

BEFORE THE
ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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

Wednesday, May 24, 2000

9:30 a.m.

BEFORE:

DAVID W. JAMES, Administrative Judge

APPEARANCES:

For the Government:

KATHLEEN HALLAM, ESQ.
Defense Supply Center Philadelphia
Defense Logistics Agency
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For the Appellant:

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PROCEEDINGS

(9:30 a.m.)

JUDGE JAMES: Let the record reflect that this is day eight in the hearings of Freedom N.Y., Inc. under ASBCA docket number 43965.

When we adjourned last evening we were in the, I believe, cross-examination of witness, Bankoff. Mr. Bankoff is here. Remember you are already under oath. Go ahead appellant.

Whereupon,

FRANK BANKOFF,

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

CROSS-EXAMINATION (resuming)

BY MR. STEIGER:

Q Mr. Bankoff, yesterday you indicated I believe, that there were a certain number of components in the twelve meal MRE package. Do you remember what was that number?

A In each menu bag? About ten, ten items.

Q I'm talking about the total number of components that went into an MRE?

A I thought it was about a hundred and ten. Mr. Bernstein, I think, said a hundred and twenty-six. Henry

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WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
FRANK BANKOFF		1327	1478	1486
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NONE		

-- Henry was saying five hundred.

Q Would it surprise you if I told you that in the MRE six configuration there were over a hundred components?

A Are you counting the same item multiple times? In other words, what I'm saying is coffee goes in every meal. Creamer goes in every meal. I count those as two items. If you're counting them as twenty-four then yeah, that's different.

Q But the fact of the matter is they all have to be handled, do they not?

A They all have to be handled. I still think five hundred is a little high.

Q I said four hundred Mr. Bankoff. Well, would you be surprised was my question?

A Yeah, I think so.

Q Okay. You gave us your understanding of the strapping and packaging requirements. You talked to us about palletization, I believe or unitization, or whatever as being the requirements. Is it not true that we are talking here about the very first production units that were coming off the assembly line for Freedom?

A I'm not following you.

Q The units that were in question, the forty thousand units --

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1 A Yes.
 2 Q -- that were in question during the discussion.
 3 Were they not the initial production units coming off
 4 Freedom's line?
 5 A I think they were.
 6 Q And, in fact, did not the AVI refuse to inspect
 7 those units based upon on-line inspection -- they refused
 8 to do an on-line inspection?
 9 A They weren't doing moving lot, yes.
 10 Q Now, did it come to pass when that happened --
 11 did Freedom come to you for help?
 12 A I believe so.
 13 Q Now wouldn't it have been in your opinion, or
 14 from your expertise would it not have been a good idea to
 15 allow a new producer like Freedom to be inspected
 16 on-line, so that he would not or it would not occur that
 17 entire units would be done without inspection?
 18 A I would have preferred that.
 19 Q Now would not this have avoided having to do
 20 the full forty thousand re-worked units as you expressed,
 21 and the -- and that great number of hours?
 22 A Yeah. I mean, I'm agreeing with you. I would
 23 have preferred a moving lot inspection. I would have
 24 preferred just as much assistance as possible. The
 25 problem was, it wasn't a contract requirement. The

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1 contract requirement was that we rely upon the
 2 contractor's inspection system. I couldn't force the AVI
 3 to start off with a moving lot inspection.
 4 Q But you knew what was right and you are the
 5 contracting officer. Didn't you feel that it was your
 6 obligation to step in and make sure it was right?
 7 A Well number one, I didn't know we had an
 8 immediate problem. And number two --
 9 Q I'm sorry, I didn't hear you.
 10 A Number one, I didn't know we had an immediate
 11 problem. But, you know, in actuality, I've been arguing
 12 and fighting with AVI and, you know, government people
 13 for years. What I -- what I think oftentimes, I can't
 14 force.
 15 Q But this was your contract, Mr. Bankoff, not
 16 AVI's.
 17 A I only have certain authority. I can't tell
 18 everybody what to do. The AVI inspect in accordance with
 19 their regulations. They're not required to do a moving
 20 lot inspection. There are standard procedures for moving
 21 from stationary lot to moving lot. There are
 22 requirements for moving from normal inspection to reduced
 23 inspection, or normal inspection to tightened inspection.
 24 Q Yeah, but this is a very simple issue. You had
 25 a contractor brand new, producing units for the first

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1 time, you knowing that on-line inspection was the way to
 2 go. It could save hundreds of thousands of dollars in
 3 re-worked costs, and yet nothing was done.
 4 A Mr. Steiger, when I first came in in June, or
 5 when they were starting, you know, first starting to
 6 produce, no, I wasn't aware of all these things. So no,
 7 I couldn't say. It wasn't really until Freedom came to
 8 me and we addressed it and, you know, I'm kind of
 9 learning these things also -- that I then said, "Let's go
 10 to a moving lot inspection."
 11 Q Well, what did you do? How hard did you try?
 12 What steps did you take?
 13 A Well, we had a meeting at Freedom. I think
 14 Henry probably has recalled to you that we kind of agreed
 15 amongst us all that the AVI, I think, would move to a
 16 moving lot inspection, change the point of inspections.
 17 Q Wasn't that several days -- many days after the
 18 problem emerged?
 19 A That's what -- no. That's what we all got
 20 together to discuss.
 21 Q But meanwhile, had been closed down for, I
 22 don't know, weeks, three weeks?
 23 A No, I don't think he was closed down. He was
 24 producing.
 25 Q But AVI refused to -- AVI had told him that

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1 were not inspecting at his own risk essentially. Isn't
 2 that right?
 3 A Yes.
 4 Q So, I mean, being a new producer and under
 5 those circumstances, it would not have been reasonable
 6 for him to proceed without some kind of resolution to the
 7 problem.
 8 A No, I mean, this is not unusual. Again, the
 9 contract requirement is that the contractor is
 10 responsible for submitting acceptable product. He is
 11 responsible for performing all the tests under the
 12 contract. The government inspection is basically a
 13 verification inspection.
 14 Q Well, with no inspection on the line would you
 15 not say that Freedom was at that time, operating almost
 16 blindly?
 17 A No.
 18 Q You would not?
 19 A In fact, the AVI would argue that it's not
 20 their responsibility to do the contractor's inspection.
 21 They inspect for the government verification acceptance
 22 inspection. The contractor is responsible for doing all
 23 his inspections throughout the day to keep his process in
 24 control; to do an end item inspection to make sure that
 25 the product he offers is acceptable.

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1 Q I'm a little confused. In the last analysis,
2 wasn't inspection -- didn't the AVI decide to do in-line
3 inspection?
4 A They agreed to move to a moving lot inspection
5 and provide more information.
6 Q Isn't that conclusive proof in your mind, that
7 this was the right way to go in the first place?
8 A Do I prefer a moving lot inspection? Yes.
9 Q And would you not say then, that this going to
10 in-line at this point, was in fact, a change in the
11 requirements of the contract?
12 A No.
13 Q Well, I'm a little confused.
14 A No. There is no requirements in the contract
15 that dictates how the government will have to inspect.
16 The government -- the requirement is, the contractor
17 would produce, conduct his inspections, and provide or
18 submit conforming product to the government for
19 acceptance. The only requirement is that the government
20 will do inspection and acceptance of origin. The method
21 is a variable method. It is not a contract requirement.
22 The switching techniques are in accordance with the AVI
23 regulations.
24 Q Mr. Bankoff, yesterday I gave you the
25 opportunity to rethink your conclusion concerning whether

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1 or not the Zyglo testing had a negative impact on the
2 contractor's operation. Have you thought about that any
3 more? Are you still of the same opinion that the Zyglo
4 testing had not impact on Freedom's operation?
5 A I believe that as of March '86 when this was
6 happening, for the most part, we had delivered the GFM
7 retorts for the five hundred and five thousand. Later on
8 when we starting shipping in the eight-ounce pouches that
9 would have been produced in 1986, for the most part, the
10 Zyglo issue was basically resolved and it was being done
11 at origin. So yeah, I mean, I don't see how we were
12 failing to provide for the first five hundred and five
13 thousand in March -- the five-ounce GFM pouches.
14 Q Okay. So your conclusions are really based
15 upon one thing, and that was that you believed that this
16 was in -- near the end of the cycle. Is that correct?
17 A When we started producing or when we started
18 delivering the eight-ounce pouches for the reinstatement,
19 yes.
20 Q Okay. Now again, these swellers that occurred
21 was as a result of -- you said micro-holes or something?
22 Would you redefine that for me? I don't remember. What
23 was causing that?
24 A Well, that was the term back then. They called
25 them micro-holes.

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1 Q Micro-holes. Now could these be observed with
2 the naked eye?
3 A At that time they thought, no. And they were
4 doing the Zyglo testing. Months later, you know, they
5 had a -- we did a big task force on the micro-hole issue.
6 Q But at that time, say around March to June time
7 frame 1986. We're talking about that time. It was
8 believed that they could not be seen with the naked eye?
9 A Yes.
10 Q Now, is it then again, true that where these
11 began to be discerned, these swellers, were in locations
12 other than Freedom's domain, so to speak?
13 A Yes.
14 Q Is it safe for you to say that they were caused
15 in plants, or occurred as a result of operations in
16 plants other than Freedom's?
17 A Yes.
18 Q So is it not correct then, that or are you
19 aware, I should say, that it essentially shut down
20 Freedom's operation for that three-month period of time?
21 A No.
22 Q You're not aware of that?
23 A No.
24 Q Are you saying it didn't?
25 A I'm saying it didn't. It didn't -- it didn't

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1 really shut down any facility.
2 Q But it was on medical hold. It could not --
3 AVI wouldn't inspect or accept it so essentially, it shut
4 down the shipments. Did it not?
5 A Some lots -- some manufactured retort lots were
6 placed on medical hold. That's why there was so much
7 substitution during 1986, to make sure that we didn't
8 shut down.
9 Q All right. Would you at least acknowledge that
10 it slowed down the operation of Freedom during that
11 period of time?
12 A No.
13 Q It did not?
14 A No.
15 Q And how do you know that?
16 A Well, I don't know that. You're asking my
17 opinion.
18 Q Well, I'll change the question then.
19 A Okay.
20 Q Do you know if it slowed down Freedom's
21 operation during that time?
22 A Do I know for sure?
23 Q Yes.
24 A No, I don't believe it did. I don't know for
25 sure.

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1 Q Okay. Yesterday you made a clear-cut statement
2 I believe in your testimony, and I'll give you the chance
3 now to rethink that in connection with
4 contractor-furnished material, that at the time of early
5 1986, the government or you, did not divert
6 contractor-furnished material away from Freedom's
7 operation. Do you still stand by that statement?

8 A Yes. From the manufacturer to Freedom to
9 another contractor. Yes.

10 Q Mr. Bankoff, I'd like you to take a look at a
11 document with us. Rule 4 -- was it -- I'm sorry -- is
12 that G-32, or is it Rule 4, 32? Is that a separate
13 number? G-32. Would you help me with that?

14 A Okay. It would be the memorandum for the
15 record dated February 26, '86?

16 Q I'm pulling it now for myself. Would you just
17 hold one second, sir?

18 I want to call your attention to paragraph four
19 of this particular memorandum. Do you see the -- you
20 were at this meeting were you not?

21 A Yes.

22 Q Do you see the statement here where Mr. Chiesa
23 says clearly that DPSC converted Freedom's intended CFM?
24 Do you see that there?

25 A I see that Mr. Chiesa expressed a Freedom

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1 concern about that.

2 Q Okay. So you -- is that wrong? Just yes or
3 no.

4 A Yes.

5 Q That was wrong?

6 A Yes.

7 Q And why didn't you say something at the time?
8 You were at the meeting. Why did you allow him to make
9 such a statement if it was wrong?

10 A Well, in the rest of the paragraph I do tell
11 him it's wrong.

12 Q Pardon?

13 A The rest of the paragraph does tell him it's
14 wrong -- he's wrong.

15 Q I don't understand that. Show exactly where it
16 says that he's wrong.

17 A The DPSC personnel explained that due to the
18 urgency of the requirements to repurchase, Rafco was
19 authorized used as CFM and GFM produced prior to award of
20 the repurchase contract.

21 Q That says it's wrong? On the contrary, I think
22 that says it's right.

23 A No. Again, listen to me. As we explained
24 yesterday, that when I awarded the contract to Rafco in
25 December, under the terms of the contract, the date of

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1 the pack -- the date of pack requirement, Rafco couldn't
2 use any components whether it was GFM or CFM that were
3 produced prior to December. We wanted Rafco to use his
4 -- the GFM that we were giving him from Freedom, plus his
5 residual GFM. We wanted Rafco to use any CFM residual he
6 had in-house that was produced before. I mean basically,
7 we told Chiesa he was wrong. When I write an MFR I don't
8 write in that I told the boss he was wrong. I just
9 explain it.

10 Q You're inundating us with words. As I
11 understand this -- and I just want you to say yes or no
12 -- does this paragraph say that the CFM intended for
13 Freedom was diverted to another contract?

14 A No.

15 Q It doesn't say that?

16 A No.

17 Q I'm going to ask you again because I don't -- I
18 don't even follow your answer to tell you the truth. I
19 think black and white to me is black and white. But did
20 you have occasion to actually go, without permission and
21 without telling Freedom, to one of its principal
22 suppliers and in effect, at that supplier divert away
23 from Mr. Thomas' operation a CFM?

24 A No. Let me read exactly --

25 Q No, no. I'm asking you a question now.

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1 A Yeah. I thought it was the same question.

2 Q No, different question.

3 A I'm sorry.

4 Q All right. I'll repeat it or rephrase it or
5 whatever the case may be.

6 JUDGE JAMES: He's already answered your
7 question, no.

8 MR. STEIGER: Pardon?

9 JUDGE JAMES: He has answered your question,
10 no. What's your next question?

11 MR. STEIGER: I didn't think he heard my very
12 last question.

13 JUDGE JAMES: He answered it, no.

14 MR. STEIGER: Okay.

15 BY MR. STEIGER:

16 Q Let us refer to document FT-436.

17 A I don't think I have FT-436.

18 Q We'll get them for you.

19 JUDGE JAMES: It's in book fourteen. Let's go
20 off the record. I want the attorneys to approach the
21 bench.

22 (Off the record)

23 BY MR. STEIGER:

24 Q Mr. Bankoff, have you ever seen this letter
25 before?

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1 A Well, I don't recall it, but it's addressed to
 2 me so --
 3 Q I can't hear you. Your head is down. What --
 4 A I don't recall it, but it's addressed to me so
 5 I assume I have.
 6 Q Do you recall making a visit to Sterling
 7 Bakery?
 8 A I've made visits to Sterling Bakery, sure. I
 9 don't know if I made a visit during this time frame.
 10 Q Isn't it true, Mr. Bankoff, that if you look at
 11 this letter that was sent to you, that it refers to CFM
 12 that had in fact, been sold to Freedom and shipped in
 13 place? Isn't that what it says here?
 14 A Are you talking about the January 7 letter from
 15 Sterling?
 16 Q Yes.
 17 A I don't really understand what this letter is.
 18 Q You don't?
 19 A I don't.
 20 JUDGE JAMES: Do you know what this phrase
 21 "shipping in place," means?
 22 THE WITNESS: I know what shipping in place
 23 means is, that would refer to product that we would buy
 24 -- that the government would buy. When we ship in place,
 25 what that means is that for some reason, I don't have a

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1 home for something and what I do to allow the contractor
 2 to get paid while I'm waiting to find a home for
 3 something, we ship in place.
 4 So instead of -- let's say Henry produces cases
 5 and we inspect and accept it and then he ships out, what
 6 we'll do is we will ship in place.
 7 BY MR. STEIGER:
 8 Q We're not saying Mr. Bankoff, that the
 9 government is the only one that ships in place.
 10 A No, but I don't know why I would get involved
 11 in a ship in place arrangement for a CFM item.
 12 Q Perhaps you got involved, Mr. Bankoff, because
 13 items that had been shipped in place for Freedom, were
 14 then directed by you to be removed from that category and
 15 in fact, sent to other contractors.
 16 A No. I wouldn't get involved in that. To me,
 17 what this says is, I don't authorize any kind of --
 18 Q Excuse me, but you do not buy directly from
 19 Sterling Bakery, so this reference to ship in place could
 20 not logically have referred to the government shipping in
 21 place.
 22 A Right.
 23 Q Therefore, logically it could only have
 24 referred to the contractor's shipping in place.
 25 A Which is why I don't understand it. I -- how

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1 could I authorize a ship in place for CFM product?
 2 Q No. You didn't authorize it. You
 3 de-authorized it according to the letter.
 4 A No. According to the letter he says that I did
 5 not authorize him to ship in place. I don't know what
 6 that means.
 7 Q Yeah. Well I'll tell you what I think it means
 8 -- you de-authorized it. Isn't that true?
 9 A No. I think what it probably means is that I
 10 didn't authorize it.
 11 Q We're talking words here. Doesn't it --
 12 doesn't it really mean that you prevented shipping in
 13 place from occurring? I mean, if you look at it, isn't
 14 that the result when you say what you said in this -- if
 15 you look what is said in this letter?
 16 A No. I didn't say anything here. Roy Terasina
 17 says it.
 18 Q I said -- but is he not characterizing you as
 19 telling him that he's being prevented from shipping in
 20 place?
 21 A All he's doing is evidently confirming that I
 22 don't authorize shipping in place for a CFM.
 23 Q Thank you.
 24 A By the way, could I --
 25 JUDGE JAMES: There's a question pending, Mr.

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1 Bankoff. Wait until he asks the question.
 2 BY MR. STEIGER:
 3 Q Yesterday your testimony referred to something
 4 as a side agreement. Are you aware from your sitting as
 5 government's representative during the course of
 6 testimony that we have consistently referred to that as a
 7 cover letter?
 8 A I'm sorry.
 9 Q Yesterday you talked about a so-called, "side
 10 agreement," a letter dated, I believe, May 13, 1986, you
 11 agreed to it as a "side agreement."
 12 Now sitting here listening to the testimony day
 13 after day, are you aware that we have been referring to
 14 that same letter as a cover letter?
 15 A Okay.
 16 Q Pardon?
 17 A No. I was not aware it was always talked to me
 18 about a side agreement, but okay I'll call it --
 19 Q You sat here for five days, you didn't hear it
 20 referred to as a cover letter?
 21 A No. Okay.
 22 Q Now you acknowledged that on that date that the
 23 modification number 25 was signed, May 29, I believe,
 24 1986 -- I'm sorry, you're shaking your head. Or are you
 25 just waiting for my question?

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1 A I'm waiting for the question. I'm not familiar
2 with the dates.
3 Q Okay. You acknowledged that on that date that
4 the particular side letter was in fact, sent or faxed to
5 Mr. Chiesa?
6 A I am now.
7 Q Pardon?
8 A I am now. After looking at -- hearing the
9 testimony, and after looking at the records, yes.
10 Q But you don't know how it got there?
11 A I didn't send it.
12 Q You didn't send it.
13 A No.
14 Q And do you recall that on the top of the letter
15 when it shows the fax reference that it actually refers
16 to May 29, that very day?
17 A I think I recall that.
18 Q Now, do you also recall being deposed by my
19 co-counsel, Mr. Luchansky, at some time in the past
20 regarding this case?
21 A Yes.
22 Q Do you recall during the course of your
23 deposition regarding what happened on the date of the
24 signing that you really had no recollection whatsoever of
25 the details of what happened?

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1 A No. I -- there are certain things that I
2 actually do see and do remember.
3 Q Now or --
4 A Always. Always.
5 Q Were these -- what you do see and remember
6 reflected in the deposition of the questions -- of the
7 answers that you gave Mr. Luchansky?
8 A If it was one of those vignettes that I
9 remember, yes. I mean there are certain things I'm sure
10 that I don't remember.
11 Q So in fact, you -- during the deposition you
12 were talking about a big show occurring with Mr. Welsh in
13 the
14 room --
15 A Right.
16 Q -- and all that at the time that the
17 modification was signed?
18 A Right.
19 Q Mr. Bankoff, is it possible that you are
20 confusing two distinct events. One that took place
21 earlier, well before the signing of the modification and
22 the event of the signing of the modification itself, on
23 May 29. Is that possible?
24 A Is it possible? It's possible. But I don't
25 believe so.

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1 Q You don't believe so?
2 A No. Because I remember talking and -- talking
3 loudly with Frank Francois that we discussed this. We
4 talked about this. There is no side agreement. There is
5 no collateral agreement, and I don't think I would be
6 discussing that on anything other than --
7 Q But you mentioned something about a Mr. Welsh
8 being there and others?
9 A Yes.
10 Q And you're convinced that all that took place
11 on May 29?
12 A Yes.
13 Q By the way, who is Mr. Welsh?
14 A He was the chief of the general products --
15 General Food Products branch. In the scheme of things, I
16 was the contracting officer in the MRE assembly, Margaret
17 Rowles was the section chief of the operational ration
18 section. She was my boss and Walsh was her boss.
19 Q Was it usual that they should be at a contract
20 signing, signing of a contract modification?
21 A No. But it wasn't usual that Henry --
22 Q I asked you a question. Please answer it.
23 A No.
24 Q Do you know specifically why they were there?
25 A Probably because of all this --

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1 Q I asked you if you knew specifically why they
2 were there.
3 A I'm trying to answer.
4 Q No you start -- you said probably.
5 A Well, because I believe.
6 Q Please answer the question.
7 A Probably because there was a lot of discussion.
8 Well, two reasons. One, because this was a major issue
9 as to whether or not we were going to continue the
10 contract or not. Remember this is all around. Freedom
11 is in for the most part, a default position and we are
12 discussing extending the contract. So Mod-25 extends the
13 contract.
14 But probably the real reason that they are
15 there is because of this hoopla around these -- this DLA
16 negotiations and this so-called side agreement. And I
17 think from the DPSC end, everybody wants to establish
18 that we're not aware of a side agreement and this mod
19 stands alone. And that's why our attorneys are there.
20 That's why Welsh is there. That's why it was a big deal.
21 To make sure there was not misunderstanding.
22 Q What default situation are you talking about?
23 A I think they -- I think this Mod-25 is all
24 around a decision whether to terminate for default or
25 extend the contract.

1 Q Is that what it says in Modification 25? Could
2 have --

3 A I thought that's what the mod did was extend
4 the delivery schedule date.

5 Q Yeah. But where do you -- where is there an
6 indication anywhere in the record that you were
7 defaulting the contractor?

8 A Wasn't there a cure or a show cause that
9 resulted in Mod-25?

10 Q I don't know if the record reflects that.
11 Doesn't the record reflect a cure notice that is back on
12 December 11?

13 A I'm not -- again, I'm not sure of the time
14 frame. But I can't imagine Mod-25 existing in and of
15 itself without an extending delivery schedule. Again,
16 without discussion on whether we were going to terminate
17 for delinquency or extend.

18 Q I would like now to review a document that we
19 have been talking about Modification 25. F-133 is the
20 document.

21 Okay. Are you familiar with this document?

22 A Yes.

23 Q Is this the document you referred to in your
24 testimony yesterday?

25 A Yes.

1 Q If we may look at the items that are provided
2 for -- I would like to discuss them with you first as to
3 the reinstatement of the one hundred fourteen thousand,
4 seven hundred fifty-eight cases.

5 A Okay.

6 Q Weren't these cases supposed to be reinstated
7 under Modification 20?

8 A I don't know. What did Modification 20 do?

9 Q You do not recall an earlier modification that
10 in fact, provided for the reinstatement of these units?

11 A Did Mod-20 reinstate, or did Mod-20 allow for
12 reinstatement?

13 Q It allowed for reinstatement. That's the
14 modification I'm talking about. So let me rephrase the
15 question perhaps.

16 Are you not aware then that provision for the
17 reinstatement was previously set forth in a modification
18 earlier than this one?

19 A Right.

20 Q And why was not -- then why was it required to
21 be put in here at that time?

22 A I think Mod-20 said that if he -- if Freedom
23 had delivered so much by April 30th, it would be
24 reinstated. And I think Freedom was short on April 30th,
25 so it didn't require automatic reinstatement.

1 Q And are you aware that during this time that
2 Freedom had alleged to you that CFM had been diverted and
3 that the Zyglo problem had essentially slowed or shut
4 down its operation as being the reason why it was unable
5 to meet that delivery schedule for reinstatement? Did
6 they express that to you?

7 A I don't recall. I don't -- I'm not saying, no.
8 Either way, eventually when that -- the hundred and
9 fourteen thousand cases would be reinstated would be my
10 contract modification. Here it's part of a settlement in
11 reinstatement.

12 Q But it was part of another settlement
13 previously of a deal previously entered into. Isn't that
14 correct?

15 A It was part of that agreement that we knew --
16 we believed that Freedom couldn't complete a contract for
17 five hundred and five thousand cases. They need the
18 whole six hundred and twenty. The reinstatement was part
19 of that -- that agreement back then.

20 Q Okay. So again, I'm asking you if it was part
21 of it back then, why was it in here now?

22 A I think -- I think I had made a determination
23 on April 30th or May 1st, whatever, that they didn't meet
24 the delivery schedule and that automatic reinstatement
25 wasn't required so --

1 Q I know you said that. But I asked you if their
2 reasons for not doing it -- mainly their assertion that
3 CFM was in fact, diverted and that they were essentially
4 shut down because of a problem not of their own doing.
5 Surely you will agree that the Zyglo matter was not of
6 their own doing, right? If it affected their operation
7 it was not of their own doing. Wouldn't you agree with
8 that?

9 A The Zyglo problem was not of their -- their
10 doing. If it affected CFM it was their responsibility.
11 If it affected GFM it was my responsibility.

12 Q That's not the question I asked. But I'll
13 rephrase it in case you didn't understand it.

14 Were you aware of their reasons for not being
15 able to meet that delivery schedule of the earlier
16 modification that would have reinstated the agreements.

17 A Without seeing the documents I don't know. All
18 I know is that whether I was aware and didn't agree
19 sometime in -- after April 30th, and made the
20 determination that they didn't comply with the delivery
21 schedule and that the cases weren't automatically
22 reinstated.

23 Q If the Zyglo issue was their reason, would you
24 agree that that was a cause not of their own doing?

25 A Would I have called that an excusable delay?

1 Q Pardon?

2 A Are you saying would I have called that an
3 excusable delay?

4 Q Yes.

5 A Evidently I didn't.

6 Q So then, you're sitting here telling us that if
7 the place was shut down or slowed down because of the
8 Zyglo testing that it's not an excusable delay. Is that
9 what you're saying?

10 A That in and of itself, yes. That would not be
11 an excusable delay. With the substitution authorities
12 that were granted, with the maintaining of the assembly
13 operation I believe my opinion was, that it did not cause
14 them to not meet the delivery schedule.

15 Q Did you in fact, provide substitutions during
16 that period?

17 A I know that we substituted -- I think even GFM
18 or menus for CFM items. Whether it was in the March time
19 frame or whether it was later on -- I know we authorized
20 substitutions for CFM.

21 Q You keep talking about substitutions as like,
22 you could stand at the door and hand out substitutions.
23 Do you have a record of all the substitutions you made to
24 all the contractors under the MRE program?

25 A Do I?

1 Q Yeah. Do you keep such records?

2 A They're probably in the contract files.

3 Q What do you mean probably? Are they in there
4 or not?

5 A Well they are written authorizations so, yes.

6 Q So you know exactly what substitutions you have
7 provided to every contractor?

8 A Me?

9 Q Your operation.

10 A I think if you looked in the files you could
11 probably see and document the substitutions.
12 Traditionally, the DD-250s were supposed to record menus
13 that were substituted. I don't know. I don't have a
14 report, but it is documented.

15 Q Substitutions are in fact, other items of GFM.
16 Isn't that correct? Are you saying substitutions?
17 There's no thing called substitutions, is there?
18 Substitution is another item of GFM to replace another
19 particular item. Is that not correct?

20 A Or it could be allowing a CFM item in place of
21 another CFM.

22 Q Right.

23 A Or it could be GFM in place of CFM.

24 Q But it is -- when we're talking about
25 substitutions with respect to GFM we are talking about

1 other GFM items?

2 A Yes.

3 Q These items have to be procured by the
4 government, do they not?

5 A They have to be there, yes.

6 Q Right. So merely having substitution authority
7 as you have said on numerous occasions in the last three
8 days, does not necessarily mean that the substituted
9 items are available to be given to contractors in time to
10 meet their required scheduled deliveries. Isn't that
11 correct?

12 A Right. Substitution authority that I have is
13 different than substitution that I grant the contractor
14 to perform.

15 Q Right. So substitution authority in effect,
16 wouldn't you say, is really nothing if it does not get
17 supported by the actual providing of replacement GFM.
18 Isn't that correct?

19 A Yes.

20 Q Isn't it true, Mr. Bankoff, that you should
21 never have had to reinstate the one hundred and fourteen
22 thousand, seven hundred fifty-eight cases in Modification
23 25?

24 A I didn't have to, no.

25 Q Isn't it true that those case should have been

1 reinstated under Modification 20, the previous one that
2 we discussed?

3 A No.

4 Q Mr. Bankoff, when you added or reinstated the
5 hundred and fourteen thousand, seven hundred and
6 fifty-eight cases, did you really intend to allow Freedom
7 to deliver those cases?

