

BEFORE THE
ARMED SERVICES BOARD OF CONTRACT APPEALS

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

ASBCA No. 43965

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

Tuesday, May 23, 2000

9:30 a.m.

BEFORE:

DAVID W. JAMES, Administrative Judge

APPEARANCES:

For the Government:

KATHLEEN HALLAM, ESQ.
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For the Appellant:

NORMAN A. STEIGER, ESQ.
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PROCEEDINGS

[9:30 a.m.]

JUDGE JAMES: Let the record reflect that this is day seven in the hearing of Freedom New York, ASBCA docket no. 43695.

How does the Government wish to proceed? Do you want to make an opening statement?

MS. HALLAM: No, Your Honor.

JUDGE JAMES: All right; do you want to call a witness?

MS. HALLAM: In a second. I'd like to offer into evidence two exhibits which are excerpts from Henry Thomas' depositions. I talked to him about those depositions the other day when I was doing my cross-examination.

JUDGE JAMES: All right; what is the position of the appellant with respect to these exhibits? I guess it's called G96.

MS. HALLAM: G97.

JUDGE JAMES: All right; G96 and G97. Do you want to represent what date this deposition transcript or dates these are from?

MS. HALLAM: I believe they are from the late 1988 or early 1989; I will find out for you in a second.

JUDGE JAMES: So you can narrow it down to the

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WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
JAMES LJUTIC	1111	1132	1145	
KEITH FORD	1148	1164		
PAT MARA	1194	1220	1226	1229
FRANK BANKOFF	1231	1288		

EXHIBITS

Number	Identified	Received
NONE		

decade; perhaps to the date.

MS. HALLAM: I will be able to tomorrow. I'm not sure I can right now.

[Pause.]

MS. HALLAM: No, Your Honor. I can give you the date tomorrow. I can hold the exhibits until tomorrow and reenter them at that time.

JUDGE JAMES: As you wish. It may be that the appellant doesn't have any objection.

I'm sorry, I didn't hear that.

MR. LUCHANSKY: My understanding -- did I hear correctly that she's going to wait until tomorrow to offer these exhibits?

MS. HALLAM: No, I said I'd wait until tomorrow to give the date, unless that is a fatal --

MR. STEIGER: Can we wait until tomorrow to respond to the request?

JUDGE JAMES: I take it you don't have any need to use those today; is that right, Ms. Hallam?

MS. HALLAM: That is correct.

JUDGE JAMES: So we can wait until tomorrow.

MR. LUCHANSKY: Thank you.

JUDGE JAMES: If Ms. Hallam is willing to wait until tomorrow.

MR. LUCHANSKY: Your Honor, as we were

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1 discussing documents from the issue that came up last
2 night as we were reviewing them on my new and improved
3 revised exhibit list, I had indicated that the version of
4 the solicitation -- the version of the solicitation that
5 we had offered, which is on page 6 of FT03A, I said
6 corresponded to Government's Rule 4 Exhibit No. 2 except
7 for page 1, and then, there was a legibility concern.
8 And going through the Government's version, there was an
9 additional page missing.

10 JUDGE JAMES: An additional page missing from
11 the Government's version?

12 MR. LUCHANSKY: And what I'd like to do is
13 propose that even though I now have the next one, I
14 propose that both of these exhibits be allowed, because
15 they really aren't identical because of the missing pages
16 of the Government's and the legibility concern.

17 JUDGE JAMES: Which is the other missing page?

18 MR. LUCHANSKY: I believe that it's 57. I
19 didn't mark it down, but I believe it's 57, which is
20 provision H-4 of the solicitation.

21 JUDGE JAMES: All right; refresh my memory:
22 have you parties, have you attorneys, stipulated that the
23 solicitation, whether we look at Rule 4 Tab 2 or your
24 FT30 Alpha in fact is the document that got incorporated
25 in the contract as awarded? Did you stipulate that?

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1 MR. LUCHANSKY: I'm not sure that we have, but
2 we certainly can.

3 MR. STEIGER: We would be willing to certainly
4 stipulate that.

5 MS. HALLAM: Yes, Your Honor; our copy does
6 have 57 on it.

7 JUDGE JAMES: Okay; that's Rule 4 Tab 2, right?

8 MS. HALLAM: One? Two?

9 JUDGE JAMES: Well, I have to say that the
10 Board's copy also has page 57, which has got clause H-5,
11 so it does not seem to be missing in our copy. Perhaps
12 there was some other page that was missing, Mr.
13 Luchansky?

14 MR. LUCHANSKY: I'll check and see it, but it
15 seems that it's missing in my copy.

16 JUDGE JAMES: I think that's what we call a
17 hiccup, because everybody else seems to have it.

18 MR. LUCHANSKY: From my copy, pages 1 and 57
19 are missing, and of course, I have a legibility concern
20 not only with some of the text being difficult to read,
21 but the white edge is cut off on most of it, so I believe
22 that our version is much easier to read.

23 JUDGE JAMES: Are the parties willing to
24 stipulate that we'll use the appellant's version as
25 "easier to read" and with the right margin intact?

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1 MS. HALLAM: Can we stipulate to use both of
2 them? Because I trashed all of the appellant's stuff
3 that was duplicative.

4 JUDGE JAMES: All right; this is an exception.
5 You can refer to either of them.

6 MR. LUCHANSKY: Thank you, Your Honor.

7 JUDGE JAMES: And we'll regard the appellant's
8 FT30 Alpha in lieu of being withdrawn, we'll regard it
9 all as in evidence. Is that satisfactory to both
10 parties?

11 MR. LUCHANSKY: Yes; thank you, Your Honor.

12 MS. HALLAM: Yes.

13 JUDGE JAMES: All right.

14 [Pause.]

15 JUDGE JAMES: Any other matters before we call
16 the witness?

17 MS. HALLAM: No, Your Honor.

18 Jim Ljutic?

19 JUDGE JAMES: The witness seat is right up
20 here, sir. Be careful of the wires.

21 Whereupon,

22 JAMES LJUTIC

23 was called as a witness herein and, after being duly
24 sworn, was examined and testified as follows:

25 DIRECT EXAMINATION

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1 BY MS. HALLAM:

2 Q Would you state and spell your name?

3 JUDGE JAMES: Please state for the record your
4 full name; spell your last name; and give us your
5 address.

6 THE WITNESS: That's home address, sir?

7 JUDGE JAMES: Home or business as you see fit.

8 THE WITNESS: Okay; my name is James Ljutic.

9 L-J-U-T-I-C. I'm employed by Defense Contract Management
10 Command in New York at 207 New York Avenue, Staten
11 Island, New York.

12 BY MS. HALLAM:

13 Q Tell us what your position is.

14 A I'm the assigned termination contracting
15 officer who's handling the Freedom New York termination
16 settlement proposal regarding the termination for
17 convenience on the Meals Ready to Eat contract.

18 Q In connection with that task, were you asked to
19 address an issue relative to alleged unpaid DD250s?

20 A Yes, I was.

21 Q I'd like you to look in the Government exhibits
22 at Exhibit No. 92.

23 A Okay; I have it in front of me.

24 Q Okay; would you tell us what this is?

25 A This is -- the first document, dated July 28.

1 1997, is a response by the then-assigned termination
2 contracting officer, Mr. Joe Mason. It's a response
3 regarding the company's inquiry that 33 invoice shipment
4 payments had not been made during the contract's active
5 life, and it's a response that addressed that issue and
6 provided documented support that at least 28 of the 33
7 invoices claimed had, in fact, been paid.

8 Q And are you familiar with the documentation
9 that follows that letter?

10 A Yes, I am.

11 Q Could you turn to page 2 of this document?

12 A I have it in front.

13 Q Could you explain to us what this is? Are
14 these a listing of the invoices that are claimed to have
15 been not paid?

16 A Yes, it is.

17 Q And could you tell us what this document
18 indicates with regard to that -- those invoices?

19 A The document is a summary listing of the
20 invoices that the contractor claims had not been paid,
21 and it explains -- it shows that 28 were, in fact, paid,
22 and the documentation behind that is the advice of
23 payments, the proof of payment for 28 of the 33 invoices.

24 Q And what does that last column indicate?

25 A The last column indicates that rather than a

1 at a 95 percent liquidation rate? If any of these
2 naturally marry up with other payments, just roll them up
3 with those payments, too, so we don't repeat the same
4 information

5 for --

6 A Yes; the documentation -- there are two
7 documents right behind that first summary sheet.

8 MR. STEIGER: Excuse me, Your Honor. I must
9 object. There is nobody that has personal knowledge of
10 this information testifying to it. I don't see what
11 value it has in terms of evidence.

12 BY MS. HALLAM:

13 Q Mr. Ljusic, are you familiar with these
14 documents?

15 A Yes.

16 Q Are you the TCO for this -- for the termination
17 for convenience?

18 A Yes.

19 Q Was this issue raised during the termination?

20 A Yes, it was.

21 Q Are these documents in your files?

22 A They are in the contract's files, yes.

23 Q And you have -- that assignment has been
24 transferred to you?

25 A For the most part, yes.

1 net payment, a cash payment made to the contractor, these
2 invoices were offset against previous payments that were
3 made. They were liquidated against unliquidated progress
4 payments outstanding at the time that had been advanced
5 to the contractor. So rather than make a payment, they
6 were applied as a credit to the outstanding unliquidated
7 progress payments, some of them at 100 percent recoupment
8 rates and some of them at 95 percent recoupment rates.

9 JUDGE JAMES: What the Board wants to know is
10 that last column, about which Ms. Hallam was asking, is
11 that a column entered by Freedom, or is that a column
12 entered by the Government?

13 THE WITNESS: That's the Government; the
14 Government's records reflect the liquidations that were
15 made against those invoices.

16 JUDGE JAMES: Do you know who wrote that
17 column, sir?

18 THE WITNESS: The column, I believe, was
19 written by the DCMC New York Office of Counsel and/or the
20 administrative contracting officer and was based on the
21 support and documentation from the payment office.

22 BY MS. HALLAM:

23 Q I'd like to go through these invoices, starting
24 with the invoice for shipment 80. Could you tell us what
25 you believe is the support indicating that that was paid

1 Q Do you understand these documents that are
2 attached here?

3 A Yes.

4 JUDGE JAMES: I overrule your objection.

5 MR. STEIGER: Pardon?

6 JUDGE JAMES: I overrule your objection.

7 BY MS. HALLAM:

8 Q Please continue, Mr. Ljusic. I want you to
9 note that there's page numbers at the bottom, so you can
10 just refer to those page numbers rather than saying like
11 the second or third after this sheet or that sheet; the
12 handwritten page numbers.

13 A Okay; well, on page number 4 is an advice of
14 payment which originated with the payment office at the
15 time which was located in New York. That office made the
16 payments on the invoices in question, and that document
17 shows -- it shows the invoices which were paid; it shows
18 the total amount of the invoices; it shows the recoupment
19 rate of 95 percent; it basically just serves as a proof
20 of payment.

21 Q Okay; in this case, what was the net payment
22 made?

23 A In this case, it looks like \$195,267.18 was
24 paid, which supported -- which represented payment of
25 four invoices.

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1 Q And how much of that was paid?

2 A Well, the whole amount was actually paid. We
3 recouped 95 percent of that as an offset to what the
4 contractor had previously been advanced.

5 Q When you say paid, I guess I'm talking in
6 layman's terms; and you're talking in financial terms.
7 I'm talking when I say paid, how much money did the
8 contractor actually get in hand?

9 A It looks like zero, because there was an
10 additional offset of the net amount that he would have
11 received, which was offset against an underrecoupment on
12 a previous payment. He whether have really received
13 \$9,763.36 as a payment to him, and we would have recouped
14 \$185,503.82. However, the \$9,763 net payment to him was
15 offset against other monies that the Government had to
16 recoup.

17 Q Okay; can you go on to the --

18 JUDGE JAMES: Before you leave page 4, Mr.
19 Ljutic, if I'm pronouncing your name right, on that very
20 same item that you just mentioned, \$9,763 that was
21 deducted because of previous payment on 3/31/86, do you
22 have any knowledge as to which Freedom invoice number or
23 numbers corresponds to the 3/31/86 payment?

24 THE WITNESS: I'm sorry, Your Honor; the
25 3/31/86? I lost you there; oh.

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1 JUDGE JAMES: Do you know what Freedom invoice
2 number the person is talking about who wrote that? I
3 take it it was some Government person; is that right?

4 THE WITNESS: Yes, it was someone from the
5 finance office at that time, and I'm not sure -- you mean
6 the offset of \$9,736, what that was applied against?

7 JUDGE JAMES: Yes; it was against a previous
8 payment of 3/31/86, it says, so I understand that. And
9 my question is 3/31/86, Freedom had vouchered voucher
10 number something or other. I want to know what that
11 something or other is.

12 THE WITNESS: I'm not sure, Your Honor, when we
13 addressed the 33 invoices which the contractor said were
14 not paid.

15 JUDGE JAMES: Go ahead, Ms. Hallam.

16 BY MS. HALLAM:

17 Q Move along to the next payment that was
18 allegedly not paid.

19 A Okay; well, that first advice of payment that
20 we just looked at, page 4, covers the first three
21 invoices on the summary sheet. They actually combined
22 four invoices to make that payment. So I guess the next
23 one that we'll be looking at is FNY0172, which is the
24 fourth one down on the list.

25 Q What information do you have about that?

1 A Well, in our research of the contract payment
2 files, I was unable to locate an advice of payment or any
3 documentary proof that that invoice had, in fact, been
4 paid or credited to the unliquidated progress payments.
5 However, the shipment records reflect that, you know, the
6 shipment was entered into the system. At the time, the
7 finance office was in New York. We had the payment
8 files. I searched our payment files, and I was unable to
9 locate evidence that that particular invoice was paid.

10 However, the shipment records reflect that it
11 was entered into the system.

12 Q Okay; can we move along to the next ones?

13 JUDGE JAMES: Excuse me; I'm a little confused.
14 Which invoice are you now talking about that you can't
15 find the records to show they were paid?

16 THE WITNESS: FNY0172.

17 What page is this reflected on there?

18 JUDGE JAMES: Which page are you testifying
19 about?

20 THE WITNESS: Well, it's on page 2; it's the
21 fourth invoice down on the list.

22 JUDGE JAMES: Oh, okay.

23 THE WITNESS: Where there's no check mark.
24 That happened to be one of the invoices that I could not
25 locate a payment record of.

1 JUDGE JAMES: All right; I follow you. So you
2 don't have anything on 172.

3 THE WITNESS: Yes; basically, the ones that are
4 checked are all supported by advices of payments, and
5 there were five which I could not locate a payment record
6 of. But the files are so old, they're like, you know, 15
7 years old; I basically searched the files that we had.

8 BY MS. HALLAM:

9 Q Okay; can you continue showing us where the
10 support of these invoices is?

11 A Okay; well, on FNY0193, on page 12, that advice
12 of payment shows that that invoice was paid, and it also
13 shows a recoupment of 95 percent outstanding unliquidated
14 progress payments.

15 Q Do you know if these advice of payments were
16 provided to the contractor at the time?

17 A Well, Mr. Mason did the first mailing back in.
18 I guess it was May or July of 1997, when he replied.

19 Q No, I'm talking -- I didn't mean to confuse
20 you. I'm talking back in the 1980s, when the contract
21 was being performed.

22 A Okay; what was the question again?

23 Q Were the advice of payments, are they provided
24 to the contractor? Do you know?

25 A I don't -- I'm not sure of that. That would be

1 -- probably the ACO would know better.
 2 Q Okay.
 3 A On ongoing payments.
 4 Q Okay, please continue.
 5 JUDGE JAMES: Before you continue, the Board is
 6 confused. You're now focusing on invoice 0193, correct?
 7 THE WITNESS: Yes, and on page 12, there is an
 8 advice of payment which incorporated 1, 2, 3, 4, 5, 6 --
 9 JUDGE JAMES: I understand that; a whole bunch
 10 of them, including 0193.
 11 THE WITNESS: That is correct.
 12 JUDGE JAMES: And it says \$63,878.30 for that
 13 particular invoice, correct?
 14 THE WITNESS: That is -- yes, it does.
 15 JUDGE JAMES: All right; now, look at page 14.
 16 The numbers don't jibe, do they? That's the source of my
 17 confusion. Where did the \$63,878.40 number come from?
 18 THE WITNESS: Well, on page 15, you'll see a
 19 record of a payment of \$63,878.40.
 20 JUDGE JAMES: Yes; which confounds the mystery
 21 of why would the Government pay \$63,000 on a \$32,000
 22 invoice? Do you know?
 23 THE WITNESS: To be quite frank, the finance
 24 office makes a tremendous amount of adjustments and
 25 reconciliatory adjustments regarding ACRYNS and different

1 accounting classifications and code that kind of go
 2 beyond the scope of what my job function is.
 3 JUDGE JAMES: Translate that as you don't know.
 4 THE WITNESS: Yes.
 5 JUDGE JAMES: They decided to nearly double his
 6 payment?
 7 THE WITNESS: Well, I don't think they doubled
 8 his payment, sir. I think in the total scope of the
 9 reconciliation and the record of disbursements and
 10 payments that the Government has a pretty clear picture
 11 of what was paid out. I don't know the intricacies of
 12 every adjustment and offset and credit that was made
 13 during the life of the ongoing contract.
 14 JUDGE JAMES: Go ahead, Ms. Hallam.
 15 BY MS. HALLAM:
 16 Q We'll go on to the next disputed shipment or
 17 payment.
 18 A FNY0202; the summary sheet indicates that there
 19 was a payment of \$63,878.40, which was offset at 100
 20 percent to recoup unliquidated progress payments. So the
 21 contractor or the assignee wouldn't have received any
 22 actual monies, but it would have resulted in a credit to
 23 the contract. And the advice of payment on page 17 takes
 24 into consideration that invoice and shows the 100 percent
 25 recoupment.

1 Q Would you show us where the next proof of
 2 payment is?
 3 A Okay; on FNY0244, which is the next one on the
 4 list, that's another one that I was unable to locate a
 5 payment record of.
 6 Q Would you continue with shipment 0245?
 7 A Bear with me; I'm just trying to locate the
 8 document.
 9 Okay; it's page 53. It also shows that invoice
 10 was fully credited 100 percent toward the unliquida
 11 outstanding progress payments at the time.
 12 The next one on the list is 0255, and it's the
 13 same document on page 53; also shows 100 percent
 14 recoupment.
 15 The next one on the list, 0264, is supported by
 16 the advice of payment on page 25, also showing 100
 17 percent recoupment against unliquidated outstanding
 18 progress payments.
 19 Q I'm sorry; I don't have an advice of payment
 20 my 25.
 21 A Oh, I'm sorry; I'm on 0264, or did I cover
 22 that? Maybe I'm a little -- the advice of payment on
 23 page 25 covers invoice FNY0264.
 24 Q I'm sorry; did you say 25?
 25 A Page 25, yes.

1 MS. HALLAM: Does everybody else have an advice
 2 of payment on page 25?
 3 JUDGE JAMES: The Board does not, and it begins
 4 with FNY0288 on page 25.
 5 THE WITNESS: Okay; it looks like it's misfiled
 6 in this one. It may be your page 35. Maybe I'm
 7 misreading it because of the copy.
 8 MS. HALLAM: Okay; yes, it does look like a 25;
 9 I'm sorry.
 10 JUDGE JAMES: Okay; we'll deem 25 to mean 35
 11 here.
 12 MS. HALLAM: Yes, I think the tail of it got
 13 cut off from the copying.
 14 JUDGE JAMES: Okay.
 15 BY MS. HALLAM:
 16 Q We're on 265.
 17 A Yes, that advice of payment is included -- that
 18 payment is page 53, the record of payment, also 100
 19 percent recoupment against progress payments.
 20 I'm still searching, but I'll find -- I'm
 21 looking for 0268.
 22 Q Let me help you at page 39.
 23 A Yes; yes, that's another one. It's the second
 24 one on that advice of payment, and it reflects 100
 25 percent recoupment against unliquidated progress

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1 payments.
 2 Also, 0269 is the first one on that same advice
 3 of payment.
 4 Q 274? Refer to page 53.
 5 A Yes; I see 51, 52 and 53 is the advice of
 6 payment, yes, which shows 100 percent liquidation of
 7 progress payments and recoupment.
 8 0275 is also covered by that advice of payment.
 9 0277 is also covered by the same advice of payment.
 10 Yes; I'm looking for 0281.
 11 Q Is that on page 39?
 12 A Yes; also on page 39, it shows 100 percent
 13 recoupment of that payment against unliquidated progress
 14 payments.
 15 Q The next one is 82.
 16 A Yes, it's the same advice of payment, page 39;
 17 again, 100 percent recoupment against unliquidated
 18 progress payments.
 19 0284 is shown on page 62, the advice of
 20 payment; again, 100 percent liquidated against
 21 outstanding progress payments.
 22 I'm still looking at 0285.
 23 Q Page 17.
 24 A Okay; yes, thank you. Again, that's the second
 25 one on the advice of payment on page 17, and it shows 100

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1 percent recoupment of that payment and a credit towards
 2 unliquidated progress payments. That same advice of
 3 payment includes invoice FNY0286, which was also recouped
 4 at 100 percent.
 5 Okay; 0287 is shown on page 39; also recouped
 6 at 100 percent.
 7 0288 is shown on page 17, advice of payment,
 8 also recouped at 100 percent.
 9 0290 is on the same advice of payment, recouped
 10 at 100 percent.
 11 0291 is the same advice of payment, also
 12 recouped at 100 percent.
 13 And 0292 and 0293 also, those invoices were
 14 represented on that advice of payment.
 15 I was unable to locate the advice of payments
 16 for FNY0297 and 0298.
 17 0299 is the advice of payment on page 62,
 18 recouped at 100 percent.
 19 0301, same advice of payment on page 62;
 20 recouped at 100 percent.
 21 0301 and 0302 are also shown on the same advice
 22 of payments and recoupments of 100 percent against
 23 progress payments.
 24 0339 is the last of the five invoices I was
 25 unable to locate a record of payment for.

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1 JUDGE JAMES: Now, sir, do I understand your
 2 testimony to mean each of these instances where you could
 3 find no advice of payment, your records show that Freedom
 4 New York didn't submit the invoice. Is that true, or
 5 you're unable to determine whether they submitted the
 6 invoice?
 7 THE WITNESS: I'm unable to determine that.
 8 MR. STEIGER: I didn't hear the answer, Your
 9 Honor.
 10 JUDGE JAMES: Do you want to repeat your
 11 answer, counsel?
 12 THE WITNESS: I said I'm unable to determine if
 13 the invoices were submitted in 1986. I wasn't employed
 14 by the Government in 1986.
 15 BY MS. HALLAM:
 16 Q I'd like you to look at G93.
 17 A I have it in front of me.
 18 Q Would you just briefly describe what this is?
 19 A I had asked the Defense Finance and Accounting
 20 Service in Columbus, Ohio to perform an audit and a
 21 reconciliation of the contract payments and disbursements
 22 and recoupments, because we -- the payment office, when
 23 the contract originally was in progress, was located in
 24 New York. Then, that payment office closed, and we
 25 retained the payment records in New York, in the ACO's

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1 file. However, the payment function was assumed by DFAS
 2 Columbus, and I sent them a copy of the contract, a copy
 3 of all of the modifications that adjusted the contract
 4 price, ACRYNs and any financial adjustments, and I sent
 5 them a record of every payment that we had, and I asked
 6 them to input it into their system and reconcile so as to
 7 determine an exact amount of outstanding unliquidated
 8 progress payments at the current time.
 9 And they performed this audit, and this is a
 10 copy of the audit that they sent me back, dated May 18,
 11 1999.
 12 Q I'd like you to refer to page 18.
 13 A Okay; I have it in front of me.
 14 Q Would you explain briefly just what this page
 15 reflects?
 16 A Well, the page shows that, on the left hand
 17 side, you'll see the invoice numbers: FNY009 starting at
 18 the top and going down, and it just basically reflects
 19 and ensures that these invoices were input into the
 20 system, and the payment is reflected as part of the
 21 audit, and that they are included in the reconciliation.
 22 Q Tell us what that voucher number or voucher num
 23 is.
 24 A The voucher number looks like the numbers on
 25 the advice of payments.

1 Q When you got this report, did you also check
2 out this report for the missing or the shipment numbers
3 that you couldn't locate advice of payments for?

4 A Yes, I did. Three of the five shipments were
5 reflected in their reconciliation, but that is a result
6 of probably my sending the total package of invoices to
7 them, because they input what we furnished them out of
8 New York. So the shipments for three of those five
9 invoices are reflected in the reconciliation. However,
10 the payments are not reflected in the reconciliation,
11 because I was unable to locate the hard copy document
12 which supported a payment.

13 JUDGE JAMES: Could you identify which are
14 those three shipments you're talking about, sir?

15 THE WITNESS: I'm not sure which of the three
16 at this time. I may have something in my notes back
17 here. I know that three of them were reflected, and two
18 of them were not, but offhand, I'm not sure. I may have
19 it back at my briefcase.

20 JUDGE JAMES: Well, when you went through G92,
21 my notes show that there were only four that you couldn't
22 locate the evidence of payment: 0172, 0244, 0297 and
23 0298. All the rest, you did discover the advice of
24 payment; is that correct?

25 THE WITNESS: No; FNY0339 is the last one on

1 record of and no payment of and the other two.

2 Q Are you talking about the listing that begins
3 on page 18?

4 A Yes.

5 Q And ends on page 23?

6 A That is correct.

7 Q And you believe it might be incorporated into
8 one of those pages, one or more of those pages where you
9 saw the shipment information.

10 A Yes, yes, it would be.

11 Q With respect to the information under G92 --

12 A Okay; I have it.

13 Q -- to your knowledge, how many times was this
14 information provided to Freedom?

15 A At least twice at a minimum; possibly three or
16 four.

17 Q And do you know the time frames of --

18 A The first time it was provided in 1997 by Mr.
19 Mason. It was provided more recently definitely in 1999
20 or 2000 again by our Office of Counsel and with a couple
21 letters signed by our commander; at least twice.

22 MS. HALLAM: I have no further questions, Your
23 Honor.

24 JUDGE JAMES: Appellant wish to cross-examine?

25 MR. STEIGER: Yes, Your Honor, we do.

1 that list that I could not locate a record of payment.

2 JUDGE JAMES: Okay; I see the files; you're
3 right. But you can't identify which three of the five
4 there on the G93 list; is that right?

5 THE WITNESS: Not at the moment, but I do have
6 that in my records.

7 BY MS. HALLAM:

8 Q Mr. Ljutic, I'd like to just direct your
9 attention to page 22 of G93.

10 A Okay; I have it in front of me.

11 Q I'm sorry; I withdraw that. Could you tell us
12 approximately where in this document those shipments were
13 reflected?

14 A The shipment numbers are in the left hand side
15 of the column, under shipment number.

16 Q Could you give us like the scope of pages that
17 it might be included in?

18 A I'm sorry? Pardon?

19 Q Can you narrow down --

20 A The five?

21 Q -- the area that it would be included in?

22 A It basically, if you go through those shipment
23 numbers, you know, that's a record of every shipment that
24 was input. So, you know, I can scan through this and
25 determine which three of the five that we have a shipment

CROSS-EXAMINATION

2 BY MR. STEIGER:

3 Q Mr. Ljutic, what is an advice of payment?

4 A An advice of payment is the finance office's
5 manual record of the payment that was issued.

6 Q Is that provided to the contractor?

7 A I'm not sure if that's given to the contractor
8 at the time the invoice is paid.

9 Q So how is the contractor supposed to know and
10 reconcile that, in fact, monies have been withheld or not
11 paid or anything like that?

12 A Well, I would be pretty sure that when a
13 payment is issued in response to an invoice that some
14 record must be furnished with the payment. I don't know
15 there are automated payments that go direct deposit;
16 there are check payments. I don't know how this was
17 actually handled at the time, you know.

18 Q So you don't know if the contractor ever
19 received notice at the time that payments had, in fact,
20 been made.

21 A No, I can't say I know for sure.

22 Q Now, on the list that was prepared in G92 and
23 appears on page 2, do you have an idea when that was
24 prepared? It says as of 6/87. Is that when it was
25 prepared?

