying to figure out how can this  
21 ingredient that my quality control people went down there  
22 and then I told them to ship it in place and we said,  
23 "Okay, fine." And then it was countermanded by Frank  
24 Bankoff and Marvin Liebman on a conference call.

25 Q Are you saying that you ordered this CFM for

1 THE WITNESS: It shut us down in January of  
2 '86.

3 JUDGE JAMES: Well, now you've got the Board  
4 really confused because a few minutes ago you started  
5 this conversation in response to your counsel's question:  
6 "Did you timely submit the first two units? The January  
7 and the February. The 20,000 to 30,000 cases." And your  
8 answer was: "Oh, yes. I delivered them early." Now I  
9 hear you saying, "Oh, no, no, no. I shut down the plant.  
10 I either didn't deliver them early. I didn't deliver all  
11 or I delivered something less than 50,000 cases." What  
12 did you do?

13 THE WITNESS: Okay. Here's what we did. We  
14 were -- we had the capability to make in January in order  
15 to meet the 80,000 cases or this other case that we had  
16 to do in April. We -- I knew I could pump out maybe  
17 30,000 in -- 30,000 in January. Okay. I could do 30,000  
18 in February. I could do 50,000. I could do it. Now,  
19 but I boxed myself into 20,000 but I had my production  
20 plans scheduled for higher. So we knocked out that  
21 portion but then I was shut down. I couldn't meet the  
22 out month's deliveries. That's the problem.

23 JUDGE JAMES: Is your testimony then that you  
24 in January of '86, delivered 20,000 cases to the  
25 Government?

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1 THE WITNESS: Yes. I met that. I met it but  
2 my production for my next month was shut down.

3 JUDGE JAMES: Did you deliver the 30,000 in  
4 February?

5 THE WITNESS: I believe we did.

6 JUDGE JAMES: Okay. Now you got me further  
7 confused when you -- I well understand the difference  
8 between CFM and GFM. If I'm listening to your testimony  
9 correctly, you're telling me that sometime in 1986, that  
10 the Contracting Officers either PCO or ACO or both  
11 together, somehow diverted not only GFM but CFM.

12 THE WITNESS: As well, that's right.

13 JUDGE JAMES: Am I understanding your  
14 testimony?

15 THE WITNESS: That's right. They diverted it.  
16 Now what you're looking at --

17 JUDGE JAMES: No. That's the only thing I'm  
18 asking you.

19 MR. STEIGER: You've answered the question.  
20 Thank you.

21 BY MR. STEIGER:

22 Q Now, did it come to pass -- About this  
23 reinstatement on your 114,758 cases, did you ever see --  
24 did the Government ever show you if they had the  
25 authority to reinstate those cases. Did you ever see any

1 us from sometime in December and the next progress  
2 payments, if you look at when the progress payment came,  
3 was sometime around the end of January. And I'm -- I'm  
4 under the gun again.

5 MR. STEIGER: Let me follow-up with that. If I  
6 may, your Honor.

7 JUDGE JAMES: Please do.

8 BY MR. STEIGER:

9 Q You were terminated for default.

10 A Yes. I was.

11 Q Is that not right?

12 A That's right.

13 Q Which meant that -- what did that mean then if  
14 you didn't get provision for the reinstatement?

15 A That meant that the contract was now a washout.  
16 It was a loss. I had to have the add on cash from the  
17 114,000 cases in order to make this economically viable.

18 Q So the 114,758 cases you say were very  
19 significant to you?

20 A Absolutely. Absolutely.

21 Q What? Is there anything than the increased  
22 dollars that you would receive down near the end of the  
23 line on this, were there any other advantages to you to  
24 having this?

25 A The advantage of it is that -- the increased

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1 kind of a D & F which would purport to give the authority  
2 to reinstate those cases?

3 A No. I didn't.

4 Q Now, after you received Modification 20, you  
5 proceeded to do your best to meet the delivery schedule.  
6 Did you do --

7 A Yes. We did.

8 JUDGE JAMES: Well, before you go beyond P0020,  
9 I understand from your prior testimony that when you were  
10 asked questions about paragraph three, by counsel, you  
11 said, "Gee, this doesn't really reflect what I understood  
12 the deal was. That they were going to have no discretion  
13 at all. There were to be no conditions and that they  
14 were simply to put the 114,000 back at the end." That  
15 was your understanding.

16 THE WITNESS: Right. That's right.

17 JUDGE JAMES: But now you signed this  
18 modification, didn't you, Mr. Thomas?

19 THE WITNESS: Yes. I did.

20 JUDGE JAMES: If it does not correspond to your  
21 understanding, why did you sign it?

22 THE WITNESS: Because the Government didn't  
23 give us any money. And in order to get the money I had  
24 to sign -- I had to sign this. In other words, Marvin  
25 Liebman said that he had orders from the PCO not to pay

1 dollars. That's exactly what it means. It means money.

2 Q What about continuous performance? Did it do  
3 anything for that?

4 A Yes. In other words, there should be no break  
5 in production because this would then bump up to the next  
6 time frame of production for the next contract. I mean  
7 we --

8 Q Well, okay. Let's stop for a minute and  
9 analyze what you just said. There should be no break in  
10 production.

11 A Right.

12 Q Would there have been a break in production if  
13 you didn't get these units?

14 A We believe it would, yes.

15 Q And what would have happened to you as a  
16 company if there was a break in production?

17 A If you got a break in production, you lose your  
18 workforce. Once you sped up to this you got to keep your  
19 production force and manage your production in such a way  
20 so that you can maintain a level of people and skills  
21 that you have developed. And that's what the  
22 determination and findings are to keep Rafco and Sopakco  
23 in business. It says, "We're giving this so there will  
24 be no break in production." They won't lose their skills  
25 and they won't do this and there won't be a break in

1 production.

2 Q So you understood it at the time, you signed  
3 that modification what the critical nature was of the  
4 114,758 units to be reinstated?

5 A Yes.

6 Q And you knew what would happen to you if, in  
7 fact, you did not get provision for reinstatement?

8 A Yes.

9 Q Now, did it come to pass that -- that you  
10 actually appealed the default?

11 A Yes.

12 Q Why did you do that if it was part of a deal?

13 A Well, basically, we found out that the  
14 Government was including this at their sole discretion.  
15 So based on it being on their sole discretion, I didn't  
16 -- if they hadn't put that in there, I wouldn't have had  
17 to appeal it. So we went to the Board and appealed this  
18 whole thing.

19 Q Because you felt that, if I understand you,  
20 you're saying that because the modification came out with  
21 language in it that didn't purport to be what you had  
22 agreed upon, you appealed the default. Is that what  
23 you're saying?

24 A Yes.

25 Q And --

1 very revealing, if I could find it, and point to a couple  
2 of things.

3 JUDGE JAMES: I gather you're talking about an  
4 appeal of the termination of the 114,758 cases. Is that  
5 correct?

6 MR. STEIGER: I am, Sir.

7 JUDGE JAMES: Fine. If you can tie it up with  
8 a docket number, I'd be edified.

9 MR. STEIGER: Okay, Sir. We're looking.

10 THE WITNESS: should be located in Mod 25?

11 MR. STEIGER: Your Honor, might we ask for a  
12 break of about three, two, three minutes?

13 JUDGE JAMES: sure. Let's go off the record.  
14 (Off the record.)

15 MR. STEIGER: Your Honor, for the record. The  
16 appeal in question -- the appeal of termination for  
17 default of 114,758 units was an appeal before the Armed  
18 Services Board of Contract Appeals and docketed as ASBCA  
19 Number 32570.

20 JUDGE JAMES: Problem is you're not a witness.  
21 Now could you ask that as a question to your witness?

22 MR. STEIGER: Yes. I'm sorry, your Honor.

23 BY MR. STEIGER:

24 Q Do you, Mr. Thomas --

25 A Yes.

1 A Yes. We appealed the default and what happened  
2 -- so that the Judge understands -- where's this thing  
3 at?

4 JUDGE JAMES: Why don't just wait and let your  
5 attorney ask you the question?

6 MR. STEIGER: I'm sorry, Sir.

7 JUDGE JAMES: I'm asking him to hold off until  
8 you ask him a question.

9 MR. STEIGER: Yes. I'm sorry. You're  
10 absolutely right.

11 BY MR. STEIGER:

12 Q Okay. Let us go on. You did appeal and in  
13 that appeal, do you recall what your defenses were? What  
14 did you claim that was unfair about it?

15 A No. I don't right now remember.

16 Q Did you not recall?

17 A No. I don't recall.

18 JUDGE JAMES: Do you recall which tribunal it  
19 was?

20 THE WITNESS: Armed Services Board of Contract  
21 Appeals.

22 MR. STEIGER: I'm looking for, your Honor, for  
23 the document. It's in the file. The complaint is in the  
24 file but for the life of me I can't seem to locate it, if  
25 you'll just bear with me a minute. I think it would be

1 Q I will restate an earlier question. And that  
2 was, with respect to the default do you recall if any  
3 action was taken by you with respect to the termination  
4 for default of 144,758 units?

5 A Yes. I --

6 Q And what was that action?

7 A We took the action of term -- of filing an  
8 appeal of the Government's action with Armed Services of  
9 Contract Appeals.

10 Q You recall the number?

11 A No. I don't. It's gone.

12 JUDGE JAMES: Why don't you draw his attention  
13 to the document that will show it?

14 MR. STEIGER: I will show it to him but my  
15 document may have just stepped away for a minute.

16 THE WITNESS: Where they got it from?

17 BY MR. STEIGER:

18 Q Allow me to refer you to document F-133. Not  
19 FT.

20 A Just F.

21 Q Right. Modification 25. Am I correct?

22 A Yes.

23 Q You have it?

24 A Yes.

25 Q Would you look at page 2 of 4, on the bottom of



1 the page?

2 A Yes.

3 Q Is that the ASBCA number that was docketed at  
4 the Board -- the appeal that we were referring to?

5 A Yes. It's ASBCA 32570.

6 Q Thank you.

7 MR. STEIGER: Sorry for this convoluted way of  
8 getting to that, your Honor.

9 BY MR. STEIGER:

10 Q Now, I'd like to go back just for a minute.

11 Regarding your explanation of why you signed that  
12 modification knowing that it contained a provision that  
13 was inconsistent with your idea of the deal that had  
14 taken place. I'm not sure I understood your reasons.  
15 So, please, restate.

16 A Freedom had just been defaulted for 114,000  
17 cases. Freedom was under duress. Financial duress, once  
18 again, by Marvin Liebman making no progress payment.  
19 Marvin Liebman says Frank Bankoff told him not to make  
20 any more payments until I sign the mod. The more I held  
21 up; the longer there was no payment. So if we, Judge, go  
22 to the progress payment chart for a second. I'll just  
23 demonstrate this to you.

24 Progress payment number ten. Number nine, I  
25 should say. Was paid to us on 12/6. Right before this

1 were just describing your financial condition at the end  
2 of 1985.

3 A Yes.

4 Q Did you have outside financing available at  
5 that time?

6 A Yes. We had outside financing.

7 Q What was it based on?

8 A It was based on receipt of progress payments.  
9 It was tied to progress payments.

10 Q Did you express to the Government your need for  
11 relief?

12 A Yes. We did.

13 Q Did you, in fact, indicate to the Government  
14 that you were incurring increased costs?

15 A Yes. I was going into acceleration mode in  
16 order to get these cases done. And then they just put --  
17 slammed their foot on the brake again. No money.

18 Q At that time was it none to you that you were  
19 going to have a substantial overrun in order to complete  
20 the job?

21 A We was telling them that we was going to file a  
22 claim. Yes. That there was an overrun that we're  
23 looking at for cost incurred. That was not contemplated  
24 by the contractor based on their actions.

25 Q Do you recall when you told them and -- by the

1 meeting on the 9th. That's the last time we got any  
2 money was 12/06/85. When we put in and had pending  
3 before the Government progress payment number ten, dated  
4 11/29/85 for \$353,000 that 353,000 I understand was our G  
5 and A salaries and money. And some of my people were  
6 always waiting for -- when you paid -- when the  
7 Government pays me. I'm going to use that to pay you  
8 type of thing. So we needed that money. Due to the fact  
9 of us being under a Cure Notice, Marvin Liebman says he's  
10 not paying any monies because the PCO told him not to  
11 until I come out of cure. And until I come out of it.  
12 So if you look at the next time I got a payment, it was  
13 on 1/30/86.

14 I had to sign this thing on 1/29/86. So the  
15 very next day, he then releases the progress payment and  
16 says, "Okay, fine." So if I hadn't signed on 1/29, if I  
17 decide I wasn't going to sign at all, then they were  
18 going to continue to hold my head under the water and  
19 give me no money. I call that duress. I don't know what  
20 to do. I got a mess on my hands up there in the Bronx.  
21 A rebellion going on. So that's why -- what was going on  
22 right there. In somewhere in the file, Marvin's says  
23 that per order of the PCO he's not to pay any progress  
24 payment until I sign the modification.

25 Q Thank you. At the -- thus at the end -- you

1 way, who is them? You said you told "them" you're going  
2 to file a claim. Who's them?

3 A Okay. At the December 9 meeting, we told  
4 Captain Parsons, Frank Bankoff, and everybody in the  
5 Government side that the reason why they were having  
6 these war reserve level problems was as a result of the  
7 actions of Marvin Liebman and that Freedom was going to  
8 be filing claims against the United States government.

9 Q And did you indicate at that time what the  
10 nature of that claim was going to be for?

11 A For delays that's attributable to their  
12 nonpayment of progress payments to their -- they're not  
13 paying me the cost that was agreed to in the negotiations  
14 with the PCO.

15 Q And did you, in fact, file such a claim?

16 A Yes.

17 Q May I refer you to document FT-266? Do you  
18 have the document in front of you?

19 A Yes. I do.

20 Q Is this the claim that you referred to?

21 A Yes.

22 Q Now, let me ask you. Before you sent this  
23 claim, did you -- did you call the Government and advise  
24 them that it was coming? You recall?

25 A I believe one of -- I think Dave Lambert called

1 the Government to tell them it was coming.

2 Q Dave Lambert?

3 A Yes.

4 Q And who is Dave Lambert?

5 A Dave Lambert was an attorney that I hired in  
6 Washington, D.C. to see if he couldn't help straighten  
7 out this -- disconnect on this contract with us and --  
8 with Freedom and DLA.

9 Q Mr. Lambert. You believe Mr. Lambert called  
10 somebody in the Government before the claim was filed?

11 A Yes. I believe he did.

12 Q Do you happen to know who that might be?

13 A I believe he called Ray Kiasa and them down  
14 there. Or Kabazman or somebody. And advised them and  
15 that DPSC was --

16 Q And who -- From what organization were these  
17 individuals?

18 A They were at DLA headquarters. One was the  
19 Executive Director of Contracting and the other was Chief  
20 of Contract -- Chief of Legal Division or Chief Counsel.

21 Q Who was who?

22 A Mr. Kabazman, Paul Kabazman was the Chief  
23 Lawyer, counsel for the DLA headquarters. And Ray Kiasa  
24 was the Executive Director of Contracting.

25 Q Now, what -- generally now because the claim is

1 BY MR. STEIGER:

2 Q Now, referring to the bottom number referred to  
3 as the total request? What is that number?

4 A Five point seven million.

5 Q Do you know what eventually happened to that  
6 claim amount itself? Do you have any idea --  
7 recollection?

8 A Well, the claim was reduced to 3.4 million  
9 which was I told was to take out the profit because they  
10 were going to give you cost.

