

Day 6

1 BEFORE THE  
2 ARMED SERVICES BOARD OF CONTRACT APPEALS

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

8 Kings County Criminal Court Building  
9 120 Schermerhorn Street  
10 Brooklyn, New York

11 Monday, May 22, 2000

12 9:00 a.m.

13 BEFORE:

14 DAVID W. JAMES, Administrative Judge

15 APPEARANCES:

16 For the Government:

17 KATHLEEN HALLAM, ESQ.  
18 Defense Supply Center Philadelphia  
19 Defense Logistics Agency  
20 700 Robbins Avenue  
21 Philadelphia, PA 19111

22 For the Appellant:

23 NORMAN A. STEIGER, ESQ.  
24 Goldberg & Connolly  
25 66 North Village Drive  
Rockville Centre, NY 11570

26 BRUCE LUCHANSKY, ESQ.  
27 Kellman & Sheehan, P.A.  
28 Sun Life Building  
29 20 South Charles Street, 8th Floor  
30 Baltimore, MD 21201

1 PROCEEDINGS

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2 JUDGE JAMES: All right. Let's go on the  
3 record. Let the record reflect that this is day six in  
4 the hearings of Freedom New York, Inc., ASBCA Docket  
5 Number 43965.

6 We're still in appellant's case in chief. Do  
7 you have a witness you want to call?

8 MR. STEIGER: Yes, Your Honor, we do. We'd  
9 like to call Mr. Jordan Fishbane.

10 JUDGE JAMES: Please assist Mr. Fishbane to  
11 get there without -- you didn't -- with any of the  
12 lawyers. And have you oriented him to where the  
13 documents are? Mr. Fishbane, please remain standing just  
14 for a second.

15 Do you solemnly swear the testimony you're  
16 about to give in these proceedings to be the truth, the  
17 whole truth and nothing but the truth, so help you God.

18 THE WITNESS: I do.

19 JUDGE JAMES: Please be seated. What I'd like  
20 for you to do, sir, is state for the record your full  
21 name. Spell us your last name, and tell us your address.

22 THE WITNESS: Mr. William Jordan Fishbane,  
23 F-I-S-H-B-A-N-E, 19 Laura, L-A-U-R-A, Lane, Plainview,  
24 P-L-A-I-N-V-I-E-W, New York 11803.

25 MR. STEIGER: Good morning, Mr. Fishbane.

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4 JORDAN FISHBANE 942  
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6 PHILIP LEWIS 1069 1091

7 EXHIBITS

8 Number Identified Received  
9 NONE

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1 THE WITNESS: Good morning.

2 Whereupon,

3 JORDAN FISHBANE,  
4 was called as a witness on behalf of the Appellant and,  
5 after having been first duly sworn, was examined and  
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. STEIGER:

9 Q Mr. Fishbane, would you kindly tell us what  
10 your current occupation is?

11 A At present, I'm president of Electromanagement  
12 Services, which is a company that does financial  
13 management consulting. I consult basically for three  
14 companies regularly, and, as you know, I work on claims  
15 of this sort.

16 Q And would you tell us what your education is?

17 A Yes, I graduated from Pace College in 1950,  
18 with an actual business administration degree, major in  
19 accounting.

20 Q Can you give us a thumbnail history of your  
21 work experiences since graduation leading up to the  
22 current?

23 A Yes. I -- after I graduated from college, I  
24 worked for several large public accounting firms. I  
25 became a certified public accountant in 1955. I was in

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1 service from January -- in the Army from January of 1952  
 2 to January 1954. Actually, my first introduction to  
 3 defense contracts came about when I was in the Army, and  
 4 I was assigned to -- what was then known as the Army  
 5 Audit Agency, which was one of the predecessors of the  
 6 current Defense Contract Audit Agency. After I was  
 7 discharged from service, I continued public accounting  
 8 until I became certified. I then took a job with a  
 9 company that was a defense contractor. The name of the  
 10 company was Dorn and Margolin. And I became treasurer of  
 11 the company. I stayed with Dorn and Margolin from 1955  
 12 to 1969, at which time I left because Dan and Margolin  
 13 merged with a west coast company. I went back into  
 14 accounting practice. I became partner in a certified  
 15 public accounting practice, and actually that practice  
 16 purchased Dorn and Margolin, my old company, in 19 --  
 17 actually the beginning of 1971. And I stayed on with  
 18 Dorn and Margolin as president of the company until we --  
 19 we sold the company in 1980, but I stayed on under an  
 20 employment contract until 1987. And since then, I've  
 21 been back consulting. Even while I was an accounting --  
 22 a partner for the accounting practice when I was Dorn and  
 23 Margolin, on occasion, I worked with attorneys who  
 24 specialized in government contracts, and I handled all  
 25 kinds of claims. I really, basically, put quantum to the

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1 liability claims of the attorneys. And the claims ranged  
 2 from most anything -- termination of convenience  
 3 complaint to delayed claims, sort of not precisely like  
 4 this one, but sort of like this one. Is that extensive  
 5 enough, Mr. Steiger?

6 MR. STEIGER: Let me go on with my questions.

7 BY MR. STEIGER:

8 Q In your work, did you ever assist counsel in  
 9 connection with litigations?

10 A Yes, I did.

11 Q And could you give us an idea perhaps of what  
 12 kind of work you did to assist counsel?

13 A Well, I really did -- like a said -- all  
 14 different kinds of work. I -- at certain times, actually  
 15 prepared the claim for counsel; helped negotiate the  
 16 claim; served as witness if the claim went to court. In  
 17 certain situations, like this one, I have served as an  
 18 expert witness, and I've probably done bunches of things  
 19 in between. But primarily, I either worked directly with  
 20 the attorney, putting quantum to his liability claim from  
 21 the start or served as an eyewitness, as a witness --  
 22 expert witness.

23 Q Did you ever consult with clients specifically  
 24 in the area of progress payments?

25 A Yes, certainly.

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1 Q And would you give us an idea of what the  
 2 nature of your consultation work was perhaps?

3 A With progress payments?

4 Q Yes.

5 A I guess really the one case I could think of  
 6 specifically concerned themselves -- itself with  
 7 mathematical aspects of project progress payments -- what  
 8 was paid, what wasn't paid. And then getting into the  
 9 details of certain differences of opinion concerning  
 10 disallowances made as to the propriety of costs incurred  
 11 as being properly included as part of the progress  
 12 payment request.

13 Q Have you had experience in the actual  
 14 preparation of progress payment vouchers?

15 A I have prepared many, both as an assistant on  
 16 claims, but also through my company. Yeah, we have  
 17 directly prepared --

18 Q And have you given opinions and assistance  
 19 where costs have, in fact, been challenged in some way by  
 20 the Government?

21 A Definitely.

22 Q Have you ever been consulted with respect to a  
 23 contractor's operation where that contractor had only one  
 24 contract?

25 A I actually did -- it goes back many years. It

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1 was a company named Peakholtz Construction Company,  
 2 working out of -- I think it was New Jersey. I'm not  
 3 sure. But they had a very large General Service  
 4 Administration contract to rehabilitate a courthouse in  
 5 Newark. And they, literally, they only had the one  
 6 contract.

7 Q So you are familiar then with any special  
 8 accounting aspects that come up with respect to having  
 9 one single contract as the entire operation?

10 A I am.

11 Q Mr. Fishbane, I would like you tell the Board  
 12 what you did to prepare for this testimony, what perhaps  
 13 what documents you looked at, and what other efforts you  
 14 did. And I think best I'd like you to tell us sort of  
 15 chronologically in terms of the job. Can you do that,  
 16 please?

17 A Yeah, I don't -- I really reviewed many, many  
 18 documents, but I'll try to do the best I can. I really  
 19 started by reviewing the Industrial Preparedness  
 20 Production Plan. The acronym is IPP, and the  
 21 determination of findings, D&F--

22 Q Excuse me. Is that document in the file to the  
 23 best of your knowledge? Did you read it from the file?

24 A I don't know what -- I don't know if it's in  
 25 the file. You're talking about the files I presented to

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1 this court at this time?

2 Q Yes.

3 A I truly don't know that.

4 Q That's okay.

5 A So I did that.

6 Q I would like to verify, Your Honor, that the  
7 document he's referring to is in the file as FT-001.

8 Please, go on.

9 A Sure. I then reviewed the solicitation for

10 Meals Ready to Eat, with the acronym MRE's, and Meals

11 Ready to Eat, Number Five. I reviewed the solicitation.

12 I reviewed each proposal submitted by Freedom in response

13 to requests for quote. I reviewed two pre-award surveys,

14 and the final audit report that was used for the final

15 negotiation. The final negotiation resulted in a

16 memorandum of understanding, dated November 6, '84, which

17 I reviewed. I reviewed the November 8th, '84 memorandum

18 -- negotiation memorandum that the Government prepared.

19 Of course, when I reviewed each of the proposals, I

20 reviewed each supporting schedule that was a part of the

21 proposal, including each and every schedule that

22 supported the memorandum of understanding. That sort of

23 takes into account pre-contract kinds of things.

24 Subsequent to contract, I obviously reviewed the contract

25 and all of its modifications. I reviewed each and every

1 report?

2 Q No, this is a D&F. If you don't remember  
3 that's--

4 A I do not remember that.

5 Q Okay. Now, in connection with your review of  
6 the RFP, did you review -- what particular section did  
7 you focus on?

8 A Well, I focused on several. I focused on the  
9 requirements, and if I'm remembering correctly, the  
10 solicitation required a management organization chart to  
11 be submitted with the proposal. It required financial  
12 statements of the company. It required a -- obviously  
13 details of the cost elements quoted. It required a  
14 projected profit and loss statement. It required a cash  
15 flow statement, and part of milestone charts -- probably  
16 other things. And I also reviewed -- I really read the  
17 whole solicitation -- but the most significant of  
18 everything that I focused on was a clause entitled L-4.

19 Q What as L-4? In connection with your review of  
20 the proposals. I'm not sure if you said this, did you  
21 review all supporting documentation and spreadsheets?

22 A Correct. I -- we did that with four proposals.  
23 I think it was an August 4th, '84 proposal, October 16th,  
24 '84 proposal, October 19th, '84 proposal, and the final  
25 proposal, November 6th, that resulted in a memorandum of

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1 progress payment request rendered by Freedom. I reviewed  
2 most every Defense Contract Audit Agency report of these  
3 progress payment requests. There were several that I  
4 couldn't locate. I reviewed much correspondence, both  
5 from Government to Government, Government to Freedom,  
6 Freedom to Government. I reviewed the termination for  
7 convenience claim put in by Freedom and an amendment  
8 thereto. I read the -- I reviewed the Government's audit  
9 report. I reviewed the pre-award surveys -- two

10 pre-award surveys on MRE-7. I interviewed various

11 people. I interviewed Henry Thomas, Pat Marer, Dale

12 Inger, Dolph Vera, Richard Penzer, Marty Bernstein. I

13 reviewed Mr. Leibman's deposition that was taken in

14 connection with the -- an ASBCA case. I reviewed Colonel

15 Holland's interview of Mr. Leibman, and I'm sure I'm

16 forgetting a lot of things, but--

17 Q Okay. You mentioned, I think, Mr. Inger and  
18 Mr. Vera. Who were they?

19 A They were employees of Freedom. They both  
20 worked in the accounting department.

21 Q Just going back one second to some of the  
22 things you said. Were you aware that there had been a  
23 determination and findings issued for the MRE-5, a D&F,  
24 as it was sometimes called?

25 A I'm sorry -- are you talking about the audit

1 understanding.

2 Q Thank you.

3 MR. STEIGER: Your Honor, some of my next  
4 questions may involve opinions. Perhaps you wish to ask  
5 respondent if they accept them.

6 JUDGE JAMES: What is the view of the  
7 respondent? You want to stipulate your expertise and his  
8 qualifications as an expert?

9 MS. HALLAM: We'll accept him as an expert.

10 JUDGE JAMES: All right. And then the Board  
11 will also rule. First of all, in what area of expertise  
12 are you offering, Mr. Fishbane?

13 MR. STEIGER: We are offering Mr. Fishbane in  
14 the area of financial -- the financial aspects of this  
15 case, the complete financial aspects of this case.

16 JUDGE JAMES: All right. Proceed.

17 MR. STEIGER: Thank you, sir.

18 BY MR. STEIGER:

19 Q From your review of the IPP document that you  
20 mentioned, can you give us your understanding of what the  
21 basic purpose of this program was that the MRE-5 was part  
22 of?

23 A Well, I think my understanding was that these  
24 programs were really very significant, and significant  
25 contracts from the standpoint of national defense

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1 importance. I gathered that it was extremely important  
 2 to keep approved producers, like MRE producers, in  
 3 operation continuously so that if there ever was a hot  
 4 war, and need to ramp up production significantly that  
 5 they would be in operation. I don't know if I answered  
 6 your question completely. I garnered other things from  
 7 the IPP and the D&F -- you know, like, the fact that some  
 8 special considerations were given to these kind of  
 9 manufacturers. I really learned, surprisingly, I didn't  
 10 realize how much technology was involved in the  
 11 preparation of the MRE case, how many components went  
 12 into each case, how stringent the packaging and assembly  
 13 specifications were and the like, and I, you know,  
 14 between what I read and what I learned about the specific  
 15 cases that were produced by Freedom and the other  
 16 producers, I really got to comprehend the technical  
 17 difficulties of these type of producers.

18 Q Did you actually look at and examine the MRE  
 19 unit itself?

20 A I did.

21 Q Were you aware what it took from an investment  
 22 point of view to position the contractor to be able to be  
 23 part of this program? Were you aware of that?

24 A Well, I'm not certain that I precisely  
 25 understood that. I knew that Freedom had done prior work

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1 and had made a significant investment in I guess learning  
 2 the ropes. I'm not sure I could quantify, you know,  
 3 dollar-wise, except perhaps by extrapolation from some of  
 4 the negative information in the financial statements of  
 5 the company.

6 Q To the best of your knowledge, Mr. Fishbane,  
 7 were you aware of -- from your reading and everything  
 8 else if there were any commercial use or equivalents that  
 9 could -- for this particular item?

10 A I don't think so.

11 Q Now you've discussed or mentioned the fact that  
 12 you had reviewed the proposals, and taken as a whole,  
 13 what could you say about the propriety of these proposals  
 14 that you reviewed?

15 A That I reviewed? Well, I could say that each  
 16 and every proposal was very well supported. They were  
 17 details of every element of cost. Details of the direct  
 18 material costs. Details of the direct labor costs.  
 19 Details of manufacturing overhead, general administrative  
 20 expenses, and other costs. And that the -- from -- what  
 21 I could tell, the -- each supporting schedule was  
 22 accurately prepared. From these schedules, the cost  
 23 elements in the proposal were determined, and the profit  
 24 rate was added thereto. The company then projected  
 25 profit -- month by month profit statements showed what

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1 would, if everything went according to plan, what would  
 2 emerge. That seemed to be accurate. And most impressive  
 3 to me, I've had a lot of background with cash flow  
 4 projections. With each proposal, the company prepared a  
 5 cash flow projection that tied into every detailed  
 6 supporting schedule that really was reflective of  
 7 professional capability.

8 Q Did you review the Government's analysis and  
 9 audits of these proposals as well?

10 A Yeah, I reviewed two pre-award surveys, which I  
 11 believe were of the August 4th, '84 proposal and the  
 12 October 16th -- it may have been the October 19th. I saw  
 13 the final audit report, what they called an audit report  
 14 that was submitted by DCAA that really had to do with the  
 15 October 19th proposal that ultimately got negotiated into  
 16 the final proposal on November 6th, which became part of  
 17 the memorandum of understanding.

18 Q Was there any indication of any of these  
 19 Government analysis documents that the contractor,  
 20 Freedom, did not intend to make a profit or was  
 21 essentially submitting the contractor on a loss basis or  
 22 anything like that?

23 A No, there definitely -- there's profit included  
 24 on every proposal.

25 Q Now, did you do any independent verification on

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1 the numbers themselves?

2 A I did particularly as it concerned the October  
 3 19th and November 6th proposals. We really did a  
 4 sampling of the costs proposed going back to source  
 5 documents and really satisfying ourselves that what was  
 6 included in the proposal were real numbers based on  
 7 logical, accurate analyses.

8 Q You mentioned the memorandum of understanding  
 9 and supporting schedules, which you had reviewed,  
 10 regarding the MOU, the memorandum of understanding, there  
 11 appeared on that document, if you recall, a list of  
 12 numbers adding up to the contract price. What were those  
 13 categories of numbers?

14 A The categories were direct materials, direct  
 15 labor, manufacturing overhead, general administrative  
 16 expenses, other costs, and then a 14.88 percent profit  
 17 rate, which got to be the final price.

18 Q Were these finite numbers or -- well, let me  
 19 ask the question, if you understand the question? Were  
 20 these finite numbers?

21 A Yes.

22 Q Isn't it unusual to put overhead and G&A as  
 23 finite numbers in a contract?

24 A Well, usually they use rates, like  
 25 manufacturing, overhead rates, and general administrative

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1 expense rates. The reason they do that is when there's  
2 more than one contract, accountants over the years have  
3 developed what are considered to be equitable techniques  
4 to allocate the indirect expenses -- overhead and G&A --  
5 equitably to each contract being worked on. You really  
6 don't need to do that when you're dealing with -- when  
7 there's only one contract involved, because all the  
8 costs, direct or indirect, apply to the contract.

9 Q And was that the case here?

10 A Yes, there was -- this was the only case --  
11 this was the only contract that Freedom was bidding on  
12 and actually worked on after it was implemented.

13 Q And what was your understanding from your  
14 review of the MOU, the supporting documents, and  
15 everything else in this contract--what was your view with  
16 respect to how it was intended that costs were to be  
17 charged against this contract?

18 A Well, all costs incurred were going to be  
19 charged to the contract. There was much correspondence  
20 that, in effect, said all costs were going to be direct  
21 costs. There was included in manufacturing overhead  
22 certain items that might be considered general purpose  
23 equipment and capitalized as capital assets in companies  
24 that had more than one contract. But there are specific  
25 negotiations for a goodly amount of this type of asset to

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1 be considered as a one-time charge to the contract  
2 because, in effect, they were like special to the  
3 contract, since there was only one contract.

4 Q As far as your review of the basis of this  
5 contract, the MOU, the supporting attachments, were there  
6 any specific foundations or agreed upon characteristics  
7 that you could define as being part of this contract?

8 A Yes. There were many really. But, you know, I  
9 would have to start by thinking in terms of the  
10 memorandum of understanding and its supporting schedules  
11 as the real basis of the contract. Everything that  
12 flowed from the memorandum of understanding and all the  
13 supporting schedules actually wound up to be part --  
14 obviously the contract price, and it included other  
15 things that were almost memorialized by the memorandum of  
16 understanding. Like, let me give you several ideas.  
17 Firstly, the cash flow projection indicates that their  
18 only indirect expenses incurred, what I mean by indirect  
19 expenses, not direct materials or direct labor for  
20 producing the MRE cases, but only other costs like the  
21 cost to get the building in shape, to get the assembly  
22 and packaging line set up, the quality control stations,  
23 the offices, administrative offices and like, the only  
24 costs that are included in the cash flow statement for  
25 the months of November, December, and January are costs

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1 of this sort. And, you know, they relate to the fact  
2 that the progress that would be made would not be  
3 specifically producing cases of MRE's, but we're getting  
4 ready to produce them. There was no direct material  
5 costs included in the cash flow statement until February  
6 of '85. There was no direct labor included in the cash  
7 flow in the statement until May of '85. The  
8 manufacturing overhead expense schedule that was a  
9 supporting schedule to the cost element manufacturing  
10 overhead specifically showed start up costs as being  
11 included as part of the manufacturing overhead expenses.  
12 They showed the special one-time charge capital assets as  
13 being part of manufacturing overhead. So these all  
14 really became foundations. The cash flow schedule showed  
15 that there was a significant need for progress payments  
16 equal to 95 percent of the costs incurred, and the cash  
17 flow statement indicated that these had to be paid  
18 according to plan no later than 30 days after the month  
19 in which the cost was incurred. The cash flow statement  
20 also memorialized the fact that as shipments were made,  
21 86.2 percent of the value of the shipments would be used  
22 to pay back the progress payment advances. Let me just  
23 think if there's anything else significant as a  
24 foundation.

25 Q Well, let me -- let me take it from there.

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1 We've heard a lot in this trial about financing and  
2 especially a figure that has been bandied about is \$7.2  
3 million of financing. Do you recall the genesis of that  
4 number -- does the number strike a bell, and do you  
5 remember--

6 A Yeah, I really do. That really evolved from  
7 the August 4th proposal. The August 4th proposal -- same  
8 quantity of MRE cases, but it was over a more protracted  
9 period. The quoted price was \$34.81. Still, one would  
10 not think that there is \$7.2 million required on that  
11 proposal, but I believe it was Mr. Stokes who was DCAA  
12 auditor. On the bottom of one of the schedules that --  
13 one of the supporting schedules -- the projected profit  
14 schedule -- that was the profit schedule that the company  
15 had submitted, Mr. Stokes had some numbers that he wrote  
16 in that sort of lead to it. I tell you what the numbers  
17 were.

18 MR. STEIGER: Well, let's take a look at it.  
19 I'd like to call your attention to FP-0047A. We'll put  
20 that in front of you.