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1 A No, that wasn't -- I believe this is a list
2 that came from Freedom -- I'm not sure when it was
3 prepared, but I know it was furnished to the contractor
4 in, I guess, May of 1997. I don't know if it originated
5 with him, and we put the check marks and the liquidation
6 rates in or if it originated with us, but I know it was
7 furnished, I guess, July 28, 1997, by Mr. Mason with that
8 cover letter that you see, the first page of G92.

9 Q Are you certain, then, that the attachment to
10 the cover letter went to Mr. Ginsburg and included the
11 hand notations on the right side?

12 A I'm not sure; I'm not the one who was handling
13 the case at that time, nor was I the one who furnished
14 the July 28 letter. My assumption would be that it was
15 provided with the letter.

16 Q Did you discuss the contents of G92 and G93
17 with Mr. Bankoff and Mr. Liebman?

18 A Not with Mr. Bankoff. To some extent with Mr.
19 Liebman.

20 Q And did you discuss the contents of these
21 attachments or these documents with Mr. Mason?

22 A Yes, I did.

23 Q By the way, who is Mr. Mason?

24 A Mr. Mason is my boss, and he's the chief of
25 terminations at DCMC-New York.

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1 Q If you look at the list, if you take a look at
2 G92, I'm a little confused by some of the information on
3 it. Mr. Ljutic, in connection with your work as the TCO
4 and your knowledge of this contract, do you know the
5 liquidation rate that was established in this contract?

6 A I'm not sure offhand if it was 85 percent or 90
7 percent. I'm not certain, because I think it might have
8 changed during the life of the contract.

9 Q Was it ever, to the best of your knowledge, 100
10 percent?

11 A Not contractually, no; not in the original
12 contract.

13 Q So if we look at the recoupment rates, as you
14 put them, or liquidation rates, as they're sometimes
15 referred to, would you know why or what the basis was for
16 100 percent recoupment?

17 A Yes; the ACO adjusted the recoupment rate
18 because he felt that the Government's -- the progress
19 payments that we had advanced the contractor were in
20 jeopardy, and the reports that he was getting was that
21 the contract was in a very large loss position. So in
22 order to protect the Government's interest and try to
23 minimize the impact or the damage to the Government,
24 since we had such -- since the contractor had such an
25 outstanding debt, he decided to increase the recoupment

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1 rate to try to get back some of the progress payments
2 that we had paid.

3 Q And, Mr. Ljutic, do you know when that was done
4 by him?

5 A To the best of my knowledge, you know, it was
6 sometime in 1986 or 1987 as those shipments were ongoing.

7 Q If I told you that the date was October 29,
8 1986, would that ring a bell?

9 A It sounds like in and around the time frame
10 when the ACO may have increased the recoupment rates.

11 Q Well, if we look at that as the may have been
12 date, and we look at the date of these invoices, do we
13 see a significant number preceding October 29, 1986? For
14 example, we have 0202, 0245, 0255, et cetera, et cetera,
15 et cetera, quite a few here. Do you notice that?

16 A Yes; dated in, you know, July and September of
17 1986.

18 Q And which you carry over to the liquidation
19 rate does not show 100 percent liquidation rate applied
20 even to those invoices.

21 A Yes, it does.

22 Q And would you know why?

23 A Well, when the contractor is in a loss
24 position, or when it's been determined by the ACO that
25 the contractor's experiencing a significant loss on the

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1 contract, they, by regulation, would adjust the
2 recoupment rates in the progress payments to protect the
3 Government's interest.

4 Q Yes, but I believe that we -- that you said
5 that this determination was made -- well, you didn't say;
6 that's true, but assuming for a minute that the
7 determination was made to liquidate at 100 percent on
8 October 29, what would have been the basis prior to that
9 time to liquidate at 100 percent?

10 A The basis that the ACO could have used may have
11 been progress payment reviews done by technical
12 specialists which indicated that the percentage
13 completion on the contract showed a significant disparity
14 between the percentage of monies expended. In other
15 words, reports furnished to the administrative
16 contracting officer would have revealed that the contract
17 was in a large loss position and that it was in danger,
18 that the Government's funds, the Government's outstanding
19 progress payments or advance payments that we made were
20 in danger, in fact, because the contractor is in
21 financial trouble.

22 Q And are you aware if, in fact, the contracting
23 officer notified Freedom that it was doing this or that
24 such a condition as you've just described existed?

25 A I'm not sure if he did or not.

1 Q I don't remember what your response was to
2 Judge James on who wrote that last column. Do you know
3 who put that in?

4 A It was either the DCMC New York Office of
5 Counsel or the administrative contracting officer.

6 Q Does anyone have personal knowledge of the
7 information in this exhibit, that you are aware of?

8 A I would think the administrative contracting
9 officer, who, you know, was administering the contract at
10 the time these payments and invoices were, you know,
11 during the contract's active life would have a closer,
12 you know, better first hand knowledge of everything that
13 transpired regarding the payments and recoupments.

14 Q Are you aware that on several occasions during
15 the course of performance of this job and even more
16 recently that the contractor advised the Government that
17 DD250 payments were still outstanding?

18 A I'm sorry; would you repeat that?

19 Q I'll rephrase the question. Do you know that
20 Freedom had advised the Government on several occasions
21 that DD250 payments were still outstanding?

22 A I saw some correspondence in the termination
23 case file. I don't remember the exact dates, but what I
24 saw was related to 33 unpaid invoices.

25 Q Okay; I'd like to call your attention to

1 JUDGE JAMES: Or 232.

2 MR. STEIGER: Would you kindly give us two or
3 three minutes to locate this document?

4 JUDGE JAMES: Yes.

5 MR. STEIGER: Thank you, Your Honor.

6 JUDGE JAMES: Let's go off the record.

7 [Discussion off the record.]

8 JUDGE JAMES: Do you want to repeat that, Mr.
9 Steiger, on the record?

10 MR. STEIGER: We can't find it.

11 Your Honor, co-counsel tells me the document
12 is, in fact, listed as part of the record. We have a
13 copy here. We can supply it. Are we -- would you allow
14 us to do that?

15 JUDGE JAMES: If you've got a 179, I take it.

16 MR. STEIGER: Yes.

17 JUDGE JAMES: Does Ms. Hallam have a 179?

18 MS. HALLAM: Our set does have a 179.

19 JUDGE JAMES: Well, let's see; is it in your
20 compilation, ma'am?

21 MR. STEIGER: I'll show you the document.

22 Would you like to see the document? And it's listed in
23 the index, the Rule 4 index.

24 MS. HALLAM: Rule 4, then, it's not --

25 JUDGE JAMES: Well, Freedom's Rule 4.

1 Exhibit No. F179.

2 JUDGE JAMES: Let the record reflect that at
3 tab F179, the Board's compilation has no document.

4 MR. STEIGER: Has no what, sir?

5 JUDGE JAMES: No document?

6 MR. STEIGER: No document? That's a heck of an
7 exhibit.

8 JUDGE JAMES: I'd be interested in knowing if
9 that is your document.

10 MR. STEIGER: Well, perhaps we might try F233,
11 Your Honor.

12 JUDGE JAMES: What do you have at 179?

13 MR. STEIGER: Pardon?

14 JUDGE JAMES: What do you have at 179?

15 MR. STEIGER: Oh, I have 179 as a letter to Mr.
16 Liebman from Mr. Mara concerning the DD250 invoices.

17 JUDGE JAMES: What's the date of the letter?

18 MR. STEIGER: The letter is dated November 5,
19 1986. It could be F233.

20 JUDGE JAMES: F233?

21 MR. STEIGER: Yes.

22 JUDGE JAMES: Well, my problem there is the
23 last F tab that I have is F231. There ain't no such
24 thing as 233 in my compilation.

25 MR. STEIGER: Okay.

1 MR. STEIGER: In Freedom's Rule 4 index.

2 JUDGE JAMES: It's F179.

3 [Pause.]

4 JUDGE JAMES: What's the answer to my question,
5 Ms. Hallam, do you have it, or don't you have it?

6 MS. HALLAM: I have it at F179, yes.

7 JUDGE JAMES: You do have it? Great; so, you
8 attorneys doesn't have it. The only one who doesn't have
9 it is Judgey James. If you've got an extra copy, then,
10 I'd appreciate being able to see it.

11 MR. STEIGER: Does the witness have it?

12 THE WITNESS: No.

13 JUDGE JAMES: Well, okay, it's even more
14 important that you show it to the witness. I will look
15 over his shoulder.

16 MR. LUCHANSKY: How about if we show it first
17 to the Board, then, we can pass it on to the witness.

18 JUDGE JAMES: You first show it to Ms. Hallam,
19 and you make sure it corresponds.

20 MR. LUCHANSKY: It's already been shown to Ms.
21 Hallam.

22 JUDGE JAMES: All right.

23 MS. HALLAM: Is it my understanding there's no
24 F documents up there? Or is it just missing --

25 MR. STEIGER: It's just missing --

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1 MR. LUCHANSKY: And the witness has said that
2 he's missing the document at 179, also.

3 JUDGE JAMES: All right; so, you've got one to
4 interrogate from?

5 MR. STEIGER: Yes.

6 JUDGE JAMES: All right.

7 MR. STEIGER: Well, I can interrogate -- I know
8 the document; thank you.

9 [Pause.]

10 MR. STEIGER: Are we back on the record, Your
11 Honor?

12 JUDGE JAMES: Sure; we're on the record.

13 Go ahead, Mr. Steiger.

14 BY MR. STEIGER:

15 Q Mr. Ljutic, you mentioned that you had seen in
16 your review of the files in connection with the
17 termination various documents related to the DD250
18 invoices. Do you recall the one that you're looking at
19 now?

20 A I can't say I recall this specific document,
21 no, sir.

22 Q Do you recall documents of a similar nature
23 where the contractor advised the Government that there
24 were DD250s that were outstanding?

25 A The documents that I can honestly say that I

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1 recall seeing in the files relate to 33 unpaid invoices,
2 the specific invoices we just went through.

3 Q And are those not the same that are on that
4 list?

5 A Some of them look the same. Without a
6 thorough, you know, without a thorough lookover, I
7 couldn't say they're all the same. Some of them are;
8 they may all be included in that list.

9 Q Now, you mentioned -- you mentioned that on
10 some occasions, the information that is in G92 was
11 provided to Freedom. Are you referring to all the
12 information in G92?

13 A Yes, sir.

14 Q And you said that you believed that was done in
15 1997 by Mr. Mason. Was this done in writing?

16 A Yes, sir.

17 Q Well, I reviewed the record; I don't find any
18 such document. Did you have occasion to discuss this
19 with your own counsel as to where that document, that
20 notice might be?

21 A It's part of G92. It's a letter dated July 28,
22 1997, to a Mr. Gilbert G. Ginsburg.

23 Q Oh, you're talking about the letter that's the
24 cover sheet to this list. Okay; so, at that time, in
25 1997, you were, in effect, making this statement. You

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1 then referred to a 1999 or 2000 communication by Office
2 of Counsel.

3 A Yes, sir.

4 Q Was this also done in writing?

5 A Yes, sir.

6 Q Is this also in the file?

7 A No, sir.

8 Q I would like to show you a document which is
9 identified as FT396. Would you please get that document
10 out?

11 Now, do you know what this document is?

12 A It's a letter from Freedom to the then assigned
13 termination contracting officer. It looks to be
14 regarding invoice payments.

15 Q Do you know if this letter is in your file,
16 your own file, your own termination file?

17 A I'm not sure; it more than likely may be.
18 There's a lot of correspondence in that file.

19 Q Do you notice the date on that letter?

20 A Yes.

21 Q Now, does the date on that letter -- is that
22 later than the date that Mr. Ginsburg sent this
23 information -- I'm sorry, that Mr. Ginsburg was sent this
24 information in the letter that you cited before?

25 A Yes, the date is later.

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1 Q Now, let me ask this: did you discuss this
2 letter with Mr. Mason?

3 A I can't recall in particular discussing this
4 exact letter, no, sir.

5 Q Do you know if Mr. Mason ever responded to this
6 letter?

7 A I would say more than likely. Mr. Mason
8 responded to every inquiry by Freedom. It was a very
9 high priority in our office.

10 Q Did you ever see a copy of that response?

11 A I can't say offhand that I have or have not
12 seen it.

13 Q Now, in your discussions about the termination
14 settlement proposal with the Freedom representative, did
15 you discuss the matter of the DD250s?

16 A Yes, I did.

17 Q And at that time, did you tell them they had,
18 in fact, been paid by the Government?

19 A I told Freedom's consultant and representative
20 that we had furnished on several occasions proof of
21 payment for 28 of the 33 invoices in question.

22 Q Now, with respect to G93, the audit findings
23 that you requested from DFAS, would it be safe to say,
24 Mr. Ljutic, that the information contained in those audit
25 findings was based solely on the information that you

1 provided to the audit authorities?
 2 A Yes, I think it would be safe to say that.
 3 Q So, then, the audit would only be as good as
 4 the data that you provided.
 5 A I would say so, sir, yes.
 6 Q I believe, Your Honor -- yes, let's go back
 7 just one second. There's something troubling me about
 8 the list on G92.
 9 JUDGE JAMES: When you say the list, do you
 10 mean page 2?
 11 MR. STEIGER: I mean page 2.
 12 BY MR. STEIGER:
 13 Q I see you have the invoices, the date of the
 14 invoices, the amount. But I don't see on the list the
 15 dates that these were paid. Are you saying that these
 16 would be included -- those dates would be included in the
 17 backup data?
 18 A Yes; they would be on the advice of payments
 19 along with a check number that represented if, in fact, a
 20 payment was issued.
 21 MR. STEIGER: No further questions, Your Honor.
 22 MS. HALLAM: I have two questions, Your Honor.
 23 REDIRECT EXAMINATION
 24 BY MS. HALLAM:
 25 Q Mr. Ljutic, I'd like you to look again at F179.

1 I believe that that was -- okay, the second page. I want
 2 you to look down the list to shipment number 245. Just
 3 move your finger over to the right there. There's a
 4 handwritten notation. Can you discern what that says
 5 there?
 6 A It appears to have the date 11 -- November --
 7 26th and in parentheses an amount of zero.
 8 Q Well, can you look at G92 again, page 53? Is
 9 that shipment --
 10 A Okay; I have it in front of me.
 11 Q Excuse me?
 12 A I have it, yes. I have page 53 in front of me.
 13 Q Is that shipment listed on this advice of
 14 payment?
 15 A Yes, it is.
 16 Q What's the date of this advice of payment?
 17 A November 25.
 18 Q Could that possibly be a 25 on the second page
 19 of 179? Would you agree it's a little hard to read?
 20 A Yes, it could possibly be.
 21 Q In parentheses on 179, there's a zero?
 22 A That is correct.
 23 Q What's the liquidation rate or the net payment
 24 here, rather?
 25 A 100 percent with a net payment of zero.

1 Q Okay; you were talking about your request for a
 2 reconciliation report, and you agreed that the
 3 information coming out was only as good as the
 4 information going in.
 5 A Yes.
 6 Q What information did you request, or what
 7 information did you give DFAS?
 8 A I furnished DFAS with the complete record of
 9 payment file that we had at New York, which included all
 10 records of every payment and disbursement that we had
 11 hard copy documentation for. I sent them a copy of the
 12 contract; I sent them a copy of every ACO and PCO
 13 modification; you know, some of them did financial
 14 adjustments; some of them did schedule adjustments, but
 15 wanted to ensure that the entire contract and every
 16 modification was input into the system as well as every
 17 record of payment that we had and every record of
 18 recoupment that we had.
 19 MR. STEIGER: I have no further questions.
 20 JUDGE JAMES: Any recross by appellant?
 21 MR. STEIGER: No, Your Honor.
 22 JUDGE JAMES: All right; thank you ever so
 23 much, Mr. Ljutic, for your testimony. You may step down
 24 from the witness stand.
 25 [Witness excused.]

1 MR. STEIGER: May we have 5 minutes, Your
 2 Honor, as a break?
 3 MS. HALLAM: Yes; can we make it 10?
 4 JUDGE JAMES: Let's go off the record for a
 5 10-minute break.
 6 [Recess.]
 7 JUDGE JAMES: Let's go back on the record.
 8 Do you have another witness you want to call?
 9 MS. HALLAM: Keith Ford.
 10 Whereupon,
 11 KEITH FORD
 12 was called as a witness herein and, after being duly
 13 sworn, was examined and testified as follows:
 14 JUDGE JAMES: Please state for the record your
 15 full name and give us your address.
 16 THE WITNESS: My name is Keith Ronald Ford. I
 17 live at 4035 Lasher Road, Drexel Hill, Pennsylvania.
 18 DIRECT EXAMINATION
 19 BY MR. STEIGER:
 20 Q Will you tell us what your title is and where
 21 you work?
 22 A Presently, I'm the chief of the food service
 23 business unit at the Defense Supply Center, Philadelphia.
 24 Q Could you give us a little history of your
 25 employment at the DSCP?

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1 A Okay; I came into DSCP in the summer of 1981 as
2 a buyer trainee. I spent a number of years with the
3 subsistence director in the general products branch, and
4 sometime in about early 1984, I went over to the
5 operational assets branch as a 9/11 buyer. I spent
6 approximately a year and a half there, when I went over
7 there as an 11 contracting officer for the commissary
8 support branch, at which time, in around November of
9 1985, I went over to the clothing textiles directorate as
10 a contracting officer. I spent approximately six or
11 seven years, in clothing textiles as a contracting
12 officer and as a section chief, and then, I went back to
13 the subsistence directorate as a GS-14 branch chief, and
14 in the early nineties, I've been either branch chief,
15 assistant CBU chief or now CBU chief for the last 7
16 years.

17 Q And were you the buyer for the subject
18 contract?

19 A Yes, I was.

20 Q And what time frame were you the buyer?

21 A I was the buyer from the summer of 1984 to late
22 spring, I guess early summertime of -- I'm sorry; that's
23 right; summer of 1984 to late spring 1985.

24 Q After that period, did you have any further
25 involvement with this contract?

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1 A No.

2 Q Are you familiar with the solicitation at Rule
3 4, tab 2?

4 A Yes.

5 Q Do you know what the origin of the L4 clause on
6 page 66 of this solicitation is?

7 A The L4 clause was in the solicitation when I
8 took over as buyer. From what I was told --

9 MR. STEIGER: I'm having trouble hearing the
10 witness, Your Honor. Would you speak louder and a little
11 slower?

12 THE WITNESS: Okay; the L4 clause was in the
13 solicitation when I picked up as the buyer of the
14 contract. There was a series of L clauses developed for
15 rations type contracts, and I was told that that was
16 standard for operational rations-type contracts.

17 BY MS. HALLAM:

18 Q Did you participate in the negotiations with
19 Freedom Industries?

20 A Yes, I was involved in a number of discussions
21 with Freedom Industries as part of the contract process.

22 Q Could you tell us to what extent you
23 participated rather than just the number of them?

24 A As the buyer, I was responsible for assisting
25 the contracting officer; working numbers; coming up with

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1 government positions with regard to price elements.

2 Q Did you attend any face-to-face negotiation
3 meetings?

4 A I attended at least one or two face-to-face
5 discussions as part of this negotiation, yes.

6 Q I'd like you to look at Government Rule 4, Tab
7 9. It would be a red book.

8 A I'm at that tab.

9 Q Did you prepare this document?

10 A Yes, I did.

11 Q And I'd like you to look at subtab A. Did you
12 also prepare this document?

13 A Yes, I did.

14 Q And I'd like you to look at Rule 4 Tab 4.

15 MR. LUCHANSKY: Your Honor, I'm sorry; our
16 version of the Rule 4 number 9 doesn't have the subtabs
17 on it; if counsel could just describe what she has behind
18 subtab A.

19 BY MS. HALLAM:

20 Q Tell us what this is. Could you describe what
21 this document at subtab A is, the title of it?

22 A Subtab A is entitled addendum to prenegotiation
23 brief memorandum dated 28 May 1984, and it's dated
24 November 6, 1984.

25 MR. LUCHANSKY: The addendum to prenegotiation

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1 brief memorandum dated 28 June 1984, prepared on November
2 6, 1984?

3 THE WITNESS: Yes.

4 JUDGE JAMES: And the Board's version is
5 preceded by a page that says A.

6 MR. LUCHANSKY: Yes; ours does not.

7 BY MS. HALLAM:

8 Q Rule 4 tab 4; did you prepare this document?

9 A Yes, I did.

10 Q Do you recall participating in any negotiations
11 on Freedom's final offer, which led to the award of the
12 contract?

13 A I was involved in the final discussions.
14 crunching numbers, developing Government positions on the
15 various cost elements as part of that negotiation.

16 Q Tell us what your recollections of the
17 negotiation were.

18 A The final negotiations were very hairy
19 contracts negotiations. We basically got the audit
20 information one day and started negotiations on the next
21 position. We were directed to push toward an early
22 December award date if we were going to do this contract.
23 There were a lot of discussions; a lot of changes in
24 pricing and various aspects of the proposal until we
25 finally came to agreement; that is, the contract price.

1 Q I want to talk with respect to prices that were
2 expensed or costs that were expensed under the contract.
3 Do you know what was expensed for legal and accounting
4 services?

5 A There was a number negotiated regarding soft
6 cost elements. If I can look at the document, I can get
7 to that real quick.

8 MR. LUCHANSKY: Your Honor, if I may, just a
9 voir dire question. I want to ask whether he has any
10 current recollection of what was discussed or whether
11 he's simply pulling out of the document the numbers.

12 JUDGE JAMES: I'm not going to allow you a voir
13 dire question right now. You can cross-examine to your
14 heart's content.

15 MR. LUCHANSKY: Yes, Your Honor.

16 JUDGE JAMES: If you're looking at a document,
17 Mr. Ford, please enlighten us which one you're looking
18 at.

19 THE WITNESS: Yes, sir; I'm looking at the
20 price negotiation memorandum, price analysis dated
21 November 8, where it talked about the Government
22 increasing their position by \$15,000 of legal and
23 accounting fees.

24 MR. LUCHANSKY: I didn't hear the witness.

25 THE WITNESS: I'm sorry; I'm looking at the

1 price negotiation memorandum dated November 8, 1984.

2 MR. LUCHANSKY: At what page?

3 THE WITNESS: Page 9; the Government increased
4 the audit position by \$15,000. So if I go back to the
5 addendum to the price analysis, I can get started if
6 there's an amount.

7 [Pause.]

8 THE WITNESS: I can't find that document; I'm
9 sorry.

10 BY MS. HALLAM:

11 Q Okay; in your memorandum, you talk about
12 building repair and building rehabilitation. Is there a
13 distinction between the two?

14 A Not by my recollection and not by the document
15 itself. It talks about them interchangeably.

16 Q Could you tell us what was expensed for
17 building repair?

18 A The final cost element accepted for building
19 repairs was \$145,000.

20 Q Do you know what was proposed in Freedom's
21 proposal?

22 A From the document, page 8, price negotiation
23 memorandum, it talks about a figure of \$650,000.

24 Q How much?

25 A \$650,000.

1 Q During negotiation, was it your intention or
2 DSCP's intention to cover all costs of performance in the
3 contract price?

4 A Our contract calls for us to give them a fair
5 and reasonable price that will allow them to perform the
6 contract, not necessarily all costs associated with going
7 into business and staying in business.

8 Q Did DSCP have any expectation as to where other
9 sources of money were coming from?

10 A At various times during discussions, there were
11 numerous lines of credit being provided by Freedom
12 Industries, upwards of \$6 million.

13 MR. STEIGER: The witness is talking so fast I
14 really cannot follow.

15 THE WITNESS: I'm sorry.

16 At various times during discussions, Freedom
17 had proposed various lines of credit. I remember most
18 clearly was about a \$6 million figure as a line of credit
19 from a commercial bank, so we fully expected Freedom to
20 have lines of credit. Also, during discussions, Freedom
21 talked about using the SBA as a source of financing.

22 BY MS. HALLAM:

23 Q Do you believe that Freedom understood that the
24 Government was not paying all of the costs in the
25 contract price, all of the costs of performance and

1 start-up in the contract price?

2 MR. LUCHANSKY: Objection; it mischaracterizes
3 the testimony.

4 JUDGE JAMES: Objection is overruled.

5 THE WITNESS: Yes, I do.

6 BY MS. HALLAM:

7 Q Did Freedom ever indicate that there may be
8 obstacles in obtaining these other sources of monies for
9 the performance?

10 A There are various discussions during
11 negotiations about financing, but up until the time of
12 award, it was my belief that Freedom had a commercial
13 financing source lined up.

14 Q Did Freedom ever indicate that there were
15 obstacles or limitations to drawing upon that source of
16 finance?

17 A Not to me, no.

18 Q Do you recall having any conversations with
19 Freedom with regard to what they could expect to recover
20 through progress payments?

21 A I don't recall any specific conversations
22 addressing progress payments. There's nothing in the
23 final contract that shows anything different with
24 progress payments, so that would not stimulate my memor

25 Q Did you advise Freedom or was Freedom advised

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1 at any time that there might be some limitations to what
2 they could -- what expensed costs could be recovered
3 through progress payments?

4 A Not that I recall, no.

5 Q Was the progress payment liquidation rate
6 discussed during negotiations?

7 A Again, not that I recall, no.

8 Q If a rate of 82.6 percent were discussed, would
9 you recall that?

10 A If an alternate liquidation rate was discussed
11 and agreed to, it would have been put into the contract.

12 Q What do you mean by an alternate rate?

13 A Well, the contract provisions list progress
14 payments provisions, and they're fairly standard
15 provisions. The progress payments are administered by
16 the administrative contracting officer and not by the
17 contracting officer who awards the contract. So a lot of
18 the responsibility for progress payments belongs to the
19 ACO, so if there was discussions about changing things,
20 we would have had to bring the proposed ACO into
21 discussions.

22 JUDGE JAMES: So should the Board understand
23 from that statement, sir, that the proposed ACO
24 participated in the negotiation of the contract?

25 THE WITNESS: No, they did not, sir.

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1 BY MS. HALLAM:

2 Q How many contract negotiations have you been
3 involved in as a buyer or contracting officer?

4 A It would be hard to say, but it's in excess of
5 100.

6 Q Is the liquidated progress payment something
7 that's commonly discussed in the negotiations of the
8 contract?

9 A Not in the ones that I've been involved in, no.

10 Q Is the recovery of the cost through progress
11 payments something that's commonly discussed in
12 negotiations?

13 A Again, not in the ones that I've been involved
14 with, no.

15 Q Do you recall during the negotiations some
16 spreadsheets that Freedom had in their possession?

17 A During the discussions, Freedom had literally
18 tens of pages of spreadsheets at various times with
19 different proposals and different pricing lines, so yes,
20 there's a number of spreadsheets that Freedom used as
21 part of its negotiation strategy.

22 Q Do you consider any of those spreadsheets to be
23 incorporated into the contract?

24 A No, no, anything incorporated into the contract
25 would either be incorporated directly into the contract

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1 or listed in the contract as an attachment.

2 Q I'd like to talk about certain capital
3 equipment, costs that were expensed under the contract.

4 Do you recall generally that certain items that are
5 generally capital in nature were expensed under the
6 contract?

7 A I recall discussions about that. The biggest
8 thing I recall about that, though, was in terms of the
9 depreciation of those items. I don't recall any
10 specifics.

11 Q I'd like you to look at page 5 of your price
12 negotiation memorandum.

13 MR. LUCHANSKY: Of which date, ma'am?

14 MS. HALLAM: Five, of tab 9, Government Rule 4.

15 THE WITNESS: Okay.

16 BY MS. HALLAM:

17 Q Do you recall, for instance, allowing the items
18 under C to be expensed under the contract?

19 A Under C?

20 Q Yes.

21 A Manufacturing overhead? We allowed those costs
22 in the contract. As part of the discussions, we
23 increased our position.

24 Q I'm sorry; you're going to have to talk a
25 little louder.

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1 A As part of the discussions, we allowed costs
2 under the contract and actually increased the Government
3 position for those four particular cost elements, yes.

4 Q With regard to your discussions or your
5 negotiations for these particular elements, like quality
6 control equipment, for instance; was there any followup
7 discussions on whether the contractor could have or not
8 received progress payments for those items that were
9 expensed under the contract as capital items?

