

Day 9

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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

Thursday, May 25, 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:

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

PROCEEDINGS

(9:30 a.m.)

JUDGE JAMES: All right. Let's go on the record. Let the record reflect that this is day 9 in the hearings of Freedom New York, under ASBCA docket number 43965.

I believe as we recessed last evening we were in the examination of witness Liebman. Mr. Liebman, take the stand, please. Remember you are already under oath.

MR. LIEBMAN: Yes, sir.

Whereupon,

MARVIN LIEBMAN,

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

DIRECT EXAMINATION (resuming)

BY MS. HALLAM:

Q Now, Mr. Liebman, I'd like you to look at Government Exhibit G-95.

A Yes.

Q With regard to the items under claims cost and the items under amount requested, can you explain what the difference in the two numbers reflects?

A Yes. The amount requested is a progress payment request at 95 percent of cost. The amount

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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
MARVIN LIEBMAN				

E X H I B I T S

Number	Identified	Received
NONE		

claimed on the right side of the chart are costs at 100 percent except for subcontractor costs which are reflected at 95 percent.

Q And why is that?

A Because the subcontractor submits progress payments at 95 percent to the prime. The prime then passes on those costs in total to the government for review and payment. We don't take 95 against another 95.

Q I'd like you to look on the 2nd page with regard to HT Foods' request number 3.

A Yes.

Q Would you explain what that comment means?

A Yes.

Q Or where that comment comes from?

A Yes. These are Freedom's figures, Freedom's numbers. I accepted the progress payment in total without question and they originally requested 544,086. They then revised their request to 535,767. I paid that amount. Again, these are Freedom's numbers.

Q Is this Freedom's explanation of what Freedom did and you paid them?

A Yes.

Q And for claimed costs, do you know whether the claims costs reflect the claimed cost of the original or the revised?

1 A This would be the original figure because the
2 subcontractor shows 56,492 as claim costs but that amount
3 was deleted by Freedom and substituted with some other
4 subcontractor costs for Del Monte and Trans Packers.

5 Q And with regard to progress payment number 4.

6 A Yes.

7 Q Would you explain why the claims costs add up
8 to the amount requested?

9 A Yes. Number 4 were costs for a subcontractor
10 called Cadillac. And after the results or review I paid
11 the amount submitted on the prior progress payments two
12 and three. So number 4 really represents Cadillac
13 product progress payment, subcontractor progress payments
14 from prior progress payments 2 and 3 where I had to do
15 subcontractor reviews prior to payment. So I accepted
16 these figures.

17 Q Progress payment number 8, where it says, "The
18 following reductions were taken," are these reductions,
19 do you know, at the 100 percent rate or the 95 percent
20 rate?

21 A The 400,000 was at 95 percent.

22 Q The 400,000 is -- that's not a reduction.
23 Isn't that an offset?

24 A Yes. Well, no. I considered it a reduction
25 from the request. I'm sorry. It was an offset. That's

1 correct. It was an offset against prior progress payment
2 number 4.

3 Well, like I say, categorically the total on
4 the right side claim costs is at 100 percent. That's not
5 915,460. The amount requested 869,688 is at 95 percent.
6 Concerning the other costs, I would have to go through
7 the math. I just can't do that off the top of my head.

8 Q Were are these costs reflected?

9 A I'm sorry, ma'am?

10 Q Where would these costs be reflected?

11 A Well, they are reflected on the progress
12 payment requests and also on government reviews.

13 Q When you deducted for certain questioned cost,
14 where did you get the information from?

15 A From the various government reports. Mainly
16 the audit report and the questioned costs would be at 95
17 percent.

18 Q I think we were on progress payment number 14.
19 Would you just briefly tell us what issues are raised on
20 this progress payment, if any?

21 A The main issue was racks and forklifts. There
22 is a figure here for occupancy costs 335,000. Freedom
23 billed us this amount for racks and forklifts and was
24 questioned by the Defense Contract Audit Agency because
25 they, their position was that the costs for these racks

1 and forklifts which were leased from their landlord,
2 Pilot Realty, I believe, should be amortized over the
3 life of the lease of the building. That was the main
4 deduction. There were some other deductions here, some
5 smaller ones. Excessive legal and accounting fees. Some
6 insurance costs. And also I applied a loss ratio
7 formula.

8 Q And, again, how did you calculate the loss
9 ratio factor?

10 A I calculated the loss ratio factor based on the
11 costs pertaining to the instant progress payment. It was
12 a modified loss ratio factor to enable me to pay some
13 more money to the contractor.

14 Q And with regard to program payment 15, could
15 you tell us what issues, if any, came up with respect to
16 that progress payment?

17 A Yes. There were some deductions, small
18 deductions by DCAA for some 15,000 for some insurance
19 costs, again, excessive legal and accounting fees. The
20 price analyst applied the loss ratio formula based on
21 total contract costs as is illustrated in the DAR as we
22 mentioned yesterday. I applied my loss ratio against
23 costs pertaining to the instant payment and I was able to
24 pay them more money. Had we used the price analyst's
25 calculation zero would have been payable.

1 Q Why is that?

2 A Because when you're going on a total cost basis
3 and computing a loss ratio per the DAR, you have to
4 subtract the total amount of previous progress payments
5 paid, because you are dealing on a total cost basis and
6 you take into account prior progress payments. The way I
7 did it. I used the costs on the instant progress payment
8 only, went through my calculation. And, of course,
9 because we are only talking about an instant progress
10 payment, I did not deduct any amounts for previous
11 progress payments paid. So it was a method that I used
12 called the modified loss ratio, to enable me to pay money
13 to the contractor to keep them going.

14 Q Do you recall paying an invoice for sums
15 recovered under modification P-25?

16 A Yes.

17 Q Could you tell us the mechanism by which that
18 payment was made?

19 A Yes. It was paid in the form of an invoice
20 rather than a progress payment and involved capital
21 equipment. These were costs, these were several items of
22 capital type costs that the buying command had negotiated
23 in the contract price at 100 percent. My P-25 covered
24 many things. One of which involved payment for these
25 capital type costs but not as a progress payment but as

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1 an invoice.
2 Now, the total capital costs were some 500,000
3 plus and what I had to do was deduct from this 500,000
4 plus in capital costs 120,000 or so that I had previously
5 paid in progress payments for these costs in error. So
6 the net amount that we paid Freedom as a result of my 25
7 for these capital costs in the form of an invoice, not a
8 progress payment, was 399,111. And, again, the
9 difference between the 399,111 that I paid for these
10 costs in the form of an invoice and the 500,000 plus
11 total capital costs was that I had paid some maybe
12 119,000, 120,000 in capital costs in error on prior
13 progress payments.

14 Q Mr. Liebman, I'd like you to look at government
15 Rule 4 the red book, tab 119.

16 A Yes.

17 Q Page 3, paragraph 2.

18 A Yes.

19 Q Can you tell by reading this how the MOD
20 intended payments to be made?

21 MR. LUCHANSKY: Objection, your Honor.

22 JUDGE JAMES: What's the basis of your
23 objection?

24 MR. LUCHANSKY: Mr. Liebman, wasn't involved in
25 negotiating this MOD. He can't testify to the intent of

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1 this MOD. The document itself, speaks for itself.

2 JUDGE JAMES: Objection is overruled.

3 THE WITNESS: Well, yes. It's basically what I
4 explained a few minutes ago. It was paid under the
5 payments clause. We paid for capital equipment under the
6 payments clause in the amount of 319,111. Not capital
7 equipment but capital type costs and the real amount was
8 123,107 higher or a grand total of 522,218. But being
9 that previous progress payments for 123,107 were paid for
10 these costs, we deducted those costs of 123,107. So the
11 net amount payable to Freedom was 399,111 under the
12 payments clause of the contract.

13 After payment of this 399,111, all payments to
14 Freedom after the effective date of this MOD in excess --

15 BY MS. HALLAM:

16 Q I don't want you read the document, Mr.
17 Liebman, if you can testify with regard to what this
18 provision means in your mind --

19 A Well, it means that we were able to pay Freedom
20 for these costs for this MOD at 100 percent for the
21 capital type costs listed here and was paid under the
22 payments clause of the contract.

23 Q I'd like to move on to progress payment number
24 16. Can you tell me if any issues arose with regard to
25 payment of this progress payment request?

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1 A Progress payment 16 was sort of an adjustment
2 type of progress payment. It involved adjustment at
3 Freedom's request of the loss ratio factor for prior
4 progress payments. Number 16 involved lost ratio
5 adjustments at Freedom's request for progress payments
6 13, 14 and 15 plus it involved costs for the instant
7 progress payment number 16. And according to Freedom's
8 submission they were entitled to 1,172,654. We agreed
9 with that. A review was done and we paid that exact
10 amount. So we accepted Freedom's figures for this
11 progress payment.

12 JUDGE JAMES: If I'm understanding what you are
13 saying, you are saying that Freedom challenged your
14 calculations and said, "Gee, you've done it wrong," and
15 you agreed with that?

16 THE WITNESS: Well, I'm not saying we did it
17 wrong. They came up with a factor that they felt, I
18 guess, was the figure to use. We reviewed it and we did
19 agree with it. And it was subsequently paid.

20 BY MS. HALLAM:

21 Q I'd like you to look at F-136, F is one of the
22 black books.

23 A Yes.

24 Q The second page of this document.

25 A Yes.

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1 Q Would you tell us what this is?

2 A This is a Freedom document calculating,
3 advising, stating that it's a loss contract. And it goes
4 through the calculation of loss ratio and it indicates
5 that they are losing 2.1 million on the contract and that
6 -- I'm sorry. They are losing 2.7 million and they came
7 out with a loss ratio of 88.73 percent.

8 Q And is that the loss ratio factor that they
9 applied in the re-adjustment?

10 A Yes.

11 Q Would you tell us what adjustments they made in
12 this calculation of the loss ratio factor?

13 A It was mainly in the areas of the costs that I
14 did not pay for the rental of racks and forklifts,
15 335,000. And adjustments in the legal and accounting fee
16 area. And the insurance area. And Freedom came up with
17 an adjusted contract loss and it was reviewed by DCAA and
18 we used their figures.

19 Q They essentially backed those disallowed costs
20 out of the costing curve figure of their progress payment
21 request, didn't they?

22 A Yes.

23 Q And what was the result of backing out the
24 disallowed cost or the result of the loss ratio factor?

25 A Well, then the loss would be less.

1 Q So they would get more money?
 2 A Right. The higher the loss ratio, the more
 3 that's payable to the contractor when you use the loss
 4 ratio adjustment.
 5 Q And on page 3?
 6 A Right. Page 3 basically breaks out what's on
 7 page 2, the previous page, in detail by progress payment.
 8 Q And the sum amount that was requested?
 9 A They were requesting 1,172,654, and that's the
 10 amount that I paid.
 11 Q Further on this tab would you look at
 12 unnumbered page, I believe it's five.
 13 A Is that the calculation of loss ratio at the
 14 top?
 15 Q It's a page that has a handwritten notation.
 16 A Yes. It's a verification that the calculation
 17 was checked and verified and I had verbally advised the
 18 contractor of same.
 19 Q What calculations were checked? Were you
 20 referring to the calculations on page 3?
 21 A Yes. Calculations on page 3. That's correct.
 22 Q So when you check the calculations are you just
 23 checking for mathematical errors?
 24 A Also, the DCA ordered us to check this as well.
 25 We were checking for everything. Mathematical errors,

1 what methodology the contractor used in this proposed
 2 adjustment to the ratio for prior progress payments. It
 3 was checked in total.
 4 Q Okay. Progress payment number 17. Would you
 5 tell us what, if any, issues arose with that?
 6 A Yes. Well, Freedom had requested 3,453,770
 7 which consisted of a lot of costs that had been not paid
 8 on prior progress payments. And in their cover letter
 9 they stated that the actual costs for the current month's
 10 progress payment request was really 1,572,097 in lieu of
 11 the 3 million plus requested. DCAA questioned these
 12 prior period costs of 2.2 million. They also questioned
 13 some same period costs meaning for the instant progress
 14 payment 17, in the amount of 66,000 which basically
 15 consisted of excessive legal and accounting fees 18,000
 16 and, again, lease of equipment 47,500. The lease of
 17 equipment involved leasing from Teknic which had been
 18 covered on the prior progress payments.
 19 The pricing group applied the loss formula for
 20 the DAR and recommended zero payments. I reduced the
 21 progress permit request by the questioned costs found by
 22 the DCA auditor but I applied my version of the loss
 23 ratio, just based on costs on the instant payment and as
 24 a result of that modified version, I was able to pay them
 25 1,325,327. Had I used the traditional method or the

1 method cited in the DAR they would have, Freedom would
 2 have gotten zero.
 3 Q Would you tell us what you mean when you said
 4 DCAA questioned prior period costs? What are prior
 5 period costs?
 6 A Well, apparently these were costs that had been
 7 submitted and paid for on the prior progress payments.
 8 Q Paid for?
 9 A Well, that's my interpretation, yes.
 10 JUDGE JAMES: should the Board understand then
 11 that you perceive this as a double billing?
 12 THE WITNESS: Yes.
 13 BY MS. HALLAM:
 14 Q Progress payment 19. Would you tell us what
 15 issues arose with regard to that?
 16 A Yes. Progress payment number 19 was submitted
 17 for 2.1 million. Freedom's cover letter stated that the
 18 actual requests for the month were 1.2 million. DCAA
 19 took out the prior period costs of around 1.2 million.
 20 It did take exception to 31,000 which was some personal
 21 life insurance, some excessive legal and accounting fees.
 22 And, again, the capital lease of equipment in the amount
 23 of 23,750.
 24 Now, P-29 represents the first progress payment
 25 -- I'm sorry. Progress payment 19 represents the first

1 progress payment where modification P-28 comes into play.
 2 Modification P-28 increased the progress payment ceiling
 3 under the contract based on a certain quantity of cases
 4 delivered.
 5 So, at this point in time, at the time of
 6 progress payment 19, Freedom had delivered 18,052 cases
 7 against the first case increment of 80,000. I computed
 8 what are called delivery percentage factor, where you
 9 divide the number of cases in the increment cited in MOD
 10 P-28, 80,000, into the number of cases actually shipped
 11 against that increment and you come out with a .22565
 12 factor. And I applied that factor against the \$1 million
 13 increment which gave me a maximum amount payable of
 14 225,650 and then I applied 95 percent against that and I
 15 was able to pay the contractor \$200,219.
 16 Q Did you also apply a loss ratio factor to this
 17 progress payment request?
 18 A We are talking about 19 now, correct?
 19 Q Yes.
 20 A Right. No. I did not apply a loss ratio.
 21 JUDGE JAMES: why was that, Mr. Liebman, did
 22 you calculator that the contractor now is going to break
 23 even or profit?
 24 THE WITNESS: No, your Honor, I just forgot to.
 25 JUDGE JAMES: You forgot?

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1 THE WITNESS: No. They were not at a break
 2 even point at this time. They were in a loss position.
 3 BY MS. HALLAM:
 4 Q Payment number 20, can you tell us what issues
 5 arose with that?
 6 A Number 20 was, basically, I have to call it an
 7 administrative type of progress payment. I allowed
 8 Freedom to submit a request prior to the 1-month time
 9 cycle completion. Normally you submit progress payments
 10 every 30 days --
 11 Q Well, Mr. Liebman, did MOD 28 allow them to do
 12 that?
 13 A No. Not specifically. No. MOD 28 -- see, a
 14 progress payment ceiling increases to certain incremental
 15 case deliveries. Specifically 80,000 incremental case
 16 deliveries.
 17 In order to facilitate some payments to Freedom
 18 I allowed those progress payments. It's called really a
 19 protanto progress payment per MOD P-28 which gave me that
 20 authority. And I felt that -- Rather than have the
 21 contractor wait another month, which is the normal
 22 situation for progress payments, I allowed this protanto
 23 progress payment and I was able to pay 311,477.
 24 Q Does that calculation pretty much correctly
 25 reflect what you did to arrive at that number?

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1 A Yes, 33,061 cases were shipped out of the
 2 80,000 increment, and you come up with a delivery
 3 percentage factor of .41 percent less cost questioned by
 4 DCAA of 31,166 and it gives you a maximum amount payable
 5 of 382,000 times a loss ratio factor of .8580. And I
 6 then applied the progress payment rate of 95 percent
 7 which allowed me to pay 311,447.
 8 Q Number 21, could you tell us what issues were
 9 involved in that payment?
 10 A Yes. Again, we have MOD 28 coming into play.
 11 There was an original request, then a revised request and
 12 the DCAA took exception -- the actual revised request for
 13 the current month was 1,222,585. The Defense Contract
 14 Audit Agency took exception to 231,157 and it consisted
 15 of cost of leased equipment 23,750, insurance costs
 16 \$7,000, a small amount of excessive legal and accounting
 17 fees \$95, excess costs over limitation \$199,807.
 18 I made my decision concerning the amount that I
 19 was able to pay taking into account the interests of the
 20 government, the contract loss of approximately 2.8
 21 million, the amount of progress payments that had been
 22 paid to date, cases accepted to date, we also allowed --
 23 The buying command also gave credit to Freedom for cases
 24 that we felt would have been accepted and shipped had
 25 there been no GFM outage. So we gave the contractor

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1 credit for 13,600 cases. And there was some -- as I
 2 said, there were some DCA disallowances.
 3 So basically, we took the total cases accepted
 4 for this 80,000 increment, the increment was 10 October
 5 1986, and of the 80,000 for this increment the contractor
 6 had shipped or we had accepted a total of 71,578 which
 7 gives you a .894 delivery percentage factor. I applied
 8 this factor against the ceiling in Modification 28, which
 9 is a \$1 million ceiling. And the net amount paid was
 10 721,887.
 11 Q And can you tell us finally what happened with
 12 regard to progress payment 22?
 13 A Right. Progress payment 22 was not paid
 14 because Freedom had laid off most of its workers, ceased
 15 full scale production and I was in a progress payment --
 16 proposed progress payment suspension mode.
 17 Q I'd like to talk about the November 5 shutdown.
 18 Do you recall about what time you found out about that
 19 shutdown?
 20 A Well, yes. The November 5 shutdown was the
 21 second shutdown. There had been a shutdown a few weeks
 22 earlier. But, I was advised by the concerned parties,
 23 government types that were stationed there. We had a
 24 team of government inspectors stationed there, you had
 25 industrial specialists who made -- also I believe I was

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1 advised by Mr. Patrick Marra of Freedom of this shutdown.
 2 Q And do you know when that advice occurred from
 3 Mr. Marra?
 4 A I'm not sure of the exact day. It might have
 5 been the 3rd or the 4th or the 5th. It was right at that
 6 point in time of the shutdown. I'm not sure if it was
 7 the exact day or the next day. But he did call. We did
 8 speak on the phone and he did cite that there were severe
 9 outages of contractor-furnished material. And the reason
 10 for these severe outages of contractor-furnished material
 11 was that vendors were requiring payment in advance and
 12 that Bankers Leasing was not advancing any more money and
 13 they would not advance any more money unless Freedom got
 14 the next contract award which was MR-7.
 15 Q Sometime after that do you recall making
 16 payments for Con Ed?
 17 A Yes. We had to make emergency payment to Con
 18 Edison in order for the -- because Con Edison was turning
 19 off their electricity or possibly had even turned it off
 20 and the government had to go into Freedom to remove
 21 inventory that we had title to under the progress payment
 22 clause, as well as government furnished material. So we
 23 paid -- I entered into an agreement with Con Edison where
 24 the government paid the Con Edison bills.
 25 Q And do you know when that agreement was entered

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1 into?