8 A When we reinstated?

9 Q Yes.

10 A Of course.

11 Q Of course. Does that mean that at that time
12 you had procured the necessary GFM or had full complement
13 of substituted GFM to allow them to complete the job?

14 A I believe so.

15 Q You believe so. Do you know for sure?

16 A Are you asking me would we have supplied all
17 the GFM required to complete the contract?

18 Q I didn't hear what were asking me, what I was
19 asking you.

20 A Ask your question again.

21 Q Okay. First of all, I'll ask you again. Did
22 you at the time you reinstated the hundred and fourteen
23 thousand, seven hundred and fifty-eight cases, intend for
24 Freedom to really deliver those?

25 A We expected Freedom to deliver them.

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1 Q Did you have procured and available to them,
 2 GFM or equivalent substitutes -- as you like to say --
 3 that would have enabled them to actually complete the
 4 full complement of one hundred fourteen thousand, seven
 5 hundred and fifty-eight cases in the MRE-6 configuration?
 6 A I would have hoped so.
 7 Q You would have hoped so?
 8 A I would have hoped so and if not, we would have
 9 bought them.
 10 Q You would have bought them?
 11 A Yeah. Remember the hundred and fourteen is not
 12 over and above anything. It was the original six hundred
 13 and twenty thousand. You asked me earlier if I knew, had
 14 we had enough components right off the bat and I told you
 15 I believed so.
 16 Q And I --
 17 A -- so my belief was always that we would have
 18 enough GFM to support the contract. Now if at any time
 19 one of my buyers would have told me, "Oops, we're short
 20 on a GFM," we would have simply ordered more and provided
 21 it.
 22 Q But didn't I ask you yesterday, if you were
 23 aware that the contractor had written to Mr. Barkewitz,
 24 your predecessor --
 25 JUDGE JAMES: What role did Mr. Barkewitz have

1 A I believe Mod-20 allowed me to reinstate the
 2 cases.
 3 Q Well, we're talking Mod-25.
 4 A Yeah. So no, I could have reinstated the
 5 cases. I believe I had the authority to reinstate the
 6 cases.
 7 Q But those cases had been terminated for
 8 default. Were they not?
 9 A Yes.
 10 Q So by what authority did you operate, that
 11 allowed you to reinstate those cases?
 12 A They had been terminated for default but we had
 13 -- as part of the Mod-20 we also had the authority to
 14 reinstate them.
 15 Q But you didn't reinstate from Mod-20. You
 16 reinstated here, now, from Mod-25.
 17 A Well, I'm a little confused. I thought Mod-20
 18 was the determination mod that allowed for reinstatement.
 19 That would mean that sometime in the future the cases
 20 would be reinstated and that would be done by contract
 21 modification. The funding was there.
 22 Q Oh, so you're saying that Mod-25 simply
 23 implemented Mod-20? Is that what you're saying?
 24 A No. Mod-25 I think, reinstated the cases.
 25 Didn't Mod-20 -- wasn't Mod-20 -- the termination for

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1 in the April 9, 1986, in this matter?
 2 MR. STEIGER: I'm sorry.
 3 JUDGE JAMES: I repeat. What role did C.L.
 4 Barkewitz have in this matter in April/May 1986?
 5 MR. STEIGER: Well, he was the original
 6 contracting officer.
 7 JUDGE JAMES: Just so.
 8 MR. STEIGER: And the mistake that was made was
 9 that there was on hand enough CFM to do the job. And all
 10 I was doing was trying to point out that something had
 11 been written to Mr. Barkewitz that disagreed with that.
 12 JUDGE JAMES: Whether that's true or untrue, it
 13 has nothing whatever to do with your question about
 14 whether he had on hand or had ordered GFM to satisfy this
 15 Mod 25.
 16 MR. STEIGER: Okay. So I shall move on.
 17 JUDGE JAMES: What's the next question?
 18 MR. STEIGER: I shall move on.
 19 BY MR. STEIGER:
 20 Q Did you have the requisite authority to
 21 reinstate those units, or did you need any particular
 22 authority to do that?
 23 A No. I believe Mod-20 allowed me to reinstate
 24 --
 25 Q I can't hear you.

1 default?
 2 JUDGE JAMES: Mr. Bankoff, you really can't ask
 3 counsel questions. Just answer his questions.
 4 BY MR. STEIGER:
 5 Q I'll ask it to you again. And I believe you
 6 testified that Mod-20 set up a situation where you would
 7 be able to repurchase the hundred and fourteen thousand,
 8 seven hundred and fifty-eight cases that were terminated
 9 for default. Is that not correct?
 10 A I believe so, yes.
 11 Q Now, in Mod-25 you reinstated the hundred and
 12 fourteen thousand, seven hundred and fifty-eight cases.
 13 Is that not correct?
 14 A Yes.
 15 Q So are you now saying then, that the
 16 reinstatement of the cases in Modification 25 was in
 17 fact, the implementation that was granted to you in
 18 Mod-20?
 19 A That's reasonable.
 20 Q Is that -- do I take that to mean yes?
 21 A I believe that was my authority and I did have
 22 the funding available so I was able to implement Mod-25,
 23 yes.
 24 Q So you would have to say then, that with
 25 respect to this modification, it wasn't really adding any

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1 new benefit in favor of the contractor that he didn't
2 already have reserved for him in Mod-20. Wouldn't you
3 say that?

4 A No.

5 Q No?

6 A No.

7 Q Well, okay, no. Did you realize -- well, let
8 me ask you this question. Do you have an understanding
9 of what the significance was to this contractor of
10 getting that hundred fourteen thousand, seven hundred
11 fifty-eight cases reinstated?

12 A Yes.

13 Q And can you express what your belief was with
14 respect to that significance?

15 A I think I recall back in Mod-20, when we looked
16 at -- at whether or not again to continue to stay with
17 the contract or whether to terminate the contract for
18 default, or just do a partial termination -- I think -- I
19 think we came up to the conclusion -- that's the
20 government with the DCAS -- that five hundred and five
21 thousand cases alone, would put Freedom in a financial
22 loss position that they couldn't complete the contract.
23 They needed the whole six hundred and twenty. And so at
24 that point, we didn't feel a partial termination was
25 going to work. It was almost like if we -- if we have,

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1 you know, we have to terminate for default, we have to
2 repurchase. But if we do this, it's going to kill the
3 contract. Rather than do that, let's do the partial
4 termination but let's allow for a provision to reinstate
5 so in fact, the contractor can be whole and produce the
6 whole six hundred and twenty thousand cases. That's how
7 we felt.

8 Q So you did appreciate the significance of the
9 reinstatement with respect to being able to complete the
10 contract from what I understand you just said.

11 A Around the time of Mod-P20, that's -- that's
12 exactly how we felt.

13 Q And did you also feel that way around the time
14 of Mod-25?

15 A Well, I'm sure we did because we reinstated the
16 cases.

17 Q Right. Did you realize that if ultimately a
18 contractor didn't have those units reinstated, that there
19 would be a break so to speak, in the production line down
20 near the end of the job?

21 A At around this time all -- all I think I knew
22 we were doing is reinstating the contract to make them
23 whole with the six hundred and twenty thousand cases.

24 Q I know, but I asked you if you understood that
25 there would be a break. Well, let me rephrase the

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1 question. Apparently I didn't make myself clear. You
2 knew MRE-7 was coming down the pike. Did you not?

3 A Sure.

4 Q And you knew that MRE-7 would essentially be a
5 follow-on to the existing contract. Did you not?

6 A Yes.

7 Q You knew that there was not a production break
8 that would be scheduled between those contracts whoever
9 the successful contractor was. Is that not correct?

10 A No. There's always a break.

11 Q Well, I meant an extensive enough break to
12 essentially break up the production line and lay off
13 workers and things like that. You didn't anticipate that
14 that was going to happen moving into MRE-7, did you?

15 A Usually there's about a one-month break --
16 anywhere from a one-month to two-month break in contract
17 production between one contract and the next. There's
18 inventory reconciliation periods, there's time when new
19 GFM and I guess there's --

20 Q One or two months is reasonable but if in fact,
21 a production line had to be shut down for several months
22 because a hundred seventeen thousand -- I'm sorry -- a
23 hundred fourteen thousand, seven hundred fifty-eight
24 units were not going to be produced, that would be far in
25 excess of the one or two months that usually would happen

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1 between contracts. Would it not?

2 A Yeah. Mod-25 though, implies that Freedom will
3 provide all six hundred and twenty thousand cases.

4 Q Right. And at a rate -- say fifty/sixty
5 thousand a month, or whatever it was -- which you
6 testified that it never exceeded a certain amount. But
7 let's assume at sixty thousand a month we are talking
8 about an additional two months to cover that period, two
9 months of production?

10 A Well, it actually looks like what this mod
11 does, is require a contract production schedule of eighty
12 thousand, one month of eighty-five thousand --

13 Q Okay. So two months, approximately two months
14 of production time would be utilized in the hundred
15 fourteen-thousand units.

16 A A little less than two months.

17 Q A little less than two months.

18 A The last two months --

19 Q But that would essentially -- if they didn't
20 get it -- would have meant two more months of down time,
21 so to speak, before they could -- would be starting up
22 production on MRE-7, had they gotten that contract?

23 A Oh, I didn't even think of that. I've never
24 even thought of that.

25 Q Well, think about it.

1 A Now?

2 Q Now.

3 A I don't know. What does that mean? I'm not --

4 I don't understand your question.

5 Q All right. Let's take another look back at

6 Mod-25. It provides for extension of delivery, does it

7 not?

8 A Yes.

9 Q On the top of page three.

10 A Yes.

11 Q Did you intend and expect the contractor to

12 meet that schedule?

13 A Yes.

14 Q Well, if you had concerned yourself with

15 contractor's statements that CFM had been diverted and

16 that progress payments were being deferred and not paid,

17 would you then have expected that schedule to have been

18 met?

19 A I expected the schedule to be met.

20 Q Were you aware that after the modification was

21 signed and for some months thereafter, that the

22 government continued to withhold progress payments so

23 that these -- this delivery schedule could not have in

24 fact been met?

25 A No.

1 Q You were not aware that Mr. Liebman was

2 withholding the progress payments from the contractor?

3 A Around this time I was not aware of it.

4 Q I'm not talking around this time. This

5 schedule extends from May through October.

6 A Right.

7 Q During that entire period, are you sitting --

8 are you telling us that you were not aware that progress

9 payments were either in a state of suspension or

10 withholding or -- or a situation such as that? Is that

11 what you're saying?

12 A You mean from the beginning of the contract?

13 Q No. I mean from the period of 1 May 1986

14 through 31 October 1986, the period set forth in this

15 extended delivery schedule?

16 Now I'll ask the question. Within the confines

17 of that period, were you aware that Mr. Liebman was

18 withholding, suspending or otherwise not making full

19 payments of 95 percent progress payments as required by

20 the contract?

21 A Well --

22 Q My question is, yes or no?

23 A I'm uncertain. I know later on in the period

24 -- I think we had -- we had issues again concerning

25 perhaps liquidating at a higher rate. As far as not

1 paying progress payments or whatever I'm, you know, other

2 than against a higher ceiling -- no, I'm not aware of it.

3 Q So your understanding is that progress payments

4 were being paid as submitted to the ACO?

5 A Yes.

6 Q May we go on to another look at the

7 modification and what it did. Do you see in paragraph

8 two that in the last sentence before the listing of

9 equipment in dollars, it refers to the sum of \$399,111

10 that was being acknowledged and paid for in this

11 modification?

12 A Paragraph two, yes.

13 Q Now is it your belief that or let me ask you

14 this question. Isn't it true that this was simply a

15 statement of costs that were incurred that were otherwise

16 due Freedom under this contract?

17 A I believe that.

18 Q So in effect, no benefit was being conferred

19 upon Freedom as a result of this provision?

20 A No. There was a benefit.

21 Q I'm sorry. You just said that this represented

22 an amount that was otherwise due them under the contract,

23 so what benefit with respect to this modification was

24 being granted by putting this amount in here at that

25 time?

1 A Maybe --

2 Q No maybe's. I asked you if you knew.

3 A I would like to answer the question. When you

4 say, "due them," I -- I took that to mean were they

5 eligible for progress payments and could the government

6 have financed these costs. I believe that, you know, I

7 felt that they should have been paid progress payments

8 for these pieces of equipment. However, DCAS said no --

9 required us to get a DAR deviation. I went forward with

10 the DAR deviation to try to get the money. The DAR

11 people -- the DOD said, no. So this was a way to get the

12 money to Freedom. Was it due them? The rest of the

13 government told me no. I wanted to pay it to them.

14 Q I didn't ask you whether you wanted to pay or

15 not, I asked you whether these costs were legitimate

16 costs due Freedom under the terms of the contract. And I

17 believe your answer was yes. Are you now reversing that

18 answer?

19 A Well, in my opinion --

20 Q I didn't ask you for your opinion. I asked you

21 the question.

22 A Do I believe that --

23 Q You're the contracting officer. I asked you

24 the question were these costs legitimate costs that were

25 due Freedom under the terms of the contract, and you said

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1 yes.
 2 A Okay.
 3 Q I'm going to call your attention to something
 4 that occurred when you came aboard or near that time --
 5 while we're still looking at this modification. May we
 6 just take a quick look at Rule 4-75?
 7 A D & F dated October 9, 1985?
 8 Q Yes. Does this document look familiar to you
 9 Mr. Bankoff?
 10 A I think I prepared this.
 11 Q I think you did too.
 12 A Okay.
 13 Q I'm wondering if you could go to page seven of
 14 this document.
 15 A Yes, sir.
 16 Q And I'm wondering if you could focus on the
 17 second paragraph near the end of that paragraph. Would
 18 you not say that there was a clear statement made by you
 19 as to what the contract interpretation was with respect
 20 to the costs set forth therein? The contract was
 21 interpreted etcetera, etcetera. Isn't that your writing?
 22 A Yes.
 23 Q So is there no question that you knew --
 24 believed and in fact, confirmed as the contracting
 25 officer that this was in fact, a list of capital costs to

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1 be expensed against this job?
 2 A Yeah, I --
 3 Q I just asked -- the question calls for yes, no,
 4 or I don't know.
 5 A I agree, yes.
 6 Q Okay. That's all. So you were aware then,
 7 that this was what was agreed to in this contract?
 8 A Yes. They were allowed to be --
 9 Q I didn't ask for any more.
 10 A Okay.
 11 Q May we go back to Mod-25?
 12 A What tab is it?
 13 Q Pardon?
 14 A What tab is it?
 15 Q Oh, what tab? I'm sorry -- Tab F-133.
 16 A All right.
 17 Q The page four contains a paragraph -- paragraph
 18 five. Would you characterize that as a release? I know
 19 you're not a lawyer but your experience would probably
 20 enable you to answer my question.
 21 A A release for everything under the contract
 22 except for that related to the Star Foods production.
 23 Q And it talks about a waiver of claims, does it
 24 not?
 25 A Yes, sir.

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1 Q Now, do you recall that there was in fact a
 2 significant claim that had been submitted by Freedom?
 3 A Yes.
 4 Q A claim that, you know, you've been sitting
 5 here and we've been referring to as the \$3.4 million
 6 claim, or words to that effect?
 7 A Yes. Right.
 8 Q Now would you say then that essentially, that
 9 was the claim that was intended to be waived in this
 10 particular paragraph?
 11 A Yes.
 12 Q I would like us to now focus on the claim
 13 itself -- FT-266.
 14 A Okay.
 15 Q Would you glance at it for a moment? Is this
 16 the claim, the so-called \$3.4 million claim? Is this the
 17 claim that we are referring to?
 18 A Well, this says five million, seven hundred
 19 nine.
 20 Q I'm sorry I didn't hear what you said.
 21 A This says five million, seven hundred nine.
 22 Q Well, yes, I know, but I believe in testimony
 23 it was brought out that this was subsequently reduced in
 24 negotiation to \$3.4 million. I just want to make sure
 25 that this is your understanding of the claim that was

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1 allegedly being raised in that release paragraph that you
 2 read.
 3 A I didn't negotiate a claim down to \$3.4
 4 million.
 5 Q No, I didn't ask you that. All I asked you was
 6 if this was the claim that was being referred to in --
 7 well not -- isn't referred to -- that was intended to be
 8 waived in that paragraph?
 9 A My understanding was that there was a claim by
 10 Freedom for \$3.4 million. Basically, what Mod-25 did was
 11 remove any and all claims under the contract at that
 12 point except for anything related to the Zyglo and Star
 13 Foods.
 14 Q So you can't make the association between this
 15 document that you have in front of you and that release?
 16 A It was any and all claims.
 17 Q Well, then, would this claim be included?
 18 A Yes.
 19 Q Okay. So let's look at the claim. First of
 20 all, did you read the claim?
 21 A Yeah, I looked at it.
 22 Q I can't hear you, sir.
 23 A Yes, I looked at it.
 24 Q I didn't ask you whether you looked at it. I
 25 asked you whether you read it at the time you received

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1 it. It is addressed to you isn't it?
 2 A Yes.
 3 Q Did you read the claim?
 4 A I don't remember. I don't recall.
 5 Q You don't recall reading this claim?
 6 A Well, I'm going to assume I did if it was
 7 addressed to me --
 8 Q Okay. If you don't recall, I'm not asking you
 9 to assume.
 10 A I don't believe that I ever responded to the
 11 claim in detail, which I would normally do.
 12 Q Well that was my next question. That was my
 13 next question. Do you recall responding to this claim in
 14 detail or otherwise?
 15 A No.
 16 Q Do you recall ever discussing this claim in any
 17 way, shape, or form with anybody?
 18 A No, which is very strange.
 19 Q Do you recall ever seeking to get this claim
 20 released prior to Mod-25?
 21 A No.
 22 Q Okay. So as far as you know, you can't comment
 23 on whether this claim has merit or no merit. Is that
 24 correct?
 25 A No, I believe that I was aware of enough of the

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1 contractor's complaints that I believe it didn't have
 2 merit. In other words, while I didn't get that detailed
 3 into the quantum, I didn't think that the merits of the
 4 claim were valid.
 5 Q I believe you're reversing yourself, or you
 6 don't understand my question. We're talking about this
 7 claim. You've indicated to me that you have virtually no
 8 recollection of it, you do not recall responding to it,
 9 you can't be sure that you even read it, and I asked you
 10 --
 11 A I don't know that I ever saw it in this detail.
 12 I don't know if I ever had this much documentation.
 13 Q Well, the claim is a complete package. Is it
 14 not?
 15 A Yeah, I don't know -- I don't know if I ever
 16 got this complete -- this complete package.
 17 Q Are you -- oh, you don't know. But you don't
 18 know that you didn't get it?
 19 A That -- exactly, yeah.
 20 Q Okay. So again, I'll ask my question again.
 21 On the basis of what you have said, you are not able to
 22 determine or say with any kind of certainty whether this
 23 claim has or has not any merit, this claim?
 24 A Well, again --
 25 Q The question is yes or no, I believe.

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1 A I believe -- I believe that I disputed the
 2 claim. I believe that I disputed the claims. And again,
 3 you know, doing that, I didn't get involved in the
 4 quantum to negotiate a settlement.
 5 Q But there is no -- you just admitted a few
 6 minutes ago that you do not recall responding to the
 7 claim or even discussing it with anybody.
 8 A Right.
 9 Q Okay. I don't want to belabor this.
 10 A I think this is extremely strange that I got a
 11 claim and yet it's been taken care of without
 12 negotiations. I've got a feeling that during this time
 13 it was kind of like, we'll take care of it or do
 14 something at DLA or whatever. But you're right, it was
 15 never -- it was never -- I don't think I have anything in
 16 the record where Henry is saying, "When are we going to
 17 negotiate the claim or when are we going to come in and
 18 whatever --," and I never -- he never asked for a final
 19 decision on the claim.
 20 Q Isn't it just a matter that you don't recollect
 21 anything --
 22 A I think it -- I don't recollect -- it's
 23 strange.
 24 Q -- rather than trying to surmise what might
 25 have happened? Isn't it the truth that you just don't

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1 recall?
 2 A Yes.
 3 MR. STEIGER: Your Honor, I've been at it for a
 4 while. May I have a few minutes of break?
 5 JUDGE JAMES: What is your prognosis as to the
 6 duration of your cross examination, to conclude it?
 7 MR. STEIGER: It's going to be a while, Your
 8 Honor. I would say another hour.
 9 JUDGE JAMES: All right. Let's go off the
 10 record. We'll take five minutes.
 11 (Recess)
 12 BY MR. STEIGER:
 13 Q Mr. Bankoff, we were talking about Modification
 14 25 and what the contractor got and what he gave up. The
 15 -- if you look at page two, small b in parenthesis on the
 16 bottom -- it's in reference to the contractor withdrawing
 17 his appeal -- I'm sorry -- you don't have it yet.
 18 A Page?
 19 Q Page two of four.
 20 A Okay.
 21 Q Mr. Bankoff, isn't it true that Modification 25
 22 -- in Modification 25, Freedom agreed to withdraw its
 23 appeal that it had pending before the Armed Services
 24 Board of Contract Appeals from the default determinations
 25 regarding the one hundred fourteen thousand, seven

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1 hundred and fifty-eight units?
 2 A If that's what ASBCA 32570 is, yes.
 3 Q But you don't have any present recollection
 4 that that is the case? Is that what you're saying?
 5 A Right.
 6 Q I can't hear you.
 7 A Yes.
 8 Q You don't?
 9 A No, not today.
 10 Q Mr. Bankoff, are you aware that your superiors
 11 in DLA had agreed to process a guaranteed loan for \$2.7
 12 million on behalf of Freedom?
 13 A No.
 14 Q You were not aware?
 15 A No.
 16 Q You're not aware now, or would you say you were
 17 never aware?
 18 A No, I was never aware.
 19 Q Never aware of that?
 20 A No. I was never aware of what anybody in DLA
 21 agreed to with Freedom if I wasn't there or it wasn't a
 22 matter of record.
 23 Q Well, I'd like to call your attention to a
 24 memorandum I believe, of a meeting, T-137.
 25 MS. HALLAM: What is it?

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1 JUDGE JAMES: It couldn't possibly be, Mr.
 2 Steiger. Their documents led off with 95 although we've
 3 got 96 and
 4 97 --
 5 MR. STEIGER: Let us try Rule 4-137. I may
 6 have confused the numbers.
 7 JUDGE JAMES: Mod-4, tab which?
 8 MR. STEIGER: Rule 4.
 9 JUDGE JAMES: Rule 4, Tab which?
 10 MR. STEIGER: 137.
 11 JUDGE JAMES: Okay.
 12 THE WITNESS: A report of travel to Freedom,
 13 dated July 15th?
 14 BY MR. STEIGER:
 15 Q Yes.
 16 A Okay.
 17 Q Are you familiar with that document?
 18 A Yeah, I guess so.
 19 Q Okay. Would you turn to page four?
 20 A Yes.
 21 Q Would you look at paragraph fifteen?
 22 A Yes.
 23 Q Does that refresh your recollection of the
 24 matter that I just asked you about?
 25 A No. You -- you asked me if I knew if people in

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1 DLA agreed to -- what is it called -- a guaranteed loan?
 2 Q I didn't say agreed. I said, if you want to
 3 know exactly what I said, I said agreed to process a
 4 guaranteed loan.
 5 A Yeah. No, I didn't know that.
 6 Q So you didn't think that -- so what did you
 7 believe this loan was related to here? What was this
 8 filing of this application here? What did you think that
 9 was related to? Why did it appear in your document?
 10 A We were relaying what Freedom told us. Freedom
 11 filed a request for a guaranteed -- \$2.7 million loan
 12 guarantee to be filed in the Federal Reserve, and he told
 13 me evidently all I have to do is certify that it's in the
 14 national interest. And I just said we replied that when
 15 anything is received --
 16 Q I can't hear you. Your head is down.
 17 A I'm sorry. And then I say, you know, that when
 18 anything is -- if I get anything, I'll take the
 19 appropriate action. I have no idea what a guaranteed
 20 loan is -- was or is.
 21 Q Your testimony is that you were not aware that
 22 DLA had in fact, had even discussions with Freedom about
 23 a guaranteed loan?
 24 A No, I know the guaranteed loan was one of those
 25 things in that so-called, side agreement. Whether --

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1 whether they guaranteed to process it I don't know.
 2 Q So you don't know what came out of the
 3 discussions at DLA?
 4 A I know nothing about the discussions at DLA.
 5 Q Oh, so you don't even know -- you're saying you
 6 don't even know discussions took place?
 7 A I believe they took place. They must have
 8 taken place.
 9 Q But nobody shared with you what the discussions
 10 were?
 11 A Only Freedom, in that May 2 letter -- that
 12 draft letter. Nobody from the government -- nobody from
 13 DLA ever shared anything. And that's why I tried to tell
 14 Freedom, "I'm not part and parcel to these discussions."
 15 Q But you did -- but Freedom did tell you --
 16 A Freedom was telling me.
 17 Q So you had no reason to believe that Freedom
 18 was lying did you?
 19 A I had no reason to believe that Freedom had
 20 discussions as to what was agreed to or not. I had no
 21 reason to believe that Freedom was correct in their
 22 assumptions.
 23 Q But you had no reason to believe that they were
 24 wrong?
 25 A No. That's why I said I want nothing to do

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1 with it because I don't know.
 2 Q Did you read the letter?
 3 A The 2 May letter?
 4 Q Yes.
 5 A I think I did.
 6 Q And did it not confirm the fact that DLA had
 7 agreed to process a \$2.7 million guaranteed loan?
 8 A That's what the letter said.
 9 Q Yes.
 10 A That's why I went to respond to the letter that
 11 I don't have anything to do with this and I can't confirm
 12 anything, and that's when Freedom said, "Oh, don't send
 13 me your response. Just rip up the letter."
 14 Q Didn't, in fact, Freedom at that time agree to
 15 withdraw the letter to you --
 16 A Right.
 17 Q -- and send it directly to Mr. Chiesa?
 18 A No. They just agreed to withdraw it from me.
 19 Q From you? But you didn't know that in fact,
 20 they were sending it to Mr. Chiesa?
 21 A It's none of my -- no.
 22 Q No? I asked --
 23 A No. I don't what Freedom does. I know what
 24 they do with me.
 25 Q Well, I'm just asking you if it was with you --

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1 A I don't know what they do in the Pentagon, in
 2 the White House, I don't know.
 3 Q I know that. I'm just asking you if you -- if
 4 it was within your frame of knowledge that they had
 5 resubmitted that letter to Mr. Chiesa?
 6 A No, I don't know that.
 7 Q And you never saw that letter after that?
 8 A Did I see that letter after that? Isn't that
 9 the thing that -- isn't that the so-called cover letter
 10 you say that I sent to --
 11 Q Yes, yes it is.
 12 A Whether I read it or not --
 13 Q I didn't ask you that. Mr. Bankoff, you are
 14 not really answering my questions and I believe that you
 15 should. I asked you had you not after that, seen the
 16 letter?
 17 A If it's the same letter you're talking about --
 18 Q Yes, it is.
 19 A -- I think I saw it.
 20 Q Do you recall when you saw it?
 21 A Do I recall? No, but I'm going to assume that
 22 it was during that signing period.
 23 Q You did see the letter then?
 24 A No. I said I'm going to assume I did.
 25 Q Okay. That's a good assumption.

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1 JUDGE JAMES: When you say during the signing
 2 period, should the board understand you're talking about
 3 29 May 1986?
 4 THE WITNESS: The signing would be then.
 5 JUDGE JAMES: All right. And when you say,
 6 "the letter," which letter are you talking about, Mr.
 7 Bankoff?
 8 THE WITNESS: The May 2nd letter or I don't
 9 know.
 10 JUDGE JAMES: So at the time of the signing,
 11 which I take it was done at your office in Philadelphia;
 12 is that right, on May 29?
 13 THE WITNESS: Yes.
 14 JUDGE JAMES: Present at that location was a 2
 15 May letter. Is that your testimony? And you knew it was
 16 there?
 17 THE WITNESS: I don't know if it was the 2 May
 18 letter or if it was a letter to the DLA or whatever, but
 19 the -- the defense that Henry was testifying about, this
 20 so-called attachment to the mod, I am assuming that
 21 that's the letter that Mr. Steiger is talking about.
 22 That's the letter that I took offense at.
 23 JUDGE JAMES: Well what was the date of the
 24 letter attached to the mod?
 25 THE WITNESS: I don't know.

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1 JUDGE JAMES: You don't know?
 2 THE WITNESS: No.
 3 MR. STEIGER: Okay. Then we're going to show
 4 you.
 5 JUDGE JAMES: Wait a second. Oh, I'm sorry.
 6 Who was the addressee of the -- to whom was the 2 May
 7 letter written?
 8 THE WITNESS: The original 2 May letter?
 9 JUDGE JAMES: Were there multiple iterations of
 10 a 2 May letter?
 11 THE WITNESS: The 2 May letter that I think I
 12 recall that was faxed to me. I think it was addressed to
 13 me.
 14 JUDGE JAMES: All right. So you saw a 2 May
 15 letter addressed to you from Freedom?
 16 THE WITNESS: Yes.
 17 JUDGE JAMES: Okay. Now, getting up to 29 May
 18 at the so-called signing. What letter of Freedom, if
 19 any, did you see on that event?
 20 THE WITNESS: I don't remember.
 21 JUDGE JAMES: You don't know?
 22 THE WITNESS: No.
 23 JUDGE JAMES: But your testimony is that you
 24 told Mr. Francois to tear it up and not to -- what did
 25 you tell him to do?