21 JUDGE JAMES: What was the document number  
22 again?

23 MR. STEIGER: 047A.

24 JUDGE JAMES: An FD number?

25 MR. STEIGER: An FP number, yes.

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1 THE WITNESS: This was the schedule I was  
2 referring to.  
3 MR. STEIGER: Your Honor, this is document  
4 number 00645 I believe you're referring to.  
5 BY MR. STEIGER:  
6 Q Mr. Fishbane, you said that --  
7 JUDGE JAMES: Counsel I think you better close  
8 to your microphone or you sound -- going to pick up your  
9 voice while reading backwards.  
10 MR. STEIGER: Okay, sorry.  
11 BY MR. STEIGER:  
12 Q Mr. Fishbane, you said that Mr. Stokes had  
13 written those numbers. You don't know that for a fact,  
14 do you?  
15 A I guess I really don't, but I --  
16 Q Okay, you said you don't know that for a fact.  
17 Okay, so if you take a look at that list of -- that  
18 particular calculation, would you please discuss it  
19 concerning its validity and whether it makes sense to you  
20 and where it you think it comes from.  
21 A Well, first let me tell what it does, Your  
22 Honor. It starts with the total costs proposed, which in  
23 round numbers were \$19,600,000, and it takes 85 percent  
24 of that, which is \$18,700. From the \$18,700,000 is  
25 reduction of \$9,000,000. The \$9,000,000 was the L-4

1 logical analysis of that kind of financing of the  
2 progress payments were needed. It would really be \$9  
3 million. It's just completely inaccurate.  
4 Q Do you recall, Mr. Fishbane, where you saw the  
5 number in any government-created document?  
6 A This 7.2?  
7 Q Yes.  
8 A Yeah, I think I saw it in various  
9 correspondence. I think I saw it initially -- like maybe  
10 a pre-award survey saying that they needed 7 point. I  
11 think they actually did have a commitment letter from  
12 Dollar Dry Dock Bank for 7.244.  
13 Q No, I'm talking about a government document.  
14 A I know, but I think it probably was a response  
15 to a government --  
16 Q And where did you see it?  
17 A I think it may have been in the pre-award  
18 survey.  
19 Q Do you recall that the author of that gave it a  
20 particular name and characteristic, a certain kind of  
21 number?  
22 A I'm sorry. Could you say that again?  
23 Q Do you recall that the writer of that  
24 particular document referred to this \$7.2 million as a  
25 certain kind of number? Does that strike a bell?

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1 ceiling that was placed in the original proposal. And  
2 that is deducted from the \$18,700,000 to get us to  
3 \$9,700,000. The \$9,700,000 is reduced by a profit factor  
4 of approximately \$1.9 million, leading us to \$7.7  
5 million, and then the depreciation expenses are deducted  
6 from this number, getting us to approximately \$7.2  
7 million. That's how the calculation came about, and I  
8 think that's how the number \$7.2 million got into  
9 everybody's mind. But let me tell you some of the  
10 illogics about this. The L-4 clause wasn't a final  
11 ceiling. It was an initial ceiling. The L-4 clause very  
12 specifically stated that if there was a need by the  
13 contractor for increases to this that they could be  
14 arranged. And, you know, obviously in hindsight we know  
15 that there were increases to the L-4 clause. So that  
16 really shouldn't have been considered as a final ceiling  
17 -- that maximum ceiling -- through L-4. But even more  
18 inaccurate is the fact that the 95 percent incurred costs  
19 less the L-4 limitation was then reduced by profit of the  
20 \$1,900,000 they gave. The profit factor wasn't a cost.  
21 It was an addition to cost to get the proposed settlement  
22 price. So that limitedly if the auditor prepared this  
23 did it accurately they shouldn't have done anything with  
24 the profit. If they did that, then \$7.2 million would  
25 have been \$9 million that -- you know if this was a

1 A Let me -- you're not thinking of factors  
2 induction, are you?  
3 Q No, I'm talking about -- well, I'll ask you  
4 point blank: have you ever heard the term plugged  
5 number?  
6 A Say it again?  
7 Q Plugged number.  
8 A Yes, I did get that.  
9 Q Ah, now was that in connection with this?  
10 A Yes, the -- that's right. In the memorandum  
11 that the auditor prepared, he called the 7.2 a plugged  
12 number.  
13 Q Do you know what that is?  
14 A Well, I've heard the expression. A plugged  
15 number is where a number that really has no explanation;  
16 that there really is, you know, referred people really  
17 analyzing financial operations saying this is a plugged  
18 number, and that the really at meat of it that they  
19 really have no explanation for what it is.  
20 Q Now, looking at the spreadsheets that you  
21 examined. What was the financing dollars that had been  
22 included in there by Freedom?  
23 A Are you talking now about the final?  
24 Q Yes.  
25 A November 6th. The cash flow, which, as I said,

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1 was very professionally prepared, was really  
2 conservatively prepared. It showed a need for  
3 approximately \$1.8 million of financing over and above  
4 the progress payments that had been received.

5 Q You said conservatively. What do you mean by  
6 that?

7 A Well, if you analyzed the cash flow, and  
8 incidentally, as an accountant, I like conservative  
9 numbers. But these were probably overly conservative.  
10 Let me give you couple of examples. Firstly, the cash  
11 flows showed a continuum of the \$100,000 cash balance by  
12 the company at all times. It is -- I've really managed  
13 cash for companies for many years. There's no way to  
14 have that large imbalance. Secondly, direct material  
15 costs normally can be paid at least 30 days after the  
16 date on which the cost is incurred. On the cash flow,  
17 they were projected as -- they were projected to be paid  
18 in the month in which they were incurred. So would like  
19 literally if they say subcontract the bill February 15th,  
20 they would pay it by February 28th or 29th. And really,  
21 you could have spread the cash at least 30 days. If --  
22 on average, if they had allowed 30 days to pay  
23 subcontractors, they would have reduced the requirement  
24 by \$800,000. And literally also in reviewing the cash  
25 flow, there was one omission. The company did not ask

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1 for progress payments of \$333,000 of depreciation that  
2 was negotiated into the contract. Now, had they -- that  
3 wouldn't have required an expenditure, but had they  
4 included that as an element of cost, which they should  
5 have because they couldn't have ever accomplished getting  
6 95 percent of all costs, they would have 95 percent of  
7 \$333,333, which is about another \$316,000 that, you know,  
8 they would have had that was at first conservatively  
9 tentative.

10 Q Then, is it your opinion that something with  
11 the business acumen of Mr. Thomas could have managed this  
12 job so that he did not really have to have \$1.8 million  
13 of financing?

14 A Oh yeah, with that question, you know, somebody  
15 really knowledgeable in dealing with cash management,  
16 with using business leverage to attend to vendoring  
17 payments and the like could have really done with much  
18 less than that. I suspected that the company really did  
19 because they didn't receive progress payments until May  
20 of '85.

21 Q I'm sorry. I didn't hear that.

22 A The company really didn't want to take this  
23 kind of good cash management because they stayed alive  
24 and starting producing without getting cash -- progress  
25 payments -- until May 1985, which is seven months after

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1 the contract started.

2 Q Let me ask you point blank: Did the contractor  
3 need \$7.2 million worth of financing?

4 A Of course, not.

5 Q Did he even need -- did he need \$3.5 million  
6 worth of financing that he got?

7 A Of course not. No, he didn't need the \$1.8  
8 million that was in the cash flow. You know, the 1.8, at  
9 best, could be described as conservative.

10 Q Okay. In your opinion, did the auditors and  
11 the ACO and the others involved with the Government  
12 administer this contract in accordance with what you  
13 explained was the basic understanding of the contract?  
14 That is, what was in the MOU and supporting attachments.  
15 Did they administer the contract in accordance with that?

16 A To the contrary. I -- as minimally critical as  
17 I could be, I would say they paid no attention to the  
18 memorandum of understanding. They didn't really  
19 understand the background information. The supporting  
20 schedules. I would be surprised if they looked at them.  
21 They really did pay attention to advice that they sought  
22 from other members of the Government, you know, as  
23 concerned the negotiations and the like.

24 Q You reviewed letters that they had received  
25 from Counsel Herringer and from Peggy Rowles, are you

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1 referring to those letters?

2 A Yeah, we're talking about various things. Take  
3 some things I remember off the top of my head. There was  
4 a government-only meeting on December 13th '84 prior to a  
5 post-award conference. At that meeting, Captain Parsons  
6 makes a comment that says the -- Freedom has to be  
7 considered solvent because their financial condition is  
8 no worse now than it was at the time of the negotiation.  
9 Karl Herringer confirms this at the meeting. December  
10 16th, I think it was, Keith Ford writes a memo to Charles  
11 Wright and Karl Herringer saying all costs have to be  
12 considered as direct. December 26th '84, responding to a  
13 request by Mr. Leibman, Karl Herringer writes a letter  
14 say that progress payments should be paid. They confirm  
15 completely to the DAR requirements; that as per  
16 negotiations as costs are to be considered direct. I  
17 believe he also refers to capital assets being committed  
18 as one-time charges to the contract. He says there isn't  
19 a need for physical progress in that letter, if my memory  
20 is correct. And what I think he meant by that is, you  
21 know, as I mentioned earlier, there was a lot of progress  
22 being taken place in getting the facility ready to  
23 produce and the like, but they're showing only direct  
24 materials and direct labor to show physical progress.  
25 And I think he reiterated in that letter the fact that

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1 the contractor could not be considered insolvent because  
2 of financial conditions then varied.

3 Q I'm going to ask you few questions that relate  
4 to the Government's withholdings and suspensions of  
5 progress payments. By the way, when you began to review  
6 the progress payment issues, did you discern any  
7 particular attitudes of the ACO and DCAA auditors?

8 A Well, the attitudes that I discerned were  
9 really based on the fact that they weren't following the  
10 memorandum of understanding. You know, I've been an  
11 accountant for a very long time, and I've been connected  
12 with the Defense Department for a very long time. I  
13 can't believe that one would consider every contract the  
14 same as every other contract. I would think that the  
15 least an ACL or DCAA auditor should do is understand the  
16 contract; understand the basis of the negotiations --  
17 length of the contract, and really understand the  
18 considerations that were attended to. You know, the ACL  
19 and the DCAA works for the same Government as the PCO  
20 worked for. And I what you're headed to when I read much  
21 of the progress payment issues was that the fact that you  
22 would think that they worked for different companies.  
23 Their arguments really seemed more to do with each other  
24 than they were with Freedom, and they certainly -- you  
25 know, I would have considered the memorandum of

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1 understanding and all of their supposed schedules as a  
2 baseline for which to audit and administer against. You  
3 know, some of the other correspondence I read -- I  
4 particularly from -- the record was made correctly -- in  
5 letters that he sent to Mr. Leibman I believe on June 5th  
6 '85, and July 15th '85. June 5th he says to him, you  
7 seem to be attempting to constructively change the  
8 contract. July 15th evidently Mr. Leibman raised a  
9 question about thinking the PCO, who seems to be like his  
10 adversary, didn't have the right to include as cost  
11 incurred for progress payments capital assets. And Mr.  
12 Montefeliz says to him in the letter that even if he  
13 didn't have the authority, he thinks the theory of  
14 estoppel would apply, which not being a lawyer I assume  
15 he used it -- whether or not the PCO had the authority,  
16 he appeared to have the authority when in negotiating  
17 with Freedom. And if he negotiated this, the Government  
18 is sort of stuck with it.

19 Q Is it your opinion that the ACO, the PCA  
20 auditors frankly went out of their way not to pay  
21 progress payments?

22 A I definitely do because again by not paying  
23 attention to the memorandum of understanding and knowing  
24 that it was memorialized therein, they really came up  
25 with all different kinds of reasons for not paying --

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1 some of the reasons -- I think it was with vice progress  
2 payment number one. They used trite kinds of things.  
3 Mr. Leibman in terms of progress payment to the company  
4 that he should have known needed current prompt progress  
5 payments -- he returns a progress payment, as he says,  
6 the contract price was understated by one dollar; that  
7 certain lines were left blank instead of saying zero.  
8 You know, almost like there's an excuse to get it off his  
9 desk, which, incidentally, is almost in contradiction to  
10 the contract administrator manual for contract  
11 administrative services. I think it's called DLAM 8105,  
12 dated December '84, which when addresses progress  
13 payments says that even if you have disallowed, you  
14 should try and pay everything that you could pay. And  
15 you know, then going with our issue. He says like  
16 constantly reasons not to pay. The DCAA auditors the  
17 pre-award surveys. They -- each and every pre-award  
18 survey said that the accounting system of the company was  
19 adequate. The final audit report says the current system  
20 was adequate. It takes no -- it does not object to these  
21 one-time charges for capital assets for all charges to be  
22 considered direct. Really start-up costs being charged  
23 direct. And the DCAA auditors disagree with their own  
24 auditors, because they start getting and they start  
25 picking on little details which had nothing with the

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1 adequacy of accounting system. And it evolved into  
2 collusion. It says the accounting system is not  
3 adequate.

4 Q Can we focus a little bit on the rejection mode  
5 and do you recall--

6 A I'm sorry the rejection?

7 Q Of progress payments.

8 A Oh, okay, sir.

9 Q Do you recall the first progress payment where  
10 the little things that you mentioned were, in fact,  
11 corrected. It was then for \$100,000 and change. Was it  
12 paid to the best of their understanding?

13 A Well, I think the \$100,000 was the original  
14 progress payment award. I think it was revised to 250  
15 some odd--

16 Q Yeah, but was that first one, before the  
17 original, paid?

18 A Was that the one you have the--

19 Q No, no. You can't ask me. I'm asking you.

20 A Okay.

21 Q The progress payment number one, for \$100,000  
22 and change--

23 A Oh, okay.

24 Q Do you recall what it was for?

25 A It was for certain indirect expenses. I think



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1 it was for occupancy costs, perhaps.  
 2 Q Do you remember if Bic, in fact, was paid?  
 3 A The -- reports?  
 4 Q That particular progress payment.  
 5 A No, it wasn't.  
 6 Q Do you remember -- do you know the reason why  
 7 it was not paid?  
 8 A Yeah, I think that at time the basic reason was  
 9 the auditors were taking the position that you can't pay  
 10 for indirect costs unless there are direct costs to  
 11 absorb them.  
 12 Q And your opinion of that particular reason?  
 13 A Well, you know, it's completely illogical. I  
 14 think I mentioned it earlier. The only reason that  
 15 accountants ever devised equitable approaches to allocate  
 16 indirect expenses to direct costs was so as to equitably  
 17 allocate indirect expenses to each contract that a  
 18 contractor was working on. In this particular case,  
 19 since there were no other contracts, since all costs were  
 20 considered to be direct, how could they take a position  
 21 that you need direct costs to allocate indirect costs.  
 22 That's never the case.  
 23 Q In fact, are you not saying, sir, there were  
 24 not indirect costs on this proposal?  
 25 A Sure.

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1 Q You discussed the whole issue of insolvency. I  
 2 don't want to repeat it. And the claim of insolvency and  
 3 the worsening of condition in which you all talked about  
 4 that. So I'm going to ask you plain out: With respect  
 5 to these progress payments that had been rejected for the  
 6 direct versus indirect issue, for the insolvency issue,  
 7 and you're knowing why now, was there any rational basis  
 8 for denying Mr. Thomas and Freedom progress payments at  
 9 that time?  
 10 A I don't consider that.  
 11 Q Did you ever hear a policy or did you ever see  
 12 situations where the Government tried to limit sources of  
 13 outside financing to banks or actual lending  
 14 institutions?  
 15 A No.  
 16 Q Is it your experience that private financiers,  
 17 venture capitalists and the like, have in the past  
 18 financed government contracts?  
 19 A Without question. Yes.  
 20 Q And do you know the mechanics of how these  
 21 loans and financing are usually secured?  
 22 A Well, firstly, the -- usually VCC filings that  
 23 are made. I believe that collateral can secure the --  
 24 can secure assets. I believe the only difference between  
 25 a bank and a private lender might be in the assignment of

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1 proceeds. I'm not a hundred percent certain that the --  
 2 in my experience, it seems that's the only difference I  
 3 can recollect.  
 4 Q But you have had experience with clients and  
 5 the like where they got acceptable financing from private  
 6 institutions and individuals for their contracts?  
 7 A Yes.  
 8 Q Based upon your understanding, your reading of  
 9 the file, and all the other things you did, is it your  
 10 opinion that Freedom did, in fact, have access to sources  
 11 of financing?  
 12 A Without question.  
 13 Q Can you give us your thoughts about what they  
 14 were?  
 15 A Well, what -- we really spoke about Dollar Dry  
 16 Dock, so I will exclude them. That certain Bankers  
 17 Leasing. Bankers Leasing issued a commitment letter on  
 18 February 8th that was revised I believe on February 28th  
 19 '85. The Suburban Bank. There was performance something  
 20 or the other -- I'm forgetting the name of the bank --  
 21 There was Richard Penzer was a source of financing. Job  
 22 Rock was a source of financing. Gemini, I'm not sure of  
 23 their full company name.  
 24 Q So there was access to financing that existed  
 25 at that time to the best of your knowledge? Did you

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1 interview any of these individuals?  
 2 A What did you say?  
 3 Q Did you interview any of these individuals?  
 4 A I spoke with Richard Penzer but not about  
 5 financing.  
 6 Q Oh. Okay. Now, you mentioned a Bankers  
 7 Leasing providing for \$5 million in financing. At that  
 8 time, again, I'll have to ask this question, is it your  
 9 opinion that they needed anything like that amount to  
 10 finance this contract?  
 11 A Right. I think I've already testified about  
 12 that.  
 13 Q I know, but this -- I'm asking now about a  
 14 little later period, so I'm not repeating myself.  
 15 A Right.  
 16 Q Okay, let me --  
 17 JUDGE JAMES: Mr. Steiger, the word is  
 18 confused. What later period are you talking about?  
 19 MR. STEIGER: Well, we -- well, let's get the  
 20 dates straight.  
 21 BY MR. STEIGER:  
 22 Q What is the period of time that the contractor  
 23 sought financing and obtained financing from Bankers?  
 24 A Well -- I'm not certain exactly when they  
 25 started--

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Q Alright, when did they obtain it?

A There's a commitment letter issued by Bankers Leasing on May -- February 5th, 1985, and it was revised in a February 28th '85 into the \$5 million commitment.

Q And is that the same time frame, to the best of your understanding, that Mr. Thomas and Freedom were seeking to use Mr. Penzer and others as a source of financing?

A Yeah, I think that --

Q Okay. I stand corrected, Your Honor. There is no different time frame. During the course of your review and other work that you've done, did you come across a requirement for Freedom to enter into -- well, actually, yeah, for Freedom to enter into a novation agreement?

A I did.

Q And do you recall what the genesis was of that particular requirement?

A Yeah, I think I do. I might be speculating on some of it. I think that Mr. Leibman was concerned that the creditors of Freedom might press for payment, and he thought that if there was a novation agreement from Freedom to H.T. Foods that he might separate himself from these creditors.

Q Do you have any professional opinion or

1 payments.

Q You mentioned that if there were creditors, they would probably have to seek relief from Dollar, not Freedom. In fact, in your review of the file and your discussions and everything else, were you made aware that suits were being brought against Freedom at that time?

A No, not suits.

Q Okay. Something we neglected to talk about and that is at the time that the contract was awarded, there was a liability that was, in fact, being carried on the books of Freedom. Do you recall that?

A Yes.

Q Do you remember the approximate amount of that?

A I'm not sure I do. But I think it was perhaps \$3 million, including the Dollar Dry Dock claim.

Q Well, do you recall, do you know who the biggest creditor was?

A It was Dollar Dry Dock.

Q Were you aware from anything you've read, and any understanding that you have that Dollar Dry Dock was intending to seek repayment of that loan or whatever.

A Well, not at all.

Q During the course of this contract?

A Not at all.

Q In fact, would it not have been -- would it

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reaction to this action that was -- that was demanded?

A Well, yeah, it's both professional and just from what actually happened -- first thing, there really wasn't a need to start with because there really wasn't any significant pressure from creditors to Freedom. From what my understanding is that a creditor -- the largest creditor was Dollar Dry Dock Bank, and they weren't pressing at all, so everything else is minimized, dwarfed by that. But I also believe that any other creditors, were they pressing, which I don't think they were, would have really had to seek relief through Dry Dock -- they went through Dollar Dry Dock, not through Freedom. I don't think that it made very much sense to go through the novation because if there really were legitimate claims, I think that creditors would very easily -- I'm not an attorney, but for business situations, they very easily pierce the corporate veil.

You know, H.T. and Freedom would be exactly the same. I frankly never saw a novation agreement other than when there was a successor in interest that was involved in novation at various points, and then my company took over contracts from other companies, and really what -- the only real significance of having gone through the whole novation agreement is to waste a lot of time. It further extended the time by which Freedom could get progress

1 have been in their best interests not to do that?

A Well, of course, because -- for several reasons -- one they owned preferred stock in the company, as well as having a loan outstanding. Secondly, the best way for Freedom to have repaid their loans was to profitably perform work on contracts, so Dollar Dry Dock's best interest -- they would have gotten very little if they forced, say, bankruptcy. The best interest was to keep the company alive.

MR. STEIGER: Your Honor, may I ask you for a five-minute break, please?

JUDGE JAMES: You may. And in all generosity will give you a ten-minute break.

MR. STEIGER: Thank you, Your Honor, very much.

[Recess.]

JUDGE JAMES: Back on the record.

BY MR. STEIGER:

Q Mr. Fishbane, I believe you testified concerning the pre-award surveys in relation to the \$7.2 million amount?

A Yes.

Q In your review of those pre-award surveys, in your opinion, how did the Government or Mr. Stokes intend that the \$7.2 million be used by Freedom?

A Well, I think that Mr. Stokes didn't really

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1 call it that number, but that was the amount that was  
2 necessary to finance this particular contract because he  
3 would hurt on the contract.

4 Q Was it, therefore, you as you saw it, was any  
5 part of the \$7.2 million to be used to pay off existing  
6 creditors?

7 A Definitely not. There was no indication of  
8 that at all.

9 Q In fact, was Stokes or anyone in the government  
10 requiring any additional financing to pay off existing  
11 creditors?

12 A Not at all.

13 Q You mentioned that Mr. Leibman had refused to  
14 pay progress payments on certain capital assets. Do you  
15 recall that -- do you recall that there were deductions  
16 made in some progress payments to accommodate this? Do  
17 you remember that in your review of the progress  
18 payments?

19 A Yeah, I think minimally it was the first  
20 progress payment that was paid, which might have been  
21 renumbered number one. There was like 60 some odd  
22 thousand dollars of capital assets that weren't  
23 considered for progress payment advances. And I think  
24 there was a continuum of that. And there probably is  
25 hundreds of thousands of dollars that ultimately weren't

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1 paid.