11 Q Who told you that?

12 A Dave Lambert. So --

13 Q But there was no document or new claim ever  
14 submitted to that effect. Was there?

15 A There was a talking claim that he had taken  
16 into DLA headquarters.

17 Q Was there any --

18 A But nothing --

19 Q -- Formal written claim that changed that  
20 amount as far as you know? From what was in there  
21 originally?

22 A I don't believe so. I don't think so.

23 Q But it then began to be referred to as a claim  
24 of a lower amount?

25 A Yes. It's the 3.4 million and what that is --

1 a matter of record and is here, what relief were you  
2 looking for in this claim?

3 A We were looking for the damages to put us back  
4 where we would have been had they -- there been no  
5 government caused action. So we were just looking for an  
6 equitable adjustment based on the cost that they had  
7 caused us to incur as a result of the Government actions.

8 Q Now, if I look at the very last page of the  
9 claim narrative. Not the exhibits or anything. I think  
10 of the claim document itself. It would be Exhibit 1, the  
11 second page. Where it indicates --

12 JUDGE JAMES: What's the Bate's number?

13 MR. STEIGER: Pardon?

14 JUDGE JAMES: What is the Bate's number of the  
15 page you're looking at? Does your claim have Bate's  
16 numbers in the lower right-hand corner?

17 MR. STEIGER: Pardon?

18 JUDGE JAMES: I repeat does your claim have  
19 Bate's numbers in the lower right-hand corner?

20 MR. STEIGER: Yes. It does, your Honor. But I  
21 was --

22 JUDGE JAMES: Okay. Please identify the Bate's  
23 number page to which you're drawing the attention of your  
24 witness.

25 MR. STEIGER: It's Bate's number 01808.

1 is, basically, when you take out the profit and just deal  
2 with cost by itself.

3 JUDGE JAMES: What would be the date of that  
4 verbal claim, Mr. Thomas?

5 THE WITNESS: It's sometime in March, I believe  
6 it is.

7 JUDGE JAMES: March of which year?

8 THE WITNESS: March of '86. It's a March of  
9 '86 because Lambert had put something together and we  
10 went to --

11 MR. STEIGER: Can't be March of '86.

12 JUDGE JAMES: well, Mr. Thomas, that makes no  
13 sense at all because the claim itself of 5.7 million is  
14 April of '86.

15 MR. STEIGER: Right.

16 THE WITNESS: I agree. That's why I said it  
17 went in ahead of time.

18 MR. STEIGER: I'm sorry.

19 JUDGE JAMES: Was the "it" that went ahead of  
20 time?

21 THE WITNESS: Mr. Lambert took our documents,  
22 worked it up, and went ahead of time to DLA headquarters.

23 JUDGE JAMES: Okay. So what you're telling us  
24 then in response to your attorney's question is that on  
25 this advance notice of the impending claim, Lambert gave

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1 the DLA folks in Washington a different number from this  
2 claim?

3 THE WITNESS: Right.

4 JUDGE JAMES: Okay. Fine. Go ahead. Now I  
5 understand it.

6 MR. STEIGER: Thank you.

7 BY MR. STEIGER:

8 Q Now the relief in here that is being sought  
9 identifies various reasons why you are entitled to that  
10 money. Were those the reasons in effect that you talked  
11 about a few minutes ago as to your condition and what had  
12 happened to you?

13 A Yes.

14 Q Who put this claim together?

15 A Myself and Kevin Seraaj.

16 Q Did you have any outside professional  
17 consulting help?

18 A No.

19 Q How long did it take you to put this claim  
20 together?

21 A We started on this claim in early January or in  
22 December when we told the Government that we were going  
23 to be accumulating these costs and putting it together in  
24 order to make it happen.

25 Q In your estimation, is there anything in this

1 back end of the contract, we were going to work clean  
2 smack out of money.

3 So it's imperative that we get money put back  
4 into this contract so that we can get to the end of the  
5 contract. Without it, you can't get to the other end.

6 Q Is it your understanding that the Government  
7 people that you were talking to at the ACO/PCO level all  
8 understood that you had to have some form of relief in  
9 order to perform the contract?

10 A Yes. I had to have some relief.

11 Q Did they understand that?

12 A Yes. They did.

13 Q Well, why you so sure about that?

14 A We discussed it with them many times that we  
15 had to have it in order to get to the end. Otherwise,  
16 without it we could just quit. I mean. We need to stop  
17 now.

18 Q After you submitted this claim, you recall  
19 having any discussions about it with the PCO or the ACO?

20 A Yes. What happened was the -- the full of this  
21 claim was actually submitted to Frank Bankoff. We were  
22 called down to DPSC. And DPSC wanted to discuss us  
23 releasing or them settling up this claim with us before  
24 -- at that time. And we wanted certain things to happen.  
25 They wanted certain things like releases and all that.

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1 claim that was written in here that you had not in some  
2 way discussed previously with the Government?

3 A No. This is everything that we told them from  
4 various times that the Government has caused us delay  
5 problems.

6 Q In putting to this -- claim together would you  
7 say this is a fully supportable claim with backup  
8 information?

9 A Yes. It is. Absolutely. We can back up all  
10 of this.

11 Q In the event that you did not get a settlement  
12 on this claim or the lesser amount of the claim as it  
13 became -- or some other relief of that type was it  
14 possible for you to complete this contract?

15 A No.

16 Q Why not?

17 A Well, if you don't get the -- these costs that  
18 pushed us into the extended out of period time, I've  
19 already burned the contract money up sitting still doing  
20 nothing for six months. And then when you slam the foot  
21 on the brake, again, and I had an additional three months  
22 of sitting still doing nothing. I'm at nine months of  
23 doing nothing. I got manufacturing over here. G and A,  
24 salaries, everything is piling up on the front end of the  
25 contract. When production was to commence and at the

1 We refused to release and they ended up -- the PCO ended  
2 up saying, "I'm going to refer this whole thing up to DLA  
3 headquarters."

4 Q You said something about a release. What did  
5 they want to do with this claim?

6 A They just wanted me to forget about it. Just  
7 release it. It's your fault.

8 Q That was their -- that was their way of  
9 settling it?

10 A Yes. Mr. Bankoff was like saying, "This is  
11 your fault. That nothing Marvin Liebman done -- has done,  
12 hurt you." Nothing he's done has hurt me.

13 Q Yet, they knew that you had to have some form  
14 of relief to complete the job.

15 A Right. I had to have some form of relief,  
16 otherwise, but he wanted, I guess, they wanted me to go  
17 out and get my own money to feed the troops.

18 Q Let me ask you this. Around that same time or  
19 within that time frame, was there not another MRE  
20 procurement that was moving ahead toward possible award?

21 A Yes. There was.

22 Q What MRE procurement was that?

23 A That's MRE-6.

24 Q MRE-6.

25 A MRE -- this time though, that's MRE-7, 1

1 believe it is. MRE-7 was moving.

2 Q MRE-7.

3 A Right. MRE-7 was moving.

4 Q Now, with respect to MRE-7, were you one of the  
5 planned producers, were you in line? What was your  
6 status with respect to MRE-7 at the time?

7 A Freedom because of its mobilization capacity,  
8 was the third planned producer in the Industrial  
9 Preparedness Program. And we were number three. That  
10 was our status.

11 Q Were you named on the D & F with respect to  
12 MRE-5 -- sorry, -7?

13 A Yes. I was.

14 Q So did you have a reasonable expectation that  
15 you were going to, in fact, get your share of MRE-7?

16 A Yes. All we had to do is reach an agreement on  
17 price and we would be maintained in the Industrial  
18 Preparedness Program.

19 Q Did there -- did there come to pass anything  
20 that may have let you to believe that was not going to be  
21 the case in this time frame?

22 A Yes.

23 Q What happened?

24 A After we told them on December -- December 9  
25 that we were filing this claim, it came to our attention

1 weren't eligible.

2 Q You didn't believe that Cinpak was qualified in  
3 essence to become the third contractor in MRE-7. Is that  
4 what you're saying?

5 A They're the fourth contractor. We were already  
6 the third. So they was behind us.

7 Q If they were named as a -- in the D & F,  
8 perhaps, you would say that it might not have been clear  
9 who would end up being the third contractor?

10 A Well, we was afraid that we were the targets.  
11 It looked like they would be trying to get rid of us.

12 And blame us for all of the problems. And also, once  
13 they got rid of us they'd get rid of these claims against  
14 the United States government all at the same time.

15 Q And what led you to be -- to come to that  
16 belief?

17 A Rumors in the industry. That DPSC was no  
18 longer going to be supporting Freedom and that we were  
19 being replaced by Cinpak.

20 Q I'm sorry. I didn't hear the first word you  
21 said.

22 A Rumors. Rumors in the industry. It's a small  
23 MRE industry. All the suppliers know who is being  
24 maintained and supported. And by bringing in Cinpak,  
25 Frank Bankoff sent a strong signal to the industry that

1 that they were going to issue a solicitation but they're  
2 only going to support three contractors. So all of the  
3 sudden we realize that Frank Bankoff, who had brought in  
4 a fourth contractor the year before -- and there's four  
5 contractors -- all of the sudden he's now saying only  
6 three seats are going to be there. Somebody was going to  
7 be eliminated.

8 Q Well, step back a minute. It's a little  
9 confusing. Are you saying there were four contractors  
10 noted on the D & F?

11 A There were three contractors, I believe. Let  
12 me see. That might have been on MRE-7, yes. I think  
13 MRE-7 had four contractors noted.

14 Q Oh, it had four contractors.

15 A It had four contractors noted. Freedom's was  
16 the third planned producers and then they had a fourth  
17 planned producer that they had brought on called Cinpak.

18 Q Did you have some reason to believe that you  
19 were not going to end up being the third selected  
20 contractor?

21 A No. Because Cinpak had absolutely no  
22 mobilization ability for production. They didn't have  
23 their 1519s in place. The -- we knew they didn't have  
24 any Walsh Healey capability. They had no food production  
25 experience. They had nothing. I mean, we knew that they

1 this is his guy who he's going to put in business and  
2 keep in business.

3 Q And you felt that -- and you felt threatened by  
4 this action?

5 A Absolutely. Because there's, only three seats.  
6 Somebody's leaving. Everybody's putting all this money  
7 into these programs -- into this investment and all of  
8 the sudden he's saying, "Well, only three people is  
9 getting a seat." Four guys -- somebody knows somebody is  
10 out. Somebody's going to be replaced.

11 Q Okay. Now, when it came getting back to your  
12 discussions with the PCO and the ACO regarding your  
13 claim.

14 A Right.

15 Q You said that -- I believe you said that they  
16 were trying to get you to wave it.

17 A Right.

18 Q And you were asking for certain things from  
19 them, perhaps?

20 A Right.

21 Q What were you seeking at that time?

22 A We wanted an equitable adjustment to the  
23 contract price and we wanted assurances that we would be  
24 negotiated with and maintained in the Industrial  
25 Preparedness Program.

1 Q When you say assurances, did that mean that you  
2 wanted a guarantee of MRE award?

3 A No. I can't -- nobody can guarantee an award.

4 Q So what is it that you wanted?

5 A I wanted to be treated equally and I want to be  
6 put back into a position so that I could be made whole  
7 again. And continue in the program as we had agreed to  
8 when I agreed to drop my lawsuit in the federal case.  
9 For the treatment --

10 Q So if the --

11 A -- That they had ran me through.

12 Q If the Government went around saying that you  
13 sought a guarantee to get the MRE-7 award, would you  
14 disagree with that?

15 A Yes. That's not good. They can't say -- I  
16 know that no one can guarantee anything. Nobody can give  
17 you an absolute guarantee that you're going even walk  
18 across the street safely. So to say that the Government  
19 is going to -- you want a guarantee -- I think that was  
20 their character. How they characterized it. But we  
21 wanted serious assurances that -- and an opportunity, if  
22 we were qualified -- if we were qualified to get to the  
23 table to talk with them and hammer out a deal.

24 Q Essentially to -- what you're saying -- to  
25 negotiate in good faith with you.

1 hands on this paper saying, "I want assurance of  
2 equitable treatment as an MRE-7, planned producer."  
3 You're telling me it's not in the claim. It's not  
4 another document.

5 THE WITNESS: I believe -- Oh, yes. It is.

6 JUDGE JAMES: Wait a second. Let me finish.

7 You're telling me it was stated orally. Is that correct?

8 THE WITNESS: No. We have it in a document of  
9 an understanding.

10 JUDGE JAMES: Fine. Let your counsel try to  
11 lead you to the document.

12 BY MR. STEIGER:

13 Q Mr. Thomas, we were talking about your -- all  
14 the discussions that were taking place between you and  
15 the PCO and ACO after you submitted the claim.

16 A Right.

17 Q All discussions.

18 A Right.

19 Q At meetings -- at meetings, these meetings,  
20 there were, in fact, you became -- did you become aware  
21 that there were minutes or memos or whatever prepared by  
22 the Government that in effect stated what your desires  
23 were?

24 A What they claim my desires were.

25 Q What they claim.

1 A That's right. They got to negotiate in good  
2 faith. But they got to treat me equally. They got to  
3 recognize that the problems that was caused was beyond  
4 the contractor. I cannot control Mr. Liebman. I cannot  
5 control his actions. I couldn't control the internal  
6 squabbling between DPSC and ACO.

7 Q Did you ever demand anything more than that  
8 with respect MRE-7?

9 A No.

10 JUDGE JAMES: Is this demand in your claim, Mr.  
11 Thomas?

12 THE WITNESS: I don't believe it was.

13 JUDGE JAMES: Is it in some other document?

14 THE WITNESS: I don't believe it is.

15 JUDGE JAMES: So it's an oral demand. Is that  
16 right?

17 THE WITNESS: To be treated equally?

18 JUDGE JAMES: Yes.

19 THE WITNESS: I think -- I think it's, yes.

20 We're talking to them that we want to be treated equally.  
21 If they had adjusted this, I would have felt that --  
22 Okay, they have now financially made me whole. I can go  
23 forward. I want them to correct --

24 JUDGE JAMES: I understand all that, Mr.

25 Thomas. I'm just trying to find out where we can put out

1 A Yes.

2 Q These are in the file?

3 A Yes. It is.

4 Q But you have no first hand knowledge of these  
5 documents so I cannot ask you to comment on them.  
6 However, you are aware they are in the file.

7 A Yes. I saw them in the file.

8 Q But you maintain that your desire, your  
9 demands, sort to speak, with respect to MRE-7 was done  
10 orally. Is that correct?

11 A And also we included in a document --

12 Q Later on.

13 A Later on.

14 Q Yes. Okay. Now, did you believe that at that  
15 time your -- shortly there after, that your discussions  
16 with the PCO and the ACO came to an impasse?

17 A Yes.

18 Q And so at that time, what did you do?

19 A At that time, we did nothing. We just left  
20 and, basically, --

21 Q No. I don't mean at that moment. I mean, in  
22 order to further your position, overall, what did you do?  
23 Did you hire somebody? What did you do?

24 A What happened at the impasse Frank Bankoff  
25 referred the entire matter to DLA headquarters for

1 resolution. And that's also contained in that writing  
2 that memorizes some of it. We asked Mr. Lambert to open  
3 negotiations with Mr. Kiasa to resolve this issue and to  
4 bring all of this to their attention as to the actions of  
5 the PCO and the ACO. What was going on that caused this  
6 claim to be over three million dollars that we were  
7 claiming against the Government.