10 A Not that I recall, no, not that I recall.

11 Q Did you attend the post-award meeting on this
12 contract, post-award conference?

13 A Yes, I did.

14 Q Do you remember participating in any private
15 meeting that was conducted at that time?

16 A I don't recall participating in a private
17 meeting, no.

18 Q Did there come a time when you became aware
19 that Freedom was having a problem with its financial
20 institution, Dollar Dry Dock?

21 A The discussions came up at the post-award
22 conference about financing problems, and subsequent to
23 that, there were no more issues to my understanding on
24 financing.

25 Q I'd like you to refer to Rule 4 Tab 6.

1 A That is a letter to Jacine Thomas from Henry
2 Thomas dated September 13, 1984.
3 Q I'm sorry; I'm looking at tab 6.
4 A I'm sorry; I'm at 8; I'm sorry; I apologize;
5 I'm sorry; the letter is from Dollar Dry Dock Bank
6 addressed to a Mr. Tom Barkewitz; August 10, 1984, is the
7 date; I apologize.
8 Q Do you recall seeing this document prior to
9 award?
10 A No, I do not.
11 Q Do you remember or was this document at any
12 time brought to your attention?
13 A I remember discussions of this document on a
14 post-award basis. I do not recall seeing this on a
15 preaward basis. It would have impacted our ability to
16 award the contract to Freedom if we were aware of
17 financial problems up front.
18 Q This particular letter would have impacted on
19 your ability to award?
20 A Wait; this letter is less than firm in its line
21 of credit. It has some conditions assigned to it,
22 specifically, a contract in the amount of \$21 million,
23 and the contract we awarded was significantly lower than
24 that.
25 Q I'd like you to look at Rule 4, Tab 8.

1 A Yes.
2 Q Were you aware of this letter prior to award of
3 the contract?
4 A This is -- do you want me to read the letter,
5 Your Honor?
6 JUDGE JAMES: Read it to yourself.
7 THE WITNESS: The document? I'm sorry?
8 No, I was not.
9 BY MS. HALLAM:
10 Q Were you aware of the situation with -- between
11 Freedom Industries and Dollar Dry Dock, wherein Dollar
12 Dry Dock was not provided money?
13 MR. LUCHANSKY: Objection; I'm going to object
14 to her characterization of a scenario not in evidence.
15 I'm going to object to her characterization of that
16 question, where it's going.
17 JUDGE JAMES: Do you have any response to the
18 objection?
19 MS. HALLAM: I'll withdraw the question.
20 BY MS. HALLAM:
21 Q I'd like you to refer to Rule 4, Tab 8, third
22 paragraph. To date, Freedom's expected support from
23 Dollar Dry Dock Savings Bank has been fertile. Were you
24 aware that the support had been fertile prior to award of
25 the contract?

1 MR. LUCHANSKY: Objection; I'm going to object
2 to him testifying about a sentence from a letter that he
3 has no knowledge about; wasn't involved in. Objection,
4 Your Honor.
5 JUDGE JAMES: He's already testified he's
6 unaware of this letter before award.
7 BY MS. HALLAM:
8 Q Did you have any knowledge with regard to any
9 financial problems that Freedom may or may not have had
10 prior to award?
11 A No.
12 Q Okay; do you recall at any time after award
13 being asked by DCAS or anyone else about your intention
14 in expensing certain capital equipment in the contract
15 price?
16 A No, I don't recall that question, no.
17 Q How many awards -- how many IPP contracts have
18 you been involved in as either a contracting officer or a
19 buyer?
20 A Probably about 30 or 40 contracts, somewhere
21 between 30 and 40.
22 Q Are you aware of any requirement to award IPP
23 producers contracts to keep them active?
24 A The goal of the IPP program is to award
25 contracts to maintain an industrial base. Whether you do

1 that with a specific contractor is not necessarily a goal
2 of the program.
3 Q Would that be a yes or a no? Are you aware of
4 any requirement --
5 A No, that would be a no, then.
6 MS. HALLAM: I have no further questions.
7 JUDGE JAMES: Cross?
8 MR. LUCHANSKY: Yes, Your Honor.
9 CROSS-EXAMINATION
10 BY MR. LUCHANSKY:
11 Q Mr. Ford, do you remember my taking your
12 deposition back on November 22, 1989, in Philadelphia?
13 A Yes, sir.
14 Q Do you remember my asking you a lot of
15 questions about the negotiations that went on for the
16 Freedom contract?
17 A That is correct, yes.
18 Q Do you remember that in response to each and
19 every one of my questions about what happened either
20 during the period before negotiations or at the actual
21 negotiating table itself or in the period following
22 negotiations that your answer consistently was "it's been
23 a long time, sir; I don't remember the negotiations?"
24 A Yes, sir.
25 Q Now, I asked you about the -- your review of

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1 the spreadsheets and other than yes, there were
 2 spreadsheets, you didn't remember anything in detail
 3 about the spreadsheets, right?
 4 A No, sir.
 5 Q Okay; what has changed between then and now
 6 that allows you to recall whether those spreadsheets that
 7 were flying around in that hurry got attached to that
 8 memorandum of understanding or didn't get attached when
 9 you couldn't recall a thing about negotiations on
 10 November 22?
 11 A Two things have changed, sir. One is that I've
 12 had a chance to review a number of documents in the file,
 13 and two, I saw the contract that had no reference to any
 14 spreadsheets as being attached -- as part of the
 15 contract, sir.
 16 Q Okay; with respect to that second claim, no
 17 reference, are you talking about -- when you say the
 18 contract, are you referring to the memorandum of
 19 understanding or the actual contract award itself?
 20 A The contract itself, sir.
 21 Q Okay; so, you are, or are you not, speculating
 22 from the fact -- you are concluding from the fact that
 23 the contract itself doesn't say anything about the
 24 spreadsheets, you're concluding that it must not have
 25 been attached to the memorandum of understanding,

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1 correct?
 2 A Yes, sir.
 3 Q But you don't have any current recollection as
 4 to whether that took place or not, do you?
 5 A No, sir.
 6 Q Now, what is it that you said you reviewed that
 7 refreshed your recollection as to what happened?
 8 A I looked at a lot of documents that I either
 9 had prepared or as part of the process that I was able to
 10 gather information.
 11 Q What documents were those, sir?
 12 A Price negotiation memorandum; the
 13 prenegotiation briefing memorandum; the addendum to the
 14 prenegotiation memorandum; specifically, those three
 15 documents as part of the process. I was the preparer of
 16 those documents.
 17 Q Now, do you remember, Mr. Ford, that I referred
 18 you to those documents during your deposition?
 19 A Yes, sir.
 20 Q And that you had the opportunity to look at
 21 them right there, didn't you?
 22 A Yes, sir; it was the first time I had seen them
 23 in 15 years probably.
 24 Q And you did look at them.
 25 A Yes, sir.

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1 Q And, in fact, on a number of the questions,
 2 when I said do you remember what happened, you said no; I
 3 asked you, well, is there anything that would refresh
 4 your recollection anything that I can get for you to look
 5 at to see if it might jog your memory. Do you remember
 6 that?
 7 A No, sir.
 8 Q And, yet, reviewing those documents at the time
 9 -- I didn't rush you through them, did I?
 10 A No, sir.
 11 Q Reviewing them at the time didn't jog your
 12 memory as to anything you're saying now with respect to
 13 the spreadsheets that weren't attached to the memorandum
 14 of understanding, did it?
 15 A No, sir.
 16 Q Did you have any meetings with counsel in
 17 preparation to testifying here today?
 18 A Yes, sir.
 19 Q How many times did you meet with counsel?
 20 A I believe twice, sir.
 21 Q Approximately when were those meetings?
 22 A The first meeting was a number of weeks ago;
 23 the last meeting was last night.
 24 Q And were you going over -- in meeting with
 25 counsel, did you go over these documents that you just

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1 referred to that refreshed your recollection?
 2 A We did look at some of these documents, yes,
 3 sir.
 4 Q Now, talking about cash flows, the solicitation
 5 in this case does call for cash flows to be submitted by
 6 the contractor; isn't that correct?
 7 A I believe so, yes.
 8 Q And it was your testimony that although you
 9 can't recall from the flurry of cash flows, certainly,
 10 those cash flows were reviewed in connection with the
 11 review of Freedom's proposal for this contract; isn't
 12 that right?
 13 A I don't believe I testified to that, sir. I
 14 did not review the cash flows.
 15 Q But you do recall that there were cash flows
 16 there being reviewed by the people at DPSC in connection
 17 with the negotiation of Freedom's contract; isn't that
 18 right?
 19 A I would assume so, sir.
 20 Q When you said that you crunched numbers; that
 21 was part of your contribution --
 22 A Yes, sir.
 23 Q -- to these negotiations; did those numbers
 24 include taking information from these cash flows?
 25 A No, the numbers I looked at were cost elements

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1 proposed by Freedom Industries; the auditors' position on
2 those particular cost elements and then coming up with a
3 Government position for negotiations.

4 Q So you would feed those numbers to Mr.
5 Barkewitz.

6 A Yes, sir.

7 Q And then, if he were the one who is reviewing
8 the cash flows, he would incorporate that into his
9 analysis.

10 A I would assist the contracting officer, yes,
11 sir.

12 Q I'm not sure that answered my question but --

13 A I just don't know if Mr. Barkewitz was the one
14 reviewing the cash flows, so if you're saying a system of
15 reviewing cash flows, the answer is I don't know.

16 Q To the best of your knowledge, somebody on that
17 DPSC team was reviewing those cash flows, since they were
18 included as part of the requirements in the solicitation;
19 is that correct?

20 A Or it could have been the DCAS team, sir;
21 that's why I'm not sure.

22 Q I'm sorry?

23 A Or it could have been part of the DCASMA team
24 that was doing the preaward survey.

25 Q Okay; somebody involved in those negotiations

1 responsibility to review those cash flows, correct?

2 A No, sir; no, sir.

3 Q Now, one of the other requirements in this
4 solicitation was that Freedom provide the sources and
5 uses of the funds that it proposed for this contract;
6 isn't that right?

7 A Yes, sir.

8 Q And the cash flows is one excellent way of
9 providing the sources and uses of those funds; isn't that
10 right?

11 A It is one option, yes, sir.

12 Q Now, you testified, Mr. Ford, briefly about the
13 use or the origin of the L4 clause.

14 A Yes, sir.

15 Q Do you remember in your deposition, I asked you
16 about the L4 clause?

17 A Yes, sir.

18 Q I'm sorry?

19 A I do recall, yes, sir.

20 Q And do you remember that your answer was that
21 you're not familiar with the L4 clause?

22 A I believe that was my testimony today, sir; it
23 was in the solicitation when I became the buyer. I did
24 not develop the clause or did not coordinate the
25 development of that clause.

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1 was reviewing those cash flows.

2 A I would assume so, yes.

3 JUDGE JAMES: Let me ask you again: was
4 anybody from DCASMA involved with the negotiations, let's
5 say, November 6, 1984?

6 THE WITNESS: No, sir, they were involved in
7 the prenegotiation discussions the day or so before that.
8 We actually had the DCAS folks to come in, because there
9 was such a short time between the audit itself and the
10 negotiations, so I don't believe any DCAS folks were
11 actually involved in the ongoing discussions, no, sir.

12 JUDGE JAMES: And what you're referring to, I
13 take it, is some sort of a Governmental meeting; is that
14 right?

15 THE WITNESS: Yes, sir.

16 BY MR. LUCHANSKY:

17 Q Now, Mr. Ford, to the best of your knowledge,
18 the cash flows were submitted by Freedom directly to
19 DPSC, weren't they?

20 A To the best of my knowledge, yes, sir.

21 Q To the extent that DCASMA might have been
22 involved in reviewing them, that was because DPSC would
23 have been asking for their input.

24 A Yes, sir.

25 Q But that wouldn't absolve DPSC from its

1 Q I understand; but your testimony went on to s
2 that it was in use at the time, or you made some oth
3 reference to the use of the L4 clause other than the f
4 that here it is in this contract, didn't you?

5 A I said, sir, I believe there was a series of L
6 clauses in MRE contracts that had been developed by
7 someone else in the MRE program.

8 Q Okay; so, in fact, you really have absolutely
9 no idea, no factual information whatsoever, about L
10 other than the fact that it showed up in the
11 solicitation, correct?

12 A Yes, sir.

13 Q Mr. Ford, you testified about Government Rul
14 Tab 6. I'd like for you to take a look at that. Do yc
15 have that in front of you?

16 A Yes, I do.

17 Q That's the August 10, 1984, letter from Mr.
18 Seeger to Mr. Barkewitz.

19 A Yes, sir.

20 Q First of all, that letter's not addressed to
21 you, correct?

22 A No, it isn't.

23 Q You're not copied on this letter in any way.

24 A No, sir.

25 Q Now, this letter concerns you a little bit,

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1 doesn't it, because it's conditional.
 2 A Yes, sir.
 3 Q And the condition that you specifically pointed
 4 to is in that first sentence where it says in the event
 5 Freedom is awarded a contract in the amount of \$21
 6 million, then, we shall provide financing; isn't that
 7 right that that was the condition you pointed to?
 8 A Yes, sir.
 9 Q And that concerns you, doesn't it?
 10 A Yes.
 11 Q Because, as you said, in the event that a
 12 contract is awarded at less than the \$21 million, it
 13 would appear from this letter that that financing won't
 14 be there; isn't that right?
 15 A Yes, sir.
 16 Q And that's a big concern.
 17 A It would be, yes, sir.
 18 Q Now, to the extent, however, that Mr. Barkewitz
 19 might have reviewed this condition and deemed it to be
 20 acceptable to him, well, that would have been acceptable
 21 -- he would have made the final call, wouldn't he?
 22 A That is correct; he was the contracting
 23 officer.
 24 JUDGE JAMES: You were just the buyer.
 25 THE WITNESS: I was the buyer, yes, sir.

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1 BY MR. LUCHANSKY:
 2 Q You weren't the contracting officer.
 3 A No, I was not.
 4 Q Now, one of the things that, assuming that this
 5 letter were known to Mr. Barkewitz at or about August 10,
 6 1984, it's true, is it not, that one of the things Mr.
 7 Barkewitz would have known if he had seen this August 10
 8 letter is that at the time of contract negotiation,
 9 November 6, 1984, when you and Mr. Barkewitz negotiated a
 10 \$17 million contract with Freedom, your team would have
 11 known that this commitment letter was no longer binding
 12 on Dollar, wouldn't you?
 13 A If he would have known about it.
 14 Q Right.
 15 A It would have raised -- yes, we would have been
 16 aware that there was an issue with Dollar Dry Dock
 17 financing.
 18 Q And if you and Mr. Barkewitz had gone ahead and
 19 awarded -- let me say Mr. Barkewitz; since you were the
 20 buyer, you don't award contracts, correct?
 21 A That is correct; I don't award contracts.
 22 Q If Mr. Barkewitz had gone on and awarded this
 23 contract to Freedom, even knowing of this \$21 million
 24 condition, well, that was certainly his prerogative,
 25 wasn't it?

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1 A Mr. Barkewitz would have had to find Freedom
 2 Industries responsible in addition to finding the price
 3 fair and reasonable, so he would have had to have made an
 4 affirmative determination of responsibility for all their
 5 capabilities, including financial.
 6 Q Well, the preaward survey had been done,
 7 correct?
 8 A Yes.
 9 Q And the preaward survey was done back on -- it
 10 was done back on August 30, 1984, correct?
 11 A I'd have to check on the date.
 12 Q Okay; it was done at a time when the terms of
 13 the contract were different than what was finally
 14 awarded; isn't that right?
 15 A Well, it was done at a time before the final
 16 price was established, yes, sir.
 17 Q Correct; and that preaward was done at a time
 18 when the total contract award was proposed to be \$21
 19 million, correct?
 20 A I believe so, yes.
 21 Q Yes; and that preaward was performed at a time
 22 when progress payments that were to be provided under the
 23 solicitation were lower, \$4 million lower than what was
 24 eventually awarded under the contract; isn't that right?
 25 A I'd have to look at the survey, sir.

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1 Q Okay; well, let's say to the extent that the
 2 terms of financing changed from the time of the initial
 3 preaward to the time of the final contract award,
 4 certainly, that change in the financing being provided by
 5 the Government through progress payments would have
 6 affected the determination of responsibility of Freedom.
 7 A Yes, sir; any changes in the financial area
 8 would have affected the determination of responsibility.
 9 Q So, Mr. Barkewitz certainly could have made a
 10 finding -- may have concluded at the time of award that
 11 Freedom was a responsible contractor based upon the final
 12 negotiated terms and the information that he had on
 13 November 6, 1984; isn't that correct?
 14 A It would be speculative, but he could have,
 15 yes.
 16 Q So, he could have. And you don't know that he
 17 didn't.
 18 A No, sir.
 19 Q And indeed, from your experience as a buyer,
 20 isn't it true that Mr. Barkewitz could not have awarded
 21 this contract to Freedom unless he did make an
 22 affirmative finding of responsibility for Freedom.
 23 A That is correct; every contractor has to have
 24 an affirmative determination of responsibility before a
 25 contract is awarded.

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1 Q And so Mr. Barkewitz -- and that would have
2 been the PCO's determination.

3 A That is correct.

4 Q In this case, Mr. Barkewitz.

5 A That is correct.

6 Q And in this case, on November 6, 1984.

7 A Yes, sir.

8 Q Please turn to Government Rule 4, Tab 5.

9 A Five? I'm sorry.

10 Q Yes, please; back one tab from where we were
11 just looking.

12 A Yes, sir.

13 Q Do you recognize this August 9, 1984, letter
14 from Mr. Seeger to Mr. Barkewitz?

15 A I've seen the letter before, yes, sir.

16 Q Okay; and do you remember if you saw it before
17 contract award?

18 A I believe I saw it, but I can't be positive.

19 Q Okay; now, do you recall that indeed, this is a
20 letter that everyone on behalf of the Government,
21 everyone from the DPSC to DCASMA to counsel, everyone
22 agrees that this letter was received by Mr. Barkewitz and
23 is the one -- and at least this letter was considered in
24 connection with the preaward survey?

25 Let me withdraw the end of that; let me

1 million after September 5, 1984, and eventually to \$17
2 million, approximately \$17 million, at the time of
3 contract award; isn't that right?

4 A Yes.

5 Q So based on your testimony, isn't it absolutely
6 certain that Mr. Barkewitz, who was in possession of the
7 letter, knew at the time of contract award that Dollar
8 Dry Dock was not committed to providing -- not commit
9 under this letter to provide financing to Freedom for
10 this contract?

11 A To tell you the truth, I'm not certain, because
12 there are other letters talking about a \$6 million line
13 of credit from Dollar Dry Dock subsequent to these
14 letters.

15 Q Oh, really?

16 A There were other discussions -- I remember
17 discussions of \$6 million lines of credit that Freedom
18 talked about having so --

19 Q Really? When?

20 A They were discussed --

21 Q When did those discussions take place?

22 A They happened sometime during the negotiation
23 process, and I really can't put a number down, but I
24 specifically, for some reason, I didn't even remember the
25 \$7.2 number, but \$6 million stuck out in my mind as one

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1 withdraw the question, and let me ask it again. Do you
2 recall that this August 9, 1984, letter is one that DPSC
3 and DCASMA all agree was received at or about August 9,
4 1984?

5 A Yes.

6 Q And is it your contention that the -- if you
7 look at the August 9 letter, you see that this letter has
8 the same condition as the one you were looking at on
9 August 10, doesn't it?

10 A Yes, sir; the one on August 10, though, has
11 additional conditions.

12 Q Okay; well, I don't want to talk about that
13 right now, because it seems to me like that first
14 condition is a very, very significant condition; isn't
15 that right?

16 A Well, it was a condition, yes, sir.

17 Q It was a condition, right?

18 A Yes, sir.

19 Q And you've just testified that with that
20 condition of \$21 million contract was not satisfied,
21 well, then, this letter would not be a binding commitment
22 letter on behalf of Dollar Dry Dock; isn't that correct?

23 A Yes, sir.

24 Q But in fact, this \$21 million proposed contract
25 was changed through negotiations down to about \$18

1 of the discussions that Freedom had financing for.

2 Q So these are discussions that you participated
3 in?

4 A Yes, sir.

5 Q And other than the number \$6 million, do you
6 have any recollection whatsoever about what you're
7 talking about?

8 A \$6 million and Dollar Dry Dock were the two
9 names.

10 Q Was there ever a letter to this effect?

11 A I'm not sure.

12 Q Who did you get this information from?

13 A That's one of the things I remember as part of
14 these discussions. I mean --

15 Q From whom did you get this information?

16 A Freedom Industries, sir.

17 Q From whom at Freedom?

18 A I believe Mr. Thomas or one of his negotiators
19 I distinctly remember that.

20 Q You don't remember from whom you got this
21 information, do you?

22 A No, sir.

23 Q And you don't remember the context.

24 A It was during discussions, yes, sir.

25 Q Yes; you don't remember the terms.

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1 A No, sir.

2 Q You don't remember whether, in fact, this was
3 anything other than some reference offhand -- you don't
4 remember anything other than that number being bandied
5 about, do you?

6 A The number of the bank, sir.

7 Q Was it in the postnegotiation memorandum? Was
8 that number there?

9 A I don't believe so, no.

10 Q It wasn't a serious enough number or an
11 important enough number to make it into your
12 postnegotiation memorandum.

13 A The postnegotiation memorandum talked about the
14 contract costs, not necessarily about financing, sir.

15 Q Now, so getting back to the August 9 letter,
16 certainly, Mr. Barkewitz knew at the time of award on
17 November 6, 1984, that Dollar Dry Dock was not providing
18 any financing pursuant to this August 9, 1984 or the
19 August 10, 1984 letters; isn't that right?

20 A I don't believe so, no.

21 Q You don't believe what?

22 A That he was not aware that they weren't
23 providing any financing. The letter just addresses --
24 excuse me -- a specific financing level. I'm not sure
25 that he knew they were providing no financing whatsoever.

1 isn't that correct?

2 A No; it was apparent to me, sir, that they
3 weren't providing \$7.2 million worth of financing on this
4 contract. I wasn't aware whether they were providing
5 other financing. I don't know the amount.

6 Q Mr. Ford, please tell me, if you would, about
7 what the extent of Mr. Liebman's involvement was. You've
8 testified that Mr. Liebman wasn't actually present at the
9 negotiation table on November 6, 1984, correct?

10 A I believe so, yes.

11 Q However, Mr. Liebman was present on November 5,
12 1984, when the Government all met, and DCASMA briefed
13 DPSC on Freedom's position; isn't that correct?

14 A I believe so, yes.

15 Q And, in fact, Mr. Liebman headed the DCASMA
16 team for purposes of briefing DPSC; isn't that right?

17 A That, I'm not really sure of. I know he was
18 part of discussions, but I don't know who headed the
19 team. I don't recall who headed the team.

20 Q And you do know also that the reason Mr.
21 Liebman was there was because as ACO, he had coordinated
22 the gathering of the studies of Freedom's October 16
23 price proposal; isn't that right?

24 A Yes, sir.

25 Q And so, DCASMA performed a price analysis of

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1 Q Under this letter, sir --

2 A Yes, sir.

3 Q Let me ask the question again.

4 A Yes, sir.

5 Q You do know with a certainty that at the time
6 of contract award, on November 6, 1984, Mr. Barkewitz was
7 not relying on this August 9, 1984, or the August 10,
8 1984, commitment letters; isn't that correct?

9 A I don't know that for certainly, sir, no.

10 Q You do know that Mr. Barkewitz understood, as
11 you testified to yourself today, that as of the time of
12 contract award on November 6, 1984, that Dollar was not
13 going to be providing any financing to Freedom under
14 these commitment letters at tabs 5 and 6; isn't that
15 correct?

16 A Well, sir, I didn't see the document under tab
17 6, so I can say that I would have a question based on
18 that, but I can't say what Mr. Barkewitz thought.

19 Q It was apparent to you --

20 A To me, it was.

21 Q -- even as just the buyer.

22 A Yes.

23 Q That Dollar Dry Dock was not committed to
24 providing financing to Freedom under this August 9, 1984,
25 letter when the contract was awarded at \$17 million;

1 Freedom's October 16, 1984, price proposal, correct?

2 A Yes, they did.

3 Q And they based that report, in part, upon an
4 analysis that DCAA did of Freedom's October 16, 1984,
5 price proposal; isn't that right?

6 A Yes.

7 Q And Mr. Liebman assembled all of this
8 information and was responsible for coordinating and
9 digesting these analyses, wasn't he?

10 A I'm not sure, again, if he was responsible for
11 it. I know that he was part of the board that was there.
12 I mean, there was numerous people from DCASMA there: at
13 one time or another, the commander of DCASMA was there.
14 So I'm not sure who the lead was on that, but he was
15 involved.

16 Q Certainly, all of the people at DCASMA appeared
17 to be very familiar with the October 16 proposal,
18 correct?

19 A I believe so, yes.

20 Q And you know that the October 16 proposal was
21 already approximately \$3 million lower than the \$21
22 million proposal from August 2, don't you?

23 A Well, I know we went from \$34 a case to \$29 a
24 case. I didn't do the math but, I mean, it was
25 significantly lower.

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1 Q Okay; and that occurred, those two figures, the
2 \$34.81 a case, that was back around July 31, August 2,
3 right?
4 A It was sometime in the summer, yes, sir.
5 Q And then, after September 5, after the meeting
6 with Captain Parsons, that case figure came down to about
7 \$29.90, correct?
8 A I believe that was the number, yes, sir.
9 Q And if you do the number, that might account
10 for the change from \$21 million to about \$18 million,
11 correct?
12 A Yes, sir.
13 Q Okay; and then, the October 16 proposal is this
14 \$18 million figure we talked about.
15 A I believe so, yes.
16 Q Now, the DCASMA team, including Mr. Liebman,
17 all seemed pretty well versed in the Freedom proposal,
18 correct?
19 A In terms of the pricing proposal, I believe
20 they had a good -- the DCASMA team had a good
21 understanding, I believe, yes.
22 Q And they appeared well-versed in the DCASMA
23 review of that proposal.
24 A As well as could be expected under the
25 circumstances. Like I said, it was a very rushed --

1 had spreadsheets.
2 A They had spreadsheets, yes, sir.
3 Q But you also know that with each proposal,
4 Freedom submitted a new set of cash flows.
5 A I know they submitted spreadsheets. As to what
6 was on each one, I mean, each document, I couldn't
7 testify to.
8 Q I'm not asking you what's on each document.
9 I'm simply asking: you do recall that with each price
10 proposal, Freedom worked up a new set of spreadsheets
11 submitted cash flows in support of each of their price
12 proposals as required under the solicitation. Do you
13 remember that?
14 A I said I believe so, but I can't, you know,
15 positively testify to that.
16 Q You talked about the IPP base.
17 A Yes, sir.
18 Q And you said that there's no certainty that an
19 IPP MRE contractor was going to get another award.
20 A Well, I believe I talked about IPP in general,
21 sir.
22 Q Okay.
23 A There's no certainty they're going to get an
24 award. You still have to find them responsible. I mean,
25 there are constraints with the IPP. You can't pay any

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1 normally, an audit takes 120 days or more. This audit of
2 Freedom was done in a matter of a month or so, the whole
3 thing was done: audited; price evaluation; negotiation.
4 It was a very quick negotiation.
5 Q They presented this information to you on
6 November 5.
7 A Yes.
8 Q And they were later commended. In fact, Mr.
9 Liebman was one of the people later commended on
10 presenting this information on November 5, correct?
11 A I don't recall.
12 Q So they presented the DCASMA review and the
13 DCAA information, correct?
14 A Yes.
15 Q And you indicated that to the best of your
16 recollection, DCASMA, including Mr. Liebman, had these
17 spreadsheets. They had a copy of the spreadsheets also;
18 is that right?
19 A I'm not sure what spreadsheets they had. I
20 testified there were a number of spreadsheets with
21 different proposals, so I don't know which ones -- I
22 couldn't say which ones they had, sir.
23 Q Mr. Ford, based upon your testimony, I wouldn't
24 even presume to ask you specifically which spreadsheets,
25 because I know you don't know, but you do know that they

1 price to maintain a base. You should be looking for
2 alternatives to increase the industrial base at all
3 times. So if you find those alternatives, it may change
4 the makeup of an industrial base. Your overall goal,
5 though, is to come up with an industrial base that
6 supports the services' requirements for the IPP item.
7 The companies in that are not so important as the
8 combined ability to fulfill the needs.
9 Q Well, certainly, sir, first of all, the MRE
10 program is under the IPP program, correct?
11 A Yes, sir.
12 Q And you testified that it's the goal in the IPP
13 program, including MRE, specifically the MRE program, the
14 goal was to maintain the industrial base to obtain these
15 items, correct?
16 A Yes, sir.
17 Q Now, once -- it takes a lot to qualify a
18 contractor as an MRE IPP producer, doesn't it?
19 A I believe so, yes.
20 Q They have to go through a lot of effort, don't
21 they?
22 A Yes, sir.
23 Q They have to invest a lot of money.
24 A That, I couldn't speculate on, how much money.
25 There is a lot of effort involved in it. How much money

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1 would be speculation on my part. I don't know what they
2 spend.