2 Q Over the next several progress payments?

3 A Correct.

4 Q Would the number \$500,000 surprise you?

5 A Correct.

6 Q Is it your opinion that it is unusual for  
7 companies to charge capital assets directly to a job?

8 A Unusual. Well, you know, most companies who  
9 have more than one contract usually do capitalize the  
10 capital equipment purchase and they depreciate it over  
11 the life of the equipment. On the other hand, even with  
12 companies that do have more than one contract, there's  
13 sometimes the situation in my own company, we were very  
14 heavily equipped with major technology kinds of  
15 equipment. But every once and a while, a certain  
16 contract we would have to buy capital equipment that was  
17 only special to that contract. So we negotiated and  
18 successfully to charge those items directly to the  
19 contract. When there's only one contract, and when you  
20 think of the background of the MRE program, it's not at  
21 all unusual in this kind of situation -- it was done for  
22 other MRE suppliers, and it really was part of this  
23 special consideration given to approved producers.

24 Q In your review of the files and all the other  
25 documents that you've looked at, is there any doubt in

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1 your mind that the Government, and what I mean more  
2 specifically, Msrs. Bankoff, Leibman, were -- is it your  
3 understanding that they were aware that -- of Freedom's  
4 critical need for progress payments?

5 A Well, of course. I don't know how any reader  
6 would not be aware of this -- such a huge portion of the  
7 monies required to pay for the incurred costs were via  
8 progress payments that really had to be paid very currently.  
9 The GEF one showed them being paid like more than 30 days  
10 after the month end. But there was really captive  
11 parcels at a meeting prior to the final negotiations said  
12 that Freedom might be eligible for 100 percent progress  
13 payments. It was right in the progress payment clauses,  
14 there's talk about 10-day payments. You know, who would  
15 think this was -- I would think they -- an ACO tuned into  
16 the memorandum of understanding. They've been paying  
17 these things in 10 days, 20 days, not -- there's really  
18 -- you know, from paying still the -- every progress  
19 payment request was audited. I had never ever seen that  
20 before. Never ever. And we -- the directions in the DLA  
21 and AUL's really say -- using -- you audit the first  
22 progress payment. You know, this client amazingly,  
23 besides their own records, they submitted to the  
24 government the backup material supporting every dollar  
25 that was incurred and was included on the progress

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1 payment. It's almost like -- when I first got introduced  
2 to government work in 1952 on cost-type contracts --  
3 contractors would submit their vouchers with  
4 documentation. I'd never seen that other than like --  
5 this was like you almost could do a review of the office  
6 and say here's this, here's this, here's this, and that's  
7 what we're paying. You know, it's just amazing.

8 Q In your review of the file, does your review of  
9 the file and the documents indicate that Mr. Leibman had  
10 an interpretation of the progress payment clause that he  
11 concluded that he needed a DAR deviation to pay progress  
12 payments on these costs?

13 A I know that he did request the DAR deviation.  
14 I don't think he needed it. I mean, obviously, he didn't  
15 need it because ultimately payments for these costs were  
16 made without there being a DAR deviation.

17 Q So you are saying in your opinion that he did  
18 not need a DAR deviation?

19 A Obviously.

20 Q And then you said that they were ultimately  
21 paid -- would you repeat that? I didn't quite hear that.

22 A What was it?

23 Q The -- what was the eventual outcome with  
24 respect to these capital costs?

25 A Yeah, I think eventually -- it may have been

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1 MOT 25, which approved payment of these costs so that  
2 they were paid without a DAR deviation. So you know how  
3 they say the proof is in the pudding.

4 Q In your review, did you become aware in that  
5 review, that progress payments had been withheld -- well,  
6 actually suspended for a period of time because of  
7 alleged deficiencies in Freedom's accounting system?

8 A Yeah, I know there was a suspension on February  
9 6th '85, is that what you're referring to?

10 Q Well, I'm asking you if you are aware if  
11 progress payments were either withheld or suspended for a  
12 period of time because of that?

13 A Yeah, definitely withheld because of that. It  
14 was the inadequacy of the accounting system.

15 Q Now, did you review the Government's findings  
16 and conclusions with respect to those allegations?

17 A I did.

18 Q And would you care to comment on the --  
19 concerning those findings?

20 A Well, yes. Firstly, most of the reasons they  
21 gave that led to their conclusion that the system was  
22 inadequate had nothing to do with inadequacy of the  
23 system. It had to do with -- if they were correct --  
24 with possible human errors. Like they might say, an  
25 invoice wasn't reported. Now, if it wasn't reported, it

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1 wasn't the system's fault, it was just the fault of an  
2 individual. Most frequently they said something was  
3 reported to the wrong account. That's obviously just a  
4 human error. It has nothing to do with the accounting  
5 system. The -- certain of the things were almost like  
6 silly because they spoke about invoices being entered net  
7 of discounts that were allowed. Now, what the  
8 significance of that is, I don't know because the amount  
9 of many of that was very minimal, but if they were -- if  
10 the invoices were entered gross of the discounts, it  
11 would have just have meant that there would have been  
12 more costs capable of being submitted against which one  
13 would request progress payments. So it's a completely  
14 illogical kinds of things. Most important, calling the  
15 system inadequate really went against previous DCAA audit  
16 findings that the system was adequate. I -- really to  
17 satisfy myself, I went back into records that were  
18 16-years-old, and recreated data that supported each and  
19 every progress payment to the penny. So there was a  
20 system in place that's 16-years-old with a new kind of  
21 software that didn't exist in 1984 could recreate  
22 accurately information from a system that was called  
23 inadequate. You know, just -- I saw no basis for that.  
24 There were the proper controls in place. There was  
25 everything I would consider necessary for an adequate

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1 accounting system.

2 Q Even if you accept the face value what was said  
3 in that audit report or in those findings regarding DCA's  
4 assessment of the system, was there any reason of  
5 significance to deny progress payments?

6 A I don't think so. You know, maybe this is over  
7 and above this system, but, as I mentioned a few minutes  
8 ago, the company with their progress payment request  
9 supported it with documents covering every invoice that  
10 was received to indicating the current costs, covering  
11 payroll records, covering checks for rental payments, and  
12 things of that sort so that -- you know if you really  
13 wanted to do something -- over the years, I've worked  
14 with a lot of companies who've had -- there was no  
15 systems. They were tiny companies, and yet there's the  
16 ability to get progress payments. There's the ability to  
17 file claims and the like, because there's enough  
18 information there. So even if you said that there was no  
19 system, that they got all these documents, but they  
20 didn't accumulate them logically, still there for  
21 progress payments.

22 Q The basic documents I believe you're saying  
23 that showed he spent that money. He spent it on the job.  
24 What it was and that it was supported by documentation  
25 was clearly evidence in the progress payment submissions,

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1 am I correct?

2 A Oh, without question. And, you know, I  
3 responded to that like because you said assuming that  
4 they what they said was correct about the system, the  
5 system was really good. I mean, one of the things they  
6 talk about like a bad system to say there's no cash  
7 disbursements journal. Cash disbursements journal is a  
8 record of the disbursements that were made. The company  
9 had what they called the check register. You know, any  
10 accountant who would consider those two phases, cash  
11 disbursements to check register, it could be synonymous.  
12 But you were saying -- but even if you said there's no  
13 adequate accounting system, there's still the data.

14 Q Are you -- in your review of the file, the  
15 progress payments submissions and the Government's  
16 responses to those submissions, were you aware of the  
17 deduction of the amount of \$400,000 from progress payment  
18 number eight submission?

19 A Correct on that.

20 Q Do you recall the circumstances under which  
21 this came about?

22 A I do.

23 Q Could you explain, please?

24 A Yes. The lease that Freedom entered into,  
25 actually H.T., Freedom, was a lease, which like all

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1 leases, covers cost for the rent of facilities and the  
 2 like, presumably at prices that were competitive for that  
 3 geographic location. It also had a clause that permitted  
 4 the company to purchase the building -- I believe the  
 5 option said they could purchase the building for six and  
 6 a half million dollars up until August 15th, '85. My  
 7 dates may be wrong. It was like March 15th, '85 to  
 8 August '85, and then for the next year, they could  
 9 purchase it for \$7 million. Now, these kinds of clauses  
 10 are very common in leases these days. They're really  
 11 very separate and very distinct. One clause is to cover  
 12 the payments that a tenant has to be made for renting the  
 13 facility. A lot of tenants think that if their business  
 14 is successful, they, at some point, would like to have a  
 15 chance of purchasing the building, so the landlord, or  
 16 owner of the building, agrees to give them an option to  
 17 purchase it, but that option is, again, independent, and  
 18 it's based upon fair market value for the facilities that  
 19 are estimated by the owner to probably be in effect  
 20 during the option period. You might say this, so why  
 21 does the owner give an option to buy his property? Well,  
 22 they do for several reasons. The major reason is they  
 23 want to rent their facility. The worst thing in my  
 24 opinion for a landlord is to have vacant facilities. And  
 25 if the -- if the tenant really considers an option to

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1 purchase improvement, the landlord is almost always  
 2 favorably impressed to do that. Yet, he won't do it  
 3 other than a fair price. Another reason for doing it,  
 4 though, is that presumably you're talking about long-term  
 5 leases, it gets to be very difficult for an owner of the  
 6 building to sell the building other than to the tenant  
 7 who has a long-term lease, because otherwise many  
 8 prospective purchasers might not be interested in  
 9 purchasing the property if they can't occupy the  
 10 property. You know, a tenant -- interested in exactly  
 11 what happened to me. My company owned a facility in the  
 12 Videlia section of Los Angeles, and we literally bought  
 13 the company. We assumed their lease, which had a  
 14 purchase option. We frankly weren't the least bit  
 15 interested in the purchase option when we bought the  
 16 company, because whereas but we wanted to use our assets  
 17 to run our business. But shortly after we were in the  
 18 building, a prospective buyer came along, and he made us  
 19 an offer that was really very interesting because we  
 20 could have made a lot of money on this, but it would have  
 21 required us to leave the premises. So, of course, we  
 22 turned it down. But ultimately -- but we could have  
 23 actually, if he would have let us stay on the premises,  
 24 we probably would have let him buy us out of the option  
 25 for a given amount of money. Well, that sort of is what

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1 happened in Freedom's case. The owner of the building  
 2 received an offer to purchase the building. The  
 3 purchaser obviously would not buy the building subject to  
 4 the purchase option that Freedom had so the owner of the  
 5 building really needed to eliminate that option if he was  
 6 going to sell the building. Freedom was in no position  
 7 to buy the building because they would have needed six  
 8 and a half million dollars or \$7 million to exercise  
 9 their option. So the landlord makes them an offer at  
 10 \$400,000 and would accept it. And, in effect, that was  
 11 buying out their option. The Government interpreted that  
 12 as a rent reduction, which it obviously had no  
 13 resemblance to -- it didn't relate to the rent at all.  
 14 The company recorded the number of the \$400,000 they  
 15 received as income, which is exactly the way that it's  
 16 required to be treated by the Internal Revenue. It's  
 17 also in accordance with the DAR -- I think it's DAR  
 18 section 7517 that talks about the sale of capital assets  
 19 being excluded from any consideration of relationship to  
 20 costs.

21 Q So then, in conclusion, is it your opinion that  
 22 the reduction from otherwise appropriate payment invoice  
 23 of the \$400,000 was not correct by the Government?

24 A It was 180 degrees wrong.

25 Q Do you recall during the course of performance

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1 based upon financial statements or whatever that had been  
 2 prepared and submitted by Freedom that the Government  
 3 made new demands for additional financing?

4 A Yes, I do. I think it was through a document  
 5 that Mr. Stokes, again, called backwards induction.

6 Q Do you recall the approximate time?

7 A I recall it precisely. Mr. Stokes on October  
 8 1st, '85, using financial statements that I think are  
 9 dated September 4th, '85, made this backwards induction  
 10 calculation.

11 Q Can you look at F-101, please?

12 A Yes. Did you say it was F-101?

13 Q Do you have it in front of you?

14 A I have 150, which is a memo that was attached  
 15 to the backward induction calculation. I don't see the  
 16 calculation. Oh, here it is. I could use this.

17 Q I hope we all can read this, but --

18 JUDGE JAMES: Mr. Steiger, let's make sure that  
 19 you the witness and the Board, we're all looking at the  
 20 same thing.

21 BY MR. STEIGER:

22 Q Yes, sir. Let us make sure. I am looking at  
 23 F-101, which is a memo to Decasser, to Mr. Leibman with  
 24 the subject financial position and condition of Freedom  
 25 New York, dated October 15th, '85. Do you see it? Now,

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1 again, I apologize. This is not as clear a document as I  
2 had hoped it would be, but nevertheless, let me ask you  
3 the questions about it. Is this the document that -- or  
4 is this a document that sets forth what was believed by  
5 Mr. Stokes to be requirements for additional financing?

6 A Correct.

7 Q And I want to make it clear that we are talking  
8 about additional financing; that is to say, in addition  
9 to the financing that had already been established or had  
10 already been demanded and obtained?

11 A Yes.

12 Q Would you take a look at page two and give us  
13 your opinion of that calculation?

14 A Okay, well, you know, to start with --  
15 incidentally, this document is a memorandum that was  
16 prepared by Julius Rubel. Stokes originally did this on  
17 October 1st, but with the same kind of calculations as on  
18 page two.

19 Q Okay. Now we -- and that's easier to read.

20 A It doesn't really matter from my standpoint. I  
21 don't know if the Judge would like that.

22 Q Okay.

23 A But, in any event -- shall I continue?

24 Q Please.

25 A Okay. In any event, you know, to start

1 you use the most probable scenario? But -- in any event,  
2 having said that, let me tell you how Mr. Stokes makes  
3 his calculations, and I'll critique that a little bit.  
4 What he does is he starts with the balance sheet as of  
5 September 5th, 1985, and that balance sheet current  
6 liabilities that are in excess of current assets by --  
7 I'm going to round the numbers off again, Your Honor --  
8 but approximately \$900,000. Now, he doesn't at all look  
9 into the details of either the assets or the liabilities  
10 to decide what will be collected; what will be -- what  
11 will not have to be paid from that. But, okay, that's  
12 his starting point. The answer to that an estimate of  
13 expenses -- the costs that would be incurred by the  
14 company for the month of September of 1985 of a \$1.5  
15 million. And he adds that to this negative -- this  
16 excessive liability coming out of all these payables to  
17 get to a total of \$2.4 million. He then says that in the  
18 assets, there's \$3.1 million of progress payments that  
19 are being withheld because there's contention about it.  
20 So he adds that to the number. So now he rounds it up to  
21 \$5,500,000, and he then makes the assumption that of this  
22 \$3,100,000 that the Government is only going to pay \$2  
23 million. So he reduces the numbers from 5.5 to 3.5.  
24 See, that's where the number comes from. It then,  
25 there's a very interesting asterisk -- \$503,000, 000 --

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1 discussing this, you have to start discussing the  
2 terminology used, backwards induction. I must tell you,  
3 as an accountant of many years standing, that is not a  
4 technical term that one frequently hears. As a matter of  
5 fact, I never heard it before I heard it used in this  
6 connection. And basically, what I think Mr. Stokes was  
7 doing was -- he was attempting to do a cash flow  
8 projection to see what, in his opinion, Freedom would  
9 need to finance the contract from this point forward to  
10 the end. Now, I must tell you, I've done a lot of cash  
11 flow projection work. Cash flow projections are very  
12 complex assignments. What you really have to do is you  
13 got to not only have to look at a balance sheets as of a  
14 given date to see what will result in cash receipts from  
15 that balance sheet, what will result, what will have to  
16 be paid out as cash disbursements from the balance sheet,  
17 but you then have to go forward for the rest of the  
18 period that you prepare the cash flow projection for. I  
19 must tell you this calculation is based upon a statement  
20 dated September 5th, 1985, and it carries just one month  
21 forward. I have to tell you also that Mr. Rubel, in his  
22 memorandum, and Mr. Stokes, in his initial calculation,  
23 say this is a worst-case scenario. So one might say if  
24 you're really trying to figure out the probable financing  
25 requirements, why would you use a worst-case? Why would

1 \$500,000 -- he says we have recognized the liabilities  
2 for September 1995; however, we it's given a value of  
3 zero for the progress payment report to be submitted in  
4 the month of October 7. So now if you assume that the  
5 \$1,500,000 of cost to be incurred in September are  
6 correct, progress on October 7th would have been about 95  
7 percent of that. So wouldn't you think that, you know,  
8 if there's any logic to this number, the \$3.5 million  
9 should at least be reduced by 95 percent of a million and  
10 a half dollars, which they would have billed that  
11 obviously, and probably had hoped to be paid for that  
12 before they didn't pay out or any of this or much of  
13 this. I tell you they caused a worst-case scenario. I  
14 think it really evolves into a worst, worst, worst-case  
15 scenario. And with some of the comments that Mr. Rubel  
16 makes -- is really charging a function just seems so  
17 illogical that any reliance could be placed on a document  
18 like this.

19 Q What's the impact of this -- what you see --  
20 the impact of this demand?

21 A Well, I think the impact is several-fold.  
22 First of all, this demand is needless, because the  
23 company is producing at this point; that things are going  
24 pretty well. And, you know, if they were getting  
25 progress payments, there would be need for virtually

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1 nothing. But what it does, it sort of tells an ACO that  
 2 presumably relies on the information from his financial  
 3 advisors that there's a lot of money needed that isn't  
 4 needed. You're starting from a worst -- why would you  
 5 start with a worst-case situation and put that amount in  
 6 the ACO's mod, and why would you leave such errors on the  
 7 table? Why would you make it seem like the ACO has the  
 8 right to disallow \$1,100,000 of progress payments? Why  
 9 would they not give credit for a progress payment that's  
 10 almost gets authenticated by this calculation. The  
 11 calculation says there will be a \$1,500,000 of costs  
 12 incurred in September that we have to account for, but  
 13 we're not going to give any credit for progress payments.  
 14 It seems like it's incongruence, certainly inconsistent.

15 Q Mr. Fishbane, are you aware that, from your  
 16 readings and other things, that there were ongoing  
 17 activities related to the next MRE by?

18 A MRE-6 or MRE-7?

19 Q Well, if you want me to rephrase the question,  
 20 I will. Okay, let me do that. Were you aware that there  
 21 were ongoing activities relating to MRE-7 at the time?

22 A I do.

23 Q And did you review any documents in connection  
 24 to that MRE-7 activity?

25 A I did.

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1 Q What were they?

2 A I reviewed two pre-award surveys.

3 Q Would you describe the contents, to the best of  
 4 your recollection, about the first pre-award survey, and  
 5 do you recall when it was dated approximately?

6 A I should remember. I think it was in '86 --  
 7 about three months before the second pre-award survey. I  
 8 may be wrong, and I'm a little hazy in my--

9 Q So approximately, in your recollection, when  
 10 was it?

11 A I think it may have been like March '86.

12 Q Well, more importantly, what were the findings,  
 13 conclusions with respect to that?

14 A Well, the first pre-award survey proved an  
 15 award. I don't remember any negatives. I think it was  
 16 industrial specialists report attached to the pre-award  
 17 survey, which sort of indicated that the company was, you  
 18 know, producing pretty well. And, you know, had good  
 19 accounting systems. I don't think any real negatives at  
 20 all.

21 Q And did you become aware that subsequent to  
 22 that finding and that recommendation in that pre-award  
 23 survey that a request was made to conduct another  
 24 pre-award survey?

25 A Yeah.

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1 Q May I call your attention to FT-316, please?

2 Just take a moment, and perhaps you could focus on  
 3 paragraph two.

4 JUDGE JAMES: Are we looking at FT-350?

5 MR. STEIGER: Sixteen, sir. Sixteen.

6 JUDGE JAMES: Alright. Thank you.

7 BY MR. STEIGER:

8 Q First you mentioned there that a request had  
 9 been made for another pre-award survey. Is this your  
 10 understanding of that request document?

11 A Correct. Yes.

12 Q And would you focus on paragraph two, please.

13 A Yes.

14 Q As -- is it your understanding that in the  
 15 first sentence sets forth the reasons why the Government  
 16 -- what the reasons were that the Government had for  
 17 requesting the second pre-award?

18 A It says Freedom has run of loss releases losses  
 19 and has shut down production on --

20 Q Right.

21 A On the current MRE-5 contract.

22 Q Financial resources shut down -- and -- I'm  
 23 sorry run out of financial resources and shut down  
 24 production?

25 A Correct.

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1 Q Concerning those two reasons, had the  
 2 Government fulfilled its end of the bargain, and what I'm  
 3 talking about bargain in my question is GFM, as required  
 4 paid DD-250's, not impose 100 percent liquidation, et  
 5 cetera, their part of the bargain, would, in your  
 6 opinion, those two reasons have existed for seeking  
 7 another pre-award survey?

8 A No, not at guide.

9 Q Well, let's look into that. Run out of  
 10 financial resources. What would have happened had, in  
 11 fact, the Government fulfilled its part of the bargain?

12 A Well, if I recall correctly, Freedom had  
 13 delivered all but 107,000 cases. And obviously, if there  
 14 was Government furnished material supplied, they would  
 15 have completed the contract. They would have liquidated  
 16 all progress payment advances. They would have, you  
 17 know, had monies coming in for the remainder of the unit  
 18 ship. They also -- if I remember correctly -- there was  
 19 approximately a \$1,900,000 of DD-250's that were never  
 20 paid. Now, the Freedom share would have only been 5, you  
 21 know, 17.5 percent of that. That's a pretty significant  
 22 amount. And then Mr. Leibman imposed a 100 percent  
 23 liquidation, so one, they would have -- you know, would  
 24 have gotten their monies from completing the contract;  
 25 two, should have filed these DD-250's, and I'm not sure

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1 of all the reasons, but some of them go back that they  
2 were never paid. Three, they not only weren't paid at  
3 any liquidation rate. Mr. Leibman imposed a 100 percent  
4 liquidation.

5 Q Interestingly, you used a liquidation rate to  
6 reflect the -- what they would get if they had been paid  
7 for the DD-250's. What was that number?