2 A I believe it was in the February 1987 time
3 frame.

4 Q Did you enter into any other agreements with
5 anybody with regard to gaining access to the plant?

6 A Yes. I had to make a contractual arrangement
7 with Freedom's landlord, Mr. Kurt Wittig for guard
8 services, for use of his forklifts, so we could go in
9 there and remove the material that the government had
10 title to that I furnished the contractor..

11 Q Do you remember when you made arrangements with
12 the landlord?

13 A It was probably in the March 1987 time frame.
14 March and April 1987 time frame.

15 Q Do you recall when product first started being
16 moved out of Freedom's facility?

17 A I believe the GFM was -- well, no. I don't
18 remember the exact month. It was around that time frame,
19 the March/April time frame because Freedom was being
20 evicted. Freedom was evicted from its facility. We
21 received notification of that in the March or April time
22 frame. There was an auction at the facility, which I
23 attended as well as other government people. So it had
24 to be around that time frame. And I know the movement of
25 everything out of Freedom was completed around the end of

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1 May 1987.

2 Q You said there was an auction. Who was running
3 the auction or who was selling the products?

4 A Well, it was an auctioneer that was there and
5 it was open to the general public. It was publicized and
6 we had a team of government people there witnessing what
7 was auctioned. The PCO was there, I was there, and
8 numerous other people and we found that they were trying
9 to auction items that the government had paid for in the
10 form of progress payments.

11 Q Who arranged for the auction? Was that the
12 government?

13 A No.

14 Q Do you know who it was?

15 A No.

16 Q Do you know if the government got any of the
17 proceeds of the sale of the auction?

18 A No. I don't.

19 Q You don't know or they did not?

20 A I don't know.

21 Q Mr. Liebman, I'd like you to look at G-92.

22 A Yes.

23 Q Would you look at page -- Well, first, do you
24 know what the payment clause requires as far as
25 submissions from a contractor in order to get paid for a

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1 shipment?

2 A Yes. The contractor must submit an invoice to
3 the government payment office, an original and three
4 copies and also evidence of shipment. The invoice could
5 be what they call a DD form 250 or it could be a covering
6 invoice that's with the DD 250. Also a separate DD form
7 250 which is what we call a "Material Inspection and
8 Receiving Report," must go to the government what they
9 call MOCAS Terminal, M-o-c-a-s, which is a terminal that
10 inputs the DD 250 for shipping purposes.

11 And in order for the contractor to be paid, the
12 invoice must be a proper invoice, must conform to the
13 provisions of the contract. As I said, the MOCAS DD 250
14 must be in put, an original and three must go to the
15 payment office. When everything is considered proper and
16 it matches in the computer, in the system, then it's
17 deemed a payable invoice and a document called a MAAPR,
18 "Material Acceptance and Accounts Payable Report," is
19 generated which indicates the invoice is now approved for
20 payment.

21 Q You indicated that they need the invoice plus
22 proof of shipment. What is proof of shipment?

23 A Evidence of shipment is a bill of lading.

24 Q I'd like you to look in Exhibit 92, page 8.

25 A Yes.

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1 Q Do you know what this form is?

2 A Yes. This is the, what I referred to as a
3 MAAPR, an acronym before, "Material Acceptance and
4 Accounts Payable Report." This form is generated when an
5 invoice has been approved for payment.

6 Q About midway down the page it says, "MAAPR
7 processed." What does that date mean?

8 A That means that this MAAPR report was generated
9 on that date, 2 April '86, and that it was now okay to
10 pay the invoice.

11 Q And the DD 250 received what does that --

12 A Well, that's really -- really means DD 250
13 processed. Where it says received was processed.

14 Q Well, what does that mean?

15 A That means it was processed in our computer
16 system.

17 Q In your what?

18 A In the government computer system.

19 Q In this exhibit all these forms on the top
20 right-hand corner say "manual." Do you know what that
21 means?

22 MR. LUCHANSKY: I'm sorry, your Honor, but what
23 page are we on?

24 MS. HALLAM: We are on page 8.

25 THE WITNESS: Yes. The term "manual" means

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1 that Freedom's invoices required special manual handling
2 because they didn't round off the dollar, the unit price
3 that they were inserting on their invoices. The contract
4 reads \$27.725 per case. When Freedom submitted their
5 invoice they had to really round it off to two decimals.
6 It should be 27.73 not 27.725. When you don't round off
7 it causes problems in the computer system and you have to
8 sort of do a lot of manual work.

9 JUDGE JAMES: But if you do round it off you
10 get wrong number.

11 THE WITNESS: Well, it's a little higher but it
12 all comes out in the wash. It's slightly, it's a nominal
13 amount. But it's the way the system is set up.

14 JUDGE JAMES: All right.

15 BY MS. HALLAM:

16 Q Under the contracts where the DD 250 sent to
17 you for processing?

18 A No.

19 Q The invoices?

20 A No. They go directly to the payment office.

21 Q Was Freedom sending to you to process?

22 A Not to process. No. They might have been
23 sending me an info copy which they weren't required to do
24 and a copy to the industrial specialist as a courtesy.
25 But, they are only required to send an original and

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1 three to the payment office and one copy to what we call
2 the MOCAS terminal for input. Anything else would just
3 be as a courtesy copy.

4 Q Do you know what happened with those finished
5 cases that were retrieved or taken?

6 A They were shipped to government destinations
7 specified by the DPSC contracting officer.

8 Q And who shipped them, do you know?

9 A I don't know who the carrier was but it was
10 shipped after they were inspected and by the Army
11 veterinary inspectors that we had stationed at Freedom.

12 Q I'd like you to look at G-91, page 4.

13 A Yes.

14 Q Have you seen this before?

15 A Yes.

16 Q And what does it indicate the number indicated
17 on there of the cases?

18 A The number of cases, 510 cases.

19 Q Do you know does this DD 250 reflect the cases
20 the government took out of the plant?

21 A It should because it was shipped, these cases
22 were shipped on 3 April 1987 which was during that, you
23 know, shutdown scenario where Freedom was evicted from
24 the building and there was an auction going on. So my
25 best guess, yes, it was during that time period.

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1 MS. HALLAM: I have no further questions.

2 JUDGE JAMES: Appellant wish to cross?

3 MR. LUCHANSKY: Yes, your Honor.

4 CROSS-EXAMINATION

5 BY MR. LUCHANSKY:

6 Q Mr. Liebman, you testified about a number of
7 disallowances that DCAA required because of excessive
8 costs. Do you remember that?

9 A Yes.

10 Q Legal costs, excessive accounting costs, other
11 costs like that, correct?

12 A Yes.

13 Q Can you please tell me what baseline DCAA was
14 using against which it measured the cost to determine
15 what was excessive and what was permissible?

16 A The base line goes back to award of the
17 contract, it reflects or is tied into the proposed price
18 from Freedom and the amounts negotiated and the amounts
19 indicated in the PCO's price negotiation memorandum. And
20 that was used as a base -- I'm sorry.

21 The costs that were cited in the PCO price
22 negotiation memorandum as agreed to among the parties,
23 meaning Freedom and the government during the
24 negotiation, were used as a baseline by the Defense
25 Contract Audit Agency in evaluating progress payment

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1 requests.

2 Q Let's take a look at FT-062, if you would.

3 JUDGE JAMES: It's in Book 3 of the Appellant's
4 documents.

5 THE WITNESS: Sixty-two?

6 MR. LUCHANSKY: Sixty-two, yes. FT-062.

7 THE WITNESS: Yes.

8 BY MR. LUCHANSKY:

9 Q Can you tell me specifically when you said,
10 "These baseline costs were coming from the memorandum of
11 understanding --"

12 A No. I didn't say that. I said they were
13 coming from the price negotiation memorandum. The
14 memorandum of understanding also applies. But these are
15 just general categories. You have to look at the price
16 negotiation memorandum to get specifics in regards to the
17 costs cited in the memorandum of understanding. The
18 memorandum of understanding is really a summary. The
19 details are contained in the PCO price negotiation
20 memorandum as opposed to the memorandum of understanding.

21 Q And that price negotiation memorandum, can you
22 tell me what date it is, where it is in the record?

23 A Oh, it's in the Rule 4, Government Rule 4. I
24 don't remember if it's in the blue book or red book. And
25 it was dated surely during the month of November 1984

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1 when the contract was negotiated.
 2 Q I'm going to ask you to help me identify in
 3 more detail, perhaps your counsel can help identify what
 4 it is you are referring to from the file. I'd like to
 5 have it in front of us.
 6 JUDGE JAMES: Do you have any recollection as
 7 to the document number, Ms. Hallam?
 8 MS. HALLAM: It's at Tab 9, I believe.
 9 THE WITNESS: Correct. It's Tab 9 in the
 10 government records.
 11 BY MR. LUCHANSKY:
 12 Q Tab 9, we have in front of us, this is November
 13 1984 Price Negotiation Memorandum that you are referring
 14 to?
 15 A Yes.
 16 Q This reflects the discussions between DPSC and
 17 Freedom on November 6, 1984; is that right? It's a
 18 summary of those discussions by Mr. Barkewitz and Mr.
 19 Ford?
 20 A Yes. If that was the of negotiation, yes.
 21 Q And these negotiations you are aware both from
 22 this memo and from Mr. Barkewitz and Mr. Ford, involved
 23 the review of prices proposed by Mr. Thomas, correct?
 24 A Right. It was a negotiation session that
 25 involved a review of a Freedom price proposal by

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1 government officers. Yes.
 2 Q And you are aware that that review involved
 3 review of cash flows that Mr. Thomas had submitted in
 4 connection with his October 16 proposal?
 5 A I don't remember if they involved the review of
 6 cash flows. I know they involved the review of a price
 7 proposal.
 8 Q So you don't know what was submitted in support
 9 of that proposal?
 10 A Here 15 years later, I can't say if there were
 11 cash flows involved.
 12 Q So there might have been, you just don't know?
 13 A There might have been. I just don't recall.
 14 Q Okay. This document, this price negotiation
 15 memorandum, this isn't signed by Freedom, is it?
 16 A No. This is a government memorandum that's
 17 required when a negotiation is concluded by a government
 18 contracting officer.
 19 Q There's nothing in the contract or in the
 20 regulations that provides for a dollar to dollar match up
 21 between costs that are negotiated at the bargaining table
 22 and the costs incurred by the contractor of which
 23 progress payment are eligible is there?
 24 A I'm sorry. Say it again.
 25 Q Say it again. There's nothing that you are

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1 aware in the DAR regulations or in this contract that
 2 requires the specific dollars paid pursuant to progress
 3 payments to be precisely those that are the costs that
 4 are discussed at the bargaining table, are you? So to
 5 the extent that there's a figure that you find in the --
 6 A There is. It's depending on the procurement.
 7 If you are dealing with first articles at times an amount
 8 will be retooled during negotiations for first article
 9 limitation, also for procurement of long lead items a
 10 dollar figure could be set that's agreed to among the
 11 parties for items that the contractor would have to
 12 acquire that involved one of the items prior to a first
 13 article approval. So, yes, it could be part of
 14 negotiations and, of course, reflected in the award
 15 document.
 16 Q Because those figures, the totals, include the
 17 numbers that were negotiated at the table?
 18 A Well, the amounts that might be established for
 19 first article limitation and any procurement of long lead
 20 items would, of course, be part of the overall contract
 21 price.
 22 Q So the answer is yes?
 23 A Well, it would be -- I'm not really sure how --
 24 the answer is yes.
 25 Q Okay. Good.

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1 A I was really sure about the wording of your
 2 question.
 3 Q Let's go back, Mr. Liebman, one other question
 4 before we go back to your involvement in the negotiations
 5 of this contract. You described a very technical and
 6 detailed procedure for getting paid on an invoice, did
 7 you not?
 8 A Yes.
 9 Q And far be it from me to be able to step
 10 through those procedures but it required the submission
 11 of a
 12 DD 250 and then a separate DD 250 that shows proof of
 13 shipment, correct?
 14 A The separate DD 250 --
 15 Q Is that right?
 16 A Not exactly. The invoice -- What I did say was
 17 that the invoice -- The contractor must invoice the
 18 payment office. The contractor can use its own invoice
 19 form or use the DD 250 as an invoice. If it uses its own
 20 invoice form it attaches the DD 250 to the invoice.
 21 Okay? And then it's submitted to the payment office.
 22 Apart from this process, a part of this process
 23 but apart from say, let's call it step 1, meaning an
 24 invoice and a DD 250 or just the DD 250 to the payment
 25 office. Step 2 as part of the payment process is a

1 separate DD 250 called a MOCAS copy and they imprint or
2 print on the DD 250 MOCAS copy. That goes to a terminal
3 in our office and that terminal inputs the information on
4 that DD 250 into the MOCAS terminal. You cannot pay an
5 invoice in step 1 unless that DD 250 is input in the
6 MOCAS terminal, step 2.

7 Q I see. So these are strict requirements.

8 A Absolutely.

9 Q Strict prerequisites to paying an invoice?

10 A Absolutely.

11 Q And, in fact, as you testified you were very
12 concerned about these technicalities because if you round
13 off 27.725, if you don't round that off the way you say
14 you should, my goodness it's not going to get processed
15 under the automatic payment?

16 A Right. It would be manual steps involved --

17 Q Okay. Correct.

18 A -- which would just delay payment.

19 Q So let me ask you this, Mr. Liebman, in
20 connection with the MOD 25 payment, that \$311,000, did
21 Freedom submit these forms that you just described and
22 was that invoice processed the way you just described?

23 A No. I don't think so. I mean, to the best of
24 my recollection, the invoice was submitted to me as the
25 contracting officer and I signed off on that. I believe

1 A Yes.

2 Q Without the processing that you described is
3 necessary for a payment under the payments clause, yes or
4 not?

5 A It was --

6 Q Yes?

7 A It was processed --

8 Q Mr. Liebman --

9 A I have to explain the answer. I would be
10 misleading the Board if I didn't explain it.

11 MR. LUCHANSKY: May I enlist the assistance of
12 the Board to instruct the witness to answer yes or no.

13 JUDGE JAMES: Answer the counsel's question.

14 THE WITNESS: Yes, your Honor. I paid the
15 invoice pursuant to the payments provision of the
16 contract.

17 BY MR. LUCHANSKY:

18 Q Without the processing that you described was
19 necessary to pay under the payment clause, correct?

20 A It required different processing. *Yes.

21 MR. LUCHANSKY: I'm going to object and move to
22 strike.

23 THE WITNESS: Without the exact processing as
24 described previously.

25 BY MR. LUCHANSKY:

1 that's the way it happened because this represented a
2 special payment. It wasn't a shipment. We weren't
3 talking a shipment here. So there was no reason to
4 process --

5 Q Mr. Liebman, --

6 A I didn't finish my answer.

7 Q You are not answering the question.

8 A What is the question?

9 Q Did you process Freedom's MOD 25 invoice the
10 way you just described a payment must be processed to be
11 paid under the payment clause?

12 A No.

13 Q And yet you still paid that invoice, did you
14 not?

15 A Yes. Because it didn't --

16 Q Yes. Is that right?

17 A May I answer the question? The invoice did not
18 represent a shipment. It was a special type of payment.

19 Q Mr. Liebman, the question calls for a yes or a
20 no.

21 A I'm sorry. I can't answer it that way.

22 Q Did you pay Freedom's invoice for the MOD 25
23 payment, for \$311,000, did you pay it?

24 A The invoice was paid. If that's the question.

25 Q Did you approve payment?

1 Q MOD 25 that you reviewed as you testified,
2 spoke about payments under the payment clause, correct?

3 A That is correct.

4 Q And that is how this invoice was to be paid
5 according to the language of the MOD, correct?

6 A That's correct.

7 Q Mr. Liebman, let's go back to your involvement
8 in the Freedom MRE 5 contract. Now, you attended a
9 meeting back on July 30, 1984 at DLA headquarters, did
10 you not?

11 A Yes.

12 Q And that was a meeting that took place in order
13 to discuss financing for Freedom for the MRE 5 contract,
14 correct?

15 A Yes.

16 Q And in deed you were there as a substitute for
17 the pre-award monitor who couldn't make it, correct?

18 A Correct.

19 MS. HALLAM: Your Honor, this is outside the
20 scope of my direct. Mr. Liebman, is not on their with
21 list.

22 MR. LUCHANSKY: Your Honor, if I may respond?

23 JUDGE JAMES: You may.

24 MR. LUCHANSKY: Your Honor, there was -- this
25 is directly relevant to the financing issue. Mr. Liebman

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1 testified that he suspended progress payments, that first
2 progress payment because of an issue of financing. And
3 that his alleged belief that financing was lost. Freedom
4 had it through award and then it was lost.

5 This line of questioning is directly relevant
6 to that.

7 JUDGE JAMES: I fail to perceive how
8 questioning about financing in July of '84 is relevant to
9 financial capacity January 4, 1985.

10 MR. LUCHANSKY: Well, if I may have leeway for
11 a couple of questions or I'll make a proffer, your Honor.

12 JUDGE JAMES: Make a proffer.

13 MR. LUCHANSKY: What this will show is that Mr.
14 Liebman knew at that time the Dollar Drydock's agreement
15 to provide any financing was conditional and that was
16 established at that meeting and everyone knew it. And it
17 was on that basis -- And, in fact, DLA issued a draft
18 commitment letter, that 8/9, the August 9, 1984
19 commitment letter is based on language issued by DLA. It
20 was established at that meeting to be a conditional
21 commitment letter. Mr. Liebman was there and he knew it.
22 And the testimony will establish that.