8 Q You asked Mr. Lambert --

9 A Right. Dave Lambert.

10 Q -- Whose services you retained.

11 A Right. We retained Dave Lambert to explain  
12 this to Frank Bankoff's bosses.

13 Q What were Mr. Lambert's qualifications?

14 A Mr. Lambert was a former -- he's -- For one,  
15 he's an attorney. Two, he was a former small business  
16 director for the Pentagon overseeing fair treatment of  
17 small minority businesses. And he had a thorough,  
18 excellent background of understanding of how these things  
19 are handled throughout the Government system. This is  
20 the first time I ever tried to put together a claim. I  
21 didn't even know what I doing.

22 Q Now, was it decided that you, too, should be  
23 part of those discussions in DLA?

24 A No.

25 Q Why not?

1 THE WITNESS: I was told --

2 BY MR. STEIGER:

3 Q My next question. How do you know that?

4 A I was told by Mr. Lambert that that's who his  
5 meetings were with. I even attended a meeting at one  
6 point but before this with Mr. -- I met him. I've met  
7 Mr. Kiasa.

8 Q Let me ask you this. Did you have discussions  
9 while the negotiations were going on by Mr. Lambert and  
10 these individuals? Did you have your own discussions as  
11 to what was going on with Mr. Lambert?

12 A Yes. Directly with Mr. Lambert, I did.

13 Q How often were these discussions?

14 A He would do it sometimes weekly, daily, it  
15 depends on right before his meeting or right after his  
16 meeting.

17 Q Did come to pass, that Mr. Lambert, in fact,  
18 did come to an agreement with Mr. Kiasa and Kabazman?

19 A Yes. He did.

20 Q And was this agreement summarized in a  
21 particular document?

22 A In one document where it was basically in  
23 writing.

24 Q I didn't ask you what it was in. Answer my  
25 question. Perhaps we could refer to document MO25.

1 A It was decided that I should not go up there  
2 because I was -- I was quite an emotional about what was  
3 going on to me and that -- I had, basically, felt that I  
4 was being totally treated differently and that the people  
5 in New York were torpedoing the deal that was structured  
6 and hammered out with DPSC and that New York was  
7 squabbling over nothing. And objecting to the way, the  
8 PCO structured the contract and claiming that he screwed  
9 up. And I told Lambert that he has to get this straight  
10 with the head of the agency here to get both of agencies  
11 in step with one another.

12 Q What did you task him with as his objective  
13 when he went up there?

14 A We wanted to -- we wanted an equitable  
15 adjustment. We wanted to have this -- I wanted to be  
16 made whole. I wanted to be made whole. Whichever way it  
17 is that's going to solve this problem so I could stay in  
18 business.

19 Q During the course of Mr. Lambert's discussions  
20 with the DLA people and who were they, by the way, again?

21 A One was Ray Kiasa, the Executive Director of  
22 Contracting. The other one was the Chief Counsel, Carl  
23 Kabazman.

24 JUDGE JAMES: Oh, Mr. Thomas, if you weren't  
25 there how, do you know that?

1 M-25. I would like you to zero in on the bottom number,  
2 800503. Would you take a look at this document signed by  
3 you to Mr. Kiasa?

4 A Right. Now which number is that?

5 Q It is 800503, on the bottom.

6 A Okay.

7 Q First page of the letter. And I'd like you to  
8 look at the letter itself. Three pages.

9 A All right.

10 Q Mr. Thomas, to the best of your understanding,  
11 does this letter reflect the agreements that were entered  
12 or that -- that the items that were agreed upon between  
13 Lambert and Kiasa and Kabazman as stated to you by  
14 Lambert?

15 A Yes. It is. This is it.

16 Q I'd like to just focus on a couple of items in  
17 this letter. Second page, 800501. Talking about  
18 respective actions to do the following. What is your  
19 understanding of number one?

20 A That if Freedom is otherwise qualified, DPSC  
21 will negotiate a fair and reasonable contract with  
22 Freedom based on Freedom's existing mobilization  
23 capabilities. And it's specific cost price qualifier.

24 Q Referring to what contract?

25 A MRE-7.

1 JUDGE JAMES: Well, you say, "Referring to  
2 MRE-7." Does it say MRE-7 here, Mr. Thomas?

3 THE WITNESS: No.

4 BY MR. STEIGER:

5 Q How do you know it was MRE-7?

6 A Because that's the contract period, we were  
7 talking about in the negotiations that I had referred to  
8 earlier. They had issued a solicitation for only three  
9 contractors to be maintained. And during the  
10 negotiations --

11 JUDGE JAMES: I understand your testimony. Are  
12 those negotiations and that solicitation mentioned here  
13 in this letter?

14 THE WITNESS: Yes. It is mentioned, MRE-7.  
15 It's in number one. "For one of the four maximum share  
16 quantities for MRE-7."

17 JUDGE JAMES: Fine. Go ahead.

18 MR. STEIGER: Thank you, your Honor.

19 BY MR. STEIGER:

20 Q So it says, "Negotiate a fair and reasonable  
21 contract if otherwise qualified." Is there anything in  
22 here that says that you would be guaranteed an award?

23 A No.

24 Q Now let's take a look at number two. What does  
25 number two mean to you? What did it mean to you?

1 try to repair the damage that was done to Freedom  
2 Industries by the novation of the contract.

3 Q Okay. Going back to the items one and two.  
4 You regard those as the most significant items in this  
5 letter?

6 A Yes. The negotiation of a contract and the  
7 processing of a loan. Satisfied, one, me; two, my bank.

8 Q Did you believe that if you got these two  
9 things that you would be able to stay in business?

10 A Absolutely. Without a doubt.

11 Q Now, I know you're not a lawyer and I don't  
12 want to ask you a legal question, but did you think these  
13 were a binding contractual arrangement?

14 A I thought this was an understanding. I thought  
15 this is in good faith and that's what I say here.

16 "Freedom wishes to confirm these commitments based on  
17 both parties and in good faith and in a timely manner."

18 To take these actions. And when I gave these to Frank  
19 Bankoff. He accepted it and we were off and running to  
20 the races. I never thought that they were not do these  
21 things. There's no reason for me to think that.

22 Q Now, these things were they -- were these  
23 things accomplished or signed or agreed to in connection  
24 with an actual contract modification?

25 A Yes.

1 A That DPSC and DLA as appropriate would process  
2 a request for a guaranteed loan which would be submitted  
3 by our bank in order to get us to the other end of the  
4 contract.

5 Q Does the language here say or did it mean to  
6 you that you would be guaranteed a guaranteed loan?

7 A No.

8 Q Now there were some other items in the letter,  
9 perhaps you might mention, were they of any great  
10 significance? What were they as number three, for  
11 example, on the next page? How did that come about that  
12 you would be needing assistance, for example? You  
13 recall?

14 A Freedom had -- well, at this time here, we're  
15 going to have to go back into the 8-A program. Freedom  
16 Industries once Marvin Liebman forces us to novae the  
17 contract, destroyed Freedom Industries as an 8-A  
18 contractor. And destroyed that whole business.

19 Freedom NY was not an 8-A contractor. So,  
20 therefore, I'm now going to need assistance by them to  
21 get me back into the 8-A program because of their actions  
22 of destroying the 8-A business that I had -- that was an  
23 8-A contractor with the United States government. So if  
24 we can get tray pack and pouch contracts issued through  
25 that, then that would be the mechanism we would use to

1 Q And what contract modification was that?

2 A This was attached to Modification 25.

3 Q You say attached.

4 A Right.

5 Q But I asked you if this was in connection with  
6 a contract modification?

7 A Yes.

8 Q And what modification was that?

9 A Modification 25.

10 Q Right. And that document is F-133.

11 JUDGE JAMES: That going to be any different  
12 from the copy attached to M-25?

13 MR. STEIGER: I'm going to check, your Honor.  
14 No, your Honor, there's absolutely no difference.

15 JUDGE JAMES: So if that is more convenient,  
16 please let us refer to that.

17 BY MR. STEIGER:

18 Q Would you take a moment to look at this  
19 modification?

20 A All right.

21 Q Now we look at the modification, it has a  
22 number of items on it regarding things that were going to  
23 happen starting with the number one on page 2 of 4 and  
24 going on to the end with number five. And let me ask you  
25 this. You've looked at this. Certain things it was going

1 to provide you with. Would the things in here, if you  
2 were provided with them have given you sufficient relief  
3 to finish the job and remain in business?

4 A This alone?

5 Q This alone.

6 A No. No, it would not have. This standing by  
7 itself would not going to give me the extra money that I  
8 needed to get to the other end of the contract.

9 Q But it did give you -- purport to give you  
10 certain things. Did it not?

11 A Yes. It did.

12 Q You said it would not standing alone do the job  
13 for you. Was the Government aware of that?

14 A Yes. It was. Absolutely.

15 Q Now, how do you know that?

16 A Because one, they accepted the cover letter  
17 that was attached to this that says that those issues in  
18 part involve a dispute. And in part is settled by this.  
19 In part. Not the whole thing. This is in part settling  
20 it.

21 MS. HALLAM: We know what document he's talking  
22 about?

23 MR. STEIGER: Pardon me.

24 MS. HALLAM: What document are you talking  
25 about?

1 and would not allow you to continue performance to the  
2 end as you had contemplated. Is that what you're saying?

3 A That's right.

4 Q And the Government knew that?

5 A Absolutely. The only way we could have done  
6 this is with the guaranteed loan to get to the other end.  
7 That was the purpose of it.

8 Q I see. So in essence not be able to use this  
9 document alone, are you saying you needed something else?

10 A Yes.

11 Q Now thing -- That you needed something else,  
12 was that documented anywhere?

13 A I believe it was documented in the cover  
14 letter.

15 Q Stop using that term, please. We don't know  
16 what it means. What was it documented in?

17 A The May 13, 1986, letter-addressed to Mr. Kiasa  
18 and cc and given to Frank Bankoff as part of this  
19 arrangement.

20 Q So in other words you're referring to the  
21 letter we previously discussed a few minutes ago.

22 A That's right.

23 Q So without the items in that letter, you say --  
24 are you saying -- I don't want to put words in your  
25 mouths. Together then what was the -- would the two --

1 BY MR. STEIGER:

2 Q What document are you talking about?

3 A The May 13 cover letter to this.

4 Q Of the previous document. What?

5 A It's also right here.

6 MS. HALLAM: Right were?

7 JUDGE JAMES: It's the very same document.

8 BY MR. STEIGER:

9 Q No. I want you to focus just on the document.  
10 We're just talking about Modification 25.

11 A Okay.

12 Q And I asked you -- you told me that this  
13 document alone wouldn't provide you with sufficient  
14 relief. And I asked you to tell me why you believe that.  
15 What are the bases of your belief?

16 A This document standing alone shows that we had  
17 asserted a claim for 3.4 million dollars.

18 Q Right.

19 A Above the contract price.

20 Q Right.

21 A By giving me back just the contract price,  
22 doesn't get me the 3.4 million that I need. This doesn't  
23 help me. Get by itself.

24 Q So this would not -- this document standing  
25 alone would not have taken care of your overrun monies

1 the items together, the modification and the letter,  
2 would that have provided you with the relief you needed  
3 to --

4 A Yes. We believe it would. That's why we went  
5 that way. The settlement was reflected in part in the  
6 contract modification which is attached is what it says  
7 in this document. So since the settlement -- my  
8 understanding that the settlement is reflected in part in  
9 the contract modification meant that the whole settlement  
10 was not inside that modification. It's only in part in  
11 there. And in terms of conditions, I understood was  
12 agreed between Freedom and DPSC.

13 Q Now at anytime why Mr. Lambert was doing his  
14 discussions and talking to you, did anyone tell you from  
15 the Government that anything negative concerning the  
16 guaranteed loan?

17 A No.

18 Q And by the way, it is a loan. How did you  
19 intend to repay it?

20 A Based on being treated fairly at the  
21 negotiations. We would have hammered out a deal similar  
22 to what we hammered out on 6 November. We would have  
23 hammered out a deal and I would have paid them -- the  
24 loan back from future -- from the proceeds of the other  
25 contracts.



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1 Q What other contracts?

2 A Future contracts.

3 Q Future MRE contracts?

4 A Future MRE contracts. Absolutely.

5 Q So there was never --

6 A And/or future any kind of contracts. You know,  
7 that the Government would do. Even in the 8-A we use  
8 that money to pay it back. We just wanted to stay in  
9 business because we were put in a condition -- something  
10 that we didn't cause ourselves as a result of Marvin  
11 Liebman completely discarding the agreements that we had  
12 structured and hammered out to settle the lawsuit that we  
13 had issued before.

14 Q The guaranteed loan that was intended here as  
15 expressed in paragraph two of the letter we just referred  
16 to. Did it say what amount that loan was going to be  
17 for?

18 A Yes. In the --

19 Q How much?

20 A Beg your pardon.

21 Q How much?

22 A In the letter on page 3, it says, "The loan  
23 guaranteed to the lender in an amount not greater than  
24 2.7 million, of course, for the purpose to insure the  
25 necessary cash flow for the performance of the contract."

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1 Q So this loan was intended for this contract?

2 A That's right.

3 Q Now, as to the amount. Is there any  
4 correlation between that amount and the overrun that was  
5 being anticipated at the time?

6 A Yes. We believe that the cost overruns that my  
7 people and that the Government's people could agree to  
8 would be 2.7 million to get us to the finish line.

9 Q So there was a direct correlation between the  
10 two?

11 A Absolutely.

12 Q Now, after this was accomplished, did you talk  
13 with your banker, Bankers Leasing. Did you tell them  
14 about this?

15 A Yes. We did.

16 Q What did you tell them?

17 A Well, we told them that we'd hammered out a  
18 deal to be maintained in the program. To be kept  
19 available. And that we would need production equipment,  
20 Mitsubishis, we would need the equipment at the APF plant  
21 in Chicago. We would need -- which had a lot of assembly  
22 equipment that they had purchases as well as retort pouch  
23 equipment they had purchased. They had about 5 million  
24 dollars worth of assets out there that was tied up with  
25 the Economic Development Administration. And Randy says

1 based on those discussions with DPSC. He would be glad  
2 to work with us and to supply the necessary money to make  
3 it happen. So we could stay in business. He could get  
4 his monies back. He would approve the loan and process  
5 it through. In other words, yes, he would do this.

6 JUDGE JAMES: I want to interrupt for a second.  
7 And you're going to be able to continue with whatever  
8 line it please you but I want to stick P0025 and Mr.  
9 Thomas' cover letter of May 13, 1986, because there's  
10 something I don't understand here. And I need to know.  
11 I'm looking at the bottom paragraph, page 1 of your  
12 letter, Mr. Thomas.

13 THE WITNESS: Right.

14 JUDGE JAMES: According to you the claim in  
15 whatever amount it was you've agreed to settle it for  
16 \$3,401,760.

17 THE WITNESS: Right.

18 JUDGE JAMES: That's what you say.

19 THE WITNESS: Yes.

20 JUDGE JAMES: Now you say that settlement is  
21 reflected in part by the modification attached which  
22 we're led to believe is P0025. So my question to you is,  
23 looking through all these terms and conditions of P0025,  
24 describe to me where's this part and in particular what  
25 dollar figures are you going to put in this little part

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1 that P0025 resolves of your number, if we believe it,  
2 \$3,401,760?

3 MR. STEIGER: Your Honor, if you will --

4 JUDGE JAMES: I want Mr. Thomas to answer the  
5 question.

6 MR. STEIGER: I have no intention of preventing  
7 him from answering the question but I will tell you this,  
8 your Honor, that I intend to go into great detail with  
9 respect to the provisions of Modification 25, themselves.