8 A Their liquidation rate?

9 Q Yeah.

10 A But we have heard -- the memorialized?

11 Q Just give us the number?

12 A 17.4.

13 Q Right. And that comes from what?

14 A Cash flow projection that was a part of the  
15 original memorandum of understanding.

16 Q Thank you. Is it your belief, then, from what  
17 you could see, that the actions that necessitated a  
18 second pre-award survey on MRE-7 were as a direct result  
19 of what the Government did or didn't do, as the case may  
20 be, with respect to Freedom in MRE-5?

21 A Without question.

22 Q I'd like to talk to you about profitability in  
23 this particular job. Do you have any reason to believe  
24 that this contract would not have been profitable had the  
25 Government provided financing as it was committed to do

1 costs were different than what was estimated. And I  
2 really tried to examine costs prior to the delays and  
3 disruptions caused by the lack of progress payments. And  
4 there was virtually no negative variations between actual  
5 costs incurred, say, for direct materials after the start  
6 of the contract. The actual cost as compared to the  
7 costs that were proposed. I really also spoke -- as  
8 concerning spoke the proposal -- well, I'll go back in a  
9 moment. We really looked at actual labor rates that were  
10 in effect at the time the contract was started and they  
11 were in line with what was quoted and the like. I spoke  
12 with Marty Bernstein, who I think was a prior witness, an  
13 industrial expert, and I asked him about the propriety,  
14 in his opinion, of the labor hours that were estimated,  
15 and he gave me confidence that those numbers were  
16 correct. So that literally based upon an actual audit  
17 that we did with -- in which we thought we did a  
18 professional amount of sampling, concluded that the  
19 company, if everything had gone according to plan, would  
20 have made at least the 14.8 percent profit that was  
21 negotiated.

22 Q Thank you. Are you aware that our next witness  
23 is going to make a quantum presentation?

24 A I am.

25 Q Have you reviewed the presentation documents?

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1 and GFM as it was committed to do?

2 A I --

3 Q Was my question too long?

4 A Was the question do I think it would -- is  
5 there any reason to --

6 Q Did you have any reason to believe that this  
7 contract would not have been profitable?

8 A No, I thought it would profitable without  
9 question.

10 Q Now, what is the basis -- can you make some  
11 kind of -- do you have any kind of basis for establishing  
12 or concluding that you believe that this would have been  
13 a profitable contract.

14 A No, I didn't really just come to the  
15 conclusion. I came to the conclusion based upon an audit  
16 that was done. I had mentioned earlier I believe in my  
17 testimony to satisfy myself as concerns the validity of  
18 the original proposal, we went back and examined the  
19 details of cost. Now, we just didn't ask somebody what  
20 is this amount. We looked for documentation. We looked  
21 for explanations. We looked for reasonableness and the  
22 like. And we satisfied ourselves that the proposal at  
23 the time it was submitted was based upon valid  
24 information. But I said to myself, that's really not  
25 enough because maybe when performance started actual

1 A I have.

2 Q Are you familiar with the sources that were  
3 used to come up with that presentation?

4 A I am.

5 Q And are they legitimate, appropriate sources to  
6 the best of your knowledge?

7 A Yeah, they're very meaningful. The sources  
8 that were used were -- are very easily explained. The  
9 first thing that Mr. Freck did was he determined the  
10 amount of costs that were included in the memorandum of  
11 understanding that was signed. He compared these costs,  
12 element by element, direct materials, direct labor,  
13 overhead, G&A, other costs to the actual costs incurred  
14 to the date of the shutdown at Freedom. Those costs I  
15 personally didn't check back to record, but those costs  
16 were included in the termination for convenience claim  
17 that was submitted, which I reviewed. The termination  
18 for convenience claim was audited by the Government, and  
19 almost all those costs were accepted. There is a couple  
20 hundred thousand dollars -- I don't know where they stand  
21 in negotiation, but there were a couple hundred thousand  
22 dollars of disallowances. But other than that, they were  
23 accepted. So, we start with the negotiated claim.

24 Q Excuse me, I don't you to repeat Mr. Freck's  
25 presentation. I want you to give us at this point your



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1 overall assessment of it, and whether you believe, in  
 2 your professional opinion that it was done professionally  
 3 and that the documents that were used were correct source  
 4 documents?  
 5 A Yes, they definitely were.  
 6 Q Okay. One more thing. Are you aware that we  
 7 are also seeking lost profits in this particular claim?  
 8 A Yes, I am.  
 9 Q Now, in connection with the lost profits  
 10 calculation that we are -- on future jobs -- that we are  
 11 putting before the Board, do you understand the equation  
 12 or formula or whatever words you want to use that we will  
 13 present to the Board?  
 14 A I think I do.  
 15 Q Perhaps you would just like to take a few  
 16 seconds to just explain or give us that equation?  
 17 A Well, the equation starts with the total value  
 18 of contracts awarded to Synpak, from MRE-7's through --  
 19 seven through twelve. It reduces that amount by the  
 20 estimated profit rate that we thought that Synpak would  
 21 have -- would have quoted on the contract. And we added  
 22 to it a profit rate that we anticipated Freedom would  
 23 conservatively have realized had they performed the  
 24 contracts to get the amount of lost profits.  
 25 Q Thank you. And do you believe, in your

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1 professional judgement, that this is a reasonable  
 2 approach to assess the likelihood of the amount of lost  
 3 profits?  
 4 A Yes.  
 5 Q Thank you. I have no further questions.  
 6 JUDGE JAMES: Well, considering the time, I'd  
 7 like you to consider the extent of cross-examination the  
 8 Government wishes to make of witness Fishbane, and give  
 9 me your view as to what that duration might be.  
 10 MS. HALLAM: Zero.  
 11 JUDGE JAMES: You have no cross examination?  
 12 MS. HALLAM: None.  
 13 JUDGE JAMES: Well, alright. I do have just a  
 14 couple of questions of Mr. Fishbane. I heard you  
 15 testify, Mr. Fishbane, that types of costs were paid to  
 16 contractors other than Freedom on MRE contracts in  
 17 contrast to what was paid or refused to be paid through  
 18 Freedom. And my question is how did you know the sorts  
 19 of costs that were paid by the Government to contractors  
 20 other than Freedom, on MRE contracts?  
 21 THE WITNESS: Well, in two ways, Your Honor.  
 22 Firstly, I believe in IPP or D&F saw some narrative that  
 23 indicated that special consideration could be given to  
 24 one-time charges. But more specifically, I read a  
 25 General Accounting Office report -- I think it was dated

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1 February 13th, '82, that audited a Defense Corporation  
 2 contract, and the GAO indicated that capital assets were  
 3 allowed as a one-time charge on the contract.  
 4 JUDGE JAMES: Alright. One other question.  
 5 How do you know whether the ACO on this contract for  
 6 Freedom, the MRE-5 contract, how do you know if the ACO  
 7 was aware of the MOU?  
 8 THE WITNESS: Well, in several ways. The first  
 9 way was that on December 13th, 1984, Mr. Marer, who was I  
 10 guess the CFO of Freedom, sent in a letter enclosing the  
 11 MOU and the supporting schedules. But also, in some of  
 12 the documents that I read, particularly documents that  
 13 were audited, he relates to the -- things that evolved  
 14 from the memorandum of understanding. So that -- if you  
 15 make the assumption that Mr. Leibman never received Mr.  
 16 Marer's transmission, one would think that if Mr.  
 17 Herringer or however you pronounce it referred to these  
 18 as being included in the memorandum of understanding. If  
 19 Mr. Leibman didn't have the memorandum of understanding  
 20 up to that time, which is kind of unlikely, he would have  
 21 sorted it out at the meeting with him.  
 22 JUDGE JAMES: As a result of my questions to  
 23 the witness, do you, the appellant, have any further  
 24 questions of the witness.  
 25 MR. STEIGER: Just one, Your Honor.

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1 FURTHER DIRECT EXAMINATION  
 2 BY MR. STEIGER:  
 3 Q Perhaps to refresh, Mr. Fishbane's  
 4 recollection, do you recall reading -- you mentioned the  
 5 Holland report.  
 6 A Yes, I did.  
 7 Q Which is in the file, do you recall reading Mr.  
 8 Holland's interview of Mr. Barkowitz, the first PCO, on  
 9 this job? If you don't, it's okay.  
 10 A You know, I did review that. I didn't mention  
 11 that -- I think I mentioned earlier that I--  
 12 Q And do you recall Mr. Barkowitz telling Colonel  
 13 Holland that, in fact, previous contractors -- previous  
 14 MRE contractors had received special treatment of this  
 15 nature? If you don't--  
 16 A Yeah, I really don't remember. I did read that  
 17 report, but I truly don't remember it.  
 18 MR. STEIGER: Okay. Thank you. That's why.  
 19 JUDGE JAMES: Government have any further  
 20 questions?  
 21 MS. HALLAM: No, Your Honor.  
 22 JUDGE JAMES: Alright. Thank you ever so much,  
 23 Mr. Fishbane, for your testimony.  
 24 THE WITNESS: You're welcome, Your Honor.  
 25 JUDGE JAMES: Thank you. Considering the hour,

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1 I would propose to break for lunch, unless you, the  
2 appellant, would prefer to put another witness on?

3 MR. STEIGER: No, our witness is here, but I  
4 think we would prefer to break at this time.

5 JUDGE JAMES: Alright. Mr. Reporter, let's go  
6 off the record.

7 [Whereupon, the hearing was recessed, to  
8 reconvene later this same day.]  
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1 Q Mr. Freck, what is your current occupation?

2 A I'm a consultant specializing in the field of  
3 government contracts. My primary emphasis is on  
4 termination for convenience proposals and claims. I also  
5 do some general contract administration work, and I  
6 occasionally support litigations.

7 Q Give us an idea, a thumbnail sketch of your  
8 past experience.

9 A I started working for the Department of Defense  
10 in 1974, specifically I worked for the Defense Logistics  
11 Agency. I was employed -- a local field office on Long  
12 Island, called Decassa Garden City. Today, it would be  
13 referred to as DCMC, Long Island. I worked there from  
14 1974 through 1979 as a contract administrator. In late  
15 1979, I became a determination contracting officer, and  
16 my office for that position was in the region  
17 headquarters, which was Decassa, New York. That's DCASR.  
18 From late '79 through 1982, I was a termination  
19 contracting officer within that division. And from 1982  
20 through 1990, I was the chief of that division, the chief  
21 of the Termination Settlement Division, as well as acting  
22 as a termination contracting officer. In late 1990, I  
23 left the Government to pursue consulting with a number of  
24 Defense contractors.

25 Q Thank you. Mr. Freck, I would ask you just to

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## AFTERNOON SESSION

1 JUDGE JAMES: We're back on the record. Who  
2 does the appellant wish to call?

3 MR. STEIGER: Yes, Your Honor, we wish to call  
4 Mr. Brian Freck.

5 JUDGE JAMES: Do you solemnly swear that the  
6 testimony you're about to give in this proceeding will be  
7 the truth, the whole truth, and nothing but the truth, so  
8 help you God?  
9

10 THE WITNESS: I do.

11 JUDGE JAMES: Please be seated. I'd like you  
12 to state for the record your full name. Spell for us  
13 your last name. And give us your address.

14 THE WITNESS: My name is Brian. B-R-I-A-N.  
15 Freck. F-R-E-C-K. I'm 48-years-old. I reside at 40  
16 Roma Street, Nutley, New Jersey. N-U-T-L-E-Y.

17 JUDGE JAMES: Mr. Freck?

18 THE WITNESS: Okay.

19 Whereupon,

20 BRIAN FRECK,  
21 was called as a witness on behalf of the Appellant and,  
22 after having been first duly sworn, was examined and  
23 testified as follows:

24 DIRECT EXAMINATION

25 BY MR. STEIGER:

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1 speak a little bit louder, please. How did you come to  
2 be involved with the appellant, and when did that happen?

3 A I received a call from Henry Thomas in I would  
4 say late 1997. I believe Mr. Thomas had been referred to  
5 me. And at the time he called, he had a definite need to  
6 prepare and present a termination settlement proposal to  
7 the Government. When I met with Mr. Thomas, for the  
8 first time, it was clear that he had a limited time  
9 available within which to submit that proposal. His  
10 contract, which had been terminated for default, and  
11 converted by the Board to a termination for convenience  
12 in I guess sometime 1996. Based upon that action, he had  
13 one year to file a termination settlement proposal under  
14 the termination for convenience clause of the contract,  
15 and, in fact, that year had just about expired at the  
16 time we met or shortly before that. I'm not clear when  
17 that year expired, but Henry had gotten an extension of a  
18 few months I believe in order to submit the proposal. So  
19 my initial job, the obvious priority, was to prepare a  
20 proposal which would be a presentation of the total costs  
21 incurred under the contract, as well as a credit for  
22 prior payments.

23 Q Do you have the approval of the contracting  
24 officer to submit a termination proposal using the total  
25 cost method?

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1 A We did. We requested the use of the total cost  
2 method because the inventory method is the normal method  
3 of submission. The total cost requires approval. We had  
4 written approval to submit on a total cost basis, and  
5 primarily that's because the contract had been in an  
6 advanced stage of completion with -- it would not be  
7 possible to allocate costs to prior to whatever it is, so  
8 it was reasonable to submit on a total cost basis.

9 Q How and in what way, did your position and  
10 function evolve into supporting this litigation?

11 A Well, I said the termination settlement  
12 proposal was the obvious priority for time reasons. It  
13 became clear when I started to work with Mr. Thomas that  
14 he had incurred significant costs overruns on this  
15 particular contract. And that, based on the termination  
16 for convenience rules, the clause and also FAR Part 49,  
17 or in this case, DAR -- since this contract is quite old,  
18 those overruns would not be reachable -- recoverable in a  
19 termination for convenience unless the contract price was  
20 adjusted upward. It's a routine part of a termination  
21 for convenience settlement process that the contracting  
22 officer would adjust the final contract price to account  
23 for any unadjusted changes, which existed under the  
24 contract. And in this case, the contract price was \$17  
25 million. It had not been adjusted upward to reflect

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1 those overruns. So an important part of my job was to  
2 analyze the costs incurred, the nature of the overruns,  
3 and what cost elements had occurred, to verify them, and  
4 to pursue a request for equitable adjustment, which would  
5 result in an adjustment upward of the contract price,  
6 which would then permit recovery of costs plus profit,  
7 and, at the same time, by adjusting the price upward,  
8 would prevent an undue decrement of costs, which were  
9 otherwise allowably incurred in an allowable sense.

10 Q In order to prepare yourself for this  
11 assignment, tell us what documents you reviewed and what  
12 you did to put yourself into that position?

13 A Are you referring to the position of the  
14 termination settlement proposal or the equitable  
15 adjustment?

16 Q Primarily the equitable adjustment.

17 A Okay.

18 Q But it's really both.

19 A It is, and, as I asked the question, I realize  
20 I probably have to give the same answer for both  
21 questions. Initially, I looked at a number of summary  
22 cost documents, which had been prepared by Freedom. And  
23 they're referred to in the record. They're a series of  
24 spreadsheets. One is called as planned and negotiated.  
25 Another is called as actually happened. And it's a

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1 summary snapshot of the total incurrence of costs on the  
2 contract over the -- well, the latter document as  
3 happened is a -- is the actual cost expended per month  
4 over the full course of the contract, which was -- which  
5 had extended out to a period considerably in excess of  
6 the originally planned period. That was the summary of  
7 costs incurred. I did some sample checking of various  
8 books and records, cost documents, purchase orders. I  
9 also reviewed all the Defense Contract Audit Agency  
10 reports which had been issued in response to progress  
11 payment submissions under the contract. By reviewing  
12 those reports, I was able to get a level of assurance as  
13 to what costs I could incur in what time frames and  
14 verify those against the summary spreadsheet that I had  
15 been working with. This put me in a position to prepare  
16 a determination settlement proposal. In terms of  
17 pursuing an equitable adjustment, I analyzed the cost  
18 overruns, which had been detailed on this spreadsheet,  
19 and I was able to compare them with the cost that had  
20 been projected as being necessary to perform this  
21 contract, primarily the document which details those  
22 costs would be the negotiation of record, which was  
23 created at the outset of the contract. And that  
24 consisted of -- there was a memorandum of understanding,  
25 which was, you know, it was just a summary of the

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1 negotiated elements. But there was also a series of  
2 detailed exhibits, exhibits which reflected the planned  
3 expenditures by each cost element during each month that  
4 they planned to be expended, as well as cash flows and  
5 payment schedules, et cetera. I also reviewed the record  
6 of that negotiation--all the documents leading up to that  
7 negotiation, such as the price analysis reports, the  
8 negotiation memorandum, the technical reports that had  
9 been issued by the Government. And by analyzing those  
10 reports, together with the record of the negotiation, it  
11 was clear to me that both parties had spent a lot of time  
12 and effort in arriving at a contract price that clearly  
13 reflected what the expectations of Freedom and the  
14 Government were with respect to the total amount of money  
15 expected to be spent on this job, and even the months  
16 that those costs were expected to be expended. In fact,  
17 the details of those exhibits, together with the  
18 spreadsheet, which was the summary plan of Freedom,  
19 clearly calls out in expenditure of costs during an early  
20 period, a pre-production period, which would be November  
21 through approximately the end of April of 1985, in which  
22 Freedom was going to be expending significant sums of  
23 money for plant, renovation, and alteration; bringing in  
24 certain types of production equipment, which Freedom had  
25 been -- had commitments from particular suppliers, and I

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1 reviewed those purchase orders, as well as installing an  
2 automated live tracking system, and generally getting the  
3 plant ready for a high-level production capability, which  
4 was going to start after the pre-production period end,  
5 which would be May of '85, where, when direct production  
6 labor work force put into place.

7 Q Would you tell us what are three categories of  
8 damages or relief that we seek in this particular case?

9 A Well, I'll refer to the charts that I've  
10 prepared. The three categories would be number one,  
11 there is an equitable adjustment to the contract in order  
12 to recover cost overruns, together with profit. Number  
13 two, there are -- and that is -- in this summary chart  
14 would give the index. The first category, the equitable  
15 adjustment, would be detailed in charts number one  
16 through nine. In the second category is unrecovered  
17 program investment costs, which I -- in my work in  
18 analyzing costs in FM -- all the associated books and  
19 records and financial statements, I have -- and also the  
20 negotiation record, I have seen that there were some  
21 expenditures for equipment, which the parties had  
22 contemplated early on, but were clearly not designed to  
23 be recovered 100 percent in the contract price. And a  
24 certain portion of those expenditures were expense to the  
25 contract, then presented by Freedom in its termination

1 those companies that would have received those awards.

2 Q Might I ask you -- are you familiar with the  
3 claim that is under dispute? Did you look over that  
4 claim?

5 A The?

6 Q The one summary referred to as the \$21 million  
7 breach claim?

8 A Have I -- when you asked the question, I wasn't  
9 sure if you meant the more definite statement or the?

10 Q No, no. I meant the claim first?

11 A The claim itself. The 1991 claim?

12 Q Yes.

13 A I have seen that claim.

14 Q And you did mention the more definite  
15 statement. Are you familiar with that?

16 A I have read that also.

17 Q Would you say that the items you described  
18 here, not necessarily the dollars, but the items that you  
19 described here are consistent with both that claim and  
20 the more definite statement?

21 A The elements of the claim, the causative  
22 elements, the history, so to say, is consistent. I don't  
23 think that that '91 claim may have clearly presented  
24 things in a way that was -- that identified each element.  
25 But if you read that claim, you will not see anything in

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1 settlement proposal consistent with what the parties had  
2 agreed to. However, there was a balance which remained  
3 in an asset account, which was written off subsequent to  
4 the termination and the demise of the operation. And  
5 that was some equipment, which was designed to benefit  
6 the future MRE programs, which, from my understanding of  
7 what I've read in the -- in the negotiation memorandum  
8 and associated documents -- it was somewhat of a, you  
9 know, encouragement to make an investment for the future.  
10 And these amounts have now been lost with the exception  
11 of some depreciation amount and some the portion that was  
12 expensed directly to the job, which has been included in  
13 the termination settlement proposal. The balance was  
14 loss to the company, and those are presented as  
15 unrecovered program investment costs.

16 Q And the third one?

17 A The third category is the lost profits on the  
18 MRE contracts, the successive awards--MRE-7 through 12,  
19 which, to the best of my understanding, would have been  
20 awards received by Freedom, by I believe another company  
21 called Synpak was brought into the program and did  
22 receive those awards; and basically, received awards  
23 that, pursuant to the D&F's each year, had designated  
24 three companies as receiving -- each receiving award in  
25 varying percentages. And I believe Freedom was one of

1 my presentation that is inconsistent or a change from  
2 that.

3 Q Right. And wasn't there a significant event  
4 that had not taken place yet when that claim was written?

5 A Well, a significant being at the time it was  
6 that the contract had been terminated for default.

7 Q That's the event.

8 A There is one -- there is a gross error in that  
9 1991 claim. There is an understatement of his contract  
10 overrun.

11 Q There is?

12 A There is.

13 Q But before us now, we have this presentation  
14 for our entitlement to damages, which I would like you to  
15 discuss. And let us begin with you telling us what the  
16 criteria you used to develop the first category, the  
17 equitable adjustment category?

18 A Well, before going to the chart, which  
19 obviously is full of numbers, I would say the criteria I  
20 utilized to present the claim, this claim, is essentially  
21 the same I would use to present any claim, and that is to  
22 examine the costs incurred, examine the elements defined  
23 out where overruns to budget occurred, and also to  
24 determine what was the budget. What was the baseline?  
25 What was -- what could the contractor reasonably expect

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1 to have spent on a particular contract; and, therefore,  
 2 the point at which you measure the overruns from. And I  
 3 was very pleased in this case that there was a -- you  
 4 know, the record was -- you know, replete with  
 5 information, which essentially had established what the  
 6 reasonable budget for this job was. And that is on my  
 7 chart number one. That is the first column, which is the  
 8 amount budgeted negotiated.