23 If that's the case then a conditional
24 commitment letter as the price changed was not a
25 commitment letter any more.

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1 JUDGE JAMES: Give all that what has that to do
2 with his findings about financial capability January 4,
3 1985?

4 MR. LUCHANSKY: Because Mr. Liebman's decision
5 was -- Mr. Liebman claimed that there was a belief at the
6 time of award that the August 9 commitment letter was in
7 place and it was only upon learning, he claims, on
8 December 17 that that commitment letter was conditional
9 and that Dollar wasn't going to back it up. That's when
10 Mr. Liebman said, "Goodness, gracious. There's not
11 financial backing. Now we've got a changed situation."

12 And that is not the case at all. Everyone knew
13 from the outset that that August 9 commitment letter
14 said --

15 JUDGE JAMES: Okay. I overrule the objection.
16 Go ahead.

17 MR. LUCHANSKY: Thank you, your Honor.

18 BY MR. LUCHANSKY:

19 Q Mr. Liebman, at that meeting, at DLA, the
20 discussion had to do with a catch-22 that Freedom found
21 itself in to obtain financing. Isn't that right?

22 A I don't know.

23 Q Do you remember that Dollar Drydock attended
24 that meeting?

25 A Yes.

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1 Q Mike Durso of Dollar Drydock?

2 A Yes.

3 Q And during that meeting Mr. Durso said, "We
4 don't want to give a commitment letter for Freedom until
5 we have assurances that there's a contract." Do you
6 remember that?

7 A I do not recall.

8 Q Do you remember that in turn the government
9 said, "we don't want to give a contract unless Dollar
10 Drydock gives a commitment letter?" Do you remember
11 that?

12 A I do not recall.

13 Q Do you remember that that was referred to as
14 the catch-22?

15 A I do not recall.

16 Q Do you remember that the resolution of that
17 situation was the agreement by DPSC and DLA to issue a
18 conditional commitment letter? Do you remember that?

19 A I do not recall.

20 Q Do you remember that DLA issued a -- In fact
21 provided Dollar Drydock and Mr. Thomas with a draft
22 commitment letter for purposes of providing this
23 conditional financing?

24 A I do not recall.

25 Q Well, let me turn your attention to FT-45.

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1 A Where would I find FT-45?

2 Q Volume 2 of the Appellant's documents. Now, I
3 understand that you don't -- that this is not a letter to
4 you. This is a letter to Dollar Drydock. But I'm going
5 to ask you to look at the attachment at Tab 0638.

6 Do you recall any discussion at that meeting
7 about DLA providing Freedom with a draft of the
8 commitment letter that has this language in it at 00638?

9 A I do not recall.

10 Q Okay. If you will please look at -- You were
11 aware at the time that a pre-award survey had already
12 been conducted and found adverse for Freedom, correct?

13 A All I know is on a Friday afternoon when I was
14 going home, the Friday before the Monday meeting, my
15 commander said, "You have to substitute for the pre-award
16 monitor. Travel without travel orders." I didn't even
17 know there was a survey going on at that time.

18 Q I'm not sure that was my question.

19 A Okay.

20 Q Certainly you attended the meeting?

21 A I attended the meeting. Yes.

22 Q You certainly paid attention, didn't you?

23 A As best I could. Yes.

24 Q In fact, you were standing in for the pre-award
25 monitor, correct?

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1 A I was there --
 2 Q Weren't you?
 3 A That's correct. That is correct.
 4 Q And you had to report back to the pre-award
 5 monitor on what happened at that meeting, didn't you?
 6 A No. No. Because our deputy commander was --
 7 Q Did you have to report back to anyone?
 8 A No. Because our deputy commander accompanied
 9 me and also the price analyst.
 10 Q Okay. The answer is, no, you did not report to
 11 anyone?
 12 A No. I just briefed my supervisor as to what --
 13 Q So you did report back to somebody. You
 14 briefed your supervisor.
 15 A No. No. Not exactly. No.
 16 Q Did you brief your supervisor?
 17 A Very briefly.
 18 Q Did you brief your supervisor?
 19 A Very briefly.
 20 Q Yes?
 21 A There was some sort of --
 22 Q Yes?
 23 A There was a briefing.
 24 Q Yes?
 25 A Yes. There was a briefing.

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1 Q Thank you.
 2 A You are welcome.
 3 Q Now, if you will please take a look at FT-37.
 4 Do you recognize this as the first pre-award survey, at
 5 least the financial component of the first pre-award
 6 survey of Freedom on this MRE 5 contract performed by
 7 William Stokes on June 6, 1984?
 8 A I don't know if it's the first survey but,
 9 obviously, it is a pre-award survey.
 10 Q Did you at any time become aware of this
 11 document?
 12 A I don't recall.
 13 Q Do you believe that it would have been within
 14 the scope of your --
 15 A No.
 16 Q -- duties as an ACO to have ever reviewed this?
 17 A No. Not normally. No. I'm not directly
 18 involved in a pre-award survey.
 19 Q You were involved -- Well, we'll get to what
 20 you are involved in. Your answer is, No, that you don't
 21 recall ever reviewing this document?
 22 A I don't recall ever -- I don't recall if I saw
 23 this document during that time period.
 24 Q Okay. Do you recall during this time frame and
 25 by "during this time frame," I mean anywhere between this

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1 meeting at DLA and the time of contract award, do you
 2 remember discussing with Mr. Stokes the results of that
 3 first pre-award survey?
 4 A No. I don't.
 5 Q You did discuss the results of the second
 6 survey, didn't you?
 7 A No. Not that I recall.
 8 Q Okay. We'll get to that.
 9 A During that time period.
 10 Q Do you remember discussing with Mr. Stokes
 11 during this time period his discussions with Dollar
 12 Drydock and their concerns about providing financing?
 13 A No. I don't think I had any discussions with
 14 Mr. Stokes during that time period.
 15 Q You didn't have any discussions with him at all
 16 before contract award?
 17 A I don't believe so.
 18 Q Okay. Well, after the -- At the time of this
 19 meeting you do remember that Freedom's proposal, Freedom
 20 had a proposal that it was discussing at this meeting for
 21 a certain price for the MRE 5 contract, didn't it?
 22 A I don't recall.
 23 Q Do you recall that there was a discussion at
 24 the meeting of \$34.81 per case and that that was the
 25 proposed contract amount by Freedom?

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1 A Are we talking about the 30 July 1984 meeting?
 2 Q Yes.
 3 A I don't recall.
 4 Q Do you recall that on August 2, 1984 Freedom
 5 submitted this \$34.81 proposal as a formal proposal to be
 6 considered by DPSC?
 7 A I had no knowledge of that.
 8 Q Did you have any knowledge whatsoever at that
 9 time that Freedom had submitted a proposal for a \$21
 10 million contract?
 11 A I would say perhaps because our office had to
 12 do a pricing review of the various proposals. So perhaps
 13 -- if we were asked to do the review the request for
 14 review would have come from me as the contracting officer
 15 and I would have served sort of the manager, not manager,
 16 but the coordinator of the review to assure the reviews
 17 were conducted and furnished to the buying command. So,
 18 yes, if we were asked to do a review, the paperwork would
 19 have come across my desk for routing to the appropriate
 20 elements for review.
 21 Q Well, in fact, during prior testimony you
 22 considered yourself to be the focal point of this review.
 23 Isn't that right?
 24 A Well, focal point meaning --
 25 Q Isn't that right?

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1 A Focal point meaning --
 2 Q Didn't you consider yourself to be the focal
 3 point?
 4 A Yes. Focal point not for decisions but for
 5 ensuring that the reviews are accomplished in a timely
 6 manner, forwarded to me for consolidation and then
 7 forwarding to buying command. I was not the
 8 decision-maker. I was sort of like a coordinator, a
 9 manager to get the reviews done.
 10 Q That's right.
 11 A That's correct.
 12 Q Manager in that you reviewed these proposals.
 13 Did you not review Freedom's August 2, 1984 proposal?
 14 A I don't remember the --
 15 Q Did you review --
 16 A I don't recall if I reviewed that proposal.
 17 Q You cannot recall whether you reviewed it. You
 18 do remember that you as the focal point were responsible
 19 for forwarding this proposal up to DCAA and to DCASR for
 20 them to do their review, do you not?
 21 A If the buying command had requested --
 22 Q Do you not remember that that?
 23 A If the buying command had requested --
 24 Q Do you remember that?
 25 A I cannot say that categorically unless the

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1 buying --
 2 Q Do you remember?
 3 A I don't remember unless there was request to --
 4 Q Fine. You don't remember.
 5 A Okay.
 6 Q I'll ask you to please take a look at FT-047.
 7 I'll ask you to start at Tab C please.
 8 A Yes.
 9 Q Have you reviewed it?
 10 A I haven't --
 11 Q Do you see it?
 12 A I see it in front of me.
 13 Q Do you recognize it?
 14 A I don't remember it. Obviously it was sent to
 15 me because it's a request of the contracting officer at
 16 the per ACO request. I don't remember it but --
 17 Q Indeed this report was prepared at your
 18 request, isn't that right?
 19 A That's correct.
 20 Q And this is a report on review of proposal of
 21 Freedom Industries, correct?
 22 A That's correct.
 23 Q And in the middle of paragraph 1 it confirms
 24 that the dollar value of the proposal amounts to
 25 \$21,593,000; isn't that correct?

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1 A That's correct.
 2 Q Does that refresh your recollection that indeed
 3 you were coordinating the review of Freedom's \$21 million
 4 price proposal?
 5 A Yes. It does.
 6 Q Good. Now, you see that in addition to this
 7 review other reviews were being performed as well,
 8 correct? There was a review being performed by DCAA;
 9 isn't that right?
 10 A Yes.
 11 Q And you don't even have to review, you don't
 12 have to read this to know that, do you, because that's
 13 pretty standard, isn't it?
 14 A That's correct.
 15 Q So you don't have to read this in order to
 16 admit to me that that's what was going on at the time, do
 17 you?
 18 A No. Because --
 19 Q You recall that? You recall that, do you not?
 20 Do you not?
 21 A The report speaks for itself. I don't recall
 22 --
 23 Q I want you to speak.
 24 A I'm trying to.
 25 Q And I want you to tell me whether you remember,

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1 from your own recollection, that this is what you were
 2 coordinating at the time?
 3 A Yes. I from --
 4 Q Very good.
 5 A The report refreshes my memory to a limited
 6 extent. That's correct.
 7 Q Now, this report is based upon the DCAA report.
 8 It refers to the DCAA report, that was done as well,
 9 correct? There are references throughout, ticking off
 10 the top of my head, page 3, paragraph 7?
 11 A Well, the DCAA report is part of the review.
 12 There's also a technical review involved.
 13 Q Correct. And this DCASMA report includes
 14 results from those other reviews as well?
 15 A Correct.
 16 Q And if you turn back one tab to B, that's a
 17 copy of the DCAA report?
 18 A Yes.
 19 Q And certainly in connection with your being the
 20 focal point for these reviews, you reviewed these
 21 reports?
 22 A Yes.
 23 Q And you reviewed them at the time?
 24 A Yes.
 25 Q So indeed your recollection is now refreshed

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1 that you did review Freedom's proposal and the reports
 2 that were done, analyzing that proposal, correct?
 3 A Yes.
 4 Q Do you also recall now that the financing that
 5 was being discussed of \$7.2 million was financing in
 6 connection with this \$21 million proposal?
 7 A Yes.
 8 Q Now, Dollar Drydock issued a commitment letter
 9 on August 9, 1984, correct?
 10 A Yes.
 11 Q And you were aware of that at the time, weren't
 12 you?
 13 A Yes.
 14 Q You were also aware at the time that that
 15 commitment letter was issued this price proposal of the
 16 \$21 million plus contract was the only price proposal on
 17 the table by Freedom; isn't that correct?
 18 A I don't recall.
 19 Q You don't recall there being any change to it
 20 between the time of August 2, 1984 and August 9, 1984, do
 21 you?
 22 A What is the date of this proposal again? I'm
 23 sorry. The date of this proposal.
 24 Q The proposal is August 2, 1984.
 25 A I'm not aware of any other proposal. Correct.

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1 Q Okay. Now, if you will take a look at
 2 government rule Tab 5.
 3 A Yes.
 4 Q That's the commitment letter that we were just
 5 speaking about, isn't it?
 6 A Correct.
 7 Q Now, if you take a look at the opening
 8 sentence, do you see that it says the words, "In the
 9 event Freedom is awarded a contract in the amount of \$21
 10 million or 21,593,000 then --"
 11 A Yes.
 12 Q And the sentence goes on. Do you see that?
 13 A Yes.
 14 Q Do you agree that this language suggest, that
 15 this language says that this language is conditional?
 16 A Correct.
 17 Q And isn't it the plain reading of this sentence
 18 that Dollar was committing itself to providing financing
 19 if Freedom were to get a contract in the amount of
 20 \$21,593,000, correct?
 21 A Correct.
 22 Q And it is also consistent with the plain
 23 reading of this document that in the event that Freedom
 24 did not receive a contract in the amount of \$21,593,000
 25 that Dollar Drydock was not going to be providing

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1 financing?
 2 A I can't read into that. No. I wouldn't
 3 interpret it that way.
 4 Q Okay. How would you read -- What is your
 5 understanding just from reading this letter as to what
 6 would happen with respect to Dollar Drydock if Freedom
 7 did not get a \$21,593,000 contract?
 8 A Well, again, it's subject to interpretation.
 9 My understanding would be some flexibility. But, again,
 10 I didn't write the letter so it may not -- my
 11 understanding may not reflect what Mr. Seigert from
 12 Dollar Drydock is stating or what he intended. It's not
 13 my letter.
 14 But to me this letter could be flexible. For
 15 example, if Freedom was awarded a contract for a lessor
 16 value, as the case with MRE 5 17 million, 17.1 million,
 17 then the amount of credit wouldn't be 7 million. If you
 18 want to go proportionately downward, if you are moving
 19 from a \$21 million contract to a \$17 million contract in
 20 proportion the amount of credit would drop from 7 million
 21 to about 5 million. But, again, this is my
 22 interpretation.
 23 Q One might hope that that might be the case.
 24 A Correct.
 25 Q But that language isn't in this letter?

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1 A Not the exact language, no. But, again, I
 2 didn't write the letter.
 3 Q But is there any language in here that suggests
 4 that any financing would be forthcoming if Freedom
 5 doesn't get a \$21 million contract; isn't that right?
 6 A Well, it does say at the last paragraph, "It is
 7 understood that the government will rely on this letter
 8 of intent in making any award," the key words are "any
 9 award of the above contract of Freedom."
 10 Q That's right. And the above contract does that
 11 not refer to a contract pursuant to solicitation, DLA et
 12 cetera in the amount of \$21,593,000?
 13 A Correct.
 14 Q Okay. Now, you had some concerns. At the time
 15 you saw this you had concerns about the conditional
 16 nature of this document, didn't you?
 17 A No. I didn't. No. The pricing group did. I
 18 didn't. I wasn't involved in the review of this document
 19 at that time period.
 20 Q Well, in fact, you had conversations with the
 21 PCO Tom Barkewitz at the time --

22

A No. That's not correct. I'd had conversations with Barkewitz several months later, in November 1984. I was not involved in the review of this letter during the pre-award phase.

Q Let's turn to G-71.

A Yes.

Q Now, this is a statement that's in the record of a statement that Mr. Barkewitz gave to Colonel Hollins back on February 24, 1987. Now, you recall doing an interview with Colonel Hollins as well, correct?

A Yes.

Q And the summary of your statements are in the record as well?

A I believe so.

Q Okay. Now, I know that you didn't prepare this and I'm not asking you to do anything other than tell me whether you agree with the statements that Mr. Barkewitz gives to Colonel Hollins --

A Would you --

Q Yes. I'll direct you to the spot.

A Sure.

Q Now, about a third of the way down the page on page 2, the question is asked about whether Mr. Barkewitz thought the Dollar Drydock letter was acceptable financial backing. And he answered that he didn't think it was acceptable. And he says that he told you, the ACO, that he didn't think the letter was acceptable and he agreed. Do you remember all this at all?

A I was not involved with this. I think this is

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incorrect. I was not involved with that. That was the pricing group that was involved with this letter.

Q Well, Mr. Barkewitz then goes on and says that later the letter was considered acceptable by the financial services personnel at DCASR and then they did the pre-award survey. So the pre-award survey was August 30, 1984, correct? That's when Mr. Stokes gave the pre-award?

A I don't remember the exact date but it was around that time.

Q So according to Mr. Barkewitz this occurred before August 30 but you have no recollection of this occurring?

A I have no recollection of that at all. Mr. Barkewitz was dealing really with the pricing people.

Q Well, Mr. Barkewitz goes on and says that the letter presupposes the contract will be awarded at a certain dollar value and the line of credit was tied to the amount of the contract. Do you remember having a conversation with him about that?

A Not at all.

Q He says that it was his concern that if they negotiated a lesser price for the contract that this would cause Dollar Drydock to drop their commitment. You don't remember that at all?

1609
A I don't recall that.

Q All right.

JUDGE JAMES: I guess from what you're testifying that Mr. Liebman the words that Mr. Barkewitz I guess it is that's attributing to you and the communication to you, that portion of it is false, correct?

Q And under section 1-903 this is a section on minimum standards for responsible perspective

Q Then I'll just ask you one other point. He says that he discussed it with you because you were his normal point of contact with Freedom and you had previously administered the contract. Do you remember that you were the normal point of contact?

A In November 1984, the normal point of contact that we were in a pre-award mode -- the pre-award was ending. I'm not directly involved with that.

Q The ACO is the normal point of contact. That is correct.

Q So he was right about that?

Q Now, let me ask you, Mr. Liebman, you are very familiar with the ACO. Is it adequate to deem them to be responsible or

A Yes.

nonresponsible?

Q And you have told me on a number of occasions that you consider them to be responsible for the call --

Q Yes, I mean, just asking you to consider yourself to

Q Now, even if -- referring now to the August 9 pre-award letter, even if the condition weren't satisfied and Freedom didn't get the pre-award, would Dollar Drydock have been not to provide financing under this commitment letter, or would that not necessarily result?