10 JUDGE JAMES: All right. You can do that.

11 Please just answer my question right now, if you can.

12 THE WITNESS: The piece that's in part -- the  
13 settlement happens to be -- that was not included -- what  
14 was not included in the -- in the mod itself.

15 JUDGE JAMES: No. No. That's not my question.  
16 I want to know what is included in the mod itself.

17 THE WITNESS: What's in it?

18 JUDGE JAMES: Yes.

19 THE WITNESS: Okay. Okay.

20 JUDGE JAMES: What part of the settlement?

21 THE WITNESS: What's included -- what's  
22 included in the mod is that the Government is going to  
23 give us the things we're already entitled to. Such as  
24 the \$522,000 that was already -- we were entitled to  
25 that. So they're going to pay us what we're entitled to.

1 JUDGE JAMES: That's just a little progress  
2 payment? Isn't it?  
3 THE WITNESS: If that's what that is. It's all  
4 progress payments.  
5 JUDGE JAMES: But that's not any part of the  
6 3.45 million, is it?  
7 THE WITNESS: No. It's not.  
8 JUDGE JAMES: All right. What else?  
9 THE WITNESS: They're going to, I believe it's  
10 in here, they're going to continue -- they're going to  
11 pay progress payments as described by the DAR regulations  
12 now. So as I recall, it's in here that they will -- Yes.  
13 All payments --  
14 MR. STEIGER: What about the 114,758 cases?  
15 JUDGE JAMES: What are we going to do with  
16 that?  
17 THE WITNESS: They are going to put back into  
18 the contract and increase the price back to -- to bring  
19 it back to 17 million dollars. So we needed that. So  
20 they did that. But what was -- that's what --  
21 JUDGE JAMES: Is that part of the 3.41 million  
22 claim?  
23 THE WITNESS: No.  
24 JUDGE JAMES: Okay. My question's pending. Is  
25 there any part of that 3.4 million that you say was the

1 THE WITNESS: Yes. It is.  
2 JUDGE JAMES: Right. Now, you say that  
3 settlement is reflected in part in P0025.  
4 THE WITNESS: Right.  
5 JUDGE JAMES: And my question is, are any -- is  
6 any dollar part of the 3.4 million settlement that you  
7 say happened in the Mod?  
8 THE WITNESS: No.  
9 JUDGE JAMES: And you've told me lots of things  
10 that aren't in the 3.4 million and I guess what it boils  
11 down to is, you've nothing you can point to in P0025 is a  
12 part of the 3.4 million. Is that correct?  
13 THE WITNESS: No. I can't.  
14 JUDGE JAMES: Can't point to anything?  
15 THE WITNESS: None of it.  
16 JUDGE JAMES: Go right ahead. So the small  
17 part became zero. If we believe the representation in  
18 the cover letter.  
19 MR. STEIGER: Perhaps I could shed a little  
20 more light.  
21 JUDGE JAMES: By all means.  
22 MR. STEIGER: Thank you. But before I do, my I  
23 ask for a few minutes.  
24 JUDGE JAMES: You may. And I will grant it.  
25 MR. STEIGER: Thank you kindly.

1 settlement amount that you got paid by this P0025?  
2 MR. STEIGER: There's a disconnect here, your  
3 Honor. Which if you'll allow me to proceed.  
4 JUDGE JAMES: I will but I still want to get  
5 Mr. Thomas' version right now. And you're going to ask  
6 him any number of questions you want on this. I'm not  
7 going to thwart you on asking him questions.  
8 MR. STEIGER: I'm sure he understands your  
9 question, your Honor.  
10 JUDGE JAMES: Well, you understand my question,  
11 Mr. Thomas?  
12 THE WITNESS: Well, yes. Rephrase it so I can  
13 clearly, crystal clear understand what you want. What  
14 you're looking for.  
15 JUDGE JAMES: If I believe Henry Thomas, he's  
16 saying my menus have gone to DLA and they've settled the  
17 claim for 3,401,760. Do I understand that correctly? Is  
18 that what you're representing here?  
19 THE WITNESS: Yes. I'm say that they have gone  
20 and based on that we were going to settle this.  
21 JUDGE JAMES: For that amount of money?  
22 THE WITNESS: For 3.4 million we're willing to  
23 settle for something. Right.  
24 JUDGE JAMES: And I have to assume that 3.4  
25 million is in addition to the contract price.

1 JUDGE JAMES: Let's go off the record.  
2 (Off the record.)  
3 BY MR. STEIGER:  
4 Q Mr. Thomas, I'd like to just throw a little  
5 more light on the statement in the cover letter that  
6 reads: "Settled in part." The settlement is reflected  
7 in part. Just to throw a little more light on that.  
8 This is a -- this is a cover letter and a  
9 modification. Now, again, looking at it that way. What  
10 was intended by that term?  
11 A This is the letter of my understanding of what  
12 was going on -- is the cover letter to -- reflecting my  
13 understanding as to what the total package is. Of what  
14 I'm doing here.  
15 Q What total package?  
16 A Of the modification terms and conditions.  
17 Q You say total package. What comprises that  
18 total package?  
19 A What comprises it is this cover letter. The  
20 terms inside this and the rest of it is in the  
21 modification itself. So you have to look at the  
22 modification as this document as one document.  
23 Q And yet, this document says that you're  
24 settling the claim in part.  
25 A Right.

1 Q And what is the other part?

2 A The other part is contained inside -- the  
3 understandings are contained inside the cover letter.  
4 The rest of the understandings are contained inside the  
5 mod itself.

6 Q Okay. Now as far as those total package of  
7 understandings, what did you give up with regard to the  
8 claim?

9 A What I gave up with regard to the claim is, 3.4  
10 million dollars.

11 Q You gave up the claim.

12 A I gave up the claim.

13 Q So you're just saying that you gave up the  
14 claim for what was in here. This cover letter and what  
15 was in the modification.

16 A Right. That's right.

17 Q Thank you.

18 A They have to be together.

19 Q Now, I'd like to talk about the execution of  
20 the modification. And how it came about. The  
21 modification was presented to you, given to you, I take  
22 it. What happened? And again, as distinctly as you can.  
23 What happened?

24 A I was told by Dave Lambert that he had reached  
25 an agreement with Kiasa. I had sent this. He asked me

1 to change the name of the recipient of this letter from  
2 Frank Bankoff to Ray Kiasa. At the bequest of Mr.  
3 Apellean who was Frank Bankoff's attorney. And that they  
4 had agreed to this. Bankoff had agreed to that and that  
5 was what I was to do.

6 Q Are you saying the original version of this  
7 letter was addressed to Mr. Bankoff?

8 A Yes. It was addressed to Bankoff. But since  
9 Bankoff had referred the whole thing up the DLA  
10 headquarters for resolution, than Mr. Apellean says, that  
11 this was negotiated by the highest person at DLA in  
12 Contracting who had authority to do something here, was  
13 Ray Kiasa, the Executive Director of Contracts. That  
14 this document should be attached to the modification and  
15 then handed to the PCO as one document.

16 Q Go on, please.

17 A So what we did was, I was to go to Philadelphia  
18 and attach this. And this cover letter says that the  
19 settlement if reflected in part in the contract  
20 modification which is attached. And it was, in fact,  
21 attached to this document. And the terms and conditions  
22 have been agreed to by Freedom and DPSC. So what I did  
23 was, I went to Philadelphia Colonel Frank Francois.

24 Q Who is he?

25 A Colonel Francois is a former colonel in the

1 United States Army off of the Joint Chiefs of Staff.

2 Q And how is he related to this deal?

3 A Well, he was at this time one of my  
4 consultants. And he -- him and I had visited with Norma  
5 Lefwich down at the Office of Secretary of Defense at the  
6 Pentagon at the time. And briefed her on what we were  
7 doing and how we were going to do it. And we gave Norma  
8 the -- and told her that we were going to go there and  
9 sign this and this is what our understanding were.

10 I traveled to Philadelphia on May 29. I met  
11 Colonel Francois at Philadelphia. We proceeded up to a  
12 DPSC conference -- to a little room where Frank Bankoff  
13 told us to go once we got there and the three of us went  
14 inside. What I did was I had a letter that I had printed  
15 out the day before, dated May 28. And I proceeded to  
16 attach that to the modification before I signed it. And  
17 Frank said to me, "That's the wrong letter. It's got the  
18 wrong date on it." So he pulled out a version of his  
19 which happens to have had on page 3, LABS, Nadig, that he  
20 wrote in there and --

21 Q This version here?

22 A Yes. This is what he pulled out of his bag  
23 when he told me I had the wrong letter. In other words,  
24 he said I got the wrong date on it. That's not what was  
25 agreed to -- Kiasa and them. So I said, "Okay." And I

1 just told him that I had printed it out the day before.  
2 My computer is one of the Word Stars that we buried the  
3 date in there and it uses the system date every time you  
4 open it. So if we open this letter a month from now,  
5 June 25 the date is going to change to that date. So  
6 every time you open the letter, the date changes. So  
7 that's what happened and that's the reason why it had a  
8 different date on it. So I sat that letter aside,  
9 grabbed his letter, and told Frank Bankoff that I'm going  
10 to sign this document, I'm attaching it to -- and this is  
11 my understanding of the document. And what he did is was  
12 say, "Okay, fine. I'm going to take this and send it off  
13 to Mr. Kiasa." Which -- after I then signed it after I  
14 attached it. And gave it to him. What he did was he  
15 left the room. He went and as I later understand it, he  
16 did fax it to Mr. Kiasa, and when he returned he signed  
17 it, and gave me my copy and we left.

18 Q How do you know he faxed it to Mr. Kiasa?

19 A The document at M-25 is a -- when we deposed  
20 Mr. Kiasa, I guess, this is where it came from. It also  
21 has a fax legend across the top. It's not in this one.  
22 It might be in another one. But there -- if it says  
23 note, date, and time. If you look at the first page of  
24 M-25, you see it says, note, date, and time. It's  
25 pointing up to the fax legend. It just didn't come out

1 clear in this copy. But there is a fax legend that shows  
2 the date and the time that this was faxed and that this  
3 document is a faxed cover sheet from the Defense  
4 personnel support center from Mr. Apellean to Director,  
5 DLA headquarters, attention, Ed Neal. And they said --

6 Q When he came back to the room -- when he came  
7 back, I'm a little confused. What did he do then? Did  
8 he sign the mod? What did he do?

9 A He came back and said, "Okay." And signed it.  
10 So if you read what it says, I said I wanted  
11 confirmation. I wanted in good faith to confirm these  
12 commitments based on both parties in good faith. When he  
13 came back and said, "Okay." I figures that Mr. Kiasa had  
14 told him, "Okay." And in good faith he signed it, too.  
15 And that confirms it. So I've got a deal here. That's  
16 what the whole -- that says, "If Freedom wishes to  
17 confirm those commitments based on both parties in good  
18 faith and in a timely manner to take the respective  
19 actions and do the following." And one of them was that  
20 they would negotiate a fair and reasonable contract with  
21 Freedom.

22 Q Thank you.

23 JUDGE JAMES: If I'm following what you said,  
24 Mr. Thomas. In Philadelphia, you and Mr. Bankoff both  
25 signed the mod itself on May 29, 1986. Is that correct?

1 there.

2 JUDGE JAMES: Okay. So the letter itself is  
3 May 13. You signed it on the 13?

4 THE WITNESS: Yes. I signed it on the 13.

5 JUDGE JAMES: And then somebody else wrote in  
6 LABS on the 29?

7 THE WITNESS: Right. No they just wrote LABS  
8 in when he gave it to me. His copy already had LABS on  
9 it.

10 JUDGE JAMES: So you don't know when that was  
11 written then?

12 THE WITNESS: No.

13 JUDGE JAMES: You didn't write it.

14 THE WITNESS: No. I didn't write LABS.

15 JUDGE JAMES: Okay. Go ahead.

16 MR. STEIGER: Thank you.

17 BY MR. STEIGER:

18 Q Was it your understanding when you signed the  
19 modification itself that the cover letter was part and  
20 partial of the deal?

21 A Yes. That's what Dave Lambert told me to do.  
22 He says, "You must attach this to the modification  
23 because it then becomes one document."

24 Q Did Mr. Bankoff indicate to you that it wasn't?

25 A No. He did not.

1 THE WITNESS: That's right.

2 JUDGE JAMES: Now, did you do that the minute  
3 you signed this cover letter?

4 THE WITNESS: No. The cover letter was already  
5 signed and agreed to with Mr. Kiasa on the 13th. And I  
6 had a copy of it and I was to take this cover letter of  
7 understanding that we reached with Mr. Kiasa, attach it  
8 to the modification, and give it Mr. Bankoff. And that's  
9 what I did.

10 JUDGE JAMES: I heard that. There's some --  
11 how's there a discrepancy in the letter that Mr. Bankoff  
12 objected to. Is that right?

13 THE WITNESS: No.

14 JUDGE JAMES: On the third page, something to  
15 do with labs.

16 THE WITNESS: No. No. He didn't object to  
17 that. What that is -- is that this is Colonel Francois'  
18 handwriting, LABS, he was saying it says, From Nadig, and  
19 he just writes LABS on it.

20 JUDGE JAMES: When?

21 THE WITNESS: That was on this copy.

22 JUDGE JAMES: When?

23 THE WITNESS: When he gave it to me.

24 JUDGE JAMES: On the 29?

25 THE WITNESS: Right. The words LABS is on

1 Q Did he say anything to you concerning the cover  
2 letter?

3 A No. He didn't say anything. He didn't say --  
4 he just accepted it. He grabbed it and says, "Okay.  
5 Fine. I'm going to have to take it and fax it off to Mr.  
6 Kiasa."

7 Q Before you handed him the document, did you  
8 have any discussion with Mr. Francois concerning the  
9 document?

10 A Yes. There was some discussion that I recall  
11 that Francois said. He says that if I didn't think --  
12 some words to this effect, I can't put -- remember  
13 exactly. He says, "If you don't think that this document  
14 put together equals the understanding . . ." It had  
15 something to do that -- I had to put it together the same  
16 way as Lambert had said. So that's why I had to put it  
17 together first and present to Frank as one package. But  
18 Frank did say something like that. I forgot what he was  
19 saying.

20 Q Regarding your understanding of the cover  
21 letter and the modification itself, are you -- did the  
22 Government know before the modification was signed what  
23 your understanding was?

24 A Yes.

25 Q Well, how do you know that?

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1 A Because this letter was given to Mr. Kiasa on  
2 May 13 and that's before the 29. No one objected.  
3 Nobody sent me anything. Nobody called me. Nobody said  
4 anything. I then took this letter as was my  
5 understanding that this was already pre-approved by Mr.  
6 Capellean -- Apellean which Frank Bankoff's lawyer, okay.  
7 And there is correspondence in the file that's going back  
8 between Kiasa, Lambert, and Bob Apellean. So Frank  
9 Bankoff's attorney, Mr. Apellean, is in step with this.  
10 He didn't object to this either. Because he took the  
11 thing and he actually, based on this cover letter, he's  
12 the one that faxed it down to DLA headquarters.

13 Q And is it your understanding, Mr. Thomas, that  
14 all the parties that you were dealing with knew that a  
15 2.7 million-dollar loan was required to enable you to  
16 complete the contract?