9 Q I see. For the record, that's the first chart  
 10 underneath the face page, referred to as chart number  
 11 one.

12 A Right. The face page is a summary with no  
 13 numbers.

14 Q Right.

15 A Each one is numbered.

16 Q We're talking about the chart number one.

17 A Okay. The first column is the amount budgeted  
 18 and negotiated. And this is clearly supported in the  
 19 documents. It's -- in particular source documents, I've  
 20 mentioned here. Document number A as planned and  
 21 negotiated would reflect these exact numbers, as well as  
 22 source documents E and F, which are the memorandum of  
 23 understanding and all the detailed exhibits which were  
 24 associated with that negotiated settlement. Also, in  
 25 terms of budget, the document A, as planned and

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1 negotiated, would clearly set out a chart, which you  
 2 could match the milestones of performance with the  
 3 expenditures of cost.

4 Q Can we take a look at that? FT-443, please.  
 5 Document labeled 04278. First, tell us where this  
 6 document -- where does the document come from.

7 A Where did I receive it, are you asking me?

8 Q No, what is the source of the source? What  
 9 does this document come from?

10 A Oh, well, these -- I'm not sure -- where did  
 11 the numbers come from or where does the document itself  
 12 come from?

13 Q Well, then, the information on there. Who made  
 14 up these documents?

15 A Well, the document was prepared by Freedom.  
 16 It's a Freedom document.

17 Q Okay. In what connection?

18 A It's a reflection of what had been negotiated  
 19 in November 1984 with the detailed presentation of cost  
 20 agreed to and the milestones of schedule and cost reflect  
 21 the record of the negotiated settlement.

22 Q So these are supporting the negotiated  
 23 settlement. They don't quite look in form as the  
 24 spreadsheets, the rough draft, or not rough draft, but  
 25 the handwritten spreadsheets that we have been referring

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1 to. Is this information the same as that?

2 A It's the same information. It's the same  
 3 information. You know, the format is obviously  
 4 different.

5 Q The format is different?

6 A Yes.

7 Q But then why was this document created, do you  
 8 know?

9 A This is a tool to work with, which is a summary  
 10 of --the spreadsheets are very -- they're not the easiest  
 11 document to work with.

12 Q I see. So this was created by Freedom as a  
 13 working tool after the contract was negotiated?

14 A I do not know when this document was created.

15 Q Okay. Well, it has a date. Well, no it  
 16 doesn't really. Okay, please, go on. Go on with this  
 17 document.

18 A I lost the question -- where was I?

19 Q I'm sorry where you were beginning to tell us  
 20 about this document.

21 A This document would give basically a -- the  
 22 expenditure of cost per planned schedule. If you notice  
 23 from contract inception in November '84 through April,  
 24 there was a pre-production period. Production was to  
 25 start in month seven, when the production -- and you can

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1 see that the planned production labor, which was eight  
 2 months at \$101,000 per month was scheduled to commence in  
 3 May of '85. Deliveries were scheduled to commence in  
 4 month nine, July of '85, and to continue through December  
 5 '85. The planned period of performance was a 14-month  
 6 period.

7 Q Now, did you review this -- these numbers were  
 8 they consistent with the spreadsheets that were a part of  
 9 and attached to or that supported the MOU?

10 A They are consistent, yes.

11 Q Okay. Is there anything else you wish to point  
 12 out on this chart?

13 A Well, the chart also shows the receipt of  
 14 monies in terms of progress payment as to when they would  
 15 be received based upon cost incurred.

16 Q Are you going to refer to this chart later on,  
 17 when you get into it with more detail in your  
 18 presentation?

19 A I may.

20 Q Okay, can we go on then to--

21 A Yes.

22 Q You want to describe the next chart that's  
 23 listed.

24 MS. HALLAM: Your Honor, I object to him  
 25 testifying from this chart. It's not even in evidence,

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1 and I also object that they are intending to move it into  
2 evidence.

3 MR. STEIGER: I don't believe that we are  
4 intending to move it into evidence. I never said we did.  
5 It's in the record right now. We're using it to  
6 essentially support or to explain a presentation that  
7 he's making. In essence, he's--

8 JUDGE JAMES: Hold on, I hear an objection.

9 MR. STEIGER: Yes, sir.

10 JUDGE JAMES: My notes show that Exhibit 443  
11 was received in evidence because there was no Government  
12 objection to that document. I fail to understand why  
13 you're saying it's not in evidence.

14 MS. HALLAM: I didn't know this was the same  
15 thing that was at 443. This is what I'm objecting to.

16 JUDGE JAMES: Oh, you mean this little document  
17 here?

18 MS. HALLAM: Yes.

19 JUDGE JAMES: That's been distributed? That's  
20 not my understanding anybody's move this thing into  
21 evidence.

22 MS. HALLAM: Well, I'm objecting to him  
23 testifying from it.

24 JUDGE JAMES: You're objecting to him  
25 testifying using this document?

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1 MS. HALLAM: Right.

2 JUDGE JAMES: Alright. Any response to that,  
3 counsel?

4 MR. STEIGER: It's simply a aid to assist the  
5 court in determining our entitlement and our quantum.  
6 It lays it out--

7 JUDGE JAMES: As far as the court's concerned,  
8 I don't need the document. The question can this witness  
9 testify from the document? That's what the Government is  
10 objecting to.

11 MR. STEIGER: This witness prepared this  
12 document based on source materials that are described.

13 JUDGE JAMES: Has there been any demonstration  
14 the witness lacks recollection so he needs the document?

15 MR. STEIGER: Well, because of the details and  
16 the numbers, Your Honor, I think it would be placing an  
17 undue burden upon him to work without these numbers.

18 JUDGE JAMES: Alright, but I see it as a  
19 mechanism by which other documentary facts -- well, let's  
20 put it this way: other documentary data are somehow  
21 distilled into this new document that this witness says  
22 he's prepared or you're saying he's prepared.

23 MR. STEIGER: There's nothing new in this  
24 document that's not--

25 JUDGE JAMES: I understand. You're saying

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1 there's nothing new in the document. If that's so, then  
2 I fail to see why he can't testify from the existing  
3 record, why he needs this document. So I'm sustaining  
4 the Government's objection to the witness testifying from  
5 this document, meaning this piece of paper handed to the  
6 Board at the -- after the lunch break.

7 MR. STEIGER: So what is your conclusion, Your  
8 Honor?

9 JUDGE JAMES: I sustained the objection.

10 MR. STEIGER: You're saying that he is not to  
11 use this document to testify.

12 JUDGE JAMES: I see no reason why he should.

13 MR. STEIGER: Okay.

14 JUDGE JAMES: Should I give--

15 MR. STEIGER: You want to hold on to yours?

16 JUDGE JAMES: It's here.

17 BY MR. STEIGER:

18 Q Alright. Let's us continue. You were  
19 describing the criteria that you used to establish the  
20 entitlement through the equitable adjustment. Please go  
21 on.

22 A Let me overview the criteria and try to pick up  
23 where I left off. The initial thrust would be to analyze  
24 the cost incurred and to match them against a budget, a  
25 baseline of the contract. I used as the baseline the

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1 negotiated amounts as representing the -- what was  
2 budgeted and expected to be incurred by Freedom in  
3 performance of the contract. In measuring the actual  
4 costs, I presented the cost incurred as part of a  
5 termination settlement proposal to the Government, to the  
6 assigned determination contracting officer. That  
7 proposal has been audited. There is a Defense Contract  
8 Audit Agency report that has been issued on those costs.  
9 It's one of the -- I believe it's one the documents in  
10 the record. The results of that review of the \$22.5  
11 million costs that were incurred and presented as part of  
12 the termination settlement proposal, DCAA has recommended  
13 for -- has recommended for allowance approximately \$21.2  
14 or \$21.3 -- I'm not sure -- we can refer to the report if  
15 we have to. The primary areas of disagreement, and which  
16 is just a little over a million dollars of the twenty-two  
17 and a half are a \$400,000 amount that was in the G&A cost  
18 category for a -- the sale of the lease option, which I  
19 believe is an allowable cost. I don't agree with the  
20 audit findings on that particular item. I believe the  
21 costs--

22 Q Why don't we go right to the file so that you  
23 don't have to strain yourself. Let us look at the DCAA  
24 audit report, dated 10 September 1999, FT-413.

25 A I have the report. I was summarizing the

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1 findings, which I'm familiar with. Would you like me to  
2 go count pertinent pages.

3 JUDGE JAMES: Well, let's just see what  
4 counsel's question is. Why don't you ask your question,  
5 Mr. Steiger?

6 BY MR. STEIGER:

7 Q Right. Okay. First of all, tell us what this  
8 document is?

9 A This is an audit report issued by the Defense  
10 Contract Audit Agency as a document representing the  
11 Government's cost review of the termination settlement  
12 proposal submitted by Freedom industries, Freedom, New  
13 York, Inc. I'm sorry.

14 Q Now, do you recall when we submitted the  
15 termination proposal?

16 A Well, the initial proposal was submitted in  
17 either late '97 or early '98, but there was a revised  
18 submission in January '99. This report is a review of  
19 that revised submission. The revised submission was  
20 essentially the initial but incorporated some additional  
21 elements that had been overlooked in the initial  
22 submission.

23 Q Now do you think you could take a minute or two  
24 to look at this just to come up with the page that  
25 reflects what amount the auditor acknowledged was

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1 incurred cost under this job.

2 A Well, that would probably be somewhat of a  
3 summary finding page.

4 Q Right.

5 A Okay, I believe the best view of that would be  
6 page seven.

7 Q On the bottom of the page, right. What  
8 numbers?

9 A Page four. I'm looking at the top -- has a fax  
10 header which has page seven.

11 Q But there's a number on the bottom.

12 A 02805.

13 Q 02805. Okay. Can you run through this with us  
14 and -- as to the conclusions.

15 A Well, the columns -- the items would be the  
16 cost elements and, I'll start with the item, which is  
17 total cost, which is merely a summation of the cost items  
18 up above. And moving to the right, under the column  
19 revised proposal is the cost incurred number of  
20 \$22,546,933. Of that amount, DCAA has questioned  
21 \$1,000,039 -- \$1,039,043.

22 Q So essentially, you're saying that the revised  
23 -- that -- of all the costs that you submitted and  
24 identified in the termination proposal, some \$1 million  
25 or so has been questioned by DCAA?

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1 A Yes.

2 Q And are you then saying that the balance of it  
3 has been accepted by DCAA as an incurred cost?

4 A Yes.

5 Q Now, in calculating your entitlement or our  
6 entitlement to the overrun, are you using the figures set  
7 forth in this particular statement?

8 A I am using a -- I am using the 20 -- I'm not  
9 using their exact recommended amount. I've taken into  
10 account certain of their recommendations, and removed  
11 those from the costs.

12 Q So you have, in fact, removed certain costs?

13 A Yes.

14 Q You've removed those because DCAA has suggested  
15 they should be removed?

16 A I removed those elements that I concur with  
17 DCAA on.

18 Q And you left in those elements that you  
19 believed DCAA was wrong? Is that correct?

20 A Yes. Yes.

21 Q Now, of the million or so here costs that were  
22 questioned by DCAA, would you give us an idea what the  
23 split was? How much -- how much of those costs did you,  
24 in fact, remove?

25 A I removed approximately \$200,000.

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1 Q And the rest you put back in because you did  
2 not agree with the findings of DCAA?

3 A Yes.

4 Q Okay. So would you say, then, Mr. Freck, that  
5 in the worst-case situation, the disagreement between us  
6 and the Government on the total amount of costs incurred  
7 on this job and properly allocated to this job is about  
8 \$800,000?

9 A Yes.

10 Q That's it. Thank you. Now, again, would you  
11 -- I interrupted you. Would you continue with your  
12 criteria for establishing our equitable adjustment claim?

13 A Well, I was actually explaining that \$800,000  
14 when we went to the beginning of the report.

15 Q Okay. Explain.

16 A The \$800,000 difference, which we say at most  
17 is the disagreement on incurred costs consists of the  
18 \$400,000 in the sale of the lease option, which I believe  
19 is an incurred cost, but was recommended for disallowance  
20 as constituting some type of a forgiveness of rent or  
21 reduction, which I don't agree with. The other area of  
22 disagreement was approximately 300 and some thousand  
23 dollars of interest. Now, interest expense, which is  
24 usually a unallowable under the procurement regulations,  
25 in this case, this particular case, Freedom had presented

4 JUDGE JAMES: Be sure to give a copy to your  
5 opponent.

23 Q You told us now what the basis for the baseline  
24 was -- the negotiated budgeted amount. You told us what  
25 the basis for the amount incurred was. Is there one

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MR. STEIGER: Yes, I do. The response is, first of all, she's right. There's no question. It was overlooked. However, I think that our goal here is to arrive at the truth, and there's no question about the relevance of the document we've been raising. So I would ask, Your Honor, that it be allowed to be included --



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1 into evidence.

2 MS. HALLAM: Well, I have raised an objection  
3 to relevance with regard to all the T for D, or T for C,  
4 that, as I said, they were -- that objection has already  
5 been overruled.

6 JUDGE JAMES: So agreeing with counsel for the  
7 Government, whether it's relevant or not relevant, is not  
8 really part of your objection. I'll put it another way:  
9 It's not a sustainable part of her objection, because  
10 I've already ruled that that aspect is not an objection.  
11 But what she's really saying is, hey, May 1st came and  
12 gone. In fact, April 14th came and gone, and you never  
13 gave it. And this is not a document created after that.  
14 It was well before it. And presumably known to you, the  
15 appellant.

16 MR. STEIGER: Don't deny that.

17 JUDGE JAMES: Or even to this witness.

18 MR. STEIGER: Don't deny it.

19 JUDGE JAMES: I think you're late. I'm going  
20 to sustain the objection.

21 BY MR. STEIGER:

22 Q In your discussions with the TCO, did you have  
23 discussions on this point?

24 A Yes.

25 Q Did you, in fact, agree with the TCO as to the

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1 amount of the estimate to complete?

2 A Yes, there was a negotiated agreement between.

3 Q Do you recall what that amount was?

4 A \$1,499,000 and I don't got the exact dollars  
5 also. I'll look at the document.

6 Q Now based upon then what -- based upon, then,  
7 what you were able to establish as the budgeted amount --  
8 the amount incurred and the estimate to complete, were  
9 you able to arrive at a total number for the overrun on  
10 this job?

11 A Yes, I was.

12 Q And to the best of your recollection, what was  
13 the amount of that?

14 A \$9,076,000.

15 Q Now, were you able to break that down into the  
16 various elements that showed the overrun amount for each  
17 one of those elements?

18 A Yes, I was.

19 Q Was there, in fact, the material overrun?

20 A It was a material overrun of \$403,000.

21 Q And do you -- what do you attribute, from your  
22 understanding of the file, do you have any -- what you  
23 attribute that to?

24 A Yes, the material overrun is comprised of two  
25 elements, and I was able to understand what the cause of

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1 the overrun was and the extent of it by reviewing the  
2 actual cost experience for build items from vendors that  
3 are submitted as part of the progress payment request,  
4 and compare that to the actual purchase order commitments  
5 and compare that to the negotiated amount in the  
6 contract. And I was also able to prepare prices from  
7 vendors in a later period after the contract had been  
8 delayed, prices which were essentially more than two  
9 years after the contract or well over a year past the  
10 planned delivery date, where I saw the imposition of some  
11 higher unit prices. And we're talking about, in some  
12 cases, extremely small prices to the extent of .0453  
13 cents a piece, but -- and of that total overrun of  
14 \$403,000, I was able to see that approximately \$48,000  
15 represented an overrun because the actual experience of  
16 cost incurred was a little different than what had been  
17 allowed, what had been negotiated between the parties  
18 when they set up the contract. In some instances, I saw  
19 some costs that were a little less and some they were a  
20 little more, but the net, if you went through the total  
21 bill on materials, the net result was a \$48,000 overrun,  
22 which I see the Government as having no culpability for.

23 Q So you removed it from your calculation of our  
24 ultimate entitlement?

25 A It's -- that would not be a part of the

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1 equitable adjustment. The balance of \$355,000 in the  
2 overrun was for the imposition of higher prices which  
3 were well out of period and would be the result of delays  
4 under the program. That amount of \$355,000 I have  
5 included as part of the request recommendation.

6 Q When you say out of period, are you referring  
7 to vendors increasing their prices or give us examples of  
8 what you're talking about there from your review of the  
9 file.

10 A I'm referring to a vendor perhaps, you know,  
11 instead of having completed delivery in October of '85,  
12 for instance, may be planning to deliver to Freedom as  
13 late as, you know, late 1986, and the unit price could be  
14 -- in this case could be a penny more per unit. It's  
15 such a -- the quantities are so large on some of these  
16 items, the dollar value so small, it's -- you go out in  
17 four digits in some cases. I don't remember specific  
18 items.

19 Q Okay. Let's go on. Now, you've given us the  
20 definition of the material overrun. Let's talk about  
21 production labor here. Do you recall, with some  
22 specificity, what the amount of the overrun was with  
23 respect to production labor?

24 A One I believe was \$1,776,000. The negotiated  
25 contract provided for \$811,000, which was a, you know,

1 from a review of all the technical reports and the  
2 proposals, the parties had agreed that there would be 135  
3 production workers for an eight-month period, eight hours  
4 a day, and there was an average wage rate of \$3.75, which  
5 had a fringe tax rate on it.

6 Q Now you say -- excuse me, you say eight months.

7 A Yes.

8 Q Why do you say eight months?

9 A The planned labor was scheduled for eight  
10 months, from May through December '84.

11 Q Now, based upon your review of the file, and  
12 what you looked at, your extensive review that you talked  
13 about initially, were you able to discover the reasons  
14 for the overrun in labor?

15 A Yes, I was. It's -- there was equipment used  
16 by Freedom which was not the equipment that was planned  
17 to be used, and I know what was planned to be used. I've  
18 seen all the purchase orders and the commitments and the  
19 documents which support the planned use of an  
20 international paper machine, which is the top and bottom  
21 sealer. There was a dough boy machines. There was the  
22 Koch multivac machines. And I -- my understanding that  
23 Freedom was not able to use this equipment because they  
24 commitments they had, they were not able to honor,  
25 because they did not have the financing in terms of

1 progress payments early on needed to consummate those  
2 arrangements, nor were they able to get confirmation of  
3 the progress payments being paid during the  
4 pre-production period. So Freedom ultimately had to use  
5 alternate equipment, which, to my understanding from  
6 reviewing a lot of documents, also I conferred with  
7 Martin Bernstein, who was an industrial engineer on this  
8 issue, and he confirmed that the use of this equipment  
9 that had been -- was ultimately used was much more labor  
10 intensive and would require considerable numbers of  
11 additional workers. And, at the same time, even if  
12 everything else had gone okay, that use of that equipment  
13 would still make the production schedule three to four  
14 months longer than the eight month period. So those two  
15 -- those two impacts resulting from the extra equipment  
16 would obviously have a considerable effect on the planned  
17 labor expenditures. Additionally, there were delays in  
18 receiving contract to furnish materials in the January,  
19 the February 1986 time period. I understand there was a  
20 modification signed between Freedom and the Government,  
21 and there was a schedule established. And when Freedom  
22 went to produce to that schedule they had found out that  
23 the Government had diverted subcontractor materials that  
24 were designated for Freedom, they had been diverted to  
25 another MRE producer. So there was a temporary shutdown

1 or a delay at that point. There were delays for failure  
2 to -- of the Government to provide GFM later on. I mean,  
3 there was one time frame where GFM was not delivered in  
4 July of '86. However, I know that there was a  
5 modification signed -- mod PE0028, in which the parties  
6 agreed that there would be no claim against the  
7 Government for that two-week GFM non-delivery. And that  
8 I have excluded from the equitable adjustment. I've  
9 excluded that impact. But there were later GFM problems  
10 in September, October, November '86 time frame that  
11 basically shut down production. And these shutdowns at  
12 times also resulted in layoffs. So you would have to lay  
13 people off, bring them back. There's -- it may be  
14 retraining necessary, but also you're bringing back  
15 people who may not be the same people you let go. So  
16 there's a turnover of personnel. So there's  
17 inefficiencies built in with the starts and stops and the  
18 layoffs. There's a combination of factors.

19 Q To account for this rather substantial increase  
20 in the labor from that which was projected?

21 A Well, you have a planned production labor  
22 period of eight months that essentially went to 16 or 18  
23 months, I forget right now. And also during that time  
24 period, you're using equipment that requires more people.  
25 But I did not see any wage rate escalation during this

1 period. I checked the wage rate from the Department of  
2 Labor and also my discussion with Henry Thomas, he could  
3 not recall any wage rate impact.

4 Q So it's not a question of escalation of wage  
5 rates, it's just more people spending more hours?

6 A Right. Even though there were delays and the  
7 period is stretched out, I saw no evidence of labor rates  
8 being escalated.

9 Q Okay, let's go on to the next item in the  
10 overrun and that is the manufacturing overhead and G&A  
11 cost overrun. What can you tell us about that?

12 A Well, G&A costs were planned at a level of I  
13 believe \$3,300,000. Manufacturing overhead was planned  
14 at a level of \$1,840,000 or \$1,860,000 -- I'm not sure.  
15 Those actuals turned out to be over \$7,000,000 for -- let  
16 me correct that.

17 Q If you can't remember, don't worry. It's in  
18 the record. Just give us the best -- give us your best  
19 shot.

20 A The G&A overrun was -- they incurred about \$4.6  
21 million against a planned amount of \$1.84 million, \$1.86  
22 million, so there was close to a \$3,000,000 overrun  
23 there. Manufacturing incurred was over \$7,000,000  
24 against a planned expenditure of about \$3.3 million, and  
25 that's primarily a function of delay. These costs were

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1 -- continued to be incurred during the various delays  
 2 that occurred during the contract, and each delay would  
 3 -- many had varying lengths or certainly uncertainties  
 4 involved with it. I could not see any opportunity of  
 5 Freedom to allocate these costs to any other contract.  
 6 There weren't any other contracts. Nor were the type of  
 7 costs that he could mitigate them to -- mitigate any to  
 8 the extent that he could make reduction and then put them  
 9 back in place when the delays were over. The delays were  
 10 all uncertain, the periods, and there was no known time  
 11 -- you know, it will be X amount of time, and there's the  
 12 ability to use a certain cost. I didn't see that.

13 Q It's essentially what they used to call a burn  
 14 rate or a marching army rate that goes on for the  
 15 duration or the extra duration, extra length of the  
 16 contract.