1 THE WITNESS: "It's not part of this
2 modification Frank, we've discussed this. I'm not privy
3 to a side agreement. I have nothing to do with it."

4 JUDGE JAMES: I understand all of that but what
5 I'm trying to focus on is which letter you're telling him
6 to disregard.

7 THE WITNESS: I think it was a letter similar
8 to the May 2nd. In other words, the same -- the same
9 type of information. But I don't believe I read -- I
10 read the letter throughout, and I can't recall who it was
11 addressed to. I just knew it was the same type of letter
12 and --

13 JUDGE JAMES: So you don't know to whom it was
14 addressed, you don't know what it said, and you don't
15 know its date. Is that right?

16 THE WITNESS: Not right now. Not until you
17 show it to me in the record.

18 JUDGE JAMES: Is it your understanding that
19 back on 29 May 1986, you knew that information?

20 THE WITNESS: Did I know that there was some,
21 yes.

22 JUDGE JAMES: But you've forgotten since then.
23 Is that the idea?

24 THE WITNESS: No. I knew there was a document.
25 I knew there was some kind of attachment or there was

1 some kind of so-called -- the provisions of a so-called,
2 side agreement, in Freedom's opinion. They tried to put
3 it back into the mod and that's when I said, you know,
4 "Forget it. There is no side agreement. There is no
5 attachment to the mod. The mod is there." Now what that
6 letter was, what that attachment was, exactly what the
7 date of it, exactly who it was addressed to -- I don't
8 recall. It was the -- it was the intent of what they
9 were trying to do when I specifically said the days
10 before, that there is no side agreement that the mod is
11 in and of itself. The fact that --

12 JUDGE JAMES: I follow your testimony. Go
13 ahead, Mr. Steiger.

14 BY MR. STEIGER:

15 Q Just as one follow-up question to Your Honor's
16 questions to you, I think I'm hearing you say that you
17 told Francois to tear up a letter that you didn't even
18 know what was in that letter.

19 A No. I said, "Frank, we spoke about this.
20 There is no side agreement. There is no attachment to
21 the modification. There is no addendums. This is it."
22 And then it was like, "Forget it. We won't sign the
23 mod."

24 Q But you are now testifying that you don't
25 specifically know what was in the letter?

1 A No. I've seen in the records since, that
2 evidently because Chiesa responded to something --

3 Q But that's exactly what the Judge asked you.

4 A Yeah, but I don't know who the letter was
5 addressed to and I don't know the date of the letter.
6 All I know is that a Bob Appellian must have faxed
7 something, that attachment to Chiesa, and then Chiesa
8 responded. And in Chiesa's response I do remember
9 reading the thing that, "Hey, Bankoff sent me this letter
10 yesterday," and that's what I told him was incorrect.
11 Bankoff never sent the letter to Chiesa.

12 Q Mr. Bankoff, with your authority as the
13 contracting officer, you do have the authority to settle
14 all claims and matters arising under the contract?

15 A Yes.

16 Q Why did you refuse to deal with Freedom with
17 respect to the matters contained in the cover letter?

18 A Because I didn't negotiate those matters.
19 Because they were issues or matters that were negotiated
20 by Freedom's representatives with DLA. I will settle
21 matters that I negotiate -- that I'm aware of. I was not
22 aware, or privy, or part of any of these side
23 discussions. And that's why I refused to rubber stamp
24 something that I know nothing about. That would be
25 totally irresponsible.

1 Q I don't understand. Were you aware at the
2 outset that Freedom was seeking additional commitments or
3 additional items that it needed to complete the contract?
4 Were you aware of that?

5 A That they needed to complete the contract?

6 Q Yeah.

7 A No.

8 Q You were not aware? So are you saying that
9 with respect to Modification 25 as you negotiated it, it
10 would have enabled Freedom to complete the contract
11 without any further relief?

12 A That was my assumption. That was my intention
13 and I understood Freedom to accept that. That Mod-25 was
14 like any other mod. We reinstated the cases, we allowed
15 for them to get their \$399,000 worth of monies and that
16 they would complete the contract with the terms and
17 conditions that were outlined in the contract and in
18 Mod-25.

19 Q Was it not known to you that they either had to
20 have the \$3.4 million of claims or whatever the amount
21 exactly was or some further relief in order to complete
22 the contract?

23 A No. If it was I --

24 Q It was not known to you?

25 A I would not have signed Mod-25 if I didn't

1 think that they could complete the contract.
 2 Q Were you not aware that they had advised you a
 3 few weeks or maybe a couple of months before, that they
 4 were in fact, in need of assistance, and had the figure
 5 of two million something been given to you as an amount
 6 that was needed to complete the job?
 7 A No.
 8 Q For goodness sake. You even sent them a cure
 9 notice on that, didn't you?
 10 A Are you asking me -- Freedom was asking me for
 11 money?
 12 Q No. They were advising you that they needed
 13 additional monies to complete the job. Do you not recall
 14 that?
 15 A Not specifically what you're talking about it.
 16 I know Freedom needed -- the whole issue around this time
 17 was about Freedom having private financing. Of course
 18 Freedom needs funds.
 19 Q You're not getting the point that I'm making.
 20 We will cover it a little later.
 21 A Okay.
 22 Q Again, I get back to your memo where you point
 23 out the \$2.7 million loan guarantee and you tell us, I
 24 believe on the stand, that you were not aware that this
 25 \$2.7 million loan guarantee had anything to do with what

1 see it.
 2 Q Well, I'm asking you to take a look at it.
 3 A Okay.
 4 Q I am not trying to rush you, Mr. Bankoff.
 5 A Do you want me to read it?
 6 Q Well, I'd like you to look it over and see at
 7 what point it becomes familiar to you. I really would
 8 like you to focus on Exhibit B, which is page four.
 9 A Appendix B?
 10 Q B, yes. B, like in boy.
 11 A Okay.
 12 Q Government furnished materials required to
 13 complete the MRE contract.
 14 A Okay.
 15 Q Now there has been testimony and I wanted you
 16 to confirm your understanding of the intentions that
 17 Freedom had down near the end of the job, to start up
 18 operations at any time as soon as GFM had become
 19 available to it.
 20 Were you aware that when they shut down, they
 21 really were intending to start up again if they possibly
 22 could? Was that your understanding also?
 23 A I'm not sure.
 24 Q But it was not beyond the realm of possibility
 25 before they were evicted and before he came in and pulled

1 was accomplished in the DLA negotiations.
 2 A Again, I was not aware of any agreements made
 3 at DLA so --
 4 Q I know, but you're not answering my question.
 5 A The answer is yes, I am not aware of it.
 6 Q Okay. Thank you.
 7 You testified yesterday about two exhibits in
 8 the file regarding the inventory that was available near
 9 the shutdown, near the close down period; do you recall
 10 that discussion that we had concerning what was needed
 11 and what was available? There were two exhibits referred
 12 to.
 13 A I believe so.
 14 Q I would like to put before you another exhibit
 15 prepared by Freedom which was, if I may use that term, a
 16 more current exhibit regarding what the situation was
 17 F-193.
 18 A Should I leave this Mod-25 out?
 19 Q No, we're finished with that. Thank you.
 20 A January 15, 1987 letter from Freedom?
 21 Q Yes, sir. That's the letter.
 22 Do you have any recollection of this letter?
 23 A No.
 24 Q No recollection?
 25 A I don't have recollections of anything unless I

1 out the stuff -- had in fact, they been in a position to
 2 produce, there was certainly a likelihood that that could
 3 be done. Isn't that right?
 4 A I think after Cinpac got the MRE-7 award -- I
 5 think the likelihood became very small that they could
 6 have completed it. But we would have supported the
 7 completion of the contract.
 8 Q Okay, and they gave you -- they never said that
 9 they were abandoning the plant -- facility or anything at
 10 that time, did they?
 11 A On November 6th?
 12 Q Well, even as late as January?
 13 A No.
 14 Q Now if you look at this, would you not confirm
 15 that this is, in fact, Freedom's assessment, analysis,
 16 accounting, whatever you want to call it, of government
 17 furnished material they needed to complete that balance
 18 of a hundred -- what was it? Five thousand
 19 approximately?
 20 A A hundred and six thousand cases.
 21 Q Is that correct?
 22 A This apparently is their opinion of what they
 23 need to complete the hundred and ten thousand.
 24 Q Yes, their opinion obviously.
 25 A Right.

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1 Q Would they not be in the best position to make
2 that opinion or that assessment?
3 A I don't know. I know that we had done
4 inventory for --
5 Q You had done inventory but this is their
6 inventory.
7 A Right. And if they disagreed, we would have --
8 we would have, you know, ascertained who was right.
9 Q You don't recall if there is anything in the
10 file that actually disagrees with this, do you?
11 A Well, according to this, he appears to almost
12 be out completely of turkey, beef slices, and ham slices
13 and I don't know in fact, if our record reflects that.
14 Q But you know of no record or letter that was
15 sent disputing this, do you?
16 A No, because at this point --
17 Q I just asked you a question, yes or no? Do you
18 know of any letter or document in your file that was sent
19 to Freedom that disputes this?
20 A We wouldn't address the complete quantity
21 needed to complete, no.
22 Q Now I'll ask you this. Did you have the GFM or
23 substituted GFM available at that time to provide to
24 Freedom? Yes or no?
25 A Yes.

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1 Q You did?
2 A Yes.
3 Q And where was that?
4 A We had our deliveries commencing on the MRE-7,
5 so our retort -- all our retort contract were up and
6 running and we had all the GFM products. We would have
7 simply diverted products to Freedom to support. Just
8 like we did on MRE-6.
9 Q Well, I don't quite understand. Do you not
10 recall removing from Freedom's facility around that time
11 or maybe a couple of months before, substantial
12 quantities of GFM?
13 A Was it at that point? I think we moved the GFM
14 --
15 Q I said, either at that time or shortly before
16 that time?
17 A I don't -- I don't remember exactly when it was
18 that we moved that GFM out.
19 Q But you do remember removing GFM out, and on a
20 rather emergency basis?
21 A We moved the GFM out when we were told that we
22 wouldn't have access to the building anymore.
23 Q Well, I don't understand how you can say that
24 you had the wherewithal to give this GFM that was needed
25 to Freedom and at the same time remove or shortly before

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1 that remove on an emergency basis substantial quantities
2 of GFM from their inventory. I don't understand that.
3 Can you explain that?
4 A Sure. Contracts allow us to move GFM --
5 Q I didn't ask that, what the contract allows. I
6 asked you why you can arrive at that conclusion? Not
7 what you're allowed to do.
8 A Why I can support Freedom with GFM?
9 Q Yeah. When at the same time you were pulling
10 out GFM and giving it to others.
11 A Right. We pulled out the GFM because Freedom
12 had shut down. They were becoming, I believe, evicted
13 from the property. We had to get the GFM out.
14 Now had Freedom started up again and I had a
15 contract, just as I moved GFM out of Freedom to Sopakco
16 and Rafco, I could have moved GFM from Rafco and Sopakco
17 -- which we did often -- and moved it to Freedom. And I
18 also could have diverted the GFM retort contracts to
19 Freedom.
20 Q And how would they been able to complete their
21 contracts to meet their schedules?
22 A We maintain a two-month inventory. In other
23 words, normally, historically, we started delivering the
24 GFM in November back then, in November and December and
25 they start up in January. So there's always a two-month

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1 inventory. So we simply would have -- would have taken,
2 you know, whatever the 'Just in time,' philosophy and if
3 we had to send a truck a week, we would have sent a truck
4 a week.
5 Q I asked you a very simple question --
6 A It's a very simple answer.
7 Q -- and the question was, did you have available
8 on order, the GFM for this MRE-6 configuration or
9 substitutes thereof pursuant to your substitution
10 authorization, to provide at that time?
11 A Between what was on contract and what was in
12 inventory, yes.
13 Q Then why didn't you provide it?
14 A Because they were shutting and -- we just had
15 to take the stuff out because we didn't have access to
16 the building. If we had sent GFM in there --
17 Q Wait, wait, wait are we -- I'm sorry, finish.
18 A If we had sent GFM in there, there is a good
19 possibility I would have lost that. Why would I send
20 more product in, if I just had to get the old stuff out
21 on an emergency basis?
22 Q You didn't testify that you had to get the old
23 stuff out on an emergency basis because of Freedom. You
24 said you had -- I think you testified that you had to get
25 it out in order to support some other contractor's

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1 operation.
 2 A All right. Let me see if I have the right time
 3 frames here. We're talking January and December. When
 4 you told me I just took GFM out --
 5 Q I said, at that time or some time shortly
 6 before that --
 7 A Yeah.
 8 Q -- which could have been December. It could
 9 have actually even have been November but within that two
 10 to three-month time frame.
 11 A Right. I don't think we started shipping GFM
 12 out until we were concerned about the security of GFM.
 13 This is different than when I took the GFM out for the
 14 hundred and fourteen thousand cases.
 15 Q You just testified that you lost access to the
 16 building. Where do you get that from? We're talking
 17 January. Where do you get that answer from?
 18 A When -- when did I take the GFM out?
 19 JUDGE JAMES: You don't ask the questions, Mr.
 20 Bankoff.
 21 BY MR. STEIGER:
 22 Q I asked you the question -- when you took it
 23 out?
 24 A I don't know.
 25 Q Okay. That's a good enough answer. If you

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1 don't know, you don't know.
 2 A Well, but you told me shortly before --
 3 Q Yes. I said, did you take out GFM on an
 4 emergency basis from Freedom and give it to another
 5 contractor, either at that time or shortly before that
 6 time? Your answer, I believe, is --
 7 A Let me say, I don't know.
 8 Q You don't know? Okay.
 9 Now let me ask you this. You just testified
 10 that the reason why you couldn't ship GFM into the
 11 facility was because you didn't have access to the
 12 building. Do you want to reconsider that answer?
 13 A I'm going to have to.
 14 Q Yes, I think you ought to.
 15 A If in fact, we still had access to the
 16 building, it's my belief we didn't take GFM out around
 17 this time frame. And if that's the case, we could have
 18 shipped in more GFM when Freedom was requiring it. So in
 19 my opinion, that December 31st inventory that we had -- I
 20 didn't kick out. It was -- it was there -- they could
 21 have produced around this 15, 1987 time period and when
 22 they started depleting that inventory, they would have
 23 had additional inventory.
 24 Q From where? If you took -- well, you don't
 25 acknowledge taking out the inventory but I can tell you

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1 right now or ask you right now, are you aware that the
 2 record does reflect that you did in fact, remove
 3 substantial inventory during that period of time on an
 4 emergency basis?
 5 A I'm not aware --
 6 Q If you're not aware, you're not aware.
 7 A -- I'm not aware that we took inventory out
 8 between the December 31st inventory and January 15.
 9 Q I didn't say that. I didn't say -- I didn't
 10 give you the -- I didn't say December 31st. I said this
 11 date or one to two months before that time.
 12 A No, I'm not aware of it.
 13 Q You're not aware?
 14 A No, sir.
 15 Q Now what about -- let's get back to the access
 16 to the building. At the time of this letter, did you --
 17 are you aware whether or not you had access to the
 18 building?
 19 A Based on what you're just telling me, I'm going
 20 to assume that at this point there was no problems in the
 21 getting of access.
 22 Q Thank you. Now I'll ask you one more time.
 23 A Yes.
 24 Q Why did you not provide the GFM requested in
 25 this letter?

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1 A There was no need to.
 2 Q That's your answer?
 3 A Yes.
 4 Q Okay. I believe you testified yesterday that
 5 after -- later on after he was evicted or Freedom was
 6 evicted, you went in there and you saw to it that items
 7 were removed. You talked about GFM, I believe was
 8 removed, CFM, and was also equipment removed?
 9 A I -- I believe so.
 10 Q All right. Do you recall that an auction had
 11 taken place and that the equipment had in fact been sold?
 12 A Yes.
 13 Q And do you recall that perhaps the figure for
 14 equipment was something in the nature of \$300,000? Does
 15 that strike a bell?
 16 A No.
 17 Q The amount does not strike a bell?
 18 A No.
 19 Q Subsequently, do you recall issuing a final
 20 decision regarding the amount of unliquidated progress
 21 payments that were due the government?
 22 A That I did it?
 23 Q Well, I believe you did. You have no
 24 recollection?
 25 JUDGE JAMES: Mr. Bankoff, do you recall doing

Page 1401

1 such a thing?

2 THE WITNESS: Not -- not right now.

3 BY MR. STEIGER:

4 Q Well, let me put it this way. Are you

5 surprised by my pointing out that, that's what you in

6 fact did?

7 A No. I just was uncertain whether I sent the

8 letter or the ACO sent the letter.

9 Q Whatever. Do you recall approximately what the

10 figure was?

11 A My understanding was there was about one point

12 six, one point seven million, and the crediting for the

13 CFM materials that we took out.

14 Q You did?

15 A Yes.

16 Q You're sure of that?

17 A Well, to the best of my ability, the CFM for

18 the food materials.

19 Q Oh, CFM for the food materials.

20 A Yes.

21 Q Oh, I misunderstood you. What about the

22 proceeds from the sale of the equipment? Do you recall

23 if that was credited to the contractor in determining the

24 amount of unliquidated progress payments?

25 A No, I don't know.

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1 Q Would you be surprised if I told you it wasn't?

2 A Would I be surprised? No, it should be but I

3 wouldn't be surprised.

4 Q Mr. Bankoff, I would like you to take a look at

5 the claim which is currently being liquidated here today

6 and that is in, I believe, Rule 4, 191.

7 A Rule 4, 191?

8 Q Yes, sir. And while you're there I would

9 suggest you also flag Rule 4, 192.

10 A All right, 192 and 194.

11 Q 191 and 192.

12 A Okay.

13 Q Again, is this not addressed to you, Mr.

14 Bankoff?

15 A Yes.

16 Q Do you know what this document is?

17 A It's a claim for breach and adjustment.

18 Q And you are aware that it has many, many

19 elements that are being claimed within its four points?

20 A Yes.

21 Q Did you read this claim?

22 A I believe I -- yes, I did.

23 Q Did you discuss or refer this claim to counsel

24 for its review?

25 A Yes.

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1 Q Did you get written findings regarding this

2 claim from counsel? Because we did not see anything in

3 the record regarding that.

4 A I gave it to counsel and whether or not I

5 issued the final decision, again I'm not certain.

6 Q That's why we're here because you issued a

7 final decision but sobeit. I'm just asking you now,

8 whether or not you sought advice or counsel with respect

9 to your analysis of this claim?

10 A Absolutely.

11 Q And who was that?

12 A At the time?

13 Q Yes.

14 A I don't know if it was Jim Maranowski or if it

15 was Ms. Hallam -- I forget.

16 Q And then were there -- I'm not sure. I didn't

17 find any written opinion or conclusions or findings. Do

18 you know if any were prepared by your lawyer?

19 A I don't recall.

20 Q Did you refer the claim to DCAA ordered and

21 reviewed?

22 A I don't -- I don't believe I did.

23 Q Do you know why?

24 A I think the first that I heard of it, I went to

25 counsel with this claim. I probably took their advice or

Page 1404

1 -- your know -- basically referred this to counsel.

2 Q Let me ask you to refer to your final decision

3 on the next document, 192 and specifically to look at the

4 decision which appears on page three. Would you take a

5 moment to glance at that please? See if you can

6 familiarize -- re-familiarize yourself with it.

7 A Okay.

8 Q Mr. Bankoff, are you aware that the claim

9 sought amounts in excess of \$21,000,000?

10 A Yes.

11 Q I would like for us to focus, if you don't

12 mind, on the decision. The initial paragraphs refer to

13 or initial paragraph refers to what was then a still

14 pending final decision terminating the contract for

15 default. Do you recall the -- what was the outcome of

16 that particular matter?

17 A Say it again.

18 Q You will notice that the first paragraph refers

19 to what was then an outstanding final decision of the

20 government, terminating the contract for default. Do you

21 recall what the disposition was or how that ended up,

22 that particular matter ended up?

23 A The ASBCA case? The termination for default?

24 Q Yes, yes.

25 A The decision was to overturn it.

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1 Q I can't hear you.
 2 A The decision was to overturn it and convert it
 3 to a termination for convenience.
 4 Q Thank you. Now if we may go on. I'd like to
 5 take a look at the second paragraph. Does it not relate
 6 to Modification 25 and in particular, a statement
 7 concerning that it was entered into with the advice of
 8 counsel etcetera, etcetera? Do you see that? And that
 9 would be in the third paragraph -- in the second
 10 paragraph.
 11 A Yes.
 12 Q Now you make the statement there in the second
 13 sentence, that the main thrust of the argument that
 14 Freedom was making related to Modification 25, did you
 15 get that conclusion from your counsel?
 16 A Yes.
 17 Q If you look at the third paragraph, it relates
 18 to one of the issues that we have in fact -- or one or
 19 two of the issues that we have in fact been discussing
 20 here in the last two days. Is that not right?
 21 A Yes.
 22 Q And again, you are here and you're making the
 23 same conclusion, I believe, regarding the impact of Zyglo
 24 testing as you have been doing the last couple of days.
 25 Is that not correct?

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1 A Yes.
 2 Q You had no different basis upon which to make
 3 that conclusion then than you have now. Is that correct?
 4 In other words, if I may rephrase the question. The same
 5 reasons you had for drawing that conclusion then are the
 6 same ones that you have now.
 7 A No. The reasons I'm giving you now are general
 8 reasons.
 9 Q I can't hear you, sir.
 10 A The reasons I'm giving you now are general
 11 reasons. The reasons back then would probably be based
 12 on specific information.
 13 Q The reasons regarding the fact that Zyglo
 14 testing had no impact on the operation are not general
 15 reasons. You said that it didn't very clearly, and you
 16 gave a reason for that.
 17 A Okay.
 18 Q And was that the same reason that you had when
 19 you made that same statement about no impact?
 20 A Yes.
 21 Q Okay. Then you talk about finally, I always
 22 wondered where the other middle paragraphs went. But
 23 anyway you talk about finally, again, you relate now to
 24 the medical hold issue that we have been talking about.
 25 A Yes.

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1 Q So in a sense, you are really addressing only a
 2 few of the matters raised in our claim. Would you not
 3 say?
 4 A No, I would have thought we were addressing the
 5 entire claim.
 6 Q Well, I don't see anything in here about
 7 failing to make progress payments. I don't see anything
 8 in here about bad faith. I don't see anything in here
 9 about a breach of key obligations on the part of the
 10 government in matters which were raised in our claim. Do
 11 you see those?
 12 A Well, the contention about the progress
 13 payments --
 14 Q I just asked you a simple question. Yes or no?
 15 Do you see those?
 16 A Yes. That would have been in the second
 17 paragraph related to Mod-25.
 18 Q That would be related to Modification 25?
 19 A Yes.
 20 Q Okay. That's your explanation?
 21 A Yes.
 22 Q What about bad faith? Where is that covered?
 23 A Well, I don't know that we would have agreed
 24 with that interpretation.
 25 Q I didn't say you agree or disagree. All I

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1 asked you is, where is that covered within this decision?
 2 A That would be in the second paragraph --
 3 Q Second paragraph as well?
 4 A -- to Mod-P25 the second paragraph.
 5 MR. LUCHANSKY: Your Honor, maybe we could go
 6 off the record for a second and approach the bench.
 7 JUDGE JAMES: Surely.
 8 (Off the record)
 9 JUDGE JAMES: Go ahead appellant.
 10 MR. LUCHANSKY: Thank you.
 11 BY MR. LUCHANSKY:
 12 Q Mr. Bankoff, when you first took over for the
 13 Freedom contract when you first arrived in June of 1985,
 14 there was a problem with progress payments to Freedom
 15 wasn't there?
 16 A Right away? I'm not sure.
 17 Q In fact, at that time in June of 1985, as your
 18 remember no progress payment had been made to Freedom
 19 from November 15 time of the award of contract in 1984,
 20 all the way through May 6, 1985. That's something Mr.
 21 Liebman had told you when you came on board, wasn't it?
 22 A Yes.
 23 Q And now the first progress payment after this
 24 six or seventh month delay, the first progress payment
 25 was for \$1.76 million, correct?

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1 A I don't know.

2 Q Okay. And Mr. Liebman paid one point seven

3 million, but didn't pay \$66,000 out of that first H.T.

4 Foods progress payment. You were aware of that, correct?

5 A No. But I think I recall from seeing some of

6 the documents this week.

7 Q And Mr. Liebman informed you at the time that

8 the issue that then began to brew was that those \$66,000

9 in incurred costs were for capital type costs that had

10 been negotiated between DPSC and Freedom. Do you

11 remember that?

12 A No.

13 Q You are aware that, that became a problem in

14 that Freedom was saying that approximately \$522,000 in

15 costs was negotiated, representing quality control

16 equipment supplies, maintenance equipment, building

17 repair, automated building and management control system,

18 lockers and office equipment. And they said there was an

19 agreement that those costs could be expensed on its

20 books. Do you remember that?

21 A I don't think at that time Freedom had all

22 \$522,000 identified.

23 Q That's not my question, Mr. Bankoff.

24 MS. HALLAM: Could you talk up, please?

25 A I -- at that time, I don't think Freedom had

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1 identified all \$522,000. The issue became -- I think

2 they were talking about something like \$300,000 worth of

3 some capital type equipment that Freedom wanted progress

4 payment money for and that DCAS --

5 Q Well, let me ask -- I'm asking you a specific

6 question. You did become aware -- you were speaking of

7 Mr. Liebman. Well did you review the PCO file when you

8 came on board in June 1985?

9 A Not immediately.

10 Q Why not?

11 A Because I was administering the contracts. I

12 didn't go into each -- remember I was administering three

13 contracts.

14 Q Well, you weren't administering because you

15 were the PCO and Marvin Liebman was the ACO, right? He

16 was administering --

17 A Well, we also do some administration of the

18 contracts during the year.

19 Q You did become aware that that amount \$522,000

20 was negotiated with Freedom?

21 A I later read that and felt that that was normal

22 capital expenses that were allowed to be expensed.

23 Q You agreed shortly thereafter, that after your

24 investigation and speaking with Mr. Liebman and review of

25 the files -- whatever it is -- you agreed that, that

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1 agreement had been reached between Freedom and DPSC at

2 the time of negotiating this contract, correct?

3 A I think I came up with the \$522,000 in costs

4 that I felt were expensed, yes.

5 Q Now the first exposure you had to it though,

6 was right when you came on board in June, when Mr.

7 Liebman denied \$66,000 in progress payments for costs

8 that he deemed to be among these \$522,000 in capital type

9 equipment. Isn't that right?

10 A No.

11 Q That's not right or you don't remember?

12 A That's not right.

13 Q Okay. It's not right that Mr. Liebman denied

14 the \$66,000 progress payment because these were capital

15 type costs?

16 A That was not the basis of my answer.

17 Q Okay. In what respect was it not accurate that

18 Mr. Liebman denied the \$66,000 from H.T. Foods progress

19 payment number one, on the basis that those were capital

20 type costs and not eligible for progress payments? How

21 does your recollection differ from my statement?

22 A My recollection is that the first thing I

23 looked at when I got into it, was Ms. Rowles

24 correspondence to Marv Liebman. I had never spoken to

25 Marv. I looked at Ms. Rowles correspondence and she

Page 1412

1 asked me to look into this matter about Freedom wanting

2 progress payment monies for certain capital type

3 equipment and the DCAS offering only to pay the

4 depreciated portion, and she wanted me to try to resolve

5 it.

6 Q And therefore, Mr. Bankoff, you were aware that

7 the reason Ms. Rowles was talking to you was because Mr.

8 Liebman had denied payment to Freedom for \$66,000 worth

9 of these costs --

10 A I wasn't aware of \$66,000 being --

11 Q How much were you aware of?

12 A None. I wasn't aware of any number. All I was

13 aware of was the issue.

14 Q Okay. So you understood this to be an academic

15 exercise.

16 A An academic exercise? No.

17 Q Then you didn't realize that it was at stake --

18 nothing was at stake for the moment? No progress payment

19 in play or according to your understanding?

20 A Well, at -- evidently --

21 Q I don't want evidently. I want what you knew.

22 A I didn't know any specific dollars of what was

23 incurred -- and what was asked to be paid 95 percent

24 versus depreciation.