3 Q Well, Mr. Ford, you and Mr. Barkewitz
4 negotiated to pay the startup costs of Freedom in this
5 MRE-5 contract, didn't you?

6 A We negotiated certain costs in the contract.
7 I'm not sure we negotiated all their startup, no, sir.

8 Q Okay; so, you're at least aware of \$7 million
9 of startup costs involved in developing a contractor,
10 aren't you?

11 A I don't know the figure.

12 Q You know that a contractor has to become
13 Walsh-Healey certified in order to become approved as an
14 MRE producer?

15 A They used to be, yes, sir.

16 Q At the time of this contract.

17 A Yes.

18 Q And you know that Freedom went through that
19 effort. You know that Freedom went through that?

20 A Freedom was a Walsh-Healey, so I know at some
21 time, they had to get certified, yes, sir, under
22 Walsh-Healey.

23 Q So once DPSC has plant producers who are
24 qualified for the MRE program, what is the expectation of
25 DPSC as to how they're going to be maintained? And I'm

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1 not talking about guarantees, and I'm not talking about
2 certainties. What I'm talking about is expectations.

3 A We expect the members of the IPP to participate
4 in the contracting process.

5 Q And isn't it true that what that means is that
6 the normal expectation is that with each year's
7 solicitation, that DPSC generally, under ordinary
8 circumstances, would negotiate with each of the current
9 IPP MRE producers to try to reach a reasonable contract
10 for MREs; isn't that right?

11 A We negotiate -- IPP contracts, we generally
12 negotiate only with IPP producers.

13 MR. LUCHANSKY: Objection: move to strike.

14 JUDGE JAMES: Granted.

15 BY MR. LUCHANSKY:

16 Q Mr. Ford, I want you to listen to my question
17 because --

18 A Yes, sir.

19 Q -- I don't think it's a hard one.

20 Wasn't it the expectation of DPSC that the way
21 they would maintain the industrial base and the IPP MRE
22 producers would be to negotiate each year with the
23 currently-approved MRE producers if they can reach a
24 reasonable price for that year's contract? Wasn't that
25 the expectation?

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1 A My expectations, sir, were to negotiate with
2 the current producers or any new producers to the base to
3 increase -- to support the industrial base. That would
4 be my expectation, sir.

5 Q I'm talking about -- you worked at DPSC.

6 A I'm sorry.

7 Q You worked at DPSC.

8 A Yes.

9 Q You're familiar -- you testified about the MRE
10 program.

11 A Yes, sir.

12 Q So clearly, you seem to be conversant with the
13 policy of DPSC regarding MREs, isn't that right?

14 A The policy is to protect the base and/or expand
15 the base, yes, sir.

16 Q And isn't one way to maintain the current base
17 to negotiate follow-on contracts in the coming years with
18 currently-approved MRE producers?

19 A That is one way, yes, sir.

20 MR. LUCHANSKY: I have no further questions.

21 JUDGE JAMES: Any redirect by the Government?

22 MS. HALLAM: No, Your Honor.

23 JUDGE JAMES: I want to ask you this, Mr. Ford.

24 THE WITNESS: Yes, sir.

25 JUDGE JAMES: You reviewed the contract after

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1 it was awarded?

2 THE WITNESS: The contract, sir?

3 JUDGE JAMES: Yes.

4 THE WITNESS: Yes, sir.

5 JUDGE JAMES: Did that contract incorporate by
6 reference MOU or memorandum of understanding of 6
7 November 1984?

8 THE WITNESS: I don't recall, sir. I'd have to
9 look at the contract again. I haven't looked at the
10 contract itself in a long time.

11 JUDGE JAMES: You can't say yes or no?

12 THE WITNESS: No, sir.

13 JUDGE JAMES: Well, take a look at Rule 4. Tah
14 10 and anywhere else you please and see if you can answer
15 the question.

16 THE WITNESS: Yes, sir.

17 THE WITNESS: Sir, I don't see that document
18 referenced in the contract, sir.

19 JUDGE JAMES: All right; as a result of my
20 question to the witness, does the Government have any
21 further question of the witness?

22 MS. HALLAM: No, Your Honor.

23 JUDGE JAMES: How about the appellant?

24 MR. LUCHANSKY: Yes, just one.

25 BY MR. LUCHANSKY:

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1 Q Do you agree, Mr. Ford, that that memorandum of
2 understanding to which you referred was indeed a binding
3 agreement between the Government and Freedom?

4 A The MOU, sir, I believe, bound on the price,
5 yes, sir. As far as the price basis, yes, sir, that's my
6 belief.

7 Q But you agree -- it's your belief that it was a
8 binding commitment by the Government to Freedom.

9 A I believe, sir, that it became the basis for
10 this contract, which became the actual binding document.
11 It's a two-signature contract signed by Mr. Thomas and
12 Mr. Barkewitz.

13 [Pause.]

14 MR. LUCHANSKY: No further questions, Your
15 Honor.

16 JUDGE JAMES: Thank you ever so much, Mr. Ford,
17 for your testimony. You may step down from the witness
18 stand.

19 Let's go off the record.

20 [Whereupon, at 12:30 p.m., the hearing recessed
21 for lunch, to reconvene at 1:20 p.m.]

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AFTERNOON SESSION

2 [1:20 p.m.]

3 JUDGE JAMES: All right; let's go back on the
4 record. Whom does the Government call?

5 MS. HALLAM: Mr. Mara, Pat Mara.

6 JUDGE JAMES: All right.

7 Whereupon,

8 PAT MARA

9 was recalled as a witness herein and, having been
10 previously duly sworn, was examined and testified further
11 as follows:

12 JUDGE JAMES: Please remember you are under
13 oath.

14 THE WITNESS: Yes, sir.

15 DIRECT EXAMINATION

16 BY MS. HALLAM:

17 Q Would you just refresh my memory again? You
18 had testified that there was a period of time that you
19 had left Freedom, beginning in February of 1985; you came
20 back -- was that August of 1985?

21 A Yes; I'm not sure of the exact date. I believe
22 it was August. I do know it was February 6.

23 Q During the time frame that the subject
24 solicitation was out, wasn't there also a solicitation
25 out for retort products?

1 A I don't remember.

2 Q Okay; I think you indicated that you weren't
3 involved in the submission of progress payment requests

4 A Some of them, I was. I was involved with the
5 first -- definitely the first.

6 Q The first progress payment --

7 A Yes.

8 Q -- request by Freedom Industries?

9 A That's right; anything up to February 6, I
10 guess. I hand-carried it myself.

11 Q Well, besides submitting them, were you
12 actually involved in the preparation?

13 A I believe so.

14 Q And did that responsibility resume again when
15 you came back on Board in August of 1985?

16 A To some extent, yes; not immediately
17 necessarily, but yes.

18 Q Were you present during the reviews conducted
19 by DCAA during the time frames that you were on board
20 with Freedom?

21 A Yes.

22 Q Were you involved in any way in maintaining
23 Freedom's books?

24 A Yes.

25 Q Did you actually make the entries onto the

1 books?

2 A I probably did in early February, the first --
3 when there were two or three entries to be made only, and
4 then, later on, it was done by the accounting department.

5 Q And who was the person in charge of the
6 accounting department?

7 A Well, directly under me was the comptroller,
8 Dolph Vera, and under him was an accountant, Neil Inga

9 Q So after the February 1985 time frame, you
10 weren't actively involved in maintaining the books in any
11 way.

12 A No, not actually making debits and credits, but
13 it was all under my supervision when I was there.

14 Q So you were familiar with what was being put on
15 the books.

16 A Yes.

17 Q Is that correct?

18 Just an aside: do you know who owned Freedom
19 Industries?

20 A Who owns Freedom Industries?

21 Q Yes.

22 A I know one of the shareholders was Dollar Dry
23 Dock, Dollar Savings Bank, Dollar Bank.

24 Q Dollar Dry Dock?

25 A Dollar Dry Dock, and Henry Thomas or Jacine

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1 Thomas basically the other stockholder.

2 Q Do you know what percentage one or the other
3 owned?

4 A I believe it was, during the time I was there,
5 virtually 100 percent of the stock, I believe, other than
6 what was held by Dollar.

7 Q Do you know who owned HT Foods?

8 A At what point?

9 Q Did the ownership interest change at any point?

10 A I don't know.

11 Q When they took over the contract, when the
12 contract was novated to HT Foods.

13 A I believe HT Foods was owned by Henry Thomas,
14 but my recollection is fuzzy.

15 Q Do you recall attending a post-award conference
16 meeting on December 14, 1984?

17 A Yes.

18 Q And did you attend the entire meeting?

19 A That, I don't know. I don't know.

20 Q Do you have any knowledge of the lease
21 arrangements for I believe what we're calling the
22 Brookdale, the Bunksdale facility?

23 A Some.

24 Q What's your knowledge of the lease arrangement
25 for the facility?

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1 A Well, it was originally leased from Richard
2 Penzer or some company controlled by him and later was
3 sold to Pilot Realty. And HT Food had a lease on that
4 property and leased, I believe in the beginning, to
5 Freedom, subleased to Freedom.

6 Q In subleasing it to Freedom Industries, was it
7 subleased on exactly the same terms that HT Foods leased
8 it from Penzer?

9 A Not 100 percent. There were some clauses that
10 were different, I believe. There was an option from HT
11 Foods to buy the factory. I don't remember the details,
12 but I know there was an option or something regarding
13 forklifts and some of the other equipment, and I don't
14 think all of that was in the sublease to Freedom, as I
15 remember.

16 Q To your knowledge, were the payments the same
17 for Freedom Industries to HT Foods as they were for HT
18 Foods to Penzer or the property holder?

19 A To my knowledge, it passed on, to my knowledge,
20 the collection.

21 Q Is it correct that in the first progress
22 payment request submitted by Freedom Industries that the
23 first submission included essentially a claim for just
24 the rent on that building, the occupancy cost?

25 A Only? Without seeing the document, I can't

1 recall that specifically, but I thought there were two or
2 three other items in there, but you're talking a long
3 time ago.

4 Go ahead.

5 Q But in any one of the submissions of progress
6 payment number one, it did include a rent payment; is
7 that correct?

8 A Yes, I believe it did.

9 Q And were you responsible for preparing that
10 document for submission?

11 A I think I did prepare it. If not -- if I
12 didn't prepare it, it would have been prepared by an
13 accountant, at that point probably Neil Inga. I do
14 remember taking the progress payment down to DCASMA
15 myself. That, I remember.

16 Q Were you aware of when that was submitted, at
17 least the second or third submission of it was after the
18 lease had been revoked?

19 A I don't understand the question.

20 Q Were you aware that the lease had been revoked
21 by Mr. Penzer?

22 A Revoked?

23 Q Revoked, yes.

24 A No.

25 Q Do you know who John York is or was?

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1 A Yes.

2 Q Who is that?

3 A Henry used that name on occasion when telephone
4 calls came in. That's the only recollection I have of
5 that.

6 Q Do you know why he used that name?

7 A No; I could suppose, but I don't know.

8 Q Do you know if he conducted any business using
9 that name?

10 A Not that I can recollect.

11 Q Do you know who Jacine Thomas is? Am I
12 pronouncing the first name right?

13 A Yes, I do know.

14 Q And who is she?

15 A I believe his wife.

16 Q I'm sorry.

17 A Was, was his wife back then.

18 Q Was she on Freedom's payroll, do you know?

19 A Directly?

20 Q As opposed to --

21 A Indirectly.

22 Q Was she on the payroll?

23 A My recollection -- can you rephrase the
24 question? I'm having problems with the question.

25 Q Did she work for Freedom New York?

1 A Not to my recollection, other than a minor role
 2 on a --
 3 Q What type of minor role?
 4 A I don't remember, but I remember, you know, on
 5 occasion. I don't remember -- full-time employee, no.
 6 Q Do you know if any progress payments included
 7 salaries for her?
 8 A Well, I do know that Henry received his salary,
 9 I thought, through payment from Jacine.
 10 Q What does that mean?
 11 A What does that mean?
 12 Q Yes.
 13 A Well, when I got back in August, what it meant
 14 was that the auditors had agreed that this is the way
 15 that Henry would receive his salary. I remember having
 16 discussions with the auditors on that matter.
 17 Q When you say he was receiving his salary
 18 through Jacine, the checks were made out to Jacine?
 19 A Jacine? I believe they were made out to
 20 Jacine; I believe that. She was on the payroll. She
 21 received his -- he earned the salary, and it was paid in
 22 her name, I believe.
 23 Q So he was not also on the payroll at that
 24 particular point in time?
 25 A I thought just one of them was.

1 it better. I do know a company called New Personnel or
 2 something along that regard was --
 3 Q New Ventures?
 4 A New Ventures, sorry.
 5 Q Do you know who the corporate office officials
 6 were or officers were of Freedom New York?
 7 A Freedom New York?
 8 Q Right.
 9 A Not from memory -- yes, I do know. I know
 10 Linda was an officer.
 11 Q Linda who?
 12 A Eglehart, I thought.
 13 Q Did she have a title?
 14 A I believe secretary; Henry, I thought, or
 15 Jacine -- I'm not sure now. I was not an officer, to my
 16 recollection, other than --
 17 Q Was Mr. Thomas, Senior an officer, do you know
 18 A He might have been a nominal stockholder. I
 19 don't remember if he was an officer.
 20 Q Do you remember the name of Mr. Dirks?
 21 A Dirks, Walter Dirks?
 22 Q Dirks.
 23 A I remember the name. He might have been a
 24 nominal stockholder. My recollection is they had one
 25 share or two shares or something like that.

1 Q Do you know how much salary was being collected
 2 through Jacine Thomas?
 3 A My recollection is that Henry Thomas received
 4 \$125,000 a year, and I thought it was either paid totally
 5 to Jacine or substantially to Jacine, with the DCAA's
 6 concurrence. I have clear recollection of discussing it
 7 with DCAA.
 8 Q Do you know who Kenneth Drummond was?
 9 A Yes.
 10 Q And who was he?
 11 A Kenneth Drummond was a CPA whom I believe had a
 12 personnel supply -- supplied personnel, temporary
 13 employees or an employment service to Freedom.
 14 Q Was he on the payroll?
 15 A If he was, in some minor capacity; I don't
 16 remember if he -- I don't remember. If he was, it was a
 17 minor capacity.
 18 Q Do you know what that minor capacity was?
 19 A Title-wise, no; not from memory.
 20 Q Was he paid as a consultant or -- I'm sorry, as
 21 an independent contractor?
 22 A At what point?
 23 Q At any point.
 24 A Could have been; it's ringing a bell, but it's
 25 not clear. If you could show me something, I could see

1 Q But he didn't have a title, so to speak?
 2 A No; I know Mr. Thomas worked for Freedom, Mr.
 3 Henry Thomas, Sr. worked for Freedom.
 4 Q Were you aware that at some point in time in
 5 1986, Linda Eigelhart resigned?
 6 A What date?
 7 Q I have no idea. Do you remember anything about
 8 her resignation?
 9 A I remember Linda sometime in -- before I left
 10 in February having a baby, and I don't know if she
 11 resigned or took a leave of absence; I don't remember
 12 that.
 13 Q Was she -- this is February of 1985?
 14 A December, January, February, somewhere in that.
 15 Q Of 1985?
 16 A December 1984, January 1985, February --
 17 Q Was she there when you came back on board in
 18 August of 1985?
 19 A Yes.
 20 Q Do you remember her resigning at any time after
 21 that?
 22 A No, other than what might have happened near
 23 the end of the contract. I don't know who resigned and
 24 who was laid off. I can't tell you that.
 25 Q Do you recall a problem or a concern of DCAA

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1 with regard to their belief that Freedom was listing
2 certain individuals as employees on the payroll and then
3 submitting progress payment requests that included taxes
4 and Social Security and then, at a later time, reversing
5 the books and listing those individuals as
6 subcontractors; independent subcontractors or independent
7 contractors?

8 A That's a loaded question; I can't absorb it
9 all. Can you break it down?

10 Q Do you recall Freedom being questioned by DCAA
11 with regard to a concern that DCAA had where they felt
12 that Freedom was listing individuals as employees on its
13 books and then submitting progress payment requests which
14 included the taxes and Social Security for those
15 individuals and then, at a later time, changing the books
16 and listing those individuals as independent contractors
17 without a tax or Social Security liability?

18 A It's a little vague; I honestly can't -- I
19 mean, it's ringing a bell.

20 Q You don't recall anything about that?

21 A It's ringing a bell, but I can't speak
22 specifically to it.

23 Q Okay; maybe I'll come back to it later, maybe
24 now that the memory cells are starting to spark. Maybe
25 you'll remember a little bit more later.

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1 At any time that you were at Freedom, were you
2 responsible for reviewing what went -- were you
3 responsible for reviewing what went into the progress
4 payment requests?

5 A Yes.

6 Q Did you rely on somebody else's input to do
7 that, or did you gather that information yourself?

8 A Well, during the -- up to February 6, there
9 weren't -- February 6, 1985, there weren't that many
10 employees.

11 Q Right.

12 A So anything that was done at that point would
13 have been done basically by myself and Henry or Linda if
14 she was there and Neil Inga, and beyond that, then, it
15 was a full-blown accounting department with all of the
16 documentation, under the control of Dolph Vera from
17 August 1985 on.

18 Q So with regard to any review, what did you do?

19 A I reviewed it.

20 Q Was all the information provided to you by the
21 accounting department, and you just passed it on, or did
22 you do some sort of review to assert its correctness?

23 A I did a review of the package that was going to
24 be submitted, yes, I did a review. In fact, in many
25 cases, I even discussed it with the auditors before it

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1 even went in. In fact, I'll even go one further: the
2 first progress payment that was submitted, I even called
3 DCAA to let them know -- called DCASMA to let them know I
4 was bringing it down the next day and would try to
5 discuss it with them.

6 [Loud siren sound from street.]

7 BY MS. HALLAM:

8 Q This was a relatively quiet street last week.

9 A I grew up and had to sleep in this
10 neighborhood, so it's not that bad.

11 Q During the course of the contract, when you
12 were employed by Freedom Industries, HT Foods or Freedom
13 New York, did you personally interface with Bankers
14 Leasing with respect to its disbursement of funds or
15 advancement of funds to Freedom?

16 A Yes.

17 Q Do you recall when Bankers Leasing first
18 started disbursing funds to Freedom New York or any of
19 its predecessors?

20 A I wasn't there when it first started. That
21 process had already taken place before -- during my
22 absence.

23 Q Could you tell me if you have the information
24 how the disbursements were determined, how much Bankers
25 was going to give Freedom at any point in time?

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1 MR. STEIGER: Objection, Your Honor; I believe
2 that the witness said he wasn't there for the disbursing
3 or when it was arranged. Did I misunderstand?

4 JUDGE JAMES: Objection is overruled.

5 THE WITNESS: Can you ask the question again?

6 BY MS. HALLAM:

7 Q Do you want it repeated?

8 A Yes, please.

9 Q Could you tell me what mechanism there was for
10 obtaining disbursements or how disbursements were
11 obtained by Bankers?

12 A I'm not sure if it was the same all the way
13 through from the period -- I'm speaking from August --

14 Q We understand you're only speaking as the to
15 term you were with Freedom.

16 A It would have been done, for the most part,
17 generally, by letting them know what we were submitting
18 to the Government for reimbursement and getting funds on
19 that basis or prior to the actual submission to meet the
20 payroll and things that we knew were going to go into the
21 next progress payment, we would contact them by either
22 letter, telex and/or telephone.

23 Q And they would advance the funds that were
24 requested?

25 A Generally, yes.

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Q Was there a percentage that they would advance depending on the progress payment, or was it 100 percent of what was expected to be recovered or 70 percent, 60 percent? Was there --

A Well, very clearly, there was no doubt in my mind that since the loan, the financing arrangement with Bankers was established by Henry Thomas, and Henry Thomas was on the line on that loan, that whatever monies that were released from Bankers to the company were done only after Henry had some discussion or approval as far as Bankers was concerned so that we could draw down the funds. I would make a request and, you know, get it or not get it, but I do know that Henry was the one saying send the money or don't send the money, because it was his loan.

Q Were there times that Bankers wanted to send money, but Mr. Thomas told them not to send money?

A Not that I can remember to that extent.

Q Do you know what the administrative -- administration fees were that were being charged by Bankers Leasing?

A The rate?

Q Were there administrative fees being charged by Bankers, to your knowledge?

A Yes, I'm sure, but I don't remember what they

us the money. I know the guarantee was there. I'm not sure who paid it, us or them. I'm not sure.

Q Are you aware of any time during the fall of 1985 time frame when there was more of a struggle to get monies freed up from Bankers Leasing?

A Well, I remember struggles; the basic struggles I remember was getting the money from the Government. But I do, there were -- there were times that we struggled. Most things were a struggle.

Q I'm sorry?

A Most days were a struggle. We had to struggle with the Government to get the monies due and fight out what was --

Q I'm talking about Bankers Leasing. Do you remember --

A I thought you were talking about struggling. Bankers Leasing, I remember in the latter part of October, everybody was on edge, and I'll go back to my answer: that's when whatever monies that were going to come into the company were basically going to come by Henry telling the banker fine, send the money.

Q That was October of 1985?

A At least October of 1985, November -- no, October 1985 -- I think we're talking in the 1986 frame by now. I think things were going pretty smooth in 1985.

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were, and I can't even recall what percentage over prime the interest rate was.

Q Okay.

A But I know it was structured along that line, yes.

Q Did Bankers also present letters of credit to certain subcontractors?

A I don't know if they were specifically letters of credit or some type of guarantee that were given on occasion to subcontractors, yes.

Q And do you recall whether that was something they did with every subcontractor, or was that given upon request, or do you have any knowledge of that?

A My recollection is mostly for the major materials, the major supplies that -- the goods that were considered direct materials under the contract. I can remember that Sterling and the Gravco and the predominant -- the major suppliers; I can remember that and maybe an occasional one other than a major supplier. But the major suppliers, I remember.

Q With regard to the subcontractors or suppliers that had these either letters of credit or guarantees, did Bankers Leasing pay those companies directly?

A That's a good question. I don't remember the mechanism. Either they paid them directly, or they sent

as I remember it, latter 1985 with the bank, not with the Government.

Q We're talking about the October 1986 time frame. We'll go back to that time frame. Did you in any way participate in preparing Freedom New York's package for the V-loan for its submission to Bankers Leasing?

A I believe so; can you refresh me with the date on that?

Q It's probably sometime during the summer of 1986.

A Yes.

Q And do you know what you prepared for submission to Bankers Leasing?

A The exact papers? No, but I do remember -- I spent a lot of time on it, yes.

Q After submission of that package to Bankers Leasing, did you become aware that the application was rejected?

A I probably did become aware if it was in that time frame. I don't recall it specifically.

Q Do you recall any of the deficiencies or reasons for its rejection?

A No, specifically not.

Q Do you recall that one of the problems was the lack of certified financial statements?

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1 A I don't recall that. In fact, my memory gorge
2 is kind of opened. It seemed to me I thought that the
3 last V-loan was issued way back quite a few years prior
4 to that and that they virtually won't be issued
5 anymore. That's my recollection.

6 Q That's not why the application was rejected,
7 was it?

8 A Don't remember the specifics of it. If you
9 could show me something that would refresh my memory --

10 Q Did you have any involvement in the
11 resubmission of the application, or do you recall whether
12 it was even resubmitted?

13 A I don't recall; if you could show me something,
14 I can recall, but I don't offhand.

15 Q Do you remember attending a meeting in August
16 of 1986 with Dr. Wade?

17 A I never met Dr. Wade, to my knowledge.

18 Q Okay; you had mentioned something about Bankers
19 disbursements becoming more of a struggle in the October
20 1986 time frame. Isn't it a fact that they disbursed
21 very little money after October 1986?

22 A I can't say very little, because I don't know
23 how much we were requesting; I don't know.

24 Q Did Bankers refuse to make any further
25 advancements to Freedom after October of 1986 unless and

1 fact.

2 Q Could you tell me why the Government was making
3 that electrical payment for Freedom when all Henry had to
4 do was tell Bankers we want money, and it would
5 materialize?

6 A Well, I can't answer the question in that way.
7 I can answer it that all funds that were proper under the
8 contract were supposed to come from the Government
9 anyhow, and I could see this as a means of Henry trying
10 to just short-circuit it because of the numerous delays
11 we've had throughout the contract getting monies when
12 they were due us.

13 Q Well, putting aside your answer that you keep
14 repeating now to every question I ask, we can just assume
15 that's going to preference every one of your answers, so
16 you don't have to repeat it anymore.

17 A Well, okay, stop asking me --

18 Q You had previously testified that Henry just
19 had to call Bankers, and the money would be there. I'm
20 asking you why was it necessary, then, for the Government
21 to make these piddling little payments of several
22 thousand dollars to turn back on electricity or to keep
23 the electricity on?

24 A You'd have to ask Henry that. I can't answer
25 that question.

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1 until there was an MRE-7 contract?

2 A I don't know if that was the date, and I don't
3 remember when they stopped making payments, but they did
4 stop making payments at some point. I don't remember
5 when.

6 Q Is it your understanding that the payments
7 would not be continued until Freedom was awarded an MRE-7
8 contract?

9 A No, my understanding was that Henry would
10 determine when Bankers was going to give us money or not.
11 That was my understanding, very seriously. Nothing
12 happened without Henry. I could do all the begging of
13 the bank, and Henry, when he said pay, we got paid.

14 Q Are you aware of two occasions when the
15 Government paid electric bills on behalf of Freedom?

16 A I seem to remember one, but I don't remember
17 two.

18 Q When is the time that you remember?

19 A I don't remember; I just remember the incident.
20 I remember Con Edison -- I could be wrong; I thought -- a
21 number \$4,500 is popping in my head, but I don't know if
22 that's accurate.

23 Q Was that sometime during the summer of 1986?
24 1985?

25 A Most probably, but I don't know it to be a

1 Q But it's still your testimony that all Henry
2 had to do was call Bankers Leasing, and the money would
3 have been there.

4 A Yes; I think if I were in Henry's shoes, I
5 would have done the same thing.

6 Q With regard to MRE-5 at the end of the
7 contract, after the November 1986 time frame, wasn't it
8 Freedom's position that it was economically unfeasible to
9 continue production on that contract unless there was
10 going to be an MRE-7 contract?

11 A I can't say that was Freedom's position. I
12 know I had a personal position that I thought -- I
13 thought the contract should have been issued before we
14 kept performing under the MRE-5, but we did continue
15 under MRE-5.

16 Q Wasn't it true that at that point in time
17 Freedom New York was losing money on every case that it
18 produced under the MRE-5 contract?

19 A Not necessarily; at the point we were losing
20 money, we weren't losing money on the cases we were
21 producing. We were making money on the cases we were
22 producing. We were losing money on the whole project
23 because of what happened starting November 15, 1984. We
24 were making huge money, in fact; when we were at the
25 point of turning out 60,000 cases a month, I was

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1 impressed to a great extent with the original forecast
2 that I had put together, based on an empty building, no
3 employees, nothing else; we were pretty much on target
4 with the original budget and probably more profitable.
5 We were not losing money when we were producing at the
6 60,000 case level at all.