17 A I wasn't going to use that term, but I'm  
 18 familiar with that.

19 Q Now, let me ask you, then, was the rate of  
 20 costs that was being incurred for these, were they  
 21 relatively consistent over the length of the contract?

22 A No, there were -- there were -- there was a  
 23 period of consistency, but early on during the  
 24 pre-production when there were no progress payments at  
 25 all. The expenditures were less than planned, and then

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1 they ramped up to try to catch up. Then, later on, when  
 2 there were shutdowns, there were some less costs in those  
 3 categories. But overall, the average monthly for each  
 4 month of those elements, you know, consistent with what  
 5 was anticipated.

6 Q Thank you. Now, faced with this overrun that  
 7 you were able to calculate based upon what you've just  
 8 told us. You came up with a figure. And what did you do  
 9 then?

10 A Well, the first thing I -- once I've identified  
 11 what I feel is the overrun, the -- what I really want to  
 12 do is I want to identify anything that is the cause of  
 13 the contractor. I want to -- I want to challenge the  
 14 contractor to show me why something happened. And in  
 15 this case, I -- on many, many occasions challenged Henry  
 16 Thomas to tell me what happened in a particular  
 17 situation, because I'm -- I could read all the documents.  
 18 I saw all the industrial specialist reports, and, you  
 19 know, you being basically looking at it from the outside,  
 20 I would want to know what this meant and what happened.  
 21 And through this effort, I was able to isolate the  
 22 instances I felt which were, of course, contributable to  
 23 Freedom, which was the material overrun element I  
 24 mentioned earlier, and also a GFM problem where he  
 25 appears to have released his right to claim those costs.

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1 And the other remaining overrun I was able to allocate to  
 2 various claim elements and with a good degree of  
 3 confidence that those elements represented acts of  
 4 omission or commission caused by the Government, which  
 5 were compensable. And the allocation was a reasonable  
 6 estimate to define the overrun as the basis for an  
 7 equitable adjustment.

8 Q If I understood you, then, you purged the  
 9 overrun of those costs that you believed, based on your  
 10 reading of the file, discussions with the president et  
 11 cetera that were Freedom's responsibility?

12 A Yes, I did.

13 Q And then you took the balance of that and began  
 14 to look for or determine the causes of the specific  
 15 increases that essentially added up to that total. You  
 16 made -- and you did that, is that what you're saying?

17 A I did that, but I also purged one other  
 18 element. I -- there is a separate element of the  
 19 equitable adjustment which is increased borrowing, and I  
 20 referred to that earlier as the delta between interest  
 21 incurred and interest planned. And that was presented as  
 22 a separate element, which was increased interest costs as  
 23 a result of additional financing requirements. That I  
 24 deleted from the G&A cost base, because that hadn't been  
 25 booked into that cost element. And to allocate G&A as a

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1 delay overrun to various elements, I reduced the interest  
 2 from that cost element so as to avoid double counting  
 3 that interest that I was claiming elsewhere.

4 Q Now, can you give us an idea how you figured  
 5 out the various allocations? What criteria did you use?  
 6 What method did you use? How did you do it?

7 A Could you repeat the question.

8 Q I said I'd like you to explain what method you  
 9 used to do your particular allocations so that you could  
 10 match incident with amount?

11 A Well, I read a tremendous amount of the  
 12 documents trying to -- and the Government reports --  
 13 trying match events with time frames and impacts. I had  
 14 numerous discussions with Henry Thomas. I also had  
 15 several discussions with Martin Bernstein, engineer, and  
 16 Jordan Fishbane, an accountant. And based on that,  
 17 identified what I felt were the top-level changes that  
 18 were the acts which had the most significant impacts on  
 19 Freedom's performance, and then I tried to allocate  
 20 dollars to them in a logical way. For instance, the  
 21 first period of the contract, from November through April  
 22 '84, there were no progress payments received. So  
 23 progress payment number was denied because of this issue  
 24 of can the Government -- I know I understand -- I've read  
 25 enough on this that I understand Marvin Leibman, the ACO,

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1 did not want to pay progress payment number because he  
 2 felt there were indirect costs, not the kind of costs,  
 3 not the costs of progress; and, therefore, a payment  
 4 should be made. And then, a month later, he started a  
 5 series of actions which eventually resulted in a total  
 6 suspension of progress payments, which was early February  
 7 of '85. Then there was a novation agreement, and  
 8 ultimately progress payments were received by Freedom,  
 9 approximately \$1.7 million in early May of '85, but that  
 10 delay resulted in Freedom not being able to -- even  
 11 though Freedom was still there working and making  
 12 progress, they were not spending the money at the rate  
 13 they anticipated. Critical performance milestones were  
 14 not getting accomplished. And I -- you know, I can see  
 15 from all the production reports, the Government  
 16 production reports, that there were building renovations  
 17 that were going on, but certainly not at the rate because  
 18 the contractor eventually -- another contractor had to  
 19 take over that effort. There was a tremendous amount of  
 20 sanitary requirements that had to be complied with in  
 21 order to get the various approvals, because this is a  
 22 food item job. There was equipment that had to be put in  
 23 place to set up the production line, which could not be  
 24 put in place immediately. So although there was work  
 25 being done, this work that was scheduled to be completed

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1 by April '84 got completed at the end of October '84.  
 2 Q Do you recall?  
 3 JUDGE JAMES: Let the record reflect that the  
 4 witness is probably mistaken in the year since the  
 5 contract wasn't approved until November of '84.  
 6 THE WITNESS: I'm sorry.  
 7 MR. STEIGER: Thank you, Your Honor.  
 8 BY MR. STEIGER:  
 9 Q Would you restate that?  
 10 A Yes.  
 11 Q The point you were making.  
 12 A Yes. The production, the pre-production period  
 13 which was scheduled to be completed in April of '85 was  
 14 not completed until October '85. That's a six-month  
 15 delay right there, during which overhead and G&A  
 16 continued to be incurred.  
 17 Q Now, of your \$9 million overrun that you  
 18 calculated, do you recall how much of that amount you  
 19 associated with this early period of non- of delay and  
 20 non-receipt of progress payments?  
 21 A I've allocated approximately \$4.7 million to  
 22 this period, and that is the six-month delay in the  
 23 pre-production period I just mentioned, together with the  
 24 equipment that was eventually utilized being of a lesser  
 25 quality, and that impacting the production schedule once

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1 production did start by three to four months. I used a  
 2 three and a half month period for that. So there's nine  
 3 and a half months of delay, which with overhead and G&A  
 4 being incurred, plus the use of the extra -- the use of  
 5 the equipment which required additional manpower to run  
 6 and to operate and to run the assembly lines. I have  
 7 allocated an amount of money there, which actually is  
 8 already part of a earlier claim Freedom had presented in  
 9 1986. I examined the supporting exhibits to that claim,  
 10 and I've -- for this particular element, which is the  
 11 additional manpower because of the other equipment, I've  
 12 utilized the amount that had been incorporated in that  
 13 particular claim.  
 14 Q That claim you mean the claim that had been  
 15 referred to as the \$3.4 million claim?  
 16 A Well, the claim I had been looking at was --  
 17 yes, it would be the 1986 claim. It would be the \$3.4  
 18 million.  
 19 Q The first claim?  
 20 A Excuse me?  
 21 Q The first claim.  
 22 A The first--  
 23 Q Are you saying -- there were two claims  
 24 submitted, do you recall?  
 25 A April '86?

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1 Q Right.  
 2 A This is a -- this claim is April '86, the one  
 3 I'm referring to.  
 4 Q Okay. Do you recall -- you've given us the big  
 5 chunk at the beginning. Do you recall any other  
 6 significant acts or omissions where you allocated  
 7 significant portions of the overrun to--  
 8 A Yes, I do. But to I need to clarify on the  
 9 previous answer regarding that significant chunk. I need  
 10 to clarify for the record how I determined the amount to  
 11 be allocated.  
 12 Q Please.  
 13 A For instance, the six-month pre-production  
 14 period delay. Six months of delay is priced out at the  
 15 average monthly G&A and overhead cost. There was no  
 16 production labor in that six-month delay pricing because  
 17 labor had not been in place. Conversely, if --  
 18 conversely, the three and a half month delay I mentioned,  
 19 which is the stretching out of production schedule, once  
 20 production had started because of the use of that  
 21 equipment. That's priced out at the monthly average of  
 22 the overhead and G&A, plus the monthly average of labor,  
 23 because during that production period, now labor is in  
 24 place. So depending upon the time of the delay, it would  
 25 either have labor included or labor not included.

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1 Q Okay. Now get back to -- do you recall my last  
2 question? It asked you to identify other examples of  
3 large ticket items that you allocated the overruns to.  
4 A Well, there was one instance in late 1985 where  
5 Freedom had a number of lots of their items rejected by  
6 the ADI inspection team, and I understand that there was  
7 a -- I mean, ultimately this situation was resolved  
8 favorably for Freedom, and inspections were promptly  
9 carried out at the point of inspection. There was a  
10 disagreement on the point of inspection. The ADI had  
11 been insisting that inspections only occurred once the  
12 completed, fully strapped, and palletized load is  
13 presented. Later on, this situation was resolved  
14 favorably for Freedom where the -- in process inspections  
15 occurred. But because of that situation, there was a  
16 problem with some leakages, which involved nothing more  
17 than a simple deburrowing of a machine to get rid of a  
18 sharp edge. And if the inspection had occurred at the  
19 proper point, though that problem would have been  
20 rectified quite quickly with no impact. Instead, they  
21 had -- basically, Freedom lost a month, and they had to  
22 go back and do a lot of rework, which could have been  
23 avoided. So that is what I would say is a one-month  
24 delay, and that's how that was -- that's how overrun  
25 monies were allocated to that particular element, that

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1 kind of element.  
2 Q Now, when you say something one month or two  
3 months, tell us again how you determined what amount to  
4 apply to on a per month basis?  
5 A Dollars?  
6 Q Yes.  
7 A You're asking dollars?  
8 Q Not the actual dollars, but the methodology you  
9 used.  
10 A I used the average monthly expenditure of  
11 overhead and G&A. The -- and I did not go to the end of  
12 the contract. The contract ran for 31 months. But costs  
13 were only incurred through April of 1987, so that  
14 14-month plan schedule in terms of allocating cost  
15 overruns became a 30-month schedule. However, the full  
16 delay is 17 and a half months, not 16, because there is  
17 another month and a half representing the work which  
18 would have been completed as part of the estimate to  
19 complete settlement. But in terms of allocating the  
20 costs, during that 30 months, there is a total overhead,  
21 total G&A expense, which if you divide by 30, gives you  
22 an average monthly. So I have used those monthly  
23 averages in association with pricing delay, which may  
24 have occurred.  
25 Q Do you recall what the one-month figure was

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1 that it came to?  
2 A Excuse me?  
3 Q Do you recall what the one-month figure was in  
4 the amount?  
5 A For the total overhead and G&A monthly was I  
6 believe \$373,000.  
7 JUDGE JAMES: \$374,000?  
8 THE WITNESS: \$373,000, which is the total less  
9 interest less any DCAA recommended unallowables which I  
10 concur with.  
11 BY MR. STEIGER:  
12 Q Then having done your allocations and having  
13 come up with your clean version of the overrun that you  
14 -- that we attributed to the Government, in arriving at  
15 the calculation of the equitable adjustment then what did  
16 you do?  
17 A Well, after determining the total overrun  
18 resulting from the total claimed overrun, which would be  
19 that amount resulting from the Government, and therefore  
20 excludes any other amounts which were purged. I took  
21 that total cost growth and I applied the profit rate that  
22 the parties had negotiated at the outset of the contract  
23 to calculate a total request for equitable adjustment.  
24 Q Do you recall what the final figure is?  
25 A Of what, the profit or the total dollars?

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1 Q No. The total profit -- the total amount of  
2 the calculation of the equitable adjustment.  
3 A I believe it was \$10.6 million.  
4 Q Okay. Let us get into the second category of  
5 costs, of damages. You mentioned some thing you referred  
6 to as unrecovered program investment costs. Would you  
7 describe those to us again?  
8 A This represents equipment and also the cost of  
9 plant renovation and leaseholder alterations that was in  
10 excess of what the parties agreed would be recovered as a  
11 direct expense under this contract. And the balance was  
12 placed into an asset account. And subsequent  
13 determination -- the -- that amount was written off as a  
14 loss to the company. And the total amount, which comes  
15 from the financial statements of Freedom, from that  
16 amount, I took the amount which had been allocated to the  
17 contract, even though there was amounts agreed to at the  
18 outset of the contract for leaseholder alterations and  
19 certain equipment fixtures. Freedom during performance  
20 of the contract had attempted to bill that to the  
21 Government as progress payments, but there were -- that  
22 was costs were not -- they were rejected by the ACO as  
23 being billable under progress -- as being eligible under  
24 progress payments because the ACO had taken a position  
25 that they should be capitalized as assets. So those --

1 the amount -- those amounts which were contemplated as  
2 being directly billed to the Government were placed in an  
3 asset account, together with the entire amount which was  
4 incurred. And from that amount, I calculated the loss of  
5 being the -- what was the total amount less what had been  
6 recovered through depreciation expense to the Government,  
7 less what had been expensed to the contract, which had  
8 not been expensed, but which I incorporated into the  
9 revised termination settlement proposal, because that  
10 represented the exact amounts agreed to as to be expensed  
11 to the contract, and the net differential is the loss,  
12 the unrecovered amount.

13 Q Do you recall what the approximate bottom line  
14 was for additional unrecovered program investment costs?  
15 A Approximately \$900,000.

16 Q Right. Okay. Now let's talk briefly about the  
17 last item that we are claiming. Do you recall what that  
18 is?

19 A Lost profits?

20 Q Right. Now, what's our methodology for  
21 calculating our lost profits entitlement?

22 A Well, it's really an equation. I don't have --  
23 unfortunately, I don't have the exact dollar amount to  
24 calculate a specific amount. It would dependent upon the  
25 value of contracts that Synpak was awarded, which Freedom

1 Q Right. We just don't know all that information  
2 right now.

3 A It's definitely known.

4 Q Right. Okay.

5 A Not by me.

6 Q I just want to make sure that we are not  
7 talking about -- that you are not -- you are not talking  
8 about events which haven't occurred yet, or amounts which  
9 have not, in fact, been established yet.

10 A No.

11 Q These have.

12 A No, those contracts were completed.

13 Q So that's why -- is that why we've referred to  
14 it as an equation that is capable of being simply  
15 calculated arithmetically?

16 A It's a simple arithmetic equation. I just  
17 don't have the value to plug in that one variable.

18 Q Okay.

19 A But it exists.

20 Q Thank you. With the exceptions of your  
21 allocations that you acknowledge come from your own  
22 understanding, your own reading of the files, would you  
23 say then that all the dollars reflected in arriving at  
24 the budgeted amount, the incurred amount, et cetera are  
25 supported by documents that are in the file and that we

1 would have been awarded, and those are the MRE's 7  
2 through 12, when there three suppliers in the program,  
3 each one designated to get an award. Freedom would have  
4 been one of those suppliers. Now the equation simply  
5 takes the value, which is undetermined at the present  
6 moment, the value of the Synpak contracts minus Synpak's  
7 projected profit to come to a cost number times Freedom's  
8 projected profit to come to the total of profits that  
9 would have been earned by Freedom during this period.  
10 And a profit -- I've used a profit rate of 12 percent  
11 because I understand from reading, there was an industry  
12 assessment guide, I believe was the name, that talked  
13 about the MRE contractors having been maintained over  
14 this period at a 12 percent profit rate.

15 Q You said undetermined? Did you mean unknown by  
16 us at this time?

17 A I -- that's what I meant. It's un -- I would  
18 hope that this information would become available to us  
19 and that we can do an exact calculation.

20 Q Certainly, the -- you would then say that the  
21 total value of contracts awarded or received by Synpak in  
22 MRE 7 through 12 are, in fact, known. I mean, they have  
23 occurred.

24 A Well, it's -- the information is known. It's  
25 not known to me.

1 can -- that you can look to to prove what you say?

2 A Absolutely. The cost incurred budgeted, yes.

3 MR. STEIGER: Thank you. I have no further  
4 questions.

5 JUDGE JAMES: Does the Government wish to cross  
6 examine?

7 MS. HALLAM: Yes, Your Honor?

8 CROSS-EXAMINATION

9 BY MS. HALLAM:

10 Q Mr. Freck, have you ever submitted an equitable  
11 adjustment claim on behalf of the contractor?

12 A Yes, I have.

13 Q And when you submitted that claim did you  
14 prepare it the same way you did this, with estimate to  
15 complete?

16 A If the contract -- well normally if the  
17 contract was completed, there would be no estimate to  
18 complete.

19 Q So is that a yes or no?

20 A Could you restate the question, I'm sorry.

21 Q I asked you if you ever submitted an equitable  
22 adjustment claim on behalf of the contractor, under the  
23 Contract Disputes Act?

24 A Yes, I have.

25 Q And in the claim, did you prepare the claim

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1 with an estimate to complete type calculation?  
 2 A On occasion, if it was warranted.  
 3 Q Isn't it generally the way to do a total cost  
 4 estimate of -- or a total cost claim on any contract for  
 5 an equitable adjustment that you just take the  
 6 anticipated contract price per unit and then calculate  
 7 the actual cost per unit, and then do the difference?  
 8 A Well, that would be -- that would not involve  
 9 an estimate to complete?  
 10 Q That's right. That's what my point is. That  
 11 your estimate to complete is completely non-relevant to  
 12 computing the contractor's loss in his case, isn't it?  
 13 A I don't agree.  
 14 Q With regard to your statement that you took  
 15 into account certain factors when you were computing the  
 16 contractor's losses, you indicated that you excluded from  
 17 his cost -- costs that were incurred due to a shutdown  
 18 due to lack of GFM jellies?  
 19 A Yes.  
 20 Q Did you exclude costs for any shutdowns or  
 21 delays due to any lack of CFM product?  
 22 A I did not exclude costs for lack of CFM.  
 23 Q With the exception of that GFM shutdown, can  
 24 you give us one other example of any shutdown that was  
 25 caused solely by Government or lack of Government GFM?

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1 A There was in I believe October '86, there was a  
 2 shutdown as a result of lack of GFM.  
 3 Q It was solely due to the lack of GFM in your  
 4 opinion? Or is that the documents that you've seen or  
 5 were provided?  
 6 A I understand there was a production shutdown as  
 7 a result of no GFM.  
 8 Q Did you understand that there were any  
 9 shutdowns due to CFM?  
 10 A I know that there was some problems with  
 11 receipt of CFM. I'm not aware that there were actual  
 12 shutdowns as a result.  
 13 Q Are you aware that the November 5th shutdown  
 14 was as a result of lack of CFM.  
 15 A The November '86?  
 16 Q Yes.  
 17 A I'm not aware of that.  
 18 Q When you were computing the estimate to  
 19 complete, were you aware of the fact that the remaining  
 20 quantities were to be produced under the MRE-6  
 21 configuration?  
 22 A Yes.  
 23 Q Were you aware of the fact that for each  
 24 quantity unit that was produced under the MRE-6  
 25 configuration, there would have been a one dollar

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1 decrease in contract price due to the fact that those  
 2 components cost less?  
 3 A I didn't hear the last part of the question.  
 4 Q Were you aware that -- did you take into  
 5 consideration when doing your cost proposal that the  
 6 MRE-6, each meal would have cost approximately one dollar  
 7 less than the MRE-5, resulting in a contract price  
 8 decrease?  
 9 A I took into account the estimated cost to  
 10 produce those units, regardless of the price of the unit.  
 11 Q I'm sorry.  
 12 A I took into account the estimated cost to  
 13 produce the units, regardless of the price of the unit.  
 14 Q And did you take into consideration the fact  
 15 that those units were cheaper?  
 16 A That what was cheaper?  
 17 Q The MRE-6 entrées were cheaper. Was that part  
 18 of your consideration or did you not know that?  
 19 A I had the actual purchase order commitment  
 20 prices for all the materials to produce the remaining  
 21 cases.  
 22 Q You had purchase for the CFM for MRE-6 that you  
 23 were using that price for?  
 24 A Yes, I had detailed outstanding commitments for  
 25 them to supply materials.

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1 Q And in computing your profit, I understand that  
 2 you pretty much just took the Synpak price, took out what  
 3 you perceived to be their profit and then tacked on  
 4 profit that Freedom would have gotten?  
 5 A Essentially, it's the Synpak contract price  
 6 minus the profit, with a Freedom-proposed profit applied  
 7 to those costs.  
 8 Q Do you know what price per unit Synpak bid for  
 9 the MRE-7?  
 10 A No, I don't.  
 11 Q But you do know that it was more than Freedom  
 12 bid, don't you?  
 13 A I don't know that.  
 14 Q Well, if that's true that Freedom would have  
 15 gotten it for -- it would have been awarded to Freedom  
 16 for less money than it was to Synpak, how do you justify  
 17 using Synpak's price?  
 18 A I don't -- I don't have any knowledge of what  
 19 Synpak's cost or price would have been.  
 20 Q Well, regardless, if it is true that the award  
 21 would have gone to Freedom for less money than it would  
 22 have gone to Synpak, don't you agree that using Synpak's  
 23 contract price is inappropriate?  
 24 A I'm not sure.  
 25 Q You can't say whether you think that's

1 inappropriate or not?

2 A I don't know what the prices or cost would have

3 been for five successive awards.

4 Q When you were computing the actual cost as

5 opposed to the anticipated cost, and you came up with the

6 overrun, does that overrun reflect the corporate losses

7 in addition to the contract losses?

8 A What corporate losses are you referring to?

9 Q Did you -- were all the losses in your opinion

10 contract losses?

11 A Though my computation dealt only with the

12 contract cost and expected cost under the contract.

13 Q Was it your understanding that the Government

14 agreed to expense or to pay all the costs Freedom

15 incurred to produce this contract or all the costs,

16 start-up costs for Freedom?

17 A It's my understanding the Government agreed to

18 pay all the costs that were negotiated as part of the

19 contract as direct costs, and that there were some

20 additional investments that Mr. Thomas and Freedom were

21 encouraged to make for the overall program. And that

22 those would not be charged to the contract. And I have

23 not included those as contract costs in the equitable

24 adjustment.