25 Q Okay, and you didn't investigate it enough with

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1 Ms. Rowles or Mr. Liebman, to find out that a certain
 2 amount had been denied at that point?
 3 A What I did -- no --
 4 Q You didn't find out exact dollar amount?
 5 A Exact dollar amount, no.
 6 Q Did you find out that any dollar amount had
 7 been denied to Freedom at that time in June of 1985?
 8 A No.
 9 Q As we sit here today however, you do know that
 10 to be the case, correct?
 11 A Yes.
 12 Q Now you also knew at the time however, that
 13 Freedom very badly needed these payments, correct? And
 14 by these payments I mean the \$522,000 in capital type
 15 expenses that you ultimately confirmed they had been told
 16 they would get.
 17 A In June of '85?
 18 Q You knew about this time, June, July of '85,
 19 that Freedom needed these payments very badly, didn't
 20 you?
 21 A No.
 22 Q Did you ever realize how badly Freedom needed
 23 these payments?
 24 A No. We weren't talking about that much.
 25 Q You did realize that among the costs included

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1 in your list, on your October 9, 1985 D & F which is
 2 government rule, Tab 75, where you say you investigated
 3 and agree that the government agreed to expense these
 4 costs?
 5 A Yes.
 6 Q And you listed them out?
 7 A Yes.
 8 Q You understood that in that list was equipment
 9 for an automated lot tracking system for Freedom, didn't
 10 you?
 11 A I knew that there was computers, yes.
 12 Q And you knew that those computers were to be
 13 used for an automated lot tracking system, didn't you?
 14 A Whether -- whether exactly I knew that at that
 15 time, I'm not sure. All I knew is that I felt that for
 16 whatever intended purpose, that these were normally
 17 capital type equipment that as far as I could see, were
 18 allowed to be expensed. And I felt progress payments
 19 should be allowed for these \$522,000 worth of products.
 20 Q Okay, so that was your position around this
 21 time -- that progress payments should be allowed to pay
 22 for these costs?
 23 A Yes, yes.
 24 Q And again, the yes or no answer to whether you
 25 realized at that time how badly Freedom needed the

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1 equipment that was going to be purchased with this money
 2 -- was that a yes or a no? You did or did not realize
 3 how important it was to Freedom at the time?
 4 A No, I didn't realize how important it was.
 5 Q Now, as we sit here today you do understand
 6 that for a contract like Freedom's an automated lot
 7 tracking system is absolutely essential, don't you?
 8 A We didn't have one. I would certainly prefer
 9 to have one. Whether I could call it essential -- I
 10 don't know how people were doing it in 1978/79 when lot
 11 track ability was also a requirement. It's certainly an
 12 improved way to do it.
 13 Q Well, you are aware that when Mr. Liebman
 14 requested a DAR deviation in order to be able to pay
 15 these costs, he did put in his DAR deviation that without
 16 this equipment the contractor was likely to go into
 17 bankruptcy and not be able to perform the contract. You
 18 are aware of that, right?
 19 A Well, I also did a DAR deviation and we put
 20 everything that we thought we had to and could --
 21 Q Were you aware that that was Mr. Liebman's
 22 representation?
 23 A I don't think so because we did our own DAR
 24 deviation.
 25 Q That's right. You also submitted your own.

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1 A Yeah.
 2 Q Were you aware of Mr. Liebman's representation
 3 -- that without this, the contractor couldn't perform?
 4 A I don't think so because --
 5 Q I just want an answer, yes, I do remember or I
 6 don't remember.
 7 A I don't remember. No, I don't remember.
 8 Q Okay. You are aware that the contract
 9 requirements for this job did require a lot tracking
 10 system?
 11 A It required lot traceability, yes.
 12 Q And you are aware that in this contract there
 13 are millions of components involved that they had to keep
 14 track of?
 15 A There were hundreds of components and numerous
 16 lots of each component.
 17 Q And if you totaled them up over the course of
 18 the entire six hundred and twenty thousand cases, you are
 19 talking about millions of components -- all of which
 20 Freedom was required by regulation to keep track of.
 21 A No. Freedom was only required to keep track of
 22 lot information for manufactured lots. If a lot
 23 contained seventy thousand units, Freedom didn't have to
 24 keep track of seventy thousand units -- they had to keep
 25 track of that lot.

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1 Q Now were you aware at that time and in fact --
 2 you submitted your DAR deviation request on August 14,
 3 1981. Is that right?
 4 A Yes. Well, I don't know but I assume.
 5 Q I'll ask you to take a look at that Tab which
 6 is F-91.
 7 A Okay.
 8 Q Now, either at this point or shortly thereafter
 9 --
 10 A F-91?
 11 Q Yes, F-91.
 12 A It's an August 14th audit?
 13 Q Yes. Before we take a look at this letter, let
 14 me just confirm. At or about this time -- either August
 15 or certainly by the October D & F that you issued, there
 16 was no doubt in your mind that there was an agreement
 17 between Freedom and DPSC to expense these costs, correct?
 18 A Yes.
 19 Q And as you said, you believed that these costs
 20 should be paid through progress payments, correct?
 21 A Yes.
 22 Q And when you said that you meant the 100
 23 percent, the entire amount of these costs should be
 24 eligible for 95 percent progress payments, correct?
 25 A Yes.

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1 Q And in that sense, you disagreed with Mr.
 2 Liebman, who was taking the position that only the
 3 depreciable portion of these costs were eligible for
 4 progress payments, correct?
 5 A Yes.
 6 Q If you'll now look at the August 14, 1985
 7 letter. This is your request for DAR deviation, is that
 8 right?
 9 A I think there was more than just this. I can't
 10 believe our entire DAR deviation was this one page.
 11 Q I don't know. This is the page that I have in
 12 my records. But certainly if there was more, this page
 13 would have been part of your DAR deviation submission,
 14 correct?
 15 A I believe so, yes.
 16 MS. HALLAM: I object to that question. How
 17 would he know that they would have necessarily put in all
 18 the document?
 19 JUDGE JAMES: The objection is overruled.
 20 BY MR. LUCHANSKY:
 21 Q So Mr. Bankoff, if you'd please look at
 22 paragraph three of this DAR deviation request, we do see
 23 here that you were representing to the director of DLA
 24 that if the deviation is not granted, that the contractor
 25 might not get the equipment and the result might be an

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1 inability to successfully perform the contract. Is that
 2 right?
 3 A That's what it says.
 4 Q And that's what you wrote?
 5 A Yes.
 6 Q Now you're also aware that apparently you could
 7 have issued a modification to the contract and authorized
 8 Freedom to invoice the government for these costs and get
 9 paid for those costs as incurred through invoices. Isn't
 10 that correct?
 11 A No.
 12 Q You weren't aware at that time?
 13 A No.
 14 Q As we sit here today you're aware of it because
 15 that's what you did in Mod-25, correct?
 16 A No.
 17 Q Okay. Is it your testimony that in Mod-25 you
 18 did not authorize Freedom to submit an invoice for the
 19 outstanding capital type cost of \$311,000 and then have
 20 the government pay that invoice in a one shot deal?
 21 A That's correct.
 22 Q That's not what happened in Mod-25?
 23 A No.
 24 Q Okay. Let me turn your attention if you can to
 25 FT-422 and it's going to be in the second notebook, in

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1 the notebooks that have progress payment ten, eleven,
 2 twelve.
 3 A FT-422?
 4 Q Yes. It's the progress payment notebooks. The
 5 section that has progress payment eight and beyond. Do
 6 you have that, Mr. Bankoff?
 7 A Yes.
 8 Q If you'd please turn to the tab that says
 9 Mod-25 payment, you'll find that after PP number 15.
 10 A Okay.
 11 Q Do you see the three pages that follow tab
 12 Mod-25 payment?
 13 A Yes.
 14 Q And you see that on the second of these pages,
 15 page number 03986, this is an invoice from Freedom for
 16 the unreimbursed incurred costs under contract -- on the
 17 MRE-5 contract pursuant to Mod-25. Isn't that right?
 18 A Yes.
 19 Q And this is dated June 3, 1986.
 20 A Yes.
 21 Q And this is for the \$399,000 which was the
 22 balance of capital type costs that hadn't accidentally been
 23 paid yet, correct?
 24 A Yes.
 25 Q And you see that -- turning back one page to

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1 page number 03985, that's a copy of the check for that
 2 invoice. Isn't that right?
 3 A Yes.
 4 Q And to go to the third page of this tab 03987,
 5 there's an advice of payment for that \$399,111 that
 6 Freedom had invoiced pursuant to Mod-25. Isn't that
 7 right?
 8 A Yes.
 9 Q Now Mod-25 was executed on May 29, 1986,
 10 correct?
 11 A Yes.
 12 Q Invoiced June 3, 1986, correct?
 13 A Yes.
 14 Q Paid June 13, 1986?
 15 A Yes.
 16 Q Any reason you couldn't have done this back in
 17 June, July, August, September, October of 1985?
 18 A This wasn't paid correctly. Mod-25 did not
 19 allow for this type of payment.
 20 Q When did you make efforts to recoup that money
 21 from Freedom?
 22 A I wasn't.
 23 Q The receipt of this invoice?
 24 A I was never in receipt of information that the
 25 invoice had been paid. That was not the intent of

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1 Mod-25.
 2 Q So did I just enlighten you as to something
 3 that you never knew had happened before, Mr. Bankoff?
 4 A Well, I heard it.
 5 Q When did you find out that this had -- let me
 6 finish my question please. When did you first find out
 7 that Freedom had been paid \$399,000 pursuant to the
 8 invoice it submitted under Mod-25?
 9 A I would say about two weeks ago when I was in
 10 the DCAS office going over the listing of payments with
 11 Jim Ljutic. That was the first time I ever realized that
 12 it was paid this way. This was not the way Mod-25
 13 requires it to be paid.
 14 Q Mr. Bankoff, you testified that it was Mr.
 15 Liebman's position -- it was your position that progress
 16 payments -- I'm sorry -- that these capital type costs
 17 were eligible for progress payments. Is there anything
 18 you believe you could have done at that time? Again,
 19 that time being between June and October -- let's say any
 20 time before Mod-25 -- anything you could have done to get
 21 Freedom paid those costs as they were incurred?
 22 A I possibly --
 23 Q I'm sorry. I'm going to ask you to stop. This
 24 is Mr. Liebman.
 25 MS. HALLAM: Sorry.

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1 JUDGE JAMES: Do you remember the question that
 2 was posed to you?
 3 THE WITNESS: Yes. I possibly -- I don't know
 4 if I had the authority to do what I did in Mod-25
 5 earlier. I didn't think of it until then. I possibly
 6 could have tried that but I honestly didn't think of it
 7 until the DAR deviation field. We all expect the DAR
 8 deviation.
 9 BY MR. LUCHANSKY:
 10 Q I don't mean -- I'm just asking whether you
 11 believed that there was anything you could have done
 12 before Mod-25 to get Freedom paid for these costs?
 13 A Today or that --
 14 Q Let's start with today. Is there anything
 15 today you believe that you could have done prior to
 16 Mod-25 to get Freedom paid for these costs without --
 17 that they were going to pay for equipment without which
 18 they might not be able to complete the contract, as you
 19 sit here today?
 20 A If the question is, today, do I think I could
 21 have done something to get those monies paid? Possibly.
 22 Q And what would that be?
 23 A To try this arrangement.
 24 Q I'm sorry?
 25 A To do this little arrangement that we did in

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1 Mod-25.
 2 Q So whatever that arrangement is in Mod-25 that
 3 seemed to have allowed them to get paid, if your
 4 arrangement wasn't going to provide for invoicing and
 5 payment they way it happened, nevertheless, your
 6 arrangement still would have provided for a lump sum
 7 payment for these costs as incurred?
 8 A No.
 9 Q Would it have allowed for Freedom to get paid
 10 in full for those costs as they were incurred?
 11 A Possibly.
 12 Q You're not sure whether it would have been
 13 successful?
 14 A It would have required delivery of product.
 15 Q Do you have the authority -- since you believe
 16 that the agreement, the contractual arrangement that had
 17 been reached between Freedom and DPSC for this contract,
 18 included progress payments for all costs aside from
 19 production equipment which was being depreciated but all
 20 costs including these costs, was it not within your
 21 authority to enforce that agreement by ordering the ACO
 22 to make those payments since this was a contractual
 23 arrangement?
 24 A I believe the answer was no.
 25 Q I want to know from now. Do you believe now --

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1 didn't you have the authority to tell Mr. Liebman, "Look,
 2 I'm the PCO on this contract and while I didn't negotiate
 3 it, I looked into this and I know there was an agreement
 4 to pay these costs in full through progress payments.
 5 That was the deal and it's your obligation to make those
 6 payments as those costs are incurred." Didn't you have
 7 that authority?
 8 A I don't know that I didn't do that. So
 9 evidently I didn't have the authority --
 10 Q I don't want --
 11 JUDGE JAMES: Please answer the question if
 12 you're able.
 13 A No.
 14 BY MR. LUCHANSKY:
 15 Q You don't believe you had that authority?
 16 A If you want one word answers, no.
 17 Q Do you remember making any attempts to
 18 encourage, or require, or otherwise try to get Mr.
 19 Liebman to make those payments at the time?
 20 A Yes.
 21 Q He wouldn't listen to you?
 22 A No.
 23 Q Do you remember how emphatic you were with him?
 24 A No.
 25 Q So you don't know whether you simply said, "Hey

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1 Marv, you really should pay these," or you said, "Marvin,
 2 if you don't pay these we are in a mess." You don't
 3 remember?
 4 A No.
 5 Q And in fact, what you decided to do instead was
 6 go along with Marv Liebman's program and submit your own
 7 DAR deviation request, correct?
 8 A No.
 9 Q You did submit a DAR deviation request,
 10 correct?
 11 A Yes.
 12 Q Even though you believe a DAR deviation wasn't
 13 necessary to pay these payments?
 14 A Yes.
 15 Q Well, then did you make any effort to adjust
 16 the contract price with Freedom?
 17 A No.
 18 Q And so ultimately, other than submitting this
 19 DAR deviation request and having conversations with Mr.
 20 Liebman that you can't remember, you didn't arrange for
 21 these payments to be made until they were linked with a
 22 modification that had a release of claims in it. Is that
 23 correct?
 24 A The question first of all, is not accurate.
 25 The assumptions you're making that it was a very slight

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1 suggestion is not accurate. The bottom line is that --
 2 Q Well, let me ask a question then if I asked an
 3 improper question. In fact, what happened was that the
 4 only efforts you have testified to that you made to get
 5 Freedom paid for these capital costs, capital type costs
 6 because there was an agreement they would be expensed so
 7 they weren't actually capital costs anymore but the only
 8 attempts you made to get Freedom paid for it was, you had
 9 some conversation with Marvin Liebman that you can't
 10 recall exactly what they were or the tone of them,
 11 correct? Correct?
 12 A No. I remember many conversations and I
 13 remember the tone. And yes, they are capital costs.
 14 Q Well, I'm not --
 15 A They were capital costs that were --
 16 Q Are you an accountant? Are you an accountant?
 17 A -- I have negotiated many, many a contract
 18 based on cost and pricing. I've allowed accelerated
 19 recovery of capital costs. I've allowed expensing of
 20 capital costs. They're still capital costs.
 21 Q Okay. We're going to disagree, but that's not
 22 your area of expertise is it?
 23 A No.
 24 Q You're not an accountant?
 25 A I don't have any expert -- area of expertise.

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1 Q Though it certainly is kind of self-serving to
 2 throw in these points --
 3 A That's my experience.
 4 MS. HALLAM: Objection.
 5 MR. LUCHANSKY: I withdraw the statement.
 6 BY MR. LUCHANSKY:
 7 Q So you had these conversations with Mr.
 8 Liebman, you submitted your own DAR deviation request?
 9 A Yes.
 10 Q Until Mod-25 you took no other actions to try
 11 to get these costs paid, correct?
 12 A I took plenty of actions.
 13 Q To get these costs paid?
 14 A Absolutely.
 15 Q Ultimately, the way you got them paid was to
 16 link these payments into a modification that required
 17 Freedom to release its claims against the government,
 18 correct?
 19 A Yes.
 20 Q Now Mr. Bankoff, I want to move forward a
 21 little bit. We're in August when you submitted your DAR
 22 deviation request. You became aware at this point that
 23 there were some additional progress payment issues that
 24 were coming up with Freedom, correct?
 25 A When is this?

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1 Q August of 1985.
 2 A No, you'll have to refresh my memory.
 3 Q Okay. Well you do remember -- if you'll turn
 4 to government tab -- government Rule 4, Tab 62.
 5 A 21 December 1986 memo for the record.
 6 JUDGE JAMES: That's not the board's Rule 4,
 7 Tab 62.
 8 THE WITNESS: Oh, Rule 4 did you say? I
 9 thought you said government.
 10 MR. LUCHANSKY: Well it's the Rule 4, Tab 62.
 11 THE WITNESS: 23 August letter from Henry
 12 Thomas -- to Henry Thomas from Marvin.
 13 BY MR. LUCHANSKY:
 14 Q Correct.
 15 A Okay.
 16 Q And you are aware -- I realize that this is a
 17 letter that you did not author but it was just to refresh
 18 your recollection which you requested. You do remember
 19 that on August 23rd, Mr. Liebman proposed suspending
 20 Freedom's progress payments yet once again claiming that
 21 their accounting system was inadequate. Do you remember
 22 that?
 23 A Well I'm not CC'd here --
 24 Q I'm not asking you -- I'm really -- you had
 25 said you didn't remember, you asked me to refresh your

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1 recollection. I'm having you look at the document. I'm
 2 not asking you whether you were receiving this document.
 3 I'm asking you whether your present recollection is now
 4 refreshed?
 5 A I recall, yes.
 6 Q Now on the basis of this recommendation, one
 7 week later you then issued a cure notice to Freedom on
 8 the same basis, correct? August 30, 1985?
 9 A If I issued a cure it was for -- probably for
 10 failure to meet the delivery schedule.
 11 Q I didn't hear that.
 12 A It was probably for failure to meet the
 13 delivery schedule.
 14 Q Do you remember that you issued a cure notice
 15 that was also based in part upon a declaration of Marv
 16 Liebman's declaration of Freedom's accounting system
 17 being inadequate?
 18 A No.
 19 Q Well if you'll turn to government Rule, Tab 63
 20 which is the next tab.
 21 A G or Rule 4?
 22 Q It's Rule 4, 63, the next tab in the book you
 23 have in front of you.
 24 A Okay.
 25 Q You notice in the second paragraph you

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1 acknowledge the August 23rd notice of proposed suspension
 2 by Marv Liebman, correct?
 3 A Okay, yes.
 4 Q You also note that progress payments are
 5 considered vital to the company's ability to perform,
 6 correct?
 7 A Yes.
 8 Q So that's something you were aware of at the
 9 time?
 10 A Okay.
 11 Q As we sit here today, do you recall knowing
 12 back in August of '85, just how important progress
 13 payments were?
 14 A I must have.
 15 Q You're basing that just on reading this
 16 document? You don't have any recollection of how
 17 important progress payments were back then?
 18 A Well, I would always think progress payments
 19 are important.
 20 Q As we sit here today, do you recall just how
 21 vital it was to Freedom to get their progress payments?
 22 A I know I was very concerned that progress
 23 payments be resumed.
 24 Q And that's because you understood that without
 25 these progress payments, Freedom was on the brink of not

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1 being able to perform its contract. Isn't that right?
 2 A I wanted whatever monies that the government --
 3 Q Answer the question.
 4 A No. That I don't -- I don't know that I'm
 5 putting one and one together to equal two, as you're
 6 saying. All I know is that Henry told me he needed
 7 progress payment monies and I wanted them to --
 8 Q So when you put in this cure notice that it was
 9 considered -- that progress payments were considered
 10 vital --
 11 A Right.
 12 Q -- to their ability to perform this contract.
 13 To you vital meant something other than actually being
 14 able to perform the contract?
 15 A No. I assumed vital meant inability to the
 16 contract performance.
 17 Q So you did know that without progress payments,
 18 Freedom was in jeopardy of not being able to perform this
 19 contract, correct? Isn't that right, Mr. Bankoff? You
 20 knew that.
 21 A No. I don't know.
 22 Q You must have kept out of the fray pretty much
 23 back then.
 24 A Pardon?
 25 Q You must have kept out of the fray pretty much

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1 back then.
 2 A I don't understand that.
 3 Q Not to be able to have known how vital these
 4 progress payments were to Freedom's performance even with
 5 the references in these letters, you must have somehow
 6 been able to keep out of an understanding of exactly what
 7 was going on in this contract.
 8 A No. Because I think at this time, from day,
 9 you know, day one when Henry was explaining this, the
 10 circumstance became, what do we have to do to make sure
 11 that the monies flow properly?
 12 When Henry testified earlier that I asked him
 13 to correct his accounting system to get the monies
 14 flowing properly, it was all for the purpose of getting
 15 progress payment monies turned back --
 16 Q Let me ask another question, Mr. Bankoff.
 17 MR. LUCHANSKY: Objection, move to strike.
 18 That is not responsive to my question.
 19 JUDGE JAMES: Granted. It is stricken.
 20 MR. LUCHANSKY: Thank you.
 21 BY MR. LUCHANSKY:
 22 Q Mr. Bankoff, in this cure notice what you do as
 23 a result of these points that you make included
 24 recognizing how vital these progress payments are and
 25 acknowledging that Marv Liebman is proposing suspending

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1 progress payments. You conclude that Freedom is unable
 2 or unwilling to comply with the requirements of the
 3 subject contract, correct?
 4 I direct your attention to the fourth
 5 paragraph.
 6 A Yes.
 7 Q And the consequence of issuing this cure notice
 8 is that it assures that no progress payments will be paid
 9 because Marv Liebman doesn't pay progress payments as
 10 long as there is a cure notice outstanding. Isn't that
 11 right?
 12 A That's true.
 13 Q So whereas a week before, Mr. Liebman had only
 14 proposed suspending progress payments, you made that
 15 suspension a defacto reality by issuing a cure notice.
 16 Is that correct?
 17 A Yes.
 18 Q Now on September 11, 1985 -- you are aware that
 19 on September 11, 1985, Freedom submitted another progress
 20 payment request? Let me ask a different question, you
 21 certainly wouldn't be aware of the dates off the top of
 22 your head.
 23 Do you remember that at this time,
 24 August/September of 1985, while your cure notice was
 25 making sure that no progress payments were being paid,

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1 Mr. Liebman required Freedom to combine three different
 2 progress payments into one -- five, six, and seven. Do
 3 you recall that?
 4 A No.
 5 Q If I may refer to this chart just to be easy
 6 for people to see it. This is the progress payment chart
 7 that is in FT-422. Mr. Bankoff, this is a summary chart
 8 of all the progress payment requests, date, amounts, date
 9 paid.
 10 So you do recall -- you do see here that
 11 progress payment five was submitted July 5, 1985, for
 12 \$807,000, correct?
 13 A Yes.
 14 Q Nothing was paid on that?
 15 A Right.
 16 Q Now on August 8, 1985, \$640,761 was submitted.
 17 Do you see that?
 18 A Yes.
 19 Q Nothing was paid on that?
 20 A Right.
 21 Q And then September 11, 1985 -- I'm sorry --
 22 number seven, was in the amount of \$1,546,045 and that
 23 was -- and nothing was paid on that?
 24 A Right.
 25 Q All three of those were combined and submitted

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1 on September 11, 1985, in the amount of almost
 2 \$3,000,000. Do you see that?
 3 A Right.
 4 Q Now all of these were being held through the
 5 point of your cure notice, correct? August 30, 1985?
 6 A Yes. Well I don't know when the cure was
 7 satisfied.
 8 Q Now you see as well, that that combined five,
 9 six, and seven -- well, let me ask you a different
 10 question.
 11 I'll ask this question. You do see that that
 12 combined three progress payments, the last of which was
 13 submitted on September 11, 1985 --
 14 A Yes.
 15 Q -- payment was made on October 11, 1985,
 16 correct?
 17 A Yes.
 18 Q And full payment wasn't made. About two
 19 million to three million was paid.
 20 A Right.
 21 Q Still leaving a balance according to this chart
 22 of amounts not paid.
 23 A Right.
 24 Q According to this chart.
 25 A Yes.

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1 Q But October 11, 1985, was how long these three
2 progress payments were held until. Now Mr. Bankoff, I'll
3 ask you to take a look at -- well, let me first ask you.
4 Do you remember a meeting back on September 20, 1985,
5 between you, Colonel Hine, Marvin Liebman, and Sam Stern?
6 A Me, Colonel Hine, Marv Liebman, and Sam Stern.
7 Where did we meet?
8 JUDGE JAMES: You don't ask the questions. You
9 answer them.
10 THE WITNESS: NO.
11 BY MR. LUCHANSKY:
12 Q Mr. Bankoff, I'll ask you to take a look at
13 FT-178.
14 A DAR deviation request 19 September '85?
15 Q It should be a conversation record -- FT-178.
16 A Oh, I'm sorry -- a conversation record, yes.
17 Q This is your handwriting, isn't it?
18 A Yes.
19 Q I'll ask you to take a look at this document
20 and see if it refreshes your recollection of the meeting
21 itself. And let me know whether you have a present
22 recollection of that meeting.
23 A In other words, you're talking -- a phone
24 conversation?
25 Q Correct. I'm sorry. If I've been referring to

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1 it as a meeting, I apologize. But the record does
2 reflect that it was a telephone conference among Colonel
3 Hine, Marv Liebman, Sam Stern, and you, correct? Is that
4 correct?
5 A What's that?
6 Q In response to your comment, I was clarifying
7 and asking for your confirmation --
8 A It's a phone conversation.
9 Q -- among the four of you?
10 A Yes.
11 Q Tell me when you're finished with reading this
12 document please.
13 A Yes. Okay.
14 Q You're finished with reading it?
15 A Yes.
16 Q Does this now bring back any recollection of
17 this telephone conversation?
18 A No. But the notes are pretty detailed.
19 Q Now, these are notes that were apparently from
20 the context. This telephone conversation happened after
21 a 20 September meeting of DPSC personnel. Is that right?
22 In that first line is, am I reading that accurately,
23 "relayed points of 20 September meeting of DPSC personnel
24 to DCASMA?"
25 A Okay.

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1 Q Do you recall that there was a 20 September
2 meeting at DPSC to discuss what to do about Freedom?
3 A Well, I don't remember that specific meeting.
4 We had plenty of meetings.
5 Q You don't remember that meeting?
6 A No.
7 Q It appears that there was a meeting on that
8 date about --
9 A That's what it says.
10 Q And that was during a time that progress
11 payments were suspended as a result of your cure notice,
12 correct?
13 A No. I don't know that for a fact.
14 Q Okay, you do know, you did testify before that
15 in fact, progress payments weren't being paid because of
16 your cure notice?
17 A No.
18 Q I think the record will reflect differently but
19 let's go on.
20 Now, in this conversation, in the next line you
21 indicate that pending decision by DPSC, "DCASMA is going
22 to withhold progress payment monies for approved
23 materials and rent (approved by DCAA)." Am I reading
24 that correctly?
25 A Yes.

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1 Q And you don't have any present recollection of
2 this conversation, you testified? You testified that you
3 don't have any present recollection of this telephone
4 conversation, correct?
5 A Not in specifics, no.
6 Q Okay, so all you know is what it says here,
7 right? Which is that DCASMA is going to withhold
8 progress payment monies for approved materials and rent,
9 and these are costs that were approved by DCAA, correct?
10 A Yes.
11 Q That doesn't seem right, does it?
12 A Well, I -- I've got a feeling that --
13 Q That doesn't seem right, does it?
14 A No, I think it does seem right.
15 Q Well, in the middle of the page you indicate
16 that, "Money is safe in DCASMA hands. If we terminate
17 them -- if we terminate, there's no guarantee that money
18 will get to subcontractors." Am I reading that right?
19 A Yes.
20 Q So you were considering terminating the
21 contract at that point, holding onto whatever progress
22 payment monies are outstanding. Am I understanding that
23 correctly?
24 A If we terminated the contract, yes, the
25 progress payment monies would not flow.