A I don't make that call. I'm not a financial person. I would not necessarily result in Freedom being terminated. That's made by the financial people.

A In the financial area?

Q So you don't consider yourself qualified to make that call?

A They would need financing depending on the dollar value of the contract.

Q Correct.

A The responsibility for the financial people.

They would need financing.

Q Okay. But the question is, in order to be placed, a conditional commitment letter that was in

place, conditioned upon the amount of the award of the contract, that's what the ACO was concerned with, that's because the price of the contract changed, that fact

1 deemed responsible, even though you are not qualified to

2 make the call, but you are aware that in order to be

3 deemed financial responsible a contractor must either

4 have adequate financial resources or the ability to

5 obtain such resources --

6 A Yes.

7 Q -- as required during performance of the contract?

9 A Yes.

10 Q Okay. So even though you are not qualified to decide whether a contractor is in position to satisfy that requirement, nevertheless, you are aware that they don't have to have the financing at the moment in order to be deemed responsible, correct?

15 A I'm not aware -- I can't -- I can't answer that. I really don't know.

17 Q Now, you are aware that ultimately this commitment letter, the August 9, 1984 commitment letter, was accepted by Mr. Stokes as part of his positive pre-award, correct?

21 A Yes.

22 Q And you did at least become familiar with the basis for his decision of giving the positive pre-award, didn't you?

25 A Yes.

1 Q Did you review that pre-award in connection with your review of Freedom's contract proposal?

3 A I don't review pre-awards. The pre-award survey is run by a pre-award monitor. I'm not the focal point of pre-award surveys.

6 Q Well, indeed when you determine whether or not to conduct audits of a contractor during your administration of the contract, one of the factors on which you base your decision on whether to order an audit is whether a pre-award has been performed recently, isn't that true?

12 A It's a fact of consideration. But, again, once the contract is awarded, I run the contractor. Prior to award of the contract --

15 Q Mr. Liebman, I don't think you are answering my question. In fact, I know you are not. Isn't it true that one of the factors that the DLAM provides that you've got to consider when deciding whether to order an audit of a contract's progress payment request is whether a pre-award had been performed?

22 A That's correct.

23 Q And indeed isn't it true that when a contractor's accounting system and controls are deemed to be adequate by you for purposes of progress payments,

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1 then there shall normally be no prepayment audit of the
 2 first progress payment request?
 3 A Are you saying adequate by the ACO?
 4 Q Yes. A determination by you.
 5 A Normally, yes. But not always. Not always.
 6 Q Okay. But you do agree that the DLAM provides
 7 this?
 8 A That's correct.
 9 Q And it says that if you determine that the
 10 accounting system and controls have been determined and
 11 are adequate then normally you don't even have to do, it
 12 says right in the DLAM --
 13 A That's correct.
 14 Q -- "There shall normally be no prepayment audit
 15 of the first progress payment request." That's right,
 16 isn't it?
 17 A Normally, yes.
 18 Q Okay. Now, the DLAM also says with respect to
 19 making this determination, that in evaluating these
 20 systems, like the accounting system, the first source of
 21 data that you would review to make a decision of whether
 22 their accounting system is adequate is determine whether
 23 a pre-award survey was conducted?
 24 A Yes.
 25 Q That's the first source of data that you would

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1 go to consider, Well, you know what, was there a
 2 declaration of an adequate accounting system? Isn't that
 3 right?
 4 A Yes.
 5 Q In this case, did you go to the pre-award
 6 survey to determine whether there was any positive
 7 findings on Freedom's systems?
 8 A Yes.
 9 Q One of the other systems that you have to make
 10 a determination on is the financial system, correct?
 11 A I have to be aware of -- no. I would word it
 12 this way. I would have to be aware and apprized -- aware
 13 of Freedom's financial condition. Not system but
 14 condition.
 15 Q Okay. Now, if you will turn to government Rule
 16 4, Tab 1. So it's not G-1, it's Rule 4.
 17 A Yes.
 18 Q That's Mr. Stokes' positive financial pre-award
 19 survey for Freedom dated August 3, 1984, is it not?
 20 A Do you know what page? There's several surveys
 21 here apparently in this package. There are over 50 pages
 22 here.
 23 Q Well, then we have a different exhibit. Let me
 24 take a look. Hold on.
 25 MR. LUCHANSKY: I'm sorry, your Honor, for some

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1 reason our government Rule 4, Tab 1, did not correspond
 2 to what's at the witness stand. If you will give me just
 3 a moment I'll have to find the document.
 4 JUDGE JAMES: All right. Let's go off the
 5 record.
 6 (Off the record.)
 7 BY MR. LUCHANSKY:
 8 Q Mr. Liebman, do you have that document open in
 9 front of you?
 10 A Yes.
 11 Q I will ask you to turn to page 0679.
 12 A Yes.
 13 Q You see that this is pre-award survey of
 14 perspective contractor financial capability, correct?
 15 A Yes.
 16 Q And if you turn two more pages to 00681, you
 17 see that this section is dated August 30, 1984, correct?
 18 A Yes.
 19 Q And it's signed by William Stokes, Financial
 20 Analyst, correct?
 21 A Yes.
 22 Q And he is indeed the financial analyst I
 23 believe is at DCASMA --
 24 A Yes. DCASMA. DCASMA.
 25 Q -- at DCASMA, so in your agency --

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1 A Yes.
 2 Q -- who performs these financial reviews as part
 3 of the pre-award, correct?
 4 A Yes.
 5 Q Now, if you will review his comments in
 6 paragraph 2, you see that he is discussing the amount of
 7 financing to be provided by Dollar Drydock, correct?
 8 A Yes.
 9 Q And in the middle of the paragraph he comments,
 10 that Dollar Drydock -- I'm sorry. The bank commitment
 11 letter of August 9 state states in part, that the bank is
 12 going to extend the \$7.2 million in the event there is an
 13 award, correct?
 14 A Yes.
 15 Q And he goes on to assess that number, the \$7.2
 16 million to discuss what that money would be used for. Do
 17 you see that?
 18 A He's talking about a cash flow projection.
 19 Yes.
 20 Q That's right. Indeed this is what I referred
 21 to before that Freedom prepared cash flow projections in
 22 conjunction with its August 2 proposal. That would seem
 23 to tie-in with what Mr. Stokes is saying, correct?
 24 A Well, by proposal I thought you were referring
 25 to Mr. Barkewitz' -- I thought you were referring to the

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1 price proposal that Mr. Barkewitz was involved with. I
2 didn't know you were referring to the financial analysis
3 documentation. I thought you meant the price proposal.

4 Q I'm not sure what you just said but let's go on
5 looking at this document. You see here that what Mr.
6 Stokes is doing is analyzing the use of this \$7.2
7 million, what it's for, correct?

8 A Yes.

9 Q And you see that what he is describing is that
10 the \$7.2 million is what will be needed to perform this
11 MRE 5 contract if it's awarded at \$21 million, correct?

12 A Yes.

13 Q And you see that the uses for it are what's
14 laid out here, some money would be used for startup, some
15 would be used to cover the difference between progress
16 payment receipts and cash outlays, correct?

17 A Yes.

18 Q If you turn the page to 00682, you even see
19 that when this money is used to perform a contract he
20 says it's very much doubtful that the bank's exposure
21 will ever even reach the \$7 million, correct?

22 A Yes.

23 Q Now, from your review of the contractor's
24 proposal at the time you knew that this \$21 million
25 proposal was once spread a 21-month period, correct?

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1 A I don't recall the time spread.

2 Q Okay. You would have known it at the time,
3 yes?

4 A Yes.

5 Q And you knew that there was an L-4 clause in
6 the solicitation limiting progress payments to \$9 million
7 on the solicitation?

8 A Or 50 percent of the contract price, whichever
9 is less.

10 Q Correct. And in this case 50 percent -- In
11 this case \$9 million would have been less of the two
12 figures?

13 A That's correct.

14 Q Okay. So, again, at this time the \$9 million
15 progress payment limit under L-4 was what was in the
16 proposal?

17 A Yes.

18 Q And on that basis Mr. Stokes makes his
19 determination about \$7.2 million or less he needed to
20 perform the contract. There's no inclusion in here of
21 any consideration of paying off past creditors, is there?
22 In other words, according to Mr. Stokes he wasn't
23 requiring any financing, either within the 7.2 million or
24 in addition to pay off past creditors of Freedom, was he?

25 A That's correct.

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1 Q Now, he wasn't oblivious to the past creditors
2 because he identifies on page 1 that there's a \$2.6
3 million deficit working capital?

4 A That's correct.

5 Q And back on page 2 he refers to Dollar Drydock
6 being the primary creditor at \$1.4 million, correct?

7 A Yes.

8 Q So he knew there were creditors out there but
9 he wasn't requiring Freedom to get outside financing in
10 order to pay off those creditors, was he?

11 A Correct.

12 Q And he wasn't requiring Freedom to use any
13 portion of that 7.2 million to pay off outside creditors,
14 was he?

15 A Correct.

16 Q And he wasn't providing any projection
17 whatsoever about when Freedom must or even should pay off
18 those existing creditors, correct?

19 A Correct.

20 Q Now, you know from your involvement in review
21 Freedom's proposals, that Freedom's proposal changed
22 after this point, correct?

23 A During negotiation -- Well, I don't know. I
24 don't know.

25 Q Okay. You recall, do you not, that on October

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1 16, 1984 Freedom submitted a new proposal?

2 A Correct. I stand corrected. You are right.

3 Q And indeed this new proposal reduced the per
4 case price from \$34.81 to \$30.12 per case?

5 A I don't remember the exact reduction, but there
6 was a reduction. Yes.

7 Q That sounds about right?

8 A It sounds reasonable.

9 Q Okay. As a result the price, overall price of
10 the contract also came down from \$21 million to about \$18
11 million, correct?

12 A Sounds reasonable, yes.

13 Q Now, at this point you once again were the
14 focal point for the conducting of a review of this price
15 proposal; isn't that right?

16 A Yes.

17 Q And once again you mobilized the troops at
18 DCASMA and DCAA to do a thorough analysis of this price
19 proposal?

20 A Yes.

21 Q If you will take a look at F-19 -- well, I'm
22 not sure, the DCASMA report, if you remember, that came
23 back as a result of your coordinating it and requesting
24 it -- strike that.

25 As a part of your responsibilities in reviewing

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1 this proposal you would have gone through Freedom's
 2 proposal line by line, correct?
 3 A No. No.
 4 Q Your troops would have?
 5 A My troops would have. Correct.
 6 Q And then you would have reviewed their --
 7 A I would have given it a general type of review.
 8 That's correct. My objective was to get the reviews
 9 done. See that it was done on time and get them to the
 10 PCO for negotiation purposes.
 11 Q Okay. Well, let's take a look at the DCAA
 12 report that was prepared in connection with the review of
 13 this price proposal at Rule 4 Tab 11.
 14 Now, a general question before I ask you to
 15 look at a specific area of the DCAA report. You were
 16 aware, as a result of your coordinating the review
 17 efforts, that Freedom had included in its price proposal
 18 a number of startup costs?
 19 A Yes.
 20 Q And you were aware that those startup costs,
 21 other than production equipment which we will treat
 22 separately, but other than production equipment all of
 23 those other startup costs Freedom had included to be
 24 expensed under this contract, correct?
 25 A Yes.

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1 Q And Freedom included those costs under their
 2 GNA and under their manufacturing overhead, correct?
 3 A Yes.
 4 Q And DCASMA concluded in reviewing that proposal
 5 that the absence of other work, meaning this was
 6 Freedom's only contract, all GNA costs would be allocated
 7 to the MRE program which is this contract?
 8 A Yes.
 9 Q Similarly with the manufacturing overhead,
 10 DCASMA concluded that the absence of other contracts,
 11 which Freedom did not have, all of manufacturing overhead
 12 would be allocated to the MRE program, meaning this
 13 contract, correct?
 14 A Correct.
 15 Q Now, looking at the DCAA report, if you please
 16 turn to page 9, this is the schedule for the contractor's
 17 proposed manufacturing overhead, correct?
 18 A Yes.
 19 Q And you see that in the list of the elements of
 20 cost it includes the costs that ultimately became a big
 21 dispute for you, meaning quality control equipment and
 22 supplies, maintenance equipment, building repairs,
 23 automated building management and control system and
 24 lockers, correct?
 25 A Correct.

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1 Q Those items are broken out here?
 2 A Yes.
 3 Q None of those items are even questioned by
 4 DCAA, are they?
 5 A Correct.
 6 Q If you turn to page 12.
 7 A It blurred. The chart that's below --
 8 Q Yes.
 9 A I'm not even to 12. I'm sorry. There's
 10 something between 11 and 12, a chart. Okay.
 11 Q You see that these elements of costs include
 12 salaries, the legal and accounting fees.
 13 A Yes.
 14 Q And down at the bottom you see computer
 15 software for \$30,000, correct?
 16 A Yes.
 17 Q Although some of the salary amounts were
 18 questioned, none of them were disallowed, correct?
 19 A No. They are questioned.
 20 Q Okay. And that resulted in perhaps a reduction
 21 in the amount but DCA doesn't say anywhere here, no, we
 22 are not paying salaries for this person, or that person
 23 or that person?
 24 A They didn't disallow it. They questioned it.
 25 Correct.

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1 Q And computer software, that wasn't even
 2 questioned right?
 3 A Correct.
 4 Q If you will please turn to page 15 of the DCAA
 5 report, you see under contractors accounting system, you
 6 see that Freedom Industries is currently under a double
 7 entry accounting system.
 8 A Yes.
 9 Q And that's acceptable, isn't it?
 10 A Yes.
 11 Q And then the auditor just goes on to note that
 12 the system doesn't provide for segregation of costs by
 13 job, correct?
 14 A Yes.
 15 Q A job means contract, right?
 16 A Yes.
 17 Q And here Freedom only had one job or one
 18 contract, correct?
 19 A Yes.
 20 Q So it didn't seem to bother DCAA that there was
 21 no provision for segregation by job because there was no
 22 job to segregate this contract from?
 23 A Correct.
 24 Q So wouldn't you agree that the audit report
 25 that the DCAA auditors deemed Freedom's accounting system

1 to be adequate as of this point?

2 A That's correct.

3 Q Now, let's discuss what you did with the his

4 information. What you did with this information was to

5 take the DCASMA report, take the DCAA report, take what

6 ever other reports were being prepared, the information

7 that was gathered by your troops and you went down to

8 DPSC on November 5, 1984, as part a team to brief DPSC on

9 all this information; isn't that right?

10 A Absolutely incorrect. I never went to DPSC

11 concerning this price proposal.

12 Q I'm sorry. Where was it?

13 A There was a meeting in New York where the DPSC

14 people came to see us to review the results of the

15 reviews.

16 Q Okay. With that change in my question, that

17 DPSC came up to you guys at DCASMA, New York, the rest of

18 my question is true, correct? You gathered all -- You

19 were part of a team that gathered all this information

20 from DCAA, DCASMA, everyone else, and were responsible

21 for presenting this information to the DPSC people?

22 A I was part of the team but at that point the

23 whole --

24 Q You were part of the team?

25 A The focal point was our General at the time,

1 Colonel, Colonel Hein. There were other people that were

2 in the show. I was part of the team but I didn't run the

3 show in regards to the meeting on the 5 of December with

4 the DPSC people.

5 Q Well, you didn't tune out, did you?

6 A I was there but it was because of the

7 visibility, the extreme high visibility of this

8 procurement our region Commander, Colonel Gunter, his

9 deputy, Joseph Donnelly, my DCASMA local commander

10 Colonel Don Hein and his deputy ran the show. I was

11 there but I didn't run the show.

12 Q You were there for show?

13 A No. I was not there for show. I did not say

14 that.

15 Q You participated?

16 A I did not run --

17 Q Did you participate?

18 A I was there --

19 Q Did you participate?

20 A On a very limited basis.

21 Q Did you participate?

22 A Very limited participation.

23 Q Okay. You got praised by Colonel Gunther about

24 a month later thanking you for your participation in this

25 briefing, didn't you?

1 A I don't know if I got -- I remember getting

2 praised by Tom Barkewitz --

3 Q You got a commendation.

4 A By Thomas Barkewitz.

5 Q You got a commendation?

6 A Thomas -- no. I didn't get a commendation.

7 Thomas Barkewitz wrote a letter to our commander praising

8 the team including myself. But, as I said, I did not run

9 that meeting.

10 Q Okay. Let's go on. Now, after you

11 participated in briefing the DPSC people on these results

12 -- let me ask this. I assume that you and your team told

13 DPSC that the accounting system was adequate, Freedom's

14 accounting system was adequate, didn't you?

15 A I don't recall exactly but I presume that was

16 part of the whole --

17 Q It certainly would have been part of the

18 information?

19 A Yes. Sure.

20 Q Now, the contract was awarded; negotiations

21 took place on November 6 based on the information

22 provided, contract was awarded on November 15. You were

23 aware at that time that the final contract award -- You

24 became aware of the terms of the final contract award,

25 correct?

1 A I became aware of the price and date of award.

2 Q You certainly reviewed the contract?

3 A Well, no. I'm saying -- you said prior to it.

4 Q No. I'm saying. And now at the time of award

5 --

6 A When I got the contract.

7 Q Okay.

8 A When I got the final contract. But I was aware

9 of the negotiation date, the award date, but until I saw

10 a contract in front of me obviously --

11 Q Well, when Freedom got the contract they

12 brought you down a copy, didn't they?

13 A I don't remember who brought me the contract.

14 I know I received it pretty quickly. But, I don't know

15 who actually gave me the contract.

16 Q Well, Freedom came down -- Freedom called you

17 on November 6, when they reached the memorandum of

18 understanding and said, we are going to put in a progress

19 payment because we've reached an agreement on the

20 contract, didn't they?

21 A That's correct.

22 Q And you said, "You can't submit a progress

23 payment until you get a contract and you don't have a

24 contract award yet."

25 A I don't remember saying that.

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1 Q You would have though, right? Because you
2 wouldn't have let them submit a progress payment before
3 contract?

4 A Sure.

5 Q So then Freedom on the day of award, November
6 15, called you again and said, "Look, I've got the
7 contract award." And they came down with it, didn't
8 they? Do you remember that?

9 A I don't remember them -- I just don't remember.

10 Q Okay. But, as you said pretty quickly -- and
11 what you told Freedom was, "Look, I can't --" and they
12 came down with the progress payment request. And you
13 said, "I can't process this until I get the contract from
14 official channels." Didn't you tell them that?