7 Q And when was that period of time?

8 A During the summer, during the summer of 1986,
9 as I remember; 1985, 1986, whenever we were there.
10 Whenever we were allowed to produce at the level we had
11 projected, we were very profitable on a per-case basis.
12 The problem with the lack of profit was 31 months versus
13 14 months. That's where the problem was.

14 Q So can you tell me more specifically what time
15 frame that was, or was that just any time frame that you
16 were producing --

17 A What I'm saying is that when we were producing
18 relatively normal, what I will call normal, anyplace
19 between 45,000; 60,000; 65,000 cases, we were extremely
20 profitable on a per case basis. Where we were losing
21 money was on having this contract go 31 months or 32
22 months, whatever it was at that point, rather than the 14
23 as projected.

24 Q Do you remember when the production line shut
25 down on November 5, 1986? Do you recall that?

1 A Mm-hmm.

2 Q Do you recall what those cash flow projections
3 showed with regard to needing an MRE-7 contract?

4 A Not from memory, but if you show me -- if
5 you'll show me the projections, I can explain it.

6 Q Well, would you agree that as of this date, it
7 was your feeling that you needed an MRE-7 contract?

8 A Yes, yes, that we did need an MRE-7 contract.
9 yes.

10 Q Do you recall in this time frame -- did you
11 have any involvement in either checking inventory, or
12 were you aware of the inventory levels at Freedom?

13 A Yes, I was aware.

14 Q Were you aware in this particular time frame
15 that Freedom had exhausted its entire inventory level of
16 crackers?

17 A I don't remember that specifically, no.

18 Q Do you recall a problem with Freedom
19 experiencing excessive damage with the crackers?

20 A Vaguely but not enough to speak to.

21 Q And crackers are GFM; is that correct?
22 Government-furnished material?

23 A Yes.

24 Q Do you recall that the problem related to
25 Freedom damaging considerable amounts of the Government's

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1 A Yes; not the exact date, but I remember the
2 incident.

3 Q I'd like you to look at what's been marked as
4 F180 -- I'm sorry; the Freedom people are going to have
5 to help you find that. I'm not familiar with what's up
6 their in their documents.

7 A I have it.

8 Q This is a memorandum that was written by you on
9 November 5 and addressed to Henry Thomas; is that
10 correct?

11 A That's what I have.

12 Q And down towards the bottom of the first page,
13 it states on October 25/27, you explained the basis for
14 the layoff; is that the layoff that occurred November 5?

15 A It would appear to be so, yes.

16 Q And among other things, one of the stated
17 reasons is shortage of GFM, eventually covered by
18 substitutions.

19 A Yes.

20 Q So as of that date, you had the substitutions;
21 is that correct? Or it was covered by substitutions.

22 A Based on that wording, yes, but I'm not --
23 shortage of GFM eventually covered by substitutions.

24 Q And the need for an MRE-7 contract as discussed
25 in our cash flow projections for mod 29.

1 GFM?

2 A I don't remember the specifics, no.

3 Q Okay; what date did you leave Freedom again?
4 You were there through the end, through, like --

5 A I believe the final date was December 19.

6 Q December 19?

7 A I believe so.

8 Q Oh.

9 JUDGE JAMES: Of which year?

10 THE WITNESS: 1986; I'm sorry.

11 MS. HALLAM: I have no further questions. Your
12 Honor.

13 JUDGE JAMES: Do you want to cross-examine?

14 MR. STEIGER: Yes, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. STEIGER:

17 Q In respect to your review of progress payments
18 and the amounts received and audit reports relating to
19 progress payment requests, did you find anything in those
20 audit reports which indicated that the costs incurred
21 were based upon actions that were illegal, improper or
22 without propriety?

23 A Not during the period I was there. Now, I'm
24 not -- I want that understood that I'm not a lawyer.

25 Q Just answer the question.

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1 You mentioned or had been mentioned to you that
2 the Government paid electrical bills direct. Do you
3 recall what the status was at the time with respect to
4 the Government honoring Freedom's progress payment
5 requests?

6 A Well, I would say the Government from day one
7 dishonored the contract, not honored it.

8 Q Do you recall --

9 A At the point that we were seeking funds to pay
10 Con Edison, I can assure you that in all respects, we
11 believed this money was due us from the Government,
12 period.

13 Q But were you aware --

14 A Overdue from the Government.

15 Q Okay; but were you aware at that time that the
16 progress payment flow had essentially stopped?

17 A Could have been; it wouldn't have made a
18 difference to me in my mind.

19 Q So, then, with that possibility, wouldn't it
20 then have been quite logical -- in fact, mandatory -- for
21 the Government to have made that payment direct to Con
22 Edison in order to keep the plant going?

23 A No doubt about it; I think we might have even
24 asked them to pay payroll on an occasion or two.

25 Q Now, you mentioned that you believe that, from

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1 your review of what was happening on the job, from your
2 financial review that, in fact, when things were going
3 well, this was a profitable job, and can you relate that
4 profitability -- can you relate that profitability to the
5 cash flow projections that have been made initially?

6 A I think I tried to get that across: based on
7 when we were operating for some reasonable sustained
8 period at the 45,000 to 60,000 case, I saw nothing that
9 was occurring financially that led me to believe that the
10 earlier -- the first projections for the MRE-5 were
11 nothing but valid in all material respects. In fact, I
12 was surprised at how much they did confirm the
13 projections, the \$27.725 price and the projections that
14 were accompanying that price. I thought it was all valid
15 at that point.

16 The only thing, the only problem, again, from a
17 profitability standpoint, from a materiality standpoint,
18 was the time. I mean, not this problem with materials
19 costing -- this problem, time.

20 Q This problem or the horizontal problem or the
21 time problem from your observations as -- in your role,
22 what do you attribute that delay and extended time period
23 to?

24 A Ninety-nine percent is the Government's
25 dishonoring the contract from day one, in my -- as I saw

1 it.

2 Q In what form was that dishonor?

3 A Total lack of cooperation; total lack of
4 meeting its obligation to pay the 95 percent on properly
5 incurred costs.

6 Q Thank you.

7 I'd like to take just a quick look once again
8 at a document referred to by the Government; F180, I
9 believe it was. Now, as I understand that paragraph that
10 was -- I'm sorry; let's make sure he has it.

11 A I have it; I have it.

12 Q Let's make sure that we understand what I'm
13 talking about in the paragraph that was called to your
14 attention concerning the reasons. Now, are these not
15 reasons for a layoff? As expressed in this letter, are
16 these not the reasons for a layoff, as you expressed them
17 in the letter?

18 A Yes.

19 Q Okay; are they reasons for a complete shutdown
20 of the operation?

21 A On its own, no.

22 Q Well, does it say that it's for a shutdown?

23 A No.

24 Q Was this letter a memo that you wrote to Mr.
25 Thomas addressing the issue of shutting down the

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1 operation?

2 A I'm sorry; I'm sorry; go back if you can give
3 me that again.

4 Q Okay; now, let's talk about -- did this
5 contemplate a complete layoff, or were there still to be
6 people remaining on staff to do work?

7 A No, we always were going to have people on
8 staff, because you can't shut down the administration,
9 security, all of that. We couldn't shut that down. We
10 would have continued for -- I continued for at least a
11 month and a half after that.

12 Q Right; but did you continue with -- were there
13 actual floor people or laborers on the floor? Did they
14 remain on the --

15 A Yes, there was work being done on the
16 production floor.

17 Q Right.

18 A There was work being done on maintaining
19 inventory. There was work being done on virtually all
20 aspects of the factory by limited crews, but work was
21 being done.

22 Q Also, within your contemplation at the time --
23 within the company's contemplation at the time these
24 people were laid off, was it not within the company's
25 contemplation that perhaps some or all of these people

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1 might be rehired again had the conditions been right?

2 A Of course; yes, yes.

3 Q And, in fact, when we talk about MRE-7 here as
4 a reason, isn't it because that these people would have
5 been needed to transition into MRE-7 had that contract
6 been forthcoming?

7 A No doubt about it.

8 Q So the layoff here did have a relationship to
9 MRE-7 but not as it related to the performance on this --
10 on MRE-5.

11 A I think the records, the need for MRE-7, as I'm
12 seeing it, was not so much in terms of we need to get
13 MRE-7. I thought that was a given, that we were going to
14 get MRE-7. I think this was just trying from the point
15 of hey, move it up; let's get it as quickly as possible
16 so we don't have to lay off; bring back people; go
17 through down time, and let's go on and continue
18 production. That's how I see it.

19 Q Okay; but you would have needed those people --

20 A Of course.

21 Q -- for MRE-7.

22 A Of course.

23 MR. STEIGER: I have no further questions, Your
24 Honor.

25 JUDGE JAMES: Government?

1 trying to be hopeful and speed up the process and get
2 across the criticality of where we stood financially at
3 this point.

4 Q Do you recall that at this time, November 5,
5 that there were still MRE cases that were due under the
6 MRE-5 contract?

7 A Yes.

8 Q Do you recall that?

9 A Yes.

10 Q Do you recall how many cases?

11 A 100,000 or so, 114,000, I guess, somewhere
12 around there.

13 Q Is it your understanding that the MRE-5 portion
14 was completed, and you needed to transition into the new
15 configuration?

16 A I don't understand the question.

17 Q Do you understand that prior to the shutdown,
18 Freedom had, in fact, been producing cases with the MRE
19 configuration? Did you realize that?

20 A Yes, but I thought there were differences in
21 MRE-7 and 6.

22 Q Do you know what transition you were testifying
23 with regard to in response to Mr. Steiger's answer?

24 A I would have been more concerned of the MRE-7
25 than 100,000 cases. The 107,000 cases or this 100,000

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1 MS. HALLAM: Yes.

2 REDIRECT EXAMINATION

3 BY MS. HALLAM:

4 Q Mr. Mara, you indicated that one of the reasons
5 that the layoff occurred was, I believe you said there
6 needed to or Mr. Steiger said there was some need for a
7 transition period between MRE-5 and MRE-6.

8 A MRE-7, MRE-7.

9 Q Well, you hadn't finished up the MRE-6
10 configurations; is that not what he was talking about?

11 A No, I think we were going from 5 -- 6 had
12 already passed us by. We were bidding on 7.

13 Q Do you recall that there were 114,000 cases
14 that were reinstated in the contract --

15 A Yes.

16 Q -- that were supposed to be performed or
17 supposed to be manufactured under the MRE-6
18 configuration?

19 A Yes, I do; now, I do, yes.

20 Q So that was not the transition that you were
21 referring to when you answered that question?

22 A I don't think so. Anything that I was writing
23 at this point was get that 7 in the door so we just don't
24 go through a bloodbath laying off and bringing back
25 people and going through the whole thing. I was just

1 cases would have been immaterial in my thinking, because
2 whether they got produced or not was not going to make
3 difference under this contract as much as the MRE-7
4 contract was going to make on the survival of Freedom.
5 wouldn't have been thinking in terms of the 100,000 case
6 in any important financial sense. I would have been
7 thinking of the new contract coming in so we can get on
8 the road again here and start getting back to where we
9 should have been 31 months ago.

10 Q As of February 5, up until the time you left in
11 December of 1986, the production personnel remained laid
12 off; is that correct?

13 A I think you're confusing dates. Could you give
14 me those dates again?

15 Q November 5, 1986, when this --

16 A Yes.

17 Q -- memorandum was written, and I believe you
18 testified that you left Freedom in December of 1986.

19 A In December of 1986; I think you said February.

20 Q Oh.

21 A December, yes.

22 Q I might have.

23 A Yes.

24 Q I might have; I meant December of 1986.

25 A Yes.

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1 Q During that time frame, isn't it correct that
2 the production personnel remained laid off?

3 A Yes, I seem to believe they were pretty much
4 laid off at that point, with the exception of any
5 skeleton crew we might have had.

6 Q The crew that was preparing for MRE-7.

7 A There might have been ups and downs; we might
8 have brought in a crew for a day or two, but I don't
9 remember all of the specifics of it.

10 MS. HALLAM: I have no further questions.

11 JUDGE JAMES: Anything further by appellant?

12 MR. STEIGER: Yes, Your Honor.

13 RECROSS EXAMINATION

14 BY MR. STEIGER:

15 Q You just testified that those that had been
16 laid off remained laid off during that one month or so
17 period. Search your memory. Do you remember why the
18 balance of the MRE-6 cases, which was a portion of the
19 114,000 cases, was not completed by the contractor?

20 A I know there were shortages of GFM. I think
21 there might have been other contributing factors. I know
22 that one stands out, but I don't remember all of it.

23 Q But that one stands out.

24 A Yes, yes, that one does stand out.

25 Q So, then, is it not your understanding that you

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1 would not have recalled these workers unless the GFM had
2 been obtained?

3 A Well, if we didn't have the material, we
4 wouldn't have recalled, no.

5 Q There would have been no reason to do that.

6 A No, other than whatever rework we might have
7 been doing, and that was it. I thought I was trying to
8 say that.

9 MR. STEIGER: Right.

10 Okay; I have no further questions.

11 JUDGE JAMES: Thank you so much, Mr. Mara --

12 MS. HALLAM: Okay, sorry.

13 JUDGE JAMES: -- for your continued testimony.
14 You may step down from the witness stand.

15 THE WITNESS: Okay.

16 [Witness excused.]

17 MR. STEIGER: Might we have 5 minutes, Your
18 Honor.

19 JUDGE JAMES: Do you want 5 minutes?

20 MS. HALLAM: Yes; I don't care; that's fine.

21 JUDGE JAMES: Fine; let's go off the record,
22 take five.

23 [Recess.]

24 JUDGE JAMES: We're back on the record, then.

25 Whereupon,

FRANK BANKOFF

1 was called as a witness herein and, after being duly
2 sworn, was examined and testified as follows:

3 JUDGE JAMES: Please state for the record your
4 full name, spell your last name, and give us your
5 address.

6 THE WITNESS: Frank Bankoff, B-A-N-K-O-F-F,
7 10115 Clark, C-L-A-R-K, Place, Philadelphia, Pennsylvania
8 19116.

9 DIRECT EXAMINATION

10 BY MS. HALLAM:

11 Q Could you tell us what your title is?

12 A I'm the chief of the group feeding rations
13 branch in the operational rations business unit of
14 Defense Support Supply Center, Philadelphia.

15 Q Okay; and could you tell us -- to summarize
16 your history with DSCP or its predecessor, DPSC?

17 A I came to work in 1978 as a contract
18 specialist, a buyer, for meats and seafoods for both
19 commissary resale and troop issue. In 1985, I became the
20 contracting officer for the MRE assembly team in the
21 operational rations section. That's the position I was
22 contracting officer in this contract. In 1992, I became
23 a branch chief for commissary resale branch for both
24 brand names and meat items. I spent about four months in

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1 1994 as the deputy and acting chief of subsistence office
2 of contracting. And in 1990 -- I think it was 1995, I
3 went back to the MRE as the MRE assembly contracting
4 officer. And I think in 1997, I became the chief of the
5 group feeding rations branch, which I'm in now.

6 Q And when is it that you took over your
7 responsibilities, again, as contracting officer for the
8 subject contract?

9 A I think it was June 1985.

10 Q Are you aware of the contract's requirement for
11 receipt inspection?

12 A Yes.

13 Q And what is required for receipt inspection?

14 A For GFM, the contractor is responsible for
15 doing a count condition and identity inspection on the
16 GFM components in accordance with the table E of the
17 solicitation and contract. There would be no need for
18 any equipment to do that type of count condition identity
19 testing.

20 Q What's required for receipt of CFM? Do you
21 know?

22 A Basically, it's the same type of inspection.
23 Again, all of the food components that come in come in
24 with a USDA grading certificate. So the products have
25 been inspected at the place of manufacture. As far as

1 the CFM packaging materials, I've never known an MRE
2 assembler who has not relied on the certificate of
3 compliance, COC, of the packaging manufacturer. I've
4 never seen any assembler or even manufacturer, even
5 retort manufacturer, do any kind of delamination or
6 tensile strength testing or any kind of configuration
7 testing on packaging materials. They basically rely on
8 the COC of the manufacturer and then the Government
9 verification inspection.

10 Q You said you'd never known of any MRE
11 assemblers or, for that matter, retort manufacturers.
12 Could you tell me what ones you are aware of in general
13 that you know rely on COC certificates of conformance?

14 A I think both MRE assemblers have relied on COCs
15 for packaging materials. The retort manufacturers,
16 people who have done the meats and the wet-packed fruits
17 have relied on COCs for packaging materials. The people
18 who have done the spreads -- basically, all the
19 manufacturers, the packagers of the foods have relied on
20 the COCs for their packaging materials.

21 Q And with regard to the count condition and
22 identity inspection of GFM --

23 A Yes?

24 Q -- are you aware of how other MRE assemblers
25 perform that type of inspection?

1 A Yes; for the GFM? Everybody does it in
2 accordance with Section E of the contract, and again,
3 basically, it is a count, condition and identity. It's
4 based on a sampling plan that's in the contract. There's
5 a table of defects listed in the contract, and they're
6 all basically visual identifications and manual
7 countings, unfortunately.

8 Q They do a manual count.

9 A Yes.

10 Q Is there any manufacturers you know that do any
11 sort of weighing process or assemblers, I'm sorry?

12 A No; unfortunately, the manufacturers -- today,
13 under certain inspection plans, they may be allowed to do
14 that. Back in 1985, unfortunately, we required -- while
15 we allowed certain manufacturers to pack based on case
16 weights, we required the MRE assemblers to actually do
17 physical counts to make sure that the formulated weight
18 to count was correct.

19 So the MRE assemblers actually had to count,
20 you know, these boxes of 300, you know, jellies or so
21 many crackers or whatever. It was a manual count.

22 Q You mentioned tensile strength.

23 A Yes; tensile strength.

24 Q Tensile strength.

25 A Yes.

1 Q Can you tell me what that is?

2 A Well, it's the measure of the seal strength, of
3 the strength of the seal when you sealed the laminated
4 materials, such as, you know, if the MRE assembler is
5 producing an accessory packet or a cracker packet or the
6 menu bag, there are seal strength requirements for that
7 seal to make sure it's not just a tack seal but that, in
8 fact, it's a hermetic seal. And, you know, that's really
9 a measure of the tensile strength, the strength of the
10 seal.

11 Q Is this something that needs to be tested at
12 some point during the contract period?

13 A Yes.

14 Q Is that on receipt of materials?

15 A No, it would be on production of materials; in
16 other words, that the people that, you know, are
17 producing food components have requirements for the seal
18 of their packages; the MRE assemblers had requirements
19 for the seal strengths of their accessory bags, their
20 cracker bags, and their MRE menu bags. And that's when
21 the seal strength tests would be completed.

22 Q Are you familiar with a strapping problem that
23 developed at Freedom?

24 A Yes.

25 Q Could you tell us what that was about?

1 A My understanding is the strapping failed the
2 Government verification inspection.

3 Q What was the problem that was caused?

4 A Well, my understanding is that Freedom was
5 producing MRE cases, palletizing, unitizing the cases;
6 putting them on pallets; putting the pallet cover on top
7 of the pallets, unit loads; strapping the unit loads; and
8 then presenting it to the Government for inspection and
9 acceptance. And evidently, Government verification of
10 the strapping indicated that the strapping was failed,
11 and so, my understanding from testimony -- and I guess
12 the documents -- is that -- my recollection is that the
13 AVI wouldn't inspect until the strapping was deemed
14 conforming.

15 Q What did the specifications require with regard
16 to the AVI's testing?

17 A The contract called for inspection at origin
18 and acceptance at origin, which meant that the finished
19 product, which is unitized, palletized MREs, would be
20 inspected by the contractor, and when the contractor's
21 inspection system found it conforming, they would offer
22 it to the Government for acceptance.

23 Evidently, the AVI at this point decided that
24 they were not going to do -- well, they had not been
25 doing the moving lot inspection; they were doing a

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1 stationary lot inspection, which meant they didn't pull
2 their samples and inspect until the entire product, the
3 day's, you know, production lot was completed, which
4 would mean the unitized MRE cases.

5 Because there was the issue of defective
6 strapping, until Freedom's strapping was determined
7 acceptable, they wouldn't inspect those final cases. And
8 evidently, what happened is Freedom continued to assemble
9 MRE cases, which was smart, and evidently, when he had
10 the proper strapping and presented it to the AVI, and the
11 AVI did the inspections, they found the menu bags were
12 not sealed correctly and rejected those, I guess,
13 40,000-plus cases of MRE.

14 Q How was the strapping problem itself resolved,
15 or was it not resolved?

16 A Well, the strapping problem, evidently, was
17 resolved because, you know, Freedom eventually got
18 strapping that was conforming. The issue as far as where
19 the inspection took place I know was resolved, I think at
20 a meeting up in Freedom with the AVI, and normally, you
21 know, the AVI doesn't move to moving lot inspection,
22 which means that they take samples throughout the day at
23 different stages of production and, in fact, could take
24 simply an MRE case before it's unitized and do that
25 inspection -- they usually don't do that until the

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1 contractor has some type of quality history established,
2 because what happens is when you do a moving lot
3 inspection, your AVI inspectors, instead of being on the
4 floor to oversee production, they're basically pulling
5 samples and perhaps even inspecting them during the day.

6 But I think we agreed that we would change the
7 inspection from the stationary lot to a moving lot to try
8 to get the contractor as much feedback as possible as
9 quickly as possible.

10 Q When you say you'd change the inspection, was
11 the moving lot inspection not already a requirement?

12 A No, moving lot is not a requirement. The
13 requirement under the contract is for the contractor to
14 have a contractor inspection systems and for the
15 contractor to inspect the product and for the contractor
16 to offer product to the Government that is conforming.
17 And then, the Government has the right whether to inspect
18 it, do a verification inspection, or an end item
19 inspection. In this case, for the MRE, every lot was
20 inspected. The same for the MRE food products.

21 But the responsibility for conforming product
22 and for inspecting their own product always rests with
23 the contractor.

24 Q You said that -- getting back to the strapping
25 problem, how would the strapping problem with these cases

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1 being accumulated and inspected in the palletized form or
2 once they were palletized and strapped, how does that
3 impact on the production?

4 A Well, what -- it doesn't. I mean, if the
5 question is that because the strapping is bad or found
6 nonconforming and until new strapping is secured that the
7 AVI won't inspect the finished cases, while that implies
8 that the product won't be inspected or accepted or
9 shipped or paid for, it doesn't mean that the contractor
10 can't continue to assemble finished MRE cases and just
11 wait to unitize -- palletize and unitize it.

12 Unfortunately, you know, if the contractor had
13 saw that the menu bags were not being sealed properly,
14 what we would have had was 40,000 cases that got
15 inspected and accepted later than you would have hoped.
16 but we wouldn't have had 40,000 rejected cases.

17 Q And the problem with the 40,000 cases, again,
18 related to the menu bags?

19 A I think it was a seal problem. You know, we
20 tried to -- we went to NADIC. We asked NADIC and the
21 services if they would accept it as it is, because the
22 individual components are packaged. You know, they're
23 packaged in trilaminates, and we were trying to accept
24 this product with a price adjustment, but NADIC and the
25 services wouldn't accept it. It was an incomplete seal

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1 or a bad seal or it didn't meet the seal strength.

2 And we then tried to see if we could just have
3 the contractor do a second seal over it, but NADIC felt
4 that that would impair the initial seal, where we had the
5 overlap, and cause problems, so they couldn't do that. I
6 mean, you know, we knew this was horrendous, but the
7 final outcome was we couldn't accept it, and that meant
8 that the contractor had to basically cannibalize 40,000
9 cases, which was a nightmare.

10 Q Just getting back to this menu bag again, what
11 does the menu bag consist of, or what is in a menu bag?

12 A Well, the menu bag is the actual container for
13 the MRE. The meal ready-to-eat is the individual meal.
14 The menu bag is that brown bag with the exterior label
15 that I think Henry showed earlier that contains the, you
16 know, 10 or 12 components that make up the meal.

17 Q So it's just the outer bag that was impacted by
18 the seal problem?

19 A I think so. That's my recollection.

20 Q Do you know what type of corrective action was
21 required with regard to those 40,000 cases that were
22 rejected because of a seal problem?

23 A Freedom had to rework those cases.

24 Q And what did that involve?

25 A Rework entailed, unfortunately, having to open

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1 every case; having to take out the menus; having to slice
 2 open the menu bag, which now made that menu bag and
 3 probably the shipping case, which was quite expensive,
 4 scrap. They then had the option of either setting up
 5 lines and trying to take the components from this bag and
 6 put it into a new bag and seal it, or they could take the
 7 components out, resort them all, all the time trying to
 8 maintain lot traceability, and then starting up a new
 9 assembly operation. And I think Freedom was doing the
 10 cannibalization of taking out the components; putting
 11 them back in -- you know, gum here -- I'm sorry;
 12 accessory packet here; entree here; cake here; and
 13 reassembling all new cases.

14 Q Do you have any idea in terms of time what this
 15 effort would involve?

16 A I would believe that -- it's my opinion only --
 17 that to rework a case, if it takes, let's say, three
 18 man-hours to assemble a case, to now have to cannibalize
 19 and get that case out again, you're probably talking, you
 20 know, three plus three, so you're probably talking, you
 21 know, twice as much: six man-hours now to rework the
 22 case. So where you started with three, now, instead of
 23 getting one case in three man-hours, you're getting one
 24 case in nine man-hours. You know, it's just -- it's a
 25 terrible thing.

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1 JUDGE JAMES: Mr. Bankoff, did you ever observe
 2 the contractor's observation to see how long it took?

3 THE WITNESS: No, sir; like I say, I'm only
 4 saying it's my opinion. I saw the rework operation.
 5 I've seen other rework operations. We always try to get
 6 away from it. I can't guarantee that it's a
 7 three-for-one.

8 JUDGE JAMES: But you saw Freedom reworking
 9 cases; is that what you were saying?

10 THE WITNESS: Yes; they were doing it by that
 11 latter method, where they were segregating the components
 12 and then redoing it.

13 BY MS. HALLAM:

14 Q Do you know when Freedom started the rework
 15 effort?

16 A No; I'm not good with times. I'm sure it was
 17 shortly -- I mean, we had the meeting at Freedom with the
 18 AVI. I know we spent time, I can't tell you how much
 19 time, trying to get NADIC to accept it as is. And then,
 20 we tried, you know, with a price adjustment; and then, we
 21 spent time trying to argue that we can double seal it,
 22 you know, but eventually, we didn't have the authority,
 23 as much authority, back then as we do today, and we
 24 needed the services' and NADIC's agreement to accept this
 25 product, and we never got that. I don't know when they

1 started.

2 Q Can you explain your understanding of the
 3 contract requirements relative to the anticipated GFM
 4 outages?

5 A Well, the contractor was required to maintain
 6 the contractor's inventory system for GFM. In the event
 7 that there was going to be an outage, the contractor had
 8 to give us five-day notice to -- of an outage.
 9 Additionally, the contractor had to give us, you know,
 10 monthly inventory reports. The contractor also had to
 11 give us damage reports, because, you know, believe it or
 12 not, back in 1985, we didn't have computers, and we ha
 13 -- we were responsible for financial accountability of
 14 the GFM. So we actually had manual spreadsheets of how
 15 much was received. You know, we took the DD250s;
 16 recorded them; how much was receipted; how much was
 17 shipped in final cases; how much was damaged; you kno
 18 if any was returned or we'd get them for any reason. Ar
 19 then, we maintained the, you know, on-hand inventories.

20 And in some cases, they didn't always, you
 21 know, jive, so that's why we required the contractor to
 22 maintain his own inventory system in accordance with, y
 23 know, the regulations.

24 Q You said that the contract required monthly
 25 inventory lists. Do you know if Freedom provided mont

1 inventory lists during the contract period?

2 A I don't know.

3 Q What was the purpose of the damage reports?

4 A The damage reports were for a couple of
 5 reasons. One, when we delivered GFM, there was a loss
 6 allowable rate to the GFM. In other words, we assumed
 7 that there would be some, you know, damage or scrap rat
 8 by the contractor that would be permissible, what we
 9 would call the loss allowable rate for assembler damage.
 10 There were a number of categories of damages. Assembl
 11 damage was the damage that we assessed where the AVI a
 12 the contractor mutually agreed was caused by the
 13 assembler.