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1 Q And you then indicate that DCASMA will find out
2 where the CFM is physically, correct?
3 A Yes.
4 Q CFM, that's contractor furnished material,
5 correct?
6 A Yes.
7 Q And that's material that Freedom would have
8 title to. Isn't that correct?
9 A I think -- I think under the progress payment
10 provision the government retains title. Freedom would
11 take title after the progress payments were liquidated
12 and all product was shipped. And so -- but the point
13 here is that if we did have to terminate for default,
14 with the unliquidated progress payments we would go and
15 we would take the title to the CFM. We would liquidate
16 the progress payments or as much as we could, and we
17 would make use of the CFM.
18 Q Mr. Bankoff, the government would take
19 equitable title only. Isn't that correct? The
20 government wouldn't take legal title to this material.
21 A I was under the assumption that we would take
22 title.
23 Q And that's an assumption.
24 A Yeah. I thought under the progress payment
25 provision, that the government would retain title to the

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1 product.
2 Q And so as we sit here today, you're really not
3 certain?
4 A I believed that to be the case.
5 Q That's what you thought to be the case. But
6 you're not certain, correct?
7 A I'm not certain of a lot of things --
8 Q And this is one of them, isn't that correct?
9 A Possibly.
10 Q To the extent that you recall this provision at
11 all, isn't it your understanding that the government
12 would only take title and have the right to take
13 possession of this CFM if progress payments were made for
14 those costs?
15 A Yes.
16 Q And at this point we've got almost \$3,000,000
17 in progress payments outstanding that have not been paid.
18 Is that correct?
19 A Not for materials.
20 Q Well, you know, you know as we sit here today,
21 exactly which costs were paid and which ones weren't in
22 that?
23 A Not under those three. I said --
24 Q No. You have no idea -- isn't this true, Mr.
25 Bankoff, as we sit here today, you have no idea whether

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1 the CFM we're talking about in this, in your notes refers
2 to CFM for which progress payments have been made or not.
3 A No.
4 Q No, you have no idea?
5 A If we did not have title to it we wouldn't have
6 taken it.
7 Q I don't want if. I don't want if, Mr. Bankoff
8 and I'll move to strike. Objection. Move to strike.
9 JUDGE JAMES: Granted.
10 BY MR. LUCHANSKY:
11 Q As we sit here today, you have no factual basis
12 or any conclusion as to whether the CFM being referred to
13 in your notes in FT-178, were materials for which
14 progress payments had been made. Isn't that correct?
15 A Correct.
16 Q Now on October 1, 1985, just about ten or
17 eleven days later, after these meeting about what to do
18 with Freedom, what you decided to do was keep Freedom in
19 the program but require them to go out and get \$3.5
20 million additional outside financing. Isn't that
21 correct?
22 A Yes.
23 Q Now you do know from your review of the
24 contract file which you finally got around to, right?
25 You did get around to reviewing the contract file in this

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1 case before October of '85, didn't you?
2 A Yes.
3 Q Okay. So you did learn that the financing that
4 was going to be provided to Freedom was going to be 95
5 percent progress payments, correct? There was a progress
6 payment clause, correct?
7 A 95 percent of allowable incurred costs, yes --
8 up to the ceilings.
9 Q And now there have been a series of events that
10 Freedom is claiming were the government's fault, that
11 have caused Freedom to incur additional costs, correct?
12 Freedom is telling you this at this point?
13 A Yes.
14 Q And your response to that is to require Freedom
15 to go out and get another couple of million dollars of
16 outside financing, correct?
17 A Yes.
18 Q Now from your review of the contract file, you
19 did realize that Freedom's proposal for the price with
20 which it can perform this contract, was based on a
21 certain amount of financing, correct? You do realize
22 that was part of the negotiations and proposal?
23 A No. I can't get a firm commitment exactly of
24 what financing. I can't get that from the PPM or the P &
25 M -- exactly what type of financing would be provided by

1 the government, and what type of financing was relied on
2 by the government in making the award.

3 MR. LUCHANSKY: Objection. Move to strike.

4 JUDGE JAMES: Not granted.

5 MR. LUCHANSKY: I'm sorry.

6 JUDGE JAMES: Your objection and move to strike
7 is denied.

8 MR. LUCHANSKY: Okay.

9 BY MR. LUCHANSKY:

10 Q Do you understand that in a submission of a
11 proposal like Freedom's, that they would include in that
12 proposal certain allocations for outside financing,
13 certain costs of outside financing?

14 A Do I understand that there was a requirement
15 for outside financing?

16 Q No. As a PCO, you do understand that when a
17 contractor submits a proposal and negotiates a contract,
18 that it includes in its proposed costs a certain amount
19 for outside financing?

20 A For cost of money?

21 Q Yes.

22 A Yes.

23 Q And you were aware at this point in October of
24 1985, that by requiring Freedom to go out and get another
25 two -- another \$3.5 million of additional outside

1 causing that -- but yes.

2 MR. LUCHANSKY: I'm going to move to strike
3 just the last portion, after the yes, Your Honor.

4 JUDGE JAMES: Granted.

5 BY MR. LUCHANSKY:

6 Q And it was only after this condition was
7 imposed on October 1, 1985, only then, on October 11,
8 1985, was any portion of the outstanding \$3.1 million in
9 progress payments released. Isn't that right?

10 A I'm sorry.

11 Q It was only after this condition was imposed
12 requiring Freedom to now go out and get additional
13 financing, which it then did and got additional financing
14 from Bankers Leasing, only then, was any portion of the
15 \$3.1 million in outstanding progress payments paid?

16 A That's when we committed to the contract again,
17 yes.

18 Q In November of 1985, let's turn our attention
19 to the beginning of production. Freedom's production
20 started in about November of 1985?

21 A Okay.

22 Q Do you recall that?

23 A Not the exact time frame, no.

24 Q Sounds about right?

25 A No. I thought they actually started before

1 financing, that you were requiring Freedom to incur
2 additional costs above what it had originally proposed,
3 whatever that might have been?

4 A Well, those -- those interest costs --

5 Q Yes or no?

6 A -- of financing are not allowed costs.

7 Q You were requiring Freedom to incur additional
8 costs for this contract when you required them to go out
9 and get another \$3.5 million in outside financing,
10 correct?

11 A Additional financing costs, yes.

12 Q Costs that would be incurred in connection with
13 performing this contract.

14 A They're not allowable costs.

15 Q That's not what my question was.

16 A Oh, I thought it was.

17 Q You were causing them to incur additional
18 expense.

19 A Interest costs, yes.

20 Q Interest costs have to be paid just like
21 everything else, right?

22 A Right and they normally come out of pocket.

23 Q So you were causing them to incur additional
24 expense, correct?

25 A Yes. I don't know that the government was

1 that.

2 Q Okay. Maybe October of 1985, October or
3 November?

4 A I thought we were having problems with the
5 strapping some time in the summer. Again, my time frames
6 are not that good.

7 Q Okay. So you don't recall.

8 A I thought they started earlier but --

9 Q Now, do you recall that production was supposed
10 to have started back in May?

11 A Yes.

12 Q And that Freedom's contention was that it
13 couldn't start because it couldn't get the equipment it
14 wanted because Mr. Liebman was interfering in that and
15 that Freedom had claims on the government that it caused
16 this delay, correct?

17 A Yes.

18 Q Now, it's at this point that these inspection
19 problems that Mr. Steiger covered with you, AVI's refusal
20 to inspect for the couple of weeks, or ten days, or
21 whatever it was it occurred at the beginning of
22 production, correct?

23 A Yes.

24 Q And it was Freedom's position at that time that
25 you could have and should have stepped in and gotten AVI

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1 to cooperate and assist in inspection in the line,
 2 correct?
 3 A Yes.
 4 Q Now, do you remember that on December 1st --
 5 And so now it's Freedom's contention that it's being --
 6 that the government is causing, in addition to the
 7 additional financing costs, in addition to the lack of
 8 progress payments, Freedom is now claiming that the forty
 9 thousand cases that it produced and now have to be
 10 re-worked, is the government's fault, correct?

11 A Right.

12 Q Do you remember that around December 1st or the
 13 first week in December, Mr. Thomas called DPSC and told
 14 them he was going to submit a claim for an equitable
 15 adjustment for all of these additional costs. Do you
 16 remember that?

17 A No.

18 Q Well, do you remember that at some -- around
 19 that time frame a chain reaction kind of was set off to
 20 discuss at DPSC, what to do about Mr. Thomas' claim. Do
 21 you remember any hubbub about that in the beginning of
 22 December?

23 A No.

24 Q Do you remember that on December 6, 1985 -- do
 25 you remember being told about the meeting among the

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1 attorneys, DPSC, Ed Neil, to discuss and strategize what
 2 to do about Freedom's claim?

3 A No.

4 Q Now there was a discussion at that point
 5 however, what to do about the cases that Mr. Thomas was
 6 supposed to produce in November and December, correct?
 7 It looked like they weren't going to be able to meet that
 8 requirement.

9 A Oh it -- yeah, sure because we wound up
 10 terminating for default.

11 Q Now I'll ask you to look at FT-218.

12 A Okay.

13 Q This is a memorandum reflecting that meeting
 14 that I just mentioned and so obviously -- well first I'll
 15 ask you. You have received a copy of this memorandum,
 16 correct?

17 A No, I don't think so. I don't know.

18 Q Now if I were to tell you that this memorandum
 19 we got out of the PCO file in this case, would that
 20 change your mind as to whether you ever received a copy
 21 of it?

22 A No, because this -- this looks like my
 23 handwriting on the edge. I just don't remember it.

24 Q And so -- well, that's a good point. I didn't
 25 notice that. In the right-hand column, to the right of

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1 paragraphs four in between four and five, those lines are
 2 your handwriting?

3 A It doesn't look unlike my handwriting. If you
 4 told me it was mine I would have said yeah.

5 Q Okay. It's your handwriting.

6 A Is it?

7 Q Well, it came from your file.

8 A Okay.

9 Q So you did see this memorandum?

10 A Well, I guess it appeared that way. Let me
 11 read it.

12 JUDGE JAMES: Let's go off the record
 13 momentarily. Continue reading. I'd like the attorneys
 14 to approach.

15 (Off the record)

16 BY MR. LUCHANSKY:

17 Q You have reviewed this document, Mr. Bankoff?

18 A Yeah.

19 Q And you do see that certainly as of this date
 20 which is December 6, 1985, there is a discussion about
 21 trying to get Freedom to release its claims?

22 A Yes.

23 Q Now do you remember a meeting that took place
 24 on December 9, 1985, between Freedom and DPSC to discuss
 25 the war reserve problem? Was that what you testified to

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1 yesterday, that without this hundred fourteen thousand
 2 cases, DPSC was in danger of falling below its minimum
 3 war reserve level?

4 A I believe the actual purpose of the meeting was
 5 to discuss the termination for default, whether it would
 6 be a partial, a complete, or anything like that and
 7 that's when we tied in the December quantities as well.

8 Q You do remember that the discussion took place
 9 in the context of the government's concern about falling
 10 below the minimum war reserve level?

11 A That was part of the reason for including
 12 December quantities before the fact, instead of after the
 13 fact.

14 Q Now do you remember that at the meeting with
 15 Freedom, DPSC reached an agreement with Freedom about the
 16 termination of these hundred fourteen thousand cases?

17 A Before the meeting?

18 Q At the meeting and as a result of the meeting
 19 --

20 A Yeah, I think we all agreed.

21 Q And among the provisions of the agreement was
 22 that Freedom would cooperate in giving the government its
 23 GFM in order for DPSC to provide it to Rafco, to whom the
 24 government would be re-procuring these hundred fourteen
 25 thousand cases?

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1 A No. That wasn't -- that wasn't a topic of
2 issue because the government had the right. The
3 government didn't have to request the right to move the
4 GFM. It was our product. As a matter for them the
5 contractor had to move it. So in fact, I don't know why
6 it's here but I don't believe that was part of our
7 discussion. We probably told Freedom we were going to
8 take the product out. We were going to move it out and
9 that we would replace it at a later date.

10 Q Well wasn't that indeed part of the
11 consideration for Freedom's agreement not to contest the
12 partial termination?

13 A What was the consideration?

14 JUDGE JAMES: You don't ask questions, Mr.
15 Bankoff. Let me repeat. Just answer to the best of your
16 ability.

17 BY MR. LUCHANSKY:

18 Q As part of that agreement on December 9, 1985

19 --

20 A Yes.

21 Q -- didn't Freedom agree not to contest the
22 partial termination?

23 A Yes.

24 Q And in exchange for that, the government agreed
25 that it would -- and Freedom agreed that it would

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1 cooperate in transferring the GFM, get it packed up,
2 palletized, and on the trucks?

3 A No. I don't think that was one of Freedom's --
4 one of the things we requested from Freedom.

5 Q But do you recall that that was something that
6 Freedom discussed with you at the time, that they said,
7 "Yes, we will -- look, if you will reinstate these
8 hundred and fourteen thousand cases on the back end of
9 this contract and extend the delivery schedule, then we
10 won't contest the T for D on the partial termination. We
11 will help you get the GFM loaded and out the door. We
12 won't give you any trouble?"

13 A No. I think you're mixing things in, no.

14 Q Now in fact, you said that there was an
15 agreement reached at that time?

16 A Yes.

17 Q Are you aware that Freedom's position and
18 understanding of that agreement was that when the
19 government agreed it would reinstate these hundred and
20 fourteen thousand cases --

21 A Yes.

22 Q -- and the government said it wanted the right
23 to reinstatement at its sole discretion --

24 A Right.

25 Q -- Freedom's position is that it said at that

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1 meeting, "No I don't want it to be at your sole
2 discretion. I want it to be a firm commitment right now,
3 December 9, 1985."

4 A Based on meeting the milestones?

5 Q Yes, correct. Based upon its, Freedom's
6 meeting the deliver schedule that you agreed to extend.

7 A I don't -- I don't specifically remember that.

8 Q It might have happened --

9 A Sure.

10 Q -- you don't remember? Freedom might have
11 taken that position?

12 A I would expect them to.

13 Q Okay. Now after that agreement was reached,
14 indeed either that day or the very next day the
15 government very much needed its GFM, sent its trucks over
16 to Freedom to get the GFM, correct?

17 A Was it the next day?

18 Q Yes, it was.

19 A Okay.

20 Q It my understanding --

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

22 MR. LUCHANSKY: Yes, sir.

23 (Off the record)

24 BY MR. LUCHANSKY:

25 Q Mr. Bankoff, do you recall when the government

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1 trucks came out to Freedom to pick up that GFM?

2 A No.

3 Q And if I were to tell you that those trucks
4 came out either that day or the very next day and Freedom
5 helped load those trucks and get the GFM over to the
6 government, would you have any information that would
7 contradict me?

8 A No.

9 Q Now on December 11, 1985, two days after the
10 agreement that you just testified to, you issued a cure
11 notice to Freedom, did you not?

12 A I don't know.

13 Q Well, could you please look at F-113? Do you
14 have that in front of you, Mr. Bankoff?

15 A F-113, December 19th circled up on the top?

16 Q Yes.

17 A Okay.

18 Q Do you recognize this as the cure notice that
19 you sent to Freedom on December 11, 1985, that you
20 telexed to them?

21 A Yes.

22 Q And although the December 19th date that you
23 pointed out, is one that's circled, that's just a fax
24 line, correct?

25 A Yes.

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1 Q The actual date of your telex is found in the
2 line directly below that which is 110830 Zulu, December
3 '85?
4 A Yes.
5 Q Have you reviewed -- do you remember this
6 document?
7 A No.
8 Q Can you review it please, and let me know when
9 you've done that?
10 A Okay.
11 Q Mr. Bankoff, this telex is a cure notice, isn't
12 it?
13 A Yes.
14 Q Well, you mention in here about the termination
15 of the November and December quantities of approximately
16 a hundred fifteen thousand cases, correct, that's
17 mentioned in here?
18 A No. I think what's mentioned in here is that
19 we did terminate the delinquent November quantity for
20 forty-nine thousand, seven fifty-eight.
21 Q Okay, correct. I stand corrected. On page
22 two, that's what's indicated that it was terminated, that
23 quantity was terminated for default?
24 A Yes.
25 Q So this cure notice is not intended to request

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1 a cure of anything having to do with those termination
2 quantities, correct?
3 A No.
4 Q And this cure notice doesn't have anything to
5 do with the proposed termination of the fifty thousand
6 quantity -- fifty thousand cases for December, correct?
7 A That I believe, it does. This has -- this cure
8 notice has to do with the fact that Freedom was already
9 advised that it wouldn't be able to meet its 1-31
10 December quantities.
11 Q Correct. Well two days before, you'd already
12 entered into an agreement with Freedom that you were
13 going to terminate those quantities and Freedom wasn't
14 going to contest it, correct?
15 A Yes.
16 Q So it was --
17 A I'll assume.
18 Q Okay. You have no reason to doubt that?
19 A No. I think that we reached that agreement at
20 that time, yes.
21 Q So this cure notice doesn't address the
22 termination -- substantively isn't intended to address
23 the termination of the December quantity because you
24 issued a separate termination for the December quantity,
25 correct?

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1 A Actually, this does address the December
2 quantity. It may be that my counsel felt that in order
3 for me to terminate it --
4 Q Okay, wait, before you speculate --
5 A Yeah.
6 Q You are speculating aren't you?
7 A I, yeah I'm speculating.
8 Q You don't have any recollection of any
9 conversation with any counsel about this cure notice; do
10 you?
11 A No. All I know is --
12 Q Okay, that's all. Now what it does say in the
13 middle of page two --
14 A Yes.
15 Q -- is something about Freedom bringing to your
16 attention at the December 9th meeting, that there was
17 going to be between a \$1.4 million and \$2,000,000
18 shortfall of working capital, correct?
19 A Yes.
20 Q This cure notice is directed to that issue,
21 isn't it?
22 A Yes.
23 Q And this cure notice says that what you contend
24 to be this lack of financial capability jeopardizes
25 completion of the contract, correct?

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1 A Yes.
2 Q And it's on that basis that you're issuing this
3 cure notice?
4 A Yes.
5 Q And if you turn to page three, one of the
6 consequences, you write, is that in view of this
7 information all discussions from your December 9, 1985
8 meeting will be held in abeyance pending your response to
9 this letter. Is that right?
10 A Yes.
11 Q Now we have agreed that there weren't just
12 discussions. There was an agreement on December 9, 1985.
13 Now we've also agreed that you have no information that
14 disputes the fact that Freedom shipped out -- cooperated
15 with shipping out the GFM on December 9th or December
16 10th, based upon that agreement, correct?
17 A Based upon the assumption of the
18 re-termination, yes -- based upon our direction to ship
19 it out.
20 Q Now on December 9, 1985, when Freedom raised
21 whatever comment it did about this supposed shortfall,
22 you didn't say to Freedom at that time, "Hey look, if
23 you've got this shortfall in working capital and you
24 can't fund elsewhere, we've got no deal here. In fact,
25 forget it. Let's break up this meeting. I'm issuing a

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1 cure notice." You didn't tell them that on December 9th
 2 did you?
 3 A I don't know.
 4 Q There's nothing in the record that indicates
 5 that is there --
 6 A I don't know.
 7 Q -- to the best of your knowledge?
 8 A I don't know.
 9 Q Now the result of issuing this cure notice,
 10 once again is that progress payments are suspended again.
 11 Isn't that right?
 12 A Possibly.
 13 Q Well, in your January 28, 1986 D & F, found at
 14 FT-239, tell me when you have that please, Mr. Bankoff.
 15 A Pardon?
 16 Q Tell me when you have that in front of you
 17 please.
 18 A I'm there.
 19 Q Okay. If you'll look at paragraph three,
 20 please, of the second page of this exhibit Bates stamp
 21 number 01634, do you see in paragraph three where you
 22 acknowledge your issuance of the cure notice on December
 23 11th, which was receipted by Freedom on December 12th?
 24 A Yes.
 25 Q Do you see in paragraph four where you confirm

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1 that because of the cure notice, no progress payment
 2 monies were released to Freedom since December 9, 1985,
 3 although Freedom continued to increase production?
 4 A Yes.
 5 Q Does that refresh your recollection that as a
 6 result of your cure notice, progress payments were then
 7 suspended?
 8 A Yes.
 9 Q And you note in the rest of that paragraph that
 10 there's an urgency to these progress payments for
 11 Freedom, correct?
 12 A Yes.
 13 Q And that's because Freedom needs this money to
 14 finance production which it's now gearing up in, correct?
 15 A Yes.
 16 Q Now in fact, after getting this cure notice, of
 17 course Freedom had no choice but to submit whatever
 18 financial information you were looking for, correct?
 19 A Yes.
 20 Q And they did?
 21 A Yes.
 22 Q And you reviewed it?
 23 A I think the DCAS reviewed it.
 24 Q You reviewed it with DCASMA, Guy Sansone, Bill
 25 Stokes, the whole crew, right?

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1 A Right. Well, they reviewed it and they
 2 addressed -- they provided their summaries.
 3 Q And you discussed it with them, correct?
 4 A Yes.
 5 Q And the conclusion that you guys came to was
 6 that, in fact, after all was said and done, at six
 7 hundred twenty thousand cases if the -- when the one
 8 hundred fourteen thousand cases are reinstated and
 9 Freedom performs the six hundred twenty thousand cases,
 10 they are at a break even point. Isn't that right? Isn't
 11 that the conclusion that you and the financial team came
 12 up with in January of 1985?
 13 A I know that we felt that they needed the
 14 hundred and fourteen thousand to complete the contract
 15 and that was the reason that we didn't simply terminate
 16 the contract without providing for reinstatement in
 17 Mod-P20.
 18 Q Well just for context, Mr. Bankoff, what we're
 19 talking about is that during the suspension of progress
 20 payments Freedom had two more progress payments
 21 outstanding, that were being held up because of your cure
 22 notice, November 29, 1985, for \$353,081, correct?
 23 A Yes.
 24 Q And December 11, 1985, for \$1,459,473, correct?
 25 A Yes.

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1 Q So approximately \$1.5 million in progress
 2 payments were being held up because of your cure notice?
 3 A Yes.
 4 Q Looking again at your D & F dated January 28,
 5 1986, found at FT-239 -- if you'll please turn to what's
 6 page two of your D & F, but which is Bates stamped number
 7 01635, the third page of this exhibit and look at
 8 paragraph five, please. Do you see that this is a
 9 discussion of your meeting with you financial guys?
 10 A Yes.
 11 Q And the conclusion that you guys reached is
 12 that at six hundred twenty thousand cases, assuming
 13 reinstatement of the terminated quantities, Freedom would
 14 break even or show a slight profit of as much as
 15 \$162,000, correct?
 16 A Right.
 17 Q Now that's not dire financial straights is it?
 18 It's not, is it?
 19 A No.
 20 Q That result would not in any way endanger
 21 performance of this contract, would it?
 22 A No.
 23 Q Going on Mr. Sansone, who is the DCAA auditor,
 24 his opinion was even at five hundred five thousand cases,
 25 Freedom could perform providing they had the financial

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1 backing to do it. Isn't that right?
 2 A Yes.
 3 Q So even at five hundred five thousand cases, it
 4 appeared that this contract was not in financial
 5 jeopardy, correct?
 6 A I believe that that's Mr. Sansone's opinion.
 7 Q That's right. And that's the opinion that you
 8 adopted in issuing this D & F. Isn't that correct that
 9 -- and when I say this, I'm talking about both at six
 10 hundred twenty thousand and at five hundred five thousand
 11 cases, correct?
 12 Now, if what you're searching for is that Mr.
 13 Stokes had a different opinion, let me direct you to
 14 paragraph seven. And Mr. Stokes opinion was that Bankers
 15 Leasing would cut and run and if you continue this
 16 contract, Bankers is going to cut and run. That was
 17 basically his opinion, right?
 18 A At five-o-five.
 19 Q Right. But that's not the opinion you went
 20 with is it?
 21 A We went with the opinion that we would
 22 reinstate, I believe, and allow the six twenty.
 23 Q Correct.
 24 A Yes.
 25 Q And that's in the next paragraph, paragraph

1 what he thought. We --
 2 Q Do you know?
 3 A No. I can't answer that question.
 4 Q So now several weeks later, after you issued a
 5 cure notice based upon your claim that Freedom was in
 6 such bad financial shape that it endangered performance
 7 of the contract, it became clear to everyone and you
 8 concluded that that was not the case, correct? Isn't
 9 that what you concluded?
 10 A I believe we extended the contract.
 11 Q Isn't that what you concluded?
 12 A I don't know.
 13 Q Now these meetings with Freedom and with the
 14 financial guys were taking place in the middle of
 15 January, correct?
 16 A Yes.
 17 Q And although your D & F isn't issued until
 18 January 28, 1986, the conclusions that we just discussed
 19 from the financial guys were conclusions you reached in
 20 the middle of January, correct?
 21 A Yes.
 22 Q Now if you'll turn to FT-219 --
 23 A Say that again.
 24 Q FT-219.
 25 A Okay.

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1 eight, Bates stamped 01636. DCAS and DCASER, New York
 2 Finance, and DCASER New York decided to reinstate and
 3 allow continued performance and that was based on Mr.
 4 Sansone's analysis, correct?
 5 A It was really based on Mr. Stokes' analysis
 6 that at five-o-five the contract wouldn't work. Freedom
 7 needed the six twenty. We had to terminate. Let's
 8 terminate and let's not kill the contract. Let's allow
 9 for reinstatement.
 10 Q Okay. And Mr. Stokes' opinion is based upon
 11 his supposition as to what Bankers reaction would have
 12 been if reinstatement didn't happen, correct?
 13 A Yeah. And we honestly felt that --
 14 Q Well, I'm asking what his opinion was based on.
 15 And that's what it was based on, that supposition?
 16 A Yes.
 17 Q So now just several weeks after this cure
 18 notice, there's this termination and -- I'm sorry -- Mr.
 19 Stokes himself would agree that as long as Bankers
 20 Leasing wouldn't cut him off, that the approximately
 21 \$700,000 that would be needed to perform the contract at
 22 five hundred five cases, if it could be arranged by the
 23 financing, even Mr. Stokes didn't have a problem with the
 24 five hundred five thousand cases, correct?
 25 A I think Mr. Stokes simply gave his opinion of

1 Q Do you recognize this as a collection of notes
 2 by you and others taken during those meetings in the
 3 middle of January 1986?
 4 A That's what it looks like.
 5 Q If you'll please turn to 01531 --
 6 A Yes.
 7 Q That's your handwriting, isn't it?
 8 A Yes.
 9 Q Based on this note it appears that you told
 10 Marv -- that would be Marvin Liebman, correct?
 11 A Yes.
 12 Q "On January 21, 1986, at 4:00 -- told Marv to
 13 wait for mod signing." Correct -- is that -- am I
 14 reading that right?
 15 A Yes.
 16 Q Do you recall that what you were telling Marvin
 17 Liebman was to wait to pay progress payments until the
 18 mod was signed?
 19 A I would assume that. It says progress payments
 20 ceiling stays at nine million.
 21 Q The mod was actually signed on -- and indeed
 22 that's what Mr. Liebman did, correct, he didn't pay these
 23 progress payments, the million and a half outstanding,
 24 until after the mod was signed, right?
 25 A I believe so.

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1 Q The mod was signed on January 29, 1986. Do you
2 recall that?

3 A No.

4 Q Okay. It's at government Rule 4, Tab 104.

5 A Okay.

6 Q If I tell you that's the date, do you have any
7 reason to disagree?

8 A No.

9 Q So the mod was signed on January 29, 1986 --
10 the day after your D & F came in. In that mod, do you
11 know what -- let's go to the mod, please, 104 of Rule 4
12 file.

13 A Okay.

14 Q If you'll turn to the third page -- well, first
15 of all, if you could see the date, you do confirm that
16 the date of this Mod-20 is January 29, 1986?

17 A Yes.

18 Q And if you look at page three, paragraph three,
19 this is the paragraph that says that in the event the
20 contractor meets the extended delivery schedule there
21 would be a reinstatement of a hundred fourteen thousand,
22 seven hundred fifty-eight cases, correct?

23 A Yes.

24 Q Now it's this point that inserted into the mod,
25 is the provision that Freedom had objected to back on

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1 December 9, isn't it -- reinstatement would be at the
2 sole discretion of the government?

3 A Oh, I -- that's according to you.

4 Q Right. We had discussed -- and I thought you
5 had recalled or agreed that that was Freedom's position
6 and you said, "yes, I would expect them to take that
7 position."

8 A I said I wouldn't -- I wouldn't doubt that they
9 objected to it, and I don't know for sure that they
10 objected to it.

11 Q Okay. And although we don't need to look at it
12 now, do you recall that there was an internal memo by
13 Freedom that reflected that position? Did they ever
14 provide that to you by Joe Clark? Do you remember ever
15 seeing an internal memo by Freedom that they ever
16 presented to you and said, "Look, this is what our
17 version was." Do you recall that?

18 A No.

19 Q Okay. It's at FT-220 but we don't need to look
20 at it right now. In any event, that provision that
21 Freedom had objected to is now in this Mod-29 or Mod-20
22 on January 29, correct?

23 A Okay.

24 Q And they signed it on the date that Marv
25 Liebman, at your instruction, was holding progress

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1 payments in the amount of \$1.5 million until Freedom
2 signed that mod. Isn't that right?

3 A Yes.

4 Q And then lo and behold, Mr. Bankoff, if we take
5 a look at the progress payment chart, what do we see? We
6 see that progress payments ten and eleven that we
7 discussed before and that were being held in abeyance as
8 a result of your cure notice and which during the last
9 two weeks of January, weren't being paid by Mr. Liebman
10 at your expressed instructions, was then an issue -- was
11 then paid in part on January 30, 1986, then the mod was
12 signed. Is that correct?

13 A Yes.

14 Q Mr. Bankoff, you did that again didn't you?
15 You instructed Marv Liebman at least one other time to
16 hold a progress payment until you could get a mod signed.
17 Isn't that right?

18 A I don't recall.

19 Q If you'll look at F-163.

20 A Okay. That's the 3 October '86 --

21 Q October 3, 1986 memo.

22 A Okay.

23 Q This indicates that the ACO was Marv Liebman,
24 correct?

25 A Yes.

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1 Q It indicates that Mod-29 was faxed to Freedom
2 for signature on October 2, 1986, correct?

3 A I'm sorry, say that again.

4 Q Paragraph two on page one of this exhibit --

5 A Yes.

6 Q -- indicates that Mod-29 was faxed to Freedom
7 for a signature.

8 A Yes.

9 MR. LUCHANSKY: I'm sorry. I'm just waiting
10 for the siren.

11 JUDGE JAMES: Let's go off the record for a
12 minute until the noise expires.

13 (Off the record)

14 JUDGE JAMES: Okay, let's go back on the
15 record.

16 BY MR. LUCHANSKY:

17 Q This indicates in paragraph two, that
18 Modification 29 was faxed to Freedom for a signature on
19 October 2, 1986, correct?