17 A Absolutely. If you look at paragraph two, it  
18 talks about that the process of this loan guarantee --

19 Q I know but I asked you, if the Government was  
20 aware of it and how you know they were.

21 A Yes. We had discussed how we were going to get  
22 to the back end of this contract because they were going  
23 to process at 2.7 million-dollar loan for Bankers in  
24 order for us to have necessary cash flow for the  
25 performance of this contract. For the completion of the

1 MRE-7 solicitation that says we're going to go from three  
2 to four. So now that I see there's four contractors, I  
3 in good faith -- they did that in MRE-7. Now I'm saying,  
4 "Okay, fine. They now intend to sit down and negotiate a  
5 portion with me."

6 Q So at the time -- at the time, you were -- you  
7 believed that that commitment or to negotiate with you,  
8 as you put it, was being fulfilled.

9 A That's right. They took actions to --

10 Q And why again, that's a very good point, why?

11 A They took action because I said I wanted it in  
12 writing. And they said, "Okay, we'll give it to you in  
13 writing. We'll have the PCO issue a modification to  
14 MRE-7 solicitation going from three contractors," that I  
15 was afraid of, "to four contractors." Now, you're in  
16 Thomas. I said, "Fine."

17 Q So once there were four, you're saying there  
18 was no way that you could not of gotten the job. You --

19 A I could not have at least went to the table to  
20 negotiate a fair and reasonable price.

21 Q So your fears about Cinpak taking your place --

22 A Was alleviated.

23 Q -- Was alleviated. That's what you're saying.

24 A That's right. I was -- I didn't care what  
25 happened to Cinpak at that point.

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1 contract. Through 31 October '86. And it spelled out  
2 what the cost was. Direct labor, raw materials, G & A,  
3 depreciation, and any other allowable costs in excess of  
4 the contract price.

5 Q Mr. Thomas, did you rely on the actions, good  
6 faith commitment, so whatever you want to call them in  
7 the May 13 cover letter? Did you rely on that with  
8 respect with your signing of the modification?

9 A Yes. I did.

10 Q Would, you of signed this modification had this  
11 cover letter not been there and part of it?

12 A No. I would not have. And I wouldn't sign --

13 Q And why not?

14 A Because if this was not part of the  
15 understanding, this is what I reached with Randy for him  
16 to continue financing in May. Otherwise, he could have  
17 stopped. That the Government had agreed to process a  
18 guaranteed loan. He had agreed to give the loan to me.  
19 And all they had to do was process the other side of it.  
20 I wouldn't of signed this document if there was not an  
21 opportunity to sit down and negotiate, not bid, but  
22 negotiate face to face with a -- for MRE-7. And when I  
23 said I wanted this in writing, they did put it in writing  
24 because what they did was the DLA headquarters, Mr.  
25 Kiasa, had Frank Bankoff issue a modification to the

1 Q Right. That was totally consistent with, in  
2 your opinion, with the side agreement or side letter --

3 A With the cover letter.

4 Q -- Or cover letter, whatever you want to call  
5 it.

6 A I called it a cover letter. With this cover  
7 letter, this is right. That would be consistent with my  
8 understanding of that.

9 Q Right. And did that take place, this going  
10 from three to four?

11 A Yes. It did.

12 Q Did that take place during the course of these  
13 negotiations or as a result of them?

14 A Yes. It did. Dave Lambert says that as a  
15 result of his negotiations and before this contract --  
16 before this was signed, the Government had, in fact, went  
17 to four contractors. They modified it. And they  
18 modified it for me. First they give us an indication  
19 that they intended to do it in a telex and I told them,  
20 "That's just only an intent to do it. How about actually  
21 doing it?" And they went back and next thing you know,  
22 here comes the actual modification. They modified it.  
23 It's out -- we're doing this. So there's four awards.  
24 Four MRE-7 in writing that I can see. My bank can see.  
25 And the only thing the bank wanted was the fact that they

1 were going to process a guaranteed loan for him.  
 2 Q Is the document that you are referring to in  
 3 the file that we can refer to?  
 4 A It is in the file --  
 5 Q Don't -- I'm not sure of that -- that I want to  
 6 do it now unless the Judge would prefer me to but is it  
 7 in the file?  
 8 A It's supposed to be in the file. I know I have  
 9 a copy of it. I hope it's in here somewhere.  
 10 Q Okay. Okay. Okay. Now after the dust  
 11 settled, if I may use the term with respect to the  
 12 signing of the mod. Did it happen that you received a  
 13 letter from Mr. Kiasa?  
 14 A Yes.  
 15 Q And my I refer to document MO-23.  
 16 A Twenty-three?  
 17 Q No. That's not the right document. I'm sorry  
 18 that is not the right document. That would be F-134.  
 19 Got it yet? No? Okay.  
 20 A One thirty-four?  
 21 Q Yes. Sir.  
 22 A Okay. Yes.  
 23 Q Let's take a look at this letter. What appears  
 24 to be the general tone of this letter as you see it?  
 25 A This letter caused all kinds of shocks.

1 A That it appears that we're asking DPSC to do  
 2 something that they can't do.  
 3 Q Well, first of all -- what do you -- what is he  
 4 saying here do you believe that he thinks we were asking  
 5 DPSC to do?  
 6 A This letter was the most perplexed -- I  
 7 couldn't understand it and why would -- did it come after  
 8 they got my signature is beyond me. He had the letter  
 9 since the 13.  
 10 Q Let's look at the first complete sentence on  
 11 the top that begins with "As an approved..." Look  
 12 what he says there. What word does he use there that --  
 13 A Yes. He says we're going to be permitted to  
 14 compete.  
 15 Q Compete?  
 16 A -- In the upcoming. Right.  
 17 Q In your opinion, is that a correct statement of  
 18 what the obligation was?  
 19 A No. We were supposed to negotiate a fair and  
 20 reasonable price.  
 21 Q Did we not at length discuss the various MRE, D  
 22 & F documents?  
 23 A Yes.  
 24 Q Did I not ask you at that time if in those  
 25 documents we had ever seen the word "Compete?"

1 Q I know. But what's the general tone of it?  
 2 What is Mr. Kiasa trying to do here? Do you think?  
 3 A It appears he's trying to renege on the deal.  
 4 Q Well, let's look at the letter and see if that  
 5 is really the case.  
 6 A All right.  
 7 Q Okay. First of all, let us look at the one,  
 8 two, three, four, fifth paragraph of the letter on page  
 9 1.  
 10 A Right.  
 11 Q He -- does he not paraphrase or almost quote  
 12 the language in the cover letter? First --  
 13 A On the fifth one, you say?  
 14 Q Yes. Fifth paragraph, bottom paragraph on that  
 15 --  
 16 A Yes. He does.  
 17 Q -- He's essentially almost quoting the cover  
 18 letter.  
 19 A Right.  
 20 Q -- Is that right?  
 21 A Yes.  
 22 Q Okay. Then he -- then he comments in the last  
 23 sentence, next page. What does he say? Would you read  
 24 that? Or don't read it but what is he trying to say  
 25 there?

1 A That's right. No.  
 2 Q Is it then your opinion that Mr. Kiasa's  
 3 outrage regarding what we said in our cover letter is  
 4 incorrect because of using this word?  
 5 A Yes. As a matter of fact, that the A16  
 6 exception is used or any of the exception is used so it  
 7 does not have to be the competition, it basically, it's  
 8 exception from competition. That's what it is. It's an  
 9 exception. So now to say that they're going to permit me  
 10 to compete for a seat, well, as far as negotiations, I  
 11 guess you can say you're competing because if you don't  
 12 reach an agreement with the PCO, then you're out. But  
 13 the point is, you're at least allowed to hammer a deal.  
 14 But the way I took this compete the bids, you will bid,  
 15 the low bid will win. And that's it. You're in  
 16 competition with someone else other than the Government,  
 17 here.  
 18 Q So is it fair to say, in your opinion, he was  
 19 mis-characterizing what you were asking for in the cover  
 20 letter.  
 21 A Well, there's a disconnect here, right quick.  
 22 And I was sort of shocked to get a letter like this one  
 23 here from him.  
 24 Q Now let's take the next paragraph. Would you  
 25 look that over? You contend -- what does that say?

1 A Right.

2 Q Is there anything in this paragraph that's  
3 different from what we asked for? Look at it.

4 A No. And I thought they did say they would  
5 process. I didn't ask them to do anything other than  
6 process it in the normal channels.

7 Q So where is this outrage coming from? Do you  
8 understand from this letter?

9 A No. I can't. I mean. It caught me totally by  
10 surprise. I asked them to acknowledge my cover letter in  
11 good faith the day before. To acknowledge it. And all  
12 of the sudden, they didn't acknowledge. This is not an  
13 acknowledgment. I thought when Frank Bankoff came and  
14 said, "Okay." That was the acknowledgment. I didn't  
15 expect this to come the next day.

16 Q Let me put it this way to you. Does this  
17 letter acknowledge their commitment to process a  
18 guaranteed loan on your behalf?

19 A No.

20 Q It doesn't? Take another look. Why not?

21 A Does it -- does it -- does it --

22 Q Let me repeat the question to you. Does this  
23 letter, restate their commitment to process a guaranteed  
24 loan? What does it say?

25 A They say that, "We will process --

1 do, is it not?

2 A Yes.

3 Q Okay. Now, let's look at these things very  
4 carefully. What's the first thing that it purports to  
5 do? Number A.

6 A It purports to reinstate the 114,000 cases --  
7 114,758 cases eliminated from the contract. They're  
8 going to reinstate them.

9 Q Now, should they ever have had to reinstate  
10 these cases at this time?

11 A No. Not at this time. They should of  
12 reinstated them per -- pursuant to Mod 20, I believe.

13 Q Didn't they promise to reinstate them in Mod  
14 20?

15 A Yes.

16 Q What was the condition that they promised to  
17 restate -- to restate them? You remember having to do  
18 with your delivery?

19 A Right. In Mod 20, once I completed those  
20 delivery schedules, they would have reinstated per Mod  
21 20.

22 Q And by virtue their action, did you not testify  
23 that you were precluded --

24 A Right.

25 Q -- From meeting that delivery?

1 Q Isn't that what it says?

2 A -- Any such request at . . . " Yes.

3 Q Right.

4 A They say they will. Okay.

5 Q Essentially, he is -- isn't he confirming then  
6 what was in the cover letter?

7 A Right.

8 Q On that point.

9 A On that point he says, "We will process it."

10 Q Okay. Let's take a look at Modification 25,  
11 itself. Since we've been talking about it.

12 A That's M-25, again?

13 Q Yes. I believe you testified that this  
14 document in part settles the matter along with the cover  
15 letter. Is that what you testified?

16 A Right. It's one document.

17 Q So let us see. Let us look at this document,  
18 if you don't mind and see what it is that purports to do  
19 any settling. Look at the one, two, three, four, fifth  
20 whereas provision. You're looking at the first where it  
21 says, "Settlement Agreement, page 2 of 4."

22 A Right.

23 Q One, two, three, four --

24 A Right.

25 Q -- Five. So that's what this is intended to

1 A Yes. Actions of the Government did preclude us  
2 from delivering under Mod 20.

3 Q And again, what was that action?

4 A One of them was they commandeered the GFM away  
5 from us. The CFM, I should say.

6 Q CFM.

7 A Yes. They commandeered the CFM and caused our  
8 production to suffer at a lower rate. Even though we did  
9 make enough during that particular time to make the  
10 actual delivery on time of that particular segment, but  
11 the production should of covered maybe 50 or 60,000 cases  
12 that month of which only 20,000 would have went for that  
13 delivery portion. And I would have had the rest of them  
14 already in-house ready to be delivered in out months. So  
15 it impacted on my ability to --

16 Q So in essence, they were restating -- they were  
17 reinstating -- are you saying that they were reinstating  
18 something that they should never of had to reinstate in  
19 the first place.

20 A That's right.

21 Q Do you believe that the Government ever  
22 intended to reinstate the 114,000 cases either in Mod 20  
23 or here?

24 A Now I don't. I don't believe it now.

25 Q What do you base that belief?

1 A Because the Government never purchased the GFM  
2 to back up the 114,000 cases that they took out of the  
3 plant.

4 Q Never?

5 A They never -- No. Mr. Bankoff said he never  
6 purchased. He never got it. He never purchased it and  
7 when we ran out of GFM in October 22, there was nothing  
8 on order that they'd ever went to the suppliers to buy  
9 enough GFM for me to complete this contract. They didn't  
10 even have any shipping this way toward plant.

11 Q Okay. Thank you. Let's go on to the next  
12 item. "B." What is that?

13 A We had -- in order to challenge their -- the  
14 way they did terminate us for default, we had an appeal  
15 that was pending at the ASBCA --

16 Q I'd like to with draw the question because  
17 that's not -- that's what we gave up. I'm trying to take  
18 this in a logical order, Mr. Thomas. What we got and  
19 then what we gave up. So if you'll hold that for just a  
20 second. I'd like to go on just to the next thing that we  
21 got. Okay.

22 The first thing we got -- you testified were  
23 the 114,758 cases back.

24 A Right.

25 Q So just set "B" aside. I apologize. It's in

1 payments and every time they would deduct -- hold up  
2 progress payments they held up deliveries and production.

3 Q So there was no way you were going to meet this  
4 schedule.

5 A Not unless they continue -- not unless they  
6 actually paid us on a timely basis the progress payments  
7 we were supposed to get as well as pay us our DD250  
8 payments for this product that we had delivered.

9 Q All right. Let's go on.

10 JUDGE JAMES: Let me see if I understand it,  
11 Mr. Thomas. Looking at just the first item under the  
12 schedule. It says, "1 to 30 May, 65,000 -- I assume that  
13 means cases? Is that right?"

14 THE WITNESS: Yes. It's cases.

15 JUDGE JAMES: Now, did you have in your hands  
16 65,000 GFM components to deliver 65,000 cases the very  
17 next day after the mod, 30 May?

18 THE WITNESS: I believe we may have. I'm not  
19 sure.

20 JUDGE JAMES: Maybe yes. Maybe no. You don't  
21 know?

22 THE WITNESS: No. I don't.

23 BY MR. STEIGER:

24 Q I was referring to the entire schedule and the  
25 ability to meet it, Mr. Thomas.

1 the other side of the ledger. Okay.

2 A Okay.

3 Q Now, let us move onto small "c" on the top of  
4 the next page.

5 A Right.

6 Q Now, what is that?

7 A That is a delivery schedule for the undelivered  
8 balance which is the 114,000 cases that would be done  
9 over there.

10 Q Where you ever put in a position where you  
11 could meet that schedule? Well, let me put it this way.  
12 Were you ultimately in a position when you could meet  
13 that schedule?

14 A No. If I didn't have the GFM, I couldn't  
15 possibly meet the schedule at all.

16 Q So in essence you're saying that -- are you  
17 saying that the Government never allowed you to meet that  
18 schedule?

19 A Right. I'm saying they never allowed us to  
20 meet the schedule.

21 Q And again, what was the reason?

22 A A variety of things that the Government started  
23 to fall short on government furnished material that  
24 caused me to fall short. The Government started falling  
25 short on -- continued, I should say, deducting progress

1 Let me ask you this now. Going on to the next  
2 one. And that's two.

3 A Right.

4 Q These items they have a familiar ring to them?

5 A Yes. These are the negotiated cost that was  
6 included in the original 6 November negotiation on those  
7 line items broken out, put back in here according to the  
8 way they were negotiated then. Now, they're giving me  
9 what I was already entitled to.