14 There was also manufacturer damage that, you
 15 know, you don't find on receipt, and perhaps you don't
 16 reject the product, but you find it later on, and you can
 17 ascertain it's manufacturer damage. That wouldn't be
 18 held accountable to the contractor. There was concealed
 19 damage. That was kind of a funny category. You don't
 20 really know whose fault it is; and, of course, the
 21 assembler damage.

22 Now, the contractor, if he exceeded the
 23 allowable assembler damage, he was liable for the cost of
 24 that product, the cost of the resupply of that product.
 25 But the real importance -- and that was really an end,

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1 you know, an annual, end-of-contract inventory
2 reconciliation that we used the damages. But the real,
3 you know, day-to-day, month-to-month use of the damages
4 was to plug it into our inventory reports to, again, let
5 us know how much GFM was usable, you know, and again, how
6 much was receipted, how much was shipped out in final
7 assembly, how much was shipped out rejected, perhaps,
8 warrantied later on; how much was damaged; and then how
9 much is usable.

10 Q And the damaged inventory lists that were
11 required to be provided just related to the GFM; is that
12 correct?

13 A Yes.

14 Q Okay; do you know if Freedom submitted damage
15 reports pursuant to the contract requirements during the
16 course of performance?

17 A I don't know -- I don't know about their
18 compliance in the beginning of the contract; I do know at
19 the end of the contract, in whether it was late 1985 or
20 early 1986, but certainly by late 1986, we were
21 basically, you know, begging for these reports, and
22 eventually, I know it was in one of the show cause or
23 cure notices that, you know, we need these damage
24 reports, and again, always with the reminder that under
25 the contract, failure to provide timely damage reports

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1 signed off by the AVI leads to the finding that the
2 Government is not liable for any down time due to lack of
3 GFM, because we don't have the visibility. And I know at
4 the end of the contract, we made repeated requests for
5 that information. We never got the damage reports.

6 Q Do you know if Freedom did, in fact, experience
7 any problems with damaged GFM during the life of the
8 contract?

9 A I know for a fact the crackers. I know at the
10 end of the contract, you know, as we were getting into
11 GFM, you know "shortages" the cracker issue came up and,
12 you know, we looked at our numbers, and we delivered all
13 the crackers. We delivered, you know, all the crackers
14 that we were supposed to. Evidently, what happened is
15 there was -- you know, we didn't know if they were lost
16 somewhere in that 40,000 case rework or if they were just
17 excessive damage, but certainly, we had delivered all the
18 required crackers, and eventually, we told Freedom that,
19 you know, you're going to have to supply your own
20 crackers now, because the Government has complied with
21 its requirement for the full quantity.

22 Q Would you explain your understanding of the
23 contract's provisions related to substitution of GFM?

24 A Well, the contract, you know, basically said
25 that the Government has the right to substitute, you

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1 know, any GFM, and provided that it was approximately the
2 same size, the contractor would have no recourse. If the
3 substitutions were not the same type items, excuse me, or
4 the same size, then the contractor, you know, could make
5 an equitable adjustment. But the Government always had
6 the right to substitute GFM.

7 Q Could you tell me if you're aware of any
8 instances where the Government made substitutions of
9 product under this contract where the product that was
10 substituted and the product that was substituted for were
11 substantially different sizes?

12 A I would say never.

13 Q Did Freedom ever file a claim under -- during
14 the life of the contract based on substitutions of
15 substantially different sized product?

16 A No; it was never really an objection or an
17 issue.

18 Q Based on your knowledge of other MRE
19 assemblers' practices, to your knowledge do any of the
20 other MRE assemblers produce crackers ahead of time,
21 ahead of final assembly?

22 A Yes.

23 Q Do they produce accessory packs ahead of time?

24 A Yes.

25 Q Do they build an inventory of finished menus?

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1 A Most did; you know, the quantity of the on-hand
2 inventory that you would need for final assembly varied
3 among the contractors and still varies among the
4 contractors, but, you know, you need like, you know,
5 Henry's industrial specialist said: you need accessory
6 bags; you need the cracker bags; and you need,
7 eventually, all the components that go into the menu bag,
8 and, of course, you need the menu bags for final
9 assembly.

10 So depending on what kind of operation you run,
11 you certainly need the accessory bag and the cracker bag,
12 and a lot of contractors actually, you know, do final
13 assembly off of a menu bag inventory.

14 Q What does that mean, to build an inventory of
15 finished menus?

16 A Well, it means that, you know, some contractors
17 don't do every operation every day or don't do the same
18 level of times of operations every day. You know; you
19 build an accessory bag inventory; you build a cracker bag
20 inventory; then, you do a final assembly -- or I should
21 say a menu bag assembly -- and then, eventually, once you
22 have all 12 menu bags, you do final assembly. So again,
23 depending on the level of the contract, you know, some
24 contractors decide to maintain smaller work forces but
25 work them every day and stagger their operations to

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1 maximize the efficiency of the operation as opposed to,
2 you know, having a full work force; doing every operation
3 every day; but it only takes, like, 10 or 15 days a month
4 to do your particular contract quantity, and then, you've
5 got problems the rest of the month holding on to people.

6 It's just a different, you know, production
7 mode that different people go into. And with a smaller
8 contractor, with, you know, indefinite work, whatever, it
9 seems to make sense to do that.

10 Q Are you aware of the type of production
11 equipment used by MRE assemblers in the 1980s?

12 A Mm-hmm.

13 Q I'd like you to look at the document at Rule 4
14 Tab 70. It's the red book.

15 A Seventy?

16 Q 7-0, yes.

17 A Okay.

18 Q On the first page at the bottom, it has a list
19 of major equipment in place.

20 A Mm-hmm.

21 Q Are you familiar with these types of pieces of
22 equipment?

23 A Yes.

24 Q Can we start with the accessory room? Can you
25 tell us what these pieces of equipment are?

1 in those plants because everybody has changed their
2 operations, so there's nothing proprietary. But in 1985,
3 Sepaco used the lazy susan for, you know, the little
4 round table for the accessory; Rafco had a different
5 conveyor system; same type slotted purpose but not on a
6 round table. It was on a conveyor type thing.
7 Everybody, for the most part, used some type of heat
8 sealer like the doughboy or some other sealers to heat
9 the preformed accessory packet. Everybody used a
10 preformed accessory packet.

11 Q And looking at the cracker room equipment, are
12 you familiar with these type of machinery?

13 A Yes.

14 Q Does this list of equipment here look like it's
15 the type of experience that other assemblers used in that
16 time frame?

17 A Now, for crackers, other assemblers used
18 snorkel bags and flex bags. I'm not sure if it was the
19 1985 time frame or the 1986 time frame or even the 198
20 time frame when just about everybody started using the
21 Koch multivac, the horizontal form-fill sealer, for the
22 crackers only. So I don't know if, in 1985, Sepaco or
23 Rafco were using the Koch, but I do know that certainly
24 in 1983 and -- well, I don't know for sure, but I know
25 that they still had in house, even when they got the

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1 A The turntables are kind of what Henry was
2 referring to before as the lazy susan. It's a round
3 table. It's probably -- lazy susan is a good
4 description, because it has different chambers. And
5 you've got your five or six different people sitting
6 around the table. There are three accessory bags, as far
7 as I know, and they differed on the candy that went in or
8 whatever. And, you know, each person was responsible
9 for, let's say, an item. So I would put in the creamer
10 every time it came around, and somebody else would put in
11 the coffee, and eventually, all five or six items that
12 were required in the accessory bag were in this
13 particular slot.

14 And then, that seventh person, when everything
15 was assembled in there, would take an accessory bag, a
16 preformed packet, scoop those components into the packet,
17 probably put it on a conveyor line that would then move
18 it to a girl who would seal the bag on a vertical band
19 sealer, and that was the doughboy they're talking about.
20 And you would just pick up the little accessory bag and
21 run it through, and that seals the accessory bag.

22 Q In the mid-1980s time frame, in the time frame
23 that Freedom had this contract, did other MRE assemblers
24 use this round table type equipment to your knowledge?

25 A Because it was 1985, I can speak about what was

1 Koch, that they had the snorkel vacs and the flex vacs,
2 because occasionally, to supplement production, they
3 would also use preformed packets; put the crackers in th
4 preformed packets and, you know, then, the snorkel vac
5 was a little different operation. You put it in, and
6 then, something would clamp over it. Because with the
7 crackers, you had to draw a vacuum and then seal it.

8 So this type of equipment was used for
9 crackers. Whether it was used as the primary by these
10 people in 1985 or just the supplementary, I'm not sure,
11 but it certainly was the type of equipment that could be
12 used for crackers and was used for crackers.

13 Q And how about the final -- turning the page,
14 the final assembly area?

15 A Yes; I mean, the final assembly of MRE really
16 is not a -- it is not a complex thing. You could almost
17 go into any packaging company, you know, in America;
18 find the same type of conveyors. Pleated tables or
19 conveyors to assemble menu bags is not a unique thing.
20 Different people do it different ways. You go into three
21 plants; they're not set up the same way. But a conveyor
22 system with a preformed menu bag and putting everythin
23 in there and then going through a vertical band sealer to
24 seal the menu bag is kind of commonplace for almost any
25 assembly operation. And the equipment here is pretty

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1 much the same type of equipment that was used at the
2 other assemblers.

3 As far as the case sealer, the case erector and
4 case sealer, at that time, you know, we didn't really
5 have automatic case erectors. Most people were building
6 their cases by hand. As far as case sealers, there were
7 case sealers. I don't know which brands or names the
8 other two contractors were using at the time.

9 The unitization operation, for the most part
10 back then, was a manual operation. People unitized by
11 hand. They put the pallet cover on by hand, and most
12 people strapped -- while there was a machine, you had to
13 manually load it under the grooves and the pallets. So
14 it was pretty much a manual operation as well.

15 JUDGE JAMES: What does unitize mean?

16 THE WITNESS: Unitize simply means that you've
17 got your MRE cases. But the final product is you have to
18 take 48 of these MRE cases; you have to put them on a
19 pallet; you know, you have a pallet cover on the bottom,
20 and you put a pallet cover on the top of the product.
21 And now, you have to put straps around the product to
22 unitize the load, and your finished product is a pallet
23 configuration of 48 cases of MRE, which we can then take
24 the forklift, pick up the pallet, put it on the truck,
25 and that's what ships out.

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1 BY MS. HALLAM:

2 Q You said that most assemblers were building
3 cases by hand. What does that mean, building cases?

4 A What did I say?

5 Q I thought you said building cases.

6 A Well, no, I mean everybody, for the most part,
7 again, there's a conveyor belt, and you put all of the
8 components of the menu, your accessory pack, your cracker
9 packet, the other five or six items. You slide it into a
10 menu bag. You put the menu bag through the heat sealer.
11 Now, you've got your menu bag. And when you have the 12
12 of them, you put them in the case -- you erect the case;
13 you put them in the case. Eventually, you close the
14 case. You then put a sleeve on top of the case. You
15 strap the case, and then, you manually take the 48, you
16 know, 48 MRE cases, and you put them on a pallet, and
17 then, you now have to take your straps and slide them
18 through the pallet grooves and strap the 48 cases onto
19 the MRE pallet. So it's a lot of manual operation, even
20 today.

21 Q Do you know if other manufacturers were
22 sleeving manually, or did they have machines that did
23 this sleeving operation?

24 A My recollection back in 1985, everybody was
25 manually -- doing manual sleeving. And, you know, at the

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1 very end of the assembly operation, the sleeving
2 operation, that's where you would have your biggest guys.

3 Q Can you explain what the medical hold problem
4 was with Star food products?

5 A Well, it wasn't just with Star food. It
6 started in Star foods. In 1986, we started finding
7 swellers, you know, of the MRE-6 retort pouches. I think
8 we first found it in Cincinnati, and then, we found it in
9 Texas with Rafco. And we were getting an inordinate
10 amount of swellers, and we couldn't find any reason why.

11 Later, we came to term this phenomenon
12 microholes, that supposedly, there were holes being
13 created in the pouches during the production process that
14 supposedly you couldn't detect visually, and so, we were
15 calling them microholes, and we determined that, you
16 know, we're going to have to do this zygo testing on
17 each lot to confirm whether or not there were these
18 microholes.

19 Eventually, you know, that went across the
20 board, not just at star, and it became an MRE-6
21 requirement. Basically, what it did was put a lot of
22 MRE-6 retort pouches on hold. It created a lot of
23 shortages on MRE-6 retort pouches, and 1986 was a very
24 difficult year with the MRE-6 in supplying not just
25 enough GFM, because it was a GFM and a CFM issue, out of

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1 the 12 meats, and I think there's applesauce, and there
2 were still beans at that time, and I don't know if there
3 were wet-packed fruits at that time, but out of all of
4 the retort components, maybe eight or nine of them were
5 GFM, and the other five or six or seven were CFM. So it
6 was a complete retort problem.

7 But, of course, the Government was liable for
8 supplying GFM, and it was a difficult year in making sure
9 that we had enough retort pouches to maintain production
10 at all basically three MRE-6 facilities. Now, later,
11 when we got into the, you know, add-on quantity or the
12 reinstatement quantity with Freedom, it became now
13 difficult to maintain four firms. And the inventories.
14 you know, normally, we maintain GFM inventories of -- or
15 at least we used to -- of two months' inventory on hand
16 at all times. Since then, we've gone much more to a
17 just-in-time inventory, but back then, in 1986, it became
18 a just-in-time inventory, and not only was it a
19 just-in-time inventory, but we were providing
20 considerable substitution authority to all of the
21 assemblers in order to get finished cases.

22 And we got, you know, a significant allowance
23 from the services that they understood that MRE cases in
24 1986 would not have 12 different entrees and for the most
25 part, you, we were just going to try to get out of 1986.

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1 Q What was involved in the testing, the zygo
2 testing, that resulted from this microhole problem?

3 A Well, in some cases, we required samples sent
4 from the assembly -- we required inspections done at the
5 assembly facilities. In most cases, it was the AVI who
6 did the inspection; in some cases, it was the contractor.
7 We also required later on, after the place of manufacture
8 -- I'm sorry; we required visual inspections at the
9 assembly facilities. I think the finding of any sweller
10 or any defect required then samples to be sent to Health
11 Services Command in Sam Houston, and they were going to
12 do zygo testing.

13 And additionally, later on, we put in extra
14 inspection requirements on the MRE-6 retort contracts,
15 both GFM and CFM, that they had to have zygo testing
16 performed at origin.

17 Q Did Freedom New York have any MRE-6 retort
18 contracts?

19 A No, but they -- but they had some MRE-6 retort
20 pouches that we provided for the reinstatement quantity.

21 Q And how would this testing requirement impact
22 on Freedom? This was just an MRE-6 problem? It didn't
23 affect MRE-5?

24 A No.

25 Q How did it impact on Freedom?

1 A Yes; I mean, if there was any, you know,
2 postage entailed in mailing; if there was any additional
3 handling costs, things like that, in the samplings, we
4 did a modification to retort contracts, and we did a
5 modification to the assembly contracts, both for assembly
6 inspection but really for the purpose of flowing down the
7 retort requirements to the CFM subcontractors.

8 So for all intents and purposes, the mods that
9 we did -- it was a couple mods, I think, that we did in
10 the assembly contracts -- it was really for the CFM
11 people. It really didn't have much impact on the
12 assembler.

13 Q To your knowledge, did Freedom ever submit a
14 claim under that modification for additional costs
15 incurred due to the requirement for zygo testing?

16 A To my knowledge, no. I even think there's one
17 bit of correspondence that I saw that I think somebody in
18 Freedom was concerned when these mods came out, you know
19 said hey, what is this about, and I think there's
20 correspondence back from Jim Lacalier, one of my buyers,
21 saying, you know, don't really be concerned; it is a
22 retort issue; something to that effect.

23 Q I want to talk a little bit about the partial
24 T-for-Ds of the November and December 1985 increments.

25 A Okay.

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1 A Well, the MRE-6 products that they would have
2 had in house, we probably would have had the AVI
3 inspector, you know, first of all, they were probably
4 getting them in at this time -- they were probably
5 getting them in, I would say, in the end of 1986. So at
6 that point, for all intents and purposes. I think the
7 zygo had just about run its course and probably would
8 have only required let's say a greater receipt
9 inspection, visual receipt inspection for the pouches. I
10 don't know if Freedom ever had to send anything, any
11 samples to Sam Houston. That would have been the only
12 impact, the inspection of the GFM and, of course, he
13 would have inspected any of the CFM he would have bought.

14 But again, by the time he's receiving the MRE-6
15 configuration, zygo started in March. By the summer, we
16 kind of had everything in place. It probably would have
17 been when he was receiving the MRE-6, I would think,
18 sometime in May or June, so -- or even later, so by that
19 time, I don't know if it had any impact on Freedom.

20 Q There is a mod that was issued under the
21 contract; is that correct, incorporating this testing
22 requirement.

23 A Yes.

24 Q The mod gave the contractors the right to
25 submit a claim for costs incurred in doing the testing.

1 Q Would you tell us -- did the Government, as a
2 result of those T-for-Ds, take GFM away from Freedom?

3 A Yes.

4 Q And could you tell us about what the Government
5 took?

6 A Yes; you know, at that point of the time line,
7 we were severely dipping below our PWR levels, and we
8 to -- we could not continue to, you know, extend the
9 delivery schedule. We really needed the product, and,
10 you know, eventually, it's in the record that Freedom was
11 delinquent, I think, on its November requirement of
12 something like 40-some-thousand, and he wasn't going to
13 meet his December requirement; we already knew that. So
14 so, rather than terminate for default the 45 and
15 repurchase and then have to terminate the December for
16 the 65 or whatever, 60,000 and repurchase, we, you know
17 had that arrangement that we would up front terminate the
18 114,000 and repurchase.

19 When we did the repurchase, now, what I have is
20 a bunch of MRE-5 components GFM; meanwhile, nobody's
21 really producing that. We're into MRE-6 at this time.
22 But I repurchased the product. I mean, I repurchased the
23 114,000 MRE cases, and we basically took the GFM for the
24 MRE-5 configuration of the 114,000 minus whatever Rafco
25 had in residual, because Rafco did have some GFM MRE-5

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1 residuals, and we transferred it to Rafco so he could
2 produce the 114,000 cases in the MRE-5 configuration.

3 Q To your knowledge, when this GFM was taken out
4 of Freedom's possession, did that leave Freedom without
5 GFM to produce or give Freedom a shortage of GFM at that
6 particular point in time?

7 A No, he had enough to do the 505 or whatever was
8 left on the contract. No, it didn't leave him with a
9 shortage at that time that we took it out, no.

10 Q I'm sorry; what were you saying about the 505?
11 Did he have enough to complete 505,000 cases at that
12 point in time?

13 A Yes; remember that, you know, GFM, for the most
14 part, was scheduled to be completed, all deliveries
15 completed, by November -- I'm sorry, probably by October
16 1985. A lot of GFM was delayed going into Freedom
17 because he wasn't ready to receive it, you know, back in
18 March 1985 or whatever. So all the GFM for the most part
19 was delivered, but the 620,000 cases weren't. When we
20 took out the 114,000 cases worth, we still left him, you
21 know, for all intents and purposes the 505,000.

22 Q At this period of time, did the Government also
23 take CFM out to support the repurchase contract?

24 A No; we had nothing to do with CFM. Can I talk
25 about the CFM?

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1 Q Could you tell me what the date of pack
2 provision in the contract is?

3 A Yes; there's a requirement in the contract that
4 basically says that components that go into final
5 assembly can't be produced prior to date of award, and
6 the reason for that clause -- it's an old one -- is to
7 make sure that we don't get old products, old components,
8 in new MRE assembly cases. Remember, the finished MRE
9 has to have a three-year shelf life at 80 degrees. In
10 some cases, the components only have a three or three and
11 a half year shelf life at 80.

12 So it's important, for the most part, to have
13 fresh components in these final assemblies. So we have
14 that date of pack clause. Normally, contracts would be
15 awarded for an MRE assembly in October, and components
16 would start being produced and delivered in, let's say,
17 November. And like I say, you'd have a November-December
18 inventory, and you'd start final assembly in January.

19 Well, when we awarded Rafco the add-on
20 contract, and I think we awarded it probably sometime in
21 December or January, I had to waive that date of pack
22 provision, because otherwise, I wouldn't be able to use
23 this 114,000 cases worth of GFM and his MRE-5 residuals
24 that he had in house. In other words, he just got the
25 award today that, say, December 1985 or January 1986;

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1 these components were bought and produced, I should say,
2 three months ago, four months ago, five months ago. He
3 wouldn't be able to use them under the date of pack
4 clause. So I waived the date of pack clause for that
5 repurchase contract.

6 Q In this period of time, did you contact any of
7 Freedom's suppliers or any of the CFM suppliers and
8 attempt or discuss with them diverting CFM from Freedom
9 to Rafco?

10 A No; the only conversations I ever had with a
11 CFM supplier would be, one, if they called me to complain
12 that they weren't getting paid, in which case we would
13 normally work it out, you know, you're going to get paid;
14 don't worry about it; Freedom is viable; they're going to
15 be around; continue, you know; or if Henry would call me
16 with a CFM supplier for that same purpose, to let them
17 know that Henry was a viable firm and, you know, continue
18 to deliver.

19 That would be the only reason I would have any
20 discussion with a CFM supplier about them getting paid or
21 not getting paid. I would never -- and I never did --
22 call a CFM supplier and commandeer CFM, and I've told
23 Henry that many, many times. I think he misunderstood
24 what that date of pack -- why I waived the date of pack
25 requirement, because Rafco would have never been able to

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1 produce the add-on or the repurchase contract, and I
2 would have been stuck with 114,000 cases of -- worth of
3 MRE-5 GFM.

4 Q Well, I just want to talk for a few minutes
5 about the MRE-6. Were you involved in the negotiations
6 that led to an award to Cifpak?

7 A Yes.

8 Q Do you recall whether Cifpak was allowed any
9 startup costs in its contract price?

10 A I don't think that we used cost-in-pricing data
11 on the MRE-6 acquisition. I think that this was one of
12 the times that we had four contractors vying for three
13 contracts, so we had competition at every level, and I
14 just think we made the award to Cifpak based on price
15 competition.

16 Q Was Cifpak, did they successfully produce the
17 contract within the contract period?

18 A Yes.

19 Q Do you know if they received progress payments
20 under the contract?

21 A I think they did in 1986, yes.

22 Q Were you aware with any problems on the receipt
23 of progress payments by Cifpak?

24 A Yes; they weren't able to get progress payments
25 initially because DCAA found their accounting system was

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1 not adequate for receiving progress payments. When
2 exactly that occurred, I don't remember; when it was
3 resolved, I don't remember. I wasn't really following
4 the progress payment situation on Cifpak. I only would
5 know how or why it came up, but I do know that they were
6 having a problem with the DCAA. Evidently, they resolved
7 it. You know, they never complained to me.

8 Q And at some time prior to or immediately after
9 award, there were protests filed with regard to the award
10 to Cifpak.

11 A Yes.

12 Q On the basis that there was questions about the
13 Walsh-Healey qualifications of the company.

14 A Yes.

15 Q Could you tell us what you did in response to
16 those protests?

17 A In response to the protests or before I even
18 got to them?

19 Q When you became aware that other contractors
20 were disputing the validity of Cifpak's eligibility.

21 A Well, let me answer your question, because I
22 don't know if that was the reason we did the preaward
23 stuff, but when we got the protest, you know, we did -- I
24 did, I guess, what I'm supposed to do. I sent it to the
25 Small Business Office for forwarding to the DOL.

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1 Q Are you aware of any requirements or any
2 regulations that required you to do any independent
3 investigation of a contractor's Walsh-Healey
4 qualifications?

5 A Well, I know in the very beginning, when we
6 first got Cifpak's proposal, he submitted -- he certified
7 he was a Walsh-Healey contractor. I don't know if he
8 submitted leasing information or if we asked for it, but
9 we received, you know, we received his leasing
10 arrangement. We received considerable information,
11 because preaward, we were concerned and weren't sure
12 whether this was a legitimate Walsh-Healey contractor.

13 And, you know, I know, like I said, we looked
14 at the lease. I looked at it very carefully with my --
15 with my attorney. I don't know if we did a preaward or
16 if we got the DCAS involved or if we got the DCAS in San
17 Antonio involved. All I know is, you know, we had a lot
18 of consideration at home about whether this was a
19 legitimate lease and whether this truly, you know,
20 qualified and was a Walsh-Healey manufacturer. Because
21 it was different; it was strange.

22 But, you know, finally, the lawyers said it
23 appears to be a good lease, and he appears to be
24 qualified for Walsh-Healey. And based on that, we -- you
25 know, I accepted the certification.

1 Q I'd like to talk about the so-called -- what
2 has been referred to as the side agreement.

3 A Mm-hmm.

4 Q Do you recall getting a May 2 draft letter
5 which laid out the so-called side agreement?

6 A Yes.

7 Q What was your reaction to that letter? First
8 of all, who did you get it from?

9 A I think Frank Francois. I think at this time.
10 it was mostly Frank talking to me, and I know, you know.

11 Frank probably -- well, I don't remember exactly, but I
12 believe that Frank probably told me, you know, you're
13 going to get something or whatever, and I probably

14 remember hearing a lot about a side agreement. But like
15 I always told Frank, you know, I don't know anything
16 about a side agreement. You're not talking to me.

17 You're in DLA; I'm not privy to DLA, you know, I'm a
18 contracting officer here; I'm not upper management. And
19 so, I'm not aware of any side agreement.

20 I think on May 2, I got a draft, and I think I
21 prepared a response to him, because I had already had. I
22 think, a draft modification, settlement modification out
23 to Freedom. At this time, Freedom, I think, was under
24 another show cause and had responded, and we were working
25 out some kind of settlement arrangement on an action in

1 lieu of termination, you know, another extension or
2 settlement. And, you know, I think the scenario here is
3 that they faxed me like a draft letter.

4 I prepared a response. For some reason,
5 looking at the correspondence, you know, now, years
6 later, evidently, I faxed it to Frank. He wanted to see
7 what my response was going to be. And then, he basical
8 said no, don't send me that; I'll withdraw the letter.
9 And it was real like, you know, strange. But in any
10 event, I never sent him the letter, and supposedly, he
11 basically told me, you know, discard the letter; don't
12 respond to it.

13 Q Did you ever see that side agreement in any
14 form after that?

15 A Well, Henry tells me that, you know, I'm not
16 that good with time. Certain things, I remember very
17 well. And I remember that on the mod 25, it was a big
18 signing. Freedom came in with a little contingent;
19 Colonel Francois; Henry came in. I don't know if Dave
20 Lambert --

21 Q Excuse me for interrupting. Is that the usual
22 thing for a contractor to actually show up to sign a
23 modification?

24 A No.

25 Q What is the usual practice for modifications?

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1 A Contractor signs it; sends it back to me; I
2 sign it; it's executed.

3 Q It's carried out through the mail?

4 A Usually.

5 Q Okay; continue; I'm sorry.

6 A But I remember: this was like a big deal. We
7 were in the conference room; there were a number of
8 people there. I was there with my boss' boss, Walt
9 Welsh, who was the branch chief of general products, and
10 I remember there was a big to-do, and I was, you know,
11 upset that it was one of those kinds of things where, you
12 know, standing up and forget it; we're not going to sign
13 this contract, and it must have been around this
14 so-called attachment that Henry's talking about.

15 Now, I don't remember Henry giving me this
16 attachment, this so-called attachment that he says I
17 faxed to Ray Chiesa. I certainly know I couldn't fax
18 anything to Ray Chiesa, because I wouldn't know the guy's
19 phone number or fax machine. You know, I don't talk to
20 Ray Chiesa. He's the head of DLA; I'm a contracting
21 officer at DSCP. Evidently, however, I do see in the
22 record that the letter was faxed or the so-called side
23 agreement was faxed by Bob Appellian. I don't know if
24 Henry gave me the letter; I don't know if I refused to
25 touch it, because I had told Henry and Frank Francois

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1 before that I'm not privy to any side agreement; I'm not
2 going to sign anything with a side agreement; you didn't
3 talk to me; you didn't negotiate with me; I don't know
4 what's being said. Chiesa doesn't talk to me.