20 A Yes.

21 Q And in addition to modifying the delivery
22 schedule, Mod-29 also had a reason, didn't it?

23 A Yes.

24 Q If you'll turn to the next page. Do you see on
25 paragraph five at the top of the page, there's a

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1 paragraph with an asterisk indicating that the ACO made a
2 decision on October 2, 1986, to pay progress payment
3 request number twenty-one at least in a reduced amount of
4 \$700,000. Do you see that?

5 A Yes.

6 Q If you see where the asterisk corresponds to
7 the bottom of the page, you see there's an additional
8 note, don't you?

9 A Yes.

10 Q And that note says that, "Per PCO request at
11 sixteen hundred hours, 3 October '86 --

12 JUDGE JAMES: Oh, Mr. Luchansky, it says, "Per
13 PCO request."

14 MR. LUCHANSKY: PCO -- I thought that's what I
15 said, Your Honor.

16 JUDGE JAMES: You said ACO.

17 MR. LUCHANSKY: Well, if I did, I apologize. I
18 meant -- thank you for correcting me.

19 BY MR. LUCHANSKY:

20 Q Note: "Per PCO request," and that's you?

21 A Yes.

22 Q Per your request at sixteen hundred hours, on
23 October 3, 1986, progress payment number twenty-one, that
24 full amount of \$700,000 that the ACO had decided would be
25 paid "is being held in abeyance pending Freedom's

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1 execution of Mod-29." Isn't that correct?

2 A Yes.

3 Q And that happened, didn't it? You told Marvin
4 Liebman to hold that \$700,000 until Freedom signed a mod
5 that had a full release in it, didn't you?

6 A Until we had an executed agreement to extend
7 the contract.

8 Q And that executed agreement was Mod-29, right?

9 A At that time it was.

10 Q With a full release in it, correct?

11 A That was one of the conditions, yes.

12 Q Furthermore, if you turn one tab, to F-165 --

13 A Yes.

14 Q You see that you wrote to Freedom on October 7,
15 1986, correct?

16 A Yes.

17 Q And you further told Freedom that once they
18 signed Mod-29, then you would increase the progress
19 payment ceiling as set forth in Mod-29, correct?

20 A Right.

21 Q So this was another benefit of Mod-29 that
22 Freedom was going to get, but not until that mod was
23 signed, correct?

24 A Yes. Not until the contract was executed --
25 the contract change was executed.

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1 Q Mr. Bankoff, that increase in the progress
2 payment ceiling, so to speak, calls into play the whole
3 L-4 provision, doesn't it? That's the provision we're
4 dealing with that involves --

5 A Yes.

6 Q -- a limit on progress payments, correct?

7 A Yes.

8 Q Now the progress payment clause itself, as
9 incorporated into this contract doesn't have any limit on
10 it does it? It just says, "none other than 95 percent of
11 costs incurred." Isn't that right?

12 A Allowable incurred costs, yes.

13 Q And you're not aware of any authority that
14 exists for imposing any limitation on the progress
15 payment clause allowing for the pre-95 percent are you?

16 A Well, I know the L-4 was an approved clause in
17 the solicitation.

18 Q But you don't know what the authority was for
19 the L-4, correct?

20 A It had to be the office of contracting at DPSC.

21 Q I don't want to know what it had to be because
22 Mr. Bankoff, it didn't have to be anything, correct? It
23 was something but you don't know what that something was.
24 Isn't that correct?

25 A Local clauses have to be approved by the office

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1 of contracting at DPSC.

2 Q Mr. Bankoff, you don't know what actions were
3 taken that led to the L-4 clause being inserted into
4 Freedom's contract. Isn't that right?

5 A Into the solicitation?

6 Q Into the solicitation and ultimately, into the
7 contract.

8 A No.

9 Q Now you're aware -- are you familiar with the
10 provisions of the DLAM?

11 A Yes.

12 Q You're familiar with the provisions having to
13 do with progress payments?

14 A Yes.

15 Q Are you aware that the DLAM -- the only
16 limitations that the DLAM describes as being applicable
17 to the progress payment clause are two. Number one is 95
18 percent of the costs incurred with respect to any
19 particular progress payment request, and then a total
20 limitation of 95 percent of the entire contract price.
21 Are you aware that those are the two limitations?

22 A I'll take your word for that.

23 Q It sounds about right, right?

24 A Yes.

25 Q And for both of those limitations, the

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1 limitation is 95 percent of total costs incurred,
 2 correct? Pardon? For the per progress payment request
 3 limit --
 4 A Yes.
 5 Q -- and the total contract price limit. Both of
 6 those limitations are 95 percent.
 7 A Yes.
 8 Q And the 95 percent determination -- the
 9 decision to allow progress payments up to that 95 percent
 10 level, those are decisions that are made at the highest
 11 levels of government. Isn't that right?
 12 A For small businesses, yes.
 13 Q That's not something that's made on a local
 14 basis is it?
 15 A Not that decision, no -- not those clauses, no.
 16 Q Now you had your doubts about whether the L-4
 17 clause that was in Freedom's contract was even legally
 18 permissible --
 19 MS. HALLAM: Your Honor, I object to all this.
 20 It's not within the scope of the direct examination and
 21 they have not called Frank as a witness. So they're
 22 limited to the scope of my direct. I don't believe I
 23 asked him anything about the L-4 clause.
 24 JUDGE JAMES: I sustain the objection.
 25 MR. LUCHANSKY: May I have five minutes, Your

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1 Honor?
 2 JUDGE JAMES: No. Let's just proceed. Let's
 3 finish the examination. Have a seat, Mr. Bankoff. Wait
 4 until you see what the question is.
 5 MR. LUCHANSKY: The Court's indulgence, Your
 6 Honor. I'm so very close to the end of my prepared
 7 cross-examination, I mean, I'll try and think whether my
 8 questions are related to direct testimony or not. No
 9 further questions, Your Honor.
 10 JUDGE JAMES: Do you wish to re-direct examine
 11 the witness?
 12 MS. HALLAM: Yes, Your Honor, a few questions.
 13 RE-DIRECT EXAMINATION
 14 BY MS. HALLAM:
 15 Q I'd like you to refer to FT-436.
 16 A Okay. Hold on. I've got to put some of this
 17 stuff back. FT-436?
 18 Q Yes. How about if I just hand you this one?
 19 A Okay.
 20 Q You were testifying with respect to this
 21 document, before you wanted to offer some sort of
 22 explanation. Do you recall what it is you wanted to say
 23 about it?
 24 A Well, yeah, I think that, you know, it wouldn't
 25 be appropriate for me to ship in place a CFM item from

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1 Freedom's subcontractor. And what I was trying to say,
 2 the fact that it's CC'd to his lawyer, David Dempsey is
 3 Sterling's lawyer, probably has to do with trying to put
 4 into some wording, something related to a relationship
 5 between Freedom and Sterling.
 6 Q I'd like you to look now at G-37.
 7 A G-37. Okay, yes.
 8 Q The second page here, you were talking about a
 9 response that you had prepared --
 10 A Yes.
 11 Q -- and never sent. Is this what you were
 12 talking about?
 13 A Yes.
 14 Q And why again, was that never sent?
 15 A Because evidently Frank and -- Frank Francois
 16 and David Lambert asked me not to --
 17 Q Do you know why they didn't want a response to
 18 the letter?
 19 A Not really.
 20 Q Excuse me.
 21 A Not really.
 22 Q No? But they did not want any official
 23 response to the letter, so you did not --
 24 A Right.
 25 Q You were talking about the five hundred twenty

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1 thousand some odd dollars that was expensed under the
 2 contract for capital equipment. Do you recall?
 3 A Yes.
 4 Q And you did some research in that regard and
 5 looked into various memorandums to determine how much
 6 capital was expensed under the contract?
 7 A Yes.
 8 Q Did you talk to anyone involved in the
 9 negotiations to find out whether it was their intention
 10 that those monies be paid through progress payments?
 11 A I spoke to Barkewitz.
 12 Q What did he say?
 13 A Barkewitz said they never discussed progress
 14 payments. They discussed reaching a negotiated price.
 15 He was concerned with awarding the contract and they
 16 talked about -- they allowed it to be expensed for the
 17 contract but they never talked about progress payments.
 18 Q So when you were saying that you wanted them
 19 paid or you would have thought they should have been
 20 paid, that was your personal opinion?
 21 A It was my opinion, yes.
 22 Q Did you talk to legal or any other people? You
 23 had indicated that everybody else in the government
 24 didn't feel the way you did?
 25 A No. I think Chuck Wright, my counsel, you

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1 know, agreed with my position. I know Peggy Rowles, my
2 boss, agreed with my position. I think most of the
3 people at DPSC felt that they should be allowed for
4 progress payments.

5 Q I'm sorry, the only Chuck Wright memorandum I'm
6 familiar with is the one that says they have to be
7 special equipment. Did you get some other legal opinion
8 from Chuck?

9 MR. LUCHANSKY: Objection to the foundation for
10 the question.

11 BY MS. HALLAM:

12 Q What legal opinions did you get from Chuck?
13 Did you get anything in writing from him?

14 A No.

15 Q No? With regard to substitutions there was
16 some discussion about what would happen in the event that
17 you substituted product X for product Y, if product X was
18 not available. What sort of information did you get
19 before making the substitutions if any, with regard to
20 determining whether they were available?

21 A Well, when we started having the problem, it
22 was the responsibility of the buyers to keep on eye on
23 the inventories. And normally, if the contractor would
24 advise us that he was running low or something we would
25 probably ask for -- well, what is your inventory of all

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1 the needs -- I'm talking about the GFM needs.

2 And so in most cases, when the contractor would
3 say we're running out or we're out of an item, we knew or
4 would find out what do you have, and then would make the
5 substitution authority. We would normally do this, you
6 know, two or three days in advance. Sometimes we did it
7 as late as one day in advance, you know, depending on
8 when the contractor advised us. But the substitutions
9 were all based on product that was in-house that could be
10 substituted.

11 Q There was also some testimony with regard to
12 the supply of GFM in the MRE-6 configuration to Freedom.

13 A Yes.

14 Q There was some discussion about an order for
15 the supplies. Could you tell me what would have been
16 involved in actually obtaining those? Was a purchase
17 order necessary?

18 A Well, I mean, we could have done it in any
19 number of ways. We could have diverted a current
20 production from one of the six retort contracts. We
21 could have transferred GFM from one assembler to another.
22 We could have done a C-2 emergency buy and bought the
23 product. But in most cases, we would have done that to,
24 you know, fill up product that we took for the long term.
25 The short term fixes in most cases, would have been

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1 diversions and shipping from one assembler to another.

2 Q There was also some discussion about the lot
3 tracing equipment.

4 A Yes.

5 Q You indicated that the purpose of that was lot
6 traceability?

7 A Yes.

8 Q Does that mean it wasn't used for inventory or
9 it was used for two purposes or --

10 A I would, you know, a computer is a piece of
11 hardware. Whatever software, you know, you program it,
12 you write, or you buy is up to you.

13 I'm assuming that when Henry talks about the
14 automated lot tracking information, he's really talking
15 about the software that will work, you know, whether he's
16 networking it with multiple computers throughout the
17 plant -- I don't know that people were doing that in
18 1985. I'm assuming he's meaning, you know, the hardware
19 and the software. And if he had the hardware, he'd, you
20 know, you could use a computer for everything.

21 Q You also stated something to the effect that
22 Zyglo problems affecting CFM was their problem. Zyglo
23 problems affecting GFM is my problem. Would you explain
24 what difference --

25 A Well, the Zyglo problem was a -- I guess when

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1 they call it the problem -- the problem resulted in the
2 AVI who have the authority for determining the
3 wholesomeness of products, you know, occasionally place
4 products on medical hold -- certain lots on medical hold
5 until they were cleared.

6 Well, the Zyglo problem was a production
7 problem. It was a production problem like any other
8 production problem, and if one of my GFM contractors shut
9 down for any reason or had production delays for any
10 reason, or produced non-conforming product and it wasn't
11 accepted for any reason, I was liable for providing
12 product to the assembler.

13 Likewise, if the CFM products or producers had
14 any kind of problems -- production problems -- the
15 government didn't have liability on delivery of the CFM
16 product. That was the responsibility of the prime
17 contractor -- the prime assembler.

18 Did I have -- did we have problems relating to
19 GFM because of the Zyglo? Yes, and we resolved it by
20 authorizing substitutions and we did the same for the CFM
21 problems. When the contractors weren't able to get CFM
22 because of this issue, we also authorized substitutions
23 for them. We did a lot to just maintain the production.

24 That's why I said additionally, the Zyglo
25 really affected production from 1986. The GFM pouches --

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1 retort pouches -- that Freedom had in-house were
 2 delivered 1985, so we didn't have these March/April GFM
 3 pouches and that had any problem. Now if Freedom was
 4 buying, you know, a real just in time type inventory, he
 5 was still producing those early cases in late -- or
 6 March/April of 1986, and he didn't have, you know, for
 7 that five hundred and five thousand cases -- and he
 8 didn't have his CFM in-house and he was now, you know,
 9 MR. LUCHANSKY: Your Honor, I'm going to object
 10 to this claim and wonder whether we're still in a direct
 11 response to this question.
 12 MS. HALLAM: I asked him to explain the
 13 difference between why it would be --
 14 JUDGE JAMES: I overrule the objection.
 15 MR. LUCHANSKY: Yes, Your Honor.
 16 BY MS. HALLAM:
 17 Q I'm sorry. Continue.
 18 A Anyway, so I don't believe that there was any
 19 problem relating to Zyglo with the GFM. Had Freedom been
 20 buying some pouches from the manufacturers in early 1986
 21 -- or late 1986 -- for his MRE-5 products -- which I
 22 don't know that I'm aware of -- then he might have had
 23 for CFM, some problems. But again, the Zyglo problems
 24 are manufacturer related problems which are the prime
 25 contractor's responsibility.

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1 MS. HALLAM: No further questions, Your Honor.
 2 JUDGE JAMES: Any re-cross by the appellant?
 3 MR. LUCHANSKY: Briefly, your Honor.
 4 RE-CROSS-EXAMINATION
 5 BY MR. LUCHANSKY:
 6 Q Mr. Bankoff, it's true is it not that H-6 --
 7 clause H-6 of the solicitation which is found on page
 8 sixty-four of ninety-six --
 9 A Can you give me the tab solicitation?
 10 Q -- which is Rule 4, Tab 2.
 11 A Direct me to the page again, please.
 12 Q It would be on page sixty-four of ninety-six.
 13 A Yes.
 14 Q H-6 does require the assembler to maintain
 15 records although by lot number but of all GFP contained
 16 in the final assembly lots. Is that right?
 17 A I actually thought the contractor was required
 18 to maintain lot traceability of all components -- GFM and
 19 CFM by lots -- lot traceability which is what I think I
 20 explained to Mr. Steiger. Seventy thousand pieces can be
 21 one lot.
 22 Q But now it appears that you were mistaken?
 23 A No. I still believe in Section E the
 24 contractor is required to do lot traceability, that's for
 25 product recalls. H-6 is basically an accountability --

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1 probably financial accountability of GFP. But I do
 2 believe the contractor is still required for recall
 3 purposes to do lot traceability for all components -- all
 4 food components.
 5 Q Mr. Bankoff, you're testifying about G-37 which
 6 you may just recall was the letter from David Lambert and
 7 your draft letter to Mr. Thomas, where you testified you
 8 were withdrawing that letter, correct?
 9 A Yes.
 10 Q That's the letter that was withdrawn. That
 11 letter was withdrawn but then it was resubmitted to Mr.
 12 Chiesa, wasn't it?
 13 A I don't know. It might have been --
 14 Q It might have been, but you don't know. It
 15 might have been but you don't know one way or the other
 16 whether it was or wasn't?
 17 A Well, from what I understand --
 18 Q I want to know whether you know --
 19 A I said I don't know.
 20 Q Mr. Bankoff, with respect to the Zyglo testing,
 21 isn't it true that the Zyglo testing as a result of this
 22 medical hold problem, testing requirements were imposed
 23 upon the contractors including Freedom that were not
 24 included in the original contract?
 25 A Say that again, please.

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1 Q Isn't it true that as a result of this medical
 2 hold problem --
 3 A Yeah.
 4 Q -- that the testing that was required of
 5 Freedom and the other contractors was testing above and
 6 beyond, in addition to what was in the original contract?
 7 A For the assemblers?
 8 Q Yes, for Freedom.
 9 A Or for the retort manufacturers?
 10 Q Well, Freedom was both, correct?
 11 A Well, yes, yes in that so --
 12 Q Well, I'm talking about Freedom. Let's stick
 13 just with Freedom.
 14 A Okay. Yes.
 15 Q And so Freedom was required to do testing that
 16 was not included in the original contract. Isn't that
 17 correct?
 18 A Yes, Freedom's subcontractors --
 19 JUDGE JAMES: He's answered your question, with
 20 yes, Mr. Luchansky.
 21 MR. LUCHANSKY: Yes. Thank you. That's all I
 22 have, Your Honor.
 23 JUDGE JAMES: Let me ask you this. Just a
 24 moment ago in your testimony you were hypothesizing that
 25 if there were an assembler such as Freedom that

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1 experienced CFM delays for MRE-5 pouches, then that could
2 have been involved with this Zyglo testing requirement.
3 Is that right?

4 THE WITNESS: I think what I tried to say --
5 that if he was in fact, still buying them -- his CFM --
6 in, you know, early '86, and if Star was still doing the
7 five-ounce pouch for him -- it's possible -- possible
8 that Star could have had lots rejected. I'm not aware of
9 it.

10 JUDGE JAMES: Well now earlier in your
11 testimony you had said, I believe, that this problem that
12 led to -- what was your term for them?

13 THE WITNESS: Micro-holes.

14 JUDGE JAMES: Micro-holes in the pouches that
15 somehow expanded or whatever the word was for it, was for
16 MRE-6 configuration only.

17 THE WITNESS: It was for MRE-6.

18 JUDGE JAMES: So now are you expanding your
19 testimony to say that this micro-hole problem affected
20 pouches from not only MRE-6 configuration, but MRE-5
21 configuration as well?

22 THE WITNESS: No. That's why I was saying -- I
23 didn't think it had any impact at all on Freedom.
24 Because the problem didn't occur until production was in
25 March '86, and for all intents and purposes it was going

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1 to stop producing. Everybody had stopped producing the
2 five-ounce pouches in 1985 -- and starting with November
3 1985, they were -- they were now producing the
4 eight-ounce MRE-6 pouches.

5 JUDGE JAMES: I'd like you to look at the
6 government Exhibit G-32, Mr. Bankoff.

7 THE WITNESS: Yes. February 26th.

8 JUDGE JAMES: Right. Now look at paragraph
9 four, the second sentence. It starts out with "The DPSC
10 personnel," do you see that sentence?

11 THE WITNESS: Yes.

12 JUDGE JAMES: Do you see in the third line of
13 that sentence it says, "CFM and GFM."

14 THE WITNESS: Yes, okay.

15 JUDGE JAMES: My question to you is: Now you
16 wrote this memorandum, right?

17 THE WITNESS: Yes.

18 JUDGE JAMES: Whose CFM were you referring to
19 in that second sentence of paragraph four?

20 THE WITNESS: Rafco's.

21 JUDGE JAMES: All right. I'd like you to take
22 a look at FT-266, sir.

23 THE WITNESS: FT-266.

24 JUDGE JAMES: It's in volume seven of the
25 appellant's collection. Now look at page four of the

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1 claim, which is Bates seven through ninety-seven.

2 THE WITNESS: Yes.

3 JUDGE JAMES: Beneath the signature it says,
4 "enclosures," right?

5 THE WITNESS: Yes.

6 JUDGE JAMES: And it's got certifications and
7 then a narrative, and then the fourth item is called,
8 "Exhibits one to twelve," do you see that?

9 THE WITNESS: Yes.

10 JUDGE JAMES: All right. Now following page
11 Bates 1807, which is this narrative explanation, you see
12 a typewritten Exhibit 1?

13 THE WITNESS: Yes.

14 JUDGE JAMES: And then 1810, Exhibit 2 and a
15 whole bunch of typewritten exhibits --

16 THE WITNESS: Yes.

17 JUDGE JAMES: -- down through twelve?

18 THE WITNESS: Yes.

19 JUDGE JAMES: All right. Now at that point
20 you're at Bates 1820, correct?

21 THE WITNESS: Yes.

22 JUDGE JAMES: Now in this compilation, at least
23 so far as what the Board has in front of it, starting
24 with Bates 1821 through Bates 1880, we've got roughly
25 sixty pages of further exhibits which pick up with number

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1 thirteen and go down through twenty-five and they are all
2 handwritten, do you see that?

3 THE WITNESS: Yes.

4 JUDGE JAMES: Now my question to you is: If
5 you recall were those exhibits thirteen through
6 twenty-five attached to the original submissions sent to
7 you, sir?

8 THE WITNESS: I don't recall.

9 JUDGE JAMES: You don't recall?

10 THE WITNESS: No.

11 JUDGE JAMES: Okay. As a result of the Board's
12 questions to Mr. Bankoff, does the government have any
13 further questions you want to ask him?

14 MS. HALLAM: No, Your Honor.

15 JUDGE JAMES: How about the appellant?

16 MR. LUCHANSKY: Just one, Your Honor.

17 BY MR. LUCHANSKY:

18 Q Mr. Bankoff, if you could look at FT-435.

19 A FT-435?

20 Q Yes, please.

21 JUDGE JAMES: It's in book fourteen of the
22 appellant's compilation, Mr. Bankoff.

23 THE WITNESS: Okay. FT-433?

24 BY MR. LUCHANSKY:

25 Q 435, please.

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1 A 435, okay.
 2 Q Is this first page 4227, in your handwriting?
 3 A Yes.
 4 Q Does this have to do with the Zyglo testing
 5 matter also? When you look at the subject --
 6 pre-assembly inspection of retort pouches and the dates?
 7 A What was that again?
 8 Q Whether this page which is in your handwriting
 9 --
 10 A Yes.
 11 Q -- refers to the Zyglo testing issue?
 12 A I would think it does.
 13 Q And although this is a copy, does this appear
 14 to be a handwritten memo with like a post-it on it, that
 15 has a note, "I don't know how to respond to this right
 16 now?"
 17 A Yeah. I don't know what that is. The
 18 handwritten note seems to tell Freedom that --
 19 Q Okay. Are those your initials at the bottom of
 20 that note?
 21 A Yes.
 22 MR. LUCHANSKY: Okay. That's all I have, Your
 23 Honor.
 24 JUDGE JAMES: All right. Thank you so much,
 25 Mr. Bankoff, for your testimony. You may step down from

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1 the witness stand.
 2 Let's go off the record.
 3 (Off the record)
 4 JUDGE JAMES: Let's go back on the record.
 5 MS. HALLAM: I have a side matter here. You
 6 asked me to provide the dates that the testimony was
 7 given by Henry Thomas, and I have the dates here as well
 8 as what the testimony was given in connection with.
 9 The testimony at G-96 was given on January 12,
 10 1989, in connection with a lawsuit brought by Bankers
 11 Leasing Association against David Lambert.
 12 The testimony at G-97 was given on February 15,
 13 1993, in connection with the ASBCA appeal 35671.
 14 JUDGE JAMES: And I'm assuming you've given
 15 copies of this to the appellant?
 16 MS. HALLAM: Yes.
 17 MR. LUCHANSKY: We have copies of -- yes.
 18 JUDGE JAMES: Now the government had previously
 19 moved that these two documents be received into evidence
 20 and I repeat now -- what is the appellant's position in
 21 these two documents?
 22 MR. LUCHANSKY: We object, Your Honor.
 23 JUDGE JAMES: The basis of the objection?
 24 MR. LUCHANSKY: Yes. This testimony both --
 25 this testimony is -- in the one exhibit deposition

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1 testimony from a different proceeding, and the other case
 2 testimony in the form of -- in the earlier proceeding in
 3 this case. But in both situations it is used for
 4 impeachment purposes, Your Honor.
 5 This is testimony that was used to question the
 6 witness as to testimony they had been given. The
 7 government attempted to impeach them with prior
 8 testimony. There's nothing wrong with that except that
 9 it doesn't provide a basis for introducing that testimony
 10 as affirmative evidence, Your Honor.
 11 JUDGE JAMES: Is it your representation that
 12 Ms. Hallam used this prior testimony during these
 13 proceedings here this May 2000, with respect to the
 14 testimony of Henry Thomas?
 15 MR. LUCHANSKY: Yes.
 16 JUDGE JAMES: Do you have any response to that
 17 objection?
 18 MS. HALLAM: Yes, Your Honor. I believe
 19 testimony prior statements of fact or prior statements,
 20 adverse statements by a party are admissible. And in
 21 this case the person testifying was given an opportunity
 22 to explain his answers, his contrary answers.
 23 JUDGE JAMES: Okay. I sustain the objection.
 24 MS. HALLAM: I'd like to call Marv -- Marvin
 25 Liebman.

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1 JUDGE JAMES: Instruct him to come up to the
 2 witness stand, please.
 3 Whereupon,
 4 MARVIN LIEBMAN,
 5 having been first dully sworn, was examined and testified
 6 as follows:
 7 JUDGE JAMES: What I would like you to do sir,
 8 is state your full name for the record, spell your last
 9 name, and give us your address.
 10 MR. LIEBMAN: My name is Marvin Liebman,
 11 L-i-e-b-m-a-n. I live at 199-33 22nd Avenue, Whitestone,
 12 New York 11357.
 13 DIRECT EXAMINATION
 14 BY MS. HALLAM:
 15 Q Mr. Liebman, can you tell us what your title is
 16 and where you work?
 17 A I'm an administrative contracting officer and I
 18 work at the Defense Contract Management Agency in New
 19 York.
 20 Q Could you give us a brief history of your
 21 employment with that agency?
 22 A Yes. I've been with the -- with this agency
 23 for approximately thirty-three years.
 24 Q Could you tell us what you've done during that
 25 period of time?

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1 A I've been a contract administrator and I've
2 been a contracting officer -- for the contracting officer
3 for the last twenty-one years.

4 Q And were you the ACO for the subject contract?

5 A Yes, I was.

6 Q I want to talk a little bit about the first
7 suspension of progress payments. Can you describe what
8 events led to your January '85 decision to consider
9 suspension of progress payments?

10 A Yes. I suspended progress payments because the
11 contractor was deemed to be in such unsatisfactory
12 financial condition so as to endanger performance of the
13 contract.

14 That decision was arrived at after many, many
15 meetings, telephone calls and exchange of correspondence
16 that went on for a period of about a month and a half.

17 Q Slow down a little bit.

18 A Yes.

19 Q Just speak a little slower.

20 A Yes.

21 Q Okay. Go ahead. What led to -- what was the
22 basis of the finding of the lack of financial support?

23 A Various documents provided by Freedom
24 Industries were reviewed by our office -- specifically,
25 our financial expert, Mr. William Stokes. He issued a

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1 post-award financial surveillance report and after a
2 review of all the documents, the company was still deemed
3 to be in unsatisfactory financial condition without a
4 commitment letter -- a certain amount of -- 3.8 million
5 approximately, in credit. Without that credit --

6 Q Mr. Liebman, with regard to your January '85
7 decision to consider progress payments, was that based on
8 all this information from Freedom?

9 A No, no. In early January 1985, I sent a letter
10 advising the contractor I was considering suspending
11 progress payments, gave the contractor an opportunity to
12 respond before I made any final decision.

13 After the contractor received my letter of
14 proposed suspension or consideration of suspension -- the
15 contractor submitted various documents.

16 Q Okay. Now the January 1985 letter, what was
17 the basis for you to consider the suspension of progress
18 payments?

19 A We were of the -- I was of the opinion that the
20 contractor was in unsatisfactory financial condition
21 because of the withdrawal of Dollar Drydock Savings Bank
22 -- which was the source of Freedom's credit.

23 Q What led you to believe there was a withdrawal?

24 A There was a conference call approximately
25 December 17th -- or during the week of December 17, 1985

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1 -- with the bank, our commander, myself, our counsel, and
2 one or two other people -- and the bank categorically
3 advised us that certain conditions had to be met before
4 any money would be forthcoming to Freedom.

5 Also, there was a post-award conference held at
6 the contractor's facility on December 14, 1984, where the
7 contractor basically indicated that no credit had been
8 forthcoming from that bank up to that point in time and
9 they were seeking alternate sources of credit.

10 Q Who attended this meeting where that
11 information was given?

12 A Are you referring to the post-award conference?

13 Q Yes.

14 A It was representatives from the government --
15 specifically the buying command, Defense Personnel
16 Support Center Pennsylvania, the Defense Contract
17 Management Office -- which was my office -- also
18 representatives from Freedom -- and also representatives
19 from the Army Veterinarian Corp.

20 Q And as a result of that information you decided
21 to consider suspension of progress payments?

22 A No. We were -- a few days after the post-award
23 conference, at our commander's request, we called the
24 bank to get more information because we were surprised by
25 this development that no monies had been flowing from

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1 Dollar Drydock Savings Bank -- which was the reason we
2 had given the contractor a positive financial pre-award
3 survey several months earlier.