10 Q Is this the stuff that -- that so called DAR  
11 deviation was put in for?

12 A Yes. It is.

13 Q And to the best of your knowledge, was there  
14 ever a DAR deviation issued?

15 A No.

16 Q So that somehow they forgot about that? Is  
17 that right?

18 A Yes. They forgot about it and just decided to  
19 pay it.

20 Q Okay. Let's go on to the next thing that you  
21 got in this modification. I believe the next thing is --  
22 let me see if I can find it here. Oh, it's still in two.  
23 But it's buried in there but I'd like to call it to your  
24 attention.

25 Look at the first sentence, please. Look what



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1 it says there.

2 A Right.

3 Q How did you regard that commitment?

4 A I regarded that all the invoices that we had  
5 which is invoices for deliveries is DD250s that had been  
6 submitted by us that Liebman for some reason was holding  
7 up, would be paid pursuant to the payment's clause of the  
8 Defense acquisition regulation which is the DAR.

9 Q In fact, Mr. Thomas, did the Government fulfill  
10 its obligations under that commitment?

11 A No.

12 Q And again, why not?

13 A They didn't pay us. I mean. They kept holding  
14 back the money. He kept holding DD250s that should have  
15 been paid based on us shipping them. And they was --

16 Q What did these DD250 represent again?

17 A Invoices for actually delivered and accepted  
18 product.

19 Q Was any reason ever given to you for the  
20 withholding of these -- of the monies here these?

21 A No. There was no reason.

22 Q Approximately how much are we talking about  
23 here?

24 A Well, on our books and records, now here where,  
25 again, I think everybody --

1 either do this or you're going to hit the ground. So you  
2 have -- I had a run away system on my hands.

3 Q When were these items of consideration given to  
4 the Government? Do you recall the time frame?

5 A They say in Mod 18 and Mod 11 and that was done

6 --

7 Q Tell me what time.

8 A One of them was done in June of '85, in order  
9 to get the, I guess, the extension on the GFM -- the  
10 plant. And then the other one was on November of '85,  
11 for some reason.

12 Q So these were for delivery extensions? I take  
13 it.

14 A Yes. I believe they were. Right.

15 Q Is that correct?

16 A Right.

17 Q Okay. Let me ask you this. The implication  
18 here is they're giving you back \$200,000. Is that the  
19 case?

20 A That's what it looks like.

21 Q Yes. Is it really the case?

22 A No. I mean. They shouldn't of taken it from  
23 me in the first case.

24 Q No. No. Forget it. Forgetting that. Are they  
25 giving you \$200,000 in cash here back?

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1 Q Simple question, Mr. Thomas. I think it is.  
2 How much? They're on the invoices.

3 A It's about -- at this point, it's about a  
4 million five.

5 Q Thank you.

6 A Being withheld.

7 Q Let's see what else they gave us here. Oh,  
8 look at number 4. You'd made mention, I believe, of one  
9 of these considerations earlier in your testimony when  
10 Mr. Luchansky was questioning you. What about these  
11 considerations? How do you regard that? You gave them  
12 back \$200,000 in consideration. How do you regard that?

13 A Well, they gave it back to me. In other  
14 words, when they was giving me back the 200,000 it was  
15 acknowledged by them that I shouldn't have to pay the  
16 200,000 in the place.

17 Q Well, maybe. Let me ask you this. Why did  
18 they take it away in the first place? Why did you give  
19 it to them in the first place?

20 A I gave it to them in the first place in order  
21 to get the modification signed so that we can go on to  
22 continue the contract and not keep falling behind because  
23 I had a marching army here. I got, I mean, I got costs  
24 running at me that there's nothing I could do about it.  
25 It's like being in an airplane and either you -- you

1 A No. They're not.

2 Q Well, why not? What they giving you here?

3 A They're just increasing the contract price back  
4 to 17 million.

5 Q Well, are they increasing the unit price then  
6 to get there?

7 A Well, the unit price stayed the same. Still --

8 Q Unit price stayed the same. So --

9 A It's still \$27 a case.

10 Q Oh, they never bothered to change it?

11 A No. They never changed the price -- unit  
12 price.

13 Q So you never did receive the money back, did  
14 you?

15 A No. I never got it. I never received -- I  
16 received it only in the terms of a -- to balance out the  
17 contract back to 17 million.

18 Q All right. Let's now look at the other side of  
19 this ledger that I mentioned to you. What did you give  
20 up in return for all of this? Well, let's go back to  
21 what I had mentioned before. And that is back to page 2  
22 of 4. One small "b" in parentheses. Take us through  
23 that. Yes?

24 A There's on other consideration that I saw in  
25 paragraph two.

1 Q I'm sorry.

2 A Besides the -- when we signed this that the  
3 DD250s was going to be paid. In paragraph two, if you go  
4 down a little further. It says that the ACO would be --  
5 "That payments shall be pursuant to the payments and  
6 progress payment clauses of the contract and the defense  
7 acquisition regulations." We wanted that because we  
8 wanted to make sure that Marvin Liebman after this time  
9 did not make up his own rules as to when progress  
10 payments was going to be paid, deducting payments --  
11 doing this. He's doing all kinds of things. I wanted it  
12 to be done in accordance with that clause because he had  
13 not done it according to that clause in the past. He'd  
14 made up his own rules.

15 So by putting that in there we'd hope that the  
16 invoices, DD250s would be paid in a timely manner.  
17 Invoices is going -- I mean, progress payments are going  
18 to be paid in a timely manner. And we're going to get  
19 over this by accepting this \$522,000 of which is 311,000  
20 -- 399,000. So we should be -- once this thing is  
21 signed, there should be no more progress payment  
22 problems.

23 Q That was your perception?

24 A Yes. We're going to fix all the problems or  
25 whatever his problem was with the way the PCO had done

1 put us in the hole in the first place.

2 Q Did you believe that we had legitimate defenses  
3 to attack that default termination?

4 A Absolutely. I mean, it clearly says that if  
5 the Government caused a delay or caused a cost overrun  
6 they shall -- and that's another one that they said -- I  
7 was pointed to by Neal, they shall adjust the contract  
8 price and/or delivery schedule. Now they caused all of  
9 this. But every time I went to get my due, they turned  
10 around and forced me to give them money when it was their  
11 fault.

12 Q Did, in fact, was not a complaint at one time  
13 filed with the Board with respect to this -- to these  
14 appeals?

15 A What happened was -- Yes.

16 Q No. No. I asked you a question.

17 A Yes.

18 Q Thank you. Would you kindly refer to Rule 4,  
19 124.

20 A Yes.

21 Q Okay. I will allow you to explain the  
22 circumstances. I'm not trying to hold you back but I  
23 just want to make a point first about what was in the  
24 complaint. If you don't mind.

25 A Fine.

1 this that impacted the progress payment clause. We are  
2 now home free. I can be treated just like everybody  
3 else. So I'm going to get my progress payments and there  
4 isn't going to be no more problems.

5 Q But really, in reality, was not the contract --  
6 did not these clauses already -- were they not already in  
7 the contract?

8 A Yes. They were in the contract but they  
9 weren't being followed. He made up his own rules.

10 Q So in reality, from a contract point of view.  
11 You were not really not getting any more than was in the  
12 contract?

13 A No. I wasn't. That's right.

14 Q Now, let's go back to the other side. Look at  
15 one small "b."

16 A Yes.

17 JUDGE JAMES: What's your question?

18 BY MR. STEIGER:

19 Q My question is, do you recall the appeal that  
20 is being referred to here?

21 A Yes. I remember the appeal.

22 Q And again, you took an appeal as to what?

23 A As to the improper way they terminated the case  
24 as we felt for default by not giving us an equitable  
25 adjustment or giving consideration for the causes that

1 Q You just testified that you had valid -- that  
2 you believe you had valid defenses, perhaps I could  
3 refresh your memory by calling your attention to maybe a  
4 couple of paragraphs in this complaint that so alleged.  
5 For example, if you would look at paragraph 19, for  
6 example.

7 A Right.

8 Q Is that not state what you believed to be  
9 legitimate defense to having those units defaulted?

10 A Absolutely. That's a very valid defense.  
11 Absolutely.

12 Q I call you also -- your attention to number 20.

13 A All right.

14 Q Is that a valid statement?

15 A Yes. It is. That's another one.

16 Q And I don't want to belabor the point, but just  
17 one more. Take a look at number 21.

18 A Absolutely.

19 Q Okay. Now, we filed the Notice of Appeal. Is  
20 that correct?

21 A Yes.

22 Q Did we within the reasonable time required by  
23 the Board's rules which, I believe, is 30 days? Did we  
24 file a complaint at that time?

25 A Yes.

1 Q We did?

2 A We tried to.

3 Q We tried to?

4 A Yes. We filed it.

5 Q No. No. I meant after the initial -- the

6 first time we filed our Notice of Appeal. Think a

7 minute.

8 A Okay.

9 Q Did we file a complaint at that time?

10 A No. I don't think so.

11 Q When did we file the complaint?

12 A We filed the complaint after I got Ray Kiasa's

13 letters that did not confirm my letter of understanding

14 with them and I immediately asked Lambert what was going

15 on. Because I didn't like the tone of Mr. Kiasa's letter

16 so I picked up the phone and called Neal Rodenberg. And

17 says, "It looks like these people are not going to honor

18 this deal. Then I don't want to honor my side of the

19 deal. So what you need to do is let's continue and

20 notify the Government that we are -- you know, we want to

21 continue with the appeal process."

22 Q And is that essentially what is encompassed in

23 the language of the cover letter which precedes the

24 complaint sent to -- well, actually this one is gone off

25 to the chief trial attorney. But as far as what it says

1 in there, is that your understanding of why the complaint

2 was filed at that time.

3 A Right. I notified him that they had failed to

4 fully implement the understanding surrounding Mod 25.

5 Q Okay. But just -- let's make sure we don't

6 mislead anybody. What happened here? Do you recall what

7 happened to the matter?

8 A Yes. What happened was that DPSC lawyers ran

9 over to the Armed Services Board of Contract Appeals and

10 slapped Mod 25 on the table to let them know that it was

11 settled. And what we -- and the Board was mislead as to

12 --

13 Q Just tell us what happened.

14 A Okay. And as a result of that filing by DPSC

15 telling them, "It's settled. It's settled." The Board

16 says, "Okay." It's dropped. Now, of course, my side

17 didn't say it was settled. We was trying to tell the

18 Board it's not settled.

19 Q But in the last analysis the Board dismissed

20 the action. Am I correct?

21 A Yes. The Board dismissed the action and didn't

22 accept the complaint and I was stuck.

23 Q Okay. Now, let's go on to the next thing that

24 you gave up. Number 2, paragraph two. I'm sorry.

25 A This is M-25, again?

1 Q No. We're going now to paragraph five.

2 A On -- which document?

3 Q The modification itself. The modification

4 itself. The last paragraph.

5 A Number 5?

6 Q Yes.

7 A Okay.

8 Q As you understood this provision, what was it

9 that you were giving up here?

10 A We're giving up our claim.

11 Q For how much at that time? The restated

12 amount, remember.

13 A I think it's 3.4 million dollars.

14 Q Okay. So you say -- let's go on to one more

15 thing here. What about the guaranteed loan? Gee, the

16 Government honored its commitment to process a guaranteed

17 loan.

18 A No. They did not.

19 Q Well, as distinctly as possible could you tell

20 us why you arrive at that conclusion?

21 A Randy Gross, from Bankers, marched ahead on

22 these understandings and put together a guaranteed loan

23 request and filed it according to our agreement with

24 Frank Bankoff and in my memorandum as accepted by him and

25 did, in fact, send off the application to the Federal

1 Reserve for a guaranteed loan.

2 The Federal Reserve contacted Frank Bankoff and

3 said that they wanted to contact the right person to work

4 this out. And they started the process. Frank Bankoff

5 referred them, I guess, to Ray Kiasa or Carl Kabizman or

6 somebody who then told them to -- words to the effect

7 that, "No. We're not going to do that." And there's

8 documentation where Frank Bankoff got back to them on

9 July 7 that says, "Was told by Carl Kabazman that no

10 authorization exists." I said, "My god, if no

11 authorization exist, why did they -- a month earlier

12 accept my understanding of the cover letter if they

13 couldn't process anything?"

14 Q Now, you said a lot of things here. Fine. But

15 let us first ask. How do you know all this?

16 A We got the records from the Federal Reserve to

17 analyze what went on. And in getting the Federal Reserve

18 records there's a complete Bate stamped set of documents

19 that take us from start to finish of their involvement.

20 And how -- what they were told in their interviews with

21 Liebman, Frank Bankoff, Carl Kabazman, and everybody else

22 up and down the table of whom -- and how they reneged on

23 the deal. To me they were -- it showed a pattern that

24 they did not intend to honor the deal and process the

25 loan.

1 Q Are the documents, this history you refer to,  
2 are they in the file in this case?  
3 A Yes. I went and I got them and I popped them  
4 in there. They're in the file.  
5 Q Now, let's talk about what you knew or  
6 believed.  
7 A All right.  
8 Q What was your understanding of the process  
9 required for -- to get this guaranteed loan?  
10 A One, we would have to have a bank willing to  
11 make a loan. That's number one. If the bank was willing  
12 to make a loan, then and the applicant was not  
13 economically strong but that the applicant was needed for  
14 the interest of national defense then a guaranteed loan  
15 could be processed. What we needed was Frank Bankoff to  
16 echo to the Federal Reserve what the Secretary of Defense  
17 had included in the determination and findings that, "It  
18 is in the interest of national defense that Freedom be  
19 given contracts to help with mobilization." And all  
20 Frank Bankoff has to say is, "Yes. Freedom is in the  
21 interest of national defense needed."  
22 So that's one of the things that had to be  
23 established. And now -- it should of been very easy for  
24 him. He could have just given them Wade's determination.  
25 He didn't have to do anything. There's already a D & F

1 headquarters that put us in a catch 22.  
2 Q Another catch 22.  
3 A Put Randy in a catch 22 by saying something to  
4 the fact of, have the bank ask DLA to -- if they're going  
5 to do this or something. And get something from DLA.  
6 Q Do you believe that the Government ever  
7 intended to process a guaranteed loan?  
8 A At this point, no. Absolutely, not. They had  
9 no intentions of giving us a guaranteed loan. That Frank  
10 Bankoff should of rejected my cover letter that talked  
11 about a guaranteed loan back in Mod 25. Instead he  
12 accepted it. I was led to believe that this was the  
13 process. My bank was led to believe that we were going  
14 to be getting this guaranteed loan processed on their  
15 behalf. It never went anywhere.  
16 Q So it is your contention than that the  
17 Government never took the steps necessary to process the  
18 loan.  
19 A Right. They never took the steps.  
20 Q Thank you. Now, going back to all this. If we  
21 than look at this modification as a whole. Modification  
22 25. What again is it that you gave up? The big thing  
23 that you gave up?  
24 A The big thing that I gave up was my claim for  
25 costs in excess of the contract price.