15 A I don't recall that at all.

16 Q Okay. Well, you said you did get the contract
17 soon after award either at or after the time?

18 A Right.

19 Q And reviewed it and found out that the contract
20 award price was \$17 million?

21 A 17.1 million, yes.

22 Q That the progress payment clause, the L-4
23 clause, was increased from \$9 million to \$13 million
24 based on deliveries?

25 A Correct.

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1 Q Now, you administer a lot of progress payment
2 in the contracts that you administer, don't you?

3 A Yes.

4 Q Now, you understand that progress payments are
5 a means of the government's financing a contractor in his
6 performance of a contract, correct?

7 A Correct.

8 Q And you also understand that the DLAM says that
9 when a solicitation includes a progress payment clause
10 that is the contracting officer's representation to the
11 contractor that the government would be financing a fixed
12 price contract, correct?

13 A Actually it means the government is sharing in
14 the financing of the contract.

15 Q Well, let me ask you if you recall that the
16 DLAM says, "when the PCO decides to include progress
17 payments in his procurement he is telling prospective
18 bidders/offers that the government will finance their
19 production efforts."

20 A I don't recall that. I do recall the wording
21 when it talks about progress payment philosophy in the
22 beginning of the progress payment portion of the DLAM.

23 Q Which is where this is from.

24 A Well, there is also the wording that it's a
25 means of the government sharing with the contractor the

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1 cost of performance. I don't recall the interpretation,
2 although I'm not saying it's not there, I just don't
3 recall the interpretation or philosophy or policy that we
4 were there to finance --

5 Q The share --

6 A The sharing.

7 Q The sharing is 95 percent government, 5 percent
8 contractor, correct?

9 A That's correct.

10 Q And to the extent that the bank is financing
11 the contractor up to that 95 percent limit, the
12 government is serving as a bank, so to speak, for the
13 performance of the contractor's efforts?

14 A Not it's not a loan. Progress payments are not
15 a loan. It's based on incurred costs of progress. It's
16 not a loan. We are not a bank.

17 Q Well, I don't want to argue with you, sir, but,
18 indeed whether we call it a loan or not we are saying
19 that, first of all let's understand one thing, for a
20 large business the way progress payments work, is that a
21 large business not only incurs the cost but they have to
22 pay those costs in order to get progress payments. Isn't
23 that correct?

24 A Yes. In those days, yes.

25 Q Okay. For a small business, however, like

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1 Freedom, progress payments are paid on costs as they are
2 incurred and before they are paid; isn't that correct?

3 A Correct.

4 Q And that was what applied to Freedom, correct?

5 A Yes.

6 Q The DLAM also provides, you are saying it's
7 based on progress. The DLAM actually specifically states
8 that progress payments are not paid on percentage of
9 completion, isn't that right?

10 A (No response.)

11 Q Isn't that right?

12 A (No response.)

13 Q Isn't that right?

14 A I can't answer it that way.

15 Q Well, let's take a look at the DLAM and just
16 see if you --

17 A My bible is -- the bible is the DAR. The
18 DLAM --

19 Q Mr. Liebman, let me just ask you to take a look
20 at the DLAM. If you look at G-4.

21 A Yes.

22 Q And if you will please turn, if you will please
23 look on that first page at 32.590-4, paragraph (b), which
24 is in the right side column of this page.

25 A What page?

1 Q We are on page 1 of G-4.
 2 A Okay. I have the -4, and where?
 3 Q And now on the right-hand side of the page you
 4 see, do you see paragraph (b)?
 5 A Yes.
 6 Q Payments based on costs?
 7 A Yes.
 8 Q Do you see that this says, "The progress
 9 payments governed by the clause at FAR, whatever, and DAR
 10 7-104.35 are based on costs not on a percentage of
 11 physical completion?"
 12 A Absolutely. But, you still must --
 13 Q Isn't that correct?
 14 A That's what it says. Yes.
 15 Q And this reference to DAR 7-104.35, that
 16 section is the DAR progress payment clause, correct?
 17 A That's correct.
 18 Q Okay.
 19 JUDGE JAMES: Mr. Liebman, do you have any
 20 recollection as to whether this particular DLAM was in
 21 effect in November 1984?
 22 THE WITNESS: May I look at the covering page?
 23 I don't know offhand because it's blurred. I know I have
 24 -- In my office I have a December '84 DLAM that I use.
 25 But I don't know if this is a copy from my December DLAM.

1 It's blurred on top so I really can't say for sure.
 2 MR. LUCHANSKY: Well, your Honor, if I may I
 3 happen to have brought a copy of the December 1984 DLAM
 4 which is a copy we made, I think, from Mr. Liebman's
 5 copy. Brought it with me. I'll be happy to open it up.
 6 JUDGE JAMES: I'm really not interested in
 7 December 1984. No, sir.
 8 MR. LUCHANSKY: Okay.
 9 BY MR. LUCHANSKY:
 10 Q Mr. Liebman, are you aware of any changes to
 11 the DLAM, to the progress payment clause in the DLAM
 12 between the version of the DLAM prior to December 1984 to
 13 the December 1984 version?
 14 A There could be. I'm not aware of any offhand.
 15 But, the DLAM is constantly being changed and revised.
 16 Q You are not aware of any changes?
 17 A I'm not aware. I don't recall any specifics.
 18 No.
 19 Q Certainly from the time of December 1984
 20 onward, you administered this MRE 5 contract in
 21 connection with the provisions of this December 1984
 22 DLAM, correct?
 23 A And any changes that might have been made to
 24 it.
 25 Q Do you know of any changes that were made to

1 it?
 2 A Not offhand. But, as I said before, changes
 3 were constantly being made to the DLAM throughout the
 4 year. Whether or not --
 5 Q Do you recall that Freedom obtained its DLAM
 6 from you?
 7 A They probably did as part of the discovery
 8 process. I just don't recall.
 9 Q Okay. And that it was provided in response to
 10 the request of "Give us a copy of the DLAM you were using
 11 to administer this contract?"
 12 A I don't recall.
 13 Q So now does this refresh your recollection that
 14 during the course of your administration of this contract
 15 that progress payments were not based on a percentage of
 16 completion but rather on costs incurred?
 17 A Well, that was my recollection always. Even
 18 when you started the testimony along this line.
 19 Q So let me understand how this works, Mr.
 20 Liebman, for progress payments for a small business like
 21 Freedom, the way it's supposed to work is that Freedom
 22 incurs costs, doesn't pay them yet, submits to the ACO a
 23 progress payment request including these costs and asks
 24 for 95 percent of those costs before the contractor pays
 25 them, correct?

1 A Correct.
 2 Q And then generally within five to 10 days the
 3 government is supposed to turn around and pay the
 4 contractor for 95 percent of those costs, right?
 5 A Under their normal conditions.
 6 Q That amount of money that the government pays
 7 only gets paid back to the government once deliveries are
 8 made, correct?
 9 A Correct.
 10 Q And the way that those monies are paid back to
 11 the government is through a liquidation rate, correct?
 12 A Correct.
 13 Q And so a certain percentage of the amount of
 14 money that is to be paid to the contractor on a delivery
 15 is withheld by the government to pay the government back
 16 for the progress payments, correct?
 17 A Correct.
 18 Q And you are saying that that's not a loan?
 19 A Progress payments are not a loan.
 20 Q Are you saying that's not a loan?
 21 A Not me. This is the government.
 22 Q Okay. You are calling it a progress payment,
 23 not a loan?
 24 A It's not a loan.
 25 Q Okay. Do you also agree that at this time that

1 the government favored progress payments for small
 2 contractors over any other form of financing?
 3 A Except for private financing.
 4 Q Isn't it true, Mr. Liebman, that generally, and
 5 we're not talking about small businesses, generally there
 6 are five different types of financing recognized in the
 7 FAR and the DAR, correct?
 8 A I don't remember the exact number but there are
 9 various types recognized.
 10 Q And generally progress payments ranked second
 11 to private financing, correct?
 12 A Correct.
 13 Q Now, private financing in this context means,
 14 financing provided by the contractor itself, correct, not
 15 commercial financing for which interest would be charged?
 16 Isn't that right?
 17 A I don't know. I don't know.
 18 Q Well, you do know that the DLAM says that the
 19 reason progress payments are incurred in favor is because
 20 it's in order to save the government the additional
 21 expense which will be incurred if the government had to
 22 reimburse contractors for the cost of commercial
 23 financing through higher bid prices?
 24 A That's correct.
 25 Q So if the preference for private financing,

1 does that refresh your recollection, that that means
 2 financing from the contractor itself which wouldn't cost
 3 those kind of interest rates?
 4 A I really can't answer that one.
 5 Q Do you recall that E503, you are familiar with
 6 that, correct?
 7 A What is E503?
 8 Q That's the appendix E to the DAR?
 9 A I know what E is, but what is 503 specifically?
 10 Q Under 503, which I believe is the progress
 11 payment session, are you aware that it says that that
 12 preference for private financing above progress payments
 13 is not applicable to small businesses?
 14 A I don't recall that wording.
 15 Q If you look at G-1 and look at E503, please,
 16 customary progress payments --
 17 A Yes.
 18 Q Doesn't this provision apply to Freedom?
 19 A Yes.
 20 Q These were customary progress payments that
 21 Freedom was eligible for, correct?
 22 A Yes.
 23 Q If you go down to the second paragraph that
 24 starts, "The long lead time or preparatory period in
 25 these cases --" Do you see that? Do you see the

1 paragraph I'm referring to?
 2 A Yes.
 3 Q If you then go to the second full sentence,
 4 about five lines down, do you see where it says, "The
 5 general preference for private financing is not
 6 applicable to this class of cases?"
 7 A Yes.
 8 Q Now, Freedom was a long lead time case,
 9 correct, a long lead time situation, wasn't it?
 10 A Yes.
 11 Q And so does that refresh your recollection that
 12 this provision of E503 does apply to Freedom or did apply
 13 to Freedom at the time?
 14 A Yes.
 15 Q So the preference for private financing is not
 16 applicable to Freedom, was not at the time, according to
 17 E503?
 18 A It's too general because Freedom was a unique
 19 situation because we were dealing with a startup
 20 operation.
 21 Q Okay. You can't answer the question.
 22 A I can't answer it that way.
 23 Q Okay. No question pending.
 24 A Okay.
 25 Q Do you recall at the time you were

1 administering this contract that progress payments were
 2 considered particularly beneficial to small businesses
 3 because he might not be able to compete otherwise or
 4 couldn't afford the rate of interest that they would have
 5 to get if they had to go outside the government to get
 6 the financing?
 7 A Yes.
 8 Q So this is a good deal all around. It's a good
 9 deal for the government because the government saves
 10 interest costs by financing the contract itself, correct?
 11 A Yes.
 12 Q And it's a good deal for the contractor because
 13 especially a small contractor might not be able to afford
 14 those interest rates anyway, correct?
 15 A Yes.
 16 Q And so the government agrees to finance the
 17 contract up to 95 percent through progress payments?
 18 A Correct.
 19 Q Now, a last point on the principals that you
 20 were governed by and were supposed to adhere to at the
 21 time you were administering this contract is that:
 22 progress payments are also favored by the government
 23 because they are supposed to require minimum government
 24 surveillance, correct?
 25 A As a norm. Under normal conditions, yes.

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1 Q That's the way it's supposed, that's how it's
2 generally supposed to work?
3 A Yes.
4 Q And the way it's supposed to require -- it's
5 supposed to be easy to administer because the government
6 is supposed to be relying upon the contractor's systems
7 rather than on the review, the microscopic review of
8 particular cost submissions, isn't that right?
9 A Under normal conditions, yes.
10 Q And the systems that we are talking about are
11 the contractor's accounting system and controls, his
12 production system and the certification of the contract,
13 correct?
14 A Right.
15 Q And if that's the case, when you've got a
16 contractor who has got an adequate accounting system, and
17 adequate controls and the production system has been
18 approved, then in general cases, in normal cases the ACO
19 is simply supposed to rely upon the certification of the
20 contractor for purposes of paying that progress payment,
21 isn't that right?
22 A Right. And tailor reviews accordingly,
23 correct. Correct. Under the circumstances.
24 Q Well, let's talk about reviews for a minute.
25 Let's talk about the first progress payment. Now, at

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1 this point, November 15, 1984 --
2 MS. HALLAM: Objection. This is not within the
3 scope of my direct either. I didn't ask anything about
4 those progress payments prior to H.T. Foods.
5 JUDGE JAMES: Objection is overruled.
6 BY MR. LUCHANSKY:
7 Q On November 15, 1984, based upon what we've
8 just discussed, the government should be eager -- strike
9 that.
10 Freedom's first Progress payment is for about
11 \$100,000, right?
12 A Yes.
13 Q It's for rent and taxes, correct?
14 A Correct.
15 Q Now, at this point as we've seen Freedom's
16 accounting system has been declared to be adequate, isn't
17 that right?
18 A Correct.
19 Q In fact, the DCAA audit report that declared it
20 adequate, that was information that you were using on
21 November 5, 1984 to brief DPSC, correct?
22 A For price proposal purposes, yes. Not for
23 progress payments but for price proposal purposes.
24 Q There's no difference for purposes of --
25 there's no difference in the review of an accounting

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1 system for purposes of what DCAA was doing as opposed to
2 what you did -- strike that.
3 In reviewing Freedom's accounting system for
4 adequacy and the DCAA declaring it adequate, that meant
5 that it was adequate for all purposes, didn't it?
6 A I would say so, yes.
7 Q DCAA didn't qualify it's position.
8 A That's correct.
9 Q And, therefore, it would have been DCAA was
10 reaching the conclusion that it was adequate also for
11 progress payments, correct, for all purposes?
12 A One can draw that conclusion, yes.
13 Q So now, 10 days later at the time of contract
14 award you have information in your personal possession
15 declaring the accounting system adequate. There has
16 never been any question raised about Freedom's production
17 systems, correct, at that time?
18 A Correct.
19 Q And that didn't come into play in your
20 administration of that first progress payment, correct?
21 A Correct.
22 Q And now you get a progress payment, the first
23 progress payment for only \$100,000 for rent and taxes.
24 Now, you understand that Freedom needed to pay its rent,
25 didn't you?

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1 A Of course.
2 Q You understood that if they didn't pay their
3 rent they were in trouble, correct?
4 A I didn't know that they would be in trouble.
5 But they had to pay their rent.
6 Q You know that if a tenant doesn't pay his rent
7 to the landlord the tenant risks eviction?
8 A Well, there's always that risk. But you can
9 always --
10 Q Right. It's a risk.
11 A -- get postponements. There are various
12 scenarios that can develop.
13 Q Sure. And you knew that under the progress
14 payment clause while Freedom had incurred that cost they
15 hadn't paid it yet and the landlord is waiting for their
16 money?
17 A Correct.
18 Q Now, I'll go back to that provision under the
19 DLAM that isn't it true that when the accounting system
20 has been declared adequate, isn't it true that there
21 shall normally be no prepayment of the first progress
22 payment request?
23 A Normally, yes.
24 Q Now, you ordered a repayment review of that
25 first request, didn't you?

1 A Correct.

2 Q What were you trying to find that wasn't

3 already declared to be adequate -- let me phrase it

4 another way.

5 Was there anything in the DCAA's review or

6 audit that you were looking to determine that was --

7 strike that.

8 You testified earlier on direct that the reason

9 you ordered that prepayment review was to determine the

10 adequacy of Freedom's accounting system, didn't you?

11 A We had to test the adequacy of the accounting

12 system.

13 Q Now, where in the DAR or the DLAM does it say

14 for progress payment that once a system is declared

15 adequate that the purpose of a review is to test that

16 system?

17 A It's DAR appendix C. There is leeway in there

18 for that.

19 Q Can you turn to G-3 and point that out to me?

20 I'm sorry. It is not G-3. It's G-1.

21 A Well, E-521.1, which is page 23. Again, that's

22 E-521.1.

23 Q Yes.

24 A Title "Extent of Supervision."

25 Q Yes. Is that the provision that you are

1 referring to?

2 A That's one of the provisions, yes.

3 Q Let me ask you this, with respect to a request

4 for rent and taxes, what was there to test?

5 A There were several things involved with that.

6 It wasn't just rent and taxes. First of all, the --

7 Q Wait a minute. Are you disagreeing that the

8 first progress payment was for anything other than rent

9 and taxes?

10 A No. I didn't say that.

11 Q Okay. Then let me ask you because you did say

12 that.

13 A I'm trying to explain.

14 Q I want you to answer my question.

15 A Okay.

16 Q What was there to test about Freedom's

17 accounting system with respect to a progress payment

18 request for rent and taxes?

19 A Because -- well, first of all, it's their first

20 progress payment. They never had progress payments

21 before.

22 Q But didn't we just agree that normally once an

23 accounting system is declared adequate the DLAM says

24 normally there shall be no prepayment audit of the first

25 progress payment request?

1 A Because this was an unusual situation.

2 Q How was this unusual? How was this different

3 from any other contractor? Was there something special

4 about Henry Thomas?

5 A No. Not Mr. Thomas. No.

6 Q What was unusual about this?

7 A First of all, this was the contractor's only

8 contract. There was no physical progress on the product

9 at the time. Normally when we get in overhead-type

10 costs, under normal conditions, the overhead is applied

11 to direct costs. That was my first gut reaction.

12 Also, there were problems with the progress

13 payment form. It was prepared incorrectly. And it took

14 three submission before we got a correct form. Mr.

15 Thomas used an alternate liquidation rate which was not

16 provided for in the contract.

17 Q And that's what required you to do an audit of

18 their system?

19 A I decided to do a --

20 Q Is that what caused you to order a review an

21 audit of Freedom's system?

22 A That's correct. It was their first progress

23 payment and I wanted to test the system. And that's a

24 standard --

25 Q How does the way Mr. Thomas fills out the

1 progress payment request form, how does that relate to

2 his accounting system?

3 A Well, it does. It reflects --

4 Q How?

5 A I'm not an accountant. But, obviously, if you

6 have the wrong thing --

7 Q You made the decision to order a prepayment

8 review, didn't you?

9 A My main purpose of --

10 Q Didn't you?

11 A I made the decision based on --

12 Q You have to answer my questions. I'm sorry.

13 A I'm trying to answer. I made the decision.

14 Yes.

15 Q Okay. And you just testified that you made the

16 decision in part because the progress payment request

17 form wasn't filled out correctly?