4 We called the bank, spoke to the vice
5 president. He advised us that unless certain conditions
6 were met, no money would be forthcoming.

7 Q What were those conditions?

8 A Specifically, that the government would have to
9 guarantee the loan. That the government would have to
10 provide assurance that progress payments would be paid
11 and also that an arrangement would have to be made to
12 settle Freedom's past creditors -- because Freedom had
13 owed about several million dollars in past debts.

14 Q And when was this telephone call made?

15 A This telephone call was made during the week of
16 17 December 1984.

17 Q And was Freedom present when the telephone call
18 was made?

19 A No.

20 Q Was there any discussion as to getting Freedom
21 involved in the phone call?

22 A No.

23 Q So was it based on that information that you
24 sent out the January letter --

25 A No.

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1 Q Okay. What information -- you would have been
2 very excellent with Mr. Luchansky.

3 What information was it that caused you to send
4 out the January letter advising that you were considering
5 suspending progress payments?

6 A Well the conference call with the bank was of
7 course, part of the process. But after the conference
8 call there was an exchange of letters between my office
9 and Freedom, exchange of phone calls, there were some
10 meetings, we gave the contractor every opportunity to
11 discuss this matter.

12 Q To discuss what matter?

13 A The matter of the withdrawal or absence of any
14 credit. The -- we were depending that the contractor
15 needed outside financing in order to perform on the
16 contract. With the absence of Dollar Drydock and no
17 replacement for the Dollar Drydock financing, I was of
18 the opinion the contractor could not perform.

19 Therefore, I sent out a letter. I made a
20 decision that I was going to consider suspending progress
21 payments and so, sent out a letter the first week in
22 January 1985, to the contractor advising the contractor
23 of that opinion.

24 Q After that letter was sent out, was Freedom
25 given an opportunity to respond to that letter?

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1 A Yes.

2 Q What was Freedom's response?

3 A Well we had -- again, there was an exchange of
4 correspondence, phone calls, more meetings, Freedom
5 submitted a lot of documentation to our office for
6 review, there were lines of credit, letters came in
7 regarding possible lines of credit that were being set
8 up. We took everything -- we reviewed everything -- our
9 whole office reviewed it and then our financial analyst
10 issued a post-award surveillance report towards the end
11 January advising that the contractor could not perform
12 without a firm commitment from an outside financial
13 institution. And then I made my decision to suspend
14 progress payments.

15 Q And again, what was the basis for that decision
16 to suspend?

17 A Unsatisfactory financial condition that was
18 endangering performance of the contract.

19 Q Were there other factors mentioned in that
20 letter?

21 A Yes. There were other factors -- side factors
22 that were mentioned.

23 Q What was the purpose of mentioning the side
24 factors if they weren't the basis?

25 A It -- well they weren't driving engines, but

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1 they were just in the way of some background information.

2 MR. LUCHANSKY: I'm sorry, I didn't hear.

3 THE WITNESS: It wasn't -- the other factors
4 were not the driving engines as to why I suspended
5 progress payments. It was made quite clear in the
6 suspension letter that it was suspended because of an
7 unsatisfactory financial condition.

8 The others were just mentioned as side issues
9 which would not have caused me to suspend progress
10 payments on their own.

11 BY MS. HALLAM:

12 Q Are there certain procedural steps that are
13 required before doing a suspension of progress payments?

14 A Yes.

15 Q Could you tell us what those procedural steps
16 are?

17 A Okay. Again, as I mentioned before -- there
18 must be an intensive dialogue between the contractor and
19 the government. Then once the ACO makes his decision to
20 suspend progress payments -- or not to suspend progress
21 payments -- the ACO must go before an internal contract
22 management review board -- which is what I did.

23 Both times when I proposed suspending progress
24 payments, I convened a contract management board of
25 review meeting and then -- this was in early January

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1 1985, regarding proposed suspension -- then when I
2 actually made my decision to suspend, I also had a board
3 of review convened. And in both cases they sustained my
4 position.

5 Q Now, who's on this board of review?

6 A Board of review consists of multi-functional
7 people, the chief of our contracts division, there's a
8 chief of production, there's a quality assurance manager
9 there, there's the chief of pricing, there are other --
10 there's a small business representative from our office,
11 legal sits in in an advisory capacity -- they don't vote.

12 There may be one or two others -- but it's a
13 multi-functional board consisting of contractual,
14 financial, production, quality, sometimes engineering,
15 small business with legal -- with a legal representative
16 as an advisor.

17 Q Sir, you said something about voting -- is
18 there actually a vote?

19 A No. The lawyer doesn't have a vote but he's
20 there to advise.

21 Q But is there a voting procedure?

22 A Yes.

23 Q Oh, okay. What steps or what did Freedom have
24 to do in order to get the suspension lifted?

25 A Freedom -- as the suspension letter indicated

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1 -- Freedom would have to demonstrate financial capability
2 in performing on the contract and then I would consider
3 resuming progress payments.

4 Q And Freedom eventually did do this, or --

5 A Yes.

6 Q And how did they do this or how did it do this?

7 A They obtained financing from a company called
8 Bankers Leasing from Illinois. They had a five or a five
9 and a half million dollar financing arrangement.

10 Q Do you remember attending a meeting at
11 headquarters, I believe, February 14th?

12 A Yes.

13 Q Could you tell us what your recollection of
14 that meeting is?

15 A Yes. The government and the contractor
16 discussed various scenarios that would enable Freedom to
17 obtain financing, which would enable me to resume
18 progress payments.

19 There was a consensus among the attendees that
20 we wanted Freedom, if at all possible to perform on the
21 contract. We wanted Freedom to be successful and I think
22 it was a very positive meeting and various -- as a result
23 of the meeting, it was agreed that -- we advised Freedom
24 that we feel they would need about \$3.8 million in credit
25 from a verifiable, reliable financial source -- that they

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1 would have to have proper documentation to support their
2 progress payments and that these two conditions would
3 apply should the contract remain with Freedom Industries,
4 or should it be novated -- if they should so decide -- to
5 H.T. Food Products.

6 Q Who was there on behalf of Freedom Industries?

7 A Mr. Henry Thomas, the president, Mr. Patrick
8 Marra, the vice president -- there may have been a few
9 others, I don't remember.

10 Q You mentioned novation. How did that come up?

11 A I don't remember who brought it up but it was
12 discussed.

13 Q Do you know if Neil Ruttenberg was there?

14 A I do not remember.

15 Q Could you tell us what the procedure for a
16 novation is?

17 A Yes. The -- basically, the contractor that's
18 in existence at the present time must demonstrate to the
19 government's satisfaction that the successor contractor
20 -- or as we call them -- the successor in interest -- is
21 capable of performing on the contract. And we basically
22 have to do a review of this new contractor.

23 The original contractor -- or the current
24 contractor -- must provide various documentation to me as
25 the contracting officer pursuant to the Defense

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1 Acquisition Regulation. We review these documents. It's
2 almost like the pre-award survey except it has to go
3 forward to higher headquarters for comments -- should
4 they so desire. And the whole process takes normally,
5 about sixty days.

6 Q In this case did Freedom submit all the
7 required paperwork?

8 A No. There were deficiencies in the
9 documentation. They didn't have certified financial
10 statements with independent accountants. Also there was
11 a problem with the seals -- some of the documents didn't
12 have seals. Again, the package was reviewed by my legal
13 office.

14 Q With regard to the financial certification --
15 was that the certified financial statement -- was that
16 cured?

17 A Yes. I recommend -- I had to go through a DAR
18 deviation. DAR is the acronym for Defense Acquisition
19 Regulation. I had to go through a DAR deviation process
20 where I recommended approval to high-- to our
21 headquarters -- Defense Logistics Agency in Washington --
22 that this be approved and they did approve this I
23 believe, on the 10th of April 1985.

24 Q And when was the novation ultimately?

25 A The novation was approved by me on 18 -- I

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1 believe 17 April 1985.

2 Q And after that period of time who had the
3 contract?

4 A H.T. Food Products, Incorporated.

5 Q Do you remember any discussion among government
6 officials with regard to the propriety of novating in
7 general?

8 A Well, in this case, yes. There was a lot of
9 discussion at headquarters at the 14 February meeting and
10 subsequent to that meeting because there was -- the
11 government was concerned that we could be -- the
12 government could be accused of shielding Freedom from its
13 creditors because H.T. Food Products was owned by Mr.
14 Thomas -- he was the president of H.T. Foods. He was an
15 officer of both companies, meaning Freedom Industries as
16 well as H.T. Food Products.

17 So there was a lot of discussion about this.
18 We called it piercing the corporate veil. Even if we
19 novated, we were concerned the creditors could pierce the
20 corporate veil -- the government perhaps could be liable
21 for novating and be accused of shielding Freedom from its
22 creditors.

23 Q But none the less, it was approved?

24 A It was approved, yes.

25 Q Were Freedom Industries and its successors

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1 progress payments subjected to pre-payment reviews?
 2 A In most cases, yes.
 3 Q What does a prepayment review consist of?
 4 A Well the -- a full prepayment review would
 5 involve pricing, audit, and technical. It could be a
 6 limited prepayment just involving one of the elements I
 7 just mentioned.
 8 Q Could you tell us why these requests were for
 9 the most part, subjected to the prepayment review?
 10 A Well the first one was -- I conducted a
 11 prepayment because it's -- the contract was a brand new
 12 contractor, never had progress payments before and it's
 13 standard operating procedure to review the first progress
 14 payment on a prepayment basis when a company was in such
 15 a mode as this -- as Freedom was -- meaning a new
 16 contractor, never had progress payments before. We had
 17 to test the accounting system.
 18 Regarding progress payments after number one, I
 19 had to do prepayment reviews on most of the progress
 20 payments because I could not place reliance on their
 21 accounting system and controls.
 22 The audits that were done by the Defense
 23 Contract Audit Agency -- or DCAA revealed numerous
 24 deficiencies in their accounting system and controls that
 25 caused me to be -- to take the position that I couldn't

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1 rely on Freedom's accounting system.
 2 Q Could you explain to us what it was that you
 3 felt was questioned or what you felt was there to make
 4 you believe that you couldn't have any reliance on their
 5 requests?
 6 A Yes. I'll just mention a few areas. There
 7 were costs that were -- in the beginning there were costs
 8 that were not booked. There were costs that were not
 9 Freedom's liability. They were costs really that were
 10 liabilities -- the liability of other contractors. There
 11 were pre-contract costs included. There were excessive
 12 costs included. There were costs that should be
 13 capitalized and depreciated. There were costs that
 14 should be amortized. There were costs that violated the
 15 defense contract -- I'm sorry -- that violated the
 16 Defense Acquisition Regulation Chapter 15, Contract Cost
 17 Principles. There were duplicative costs. There were
 18 costs that Freedom did not pay in the ordinary course of
 19 business which it was required to do. These include
 20 vendor costs, subcontractor costs, the payment of taxes
 21 -- and these are just some examples.
 22 Q Where did the information with regard to these
 23 problems come from? Were you doing a review of the
 24 progress payment request and did you discover these
 25 problems?

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1 A No. The review -- the organization that
 2 reviewed Freedom's books and records regarding the
 3 progress payment requests was the Defense Contract Audit
 4 Agency, or DCAA. They sent auditors out to Freedom,
 5 performed the reviews in accordance with the Defense
 6 Acquisition Regulation.
 7 Q So you were relying on their findings with
 8 regard to these problems?
 9 A Yes.
 10 Q With regard to those examples that you gave,
 11 were those examples all found during the first progress
 12 payment?
 13 A No. These were pervasive -- at various times
 14 -- they occurred at various times throughout the life of
 15 the contract. There were twenty-two progress payments
 16 and they occurred at various times.
 17 Q I'd like to talk to you now about the second
 18 time you considered suspending progress payments, in
 19 August of '85. Could you tell us what the basis for that
 20 decision to or determination to consider suspending
 21 progress payment was based on?
 22 A The Defense Contract Audit Agency issued a
 23 report for progress payment number five deeming Freedom's
 24 accounting system unacceptable for progress payment
 25 purposes. The deficiencies in the system had mushroomed

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1 to such an extent that DCAA made the determination that
 2 it was unacceptable. Per the Defense Acquisition
 3 Regulation which has the full force and effect of law, I
 4 cannot as a contracting officer, pay progress payments
 5 without an approved accounting system.
 6 Q Could you tell me what you mean by, "the
 7 deficiencies had mushroomed to such an extent?"
 8 A Right. The -- there were just so many
 9 deficiencies that we couldn't place reliance on the
 10 system. DCAA made the determination that the system was
 11 so flawed that the system was deemed inadequate.
 12 Q Could you give me an example of some of these
 13 deficiencies, do you recall any?
 14 A Yes. Well, I mentioned a whole bunch of them
 15 before but I can just add in some more.
 16 One of the areas was a reduction in contract
 17 costs. Specifically, about -- approximately \$400,000 in
 18 rental payments and New York City occupancy tax that I
 19 had paid progress payments for but had not been passed on
 20 to the landlord. That was picked up by the DCAA
 21 auditors. And again, there were numerous other --
 22 basically I can repeat what I said before. It's --
 23 Q Okay. What is the impact of this determination
 24 by DCAA that the accounting system is inadequate?
 25 A I'm sorry. I missed the first part of the

1 question.

2 Q What is the impact of that?

3 A Well, it prevents me from paying progress

4 payments. The system must be deemed adequate and DCAA is

5 or the Defense Contract Audit Agency is the government

6 office that performs the reviews of the contractor's

7 accounting system for the Defense Acquisition Regulation.

8 Q You're the ACO. Don't you have authority to

9 overrule their findings?

10 A Again, no. I don't believe so, no. I'm not a

11 lawyer but it's -- it's quite clear in the Defense

12 Acquisition Regulation that it is DCAA that makes the

13 determination of acceptability of the accounting system.

14 They're acting for the ACO. They are a service

15 organization servicing the ACO. They are the experts.

16 I'm not an accountant. I'm not an auditor. But it's --

17 they make the determination concerning acceptability of

18 the system per the DAR.

19 Q Could you explain how Freedom's system could be

20 found inadequate after or as a result of progress payment

21 request number five when it was considered adequate prior

22 to the award of this contract?

23 A Well prior to award of the contract, the

24 contractor had no -- did not have any progress payments,

25 didn't have any contracts -- there basically would have

1 been very little to look at when DCAA did a review during

2 the pre-award process concerning acceptability of the

3 system.

4 Once the contract was awarded -- which was

5 Freedom's first contract for progress payments -- in fact

6 the company had been really out of business for about two

7 years and didn't have any contracts -- the system had to

8 be tested. So there was really -- probably nothing to

9 look at or very little to look at when the contract --

10 when DCAA went out there during the pre-award phase.

11 It was only after the contract was awarded that

12 costs were being incurred and recorded on their books and

13 records for this contract that gave the auditing agency

14 something really to look at and to test the system --

15 that formed as a basis to test the system.

16 Q How and when was this matter ultimately

17 resolved?

18 A Okay. It was ultimately resolved as a result

19 of a meeting at headquarters in late -- I think --

20 September 25, 1985, with government personnel, Freedom

21 personnel, and the DCAA or Defense Contracting Audit

22 Agency review of progress payment number seven.

23 Freedom's system showed improvement as a result

24 of a review of number seven. The documentation had been

25 improved. The paper trail was better. Its system had

1 been set up to capitalize costs. So there was

2 improvement and that -- as a result, DCAA took away the

3 statement that the system was not acceptable for progress

4 payments.

5 Q And at that time were progress payments

6 reinstated?

7 A Yes. Actually, it was reinstated on an

8 emergency basis before that meeting to pay an -- to pay

9 some electrical bills. On progress payments five and

10 six, we paid electrical bills in the amount of about \$10

11 or \$11,000 in order to protect our property that was out

12 there.

13 But I reinstated progress payments of -- really

14 for number seven as a result of the DCAA findings.

15 Q I'd like to go through H.T. Foods and Freedom

16 N.Y.'s progress payment submissions starting with H.T.

17 Foods progress payment number one. Could you briefly

18 describe what if any costs were questioned, what was

19 withheld?

20 A Yes. The request was submitted for roughly

21 \$1,700,060 whatever. There was only about \$60,000

22 questioned. I paid \$1,700,000 and questioned about

23 \$60,000 as a result of a DCAA review.

24 Most of the costs questioned were -- forty of

25 the sixty some thousand had to do with capital type

1 costs. These costs should have been capitalized.

2 Specifically, for computers -- office equipment. There

3 were some small deductions for guard service, accounting

4 -- there was an adjustment for one of Freedom's

5 subcontractors, Star Foods, in the approximate amount of

6 seventeen thousand.

7 So I paid basically, the bulk of the progress

8 payment -- one million seven, out of one million, seven

9 hundred sixty thousand.

10 Q Could you tell us what the problem was with the

11 capital equipment -- why the DCAA found that

12 questionable?

13 A Well, when it's capital equipment you must --

14 you only can submit progress payments for the depreciated

15 value of that equipment. You can't submit progress

16 payments for the full value of that equipment.

17 Q Wasn't Freedom at this particular point in time

18 telling you that that was the way they negotiated the

19 contract?

20 A Yes.

21 Q Why didn't you pay the progress payments then

22 if that was the way it was negotiated?

23 A The contract price was negotiated that way.

24 I'm not -- I was not going to interfere with the contract

25 price. However, when you're talking about progress

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1 payments you're talking about a different venue and I'm
2 prohibited by government regulations to pay progress
3 payments for capital equipment at a hundred percent -- or
4 95 percent. I only can pay for the depreciated value.

5 Q Did you check with anybody at the DPSC, with
6 the PCO or check with anybody with regard to the
7 propriety of not paying the costs, the progress payments
8 on those capital type equipment?

9 A Yes. Yes, I spoke to the PCO, Mr. Thomas
10 Barkewitz, I spoke to his procurement agent, Mr. Keith
11 Ford. My counsel, Mr. Carl Herringer spoke to the DPSC
12 counsel, Mr. Chuck Wright. I was also in touch with Mr.
13 Chuck Wright with Mr. Herringer present.

14 The PCO, Mr. Barkewitz said the issue with
15 progress payments only came up during the negotiation of
16 the contract at the very end. But there was no
17 discussion concerning progress payments for capital
18 equipment.

19 The PCO allowed certain items of capital
20 equipment at a hundred percent in the contract price
21 because they wanted Freedom as a -- or they hoped Freedom
22 would be a prospective supplier or an assembler down the
23 road -- so they figured they would pay for it in terms of
24 contract price now. But it was only selected items of
25 capital equipment.

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1 However, in order to pay progress payments I
2 would have -- a DAR deviation would have to be obtained
3 -- it would be to pay progress payments for this capital
4 equipment. The PCO basically -- the PCO's position was
5 -- and Mr. Ford's position was that -- the progress
6 payments were something within the purview of the DCAS
7 contracting officer, myself. I administer the progress
8 payments. I'm responsible for progress payments and that
9 was my call.

10 Q Was a DAR deviation pursued?

11 A Yes.

12 Q Did you have any -- did you participate in that
13 in any way?

14 A Yes. I recommended approval to higher
15 headquarters. I recommended that it be approved.

16 Q What was the ultimate outcome of that request?

17 A Well I never saw the ultimate outcome but it's
18 my understanding it was never approved. I know there
19 were letters going back and forth and correspondence and
20 discussions for months -- up until February 1986. I know
21 in the government Rule 4 there's a document from signed
22 -- well, anyway -- I know it was disapproved at the
23 assistant secretary of defense level -- undersecretary of
24 defense level, Dr. Wade.

25 Q I'd like to move on to H.T. Foods progress

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1 payment number two. Can you tell us what was -- if
2 anything -- not paid under that progress payment and why?

3 A Yes. Approximately six hundred and seventy so
4 thousand in progress -- in the amount of the progress
5 payment. I did a -- I had a -- I paid, I think, three
6 hundred thousand right away. I had to deduct I think it
7 was two hundred thousand or so -- not deduct -- but I had
8 to set aside about two hundred thousand because they
9 involved subcontractor progress payments and I had to do
10 a review of the subcontractor before I could pay the
11 progress payment.

12 Also there were three items of capital
13 equipment that were not depreciated. Specifically,
14 quality control equipment, office equipment, and security
15 equipment. So I was able to pay half the progress
16 payment. I had to question some -- about a hundred
17 thousand or whatever -- in capital equipment, and I had
18 to set aside about two hundred thousand for review of the
19 subcontractor -- which I believe was Cadillac Products --
20 until the results of the review -- no I'm sorry, yes --
21 Cadillac Products -- until the results of the review were
22 received.

23 Q Could you tell us a little bit about what is
24 involved with regard to subcontractor's progress
25 payments?

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1 A Yes. A subcontractor -- if his subcontract
2 with the prime contains a progress payment clause similar
3 to the DAR clause -- has the option of requesting a
4 progress payment.

5 They fill out a DD form 1195 -- a progress
6 payment request and submit that request to the prime
7 contractor. The prime contractor is responsible for
8 reviewing that request and passing on the results of the
9 review to the government with his own covering progress
10 payment request form -- also a DD-1195.

11 Now all of the government rules and regulations
12 -- meaning DAR rules and regulations that apply to the
13 prime contractor for progress payment purposes -- also
14 apply to the subcontractor. Specifically, the
15 subcontractor has to have a progress payment flow down
16 clause similar to the DAR progress payment clause. The
17 subcontractor has to have an adequate accounting system
18 and so on and so forth.

19 In the absence of Freedom's review of the sub
20 -- or even not in the absence -- the ACO or myself, has
21 the option of requesting a government review at the sub
22 level -- which is what I did. I had the local government
23 office conduct a review of the subcontractor request. We
24 had no experience with the sub and we had to see that
25 everything was in conformance with DAR regulations.

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1 Q Actually, it was more than one sub in this
2 particular case. Do you recall that?
3 A Yes. Now I recall, I'm sorry. Yes, it was
4 Cadillac, it was Transpackers I believe, and I believe,
5 Del Monte -- I'm sorry. There were three subcontractors
6 -- Cadillac, Transpackers, and Del Monte. We had to
7 review all three subcontractors.
8 Q Would you continue now with progress payment
9 number three? What if anything was not paid from the
10 request?
11 A Right. I think -- on progress payment three,
12 there was an original submission and a revised
13 submission. The original submission was -- I don't know
14 -- I think the five hundred and forty thousand range.
15 The revised one, the five thirty-five range. Basically
16 Freedom removed Cadillac from the original submission and
17 inserted Del Monte and Transpackers as subcontractor
18 payments. I paid the full value of the revised progress
19 payment request.
20 Q Did progress payment number three actually
21 include the subcontractor costs that were submitted under
22 number two?
23 A Yes. I believe so, yes. For Del Monte and for
24 Transpackers, yes, I believe so.
25 Q Is it just a coincidence that the contractor

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1 resubmitted them in number three?
2 A Well I -- I don't remember the exact situation
3 but probably at that time, I would have received the
4 results of a review -- or I might have received the
5 results of a review performed by the various government
6 offices cognizant of those subs.
7 But again, it's also possible Freedom just
8 included it in its progress payments because that was a
9 pattern they followed throughout their progress payment
10 requests -- where they would include costs that I had
11 questioned or not approved in subsequent progress payment
12 requests.
13 Q Do you know what part, if any, of progress
14 payment number three included subcontractor costs for
15 progress payment number two?
16 A I'm sorry?
17 Q Do you know what part, if any, what part of
18 progress payment number three included subcontractor
19 costs from progress payment number two?
20 A You mean progress payment number three? I'm
21 sorry.
22 Q What part of progress payment number three,
23 included costs that were also submitted under progress
24 payment number two? Do you recall?
25 A Well yeah, well approximately. Maybe a hundred

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1 thousand dollars. I mean -- I'm -- it was for Del Monte
2 and Transpackers. It wasn't the predominate portion of
3 progress payment three. It was relatively a smaller
4 portion.
5 Q And it was for what subcontractors did you say?
6 A Del Monte and Transpackers.
7 Q Could you tell us what, if any, was withheld
8 from progress payment request number four?
9 A Progress payment request number four I with --
10 I held for prepayment review approximately, I believe,
11 seven hundred thousand -- well maybe six to seven -- six
12 to six hundred and fifty thousand roughly, of about eight
13 hundred thousand requested.
14 I paid -- I was able to pay for Cadillac
15 Products because they had the results of review. So I
16 paid -- I requested that Freedom -- being I had the
17 results of review for Cadillac from prior progress
18 payments that they changed that I paid for Cadillac only
19 on progress payment four.
20 Pay what I can now -- which was approximately
21 \$170,000, because I had the results of review of Cadillac
22 and then treat the rest of the costs submitted on
23 progress payment four as the next progress payment number
24 five because I had to do a prepayment review.
25 Q Is that money that you paid out under four,

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1 actually requested under the progress payment that was
2 submitted originally as number four?
3 A No. It -- the Cadillac progress payment before
4 that I paid, was based on submissions for Cadillac in
5 Freedom's progress payments two and three.
6 Q So progress payment number four was changed to
7 progress payment number five?
8 A Except for the Cadillac portion.
9 Q So the Cadillac portion was part of the
10 original four amount?
11 A Yes. It was part of the original amount of
12 four, right.
13 Q Could you tell us what was paid, if any, on
14 progress payment number five then?
15 A Progress payment number five was paid only for
16 about six thousand and change for an emergency electrical
17 payment, late September 1985, the day before the big
18 meeting at DLA headquarters. And then the balance of
19 progress payment number five was paid, I believe, in toto
20 as part of progress payment seven.
21 Q Why wasn't it paid until progress payment
22 number seven?
23 A Because the Defense Contract Audit Agency had
24 deemed Freedom's accounting system unacceptable for
25 progress payments as a result of their review of progress

1 payment number five.
 2 Q How about progress payment number six?
 3 A Progress payment number six was reviewed by the
 4 Defense Contract Audit Agency and they indicated in their
 5 report that there was no change in the acceptability of
 6 their accounting system. And I did pay also -- as part
 7 of that emergency electrical payment -- the day before
 8 the September 25th meeting at DLA headquarters --
 9 September 25, 1985 -- approximately four thousand and
 10 change as an emergency electrical payment.

11 The balance of number six along with the
 12 balance of number five was paid as part of number seven
 13 in early October 1985.

14 Q Could you tell us about number seven? What, if
 15 anything, was not paid and why?

16 A Yes. Out of two point nine million, I paid one
 17 point nine million, and what was not paid was
 18 approximately nine hundred and some thousand mainly in
 19 two areas. One was Del Monte -- which was a
 20 subcontractor progress payment for over a half a million.
 21 That was set aside for a prepayment review. And also, on
 22 number seven there was the issue of the lease of
 23 equipment from a company called Teknic.

24 The Defense Contract Audit Agency reviewed -- I
 25 think the Teknic portion of that progress payment was

1 three hundred and forty thousand or close to it -- and
 2 the Defense Contract Audit Agency said that it was a
 3 capital type lease, as opposed to an operating lease
 4 because most of the costs of the lease were up front,
 5 meaning the first payment.

6 Q Excuse me. Was number seven, the seven you're
 7 talking about, a rolled up progress payment?

8 A Yes. Number seven -- yeah, seven was the five
 9 and six -- less the electrical payments of about ten
 10 thousand total for both five and six -- plus costs on
 11 seven.

12 Q Okay. And you mentioned a question with regard
 13 to, questioned costs, with regard to Teknic?

14 A Yes.

15 Q Could you tell us what that was about?

16 A Yes. They were costs -- the Defense Contract
 17 Audit Agency, as part of their review of the progress
 18 payment, determined that it was a -- really the cost
 19 submitted was actually almost like a purchase -- like a
 20 financing arrangement, and they called it a capital lease
 21 versus an operating lease.

22 It was just too much money. I think ninety
 23 percent -- I think -- of the costs of that -- of the
 24 lease -- was up front in the first payment. They called
 25 it equipment lease and also pre-payment expenses -- or

1 pre-paid expenses.

2 The Defense Contract Audit Agency said that it
 3 was a capital lease and I just could not pay it in that
 4 amount.

5 Q Was any of it paid?

6 A Yes.

7 Q Any of the lease?

8 A On that progress payment I don't -- but later
 9 on, yes. I don't think there was anything that was paid
 10 on that progress payment, no -- nothing on that progress
 11 payment.

12 Q And how about the subcontractor claim?

13 A Okay. In early October we were advised by the
 14 government office reviewing Del Monte -- who was the
 15 Defense Contract Management Office in Buffalo -- issued
 16 two reports.

17 One was 5 October, by their industrial
 18 specialist group. The other was 10 October -- I believe
 19 -- by their pricing group, advising us that this Del
 20 Monte progress payment -- which was Del Monte progress
 21 payment two -- Del Monte two -- there was a problem
 22 because Del Monte had not been paid by -- for progress
 23 payment one from the spring -- meaning around the May 5
 24 time frame. Here we're now in September and October.

25 Del Monte's position was -- they're not going

1 to give any product -- or give title to Freedom until
 2 they got paid. They wanted up-front money.

3 Q Up-front money for this product or the last
 4 product?

5 A I'm not certain. They just said they wouldn't
 6 give title to Freedom without -- without up-front money.
 7 So I don't know if it means both progress payments or
 8 just number two. I just don't know off hand.