25 Q Are they in your second category of costs then?

1 the GFM that they had to go out and replace the GFM with

2 their own crackers?

3 A I'm aware there was some cracker shortage as a

4 result of that. But that -- I'm not aware of Freedom

5 having caused that problem.

6 Q So that wasn't taken into consideration in your

7 development of the costs?

8 A It was not taken into consideration as a -- as

9 something that was attributable to Freedom's acts.

10 Therefore, it was not deducted from the overrun.

11 Q Correct me if I'm wrong. You were talking

12 about the DCAA report on the T for C claim, and I had the

13 impression that you thought that that established

14 entitlement on Freedom's part for all but \$800,000 of the

15 claim?

16 A I merely stated that they had recommended for

17 acceptance as allowable cost. I did not mention the word

18 entitlement, I don't believe. I understand that there's

19 a calculation with a loss factor where costs could be --

20 recovery could be decreased under the termination for

21 convenience rules, if that's the existing contract price.

22 And the equitable adjustment that we seek would overcome

23 that problem.

24 Q Would rework have a substantial or have a

25 impact on the higher labor costs?

1 A Yes, they are.

2 Q So they're in the claim somewhere.

3 A Yes, in the second category.

4 Q Okay. In considering the excess costs, did you

5 give any consideration to all the excess scrap costs that

6 Freedom incurred due to its damaged components?

7 A Well, there's a normal scrap allowance in the

8 contract, and I did not see any incidence of excessive

9 scrap that resulted from any problems which were caused

10 by Freedom.

11 Q So you were not aware of all the excess scrap

12 and salvage that Freedom had in its plant?

13 A I'm not aware of any overrun for cost in that

14 area that would be attributable to anything that was the

15 fault of Freedom.

16 Q Specifically, were you aware that Freedom

17 damaged substantial number of GFM crackers and ended up

18 having to buy additional crackers on its own -- at its

19 own expense to make up for the damaged crackers?

20 A I'm aware that they--

21 Q Are you aware of that?

22 A Are you referring to excess salt or--

23 Q No, under the contract crackers was a GFM item.

24 A Yes.

25 Q Were you aware that Freedom damaged so much of

1 A Rework would be -- I mean, there's -- there's

2 always a contemplated amount of rework, some allowance.

3 If there's excess rework, then it would serve to increase

4 labor costs, yes.

5 Q Would you consider 40,000 cases accessory work

6 or allowable or what was anticipated?

7 A I don't have numbers in terms of standards

8 which an industrial engineer might use to give an opinion

9 on what would be customary. I'm not aware of any extra

10 rework that was performed that stemmed from a problem

11 caused by Freedom. I am aware of rework that was caused

12 by an improper rejection.

13 Q You're -- the claim that you developed is based

14 on the assumption that every delay was caused by the

15 Government, isn't it?

16 A With the exception of -- well, actually, yes.

17 Every delay was caused, but Freedom released its right to

18 claim one particular delay.

19 Q Well, that was backed out.

20 A Yes, it was.

21 Q But the claim that is being pursued right now

22 assumes that every single delay was due to Government's

23 fault?

24 A Yes.

25 Q Is that correct?



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1 A Yes.

2 Q It assumes that every single penny over the

3 contract price or the negotiated costs were due to

4 Government fault, is that also correct?

5 A The total amount minus what has already been

6 purged as a result of attributing some amounts to

7 Freedom, which I talked about earlier.

8 Q Are you aware of any problems in contract

9 performance -- were you made aware of any problems that

10 might have been contractor fault?

11 A I was aware of a number of problems from

12 reading Government industrial specialist reports and ACO

13 alert reports and various things. But when I looked into

14 those problems, I found out that they were not caused by

15 Freedom, and those areas were justified to me and

16 supported as having been the result of either not getting

17 the financing from the Government or some other act of

18 the Government.

19 Q Do you believe it was the Government's

20 responsibility to finance this -- all the costs under

21 this contract?

22 A 95 percent of them.

23 Q 95 percent of the costs?

24 A If the contract contains the progress payment

25 clause that requires prompt reimbursement of 95 percent

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1 of allowable costs incurred in performance of the

2 contract.

3 MS. HALLAM: I have no further questions, Your

4 Honor.

5 JUDGE JAMES: Any redirect by the appellant?

6 MR. STEIGER: No, Your Honor.

7 JUDGE JAMES: Alright. Thank you ever so much,

8 sir, for your testimony. You may step down from the

9 witness stand. Do you have another witness you want to

10 call?

11 MR. STEIGER: We do, and I'd like to just check

12 outside to see if he's there, and maybe we take a

13 10-minute break or 7-minute break or--

14 JUDGE JAMES: You may, yes. Let's go off the

15 record.

16 [Recess.]

17 JUDGE JAMES: We're back on the record. Does

18 the appellant have another witness you want to call?

19 MR. STEIGER: Yes, we do, Your Honor. We call

20 Mr. Phil Lewis, please.

21 JUDGE JAMES: Please raise your right hand. Do

22 you solemnly swear that the testimony you're about to

23 give in this proceeding will be the truth, the whole

24 truth, and nothing but the truth, so help you God?

25 THE WITNESS: I do.

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1 JUDGE JAMES: Please be seated. Would I'd like

2 you to do, sir, is state for the record your full name.

3 Spell for us your last name. And give us your address.

4 THE WITNESS: My name is Philip Lewis.

5 L-E-W-I-S. And I reside with my wife at 17, and I'll

6 spell G-I-A-E-C-C-K-A Street. And the town is Blauvelt.

7 That's in New York, and the zip is 10903.

8 Whereupon,

9 PHILIP LEWIS,

10 was called as a witness on behalf of the Appellant and,

11 after having been first duly sworn, was examined and

12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. STEIGER:

15 Q Mr. Lewis, would you tell us what your current

16 occupation is?

17 A I retired from the Board of Education in 1991.

18 Prior to my retirement, well in advance of my retirement,

19 I had started a private consulting firm. Firm for --

20 training personnel who want to be managers in industry

21 or, you know, the Government agencies. In '91, after I

22 retired, I made that a full-time occupation, and we not

23 only trained managers but we also trained and developed

24 plans for training for people who would work in assembly

25 line jobs of one kind or another.

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1 Q Would you speak up a little louder, Mr. Lewis.

2 A I'm sorry. People who work in assembly line

3 jobs of one kind or another or we even higher occupations

4 and higher job titles.

5 Q And what is your education, Mr. Lewis? What

6 education do you have?

7 A I have a baccalaureate degree, two master's

8 degrees, and I completed work for my doctorate at St.

9 John's, but got stuck on the thesis, and following that

10 I've taken other additional courses in management, in

11 supervision, in areas that we'd normally call guidance or

12 personnel work. So there's a considerable body of

13 college and university work.

14 Q Mr. Lewis, in what capacity were you affiliated

15 with Henry Thomas and Freedom?

16 A Well, my association with Mr. Thomas actually

17 started before Freedom was organized. I met Mr. Thomas

18 back -- and his family, by the way -- back in 1975, which

19 was about 10 years before Freedom got organized. And

20 from 1975 through 1985, Henry and I never lost contact

21 really. I never lost contact with his dad. By the way,

22 he was a wonderful, someone I respected very much. And

23 someone, by the way, who asked me to look after Henry, so

24 I didn't want to break my promise to pop. So, Henry and

25 I would get together and socialize. We would talk. He

1 talked to me about problems that he might have been  
 2 having organizing businesses. And wherever I could, of  
 3 course, I gave him a hand. We had some formal  
 4 organization to our relationship. For example, in 1975,  
 5 Mr. Thomas' company was awarded a manpower training  
 6 contract by the folks in the -- in Westchester Department  
 7 of Labor -- it was to train trailer tractor drivers, and  
 8 Henry turned to me for some assistance in that. In  
 9 addition to my college work, I had a background in  
 10 trucking as well, at least my brother did at the time.  
 11 And we put together a very fine training program. One,  
 12 as I understood later on, was very, very respected in  
 13 Westchester and produced a good result. We produced  
 14 folks who could drive, could change tires, maintain  
 15 engines, really good employees -- all of them found jobs.  
 16 Following that, there was a time when, I myself dabbled  
 17 in the food business, and Henry and I had an association  
 18 there. I had my own company. Contracted certain labor  
 19 from Henry's company, so we worked together jointly on  
 20 some food-related industry type things. And that's the  
 21 way really it went, right up until about 1982, when I got  
 22 very busy with some other work and Henry was doing  
 23 something else. But during the period '75 to '85, there  
 24 were at least four formal projects we worked on, and--  
 25 Q Did Henry call you back or did you rejoin Henry

1 to work with him on the MRE-5 contract?  
 2 A Yeah, Henry did call me. He called me in about  
 3 1980 -- very late '83 or very early in 1984. And at the  
 4 time, he called me I had just completed a project with  
 5 the Hunts Point Market in the Bronx, and we had a small  
 6 food assembly company going there. And he said that he  
 7 was interested in the Hunts Point Market, not in the  
 8 market, but there's a building across from the market,  
 9 would I come over and look at it, and tell him what I  
 10 thought of it. And I did. I actually took an associate  
 11 with me. We went over and looked at that building. And  
 12 there were possibilities in that building. As I recall,  
 13 it was a city-owned building. It had once had a United  
 14 States Department of Agriculture certification. There  
 15 was some work that needed to be done to bring it back.  
 16 But nothing that was absolutely impossible to achieve,  
 17 and Henry talked to me about utilization of that plant --  
 18 what would be needed in terms of renovation of it, and  
 19 creating a labor force that would provide a product for  
 20 the United States Government, particularly these rations,  
 21 MRE's. And we set about that task. I gave Henry a --  
 22 provided actually his company with a plan for renovation  
 23 of the building -- began to look at vendors of equipment  
 24 that might be called upon to provide equipment in such an  
 25 operation. We had long discussions about developing

1 labor force to staff that operation and the management  
 2 that would be needed to carry forward a very large  
 3 initiative under a government contract.  
 4 Q Would you call this a kind of a learning  
 5 process for Mr. Thomas at the time, to get him positioned  
 6 to what was to come later?  
 7 A Yes, Mr. Thomas was interested in everything  
 8 that would be attending to the operation of a very large  
 9 organization. The processes involved in that eventual  
 10 production were not processes that were totally  
 11 unfamiliar to Mr. Thomas.  
 12 Q I'm sorry. I can't hear.  
 13 A I said the processes involved in that target  
 14 industry that he was going for were not really unknown to  
 15 Mr. Thomas because he and I, in 1976, cooperated on a  
 16 food vending program that required assembly. Then again,  
 17 in '78 and '79, and then I was -- by that time, of  
 18 course, I was doing my own business in '79 and '80, but  
 19 always worked with Mr. Thomas and Mr. Thomas' companies  
 20 supplied a certain amount of our product. So in terms of  
 21 assembly, Henry was quite familiar with what went into  
 22 that kind of operation. In terms of the organization of  
 23 a food plant, certainly Mr. Thomas was very knowledgeable  
 24 in that because the operations that he and I both worked  
 25 on, either independently or jointly, were fresh food

1 preparation types of assembly facilities. Very high  
 2 standards set by the Department of Agriculture and so  
 3 forth. So in terms of changing gears for this sort of  
 4 operation, that wasn't difficult for Mr. Thomas at all.  
 5 The organization and the development of staff on that  
 6 sort of scale was new. But I was only one of a number of  
 7 advisors that Mr. Thomas had. And we had many  
 8 opportunities to exchange draft plans. And from those  
 9 draft plans, an organizational chart developed.  
 10 Q I take it now you're moving forward--  
 11 A Into?  
 12 Q To in time to the MRE-5 contract itself.  
 13 A That's correct. Yes, sir.  
 14 Q I see. And so your involvement with Mr. Thomas  
 15 started before the -- on this particular contract started  
 16 before the actual award.  
 17 A That would be correct. Yes. It started  
 18 actually. It started. Well, not only my involvement  
 19 started with reviewing the facilities, at that Hunts  
 20 Point plant, developing an organization, but I began to  
 21 read about MRE, and I tried to, as much as I could, learn  
 22 about the industry itself, trying to develop for Mr.  
 23 Thomas and his associates a notion of what the  
 24 competition might be. It was certainly a Government bid,  
 25 and Mr. Thomas and I both have a lot of experience in

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1 developing Government bids. There was food programs, by  
2 the way.

3 Q Did you help him with his bid or bids on--

4 A Yes, I did. I prepared portions of it, and I  
5 certainly reviewed good pieces of it. And there were a  
6 number of issues related to even qualifying Freedom as a  
7 potential candidate for bidding, which I became involved  
8 with. And from that set of involvement, of reading about  
9 the other industries, and reading the government  
10 regulations, we were able to develop what we thought --  
11 that is, not only Mr. Thomas and myself, but other  
12 experienced business people--

13 Q Which, of course, proved to be a successful  
14 venture because he did eventually qualify or--

15 A Well, yes, sir, and to say he did eventually  
16 qualify is a simplification of what was a very long and  
17 arduous process, a process that many people felt was not  
18 fair to a potential minority contractor at that time, a  
19 process that really militated against the eventual  
20 success of any minority contractor coming from New York  
21 City in relation to this particular industry where the  
22 other players in that industry, if we can characterize  
23 them as such, came from other states. And it seemed that  
24 it was a closed shop. So to say that he eventually  
25 qualified and was successful is true, but it skips over a

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1 lot of writing and a lot of agony on the part of Mr.  
2 Thomas and his associates as they wended their way  
3 through these labyrinthian regulations, which seemed on  
4 Tuesday to be good for someone else, but on Thursday bad  
5 for Mr. Thomas.

6 Q Mr. Lewis, take me now past the contract award.  
7 He was awarded this contract. You've made your  
8 contribution. He's been awarded it. Were you then  
9 retained by him or working with him or for him or in some  
10 capacity to do some things on this job once it was  
11 awarded to him?

12 A Yes, sir.

13 Q And what were they?

14 A My areas of responsibility in general were to  
15 help others develop a train -- first of all, a model for  
16 selection of employees. A model for selection of foreman  
17 and managers. A model for an organization chart that  
18 would relieve it of executives. Following that,  
19 developing some general plans about training those  
20 middle-level and top-level executives for this special  
21 industry. And then there was a body of work that was  
22 included that was aimed at training the folks on the  
23 floor, as we said. The people who were directly involved  
24 with the packaging of the materials that went into the  
25 MRE in addition to storage and the management of the

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1 storage -- the finished product and so forth -- right  
2 down to timekeeping procedures.

3 Q Okay, so there was, in addition to supervisory  
4 training, training was provided for the floor worker.  
5 Give me an idea what that training consisted of?

6 A The training consisted generally of three  
7 general categories. First, the first part of the  
8 training was motivational. It was designed to empower  
9 the workforce from the community to attend work, to be  
10 serious about it, to understand the regulations that all  
11 of us were working under, because it was a Government  
12 contract. And in addition, to the regular items that  
13 you'd find on the job that you were responsible for,  
14 there was another set of responsibilities. In this  
15 particular case, they related to the manner in which  
16 inventory was kept and certain business procedures that,  
17 even though they were not going to be directly involved  
18 with, they would need to know. For example, there was  
19 the whole -- there was a number of discussions about  
20 protocol. There was a Government inspector at all times.  
21 They needed to understand that the Government inspector,  
22 if the Government inspector asked for something that  
23 whatever that person asked for, those people asked for,  
24 would need to be forthcoming quickly and so forth So  
25 there was that body of motivational training and

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1 orientation. Then there was the body of work that  
2 related to the actual assembly. Getting right down to  
3 the basics. How do you build a carton. What are the  
4 ingredients that go into each package? How should the  
5 packages be placed in the carton? All of this was done  
6 so that the folks on the line would understand that this  
7 was not a menial task; that it was something very  
8 important; that their sons and daughters, brothers,  
9 uncles, and whatever might very well be utilizing the  
10 package that they had developed. And so that training  
11 went forward based on the equipment that we thought was  
12 supposed to be acquired for this--

13 Q Hold up with the equipment for a second. I  
14 just want -- you know some people always have their own  
15 idea about this kind of a workforce merely because they  
16 are not getting paid fancy monies. People have the wrong  
17 idea about them. What is -- what was the nature of this  
18 workforce?

19 A Well, I -- you know, we're sitting here in the  
20 year 2000 with probably the most robust economy that New  
21 York City has ever known, so we tend to forget how it  
22 really was back in '84 and '85, when college graduates  
23 were having difficulty finding a job. So there was a  
24 flight of manufacturing from the city. We were probably  
25 at our low point at about that time in the creation of

1 new jobs in New York City. So the folks who came in,  
 2 even though they received wages, were generally those  
 3 people who had been out of work for a long time. And the  
 4 demographics broke down very easily. Some of them were  
 5 vets from the Vietnam era. Many of them were single moms  
 6 who were supporting their families. Some were young  
 7 people right out of high school, and this was the first  
 8 job experience for them. All of them came generally from  
 9 the Bronx community, although we knew some had come from  
 10 Queens and some from Mount Vernon, where Mr. Thomas had  
 11 some other roots and was well known in that community.  
 12 And when people heard that he was opening a factory in  
 13 the Bronx, of course, the came down. The level of  
 14 education was surprising, because in that workforce,  
 15 there were people who had some college. There were many  
 16 people who had high school diplomas, whether they were  
 17 diplomas or GED's. And then there were, of course,  
 18 people who didn't have that level of education, but who  
 19 had job experience. The truth is that the majority of  
 20 people had job experience, who came. Some of it wasn't  
 21 recent. But they all had job experience except the ones  
 22 who had, you know, recently graduated high school, and  
 23 even they had some sort of job experience as well. But  
 24 they were serious, and their job was very important to  
 25 them, because it was a source of money, obviously. And

1 in this particular case, I always felt that the people  
 2 that I spoke with, and I didn't dress in a suit, I wore  
 3 jeans and work shirt and boots -- they were very free to  
 4 say that they were very happy to work in that place, and  
 5 they felt that they were contributing something to the  
 6 Government, and it was very honorable work.  
 7 Q Now, you started to mention about equipment and  
 8 the area of training on the use of equipment. I kind of  
 9 cut you off, but I'd like you to start up again on that  
 10 subject.  
 11 A Well, there are lots of ways to assemble  
 12 products. Freedom had a consulting engineer at the time  
 13 who developed some scenarios for packaging equipment.  
 14 And whether the equipment was leased or borrowed, I don't  
 15 really remember. But there was equipment, and people  
 16 would be trained on that equipment, which was a conveyor  
 17 type of equipment. And we probably -- my recollection is  
 18 that the estimate of the number of people who were  
 19 trained on that was approximately 60 percent of the  
 20 eventual workforce. The first training on that equipment  
 21 went for the folks who were going to be the line leaders.  
 22 And they learned, right from the ground floor, what it  
 23 was to be like. So, everyone had an opportunity to be an  
 24 assembler. Everyone had an opportunity to be a line  
 25 leader. Everyone had an opportunity to begin to under --

1 learn how that package should look as it went off the  
 2 line. They formed the core of the cadre of line leaders  
 3 and foremen. Once we had those place, and we felt that  
 4 they had achieved some facility in managing that aspect  
 5 of the process, then other people were brought in and  
 6 they were beginning to be trained as teams, where the  
 7 line leader actually performed the task for it.  
 8 Q Can you focus on the equipment?  
 9 A The equipment was conveyor-type equipment. It  
 10 allowed for--  
 11 Q I'm talking now about the equipment that was  
 12 planned to be used.  
 13 A Yeah.  
 14 Q Okay.  
 15 A Was conveyor-type equipment, and it was  
 16 designed so that people would be handling one item at a  
 17 time. So if the package -- the packages generally went  
 18 -- I think, as I recall -- ran from about seven to ten  
 19 items, depending on what that ration was going to be.  
 20 The line -- the number of people on the line varied. But  
 21 each person had a responsibility in effect -- went down  
 22 the conveyance to place the appropriate item in the -- in  
 23 its place, and there was the line leader essentially  
 24 walked that line and encouraged people and made sure that  
 25 things weren't slipped up as it went down.

1 Q Are you aware that the equipment that you're  
 2 talking about and was trained in, as contemplated, didn't  
 3 materialize? Do you recall that -- what had happened?  
 4 A Yes. What had happened was that your plant was  
 5 never fully equipped with that equipment, I think. There  
 6 were two pieces essentially in the plant of that  
 7 equipment. My understanding at the time was that the  
 8 financial plans that the company had made went awry, and  
 9 that the company was forced to withdraw from using that  
 10 kind of equipment. The equipment that eventually came in  
 11 was a slower type equipment. People felt it wasn't as  
 12 efficient because it was around a table, and folks stayed  
 13 at that table, and as the item went around, their salt,  
 14 pepper, so on in. It wasn't as fast. It wasn't as  
 15 efficient. It didn't provide enough space really for  
 16 people as they stood shoulder to shoulder.  
 17 Q So you had trained them on this original  
 18 equipment that you mentioned--these two pieces--  
 19 A Right. Yes, sir.  
 20 Q And now something else occurred. Different  
 21 equipment was used. Did you also have to train on that?  
 22 A There was -- it is not as though, and I didn't  
 23 mean to make it appear that one equipment went out and  
 24 the other one came in right away. That did not happen.  
 25 There was an expectancy on the part of that pilot

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1 workforce, if you will, to begin work immediately. And  
 2 that just didn't happen. I wish I could tell you that I  
 3 remember exactly the length of time between the equipment  
 4 going out what the people trained on, and the equipment  
 5 coming in that was a substitute. But it was some weeks.  
 6 Of that, I am sure. And during that time, there was an  
 7 attrition. People lost interest in working for the  
 8 company. And so consequently, in addition to getting new  
 9 equipment, these round tables, a major portion of the  
 10 workforce had to be re-recruited and, of course,  
 11 retrained. And the people that the company lost were the  
 12 key people, those people who ought to be foreman and line  
 13 leaders. And we were never able to get them back. So  
 14 that changed -- it caused a slowdown, and it had a  
 15 resultant adverse impact on the morale of everyone who  
 16 worked there, not only the people on the floor, but all  
 17 of the executives as well.