18 A No. That's not correct. I'm just providing

19 that in the way of background information. I made the

20 decision --

21 Q And so are you changing your testimony now?

22 A No. I'm not changing the testimony. I'm

23 trying to --

24 Q So now tell me because you are confusing me.

25 Tell me now what reasons you had that made Freedom any

1 different, something out of the normal that caused you to
2 order a prepayment audit, prepayment review of Freedom's
3 progress payment request number one?

4 A Because it was a start up company, never had
5 prepayments before I ordered a prepayment review. It was
6 my decision.

7 Q Because they were a startup company.

8 A I'm sorry.

9 Q Because they were a startup company?

10 A Correct.

11 MR. LUCHANSKY: Your Honor, may I suggest that
12 perhaps we break for lunch now and resume after lunch?

13 JUDGE JAMES: Suggestion is noted. And we are
14 off the record. Let's resume at 1:00 o'clock.

15 (Whereupon, at 12:00 p.m., the hearing was
16 recessed, to reconvene at 1:00 p.m., this same day.)
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1 AFTERNOON SESSION

2 JUDGE JAMES: Mr. Liebman, please take the
3 stand.

4 Whereupon,

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

9 CROSS EXAMINATION (resuming)

10 BY MR. LUCHANSKY:

11 Q Mr. Liebman, we were talking about the reasons
12 or the reason you gave for ordering a prepayment audit of
13 progress payment number one was just because -- You were
14 aware of the time that anytime you order a prepayment
15 audit, whether the first one or subsequent one, you are
16 obligated to document the contract file with your
17 rationale. Isn't that right?

18 A Correct.

19 Q You didn't do that in this case, did you?

20 A I don't recall.

21 Q Is there any where you can point me to, either
22 in the record or anywhere else that you know of where you
23 documented your reasons for ordering prepayment audit of
24 Freedom's progress payment request number one?

25 A I don't recall a specific document. It's

1 probably in the various --

2 Q I don't want probably.

3 A I can't recall a specific document.

4 Q You don't recall that you ever did that, do
5 you?

6 A I cannot say that with certainty.

7 Q You don't know one way or the other whether you
8 did or you didn't?

9 A I can't say that with certainty.

10 Q Certainly it's not in the record here, you
11 haven't seen it in the record, have you?

12 A I haven't seen it. No.

13 Q Now, even more than that, Mr. Liebman --

14 A Oh, I shouldn't say that. I'm sorry. Because
15 the record contains various reports, government reports
16 that I've prepared. It's conceivable that it's contained
17 in these reports. I don't know offhand.

18 Q Well, just go back to. You don't remember ever
19 specifically documenting the record for purposes of
20 progress payment number one with your rationale for --

21 A Wait -- no.

22 Q Let me finish my question -- for your rationale
23 for ordering a prepayment audit of the progress payment,
24 correct?

25 A No. That's not correct. I believe I did send

1 a letter to Freedom advising them that I was holding that
2 prepayment review. I believe that was the case.

3 Q Okay. Well, let's turn to F-20.

4 A Where would F-20 be? Yes. There is the letter
5 that I was speaking about. I did on 30 November 1984
6 advise Mr. Thomas in writing that due to need for review
7 I was conducting a prepayment review.

8 Q Very good. Let's take a look at this letter.
9 First of all, you do note that the progress payment
10 request was dated November 15, 1984, correct?

11 A Correct.

12 Q The date of your letter back to Freedom is
13 November 30, 1984.

14 A Yes.

15 Q Isn't that correct?

16 A Correct.

17 Q Now, you claim in this letter that the request
18 was received in this office on November 29, 1984.

19 A Correct.

20 Q Does this refresh your recollection as to the
21 circumstances of how you received the first progress
22 payment request?

23 A I can't say with certainty. I believe it was
24 hand-carried to my office. But I can't say that with 100
25 percent certainty.

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1 Q And don't you recall that Freedom hand-carried
2 that request to you first on November 15, 1984?
3 A I don't recall that.
4 Q Okay. But the request is dated November 15,
5 1984?
6 A The request is dated the 15th, yes.
7 Q Any reason to believe that Freedom would have
8 waited two weeks before they came to you and hand-carried
9 that request?
10 A I don't know off-hand.
11 Q Okay. So now we are two weeks after the date
12 of this request which is perhaps 10 days later than they
13 should have been paid on it according to the five to ten
14 day turn around time and you do tell them that due to the
15 need for review you anticipate that final action on this
16 request won't be completed until December 21, 1984. Is
17 that correct?
18 A That's what it says. Correct.
19 Q Now, we are still talking about the progress
20 payment request for rent and taxes, aren't we?
21 A That's correct.
22 Q So you are telling Freedom that you are not
23 going to even consider paying their rent and taxes until
24 this review is completed which most likely isn't until
25 seven weeks, I'm sorry, five weeks after the date of the

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1 request?
2 A That's not correct. Because as I told Freedom,
3 during discussions on the phone, we were going to do
4 everything I could to accelerate the review.
5 Q I'm sorry. I'm talking about what you are
6 telling them in this letter, Mr. Liebman.
7 A The letter says on or about. But that's just a
8 guess. It's an estimate.
9 Q Okay. So you were anticipating that you
10 anticipated, as somebody who is trying to hurry this
11 process, that the earliest you are going to be able to
12 give them a response is five weeks after the date of
13 their request, correct?
14 A Three weeks after receipt of the request. Five
15 weeks after date of the request. And, again, this was a
16 guess at that time. Just an estimated date.
17 Q I'm not going to argue with you. You don't
18 indicate the circumstances of how you received it on
19 November 29, here, correct?
20 A Well, the record says it was received on the
21 29. That's what the letter says. I wouldn't lie in the
22 letter.
23 Q I understand.
24 A I'm not going to lie.
25 Q But it doesn't say and you don't recall whether

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1 Freedom made an attempt to hand carry it to you earlier
2 than that, correct?
3 A Well, also there's another document.
4 Q Isn't that correct?
5 A I said I did not recall that. There's another
6 document that specifies 29 November. There's another
7 document.
8 Q Okay. Good. Now, where in this letter do you
9 specify your rationale for ordering a prepayment review,
10 Mr. Liebman?
11 A No. It's specified in here.
12 Q Okay. So, in fact, you did not document the
13 contract file with your rationale for requiring a
14 prepayment review, isn't that correct?
15 A No. That's not correct. I'm not saying that.
16 Q When I asked you that before you pointed to
17 this letter, correct?
18 A No. I did not. I said it could be in
19 government reports --
20 Q Mr. Liebman, now, you also note at the bottom
21 of this page that per contract requirements a progress
22 payment request cannot be submitted more frequently than
23 monthly, correct?
24 A That's correct.
25 Q Do you recall that you included that statement

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1 in response to Freedom's informing you that in light of
2 them not having received payment yet they now had
3 additional costs that they were incurring and now were
4 about to submit a second progress payment. Do you
5 remember that?
6 A They were going to submit a revised progress
7 payment.
8 Q Well, you do recall them speaking to you about
9 having additional costs?
10 A Yes.
11 Q Now, isn't it true, Mr. Liebman, that they
12 expressed concern at that time about not having been paid
13 for progress payment number one?
14 A That's correct.
15 Q And when they told you that they wanted to
16 submit now a second progress payment request you told
17 them they can't submit progress payment requests more
18 frequently than monthly, correct?
19 A That's why they submitted revised requests.
20 Q Now, isn't that because you told them, Mr.
21 Liebman, that what they should do is withdraw the first
22 one, add those costs in and then resubmit the first one?
23 A Right. As the first progress payment. It's a
24 revised request.
25 Q So it's your suggestion?

1 A That's correct. They had additional costs, you
 2 want to include those? Let's revise the first request
 3 and call it "Revised Number One." Yes.
 4 Q Now, as a matter of fact what that did was
 5 trigger the time again for the start of a prepayment
 6 review because you then ordered a prepayment review of
 7 that request, isn't that right?
 8 A Correct. Which included many more costs.
 9 Q Progress payment one resubmitted?
 10 A That's correct. It included many more costs
 11 than the first request. That's correct.
 12 Q You didn't tell Freedom that the first progress
 13 payment request amount \$100,000 would then be rolled in
 14 for purposes of review again and would then be subject to
 15 this review process again, did you?
 16 A That was discussed during conversation.
 17 Whatever they submitted would be reviewed because it was
 18 the first progress payment. Whether it was the original
 19 request or the revised request.
 20 Q Now, in fact, every single one of Freedom's
 21 progress payment requests were audited at your
 22 instruction, isn't that correct?
 23 A That's not correct. There were several
 24 progress payments that were just administrative progress
 25 payments. That didn't require any audit.

1 Q Which ones were those?
 2 A Number -- well, number -- Well, number 4. I'm
 3 just trying to tick off the top of my head. They were
 4 administrative progress payments because they had been
 5 reviewed on prior progress payments. Number 4, for
 6 Cadillac.
 7 Q I'm not asking you why, Mr. Liebman.
 8 A Number 4 for Cadillac was the administrative
 9 payment because it was based on reviews of progress
 10 payments.
 11 Q Well, that was a progress payment to a
 12 subcontractor, correct?
 13 A That's correct.
 14 Q That was not a progress payment to Freedom, was
 15 it?
 16 A Yes. It was.
 17 Q To Freedom for a subcontractor's progress
 18 payment request?
 19 A That is correct.
 20 Q Okay. Any others that escaped review? And,
 21 indeed you ordered an audit report, a review of
 22 Cadillac's progress payment, didn't you?
 23 A That is correct.
 24 Q So that progress payment didn't escape review,
 25 did it?

1 A On Cadillac progress payments were tied to
 2 prior progress payments to Freedom, not number 4.
 3 Q Virtually every one of these -- and I'm doing
 4 that only to accommodate you, to cut down on the time
 5 because I believe the record reflects that every single
 6 progress payment request submitted by Freedom was
 7 submitted for review. But I won't quibble with you.
 8 You will certainly agree that out of the 22
 9 progress payment requests submitted almost all of them
 10 were subject to review at your instruction, isn't that
 11 correct?
 12 A That is correct.
 13 Q Now, it is true, is it not, that under the DLAM
 14 the requesting of prepayment audits after the first one,
 15 which we have already discussed the first one and how
 16 normally that's not reviewed under circumstances that we
 17 discussed. But, beyond that additional progress payment
 18 requests generally are not, it further limits the
 19 requesting of prepayment audits at any time on the
 20 contract to the following circumstances and there are two
 21 circumstances, correct?
 22 A Correct.
 23 Q Number one is, that the ACO has reason to doubt
 24 the certification signed by the contractor on the
 25 progress payment request, correct?

1 A That's number one.
 2 Q And number two is that the ACO believes the
 3 contract will involve a loss. That's number two, isn't
 4 it?
 5 A That's right.
 6 Q And then, of course, if those circumstances
 7 apply then the requirement is set forth here, that the
 8 contract file has to documented with the ACO's rationale,
 9 correct?
 10 A Are you reading from the DLAM now?
 11 Q Yes.
 12 A Because the DAR goes further, the DAR lists
 13 some other circumstances.
 14 Q Okay. At the very least you have to find a
 15 doubt of these two situations, correct?
 16 A At the very -- Well, yes. That's correct. As
 17 well as the DAR.
 18 Q And, so, there are additional requirements in
 19 the DAR?
 20 A That's correct.
 21 Q So at the very least you've got these and in
 22 addition you would have to find whatever the DAR sets up?
 23 A That is correct.
 24 Q So that further limits your right to order
 25 subsequent prepayment audits?

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1 A No. The DAR expands upon my right to order
2 prepayment reviews. It goes further.
3 Q It doesn't change your right to have to
4 document the file with your rationale each time you order
5 one, does it?
6 A Documentation of the file --
7 Q Does it change? The DAR provision that you are
8 referring to, that doesn't change your obligation to
9 document the contract file with your rationale very time
10 you order a prepayment review, does it?
11 A No. It doesn't.
12 Q And in fact, you never documented the contract
13 file specifically with your rationale for ordering these
14 prepayment reviews, did you?
15 A That's not correct. The file -- I'm saying the
16 reports -- I've issued many, many reports on this
17 contract.
18 Q I'm not asking about reports, Mr. Liebman.
19 What I'm asking for is, at the time that you ordered
20 prepayment reviews, at the time that you ordered them,
21 you did not document the contract file saying, "I am
22 ordering a prepayment review because of the following
23 rationale," did you?
24 A I put the rationale in the reports which are
25 part of the official file.

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1 Q What reports are those, Mr. Liebman?
2 A There are numerous -- there are several types
3 of government reports. I was required to submit monthly
4 point papers to DLA headquarters called "Smart Reports."
5 Q Are they in the record, Mr. Liebman?
6 A Yes. They are part of the Rule 4, yes.
7 Q And that's where your rationale is?
8 A Well, there's more. Monthly what they call
9 contract management --
10 Q And that's where your rationale is for ordering
11 prepayment reviews?
12 A Well, let me finish -- there are other reports.
13 Q And I'm asking in these reports --
14 A Yes.
15 Q -- is that where you are saying your rationale
16 is for ordering these prepayment reviews?
17 A Yes. They should be mentioned in these --
18 Q Fine. It's in the record. We'll take a look
19 at it and see if it bears out your testimony.
20 A Okay. It should be there.
21 Q It's that simple right? And if it doesn't bear
22 out your testimony, then you are wrong?
23 A Correct.
24 Q Now, Mr. Liebman, who was supposed to be paying
25 Freedom's rent and taxes while they were waiting for your

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1 prepayment review to be returned by about December 21?
2 A Other than the progress payment, I can't answer
3 that. I don't know.
4 Q Did you think about it at the time?
5 A Absolutely.
6 Q So who did you come up with as to who should be
7 paying those costs while Freedom is sitting around
8 waiting for the results of your review?
9 A That was not my conclusion to draw. That's --
10 that's not my conclusion.
11 Q Now, throughout this contract, did you not
12 apply a percentage of completion method for determining
13 which progress payments to pay at all?
14 A That's not correct. Only at the very end when
15 MOD 28 was issued, from progress payment 18 forward, did
16 a percentage of completion come into play on individual
17 progress payment requests.
18 Q Okay. And from that date forward you applied a
19 percentage of completion rationale?
20 A Based on MOD 28 and the contents of MOD 28,
21 yes. In addition to the costs, to considering costs.
22 Q Now, Mr. Liebman, on December 7 of 1984 DCAA
23 got back to you on your request for prepayment audit,
24 didn't they?
25 A I don't recall that.

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1 Q If you will turn to Tab F-21, please.
2 A There's no F-21 here. There's the tab but the
3 document is not here.
4 JUDGE JAMES: Let the record reflect that the
5 Board's copy is identical. A tab but no document. Let's
6 check with Ms. Hallam, what do you have behind Tab F-21?
7 MS. HALLAM: I have a document.
8 JUDGE JAMES: Okay. Let's go off the record.
9 Please unscramble.
10 (Off the record.)
11 JUDGE JAMES: Could counsel for the Appellant
12 just make a proffer as to what F-21 constitutes?
13 MR. LUCHANSKY: Yes, your Honor. F-21 is a
14 document from DCAA dated December 7, 1984 returning
15 prepayment number one in the amount of \$100,310.
16 JUDGE JAMES: Is it an audit report?
17 MR. LUCHANSKY: I cannot describe it as an
18 audit report per se because it does not look like the
19 other audit reports. It's a single page document.
20 JUDGE JAMES: All right.
21 MS. HALLAM: Your Honor, I'm familiar with the
22 document. You can look at it from my book if you want?
23 JUDGE JAMES: That's fine. You just keep it
24 right there, Ms. Hallam. Go ahead.
25 BY MR. LUCHANSKY:

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1 Q Mr. Liebman, are you familiar with this
2 document?
3 A Yes.
4 Q This is DCAA's response to your request for an
5 audit of progress payment number one. Is that correct?
6 A Yes.
7 Q And what this does is return the progress
8 payment for the reasons that are here, correct?
9 A Yes.
10 Q Can you describe briefly what you understand
11 that reason to be?
12 A Right. DCAA is saying that the costs were
13 indirect in nature and basically there was no direct
14 costs to apply these indirect costs to and it wasn't --
15 there was no fair value of work accomplished against
16 these indirect costs.
17 Q Okay. And like you just said a moment before
18 that, that the request is for indirect costs and not
19 direct costs?
20 A That's correct.
21 Q And you just explained -- the words of the
22 document that explained quite accurately that what they
23 meant was that there were no direct costs against which
24 to apply the indirect costs?
25 A That's correct.

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1 Q Now, this opened up a whole can of worms with
2 respect to paying Freedom's progress payments, didn't it?
3 A Well, it opened it up a few weeks prior to that
4 but, yes, it did.
5 Q A Few weeks prior to that when?
6 A When the request was first submitted. I was
7 also concerned about that. In fact, I was also concerned
8 about the progress payments solely being for indirect
9 costs versus, you know, including direct costs. So I had
10 some concern about it at first.
11 Q You were concerned about that when Freedom
12 first submitted the request?
13 A Yes.
14 Q Who did you go to to try to resolve that issue?
15 A I went to numerous sources of authority, both
16 in my office, I went to DLA headquarters. By my office
17 meaning my local office plus our region office. I
18 consulted with multi-functional people including,
19 lawyers, price analysts, auditors, contractual types, to
20 get their opinion on this situation.
21 Q Now, all of this was before you submitted the
22 request to DCAA?
23 A Yes. Several, about two weeks before. As
24 soon, I knew this request was coming in, in fact, the day
25 of negotiation of the contract. On December -- on

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1 November 13. And I so informed Mr. Marra I was concerned
2 about it and I also informed the PCO Mr. Barkewitz about
3 this.
4 JUDGE JAMES: Was it your belief, Mr. Liebman,
5 that the contract was negotiated on November 13?
6 THE WITNESS: I'm sorry. December, forgive me,
7 your Honor. It was negotiated on November 6. I'm sorry.
8 November 6, 1984.
9 JUDGE JAMES: At that time you were already
10 informed that the contractor was going to submit a
11 progress payment report?
12 THE WITNESS: Oh, I'm sorry. It's my mistake.
13 It's my mistake. It was -- Well, yes. Yes. Yes, your
14 Honor. Freedom advised me that as soon as the contract
15 was signed, I'm specifically referring to Mr. Patrick
16 Marra, the treasurer. As soon as the contract was signed
17 they were going to come in with the progress payment.
18 JUDGE JAMES: It was going to be for rental
19 costs?
20 THE WITNESS: Yes. For these overhead-type
21 costs. Yes.
22 BY MR. LUCHANSKY:
23 Q So you knew all this. And you knew that this
24 direct cost/indirect cost was an issue in your mind at
25 the time --

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1 A In the very beginning, yes.
2 Q And you knew that it was an issue apparently in
3 the mind of DCAA, yes?
4 A Yes. It should have been, yes.
5 Q And yet you still went through the motions of
6 submitting this progress payment request number one to
7 DCAA for an audit?
8 A Well, to test the system. Yes.
9 JUDGE JAMES: Well, Mr. Liebman, did you
10 inquire with PCO Barkewitz, I believe his name was, about
11 this matter?
12 THE WITNESS: Yes. I did.
13 JUDGE JAMES: What did he tell you?
14 THE WITNESS: Basically, they were going to
15 conclude negotiations that day with Freedom. That the
16 progress payments really wasn't his call that I'm the one
17 who is going to be administering the progress payment
18 provisions and he really didn't have in-depth knowledge
19 as to how progress payments are administered. So it was
20 basically DCMC New York's call, meaning myself as the
21 contracting officer.
22 BY MR. LUCHANSKY:
23 Q Now, as we sit here today, Mr. Liebman, let's
24 see if we can get a handle on the issue. Do I understand
25 correctly that the issue is that generally when a

1 contractor, when there's a contractor that has several
2 contracts, that contractor is going to be billing for
3 both direct costs and indirect costs, correct?