1 from the Secretary of Defense's office. That said I was  
2 needed.  
3 Q So you believe that by virtue of the D & F  
4 setting up the MRE situation it was, obviously, in the  
5 national defense.  
6 A Absolutely. I mean. He didn't have to make  
7 any independent determination. I mean, if he was going  
8 to make an independent determination saying I'm not, then  
9 he's just countermanded the Office of Secretary of  
10 Defense.  
11 Q Whether or not you were fully aware of exactly  
12 what he had to do, you were under the impression, I take  
13 it, from what you're saying that it was the agency that  
14 made the determination essentially to loan you the money?  
15 A No. The one who's made the -- the one to loan  
16 me the money is Randy Gross, the bank. They're the ones  
17 that have process it --  
18 Q I meant the guaranteed loan.  
19 A Right. I'm sorry. Okay.  
20 Q I didn't mean loan the money. I meant that the  
21 agency actually was the one to determine ultimately  
22 whether the guaranteed loan would be issued.  
23 A Right.  
24 Q And was the loan ever issued?  
25 A No. It was stopped by comments by DLA

1 Q And how much was that?  
2 A It was 3.4 million dollars of which I was  
3 settling for 2.7 million dollars. By virtual --  
4 Q By virtual --  
5 A -- Of a guaranteed loan.  
6 Q But anyway, that's what you gave up.  
7 A Right.  
8 Q What did you get in return?  
9 A Nothing.  
10 Q Thank you.  
11 MR. STEIGER: With your indulgence, your Honor,  
12 may I ask for another few minutes. Thank you.  
13 (Off the record.)  
14 JUDGE JAMES: Let's go back on the record.  
15 BY MR. STEIGER:  
16 Q I'd like to go back for just a minute to  
17 something a little earlier because I read in my notes and  
18 there was a disconnect.  
19 I remember when I asked you going back to Mod  
20 20 and the inability to meet that delivery schedule  
21 because of government actions. You said there two  
22 reasons and you mentioned one was the G -- the CFM. If  
23 you recall. I'm talking about Mod 20, now.  
24 A Okay. Right.  
25 Q You said there were two and I believe you

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1 mentioned something about testing of some kind. Some  
2 kind of -- something that affected production. Do you --

3 A Oh, yes. That's when the Zyglol testing and the  
4 medical hold problems came and impacted us. There was a  
5 series of -- in March -- in March and April that  
6 automatic -- that shut down our plant as a result of  
7 micro holes that was found in Star Foods' processing  
8 plant in Texas that was allowed to be shipped out to all  
9 of the assembly plants during this period. And even  
10 though Star Foods was say -- one of my subcontractors, he  
11 was also a government -- he was also a GFM contractor.  
12 And but for these delays, I would not have been in this  
13 time frame to be impacted by Star Foods' over production  
14 and things that caused it.

15 So we got caught up with Frank Bankoff trying  
16 to impose on us inspection criteria that wasn't in our  
17 contract and we didn't -- we couldn't understand what he  
18 was doing. And he needed to have done a change or a --  
19 there was a change going in like a constructive change or  
20 something. To incorporate the delays that was imposed on  
21 us by the AVI, the Health Services Command, ordering all  
22 plants to stop so that they could get a handle on this  
23 outbreak of what they called micro holes and bacteria  
24 growing in plant -- in the food. That affected the  
25 mobilization base of the United States.

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1 JUDGE JAMES: Well, Mr. Thomas, when you say  
2 March and April, should the Board understand that means  
3 year 1985? Or 1986 or what year?

4 THE WITNESS: Yes. That's March and April of  
5 1986. Right. And that's during the time frame when I  
6 had just agreed with them that I would be able to meet  
7 the production requirements for this contract. And they  
8 gave absolutely no credit or weight to what they did to  
9 us as a result of forcing us to stop production and then  
10 do all these inspection that had nothing to do with us.  
11 It wasn't even a part of our contract. So that created a  
12 problem but we were still running and Mr. Bankoff was  
13 supposed to give us some sort of equitable adjustment for  
14 that. But we never did. We were so far behind all the  
15 time that we thought we would have put this equitable --  
16 adjustment claim in but, unfortunately, before the  
17 contract ended but, unfortunately, with the way the  
18 contract was terminated and Freedom was defaulted and  
19 they strangled me for money. I had to layoff the people  
20 before we had an opportunity to show the Government the  
21 errors of their ways.

22 JUDGE JAMES: Thank you.

23 BY MR. STEIGER:

24 Q After modification 25 was signed, you had Mr.  
25 Kiasa's letter coming shortly thereafter but with respect

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1 to the guaranteed loan did you have any reason to believe  
2 that the Government would not be processing the  
3 guaranteed loan?

4 A No. They said they would process it in there  
5 even though the letter was --

6 Q Please answer the question. Thank you.

7 A All right.

8 Q Did you have any reason to believe that the  
9 Government would not reinstate the 114,758 cases at that  
10 time?

11 A No.

12 Q Did you -- did you continue work after  
13 Modification 25 was signed?

14 A Yes.

15 Q What were you doing?

16 A We was -- we was again gearing up with  
17 everything we had to meet those delivery schedules and  
18 that's what we were doing.

19 Q Were you, in fact, delivering?

20 A Yes. We was delivering. We was in delivery  
21 mode.

22 Q Now, there came a time in July that you  
23 received a Cure Notice. I'll refer you to Rule 4,  
24 document 134.

25 A Rule 4, document 134.

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1 Q Right. In this Cure Notice, what is the  
2 Government claiming that needs curing? Just roughly  
3 speaking. What is the Government asking you to cure  
4 here?

5 A I think the delivery schedule. I guess.

6 Q Right. I call your attention to the second  
7 paragraph and the last sentence. What does that say?

8 A Some -- form 375?

9 Q No. No. No. The second paragraph beginning  
10 with, "Under the terms of . . ."

11 A Oh, I see it.

12 Q See that last sentence? It refers to what  
13 delivery increment?

14 A The 1 July to 31 July delivery increment is  
15 doubtful.

16 Q Let me ask you this. Was there a reason why  
17 that July increment was in jeopardy?

18 A Yes. I believe we was out of GFM, jellies or  
19 cream sub -- we were out of some form of GFM at the time.

20 Q Are you saying the Government had not delivered  
21 the required GFM?

22 A Right. That's part of the problem.

23 Q What do you mean part?

24 A That was the problem. We had no GFM and we  
25 were shut down.

1 Q Okay. Did you respond to that letter?  
 2 A Yes. We did.  
 3 Q Okay. May I refer you to F-144?  
 4 A Yes.  
 5 Q Does that letter explain why you were going to  
 6 have problems with the July shipment?  
 7 A Yes.  
 8 Q I refer you to page 3 of that letter, number 2.  
 9 A Right.  
 10 MS. HALLAM: What tab is this again, I'm sorry?  
 11 I thought you said 144.  
 12 MR. STEIGER: The tab is, tab F-144.  
 13 BY MR. STEIGER:  
 14 Q Now ultimately how was that resolved? Said you  
 15 was shut down, right? How was it resolved?  
 16 A It was resolved by the Government getting us  
 17 some jellies.  
 18 Q Getting you the jellies.  
 19 A Right. We were shut down for seven days. Loss  
 20 of production for no jellies.  
 21 Q Let me ask you a question about GFM and  
 22 lateness in GFM. Can you equate a day of lateness in GFM  
 23 with a production delivery day?  
 24 A No.  
 25 Q Is it one for one?

1 given change in an item would do to the bulkiness of that  
 2 package.  
 3 Q Now, as you get into production and you're  
 4 moving along. It's now July, August, we're moving into  
 5 the latter part of 1986, the fall. Are you producing the  
 6 units? Are you working?  
 7 A Yes. We're up and running and we're moving.  
 8 Racing ahead.  
 9 Q Are you still having trouble with your progress  
 10 payments?  
 11 A Absolutely. The progress payments after Mod  
 12 25, we thought that we was going to have that solution  
 13 fixed and we also thought we was also going to get the  
 14 DD250s paid on time and neither one was being paid again.  
 15 He kept reducing. Using a loss formula. Taking money  
 16 out, I was being micro managed. The contract that I  
 17 thought that I had the right to use my discretion to  
 18 manage this contract, eke out some profits on, I was  
 19 being micro managed through the progress payment review  
 20 of what I was doing. And if they didn't like what I was  
 21 doing, they would either withhold the money, pull it  
 22 back, do this, and that had a profound effect on me.  
 23 Q Now, you remember our old friend L-4, don't  
 24 you?  
 25 A Yes. That's right.

1 A No. Sometimes it takes more days to come back  
 2 up to speed. So once you gear down, you can gear down  
 3 quickly but you can't come -- you can't work back up as  
 4 fast. You just don't hit the bottom and light pops --  
 5 Q Right. It's not --  
 6 A -- I mean, production --  
 7 Q -- Simply by replacing a GFM doesn't  
 8 necessarily restore the schedule or anything like that.  
 9 A No. You would have to have a -- some history  
 10 of how fast you yourself can gear up and the people and  
 11 the things that causes you to shut down.  
 12 Q Now, if the Government should replace GFM --  
 13 one type of GFM that you believed you were getting as  
 14 called for in the configuration with another one, would  
 15 that have some impact on production time?  
 16 A It could. Yes. If they -- you have to  
 17 understand that case is a tight fit case. If they give  
 18 us the wrong type of component to replace a lighter  
 19 component and you have -- that component is bigger than  
 20 that case may not fit. We have to re-engineer or return  
 21 certain items to package it a different way. And we've  
 22 had that problem -- we had that problem where the bag --  
 23 the case was too fat because of the components that were  
 24 put in there as a result of substitutions. So we had to  
 25 come to understand how to really substitute and what a

1 Q Now, you testified after looking at L-4 you  
 2 said that L-4 -- did you not say that L-4 was subject to  
 3 being increased if you did something.  
 4 A Right.  
 5 Q And what was that?  
 6 A We have to give the PCO cash flow showing that  
 7 we needed the money. If we needed it, we would get it.  
 8 Q So here you are, you're delivering, you're  
 9 producing, you're delivering, you're asking for increases  
 10 in L-4. Is that correct?  
 11 A We asked for increases and they're being  
 12 denied.  
 13 Q And you are providing the necessary  
 14 information?  
 15 A Right.  
 16 Q And they're being -- what you say?  
 17 A Denied.  
 18 Q Thank you. I call your attention to  
 19 modification, Rule 4, 44, I believe it is. Looking for  
 20 Modification 28. No.  
 21 JUDGE JAMES: Rule 4, tab 44?  
 22 MR. STEIGER: Okay. Maybe 144.  
 23 THE WITNESS: We was just at 144.  
 24 MR. STEIGER: Pardon?  
 25 THE WITNESS: I thought we was just at 144.

1 BY MR. STEIGER:  
 2 Q This is Rule 4. Yes. Rule 4.  
 3 A Okay.  
 4 Q Tab 144.  
 5 A I have it.  
 6 Q You have -- it would just take a moment to look  
 7 at that schedule.  
 8 A Okay.  
 9 Q Do you remember why this modification came to  
 10 be or why it was issued?  
 11 A Not really.  
 12 Q Okay. That's a good answer. So let's take a  
 13 look at it. Does this contract -- is this modification,  
 14 do anything with respect to delivery?  
 15 A It amended the delivery schedule.  
 16 Q If you look at the -- let's see we have several  
 17 "Whereas provisions to . . ." that being on the first  
 18 page. Then we have a third one. Fourth one. On that  
 19 next page, 2 of 3 beginning with, "Whereas contract is  
 20 delinquency . . ."  
 21 A Right.  
 22 Q It refers to a late delinquency due to the -- I  
 23 don't want to read it but what are they talking about?  
 24 A The lack of government furnished material,  
 25 jellies for eight production days.

1 Q There's also some other language in here. I  
 2 guess we should deal with it. What do you mean -- what  
 3 do you think they meant by partially? Excuse me. Was  
 4 there any other -- was there any other thing here that  
 5 you were aware of? What do they mean by partially? Do  
 6 you know?  
 7 A No. Not really.  
 8 Q But you were never told or had any reason to  
 9 believe that it was other than the GFM jellies that were  
 10 delivered late.  
 11 A Right.  
 12 Q And certainly there was no indication in here  
 13 of any other reasons specifically.  
 14 A Right.  
 15 Q That -- that you could be aware of, is there?  
 16 A No.  
 17 Q Now, so there is a delivery schedule week.  
 18 There is something -- come down a little bit and look at  
 19 "c." Small "c."  
 20 A Yes.  
 21 Q Now, does this not refer to L -- the L-4  
 22 concept?  
 23 A Yes. It does.  
 24 Q And what does this -- what did this purport to  
 25 do?

1 A It purported to raise the ceiling and what it  
 2 was doing was tying progress payments to deliveries.  
 3 That's what this did.  
 4 Q I thought our progress payment clause was based  
 5 on incurred cost?  
 6 A We did, too.  
 7 Q Let me ask you this. It did, in fact, increase  
 8 the "ceiling" as you put it?  
 9 A It did.  
 10 Q It did. Now, at that time how important was it  
 11 for you to get that ceiling increased?  
 12 A This was a false ceiling. It was very  
 13 important for me to get it increased. But this became a  
 14 false ceiling because Frank Bankoff refused to accept or  
 15 understand the impact on the ceiling that the 82.6 --  
 16 that the 95 percent progress payment that they was  
 17 extracting from us or the liquidation rate had on cash  
 18 flow. They was taking money back from us too fast. And  
 19 at the same time that we was incurring the cost they add  
 20 the ceiling on me. So I couldn't get money from them.  
 21 So they blocked me from getting the money that I needed  
 22 to make progress and then they started to rip the money  
 23 away from me so fast it was like taking my air away from  
 24 me. It took the breath right away from us.  
 25 Q But notwithstanding the fact that it didn't do

1 the job the way you want -- the way you needed it to. It  
 2 did even in its own right give you some extra money at  
 3 the time?  
 4 A Very little. Not enough.  
 5 Q But did you give you the extra? Some extra  
 6 money?  
 7 A A little, yes.  
 8 Q And did you need it?  
 9 A Yes. We did.  
 10 Q Why? At that time? What was happening at that  
 11 time that you had to have their money or needed that  
 12 money? Do you remember?  
 13 A We needed it to make the payments to everyone  
 14 so that we can continue the rapid progress that we were  
 15 doing. We was knocking out cases to them so fast after  
 16 Mod 25 that they reduced their exposure from say -- about  
 17 7 million dollars at Mod 25, I think that was their  
 18 exposure. All the way down to 1.6 when they abandoned  
 19 the contract in October. And had they not abandoned the  
 20 contract or Liebman had not stopped in October, it only  
 21 took another 50,000 cases, that if I had delivered  
 22 another 50,000 cases they would have got their whole  
 23 million six back. There would have been no "owning the  
 24 Government any money."  
 25 Q If they had allowed you --

1 A Keep -- just deliver another 50,000 cases.  
2 They would have liquidated all the progress payments. So  
3 it -- would have taken.

4 Q Look at this. Let's take a look at this  
5 progress payment limitation schedule. The third one down  
6 says that if -- refers to 490,000 cases and the ceiling  
7 would be 15 million if you had completed and accepted  
8 that you'd be allowed to bill the progress payments. Did  
9 you, in fact, deliver -- produce and deliver 490,000  
10 cases?

11 A We certainly did.

12 Q Did the Government ever increase the progress  
13 payment schedule from what was set forth in here?

14 A When we delivered the 490, they didn't give us  
15 the money to back it up.

16 Q That's what --

17 A When we met this -- this target that they  
18 forced us into we gave them that and then we held our  
19 hand out for money. And they didn't give us the money.  
20 Liebman continues to hold back our progress payments. He  
21 never paid the DD250s. So I -- we was stuck. Every time  
22 we turned around we were trying to wiggle and squirm to  
23 stay alive.

24 Q Okay. Now, do you recall -- Well, let me ask  
25 you this first. It's another provision in here that

1 needs some kind of explanation. And that is that --  
2 that's the small "b." Maybe you can help us out. You  
3 signed away a claim -- a monetary claim, for government  
4 furnished material, failure to provide GFM jellies.