9 Q So what happened to this claim?

10 A I believe it just -- I checked all the progress
 11 -- my review of the progress payments, to my recollection
 12 is that I think it just was self-fulfilling because Del
 13 Monte completed its subcontract either late fall of 1985
 14 or early January 1986. They fulfilled the subcontract
 15 with Freedom.

16 I do not believe -- although I can't say with
 17 certainty that the five hundred thousand was paid. But
 18 the contract was fulfilled -- the subcontract was
 19 fulfilled.

20 Q I'm sorry what did you say?

21 A I know the subcontract was fulfilled, but I
 22 don't recollect how the five hundred thousand was
 23 eventually handled in terms of prime contractor progress
 24 payments.

25 Q How did you handle it?

1 A I do not recall. I had set it aside on number
2 seven for review. I do not recall how it was --
3 Q Do you not recall whether it was ever
4 resubmitted under a different progress payment request?

5 A I do not think so but I can't say for a
6 certainty. I can't say for a certainty -- or change that
7 -- I don't know. I really don't know.

8 Q Could you explain what, if anything, was not
9 paid on progress payment request number eight?

10 A Yes. Progress payment number eight I reduced
11 the progress payment by approximately by, I believe,
12 \$400,000 stemming from findings of DCAA on progress
13 payment number four, which was re-numbered to five.

14 It was -- the costs were really rental costs
15 and related New York City occupancy taxes that were not
16 -- that I had paid for in prior progress payments that
17 were not passed on to the landlord. DCAA as well as
18 myself considered it a reduction in expenditures. I once
19 described it as a void cost and I made the deduction
20 after protracted discussions with Freedom, telephone
21 calls, meetings over a several month period, to get that
22 money back.

23 Q You say you were reducing it and getting it
24 back. Was that \$400,000 in costs included in this
25 progress payment?

1 A No. Well, no, no. It was from progress -- as
2 I -- I mean, I just stated -- it was from progress
3 payment number four that was re-numbered five. And I
4 took back the money in progress payment eight.

5 Q And did Freedom dispute that action?

6 A Yes.

7 Q And do you recall looking at materials,
8 letters, opinions from Freedom with regard to this
9 dispute?

10 A Yes.

11 Q And did you give some or any consideration to
12 what Freedom was saying?

13 A Yes.

14 Q And what decisions did you reach with regard to
15 how Freedom was intending to treat the \$400,000?

16 A After review of all the documents, review by
17 our legal department, meetings with Freedom and including
18 their lawyers, exchanges of correspondence, review by --
19 by my experts, the Defense Contract Audit Agency -- of
20 various entities within my office, I made the decision
21 that the -- that that money had to be returned to the
22 government.

23 Q How was Freedom viewing this \$400,000?

24 A They viewed it as revenue because it was part
25 of an overall agreement with their former landlord, Penco

1 -- Rob Penzer was the president -- and Pilot Realty, I
2 believe -- which was the new landlord.

3 Q Were they viewing it essentially as asset from
4 a sale?

5 A As revenue -- because in turn, they gave up
6 their option to buy or -- to buy the building that they
7 were leasing. It was part of an overall compromise and
8 settlement.

9 Q And what was the government's view of it?

10 A The government's view was that it was a
11 reduction in expenditure and that -- being that Freedom
12 didn't have to pay these costs -- they were not entitled
13 to progress payments for these costs.

14 Q The costs are the rent payments?

15 A The rental payments and the related New York
16 City occupancy tax that's applied to that rental payment.

17 Q Had Freedom paid the tax or the rent for the
18 facility during that time period that the \$400,000
19 applied to?

20 A No, no.

21 Q Did they receive progress payments for the rent
22 for that time period?

23 A Yes.

24 Q Were there taxes also that were included in
25 their progress payment request?

1 A Yes.

2 Q And did they receive the taxes on -- the
3 occupancy taxes for the first several months of the
4 contract period?

5 A They received progress payments for the taxes,
6 yes. But they didn't pay the taxes.

7 Q I'd like to move on to progress payment number
8 nine. And again, do you recall what, if anything, wasn't
9 paid and why?

10 A I don't recall the specifics on number nine. I
11 would have to look at the government file to refresh
12 memory.

13 Q If you need to refresh your memory, look at
14 G-95 -- I think that's your chart. It's the blue book.

15 A Blue book? Sure.

16 Q Yeah.

17 A Okay. Can I keep the book open or is that --

18 Q Excuse me.

19 A Can I keep this page open right here or --

20 Q Do you need to refresh your memory?

21 A Well, no, not really. I'll just close it. The
22 payment was submitted in the amount of approximately nine
23 hundred thousand, plus I paid over eight hundred
24 thousand. There was the main -- there were basically,
25 three deductions.

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1 There was a deduction for excessive legal and
 2 accounting fees. There was also a deduction because of
 3 this Teknic lease scenario -- meaning Teknic was the
 4 company that leased certain equipment for them.
 5 There was what they called an old Teknic lease,
 6 and a new Teknic lease and you'll see -- I think the old
 7 lease was two hundred and fourteen thousand, and the new
 8 lease was a hundred and forty thousand. This was not the
 9 sum total of the lease but it represented several month's
 10 payment. Also there was some sort of \$3,000 or some small
 11 adjustment for about \$3,000.
 12 Do you want me to elaborate on the Teknic
 13 lease, the old lease or the new lease?
 14 Q If you know anything else about it.
 15 A Yes. There were basically three types of
 16 scenarios with this Teknic lease which stemmed -- goes
 17 all the way back to progress payment seven -- although
 18 here we're with progress payment nine.
 19 The three scenarios are -- One, a total lease
 20 arrangement of a half a million. The two other scenarios
 21 were totally -- was a total lease arrangement of three
 22 hundred and seventy-five thousand. Now this old lease
 23 involved -- as is indicated for this progress payment on
 24 the chart -- progress payment nine involved, like a total
 25 of two hundred and fourteen thousand -- involved three

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1 month's rental and about seventy-one thousand a month.
 2 DCAA felt that was too high. This new lease
 3 represented, I believe, three month's payments at
 4 forty-six or forty-seven thousand a month. That's how
 5 you get this new lease amount of a hundred and forty
 6 thousand.
 7 There were basically three scenarios. One was
 8 a total lease of five hundred. The other two for three
 9 hundred and seventy-five thousand. It had to do with the
 10 monthly amounts for these lease payments and we --
 11 Q You said something about DCAA thought that it
 12 was too much?
 13 A Right. On the -- on --
 14 Q Where does DCAA get off, even expressing an
 15 opinion about how much somebody should be paying for
 16 something?
 17 A Well, it's part of their audit function because
 18 we -- when you're talking about a lease -- if there's too
 19 much money up front it's called a capital type lease --
 20 as was the case with progress payment seven where they
 21 were billing the government for about three hundred and
 22 forty, or three hundred and forty some thousand on the
 23 first payment -- for the first month.
 24 The scenario of forty some thousand a month was
 25 accepted by DCAA as an operating type of lease and

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1 enabled me to pay. You can't pay the bulk of it up front
 2 because it's almost like a purchase.
 3 Q I'd like you to refer to the F Exhibits. I
 4 think they're in black binders up there, Tab 232, under
 5 sub-tab progress payment number nine --
 6 MR. LUCHANSKY: I'm sorry, Your Honor. As I
 7 mentioned yesterday, we do not have the 232 and 233
 8 progress payment binders here. Those were the progress
 9 payment notebooks that got incorporated into 422, and we
 10 no longer have those binders.
 11 JUDGE JAMES: What is it your asking the
 12 witness to refer to, ma'am?
 13 MS. HALLAM: I was asking him to refer to
 14 F-232, sub-tab nine.
 15 MR. LUCHANSKY: Again, Your Honor --
 16 JUDGE JAMES: Hold it. F-232 is what she's
 17 asking him to refer to. And as I think I remarked
 18 yesterday or the day before, F-231 is where the board's
 19 exhibits cease -- which is to say there ain't no thing
 20 such as F-232.
 21 MS. HALLAM: We have 232. They acknowledge a
 22 232, it does exist.
 23 MR. LUCHANSKY: They had -- they were
 24 submitted, Your Honor, as part of Freedom's original Rule
 25 4 file, as part of the F series. She's correct that it

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1 was part of the F series. The F series did go up to 232
 2 and 232.
 3 As I remarked earlier in the proceedings, it
 4 somehow in the course of our putting together the new
 5 exhibits that our copy of 232 and 233 got reassembled as
 6 part of 422 which is the current progress payment
 7 notebook.
 8 JUDGE JAMES: All right. Does the witness have
 9 232 available to him?
 10 MS. HALLAM: I was trying to see if it's
 11 duplicated in this FT series.
 12 JUDGE JAMES: Well, let's just take it step by
 13 step. I assume you have it, Ms. Hallam. Is that right?
 14 MS. HALLAM: Yes.
 15 JUDGE JAMES: Now does the witness, Mr.
 16 Liebman, does he have it in front of him?
 17 MS. HALLAM: It might be --
 18 JUDGE JAMES: Well, let's have Mr. Liebman look
 19 and tell us. Do you have it, Mr. Liebman?
 20 THE WITNESS: No, Your Honor.
 21 JUDGE JAMES: So he doesn't have it. I don't
 22 have it and the appellant doesn't have it. So as we
 23 stand right now, you're the only one who has it, Ms.
 24 Hallam.
 25 MS. HALLAM: Okay. I think what I want him to

1 refer to is in the FT-422. I am not certain. If
2 somebody shows me an FT-422 -- because I trashed all the
3 stuff that was duplicative, but I think it's under D.

4 JUDGE JAMES: Well, 422 is a many --
5 multi-splendored thing. It's various volumes and it's --

6 MS. HALLAM: It's progress payment number nine.
7 There was an A, B, C, D at least -- in there?

8 JUDGE JAMES: Yes.

9 MS. HALLAM: If I can look at a D, I can tell
10 you whether that is the same as F-232.

11 JUDGE JAMES: Okay. So we're looking at
12 progress payment ten. Is that right?

13 MS. HALLAM: Nine.

14 JUDGE JAMES: Oh, nine. And sub-portion D; is
15 that right?

16 MS. HALLAM: Yes.

17 JUDGE JAMES: Okay. That's a Freedom letter of
18 November 29th '85, correct?

19 MS. HALLAM: November 29th, yes. It's Bates
20 stamped number 3922.

21 JUDGE JAMES: Right. That's what the board
22 has. Is that in what you have as F --

23 MS. HALLAM: I have that under F-232, sub-tab
24 progress payment number nine.

25 JUDGE JAMES: Okay. I take it you, the

1 FT-422?

2 JUDGE JAMES: Well, okay. Let's go off the
3 record.

4 (Off the record)

5 BY MS. HALLAM:

6 Q Mr. Liebman, I know you weren't a party to this
7 letter, but the letter does state that the following
8 summarizes cash which will be paid by Mr. Marvin Liebman.
9 Does that accurately reflect the treatment of the lease
10 under progress payment number nine?

11 A Yes. For progress payment nine, yes, it does
12 accurately reflect that, yes.

13 Q And it also talks about the release of \$3,178
14 related to an error. Was that included in the amount
15 that was paid in progress payment number nine?

16 A No, it wasn't.

17 Q Do you know what error the letter refers to?

18 A No.

19 Q The next paragraph says you agreed to pay -- it
20 looks like it's \$308,000 -- \$308,542 on past salaries
21 improperly withheld?

22 A I don't agree with that word, improperly. It
23 was my understanding that progress payment ten involved a
24 -- I guess a -- correction, or a restructuring of
25 salaries in the manufacturing overhead and G & A areas.

1 Appellant, do have this document available to you,
2 correct?

3 MR. LUCHANSKY: Yes, Your Honor.

4 JUDGE JAMES: All right. And now it's
5 available to the witness. So at least with respect to
6 that document, we all seem to have a copy. You may
7 proceed, Ms. Hallam.

8 MS. HALLAM: Could I just ask one question? Am
9 I to assume that FT or F-232 is not in the record or is
10 it in the record?

11 JUDGE JAMES: What I can say for the Board is:
12 I don't have it here. What I have back at Falls Church
13 offices, I cannot tell you right now. And I'll tell you
14 why I can't tell you. I don't recall that the Board ever
15 received an index to the F files.

16 MS. HALLAM: Well --

17 JUDGE JAMES: When I say that I mean the Board
18 under 43965. Now it's conceivable that the Board, my
19 predecessor, Judge Grossbaum, might have received it
20 under some earlier incarnation of the disputes between
21 these parties, that's possible. I know nothing of that.

22 MS. HALLAM: If there might be additional
23 documents I need to refer to in here, that's why I want
24 to know if they're going to be treated like, I have to
25 enter them into evidence if they're not already at

1 I am not aware that anything was improper. I thought it
2 was just a reclassification. The orders used the
3 description reclassification. I don't recall anything
4 that was improper but otherwise, the amount I agree with
5 -- but not the term, improper.

6 Q Okay. So this wasn't something that was paid
7 under nine? It talks about some future progress payment?

8 A Yes. Number ten.

9 Q Okay. Let's get to number ten then. Do you
10 recall what, if any, amount was not paid under progress
11 payment number ten?

12 A I paid the full value of number ten. I think
13 it was submitted in the amount of three hundred and eight
14 thousand, roughly. I paid the full value after the
15 Defense Contract Audit Agency reviewed number ten to
16 their satisfaction.

17 Q In this amount, \$353,081, does three hundred
18 and eight thousand, five hundred forty-two reflect past
19 salaries?

20 A Yes.

21 Q Is the remaining amount reflective of just
22 adjustments that were made?

23 A It reflects an adjustment in the deduction made
24 for real estate and for rental and occupancy tax.
25 Freedom had indicated that the four hundred thousand I

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1 had deducted for their agreement and compromise with
 2 their landlords, was really an estimated figure which is
 3 something I had not known before, to the best of my
 4 knowledge. The true value was a lesser amount.
 5 After DCAA verified that, I then paid that
 6 amount as progress payment number ten. So they got back
 7 part of that four hundred thousand I had previously
 8 deducted for the rent, non-payment of rent and
 9 non-payment of occupancy tax.
 10 Q Do you know what the original lease said with
 11 regard to the sale of option?
 12 A In terms of dollars or in terms of --
 13 Q Yes.
 14 A Four hundred thousand. No estimated amount was
 15 mentioned.
 16 Q If the money is actually from a sale of option,
 17 why did it need to be adjusted?
 18 A Because I had paid progress payments for that
 19 money and we had to -- those progress payments were not
 20 paid to the landlord or to New York City, and therefore,
 21 as a result -- this was an agreement they were not going
 22 to be paid -- and the company had payments that it wasn't
 23 entitled to.
 24 Q I understand that, but Freedom's position is or
 25 at least it has been, that this \$400,000 is \$400,000 that

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1 Freedom was paid for the sale of an option. If in fact,
 2 they were paid \$400,000 for the sale of an option, why is
 3 this amount being adjusted to give them another \$43,000?
 4 A Okay. Because the -- the documentation in our
 5 possession at the time, showed that four hundred thousand
 6 was a firm figure. We were not aware -- I was not aware
 7 that it was an estimated figure.
 8 Freedom -- with progress payment -- subsequent
 9 to my deduction of the four hundred thousand -- submitted
 10 paperwork advising us that it was really only an
 11 estimated amount -- it was really a lesser amount.
 12 In view of the fact that DCAA reviewed the
 13 documentation and confirmed that, I then paid the
 14 difference back to Freedom -- which was forty some
 15 thousand.
 16 Q Under the lease, wasn't the sale of the option
 17 provision worth \$400,000?
 18 A Under the agreement, yes that's correct.
 19 Q You were adjusting due to the rent payments.
 20 Were you not?
 21 A And the occupancy tax, correct.
 22 Q So you were making the adjustment based on
 23 Freedom's position that this was four hundred thousand or
 24 a sale of an option?
 25 A Correct.

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1 Q I'd like to go on to progress payment number
 2 eleven.
 3 A May I again, refer to the chart? I'm going to
 4 need the chart on some of these progress payments just to
 5 refresh my memory. Is that G -- Rule 4 -- government
 6 Rule 4, number 95?
 7 Q No. It's G, the blue book, 95.
 8 A The blue book, 95. I'm sorry. May I --
 9 because I think I going to need that. May I briefly read
 10 the chart on number eleven?
 11 Q Yeah.
 12 A Thank you.
 13 JUDGE JAMES: Before you get too far into this,
 14 Mr. Liebman, I want to ask you this question. Do you
 15 know who prepared this document G-95?
 16 THE WITNESS: Yes. Ms. Hallam and myself.
 17 JUDGE JAMES: Do you know who, if anybody,
 18 verified the arithmetic in this document?
 19 THE WITNESS: No. It was just Ms. Hallam and
 20 myself. Nobody reviewed the arithmetic.
 21 JUDGE JAMES: Okay. And each or some of these
 22 progress payments contain an item called comments.
 23 Should I also understand that you and Ms. Hallam prepared
 24 those comments?
 25 THE WITNESS: Yes, Your Honor.

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1 JUDGE JAMES: Let me --
 2 MS. HALLAM: Can I ask a question?
 3 JUDGE JAMES: Let me explain why I'm dubious
 4 about using the document. Look at progress payment
 5 number nine, about which this man testified just a few
 6 minutes ago.
 7 Do you see that the amount requested is nine
 8 seventy-nine thousand and some-odd-dollars, so you state?
 9 Do you see that?
 10 THE WITNESS: Yes, sir.
 11 JUDGE JAMES: Okay. Now do you see that the
 12 amount paid is eight 95, two seventeen, so you say?
 13 THE WITNESS: Yes.
 14 JUDGE JAMES: All right. Now interestingly
 15 enough, those dollar figures correspond to Freedom's
 16 list, its payment history for progress payment number
 17 nine. Up to that point, I see no discrepancy.
 18 I see now, two things that puzzle the dickens
 19 out of me. Number one, you say the payment was decreased
 20 by eighty-eight thousand, three fifty-seven.
 21 Eighty-eight thousand, three fifty-seven is the
 22 difference between what and what?
 23 THE WITNESS: It should be the difference
 24 between the nine seventy-nine, one fifty-six and the
 25 eight 95, two seventeen.

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1 JUDGE JAMES: Okay. But it isn't, of course,
 2 right? You know that?
 3 THE WITNESS: No, I don't.
 4 JUDGE JAMES: Okay, fine. Now take a look at
 5 claim costs.
 6 THE WITNESS: I'm sorry, Your Honor?
 7 JUDGE JAMES: The claim costs were a million
 8 thirty thousand, six ninety, correct -- according to this
 9 compilation?
 10 THE WITNESS: Yes.
 11 JUDGE JAMES: Now if the claim costs were over
 12 a million dollars, why was the contractor requesting nine
 13 seventy-nine, one fifty-six?
 14 THE WITNESS: I believe, Your Honor, that --
 15 the total 1,036,090 is at a hundred percent, and the
 16 amount requested was at the progress payment figure at 95
 17 percent.
 18 JUDGE JAMES: All right. Thank you. I have
 19 trouble with this document, Ms. Hallam, because it's got
 20 arithmetical discrepancies in it. I'm aware that your
 21 opponent has not objected to it. I'm just simply
 22 pointing out that -- notwithstanding that it's admitted
 23 into the record -- or into evidence, but I'm not going to
 24 give it a hundred percent credibility.
 25 MS. HALLAM: Okay.

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1 THE WITNESS: Your Honor, may I --
 2 JUDGE JAMES: No. No question is pending to
 3 you. Go ahead, Ms. Hallam.
 4 BY MS. HALLAM:
 5 Q Could you explain what was adjusted, if
 6 anything --
 7 A On progress payment eleven?
 8 Q Yes.
 9 A There was a small deduction, \$7,458, for
 10 excessive legal and accounting fees. I paid 1,152,015 as
 11 opposed to the 1,159,473 requested.
 12 Q Mr. Liebman, I'd like you to go on to progress
 13 payment number twelve.
 14 A Yes. May I refresh my memory?
 15 Q Yeah.
 16 A Yes. It was only a -- the contractor had
 17 requested in a revised submission, six hundred and
 18 twenty-three thousand, three seventy-one, and I paid six
 19 hundred and three thousand, one eighty-three. There was
 20 just a small -- there was a deduction for excessive legal
 21 and accounting fees for twenty thousand, one eighty-five.
 22 Q And number thirteen?
 23 A Again, I have to -- I have to refresh my memory
 24 by looking at the chart.
 25 Progress payment thirteen was an amount

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1 requested of a million, and I paid seven hundred thousand
 2 -- and if you would just bear with me a moment?
 3 Okay. Progress payment thirteen was the first
 4 progress payment that I applied a loss ratio formula.
 5 The matter of a loss contract first surfaced with
 6 progress payment eleven -- then with progress payment
 7 twelve. But thirteen was the first payment I applied a
 8 loss ratio on. There was a significant disparity between
 9 progress and costs.
 10 Progress was thirty-eight, nine point eight
 11 percent cost was approximately sixty-six percent. I was
 12 very concerned about that because that indicated that the
 13 contractor might not be able to complete the contract --
 14 or within the confines of the contract price.
 15 I initiated the formulation of what we called a
 16 typer-team to evaluate Freedom's financial condition. We
 17 requested various types of financial information from the
 18 company including break out of, you know, their estimates
 19 complete. Cash flow, it seemed, went out to Freedom's
 20 facility but was really not satisfied with everything
 21 they provided so the net result was I applied a loss
 22 formula that resulted in payment of \$700,000.
 23 Q Do you know what method is set out in the FAR
 24 for computing a loss ratio factor?
 25 A Yes. There's an illustration in the DAR,

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1 Defense Acquisition Regulation, Appendix E, there's a
 2 sample computation which uses total costs on the
 3 contract.
 4 Q And how are those total costs determined?
 5 A Well, it's the costs that are incurred by the
 6 contractor, as well as the estimated cost to complete.
 7 Then you form a total cost and less any costs questioned
 8 by government reviews and then you divide total costs
 9 into the contract price and come up with what they call a
 10 loss ratio factor and you apply that loss ratio factor
 11 against the total costs that are recognized by the
 12 government. And then you apply the progress payment rate
 13 of 95 percent and you come out with an amount that's
 14 payable under the loss ratio formula. That's on a total
 15 cost basis.
 16 Q Tell me where the government would get the
 17 total cost and the estimate to complete?
 18 A Well, it's from the contractor. That's one --
 19 that's the ideal way. From the progress payment form --
 20 the contractor would indicate his total costs incurred to
 21 date as well as estimate and costs to complete. The
 22 government of course, has the option of reviewing those
 23 costs on the form.
 24 In the absence of that, there's another
 25 scenario. We divide the costs on the form by the

1 percentage of progress and then come up with an estimate
 2 to complete.
 3 Q When you're talking about the costs on the
 4 form, can you look at Rule 4, Tab 160-C?
 5 A Is that the red book -- I'm sorry.
 6 Q I'm sorry. It's the red book, yeah. It's Tab
 7 162, sub-tab C.
 8 A 162, Sub-tab C, is that right?
 9 Q Yes.
 10 A Yes.
 11 Q Could you tell us what numbers you're talking
 12 about when you were talking about the DAR methodology for
 13 computing a loss ratio factor?
 14 A Okay. If we use the contractor's figures, we
 15 would be using blocks 12-A and 12-B total costs incurred
 16 to date, and estimated additional costs to complete --
 17 and then total those costs. And then divide the total of
 18 those costs into the contract price to determine a loss
 19 ratio.
 20 Q When you applied a loss ratio to this, is that
 21 the --
 22 A I'm sorry?
 23 Q When you applied a loss ratio to this, did you
 24 apply a loss ratio to this?
 25 A I applied a modified loss ratio to enable

1 Freedom to obtain more money. I applied --
 2 Q I'm sorry. Before you get into that, is the
 3 DAR methodology, the methodology you explained that's
 4 laid down in the DAR, is that the methodology that cost
 5 and price they've used --
 6 A Yes.
 7 Q -- in computing the loss ratio?
 8 A Yes.
 9 Q And do you know if they used that methodology
 10 consistently throughout this particular contract period?
 11 A Yes, yes.
 12 Q Could you tell me what it is that you used?
 13 A I used -- in order to give Freedom more money
 14 -- I used the costs on the instant progress payment. I
 15 didn't use the total cost on the contract. I just took
 16 the progress payment submission -- the instant progress
 17 payment submission -- computed a ratio that way. And by
 18 that method, more money is payable to the contractor.
 19 Q Why is that? Is that always the way it works
 20 out, or it just --
 21 A It should be, yes. That's the way it should
 22 work out because with the total cost method -- as part of
 23 the methodology illustrated in DAR Appendix E, when you
 24 come up -- when you apply your ratio, you are deducting
 25 as part of that methodology, the total of previous

1 progress payments paid.
 2 I don't do that on the instant progress payment
 3 because I'm taking the instant progress payment in
 4 isolation. I'm not applying any payments on prior
 5 progress payments. So the computation comes out in the
 6 contractor's favor.
 7 Q And you said that when you computed it this
 8 way, it amounted to something more than seven hundred
 9 thousand?
 10 A Bear with me one moment. It resulted in seven
 11 hundred and fifty-nine thousand, six sixty-four
 12 twenty-nine. I -- I made a determination to pay only
 13 seven hundred thousand because of -- for two reasons.
 14 There was a major disparity between progress and costs
 15 and so we weren't happy with the cost data provided by
 16 Freedom to the typer-team. And so I set aside the --
 17 about fifty-nine thousand and I paid seven hundred
 18 thousand -- which was within my discretion. Which was
 19 still more than what the price analyst recommended using
 20 the methodology cited in DAR Appendix E.
 21 Their methodology would have resulted in five
 22 hundred and fifty-seven thousand, nine hundred and
 23 sixty-seven to be paid. So I still paid them more by my
 24 methodology -- although I set aside some of it, pending
 25 receipt of additional cost data from the contractor.

1 Q When this was set aside, was it subsequently
 2 paid?
 3 A I do not recall.
 4 Q You said there was a substantial disparity
 5 between work and the value of --
 6 A There was a major discrepancy between the
 7 percentage of progress -- thirty-three point eight
 8 percent, determined by the industrial specialist from my
 9 office -- and costs cited on the progress payment form.
 10 Something like sixty-six percent of the costs.
 11 Normally, a variance of about ten percent -- or
 12 less than ten percent is no problem. But when you're
 13 talking a major discrepancy of over twenty-six percent,
 14 that's a cause for concern.
 15 Q At what point would a loss ratio factor be
 16 applied? Is there any point or is it just a judgement
 17 call?
 18 A Well, the ACO has the discretion. But again,
 19 obviously in theory you could apply it whenever there's a
 20 loss -- but the ACO -- the contracting officer -- meaning
 21 myself -- administrative contracting officer -- has
 22 discretionary authority under the regulations and we must
 23 be -- we don't apply that arbitrarily. We must be fair
 24 and reasonable and take everything into consideration.
 25 Q We move on to progress payment fourteen.

1 A Again, I'd like to say I must refresh my memory
2 quickly. Yes. They would send submissions -- I pay --
3 what was requested -- the review was done on an original
4 submission -- on the original submission. But there were
5 two basic submissions.

6 The major area of cost questioned had to deal
7 with this three hundred and thirty-five thousand they
8 cited as occupancy costs in the comments -- but it was
9 really for racks and fork lifts. Freedom had -- was
10 leasing racks and fork lifts necessary for the
11 performance of the contract, from its landlord. They
12 apparently billed this in one lone sum -- three hundred
13 and thirty-five thousand. These costs were questioned by
14 DCAA because they had to be amortized -- capitalized or
15 amortized over the life of the lease of the building --
16 which I think was ten years.

17 There were some other small deductions for
18 insurance -- twenty-nine thousand, legal and accounting
19 fees that were excessive -- thirteen thousand. The price
20 analyst from DCMC New York recommended payment of four
21 hundred and thirty-seven thousand, based on their
22 application of the loss formula. I applied, you know,
23 mine -- my modified version of the loss formula meaning
24 costs against the instant progress payment and I was able
25 to pay one million one and some change.

1 Q When you reduced progress payments by
2 questioned costs, were they the questioned costs in --
3 that would be reported in the DCAA reports?

4 A Yes.

5 Q You didn't go ahead and question anything that
6 DCAA didn't question?

7 A No. Normally not, no. It was in the main, I
8 just don't remember any instances off hand where I came
9 up with my own questioned costs but it was -- I relied on
10 the Defense Contract Audit Agency.

11 MS. HALLAM: Your Honor, can we stop for this
12 evening at this point?

13 JUDGE JAMES: How's your projection as to the
14 amount of time you would expect for the complete direct
15 examination of the witness?

16 MS. HALLAM: At least by lunch tomorrow --
17 noon.

18 JUDGE JAMES: All right. Let's go off the
19 record.

20 (Whereupon, at 5:00 p.m., the hearing was
21 recessed, to reconvene on Thursday, May 25, 2000)

CERTIFICATION OF TRANSCRIPT

2
3 This is to certify that the attached
4 proceedings before Administrative Judge DAVID W. JAMES,
5 Department of Defense, Armed Services Board of Contract
6 Appeals, in the matter of FREEDOM NY, INC., at Brooklyn,
7 New York, on 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

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