4 A That is correct.

5 Q And in order to determine -- And when you have
6 several contracts those indirect costs -- strike that.

7 According to the DAR and DLAM, the direct costs
8 -- I'm sorry.

9 Those costs that go into making up the product
10 itself are clearly attributable to or allocable to a
11 particular contract, right?

12 A That's correct.

13 Q So when you have got, you know, Bobby on one
14 line making ball bearings so his labor costs and direct
15 material costs that go into making those ball bearings,
16 it's clear that those are direct costs, correct?

17 A Yes.

18 Q But if you have Wally making widgets on a
19 separate contract for the same contractor, his direct
20 costs are going into that product, correct?

21 A Correct.

22 Q So it's easy to divide up those direct costs?

23 A Correct.

24 Q But the cost of rent and the cost of the
25 administrative staff, the cost of guards around the whole

1 building, those costs are attributable to both contracts,
2 correct?

3 A Correct.

4 Q And those would be indirect costs you're
5 talking about?

6 A Correct.

7 Q And, so, what you are describing is that
8 ordinarily in order to be fair about how to divvy up
9 those indirect costs accountants have developed a system
10 that will apply a rate to the direct costs for a
11 contract, correct?

12 A Correct.

13 Q And that when a contractor incurs raw materials
14 and direct labor costs then a rate will be applied
15 against those costs of something of over 100 percent and
16 take a portion of the total and direct costs and add that
17 on to Bobby's ball bearing contract. Is that correct?

18 A Correct.

19 Q That doesn't apply when there's only one
20 contract, does it?

21 A That is correct.

22 Q You know that to be the case, do you not?

23 A Yes. I do.

24 Q It took you a while to figure it out, didn't
25 it?

1 A Not a while. It took -- very quickly. Within
2 a week or two. That is correct.

3 Q And that's interesting because we will see in
4 the record how that's not true. But, in any event, at
5 the time, certainly at the time of this first request you
6 thought that indirect costs could not be recovered until
7 direct costs of raw materials and labor were incurred,
8 correct?

9 A That is correct.

10 Q And that's what DCAA was saying, to the best of
11 your understanding in its December 7 response, correct?

12 A That's correct.

13 Q Now, there was a post award meeting conducted
14 at Freedom's facility on December 13, 1984. Is that
15 correct?

16 A No. December 14, 1984.

17 Q Okay. December 13 the government got together
18 before traveling to Freedom and the government conducted
19 a meeting?

20 A That's correct.

21 Q And that was to prepare for the meeting with
22 Freedom, correct?

23 A Correct.

24 Q Now, by that point Freedom had already
25 resubmitted progress payment request number one on

1 December 7, correct?

2 A Correct.

3 Q So now there was about \$252,000 outstanding?

4 A I believe so, yes.

5 Q And that's the request that you rejected for
6 these technical errors, correct?

7 A No. The first one was rejected and the
8 resubmitted one. There were two resubmissions. The
9 first number one and the first resubmission of number one
10 had errors. They had the wrong liquidation rate and some
11 other errors on the form. The second resubmission, of
12 number one, was acceptable from a format standpoint.

13 JUDGE JAMES: Is it your testimony, Mr.
14 Liebman, that progress payment number one got submitted
15 three times?

16 THE WITNESS: Yes, your Honor.

17 BY MR. LUCHANSKY:

18 Q One of those times was November 15, 1984,
19 wasn't it?

20 A No. Well, the date of the request was November
21 15, 1984. With received it November 29, 1984. There was
22 a first resubmission. I don't recall the date offhand.
23 It's in G-95. Then there was a second submission.

24 At the post award on December 14, at Freedom's
25 facility, Freedom gave us one of the submissions. I

1 don't know if that was the first revision or the second
2 revision. Probably the second revision. But G-95 has
3 the dates spelled out.

4 Q For some reason your document showing your
5 rejection of progress payment number one resubmitted
6 escapes me. But do you recall that you sent it back
7 because Freedom didn't round off properly and they had a
8 zero instead of a blank?

9 A Number one and revised number one, the first
10 revision, had the wrong liquidation rate. They used the
11 rate of 82.5 or 82.6 percent which violated the progress
12 payment clause of the contract. The contract called for
13 a progress payment liquidation rate of 95 percent not
14 82.6.

15 JUDGE JAMES: Now, answer Mr. Luchansky's
16 question about rounding off dollars.

17 THE WITNESS: Yes. There were some minor
18 administrative things. Some boxes weren't filled out,
19 some numbers weren't rounded but surely not a reason to
20 reject payments just for that. But the real problem was
21 the wrong liquidation rate and as a result some of the
22 other numbers on the form, boxes on the form were
23 incorrect.

24 BY MR. LUCHANSKY:

25 Q Do you recall that in rejecting the request for

1 progress payment number one resubmitted, you said the
2 reason you are sending it back is because the way it was
3 submitted wouldn't allow the automated processing system
4 to process it?

5 A Yes. That was part of it. In fact, we sent
6 Freedom a letter to that effect in addition to phone
7 discussions.

8 Q Now, in fact, you never processed any of
9 Freedom's progress payment requests through an automated
10 system, did you?

11 A The progress payments? They were signed
12 manually by me but they went down to finance for
13 processing through the system. The progress payment must
14 be correct --

15 Q All I'm asking, Mr. Liebman, is whether you
16 ever processed --

17 A Automatically?

18 Q Yes.

19 A I doubt it.

20 Q They were all processed by hand, weren't they?

21 A I would -- yes. I would imagine so, yes.

22 Q And they were all subject to mandatory review,
23 weren't they?

24 A Most of them were. Most of them were subject
25 to prepayment review.

1 Q And at no time did you ever question the
2 certification on any of these progress payment requests,
3 did you?

4 A That's not correct. That's not exactly
5 correct. I'm not questioning Mr. Thomas' integrity or
6 anything like that --

7 Q I'm just asking whether you questioned his
8 certification?

9 A Yes. Because of the audit reports that I was
10 receiving from DCAA, which cited numerous deficiencies.

11 Q And we will find references to your questioning
12 certification in the smart program reports in the
13 contract management awards?

14 A I don't think it says it in that vein. I don't
15 think it uses the word certification. It goes into the
16 reason why I'm not paying certain --

17 Q Okay. So you never actually questioned the
18 certification per se?

19 A I did. Not the word certification.

20 Q The concept.

21 A But the concept was questioned.

22 Q The concept of certification?

23 A The concept was questioned. That's correct.

24 Q I must have just understood you. It seems
25 somewhat imprecise but now I understand what you are

1 saying.

2 A Okay. Thank you.

3 Q Now, December 13, 1984, you have a meeting at,
4 where was that meeting, the government meeting?

5 A It was at my office, then it was called DCASMA
6 New York, D-C-A-S-M-A New York.

7 Q That meeting was on your turf?

8 A That is correct.

9 Q And you were in charge of that meeting?

10 A I was in charge of the meeting.

11 Q Now, you are in charge of administering this
12 contract, right?

13 A Yes.

14 Q Now, do you remember at that government meeting
15 that the issue of whether to pay Freedom's progress
16 payments came up?

17 A Yes. I believe it was discussed. Yes.

18 Q Now, if you look at FT-074 --

19 A What was that reference again, please?

20 Q FT-074.

21 A Yes.

22 Q For the record the other document we were
23 looking for was government Rule 12, Rule 4 Tab 12, the
24 rejection letter for automatic processing.

25 Okay. We are looking at FT-074, this is a

1 report of travel that was prepared to summarize both the
 2 meeting held at DCASMA on December 13 and then the
 3 meeting that was held on December 14 with Freedom,
 4 correct?
 5 A Yes.
 6 Q Now, if you turn to page 2, the top paragraph
 7 --
 8 A Yes.
 9 Q -- you see that this report of travel indicates
 10 that the next topic was the most heated debate of the
 11 day?
 12 A Yes.
 13 Q Now, this indicates that Freedom had submitted
 14 its first progress payment, correct?
 15 A May I read this for a moment?
 16 Q Sure.
 17 A Yes. Okay.
 18 Q Now, the dispute -- You made it clear that you
 19 had not yet decided whether to pay this progress payment
 20 request yet, correct?
 21 A (No response.)
 22 Q I'm in the first paragraph, second sentence.
 23 A Correct. And it's explained in paragraph 4 of
 24 that page. May I read what I'm referring to?
 25 Q No.

1 A Okay.
 2 Q Now, the dispute was -- Now, first of all, you
 3 hadn't told Freedom yet that you weren't sure about
 4 whether you were even going to pay their progress payment
 5 request number one, had you?
 6 A I had told them it was under review.
 7 Q Under review.
 8 A That's correct.
 9 Q At this point there's \$252,000 outstanding,
 10 correct?
 11 A I'm not sure because the progress payment --
 12 I'm not sure when that 252 came in. If it was December
 13 14 at the post award or on the 7 December.
 14 Q The progress payment number one resubmitted is
 15 dated December 7, correct?
 16 A Now, is that the first resubmission or the
 17 second one? Because there was a progress payment given
 18 to us at the post award on this --
 19 JUDGE JAMES: Mr. Liebman, you don't ask
 20 questions. You answer them.
 21 THE WITNESS: I'm sorry.
 22 BY MR. LUCHANSKY:
 23 Q The dispute at this point is between DCAA on
 24 the one hand and the legal guys on the other, correct?
 25 A DCAA and pricing and legal on the other side.

1 Q DCAA and pricing.
 2 A DCAA pricing versus legal and contracts on the
 3 other side. There was a split.
 4 Q Now, the dispute is about whether to pay
 5 Freedom, correct?
 6 A Correct.
 7 Q The DCAA people took the position that there
 8 were two reasons not to pay Freedom; isn't that correct?
 9 The first being that Freedom was insolvent and not
 10 financially stable, correct?
 11 A That's what it says, yes.
 12 Q And that's what happened, to the best of your
 13 recollection, right? That's what was said?
 14 A That was one reason. Yes.
 15 Q That was one reason?
 16 A Yes.
 17 Q The second reason that's reported here is, that
 18 in addition DCAA said that while they realize that this
 19 is not a normal contract in terms of direct and indirect
 20 costs because Freedom has no other business,
 21 nevertheless, DCAA believed that Freedom's request was
 22 not acceptable for payment, correct?
 23 A That's what it says, yes.
 24 Q Now, do you have any recollection as to any
 25 further explanation of that second point?

1 A No.
 2 Q Just that even though DCAA knew that this was
 3 Freedom's only contract and that it was special in that
 4 sense, it still should be paid?
 5 A That is correct.
 6 Q Let's look at these two reasons very briefly.
 7 The first one about insolvency and financial instability,
 8 this is before the phone call that you made to Dollar
 9 Drydock on December 17, isn't it?
 10 A Is that correct?
 11 Q And according to you it was the phone call to
 12 Dollar Drydock that led you to conclude that Freedom
 13 didn't have any financing and, therefore, it was
 14 financially unstable, correct?
 15 A It was the phone call to Dollar Drydock and
 16 also what was discussed at the post award on December 14,
 17 the next day.
 18 Q And yet here on the 13 DCAA is already pushing
 19 for denial of progress payments in total to Freedom
 20 because of their financial condition, is that right?
 21 A That's their advice. Yes.
 22 Q Now, with respect to all of the testimony that
 23 you gave on direct, having to do with the deductions for
 24 the 22 progress payments that were submitted by Freedom,
 25 all of your deductions were based upon the advice of

1 DCAA, isn't that correct?

2 A I'd say for the most part. I can't say 100

3 percent with certainty but for the most part, yes. No.

4 Not exactly. No. I can't say that because DCAA did not

5 apply a loss ratio formula for the most part.

6 Q Let's set aside the loss ratio.

7 A Also MOD 28, DCAA did not take into account MOD

8 B28 which tied in progress payment ceilings to

9 deliveries.

10 Q Okay. With respect to everything else?

11 A There might be some others. I just can't think

12 of anymore.

13 Q But as we sit here you and I both know that

14 pretty much you follow DCAA's recommendations on

15 deductions from progress payments down the line?

16 A No. Are you talking Freedom or are you talking

17 about in general or all their contracts?

18 Q Talking about Freedom.

19 A Well --

20 Q Now, let's go on, Mr. Liebman.

21 JUDGE JAMES: Please let the witness answer the

22 question.

23 MR. LUCHANSKY: I'm sorry. I didn't hear.

24 BY MR. LUCHANSKY:

25 Q Go on, Mr. Liebman.

1 A I can't say 100 percent but for the most part

2 unless I had a reason to question a specific deduction I

3 would have heeded their advice, yes. For the most part,

4 except for the reasons I just mentioned. No, let me --

5 JUDGE JAMES: Please, Mr. Liebman, there's no

6 question pending. Let counsel ask you the question.

7 THE WITNESS: I'm sorry.

8 BY MR. LUCHANSKY:

9 Q Now, it's at this point that the legal team

10 jumped in and said, Look, we deem them to be solvent when

11 we did the prepayment review, when we did our

12 negotiations, correct?

13 A Correct.

14 Q And with respect to the progress payment issue

15 Karl Herringer said, you can't look at it from a strict

16 accounting standpoint, correct?

17 A That is correct.

18 Q Now, he also told you that all costs were

19 negotiated as direct on this contract, correct?

20 A That is correct.

21 Q What did you understand that to mean?

22 A I understood it to mean that, per legal advice,

23 that these progress payments were payable in their eyes.

24 Q Now, isn't it true that under the DAR cost

25 principals, you were familiar with the DAR cost

1 principals, weren't you?

2 A Yes.

3 Q And under the DAR cost principals direct costs

4 are not costs that are simply limited to raw materials

5 and direct labor. Isn't that right?

6 A That's correct.

7 Q And that under 15.109 it says, "Direct costs

8 are not limited to items which are incorporated in the

9 end-product as material or labor," correct?

10 A Yes.

11 Q I mean you are familiar with that?

12 A Yes.

13 Q And then (d) "It's simply costs identified

14 specifically with a contract, specifically with the final

15 cost objectives of the contractor." A single cost

16 objective, correct?

17 A I'm not sure of that exact definition but I

18 know what you are getting at.

19 Q Meaning all costs that are attributable to a

20 single contract are to be considered direct costs?

21 A I would say so, yes.

22 Q Now, despite the input of legal at that point

23 and your knowledge of these DAR provisions, you didn't at

24 that point reject DCAA's advice, did you?

25 A I said that there was no need for an immediate

1 decision as is reflected here on paragraph 4 of this

2 page. There was no need for an immediate decision

3 because the post award was the next day at the

4 contractor's facility and the contractor was going to

5 submit a revised request. As I also say in this

6 paragraph concerning the need for a decision, I said --

7 Q You didn't make the decision right then?

8 A I'm sorry? No. I did not make it right then.

9 However, I did say that a decision would be made shortly.

10 Q Okay. Now, jumping ahead for a moment to your

11 January 4, 1985 proposed suspension letter, one of the

12 reasons that you included in the proposed suspension was

13 this reason, that Freedom was billing for indirect costs

14 and it hadn't yet incurred direct costs. Isn't that

15 right?

16 A That was not the reason for suspension. It was

17 made quite clear --

18 Q I'm asking what was in the letter.

19 A It was in the letter as some background

20 information but was not the reason for suspension as is

21 clearly stated in the letter.

22 Q You are quite clear about that?

23 A Absolutely.

24 Q Let's take a look at government Rule 16. Do you

25 have that, Mr. Liebman?

1 A Yes.

2 Q You see that, you do confirm here that at the

3 very least progress payment number one resubmitted was

4 given to you at the post award at the very latest,

5 correct, if it wasn't provided to you earlier. Now, the

6 first reason that you give on this page for proposing

7 suspension is claiming that Freedom is in such

8 unsatisfactory financial condition as to endanger

9 performance, correct?

10 A Correct.

11 Q And you say that Dollar Drydock has given you

12 conditions now for the financing and that's contrary to

13 whatever you knew before?

14 A Right.

15 Q We're going to talk about that in a minute. On

16 page 2 you do say, "In addition a review of progress

17 payment request number one reflects all the following

18 items." And these are nitpicky audit points, correct?

19 A I don't describe them as nitpicky points. But

20 I'm just saying these are matters that were brought to my

21 attention. And it means in addition --

22 Q Okay: They were brought to your attention.

23 And at your deposition we talked about these four

24 suggestions here, correct, these four points?

25 A Correct.

1 Q And you admitted to me that indeed these really

2 shouldn't have been reasons to suspend or propose

3 suspending progress payments, correct?

4 A These were not reasons to suspend progress

5 payments.

6 Q Now, you do say at the end of page 2, "As an

7 additional consideration," correct? The last paragraph

8 on page 2.

9 A Yes.

10 Q And what you put here is this indirect/direct

11 cost confusion, correct?

12 A Not a confusion. We were just mentioning it as

13 additional information, background information but there

14 was no confusion.

15 Q And what you are saying here is that Freedom's

16 indirect costs cannot be paid until direct costs are

17 incurred. Isn't that correct?