5 A Right.

6 Q During this period.

7 A Right.

8 Q Did you not believe you were entitled to some  
9 monetary relief?

10 A Of course, we did. But if Frank Bankoff, the  
11 PCO, was saying he's not going to give us any  
12 consideration. It's like I'm trying to talk to him and  
13 he's walking away. What are you going to do? I need to  
14 get this contract -- Fine. I got to keep this thing  
15 moving. And without -- and every time Frank did  
16 something or not did something, Marvin Liebman froze. In  
17 other words, Marvin tied his actions to Frank. It wasn't  
18 evident that I could get my money on this side and then  
19 bark at Frank.

20 Q Well, let's step back. You accepted a  
21 modification --

22 A I did.

23 Q -- Waving certain things here. You believed  
24 you were entitled to monetary relief.

25 A Of course, I was.

1 Q Yet, you -- and you went to the Contracting  
2 Officer. You pleaded your case. Did he ever give you  
3 any reason why you were not entitled to monetary relief?

4 A No. It's just that he's not doing it. Period.  
5 I can't make him do it. I cannot make that man sitting  
6 over there do anything.

7 Q Now, I go back to my original question. Why  
8 did you sign the modification then?

9 A We needed the increase on the ceiling. We  
10 needed money. If we didn't sign a modification, we  
11 wasn't getting this. And then the problem is that we're  
12 telling him that this modification is -- the whole  
13 concept here's wrong because it should be based on cost.  
14 And this is in violation of the progress payment clause.

15 Q Okay. But back go back to what you said. If  
16 you didn't sign -- I'm not sure I heard you. Sorry, your  
17 Honor.

18 Again let's go back to what you said. If you  
19 hadn't signed this modification, what?

20 A Our plant would have shut down so fast because  
21 we wouldn't have money. We need money to stay afloat.  
22 To pay for things. And without the money we can't go.  
23 And that was one of the reasons this contract has been in  
24 a delinquent mode is because the Government has never put  
25 the cash on the table the proper way as called for in our

1 business plan with them. And the cash flows -- the cash  
2 never flowed. It's like, fuel never getting to the  
3 engine or the airplane that you're flying in. And if no  
4 fuel gets to that engine, you can rest assure you're  
5 jeopardized up there and you're going to come crashing  
6 down.

7 Q Okay. Now, let's go to the progress payment  
8 submission that you made in connection with your new  
9 found riches in this modification. And I refer again  
10 going back to government's prepared summary of progress  
11 payments -- what did we say it was? G-95. Let's take a  
12 look at progress payment number 21.

13 A Progress payment number?

14 Q Twenty-one.

15 A Twenty-one. Right.

16 Q I take it -- now you stop me -- you -- let me  
17 ask you. This modification -- this progress payment was  
18 submitted because you knew that you had some increase in  
19 the progress payment's ceiling -- this now -- this  
20 progress payment comes in and you -- based on this you  
21 expected a payment because you knew you had your ceiling  
22 increased. Is that right?

23 A Well, we had a false ceiling. We didn't agree  
24 with the ceiling.

25 Q Come on. Answer my question. Please.



1 A Yes.  
 2 Q Okay. Now, what's the amount requested?  
 3 A We requested 2.3 million dollars.  
 4 Q And what's the amount that they agreed to pay  
 5 you? Notice I didn't say "paid." I said, "agreed to pay  
 6 you."  
 7 A Seven hundred and twenty-one. That's --  
 8 Q That's right.  
 9 A Seven hundred and twenty-one thousand dollars.  
 10 Q Okay. So as a result of this modification and  
 11 this increase, you submitted a progress payment request  
 12 and some \$720,000 worth of monies was agreed to be to  
 13 you.  
 14 A Right.  
 15 Q Now, I'm not -- you're not -- you're not saying  
 16 that you agreed with that amount?  
 17 A No.  
 18 Q But at least you expected it. Was it important  
 19 for you to get that particular amount?  
 20 A That's -- Yes. That's the amount they claim  
 21 they can give me.  
 22 Q I know. But was it -- was even that amount  
 23 important to you?  
 24 A Yes. It was. Any amount of air or fuel you  
 25 can get to keep afloat a little longer, you have to take

1 attention to a couple of things in the mod. First of  
 2 all, if we look at "C," paragraph "C," I think. I'd like  
 3 you to take a look at -- that's page 2 of 3.  
 4 A Right. Yes.  
 5 Q Well, it would appear to me -- would you think  
 6 that means perhaps one reason not to sign this  
 7 modification?  
 8 A Absolutely.  
 9 Q And by the way, does not subparagraph "C" refer  
 10 to entitlements that you mentioned just a few minutes ago  
 11 concerning Zyglö testing?  
 12 A Yes.  
 13 Q Just as in the side.  
 14 A Right.  
 15 Q But that's really not what I'm zeroing on. And  
 16 again, you told them you didn't want to sign it.  
 17 A Right.  
 18 Q Well, again, I ask you. Why did you sign it?  
 19 A Because I would -- Liebman says he's not going  
 20 to pay me any money until I sign this modification.  
 21 Q Any money meaning what money?  
 22 A For any progress payments. I need that  
 23 \$700,000 to stay -- so that everything wouldn't fall  
 24 apart on me again. And he said that the PCO told him to  
 25 do it.

1 it.  
 2 Q So I call your attention now to the very next  
 3 modification in this contract. Modification 29 which  
 4 appears in Rule 4, 159.  
 5 A Okay.  
 6 Q You don't see it?  
 7 A I have it.  
 8 Q Yes. Rule 4, 159. Do we all have it?  
 9 A Yes.  
 10 Q Modification 29.  
 11 A Mod, right.  
 12 Q This modification was presented to you for  
 13 signature?  
 14 A Right.  
 15 Q Did you tell the Government that you didn't  
 16 want to sign this modification?  
 17 A Yes.  
 18 Q Did you make it clear to them that you had no  
 19 intent of signing this modification?  
 20 A Yes.  
 21 Q And what was wrong with this modification that  
 22 you didn't want to sign it?  
 23 A I'm not -- I'm not seeing it here but --  
 24 Q Maybe that's a little bit -- asking is a little  
 25 too much at this point. But at any rate, let me call you

1 Q You mean to tell me that Liebman did not pay  
 2 the 700,000 from Mod 28? Until you sign this?  
 3 A That's right. That's absolutely right. We had  
 4 made the mile stone of giving them the 490,000 which we  
 5 said was imposed on us since it should have been based on  
 6 cost. We did it anyway. We got to that point and then  
 7 they say, "Okay. Now you're at this point. You do this  
 8 money. Here's the carrot. Now before I give it to you  
 9 sign the modification."  
 10 Q Well, we saw from the progress payment summary  
 11 prepared by the Government that you -- that it was  
 12 approved payment for you. Right? The 721,000. Yet, you  
 13 say that he did not want to release that money until you  
 14 signed it.  
 15 A Right.  
 16 Q This modification. Did he tell you that?  
 17 A That's what Marvin Liebman said. I had to sign  
 18 the mod first. After I signed -- when I sign the mod, he  
 19 will then release the money. And he did. I mean, as  
 20 soon as I signed the mod, I think we got the money the  
 21 next day or something.  
 22 Q Now, is your understanding -- is it your  
 23 understanding that the delays, the schedule changes set  
 24 forth in this Modification 29 -- Well, what was the  
 25 reason for that?

1 A The reason for these schedule changes was for a  
2 -- let me see. I'm not sure. What is -- I just closed  
3 the book? I'm sorry.  
4 Q Remember what we're talking about here. Mod  
5 29. Look at the time.  
6 A Let me -- what was it? One forty-four? I  
7 think --  
8 Q That's 159.  
9 A Okay. 159. Okay. What's your question?  
10 Q The delivery adjustments here that appear on  
11 the top of page 2 of 3.  
12 A Right.  
13 Q Wait a minute. That's the present delivery  
14 schedule. I'm sorry. It's in "A" where the changes are  
15 being made.  
16 A Right.  
17 Q What caused the need for those changes?  
18 A I believe. I'm not sure. I can't -- I'm  
19 blocking on it right now what that was.  
20 Q All right. That's okay. Let me try and  
21 refresh your memory. Do, you recall being impeded in  
22 your ability to deliver during that period of time?  
23 A Oh, yes. There was some more GFM outages.  
24 That's right.  
25 Q And what GFM was being -- had you not received?

1 A At that time, it -- let me think. Was that --  
2 either cream substitutes, maybe or it was some item that  
3 we needed that we didn't have?  
4 Q So --  
5 A That caused us again to be -- the GFM was a  
6 problem.  
7 Q Would you say, Mr. Thomas, that the delivery  
8 schedule increases here were sole to accommodate the late  
9 GFM?  
10 A Yes. It was. I would say so. No shortages.  
11 Q No other reason?  
12 A No other reason.  
13 Q Would there be any reason in the world why you  
14 would sign a release that went beyond the delivery  
15 entitlement for the GFM?  
16 A No.  
17 Q Mr. Thomas, I ask you this, think about this  
18 for a minute. Did you sign this modification under  
19 duress?  
20 A Absolutely. We told them that we were going to  
21 sign it under duress. I think there's something where we  
22 said -- Pat and I wrote them a letter saying we don't  
23 agree with this. We're going to accept it under duress.  
24 Now Pat --  
25 Q I'm going to refer now to a document. I'm

1 going to ask you about it. F-165.  
2 A One sixty-five.  
3 JUDGE JAMES: M?  
4 MR. STEIGER: F. Sir. F.  
5 JUDGE JAMES: Oh, S.  
6 BY MR. STEIGER:  
7 Q F-165.  
8 A Right.  
9 Q Mr. Thomas, what does this document tell you?  
10 A This says, "That upon execution of Mod 29 . .  
11 ." Frank Bankoff is telling us as he told us when we  
12 signed the mod. We're going to get money paid from  
13 Marvin Liebman. But the mod had to be signed first. You  
14 don't sign the mod, you get no money.  
15 Q Now, what was the genesis of this \$721,000? I  
16 mean where did that come -- where did that entitlement  
17 come out of?  
18 A It came in -- Oh, from that false ceiling of  
19 Mod 28. We met -- we met the requirement.  
20 Q Thank you. Thank you. You've answered the  
21 question. Thank you. Let's take another look at this  
22 release "C."  
23 A Oh, the same document?  
24 Q Yes. Same document. "C," we're still looking  
25 at the modification.

1 A Give me that number again. I closed it.  
2 Q Rule 4, 159. I'm sorry.  
3 A One fifty-nine. I closed the book when you  
4 said, okay. I'm sorry.  
5 Q Right. Sorry. Sorry.  
6 A F-159?  
7 Q Rule 4, 159.  
8 A Oh, Rule 4. Okay. Okay. Which paragraph?  
9 Q Well, I want you to focus a little bit on this  
10 release in "C."  
11 A Okay.  
12 Q Now, you submitted a claim of 3.4 million  
13 dollars. Is that right?  
14 A We had a claim.  
15 Q You had and in the hope of getting valuable  
16 consideration in Modification 25, you did, in fact, wave  
17 that claim. Isn't that right?  
18 A That's right.  
19 Q Well, I want to talk about it just for a minute  
20 because I think I neglected to ask this. Did the  
21 Government ever respond to your claim of \$3.4 million?  
22 Did they ever review it? To the best of your knowledge  
23 and respond to it?  
24 A No. They didn't.  
25 Q Did they ever tell you in any detail that the

1 claim was no good?

2 A No. As a matter of fact, they thought it was  
3 good.

4 Q Why did you think that?

5 A Well, they quickly ushered us down there  
6 wanting meetings with us.

7 Q And what were they trying to do?

8 A They wanted to -- Well, they wanted us to  
9 release our claim. They --

10 Q Does it appear sensible to you, Mr. Thomas,  
11 that someone would want to release a claim of no value?

12 A No. And --

13 Q I just wanted to know if they reacted to the  
14 claim and what they did to it.

15 A Nothing. Okay.

16 Q By the way, is there a mention of the 3.4  
17 million dollar claim in this release language?

18 A No.

19 JUDGE JAMES: Oh, Mr. Thomas, you're leaving me  
20 in a quandary. Earlier this afternoon you testified that  
21 at your instruction your man Lambert went and negotiated  
22 a settlement of that claim for about 3.1 million.

23 THE WITNESS: Three point four.

24 JUDGE JAMES: Now you're telling me, "Gee, they  
25 didn't even look at it and nothing happened." Now, which

1 nobody.

2 BY MR. STEIGER:

3 Q Mr. Thomas, did -- did Mr. Lambert ever  
4 negotiate the details of your claim?

5 A No.

6 Q Did he not, in fact, Mr. Thomas, agree to a  
7 settlement that waved the claim?

8 A Right.

9 Q So why would there be any reason that you could  
10 think of why Mr. Lambert would, in fact, have to be well  
11 versed in all the details and supporting information  
12 when, in fact, he agreed to a global settlement to wave  
13 the claim?

14 A Yes. I guess. That's what he did.

15 MR. STEIGER: May I get an idea, your Honor,  
16 how far, how long we're going to go today?

17 JUDGE JAMES: Your judgement call.

18 MR. STEIGER: Your Honor, with your permission  
19 we would like to adjourn or have you adjourn until  
20 tomorrow morning. Perhaps we could meet earlier  
21 tomorrow?

22 JUDGE JAMES: If you complete the direct  
23 examination in a few minutes, I'd say go for it.

24 MR. STEIGER: No. I cannot.

25 JUDGE JAMES: All right. Then let's go off the

1 am I to believe?

2 THE WITNESS: Well, they never dealt with me or  
3 my -- In other words, to talk about the content of the  
4 claim they usually send up to DCAA to look at your books,  
5 records, and see what was cost and none of that happened.  
6 They didn't do anything on that. They didn't -- when I  
7 put in --

8 JUDGE JAMES: Did they deal with your  
9 designated representative, Lambert?

10 THE WITNESS: Yes. They was dealing with him  
11 and at the DLA level but what I'm saying is no one ever  
12 came to actually see the supporting documentation behind  
13 it.

14 JUDGE JAMES: Did Lambert have this supporting  
15 documentation behind it?

16 THE WITNESS: No. He just had the claim and  
17 what we said. Everything else and what caused it was at  
18 the plant.

19 JUDGE JAMES: So you're telling me then that  
20 Lambert negotiated a settlement of it with DLA  
21 headquarters, at Washington somewhere, without any kind  
22 of backup or substantiation.

23 THE WITNESS: Other than just the narrative  
24 that's included. So if they wanted to come and measure  
25 and actually see -- nobody ever came. The DCAA or

1 record.

2 (Whereupon, at 5:30 p.m., the hearing was  
3 recessed.)  
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Wednesday, May 17, 2000

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CERTIFICATION OF TRANSCRIPT

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This is to certify that the attached  
proceedings before Administrative Judge DAVID W. JAMES,  
Department of Defense, Armed Services Board of Contract  
Appeals, in the matter of FREEDOM NY, INC., at Brooklyn,  
New York, on Wednesday, May 17, 2000 were had as therein  
appears, and that this is the original transcript thereof  
for the files of the Department of Defense.

We, the undersigned, do hereby certify that  
this is a true, accurate and complete transcript prepared  
from the tape made by electronic recording by Donna  
Hughes, Official Reporter, on the aforementioned date,  
and have verified the accuracy of the transcript by  
comparing the typewritten transcript against the verbal  
recording.

Date: 7/9/00

\_\_\_\_\_  
Transcriber

\_\_\_\_\_  
Proofreader