5 And, you know, to me, it was a big deal, and it
6 wasn't anything -- the way Henry reflected it was not
7 accurate. I didn't take something, walk out, come back
8 in and simply sign a paper. I know I made a big deal
9 about forgetting; walking out. And I think it was
10 Colonel Francois that said okay, forget it; forget it;
11 take it out, whatever; this is fine. And Henry signed
12 the modification exactly the way it is, and we stressed
13 that paragraph the said this is a discrete agreement.
14 Everything is within this modification, because I have no
15 idea, you know, what was discussed in DLA. Most of that
16 stuff, I don't even know how to do. So, you know, how
17 could I agree to it?

18 Q You said we stressed. Who was we?

19 A Myself, Walt Welsh; I mean, as far as I was
20 concerned, it was my show. It's my contract
21 modification, and I'm there to sign it with the
22 contractor, and that was it. That was enough. And Walt,
23 you know, certainly agreed with me. And, you know, I
24 remember -- I remember the room; I remember the table.
25 You know, it's one of these things that I remember from

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1 my career. And, you know, Frank finally said okay, take
2 it out. And he might have talked to Henry, and I don't
3 know what Henry's exact words were, but Henry understood
4 when I said that I wasn't signing this that I was signing
5 only this modification, and there was no other side
6 agreement with me.

7 Q I'd like to talk about some of the provisions
8 in modification 25, specifically, right now, the add-on
9 of the 114,000 cases. Could you tell me why they were
10 added back in in the MRE-6 configuration?

11 A Because I couldn't get any more MRE- 5
12 components, and neither could Henry. Nobody was
13 producing MRE-5 at this point. This was probably -- I
14 want to say like September -- was it 1986?

15 Q May 1986?

16 A May 1986? Nobody was producing MRE5
17 components. We had gone from 5 ounces to 8-ounce
18 entrees.

19 Q That's the meat?

20 A They're the meat items. There were some, I
21 think, non-meat entrees, but basically, except for the
22 ham slice or maybe the franks, everything went to an
23 8-ounce, and nobody was producing 5 ounces, and I don't
24 believe Henry -- I know Henry didn't have enough --
25 114,000 cases worth of MRE-5 5-ounce components to do his

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1 CFM portion, and I knew that we couldn't get in the MRE-5
2 entrees and components. So it was easier for everybody,
3 and Henry understood this, that we would reinstate at the
4 MRE-6 configuration. Nobody could do an MRE-5 anymore.

5 Q With the exception of going from the 5 to 8
6 ounce size for the majority or at least certain of the
7 entrees, the meat entrees, were there other size
8 differences or other differences in the components to the
9 accessory packs or the cracker packs? Were there changes
10 between the MRE-5 components and the MRE-6?

11 A No change in cracker; I don't believe there was
12 a change in accessory components; I'm not sure; in any
13 event, the package would have probably been more or less
14 the same. As far as other components, I don't know if
15 that's the year we did away with the beef and pork patty
16 and the potato patty. We may have changed some of the
17 components. I do know there was a change, because we
18 talked about there would be an equitable adjustment in
19 the change to go -- for Henry to go from an MRE-5
20 assembly to an MRE-6 assembly, and later on, we all kind
21 of agreed that it would result in a dollar per case
22 decrease, and that was basically just material costs.
23 And again, he wouldn't be responsible for GFM costs, so I
24 think there was a change in the CFM components that were
25 required in the MRE-6, and I think the bottom line was it

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1 was about a dollar's worth less CFM per case, but I don't
2 think it was a size issue, well, other than for the
3 retorts; I'm sorry.

4 Q Was that dollar decrease, was that something
5 that the Government intended to make a contract price
6 adjustment at some time for or --

7 A Well, yes, let me add to that other answer; I'm
8 sorry. I don't think the -- I know the menu bag size
9 didn't change. I know the final assembled MRE case
10 didn't change, and I know even during MRE-5, you were
11 allowed to put your retort entree in a regular case or a
12 larger case. So I think the increase from a 5-ounce to
13 an 8-ounce really didn't impact the spatial arrangement
14 within the MRE bag. So that answers the size
15 arrangement.

16 As far as the dollar per case reduction, mod 25
17 said that when we reinstated in the MRE-6 configuration,
18 we probably delegated to the ACO to definitize the change
19 in the contractor's effort under MRE-6 versus MRE-5
20 configuration. And like I say, later on, I think we just
21 ballparked it at a dollar, a dollar per case decrease.

22 Q So to your knowledge, the only size change that
23 you are aware of right now would be with regard to going
24 from 5-ounce to 8-ounce on possibly as many as 10 of the
25 meat entrees.

1 is short and the items that he still needs.

2 And under the short column, the items with the
3 minus appear to be the shortages.

4 Q I'd like you to look at also G57.

5 A Okay.

6 Q Did you say Jim Lacalier was one of your
7 buyers?

8 A Yes.

9 Q And could you tell us what this indicates to
10 you as far as the supply situation?

11 A It looks like it's a memo for the record from
12 Jim Lacalier dated 28 October 1986, and it looks like
13 it's a summary per Kevin Sarrage of Freedom with -- it
14 looks like -- it looks like these are the items that he
15 still needs to complete the 620,000 cases. Probably at
16 this time, which means to complete the let's say 114,000
17 cases or 110,000 cases or however many as of 28 October
18 have not been produced.

19 Q Do you think this is a number of what they
20 needed at that point in time rather than what they had?

21 A Well, you know, it says these items are
22 required, and Mr. Sarrage provided the following. Now,
23 he probably wouldn't need 160,000 frankfurters, because
24 he only had, like I say, 110,000 cases to produce. I
25 mean, I may be wrong. It may in fact be his actual

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1 A Yes; but again, that increase in size in the
2 retort pouch really didn't impact the actual size of the
3 carton entree. For all intents and purposes, the carton
4 really was almost the same size, and as a result, I know
5 we didn't change the MRE bag, menu bag size, and I also
6 don't believe we changed the MRE finished case size. So
7 you've got more food, but for some reason, it fit in the
8 same space. You've got more meat entree, but it fit in
9 the same space.

10 Q I'd like you to look at a couple of Government
11 exhibits. They're in the blue books; Exhibit No. 53.

12 A G53?

13 Q Yes.

14 A Okay.

15 Q Do you know what this is?

16 A It looks to be an inventory, and it looks like
17 both a GFM and a CFM inventory from Freedom's -- I guess
18 Bob Arrington was one of his property people or one of
19 his production people, but it's an inventory from Freedom
20 to the DCAS industrial specialist, and it looks like it
21 describes, for each component, how much was received; how
22 much was shipped out; and I guess it has a quantity
23 remaining, which he calls actual quantity. And then, he
24 shows a quantity required, which seems to be the quantity
25 for the entire 620,000 cases, and then, he shows us what

1 inventory on 28 October 1986. But we can check that,
2 because I have -- there's something in the record, a 31
3 December inventory.

4 Q Okay; and that's the Government inventory at
5 63, G63?

6 A Yes.

7 Q Starting with the third page here, can you
8 confirm here that all of these items are GFM?

9 A I know the eight meats are. I'm going to
10 assume everything on there is GFM as well, because on
11 December 31, that would have been our concern.

12 Q Did you make those notations at, for instance,
13 diced beef, the usable amount stated here is 92,899? Are
14 you the one who made that notation of 6,755?

15 A That's my handwriting.

16 Q Do you recall what the notation indicated?

17 A Unfortunately, I don't.

18 Q Do you know when you made the notation?

19 A Sometime after 31 December 1986, I think. I
20 don't know.

21 Q What does this final inventory dated December
22 31, 1986, indicate to you with regard to the Government
23 GFM position?

24 A Well, it says a couple things. First of all,
25 at least as far as the meats go, and that was really the

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1 problem in 1986. But as far as the meats go, with the
2 substitution authority that we had, there is certainly
3 enough entrees to probably do anywhere from 30,000 maybe
4 even to 50,000 MRE cases. I think there's about 440,000
5 entrees here, and there's eight GFM entrees in a case.
6 So best case scenario of 50-some thousand; allowing for,
7 you know, substitution, but we don't want to put more of
8 two of anything in a box. I think we came up with a
9 minimum of 30-some thousand cases that were available.

10 The other thing it does is if you look between
11 September 26, 28 October --

12 Q I'm sorry; where are you looking?

13 A If you look between the September 26 and the 28
14 October --

15 Q Okay; that's G57?

16 A That's -- I'm sorry; if you look at G53 --

17 Q G53?

18 A -- and G57.

19 Q G57? Okay.

20 A At the same time; for instance, if you look on
21 page 2 --

22 Q Of what document?

23 A Of the September 26 document at G53, and if you
24 go down to frankfurters, it looks like he's about 66,000
25 short. 66,000 short of 110,000 would be about, oh,

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1 40,000 on hand. And then, if you go to G57, there's
2 160,000 frankfurters.

3 Q And these are both Freedom's inventory records
4 or information?

5 A Yes, these are Freedom's inventories of GFM.
6 So evidently, there's been additional frankfurters
7 delivered after September and in October. So, you know,
8 what it indicates to me is two things: is certainly that
9 we have GFM there; we have enough to maintain production;
10 and we're continuing to deliver GFM, you know, as of
11 October 1986.

12 Q In your opinion, would there have been a
13 problem with keeping Freedom in GFM for that 114,000
14 cases that were reinstated using the MRE-6 configuration?

15 A Would there have been a problem?

16 Q Would there have been a problem? Was there a
17 problem?

18 A There would have been the same problem that we
19 had with the other assemblers. It was -- we probably
20 would have had to continue substitution authority,
21 because it was very probable that on any given day, we
22 wouldn't have all 12 entrees. That includes CFM, because
23 during this contract, we allowed Freedom to substitute
24 GFM for CFM to maintain production. He didn't have some
25 CFM entrees, and we allowed him to use the GFM.

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1 So, yes, it would have been the same problem
2 that we had with the other three contractors in getting
3 them through. We probably would not have had 12 menus
4 per day, 12 different menus per day. We would have
5 substituted -- again, the Government is entitled to do
6 that. I can't even guarantee you that there wouldn't
7 have ever been a down day, but we would have completed
8 it. And as far as I can see here, with about 30,000 case
9 equivalents of GFM in house --

10 Q Which one are you looking at?

11 A Well, I'm looking at the final G63, the
12 December 31, which is evidently the GFM that he has in
13 house when he shuts down on November 6. Assuming there's
14 about 30,000 to 50,000 cases worth there, which is
15 anywhere from 30 percent to 50 percent of the contract,
16 also, I don't think Freedom ever did 80,000 cases a
17 month. I don't even know that Freedom did 60,000. But
18 he might have done 60,000 in one month.

19 Allowing for 60,000 cases a month, and allowing
20 that I have almost a half a month or close to a month of
21 GFM in house already, I don't have any doubt that we
22 would have been able to supply him, maybe with inventory
23 only in a week ahead of time; maybe even three days ahead
24 of time, which was not uncommon. But I believe we would
25 have supplied him with the GFM to complete.

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1 I don't see any instance where Freedom ever
2 went down in the record for GFM. There is substitution
3 authority granted on every request from Freedom about an
4 outage of GFM, and that is not unusual during 1986.

5 Q You're talking about GFM meats?

6 A I'm talking about GFM really anything. Other
7 than those jellies -- and if you recall, in that one mod
8 that Mr. Steiger, you know, stressed the term partly
9 inexcusable, it was partly inexcusable because during
10 that 8-day down time or whatever, Freedom also didn't
11 have CFM. But again, that whole modification and that
12 whole issue was really about whether or not to terminate
13 Freedom's contract or extend. And if you look at the
14 tone, it really is let's extend, and let's give every
15 benefit of the doubt, and let's call those eight days
16 excusable. We say partly excusable because they
17 understand it's not solely attributable to lack of GFM.
18 But we're not asking anything for it; we're giving him
19 the 8 days extension basically for no cost.

20 Q Wasn't there a problem also with creamer at one
21 time?

22 A There may have been.

23 Q And potato patties?

24 A And again, there may have been. Potato
25 patties, we would probably substitute. We would probably

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1 substitute a candy or a spread. We did that frequently
2 as well. And again, they're proximal-sized. It's not a
3 problem. If anything, the candy or spreads are smaller
4 than the potato patties. But the creamer would have been
5 required for accessory production. Now, whether or not
6 Freedom had an inventory of accessory bags that wouldn't
7 delay final assembly and was able to make it up, I don't
8 know. I really don't know the impact of that assembly
9 packet shutdown.

10 Q Do you recall removing GFM product from
11 Freedom's plant after -- at some point after its
12 production closedown in November?

13 A Yes.

14 Q Do you recall when GFM was removed from the
15 plant?

16 A I don't think we -- I don't think we -- again,
17 I would need help on the time frames. I don't think we
18 removed GFM until Freedom was evicted out of the plant,
19 because then, it became a big deal that we had to pay the
20 landlord and negotiate a deal to, you know, keep the
21 facility lit. We had to negotiate a deal with the
22 landlord to provide us with security and forklift
23 operators so that we could move the equipment. So I
24 don't think we moved it until Freedom vacated the
25 facility.

1 A I think so, yes.

2 Q Why in this document, then, were we taking
3 crackers that may have been purchased at Freedom's
4 expense?

5 A You know what? Now that you ask me, I think
6 that's a mistake.

7 Q Yes.

8 A I think we should probably credit Freedom the
9 value of the cracker, then, also. Again, we never did a
10 final reconciliation on this contract. So I really don't
11 know if they're my crackers or Freedom's crackers. All
12 that I know is that Freedom told me he needs more
13 crackers. And we told Freedom we're not responsible for
14 any more crackers; you're responsible. I don't know if
15 you damaged them; I don't know if you lost them; but we
16 provided you -- you've never given me any damage recor
17 but we gave you all the crackers you need.

18 Now, whether he eventually found these crackers
19 -- because stuff was being found all over the place --
20 whether he found them and they really were our crackers
21 or whether or not Henry actually went out and bought the
22 crackers -- if Henry bought them, then I owe him the
23 value of these crackers. But at the time, I believed
24 they were my crackers.

25 Q You said we were finding stuff all over the

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1 Q I'd like you to refer to G86.

2 A Okay; I have it.

3 Q Could you tell us what this is?

4 A Yes; under the contract, any subassemblies that
5 the contractor performs become the property of the
6 Government, because his accessory bag -- his accessory
7 packets contain GFM. His cracker packets contain the
8 crackers, which are GFM. What this basically is is we
9 took the accessory packets and the cracker packets, and
10 we sold them -- we found a home for them; I can't really
11 use the term sold, but we provided them to Sepaco, and in
12 return for providing it to Sepaco, we reduced his
13 contract price by \$38,594, which would have represented
14 the value of Freedom's packaging material and assembly
15 labor. And then, you know, what we basically told DCAS
16 was, you know, take that \$38,000 and credit it to
17 Freedom's account, you know, for progress payments or
18 whatever.

19 Q I thought you testified earlier that the
20 Government had provided Freedom with all its crackers
21 prior and been there at some point prior to it shutting
22 down its production that we required it to go out and buy
23 replacement crackers, essentially.

24 A That's a good point.

25 Q Is that correct?

1 place when we went in. What does that mean?

2 A Well, you know, we had the December 31
3 inventory, but when Henry vacated the building and we
4 finally went

5 in --

6 Q When was that?

7 A It was when he vacated the building, and we had
8 to go in. I don't know; 1987.

9 Q Okay.

10 A But I know it wasn't too early, because in
11 early 1987, we were still talking about completing the
12 contract and extending the contract somehow. So, you
13 know, the whole thing; so, I don't know when. But I kn
14 sometime in 1987 -- this says July. I would bet around
15 this time; it was around the time that Bankers was going
16 to have the auction.

17 Q Okay.

18 A And we had to get in there and get the GFM out.
19 I mean, not only -- not only may I have lost it, you
20 know, and not been getting access to it, but it was
21 getting old; maybe I couldn't use it again, and, you
22 know, there's a value to this GFM. There was significant
23 GFM. But when we went in to look for it, you know, we
24 were finding stuff all over the place that wasn't carried
25 on any inventory report. It was a big facility, and, you

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1 know, here's some menus, and there was stuff all over.

2 Q Was it usable stuff or salvage stuff or stuff
3 on --

4 A No; I think for the most part, and maybe that's
5 the difference in my markings on that December 31
6 inventory; a lot of the stuff wasn't usable, you know,
7 either because the AVI couldn't attest to the location,
8 you know, and the thing with the AVI and, you know,
9 Health Services Command and the sanitation plant. If
10 it's in a facility maybe that is not considered sanitary,
11 you can't use it. It might have been all dirty and
12 whatever, so you couldn't use it.

13 But I do know we took a lot of GFM out.
14 There's another document in here that shows about \$77,000
15 worth of product; other GFM items that we also sent to
16 Sepaco and decreased his contract there.

17 Q First, let's look at G67.

18 A Hold on; I'm sorry. I'm sorry; there's another
19 document that shows about \$77,000 worth of CFM, again,
20 that we sent to Sepaco and again credited to Freedom.
21 The GFM is ours to send wherever we want.

22 What document?

23 Q Why did we take the CFM if it wasn't ours?

24 A Well, at that point, we took the CFM because
25 under progress payment, the title would vest with us and

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1 additionally, you know, we would try to -- let me just
2 use the generic term sell it; give it to one of the other
3 contractors to use it as price possible, again, to
4 liquidate progress payments and get a credit to mitigate
5 the loss. So I know there's another document where we
6 take about \$77,000 of CFM, provide it to Sepaco and
7 reduce his contract price and then tell the ACO to also
8 give credit to Freedom for that.

9 Q You go back and look at this document at G67.

10 A Mm-hmm.

11 Q It's dated February 12. Do you recall taking
12 -- or do you recall that the Government took certain
13 stuff out in February or --

14 A That's what it looks like.

15 Q This is just dated and --

16 A This is GFM; yes; this is GFM we moved out, I
17 guess, in early --

18 Q I'm sorry; we moved out what?

19 A This is GFM that we moved out, I guess,
20 sometime in February 1987 from Freedom to Sepaco. At
21 least that's what this says. We would have shipped out
22 supposedly on some kind of formal document, not this, I
23 would hope.

24 JUDGE JAMES: Is that your handwriting?

25 THE WITNESS: No, sir.

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1 JUDGE JAMES: Do you know whose it is?

2 THE WITNESS: You know, this looks to be like
3 either Lacalier's or Henry's. They both kind of have
4 that -- it may be Lacalier; it may be Henry. Is that
5 yours? I don't know whose handwriting it is. It's not
6 mine, though. The way it's written, DPSC wants
7 approximately --

8 BY MS. HALLAM:

9 Q Do you know how many truckloads of GFM were
10 removed from Freedom?

11 A No.

12 MS. HALLAM: I have no further questions.

13 JUDGE JAMES: Do you have any cross?

14 MR. LUCHANSKY: Your Honor, if we could, I
15 would request a brief recess before we begin our cross,
16 and I'd ask that it be a little longer than 10 minutes.
17 I have my materials for cross-examination back at the
18 hotel. We had anticipated through discussions about how
19 long Mr. Bankoff was going to be testifying; we thought
20 he was going to be the last witness, so I thought he
21 wasn't going until tomorrow. So the transcripts and
22 those things are over there. I would request permission
23 to go and get that and either start at 20 to 5:00, if
24 that's acceptable, or we can just start tomorrow morning.

25 JUDGE JAMES: Let's go off the record.

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1 [Recess.]

2 JUDGE JAMES: Back on the record.

3 CROSS-EXAMINATION

4 BY MR. STEIGER:

5 Q Mr. Bankoff, concerning your testimony about
6 incoming inspection, you indicated that specialized
7 equipment was not required, or was that the point you
8 were trying to make? I didn't follow that.

9 A To my understanding, yes.

10 Q And you talked about inspecting on the basis of
11 manual count.

12 A Basically, it's a manual and visual -- yes,
13 manual inspection for count, condition and identity.

14 Q We are talking about hundreds of millions of
15 items, are we not here?

16 A Oh, I don't know about that. Remember, what we
17 do is inspect based on a sampling plan. So if a truck
18 comes in, and we're 70,000 pieces on the truck, you may
19 have to inspect maybe eight cases, and of the eight
20 cases, you don't normally inspect every one. So the
21 sample sizes probably for a truckload are anywhere from
22 maybe -- I'll say as far as retort pouches, we do, I
23 think, a 200-pouch inspection on each truckload.

24 Q Wouldn't it be in the best interests of the
25 Government to have inspections be done as thorough and as

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1 complete as possible?

2 A The inspections have to be done in accordance
3 with the contract.

4 Q Is there a requirement in the contract that
5 says that certificates of completion are the only way
6 that goods are to be accepted?

7 A For food items or for non-food items?

8 Q For food items.

9 A For the food items, we don't accept COCs. Most
10 of the food items if not all the food items required USDA
11 origin inspection and grading certificates.

12 Q When you referred to CFCS, what were you
13 talking about?

14 A COCs.

15 Q COCs.

16 A A COC is a certificate of conformance. In
17 other words, take the accessory package, the packaging
18 material that Henry would buy, because on the CFM side --
19 and again, he was responsible for doing the same type of
20 inspections on the CFM that he would do on the GFM. The
21 difference is he did the GFM in strict accordance with
22 the contract requirement. The CFM, for the most part, he
23 was liable for, so he kind of inspected it on the basis
24 of his own inspection system.

25 His CFM food items all had to be inspected by

1 ever an MRE assembler who actually did a verification
2 inspection on packaging material, not one.

3 Q Thank you for the lesson.

4 A I was trying to answer your question, sir.

5 Q Now, answer my question. Is a COC -- is a COC
6 the only method prescribed for accepting non-food
7 products in that contract?

8 A No, the contractor can actually do his own
9 inspection.

10 Q And isn't that, in fact, what was being done
11 here?

12 A Like I said, I've never seen anybody do a
13 verification inspection on packaging material. I don't
14 know anybody in the industry who has the capability to
15 a wet burst strength test. I don't know anybody in the
16 industry who has the capability to ensure that a retort
17 pouch has the right thickness of polyethylene, aluminum
18 and polypropylene. I don't know anybody who has the
19 ability in the industry to confirm that these
20 specification requirements for the packaging material are
21 met. And when we talk about specialized equipment, it
22 would not be a seal strength tester; it would not be any
23 of the equipment Henry talked about. It would be
24 equipment much more specialized to do that type of
25 verification inspection, and I don't know anybody in the

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1 the USDA at point of manufacture and come in with a
2 grading certificate, same as the GFM. So when it comes
3 in, it's already been inspected at point of manufacture,
4 and all he's making sure is it's the right stuff; it's
5 the right counts; and there's no damage to it in transit,
6 whatever. That's what we mean by count, condition and
7 identity.

8 Now, as far as the packaging materials, take,
9 for instance, his box -- I switched -- his box. He's
10 buying the V2S box, which is the solid paper board. That
11 box is required to meet certain requirements for burst
12 strength, seal strength, the whole bit: so much density
13 and basis weight for the cardboard itself. When that box
14 comes in, in most cases, what the contractor can do is
15 either do his own inspection on the box, either send it
16 to an independent lab or do his own evaluation on the
17 basis weight of the material for that burst strength or
18 rely on the COC; in other words, the box manufacturer, he
19 does the test. And when he's comfortable that his
20 product meets our end item requirement, they give us --
21 they give his contractor or us a certificate of
22 conformance.

23 And in most cases, the Government relies on
24 that COC. Now, we have the right to do verification
25 inspection, and that's what our lab does. I don't know

1 industry who has that. That's why the Government does
2 verification inspection on occasion at our lab. We do
3 have that ability, and NADIC laboratory has that ability.

4 Q Mr. Bankoff, were you aware of the contractor's
5 plans to utilize high technology equipment on this job?

6 A No.

7 Q You were not? As far as you knew, the
8 contractor planned to use the equipment that he ended up
9 using?

10 A Well, remember: I came in in June of 1985. I
11 didn't negotiate the contract. I came in and
12 administered the contract to the best of my ability.

13 Q I understand that.

14 A My concern was that Freedom produce the cases.
15 What equipment he had planned on using originally, I
16 don't know. I don't know.

17 Q Didn't he file two claims with you, and it set
18 forth his understanding of what equipment was intended
19 be used versus what equipment was actually used?

20 A Well, and I'm still a little confused, because,
21 you know, as far as the Koch machine, we talked about -
22 I think Henry talks in his proposals about production
23 equipment, and I think earlier, I read something like a
24 million and a half dollars in production equipment. I
25 think the Koch equipment, at that time, was close to

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1 \$500,000 or \$700,000 itself. I don't know where you're
2 going to be able to fit \$1.5 million worth of production
3 equipment in with two Koches.

4 So again, you know, as far as the assumption,
5 even as far as the claim -- if you recall, on a lot of
6 the mods you're going to read later and the DNFs, the
7 Government disputed most of those claims.

8 Q The Government disputed what claims?

9 A Well, you said didn't I read Henry's claims
10 later on about the equipment he was going to use. You
11 know, in most cases, we disputed most of those claims.

12 Q Did you?

13 A Yes; so, when Henry says that, you know, he was
14 going to use two Koches, I don't know. Nobody else was
15 using the Koch at that time for accessory bags. You
16 know, I don't know what his original plan was.
17 Sometimes, you don't start with a Caddy. Sometimes,
18 you've got to use other equipment. I can't speak to
19 that.

20 Q But Henry advised you that he had plans to use
21 that equipment and, in fact, were you not aware that the
22 price that he bid and the labor that he projected and the
23 cash flows and everything else that he predicated his
24 price on was, in fact, based upon using this high
25 technology equipment?

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1 A All I really know, and again, I came in in June
2 1985. I want to make this contract happen. You know,
3 the first reason I went to the price regs to look at the
4 history was in discussing this so-called capital
5 equipment that was allowed to be expensed for progress
6 payments and that Henry wanted the progress payment for
7 in total. I think I find later on about \$500,000 worth
8 of such equipment. And I also see that in terms of
9 production equipment, they allow about a \$333,000
10 depreciation. Now, somewhere, you know, I don't know
11 where it comes from; whether it was in my reading;
12 whether it was in testimony; whether it was in the
13 documents I see now that were talking anywhere between
14 \$1.5 million and \$1.7 million.

15 If you look at \$333,000 on depreciation, and
16 you allow a 5-year straight line, you're talking \$1.7
17 million. So somewhere along the line, if you're going to
18 buy \$1.7 million worth of production equipment, you've
19 got to buy it. The Government's not buying it; you've
20 got to buy it. If you intended to use it, then, where is
21 it? Then, buy it. The Government was not financing
22 production equipment.

23 Q Weren't you aware that the equipment was, in
24 fact, bought? Didn't anyone tell you that?

25 A I'm not aware that there was a Koch in the

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1 facility.

2 Q Really? And you were not aware that the
3 equipment was removed?

4 A I'm not, no.

5 Q Are you familiar with the Koch and Doughboy
6 pieces of equipment?

7 A Yes.

8 Q Did the other suppliers have them?

9 A Again, like I said, at some point, the Koch was
10 introduced on the cracker line. I don't know if it was
11 in 1985; I don't know if it was in 1984; I don't know if
12 it was in 1986. So when I first came in, I don't know if
13 they all had Koches.

14 Q Okay; I didn't ask if they all had. I asked if
15 you have -- I asked if any of them had.

16 A I don't know in 1985.

17 Q Did you observe these machines in operation?

18 A Have I observed them?

19 Q Yes.

20 A Yes; I've observed them on a number of plants
21 in a number of different uses. But in 1985, when I first
22 came on board, and I visited all the plants; I don't know
23 if in 1985, the other two facilities had the Koch.

24 Q Okay; I accept that.

25 A I don't remember.

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1 Q I accept that.

2 A Okay.

3 Q Now, getting back to the time that you did
4 observe the equipment, and you do say you are familiar
5 with it, would you say that this is high efficiency
6 equipment that would enable the production to be more
7 efficient?