18 Q Did that -- was there also an impact on the  
 19 speed of operation and the time it took now to produce  
 20 items?

21 A Every person involved in that process came away  
 22 with exactly the same conclusion: that the round tables  
 23 simply didn't work. As I said, it was slow, slower than  
 24 the conveyor line. It was much more difficult to check  
 25 items as the were assembled than on the assembly line for

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1 those two pieces of equipment that we had either leased  
 2 or borrowed. And actually -- the actual space that the  
 3 workers had to work in was more confined. On the  
 4 assembly line, for example, you have people on both sides  
 5 of the line, so you spaced them out. People get a little  
 6 more space to work in. On these round tables, you don't.  
 7 And, you know, it's well known that you keep people in a  
 8 confined space for a period of time. They lose interest  
 9 and after they lose interest, they become antagonistic,  
 10 and the whole efficiency of the operation drops. It's  
 11 like a subway car. You know, you've got to give people  
 12 space to work in and that was a major -- that and the  
 13 speed was a major criticism of those round tables.

14 Q Let me ask you this. How long did -- were you  
 15 with Mr. Thomas and Freedom in the course of the program.  
 16 Did you stay until the end, until the middle? How long  
 17 were you observing or doing your thing there, do you  
 18 recall?

19 A Well, I was there from the beginning.

20 Q Right.

21 A Or prior to the beginning.

22 Q Actually prior, yes.

23 A Until the plant was closed up.

24 Q I'd say the whole time.

25 A The whole time. Yeah.

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1 Q Right. Did you--

2 A You--

3 Q I'm sorry.

4 A You understand that I was not a full-time  
 5 employee, but my routine was that I would visit the plant  
 6 at least three times a week.

7 Q So you observed what was going on?

8 A Yes, sir.

9 Q Did there -- did there happen to be occasion  
 10 where the Government did not provide Government furnished  
 11 materials that were required for the MRE units?

12 A Yes, there was an occasion. There were at  
 13 least -- there was at least one occasion and possibly  
 14 two. Or there were two parts to the occasion when the  
 15 Government did not supply what was needed according to  
 16 the schedule. There was no advance notice that I was  
 17 aware of that there was going to be a change in the  
 18 schedule of delivery of Government-furnished material.

19 Q Would you repeat that? There was no--

20 A There was -- there -- it did not appear to me  
 21 or to others with whom I worked that the Government had  
 22 advised the company that there would be a change in the  
 23 delivery schedule of Government-furnished materials. I  
 24 made this observation based on the fact that we assembled  
 25 a whole workforce, only to find out that that material

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1 was not in the warehouse space of the company. And that,  
 2 of course, meant that everything was closed at that  
 3 point.

4 Q Did you -- explain if you would briefly the  
 5 impact on the productivity if there wasn't the necessary  
 6 GFM?

7 A Without the necessary GFM, it was impossible to  
 8 perform any work on the product that was to be delivered.

9 Q You talked about shutdown. Final shutdown you  
 10 mentioned. I know this is a long time ago, but if you  
 11 had to put your finger on the reason why that final  
 12 shutdown took place, do you remember what it was?

13 A It was a constellation of reasons. There was  
 14 really no single reason. If you would characterize it,  
 15 you would say that the company was really strangled; that  
 16 the resources that it needed to continue were taken away  
 17 from it. And so you were left with a situation that  
 18 dictated only one circumstance and that was the closure  
 19 of the company.

20 MS. HALLAM: Your Honor, I object to this  
 21 testimony. He said his involvement with the company was  
 22 coming in several times a week for training purposes.

23 MR. STEIGER: I also asked him if he observed  
 24 operations during the time he was there. He said yes. I  
 25 asked him if that were -- what the period of time was.

1 He said up until shutdown. I think the question is  
2 relevant, Your Honor.

3 JUDGE JAMES: I overrule the objection.

4 BY MR. STEIGER:

5 Q Again, you were telling what you felt were this  
6 conglomeration of reasons to -- for that shutdown.

7 A Well, one was the lack of necessary product.  
8 That was one.

9 Q Necessary product. You mean GFM?

10 A GFM.

11 Q Yes.

12 A Another was -- another was the fact that the  
13 executives -- all the executives seemed frustrated in  
14 securing the assistance of the contracting officers to  
15 facilitate the work that needed to go on. And while it  
16 was true that my charge or responsibility was training,  
17 I'd like to bring to your attention the fact that Mr.  
18 Thomas and I had a long association and that there were  
19 times when Mr. Thomas asked me to render an opinion as a  
20 trusted advisor. And so I did that without, of course,  
21 interfering with anybody else's work, whether it be the  
22 treasurer or legal counsel or the banks that were in the  
23 process of providing funding for the company. And in  
24 that capacity, which was as an advisor, I sat in on many  
25 of the meetings that the company had with the folks from

1 assembly-type operations. Right? Is that so?

2 A Yes.

3 Q And in your experience have you observed  
4 production lines that have been working where you've done  
5 the training?

6 A Yes.

7 Q And have you seen in the past situations where  
8 the initial production runs, the first lot of the initial  
9 production runs would occasionally encounter certain  
10 production difficulties?

11 A Absolutely. The purpose of having  
12 pre-production runs is to obviate the problems that -- if  
13 -- obviate the problems that you haven't foreseen that  
14 occur.

15 Q But even if you don't have pre-production, as  
16 such, even your initial production runs--

17 A Yes.

18 Q Would you think that normally problems would be  
19 encountered?

20 A There's no doubt about it. Problems will be  
21 encountered as you begin an operation.

22 Q And if you correct those problems, would you  
23 then conclude that management has taken the right steps  
24 and that essentially you cannot say that the training is  
25 bad or that the management was poor?

1 the Government who came down to monitor the progress of  
2 production.

3 Q Good. Thank you. Tell me this. If there was  
4 a period whereby GFM was not available for, say, seven  
5 days, did that mean that what would be impacted is seven  
6 days worth of production or did it mean something else?

7 A Well, anything that interferes with a  
8 production process can cause a delay that is a  
9 magnification of the actual time of the event. It's a  
10 ripple effect. Throw a pebble in the pond, and the  
11 ripples are going to go out. When you begin to upset a  
12 schedule of delivery, of assembly, of delivery of storage  
13 of inventory of assembly, of distribution to a line, and  
14 you add to that things that happen in the normal course  
15 of events--absence of a key person because of  
16 illness--you're very likely to develop a longer delay  
17 from the seven days where the equipment or materials was  
18 not available.

19 Q So it's not a one-for-one kind of situation?

20 A Not. It's not a one for one because number  
21 one, there's a human ingredient involved. Number two,  
22 there's a constellation of activities that go on that  
23 stop.

24 Q Now, you have been, in your experiences with  
25 other companies, have prepared training programs for

1 A If the management has taken vigorous steps to  
2 correctly identify problems, then you can't say that the  
3 management was poor. The management was proactive. If  
4 you say that, in addition, there was another problem that  
5 was unforeseen that came up, that the management didn't  
6 have the foresight to see, and sat around looking at,  
7 then you'd say it was poor management. But that wasn't  
8 the case here.

9 Q That's where I was going with my next question.  
10 From your observation, how would you characterize the  
11 management of Freedom during the course of performance?

12 A I would say that the management was serious.  
13 It was connected to the process. Everyone wanted Freedom  
14 to be successful. No one watched the time clock. We  
15 worked 12- and 14-hour days to make it a success. They  
16 were serious people in a serious business trying to be  
17 successful. Everyone, everyone felt somehow that they  
18 had a stake in the eventual success of that project.  
19 Some of it was financial. And some of it was because  
20 some of the executives were also local people. And I can  
21 think of one person who is very well known. So he was,  
22 in fact, helping his community directly. Not that he was  
23 serving free. He was not. But that was an additional  
24 motivation that he had.

25 MR. STEIGER: Thank you. I have no further

1 questions.

2 CROSS-EXAMINATION

3 BY MS. HALLAM:

4 Q I have a few questions. You were talking about  
5 at least one shutdown that you were aware of that was  
6 caused by GFM. Could you tell me exactly when that  
7 shutdown was?

8 A It was early on in the process. It was, as  
9 best as I recall, sometime after October '85. I haven't  
10 had -- by the way, I haven't looked at any records I  
11 guess in almost 15 years, I suppose so. I would be very  
12 hard pressed to place a date on it.

13 Q Well, what was the GFM item that was missing?

14 A Excuse me, ma'am?

15 Q What was the GFM item that was missing?

16 A There were several as I recall, and some of  
17 them were very basic to the package itself.

18 Q But they were basic, weren't they?

19 A Pardon me, ma'am?

20 Q They were also basic to the package, weren't  
21 they?

22 A Well, there were -- as I recall, there were  
23 different -- there were different meals. So one meal  
24 might not need the same as the other. But, as I recall  
25 condiments was one. And then an actual meal product

1 itself. It might have been a meat product as I recall.

2 Q Is this the occasion you were saying that the  
3 workforce had all showed up and there was no advance  
4 notice of the delay in shipment? Is this the incident  
5 that you were--

6 A That would be the incident as I recall, yes?

7 Q And nobody could figure out why there wasn't  
8 any inventory?

9 A No, I didn't say that no one could figure out  
10 why there was inventory. It became apparent that there  
11 is no inventory.

12 Q Well, everybody was surprised there weren't --  
13 wasn't any inventory?

14 A No, they weren't really surprised that there  
15 was no inventory. There was an expectancy that there  
16 would be inventory, and there was none. And yes, that  
17 did come as a distressing event to them.

18 Q Do you know if the five-day notice about each  
19 was provided to the Government in that instance?

20 A It would not have been within my knowledge to  
21 know that.

22 Q And you say you went to Freedom about two or  
23 three days a week?

24 A Yes, ma'am.

25 Q And you were training or observing or what was

1 your?

2 A Well, I was training. You know, I was  
3 observing. I was sitting in on meetings. I was writing  
4 some correspondence, frankly, for Mr. Thomas. Sometimes  
5 people came to visit the plant, and he -- I was asked to  
6 take them around. So there were a variety of activities  
7 that I was involved.

8 Q How many days did the production facilities in  
9 the plant run a month? Was Freedom on a 14-day month?

10 A Was Freedom on a 14-day month?

11 Q Yes. Were they on 14-days a month?

12 A No, as far as I recall -- as far as I recall,  
13 people expected full employment.

14 Q Excuse me?

15 A As far as I can recall, people expected full  
16 employment, but that was not the case as these problems  
17 arose. There were breaks in time.

18 Q So if that is what's discussed in one or more  
19 pre-award surveys, that information is not true?

20 A I'm sorry. I don't understand the question,  
21 please.

22 Q Was Freedom running an average of 14 days --  
23 was Freedom running a 14-day a month production time,  
24 production lines, 14 days a month?

25 A My belief is that Freedom intended to provide

1 20 days of service each month. If it provided less, and  
2 we now know that it did, and we knew at the time that it  
3 did, it was not because of any plan. It was because of  
4 the circumstances attendant to it. So I couldn't say it  
5 was 14 days. It might have been at some time. It's  
6 quite possible.

7 Q So it's your belief that it was never intended  
8 that Mr. Thomas would run 14 days a month and give his  
9 employees long weekends every week?

10 A I can say from my recruitment activities that's  
11 not what I told folks who were interested in working at  
12 Freedom.

13 Q Well, you were there until the end of the  
14 contract. Was that the way it worked during the  
15 performance of the contract?

16 A No. No. Of course, by the time, and well  
17 before the contract finally expired, because of the  
18 problems attendant, the work was irregular.

19 Q You're talking about -- it's a Lazy Susan, a  
20 round table or something.

21 A I was talking about round tables, yes.

22 Q Are you aware of what other MRE assemblers were  
23 using at that time in the way of equipment?

24 A I was aware that there was several types of  
25 equipment being used by some other MRE assemblers, yes.

1 Q Were you aware that at least one other  
2 assembler was using that round table?  
3 A We were aware of that, yes.  
4 Q You said that you trained employees on certain  
5 new equipment. Could you tell us what the new equipment  
6 was that you began your training process on?  
7 A We began our training process--  
8 Q Your training program.  
9 A On conveyor-type equipment. I wish I could  
10 recall the name of the manufacturer, but I can't, you  
11 know.  
12 Q Was it more than one piece of new equipment  
13 or--  
14 A As I recall, there were two pieces -- at least  
15 two pieces of equipment that was used for training  
16 purposes.  
17 Q And this was for the final assembly, for  
18 accessory assembly, cracker, for what were the pieces  
19 used for?  
20 A It was used in each of those processes.  
21 Q There was two pieces of machine that were used  
22 in three different processes?  
23 A Just for training. Just for training. My  
24 understanding at that time was that there would be many  
25 pieces of such equipment or like equipment that would be

1 A I'm almost sure that it was after contract  
2 training. Excuse me?  
3 Q There were at One Luke Drive?  
4 A One Luke Drive? Oh, you mean the Hunts Point  
5 area plant?  
6 Q Hunts Point, is--  
7 A No, they were at Bronxdale.  
8 Q Isn't that called One Luke Drive?  
9 A No, ma'am. I mean, I don't know. I know it's  
10 Bronxdale Avenue. I would assume that Luke Drive was the  
11 address at the Hunts Point facility.  
12 Q And when were they put into the plant?  
13 A Well, they were put into the plant after the  
14 company leased the plant and had renovated the plant, and  
15 made it ready for production. The time -- again, I  
16 haven't refreshed my memory with the record, but I would  
17 say it was sometime in the spring, late spring of '85.  
18 Q You talking May, June--  
19 A Yeah, probably May-June. Yeah, something like  
20 that.  
21 Q And these two pieces of equipment were put in  
22 for training purposes at that point in time?  
23 A They probably arrived there earlier than that,  
24 but they were used in and around that time.  
25 Q And what time was it that they left the plant?

1 used for the different parts of the process.  
2 Q Was this as conveyor belt type piece of  
3 machinery?  
4 A Yeah, you could call it a conveyor type piece  
5 of equipment.  
6 Q Was it more than one conveyor belt or two  
7 different type machines?  
8 A No, we had two machines as I recall that were  
9 the same.  
10 Q And what was the other machine?  
11 A It was the duplicate of the first machine.  
12 Q I'm sorry.  
13 A It was a duplicate of the first machine.  
14 Q So it was two conveyor belt type machines?  
15 A Yes.  
16 Q And you don't recall the names of those  
17 machines?  
18 A No, I don't.  
19 Q And they were in what plant at the time?  
20 A Excuse me.  
21 Q What plant were they in when you conducted the  
22 training. Was this pre-contract training or after  
23 contract training?  
24 A No, this was after contract training.  
25 Q So they were at One Luke Drive?

1 A They left the plant before production began,  
2 and production really began around the fall, October as I  
3 recall, because there was a whole shift during the summer  
4 of regrouping and speaking to the New York City  
5 Department of Labor people for additional applicants.  
6 That I do recall. That was in the summer. So it  
7 probably was around October.  
8 Q So just sometime before full production that's  
9 all you can recall with regard to when they left the  
10 plant?  
11 A Yes. That's true.  
12 Q Was there any other equipment brought in during  
13 the time prior to them leaving the plant? Was there  
14 other equipment that was brought in?  
15 A It was a -- well, if your question refers to  
16 production equipment?  
17 Q Yes.  
18 A Not to my recollection. But if your question  
19 refers to other kinds of equipment like high-lows and so  
20 forth, yes, other equipment did come in. Some of the key  
21 equipment, though, that we were all looking forward to  
22 did not come in, other than the food assembly equipment.  
23 Q So until the fall of '85, the only equipment in  
24 house was the two conveyor belts that ended up leaving?  
25 A No, it's not -- I don't think I stated that--



1 Q The only production equipment?  
 2 A No, that's not what I said.  
 3 Q I'm sorry. What did you say?  
 4 A I said that there was a quantity of equipment  
 5 in the plant, and we were referring to the pieces that  
 6 were used for training.  
 7 Q What other equipment was in the plant,  
 8 production equipment?  
 9 A You mean assembly equipment?  
 10 Q Any type of production equipment?  
 11 A Well, the high-lows were used to store boxes.  
 12 There were racks that were put in for inventory. There  
 13 were a number of things like that that were there. Ready  
 14 to go.  
 15 Q What type of equipment was there in for  
 16 assembly?  
 17 A Eventually, what happened was the equipment  
 18 that was used for assembly were these round tables.  
 19 Q Was -- I'm sorry.  
 20 A Eventually, there were the round tables that  
 21 were used for assembly.  
 22 Q What other equipment besides the two conveyor  
 23 belts, what other assembly equipment was in plant in the  
 24 spring of 1985?  
 25 A I don't recall.

1 Q Do you recall what was in plant in the summer  
 2 of 1985?  
 3 A Prior to the summer, we had the two units, and  
 4 then sometime late in the summer, I believe we had the  
 5 round tables.  
 6 Q And then the two units, the two conveyor  
 7 belts--  
 8 A They were gone.  
 9 Q Left?  
 10 A Yep. They were gone.  
 11 Q And they weren't -- were they replaced?  
 12 A Excuse me.  
 13 Q When were they replaced?  
 14 A They were replaced some time before production  
 15 began as I recall.  
 16 Q When would that be?  
 17 A Right after the summer in '85, as I recall.  
 18 Q Was there other production equipment that was  
 19 used in the assemblies or sub-assemblies that was brought  
 20 in prior to production?  
 21 A I'm sure there was, but I don't recall that. I  
 22 can't give you a specific--  
 23 Q But it seemed there would be--  
 24 A Date.  
 25 Q Do you remember what was brought in and when it

1 was brought in?  
 2 A I already answered that I think. But if you'd  
 3 like me to continue, I'll continue.  
 4 Q Do you know when it was brought in and what it  
 5 was?  
 6 A The round tables? Sometime, sometime, late  
 7 August, early September, October. Something like that.  
 8 Q So the only equipment that you have an idea of  
 9 when it was brought in was the conveyor belts and the  
 10 round tables?  
 11 A Well, there were other -- you know, there was  
 12 equipment for banding boxes and things like that. Now, I  
 13 don't know if that's what you mean by production  
 14 equipment.  
 15 Q Yeah, there was also--  
 16 A There were box sealers and things like that.  
 17 Q For crackers?  
 18 A Yeah.  
 19 Q You don't remember any of that?  
 20 A No, not particularly, no.  
 21 Q But you are training the people on these  
 22 machines?  
 23 A My training involved the assembly. And my  
 24 training involved the assembly on conveyor belts.  
 25 Q So it was the final assembly?

1 A Final assembly?  
 2 Q And not the crackers, not the accessory packs?  
 3 A No, somebody else provided some of that  
 4 training. I wasn't the only person, and I don't mean to  
 5 give anybody the impression that I was the only person to  
 6 provide the training. That's not true. There were other  
 7 folks who provided training.  
 8 Q And who took the equipment out of the plant?  
 9 Was that the manufacturing of the equipment? A leaser?  
 10 Who?  
 11 A Well, I don't know who took the equipment from  
 12 the plant. I know the equipment was taken, and I know  
 13 the equipment was taken by truckers. Now, since I didn't  
 14 know at the time whether the equipment was purchased,  
 15 leased or borrowed, I couldn't tell you who removed the  
 16 equipment. I can tell, you, though, it caused great  
 17 consternation that the equipment was not there.  
 18 Q Was there retort equipment in the facility?  
 19 A Yes, there was retort--  
 20 Q In the 1984, early 1985 time frame?  
 21 A There was retort equipment available for use.  
 22 Yes, there was a room. But my recollection was that that  
 23 equipment was never used.  
 24 Q I'm sorry. There was retort equipment  
 25 available?

1 A There was retort equipment that was available.  
2 And, as a matter of fact, there was retort equipment  
3 available in the Hunts Point plant, which was transferred  
4 to the Bronx later on.

5 Q And when was that transferred?

6 A After the company took the lease on the  
7 Bronxdale plant, which was spring in '85.

8 MS. HALLAM: I have no further questions.

9 JUDGE JAMES: Is there any redirect?

10 MR. STEIGER: No, Your Honor.

11 JUDGE JAMES: Alright, Mr. Lewis. Thank you  
12 ever so much. Kindly just step down. Should the Board  
13 gather that the appellant has completed his case in chief  
14 or do you have another witness to call?

15 MR. STEIGER: No, sir, you gather correctly.  
16 We have finished.

17 JUDGE JAMES: Alright. Does the Government  
18 wish to make any kind of opening statement?

19 MS. HALLAM: No, Your Honor. The Government  
20 also is not -- wasn't anticipating questions for  
21 finishing up this early. They indicated they'd have four  
22 witnesses.

23 JUDGE JAMES: Alright, so you don't have a  
24 Government witness you want to put on the stand this  
25 afternoon?

1 MS. HALLAM: I'd prefer to wait until tomorrow,  
2 Your Honor, unless that's going to agonize you.

3 JUDGE JAMES: well, God forbid that the Board  
4 should be agonized. We're off the record. We're  
5 adjourned for the day. And I will appreciate  
6 recommendations of you attorneys as to when would be the  
7 most appropriate time to commence tomorrow morning.

8 [Whereupon, the hearing was recessed.]  
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## 1 CERTIFICATION OF TRANSCRIPT

2  
3 This is to certify that the attached  
4 proceedings before Administrative Judge DAVID W. JAMES,  
5 Department of Defense, Armed Services Board of Contract  
6 Appeals, in the matter of FREEDOM NY, INC., at Brooklyn,  
7 New York, on Monday, May 22, 2000 were had as therein  
8 appears, and that this is the original transcript thereof  
9 for the files of the Department of Defense.

10 We, the undersigned, do hereby certify that  
11 this is a true, accurate and complete transcript prepared  
12 from the tape made by electronic recording by Ken Gerber,  
13 Official Reporter, on the aforementioned date, and have  
14 verified the accuracy of the transcript by comparing the  
15 typewritten transcript against the verbal recording.

16 Date: 7/12/00  
17

18 \_\_\_\_\_  
19 Transcriber

20 \_\_\_\_\_  
21 Proofreader  
22  
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25