8 A It's an excellent piece of equipment;
9 absolutely.

10 Q And if, in fact, an item of this nature were to
11 be used, would it not permit a contractor to lower its
12 requirements for labor to perform the manual jobs?

13 A Well, the whole purpose of automation is to
14 reduce labor costs.

15 Q Right; so, it would do that, you're saying.

16 A I believe it would.

17 Q So in essence, if you then -- if a contractor
18 had based his price on that and was unable to use that
19 equipment, he would then have to use a greater number of
20 workers to accomplish the same thing.

21 A He would have to incur greater labor costs.
22 You know, there's a rate of return on a piece of
23 equipment. It capitalizes itself. There comes a point
24 that the return on the investment offsets the cost of the
25 equipment. You know, sometimes -- and you see this

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1 oftentimes on a first contract -- some firms don't go out
2 and buy the Koch right off the bat, or they don't buy
3 the, you know, other specialized equipment, because at
4 that point, for whatever reason -- maybe they don't have
5 the money; their rate of return, the guarantee, whatever,
6 is not there; they don't do that. Eventually, though,
7 with any capital investment, you make a decision that at
8 some point it's going to return, you know, give you the
9 positive return on the investment. And then, you always
10 make the decision whether to invest or not.

11 Q There's no question that some firms would adopt
12 that modus operandi with respect to capital equipment,
13 but there are others that in anticipation of perhaps
14 being part of a long range program would make such an
15 investment, would they not?

16 A Sure.

17 Q You made mention of notices of outage and that
18 the contractor was required to give notice of potential
19 outages of GFM, did you not?

20 A Yes, sir.

21 Q I wasn't aware if you said that Freedom failed
22 in their obligation to provide those notices; did they?

23 A I don't know.

24 Q You don't know?

25 A No.

1 that early in 1985, or had you seen in your files that
2 you inherited, a letter from your predecessor that did,
3 in fact, set forth the Government furnished material that
4 would be supplied to Freedom Industries?

5 A No, I don't think so.

6 Q You did not.

7 A No.

8 Q Were you aware that at the time the contract
9 was awarded or even shortly thereafter that Government
10 furnished material to satisfy the full requirement of
11 620,000 units was not, in fact, procured by the
12 Government?

13 A Say that again?

14 Q Were you aware that at the time the contract
15 was awarded or shortly thereafter, the Government had
16 in fact procured the full complement of GFM to support
17 the 620,000 unit contract that was awarded.

18 A I'm not aware of that.

19 Q You're not aware? So to the best of your
20 knowledge, you believe it was.

21 A I would imagine so, yes. Remember, components
22 are not bought for a contract. They're bought for a
23 total year's requirement, and then, they're diverted to
24 the individual assemblers.

25 Q Are you aware that after having been advised by

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1 Q You have no reason to believe that they did.

2 A Well, I have no reason to believe that they
3 didn't, because I know we gave substitution authority
4 quite frequently, which would be in response to that. I
5 have no reason or I don't know if they ever failed on any
6 occasion.

7 Q Did you at one time early in the program
8 provide -- it was either you or your predecessor, so if
9 it's not you, you'll let me know -- did either you or
10 your predecessor sometime early in the program provide
11 Freedom with a list of all Government furnished material
12 it intended to provide? Do you recall that?

13 A I think, you know, the solicitation for the
14 most part kind of has a bill of materials of GFM, and it
15 almost has, you know, I think it's based on per case. I
16 know later on, when we made awards, we would routinely do
17 that to let people know what their doings would be. But
18 I don't believe that I did it on this MRE-5.

19 Q It was not you.

20 A Yes.

21 Q It was your predecessor, Mr. Barkewitz.

22 A Yes; and that would be a routine.

23 Q Okay.

24 A Yes.

25 Q Now, let me ask you; are you aware of the fact

1 Mr. Barkewitz what the total quantity was available for
2 GFM that Freedom did, in fact, notify the Government th
3 the GFM was insufficient to support the 620,000 units?

4 A Do I know that?

5 Q Yes, do you know that.

6 A No.

7 Q You do not know that.

8 A I don't know that.

9 Q Okay; thank you.

10 You mentioned something about damage reports,
11 and you were benning for them, I think was the word yo
12 used.

13 A It might have been a poor choice of words, but
14 we were requesting them.

15 Q And then, you pointed to a particular damage
16 report found at the end of the job. Do you recall that?

17 A No, I don't.

18 Q That had not been received?

19 A No, I don't think I found any damage reports.

20 Q Were you asking for them?

21 A Yes.

22 Q And was there any -- you mentioned one
23 particular report either -- it may be in the damage, or
24 maybe it was an inventory control report that you claime
25 you didn't get down near the end of the job. Do you

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1 remember that?

2 A No, I think what I said was I wasn't getting
3 any damage reports. I did see a December 31 inventory
4 report, which I believe we provided; we developed, we
5 being the Government. I think we had a 28 October report
6 for at least some items that was provided to us by Kevin
7 Sarrage, and I think we had a September inventory report
8 from Bob Arrington. So I think we had an inventory
9 report at least as late as 28 September.

10 Q This contract was terminated for default by
11 you?

12 A Let me say, though, that that inventory report
13 was a simple inventory report. It still didn't include
14 any damages. And inventory reports, remember, had total
15 quantity received; quantity shipped out, you know, which
16 would be similar to that 114,000 cases of GFM that we
17 shipped out or anything that we shipped out on warranty.
18 It then subtracted from that amount usable and amount
19 required. There still was nothing that showed damages.
20 And really, if you look at what the contract says,
21 failure to provide damage reports alleviates the
22 Government of any liability of down time due to GFM. We
23 were never able to get those damage reports.

24 Q Let me ask you a question. Let me jump ahead a
25 minute.

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1 A Okay.

2 Q The contract was ultimately terminated for
3 default, was it not?

4 A Yes.

5 Q And you were the contracting officer who did
6 that.

7 A Yes.

8 Q Do you remember the reasons that you used in
9 your final decision?

10 A Failure to perform.

11 Q You don't remember anything else, anything
12 specific concerning inventory control?

13 A I can probably say inventory control; I could
14 probably say failure to provide required inventory
15 reports including damages; I could probably say vacating
16 the premises.

17 Q You could say a lot of things, but what I was
18 asking from you was to tell me what the reasons were for
19 your termination for default, and I was asking
20 specifically if one of those reasons had to do with
21 inventory control. If you don't remember, I accept that.

22 A I believe that was one of the deficiencies I
23 cited in the show cause, and it probably was one of the
24 deficiencies that I cited in my DNF, and it's probably
25 one of the deficiencies I cite in the termination letter.

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1 Q And you are aware, Mr. Bankoff, that the Armed
2 Services Board of Contract Appeals, in their decision,
3 overturned your termination for default; is that not
4 correct?

5 A I am aware of that. I don't agree with that.

6 Q I didn't ask that.

7 A Okay.

8 Q You mentioned something about cracker damage.

9 A Yes, sir.

10 Q Do you recall the specifics -- well, let me be
11 a little more precise -- regarding the alleged cracker
12 damage, was it your conclusion or the conclusion of the
13 Government that that damage was caused by appellant?

14 A Yes.

15 Q Do you recall what investigation or examination
16 you undertook to enable you to arrive at that conclusion?

17 A You know, let me modify that last answer, if I
18 may. Again, like I say, I don't know if it was excessive
19 damages, because I had no damage reports. I don't know
20 if it was loss, because, of course, the only way to
21 ascertain loss is by a complete inventory report. All I
22 know is that we provided the required amount, the total
23 required amount of crackers. Absent any damage reports,
24 I can only assume that the reason we don't have the
25 crackers is due to assembler damage or loss. Either way,

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1 the contractor is liable.

2 Q There is no other conceivable way for crackers
3 to be damaged; is that what you're saying?

4 A There are other categories of damage. There's
5 manufacturer's damage; there's concealed damage; and
6 there's inspection damage; in other words, the
7 destructive sampling that the AVI do. But they have to
8 be documented, and the responsibility for preparing the
9 2651 forms is the contractor's.

10 Now, absent that and not knowing how much
11 inspection damage is done and not knowing how much
12 manufacturing damage is done, and, like I say, concealed
13 was always an ambiguous, the bottom line is I've provided
14 the crackers. The fact that they're not there to me
15 indicates that either the contractor has had a
16 significant quantity of scrap, which, in most case, would
17 be assembler damage, or he lost them. I don't think the
18 AVI were eating them and doing excessive sampling. I
19 don't know what else to think.

20 Q Did I hear you say you provided them?

21 A That's what I believe.

22 Q Why did you do that?

23 A Why did we --

24 Q Provide the crackers.

25 A Well, they were GFM. We were supposed to

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1 provide them for the contractor to package.

2 Q So wasn't it possible that crackers could have
3 been damaged in transit, for example?

4 A Is it possible? It is possible. That's why
5 the contractor does receipt inspection. But when I say
6 we provided, what I mean was that the contractor
7 accepted. When I say that we provided 500,000 crackers,
8 and that's just a number I'm throwing off, what that
9 means is that the contractor receipted, on the DD250s,
10 which implies he inspected it; he receipted it; and then,
11 the AVI accepted for the Government.

12 So it means Freedom accepted 500 crackers. So
13 what I'm saying is the contractor accepted, inspected and
14 accepted, the required number of crackers.

15 Q Mr. Bankoff, there came a time, I believe, in
16 October of 1986 that it was determined that there was
17 some substantial cracker damage. At that time -- are you
18 familiar with the time that I'm talking about?

19 A September 1986, you said.

20 Q Yes; October 1986; around that time frame.

21 A October of 1986.

22 Q September or October of 1986.

23 A Okay.

24 Q Are you aware that the cracker damage was noted
25 by your own industrial specialist in his plant visit, you

1 Q I heard you mention Wedtech.

2 A No, I never mentioned Wedtech.

3 Q I could have sworn you said Wedtech. Am I
4 only one in this room that heard that?

5 A Did I mention Wedtech?

6 Q You said something about Wedtech was taken
7 place or --

8 A Why would I say that?

9 Q I don't want to go back; it's not that
10 significant to me, but I just wanted to know what y
11 take was on that, because I heard the term Wedtech
12 mentioned. But again, if you do not recall making
13 I'll go on.

14 A I don't think you heard it from me.

15 Q Okay; I thought I did in your testimony.

16 Is it something -- I think your conclusion was
17 that the zyglol testing had little or no impact on
18 Freedom's operation.

19 A I believe that, yes.

20 Q And the basis of that belief is simply because
21 it occurred late in the zyglol testing cycle; I believe
22 that's what you were saying.

23 A Yes.

24 Q But you do not know for a fact if it did or did
25 not have an impact on that operation.

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1 know, routine report?

2 A Okay.

3 Q And is it true that you provided another batch
4 of crackers?

5 A If that's what the record says.

6 Q Yes, it does.

7 A Okay.

8 Q And did you attempt to charge the contractor
9 for this, or do you recall?

10 A I don't recall, but I would find that -- I
11 would find that strange to charge the contractor for the
12 crackers at that particular time. That would normally be
13 something that we would do on end of contract GFM
14 inventory reconciliation. We would assess the contractor
15 charges for excess loss, excess damages and loss.

16 Q Are you familiar with the industrial specialist
17 reports that were issued from time to time?

18 A A little.

19 Q Did you review them, look at them?

20 A I believe I did.

21 Q Do you recall any specific instances in those
22 reports whereby the industrial specialist criticized the
23 management or the technical operation that was being
24 conducted by Mr. Thomas and Freedom?

25 A I don't recall; I can't say that.

1 A Let me say this: the impact on zyglol was
2 primarily at the retort manufacturers. Now, in the
3 beginning of the program, in March and April, when we
4 found the problem, we actually found it at the assembly
5 points. So everything that was in inventory in March and
6 April had to be inspected. That created a significant
7 burden on a lot of assemblers. Therefore, the allowance
8 to claim an equitable adjustment for sending in samples
9 for zyglol and what have you.

10 But Henry didn't have MRE-6 retort pouches at
11 that time. Henry didn't start getting his MRE-6 retort
12 pouches, you know, the reinstatement pouches, until late
13 on. And by that time, for the most part, the zyglol
14 situation was a manufacturer situation. So I don't know
15 if it impacted Henry at all. As a matter of fact, I
16 would have to -- I would have to ask you to show me w
17 it impacted Freedom. The only impact that it would hav
18 on Freedom is that, like I said, we couldn't guarantee
19 all 12 -- all 8 GFM items to be in sufficient quantity
20 every day for assembly, as Henry, I'm sure, couldn't
21 guarantee he could get the four CFM meats.

22 That's the only impact, but because of the
23 substitutions, we got through.

24 Q Where was that taking place that you just
25 mentioned, that Star Foods or at Synpack? Where was it

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1 taking place?

2 A Where was what taking place?

3 Q The zygllo testing; where was that taking place?

4 A That was basically taking place at Fort Sam

5 Houston. Fort Sam Houston, the Health Services Command

6 in Fort Sam Houston in San Antonio was doing the Zygllo

7 testing. But what we required originally was that

8 samples be submitted to Sam Houston for zygllo testing,

9 and later on, manufacturers had to continue submitting

10 samples for zygllo testing.

11 Q Now, what caused the problem to begin with?

12 What plant did that problem first arise at?

13 A Where did we first see it?

14 Q Yes.

15 A We first started seeing a lot of swellers -- I

16 think Cincinnati -- Synpack was the first online

17 inspection system to find the swellers. Shortly after,

18 we found swellers at Rafco. We didn't find a lot of

19 swellers in South Carolina, but we found them in

20 Cincinnati and Rafco. And then, it was basically Star

21 Food product.

22 Q I don't recall; were any swellers attributed to

23 Freedom's operation?

24 A Well, first of all, Freedom had MRE's retort

25 pouches. We didn't really have a production problem in

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1 1985 with any of the manufacturers. So -- and Freedom

2 was --

3 JUDGE JAMES: So do we your answer is no?

4 THE WITNESS: My answer is no; Freedom also

5 didn't produce in early 1986 retort pouches. So Freedom

6 wasn't a manufacturer and basically had MRE's pouches in

7 house. So, no, there was no problem with the condition,

8 the integrity of retort pouches at Freedom's facility.

9 BY MR. STEIGER:

10 Q I'm a little confused about this whole business

11 of the GFM and what was available, et cetera. Is it not

12 true that to deliver a complete MRE unit, every single

13 item is required to be in there?

14 A No.

15 Q No?

16 A No.

17 Q You can deliver an MRE unit with missing items?

18 A Define your -- what do you mean by every single

19 item?

20 Q Every single item that is supposed to be part

21 of the package.

22 A Well, you have a menu right in front of you.

23 Now, you know, Henry talked about the MRE having 500

24 components. Your Mr. Bowenstein, I think, mentioned 126

25 components. I think there's closer to like 110

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1 components. If you're asking me if all 110 have to be in

2 each case of MRE, you've already heard me say no;

3 substitution authority has been granted. What we have to

4 have are 12 MREs in each case, 12 complete meals, and

5 each meal has to be nutritionally -- meet the nutritional

6 requirements.

7 Q You're not playing word games with me now, Mr.

8 Bankoff.

9 A I think I'm answering your questions. I said

10 no.

11 Q I think I made the question -- I'll rephrase

12 the question, Mr. Bankoff, but I believe you know what

13 I'm talking about. In order to have a completed MRE

14 case, do all the items that are supposed to comprise that

15 case item have to be in there?

16 A All 110 or 126 items?

17 Q No, whatever is supposed to be in a particular

18 MRE unit?

19 A Well, how can you ask me that when I've already

20 told you that we provided for substitution? So a case of

21 MRE does not need a beef stew if we allow a substitution

22 for beef stew.

23 Q Okay; if you allow -- even if you allow the

24 substitution, if, including the substitution, does every

25 item have to be there, albeit some may be substituted

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1 for?

2 A Are you asking me if we have to have 12

3 complete meals in a case of MRE?

4 Q Well, okay, I'll ask you that.

5 A Yes.

6 Q And if you have 11, or if you have incomplete

7 meals, then, you would not have a completed MRE unit; is

8 that not right?

9 A You are not authorized to assemble less than a

10 complete menu, and a finished case of MRE must have 12

11 menus.

12 Q Okay.

13 A There can be duplicate menus; there can be

14 substituted menus. But each case of MRE will have 12

15 menus so it can feed 12 soldiers.

16 Q So, essentially, if the completed menus -- if

17 the menus were not complete, and substitutions were not

18 provided for, then, in effect, these units could not be

19 assembled, shipped and accepted by the Government; is

20 that correct?

21 A That's fair; that's, I think, accurate.

22 Q Okay; now, you showed us inventories that

23 existed near the end of what I like to call the shutdown

24 period. It wasn't clear where they came from. One of

25 them, it wasn't clear whether or not it referred to what

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1 was on hand versus what, in fact, was needed, but at any
 2 rate, did it show a complete complement of the required
 3 GFM to perform this job?
 4 A I think what it showed, as I said --
 5 Q I don't want a --
 6 A Well, I have to answer because your question --
 7 Q Well, the question is yes, no, or I don't know.
 8 A Your questions are not accurate.
 9 Q Then tell me; I'll rephrase it.
 10 A They don't indicate understanding of the item.
 11 They don't indicate an understanding of what the finished
 12 MRE was supposed to be and what was authorized. What I
 13 told you was based on the end item inventory that I saw,
 14 we could have assembled 30,000 cases, 30,000 or 50,000,
 15 based on the substitution authority which had already
 16 been granted. I don't know how else to answer that.
 17 Q Was 50,000 units enough to complete the job --
 18 A No.
 19 Q -- on the contract?
 20 A No.
 21 Q Okay; so you did not have on hand sufficient
 22 Government furnished material or with substitutions to
 23 enable the contractor to complete the full quantity of
 24 units that he had on the contract.
 25 A I believe I had more of a percentage of GFM --

1 services, the contract allowed me to make any number an
 2 extent of GFM substitutions.
 3 Q I see; and if it disrupted the operation, it
 4 didn't matter? I mean, that was okay? You could make
 5 unlimited substitutions?
 6 A If the substitutions were of items of
 7 significantly different size that would have impacted the
 8 production, then, the contractor could have requested an
 9 equitable adjustment. But I still had the right to
 10 substitute to make final production.
 11 Q Okay; I must tell you, Mr. Bankoff, you must
 12 change your phrase. In one, you said almost the same
 13 size; similar size; drastically different. What is your
 14 understanding of what right you had to make substitution
 15 with respect to size?
 16 A Let's read it. It's right there in black and
 17 white.
 18 Q Okay.
 19 JUDGE JAMES: That wasn't his question. His
 20 question was what is your understanding, Mr. Bankoff.
 21 Can you answer that question?
 22 THE WITNESS: My understanding is of similar
 23 size.
 24 BY MR. STEIGER:
 25 Q Similar size.

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1 Q I didn't ask that.
 2 A -- than the contractor --
 3 Q I asked a very simple question.
 4 A Did I have the complete complement? No. I had
 5 about three weeks' worth of work, and I would have
 6 supplied the remaining GFM.
 7 Q What you would have done is not the issue.
 8 A I think it is.
 9 Q Well, I don't. The issue here is what he had
 10 on hand and what managerial decisions he made with
 11 respect to what he had on hand.
 12 A But you're not giving me any credit for how I
 13 would have managed the GFM. It didn't make --
 14 JUDGE JAMES: Mr. Bankoff, please just answer
 15 the attorney's questions.
 16 BY MR. STEIGER:
 17 Q I'm asking very simple questions here, really,
 18 basic and inherently basic questions.
 19 A Say it again.
 20 Q Now, you talked about substitutions. You said
 21 many times that you had the right to make substitutions.
 22 Do you believe you had the right to make unlimited
 23 substitutions in this contract?
 24 A Yes, as long as I did not -- as long as I
 25 provided an end-item MRE that was acceptable to the

1 A Right.
 2 Q That is your final answer; similar size.
 3 A I don't want to guess. I don't want to guess.
 4 Q Well, you know, I think your perception and
 5 your perception is the way this contract was managed by
 6 you, was it not?
 7 A In accordance with the requirements of the
 8 contract.
 9 Q I asked you --
 10 A It's right in the contract.
 11 Q I asked you before if you felt you had a right
 12 to make unlimited substitutions, and I'm not sure -- did
 13 you say you had that right?
 14 A Yes.
 15 Q Okay.
 16 A Can I qualify that by saying --
 17 JUDGE JAMES: Please, Mr. Bankoff, there is no
 18 question pending. Let him ask his questions.
 19 Does the appellant have any further questions?
 20 MR. STEIGER: I'm ready. Pardon?
 21 JUDGE JAMES: Do you have any further
 22 questions?
 23 MR. STEIGER: Yes, I do.
 24 JUDGE JAMES: Go right ahead.
 25 MR. STEIGER: Thank you.

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1 JUDGE JAMES: You're welcome.

2 BY MR. STEIGER:

3 Q Getting back again to these substitutions, I
4 don't quite understand it. You've got an inventory that
5 clearly shows, by your own admission, that there was not
6 sufficient CFM -- I'm sorry, GFM -- to complete the
7 entire complement of MRE-6 units that were then on the
8 contract. We talk about having unlimited rights of
9 substitution. At the time that these inventories were
10 prepared, did you indicate that you were going to provide
11 substitutes?

12 A I think it's obvious by --

13 Q No, no, answer the question.

14 A Well, I can only answer it by the documents
15 that I've looked at. There are a number of telex
16 messages from DSCP to Freedom around this time frame, in
17 October, what have you, that authorizes substitutions. I
18 know from the entire year in 1986 that we authorized
19 substitutions on the other assemblers. I can probably
20 tell you that as of October 1986, we probably didn't have
21 all the GFM retort entrees at the other assemblers to
22 complete MRE-6. I've told you before it was almost a
23 just-in-time inventory.

24 Q I asked you a very simple question, Mr.
25 Bankoff. At the time that these inventories were

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1 prepared, do they indicate that substitutions would be
2 made to make up for the shortfall?

3 A The inventory doesn't indicate either. It's
4 just an inventory.

5 Q So the inventory does in fact show shortfall.
6 In and of itself, it shows a shortfall.

7 A For what would be required to complete the
8 entire contract.

9 Q Exactly; exactly.

10 A Yes.

11 Q Now, did you send to the contractor specific
12 information indicating exactly what substitutions you
13 were going to make to make up for that shortfall?

14 A We had sent substitution authority on
15 production up to that point.

16 Q No, I asked a very simple question.

17 A I don't know if substitutions would have been
18 required. I already said that if Freedom had assembled
19 tomorrow, we would have given him substitution authority.
20 If he assembled the next day, we would have given him
21 substitution authority. But maybe in one week, there
22 would have been additional shipments, and we would have
23 had all eight entrees. At that point, we probably would
24 have been involved in reverse substitutions.

25 Q I don't understand. Mr. Bankoff, you testified

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1 that you were not aware of the contractor's failure to
2 notify you of outages. I take that to mean that you were
3 aware. Now, if you were aware of his outages, did you
4 make provisions at that time to provide him specifically
5 with substitutions that would enable him to complete the
6 contract? Just a simple question.

7 A Yes.

8 Q You did?

9 A Yes.

10 Q Where were they? Did you tell him?

11 A There was written documentation that we
12 authorized substitutions for assembly days when he was
13 down. The fact that he didn't have enough GFM to
14 complete didn't mean that additional GFM wouldn't have
15 been delivered. We were delivering GFM, you saw, as late
16 as October 1986. We would have continued to deliver. If
17 on every given day, I would have had all eight GFM items,
18 I don't know, but I can almost say based on what I had
19 done the day before that we would have authorized
20 substitutions on every given day so at least he could
21 assemble.

22 Q What you had done before is what you had done
23 before. The contractor, as you are aware, laid off
24 people and essentially shut down his operation. Do you
25 know why?

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1 A I know it wasn't due to lack of GFM.

2 Q Oh, really?

3 A My belief.

4 Q I see; and didn't the contractor tell you that
5 was his reason for shutting down?

6 A The contractor never said it was lack of CFM.
7 I think you have to look at the -- well, actually, Pat
8 Mara's documents show lack of CFM. My final inventory
9 and my messages authorizing substitution say that there
10 is GFM. The facts indicate there was GFM to continue
11 assembly.

12 Q What facts are those?

13 A The inventories.

14 Q I thought we just concluded that the
15 inventories indicated there was a shortfall.

16 A The inventories indicate that there's enough
17 GFM entrees and other items to do 30,000 to 50,000 cases.

18 Q Mr. Bankoff, we're going around in circles.
19 But the requirement to complete this contract was not
20 30,000 to 50,000; it was 106,000, was it not?

21 A Yes.

22 Q So there was not enough GFM to complete the
23 contract other than your supposition that you may or may
24 not in the future or whatever provide substitutions;
25 isn't that right?

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1 A There was not enough GFM in inventory at that
2 particular time to complete the entire 110,000 cases,
3 yes.

4 Q Is it reasonable for you to expect the
5 contractor to maintain his full complement of his labor
6 force while you decided whether or not to make
7 substitutions?

8 A We did it at three other MRE assembly plants.

9 Q Hey, let me tell you -- I mean, you're telling
10 me -- I asked you a question. Do you think it's
11 reasonable? You're telling me it's reasonable?

12 A It was the only way to complete. What I am
13 telling you is that under the contract, given the
14 authority to substitute entrees for entrees, other items
15 of similar ilk -- we would never substitute a candy for
16 an entree, so when I say I have unlimited authority,
17 given what the services would require to have in MRE, I'm
18 talking entree for entree. I'm talking a spread for a
19 spread. Given that authority, we had enough GFM; we
20 completed all MRE-6 contracts; we would have completed
21 this. We had enough in-house to do another 30,000. I
22 would have supplied the rest.

23 Q Well, one, I'm not sure the record is clear
24 that you ever told him that; two, your authority, I
25 believe, and you can stop me if I'm wrong, was you had

1 question.

2 A I don't know what future substitutions would
3 have been required. I can't answer about the future

4 Q All right; then, I think we're talking on a
5 different page.

6 A We are.

7 JUDGE JAMES: Mr. Steiger, don't argue with
8 him.

9 MR. STEIGER: Are we going on?

10 JUDGE JAMES: Do you have any further quest
11 of the witness?

12 MR. STEIGER: I do have more questions; it
13 could take another hour.

14 JUDGE JAMES: Another hour?

15 MR. STEIGER: Yes.

16 JUDGE JAMES: What's your preference? Do y
17 want to take them tonight, or do you want to take th
18 tomorrow?

19 MR. STEIGER: I'd prefer them tomorrow.

20 JUDGE JAMES: Does the Government have any
21 problem with that?

22 MS. HALLAM: I'll defer to the witness. Do yo
23 care whether you stay for another hour?

24 THE WITNESS: I don't care.

25 MR. STEIGER: I said could take an hour. It

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1 the authority to make substitutions. I don't know about
2 your authority to promise substitutions, but the fact of
3 the matter is that you did not make substitutions in this
4 particular case before he shut down his operation; is
5 that not correct?

6 A I think I made substitutions on his production
7 on the day or the days before he did --

8 Q Mr. Bankoff, I think you know what I mean. You
9 did not make the substitutions sufficient enough to
10 enable him to complete the 106,000 cases that he had to
11 complete; is that not correct?

12 A I can't agree.

13 Q You did; you provided him with the
14 substitutions.

15 A I can't agree. If I make a substitution on his
16 last day of production, and the last case of MRE that he
17 produces does not have all eight entrees but does have 12
18 menus because I allowed substitutions, how can you say
19 I'm not authorizing substitution to complete?

20 Q I don't understand; it sounds like double-talk
21 to me. To me, I'm trying -- I'm asking you whether or
22 not you made available to him substitutions --

23 A Yes.

24 Q -- knowing, for the specific amount that he was
25 in shortfall to complete the job. It's a simple

1 could take longer.

2 JUDGE JAMES: That's true, and she could hav
3 more questions.

4 MR. STEIGER: That's right.

5 JUDGE JAMES: All right; let's go off the
6 record. Let's adjourn for the day.

7 [Whereupon, the hearing was recessed, to
8 reconvene the following day.]

1 CERTIFICATION OF TRANSCRIPT

2
3 This is to certify that the attached4 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 Tuesday, May 23, 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 Transcriber20 _____
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