18 A May I read this for a moment? No. No. That

19 doesn't say that at all. What this is alluding to is

20 that in the event of default or if the company went out

21 of business, and the government had invested indirect

22 costs into a contractor the government really have

23 nothing to take title to. It was just a matter of

24 bringing out, for the record, that the government was at

25 risk here in the event the company went out of business

1 because we could not recover these progress payments.

2 The progress payments would be lost progress payments.

3 Q Mr. Liebman, does this paragraph not mirror the

4 December 7, 1984 reason given to you by DCAA for

5 rejecting progress payment number one?

6 A No. Not exactly.

7 Q Is it not in substance the same?

8 A No.

9 Q By this point had you not also received DCAA's

10 audit report on progress payment number one resubmitted?

11 A I don't recall.

12 Q If you look at government Rule 4 Tab 15.

13 A Yes.

14 Q If you turn to the last page, page 5.

15 A Yes.

16 Q Do you see that the results of this audit were

17 furnished to you on December 20, 1984?

18 A Yes.

19 Q So that confirms that you had the results of

20 this audit report at the time January 4, when you sent

21 your letter, correct?

22 A Yes.

23 Q You see that DCAA recommends that zero dollars

24 be paid to Freedom. Isn't that right?

25 A Yes.

1 Q And as you go down this audit report you see

2 that the reasons they give are the same reasons as you

3 put in your letter, aren't they?

4 A Yes.

5 Q Now, these reasons include such things as DCAA

6 finding no evidence that the contractor has paid or will

7 pay these salaries. Do you see that at the bottom of

8 page 2?

9 A Yes.

10 Q You knew that that was inconsistent with the

11 progress payment provisions and that Freedom was supposed

12 to be paid upon incurring costs not upon paying them.

13 Isn't that right?

14 A That is correct.

15 Q And there's certainly no requirement that

16 Freedom proved that it will pay these salaries before

17 they get paid on incurred costs. Isn't that right?

18 A That's correct.

19 Q Yet you include reasons like this in your

20 January 4 letter. Isn't that right?

21 A That's correct.

22 Q Now, this audit report also talks about

23 unbooked costs, correct?

24 A Yes.

25 Q Now, it came to your attention, did it not,

1 that, in fact, in doing this audit DCAA never asked for
 2 Freedom's books? Isn't that right?
 3 A That was Freedom's version. Yes.
 4 Q Freedom came down and said, "What are you
 5 telling me, the unbooked costs? It's all on the record.
 6 Here are my books. Isn't that right?
 7 A According to Freedom, yes.
 8 Q And then you sent the auditors back out to
 9 Freedom --
 10 A That's correct.
 11 Q -- and then suddenly the next audit report
 12 comes out and DCAA says, Yes. Well, we see that it's on
 13 the books but we still stand by our position in this
 14 audit report. Isn't that right?
 15 A More or less, yes.
 16 Q If you turn to page 4 --
 17 A Of which?
 18 Q I'm still looking at Rule 4 Tab 15.
 19 A Yes.
 20 Q Before I get to this question, wouldn't you
 21 agree with me now that these reasons that are being given
 22 to you from A through J, from A on page 2 through J on
 23 page 4, are reasons that you should have rejected as
 24 being a basis for reducing progress payments once you
 25 learned that these costs were indeed booked on Freedom's

1 A They would have. I would imagine, sure.
 2 Q Well, that's not typical, is it?
 3 A I'm sorry.
 4 Q That's not typical of the contractor.
 5 Ordinarily the contractor submits the progress payment
 6 request and then if there's an audit they come out and
 7 look at the books, correct?
 8 A No. That's not correct. The contractor
 9 submits the request and any information requested,
 10 reasonable information requested by the contracting
 11 officer, and usually I request a summary sheet of the
 12 costs.
 13 Q And they enclosed that?
 14 A Yes.
 15 Q Now, in fact, you found out that the invoices
 16 from Mr. Penzer, from the landlord, to H.T. Foods were
 17 included in the support?
 18 A Well, the auditors did.
 19 Q And they found that, in fact, the bills from
 20 H.T. Foods to Freedom for these past due costs were also
 21 included in the support, weren't they?
 22 A I don't recall. I know that there was a matter
 23 of costs being billed to H.T. Foods for several cost
 24 categories.
 25 Q But eventually on May 6, 1985 you paid all

1 books?
 2 A May I read these progress --
 3 Q Yes. I'd like you to skim them.
 4 A Sure. These, you are saying A through J right.
 5 Q That's right.
 6 A Okay.
 7 Q To the extent that you have reviewed them, Mr.
 8 Liebman, do you agree with me?
 9 A I'm only up to number C, B1.
 10 Q Do you agree with me so far?
 11 A So far, yes. Well, no. I shouldn't say that.
 12 Small number one was a problem.
 13 Q Okay. The question was whether you agree or
 14 not. Your answer was --
 15 A No.
 16 Q -- yes. You agree and now you are finding
 17 something that you do.
 18 A Because I spotted something in B number one
 19 because they are citing that the H.T. Food Products
 20 liability, while it's a Freedom contract --
 21 Q Well, that's an interesting point, Mr. Liebman,
 22 isn't it true that in support of progress payment request
 23 number one resubmitted, that Freedom, in fact, enclosed
 24 with their progress payment request all of the backup for
 25 these costs?

1 these costs, correct?
 2 A After the contract was novated, yes.
 3 Q Am I going to have to pull out the backup and
 4 find those invoices, Mr. Liebman?
 5 A Well, the invoices are in the file. But I
 6 didn't review that thick file. That was done by the
 7 Defense Contract Audit Agency.
 8 Q Okay.
 9 A Freedom submitted a stack of documents at
 10 times, sometimes several inches thick that went to the
 11 auditors or the technical representative when appropriate
 12 for review. I didn't really review that.
 13 Q Okay. Did you bother -- When you got the
 14 reasons from DCAA, did you bother verifying DCAA's
 15 purported reasons?
 16 A Not in depth, no.
 17 Q Okay. Not even in depth enough to say, "Hey,
 18 DCAA you mean to say they only billed here? Are you sure
 19 there are no invoices from H.T. Foods to Freedom?" And
 20 you checked the file to see if there were?
 21 A I never checked. No. I don't recollect that
 22 question ever coming up.
 23 Q And you would agree that if the bills from H.T.
 24 Foods to Freedom were in the backup that Freedom provided
 25 then DCAA auditors were wrong?

1 A Meaning that the landlord or whoever billed
 2 H.T. and H.T. then submitted separate billings to
 3 Freedom?
 4 Q Correct.
 5 A I don't know. That would be an audit call
 6 because Freedom --
 7 Q Because you were aware at the time, Mr.
 8 Liebman, that Freedom's lease was a sublease, weren't
 9 you?
 10 A Yes.
 11 Q And so you were aware that the original lease
 12 was from Mr. Penzer to H.T. Foods, correct?
 13 A That's correct.
 14 Q And that H.T. Foods then sublet the space to
 15 Freedom, correct?
 16 A Right.
 17 Q And that's something you knew at this time,
 18 didn't you?
 19 A That's correct.
 20 Q Now, if you will turn to page 4 of the audit
 21 report.
 22 A Yes.
 23 Q First of all, you see in the paragraph found J,
 24 where DCAA talks about the contract not providing books
 25 of account. You didn't ask DCAA whether they asked for

1 those books, did you?
 2 A I don't recall.
 3 Q And where you see that they were unable to
 4 determine the adequacy of the accounting system, again,
 5 that's what you sent them out to do, correct?
 6 A I --
 7 Q Is that what you sent them out to do?
 8 A No. I sent them out to --
 9 Q I'm sorry. Was that a no?
 10 A That was -- I sent --
 11 Q Was that a no?
 12 A I sent them out at Freedom's request to review
 13 the books and records which Freedom claimed it had.
 14 Q I'm sorry, Mr. Liebman, I could have sworn that
 15 you just testified that you sent the DCAA auditors out to
 16 review Freedom at Freedom's request.
 17 A Freedom said --
 18 Q Is that right?
 19 A Yes. Freedom said they had --
 20 Q And that's with respect to this audit report?
 21 A Yes. Freedom said they had books and records.
 22 The auditors were wrong. I'll show them the books and
 23 records. Send them out there. And I immediately sent
 24 them out there.
 25 Q Well, are you saying that the first audit?

1 A Well, the one I got based on --
 2 Q Are you saying the first audit was at Freedom's
 3 request?
 4 A No. I'm saying Freedom --
 5 Q Was the first --
 6 A You are not letting me ask the question.
 7 Freedom disputed the audit findings saying they did have
 8 books and records. Was very upset about it.
 9 Q Well, I'm afraid we are miscommunicating
 10 because this was the audit report results that spurred
 11 Freedom to then say, "What are you talking about
 12 unbooked? They are all booked." And in a subsequent
 13 audit report is the one that came back and said, "Oh,
 14 yes, we see it's on the books."
 15 A Yes.
 16 Q Not this one?
 17 A That's correct. There was a subsequent report
 18 a few weeks later.
 19 Q We are talking about this report.
 20 A Right. We are --
 21 Q This is the first audit that was performed?
 22 A That's correct.
 23 Q And this audit was one that you ordered, do you
 24 agree that it was ordered by you to determine the
 25 adequacy of Freedom's accounting system?

1 A Yes.
 2 Q Now, the next paragraph is the one that I
 3 really want to get to, which is DCAA says flat out "The
 4 contractor has not started production and, therefore,
 5 does not qualify for progress payments," isn't that
 6 right?
 7 A That's correct.
 8 Q And that's the way that DCAA is expressing the
 9 direct/indirect issue that was raised on the December 13
 10 meeting, correct?
 11 A That is their opinion. Yes.
 12 Q And that's the position that you are expressing
 13 in the last paragraph of your letter that we were looking
 14 at a moment ago. Isn't that right?
 15 A No. Not exactly.
 16 Q Okay. Is it your contention that that
 17 information was a reason other than -- a reason that you
 18 got from somewhere other than the DCAA report, something
 19 you made up on your own?
 20 A I'm sorry. I'm not following you.
 21 Q Are you saying that the reason you were
 22 expressing in the last paragraph of page 2 of your
 23 January 4 letter, is something other than what DCAA
 24 expressed in its audit report?
 25 A Yes.

1 Q Are you saying that that's a reason you came up
2 with outside of and apart from what's contained in the
3 DCAA report?

4 A That's correct.

5 Q You included that for Freedom's consideration,
6 correct?

7 A Right. My legal office provided me that type
8 of advice.

9 Q Now, let's take a look at FT-075 please. Now,
10 while you are getting it out, you testified, Mr. Liebman,
11 that you had resolved this indirect/direct issue within a
12 couple of days of its being raised?

13 A It was within a few weeks.

14 Q So is it your contention that it was resolved
15 before you sent the letter to Freedom?

16 A The proposed suspension letter?

17 Q Before you sent the January 4 letter, correct?

18 A Yes. That was not an issue.

19 Q Not an issue for you anymore direct or
20 indirect?

21 A Yes.

22 Q If you will turn to FT-75, which is -- 00967 is
23 the Bates stamp. You see that this is a telephone
24 conversation record, correct?

25 A Yes.

1 Q And this records apparently an incoming
2 telephone call from you and several other individuals who
3 are listed here to Keith Ford, correct?

4 A I don't know. It doesn't say -- I'm not sure
5 who made the call. It doesn't say -- oh, it says
6 "incoming." Yes. Incoming call.

7 Q And it has your name up there, right?

8 A Yes. May I just read the --

9 Q Sure.

10 A Well, again, this is before saying --
11 documenting this file. Yes.

12 Q Thank you. And while there's no date on this
13 the subject matter is letters to Dollar Drydock regarding
14 the loan and letter to Freedom Industry denying first
15 progress payment. Those letters both went out on January
16 4, 1985, correct? You sent a letter to Dollar Drydock
17 confirming your discussion with them back on December 17?

18 A I'm not sure of the date of the Dollar Drydock,
19 my letter to Dollar Drydock but --

20 Q You are aware January 4 is your letter to
21 Freedom?

22 A Yes. Proposing suspension.

23 Q So this conversation must have happened at or
24 about the time of that January 4, 1985 letter, correct?

25 A Yes.

1 Q You see how in the middle of the page at the
2 bottom of the message it says, "The letter to Freedom
3 denying first progress payment is for bad financial basis
4 and no progress?"

5 A That -- I don't agree with the order of
6 precedence here. This is Mr. Ford who works at the
7 procurement office and who is really not familiar with
8 the administration of progress payments. Again, this is
9 not my documentation of the file. I would not have
10 documented it that way. So this is not correct. Not
11 correct from my vantage point. Maybe from Mr. Ford's
12 perspective but not from mine.

13 Q Well, wouldn't you agree that in context it
14 would seem that this is a record of information that was
15 being provided to Mr. Ford not from Mr. Ford?

16 A Right. We provided -- we informed Mr. Ford who
17 because probably Mr. Barkewitz wasn't in, of the proposed
18 suspension and we cited the reasons and I would not have
19 documented the file this way by --

20 Q This way in terms of the order?"

21 A That's right.

22 Q But indeed does this not --

23 A Not just the order but the --

24 Q Does this not confirm for you that indeed one
25 of the reasons that you proposed suspending progress

1 payments to Freedom was that last paragraph of the audit
2 which is no progress?

3 A Right. The -- no. The only reason was number
4 one, bad financial basis. Mr. Ford might have
5 misunderstood what we were saying or perhaps didn't get
6 the thrust of what we were saying. But it was clear that
7 we were suspending progress payment, proposing to suspend
8 progress payments for an unsatisfactory financial
9 condition.

10 Q Do you think that in the same way you might
11 have caused some confusion for Freedom, by including it
12 in your January 4 letter to them?

13 A No. Because the letter is quite clear on the
14 first page that we are suspending because of
15 unsatisfactory financial, proposing to suspend because of
16 unsatisfactory financial conditions. It shouldn't cause
17 confusion.

18 Q Now, let's move on to December 14 when you have
19 your meeting with Freedom. Now, according to your --
20 according to government Rule 4 Tab 16, your January 4
21 letter -- Tell me what happened at this December 14
22 meeting to cause you concern?

23 A After the formal meeting there was a, at
24 Freedom's request there was a side meeting of only
25 certain individuals from the government and Freedom

1 regarding the financial situation. The meeting was at
2 Freedom's request. And based on what was discussed at
3 that meeting we were concerned because Freedom indicated
4 --

5 Q Well, tell me -- don't tell me why. Tell me
6 what Freedom told you about its financial condition?

7 A That no -- that the -- that their deficit had
8 increased from time of the pre-award survey, August of
9 1984, that Dollar Drydock had not advanced any monies in
10 accordance with the commitment letter. There was no
11 indication when monies would be advanced. They did
12 indicate that Dollar Drydock wanted an arrangement in
13 place to deal with their cash creditors. Freedom did
14 indicate they were seeking alternative sources of
15 financing apart from Dollar Drydock. They went into
16 their current financial condition with us.

17 Q Okay. Now, Freedom did not tell you at that
18 point that Dollar Drydock had refused and was refusing to
19 provide any financing, did it?

20 A No. Not categorically, no.

21 Q And indeed what Freedom told you was that they
22 had a concern about Dollar Drydock because they had seen
23 a newspaper article that showed that Dollar Drydock was
24 in the red, didn't they?

25 A Yes. They did mention that.

1 Q And they gave you that article and that
2 confirmed that what they said was true about Dollar
3 Drydock?

4 A I don't know if they gave me the article. But
5 the matter was discussed. I remember the article but I
6 don't know if it was given --

7 Q You do remember it?

8 A -- if it was given to me at the post award.
9 But I remember the article and I know the matter was
10 discussed.

11 Q Now, Freedom also told you at the point that
12 they were pursuing other alternatives like Broadway Bank
13 in Patterson, New Jersey, correct?

14 A Correct. And also an SBA loan.

15 Q Right. So Freedom in no way indicated to you
16 that they had a situation financially that they wouldn't
17 be able to obtain financing, did they?

18 A It was still open ended, yes.

19 Q That doesn't answer my question. Freedom
20 didn't say to you that it was going to be unable to
21 provide financing, did it?

22 A All it said was it had not obtained any
23 financing up to that point.

24 Q Correct. And obtain financing meant that
25 Dollar Drydock had not cut a check to them yet, correct?

1 A No. Not exactly. Not just Dollar Drydock but
2 anybody. There was just no other source of financing
3 that had been formalized at that point.

4 Q Well, Dollar Drydock had been up to that point
5 the focus of everyone, correct?

6 A That's correct.

7 Q And Freedom had told you, did tell you at that
8 meeting that Dollar has been waiting for that first
9 progress payment request to be paid?

10 A I don't recall that.

11 Q Certainly you would expect Dollar Drydock to be
12 very interested in whether that first progress payment
13 request was being paid or not, correct?

14 A Yes.

15 Q And would certainly expect that to the extent
16 dollar is going to be hanging around any more to provide
17 financing it's going to want to see if the government is
18 performing, correct?

19 A I don't know that. I can't say that with
20 certainty.

21 Q You did understand at that point as well that
22 the August 9 letter, as we discussed before, was a
23 conditional commitment letter, correct?

24 A Based on a certain -- based on award of a
25 contract of a certain amount.

1 Q Of \$21 million, correct?

2 A Correct.

3 Q And you were aware on December 14, when you met
4 with Freedom, that, in fact, Freedom hadn't received a
5 \$21 million contract, correct?

6 A Correct.

7 Q And so you were either aware at that time or
8 should have been aware that by its terms that Dollar
9 Drydock commitment letter was no longer binding on
10 Dollar, correct?

11 A No. I don't agree with that.

12 Q Now, Freedom's advice to you of the fact that
13 it was seeking other financing, that it might use Dollar
14 Drydock might not, that didn't send off any alarms, any
15 alarm bells for anyone in the government, did it?

16 A That's not correct. It did. We were very
17 concerned about that.

18 Q You didn't tell Freedom, at that point, "What
19 do you mean you don't have financing?" Let's put it this
20 way. You didn't say anything to Freedom at that point
21 about any alarm bells going off, did you?

22 A Yes. We did. Well, we were concerned. It was
23 brought to Freedom's attention that we were concerned.
24 And we had in-depth --

25 Q Okay. Did you tell Freedom that if they didn't

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1 have -- Did you clarify with Freedom that you believed
2 they were telling you that they didn't have any financing
3 available?

4 A Freedom told us they didn't have any financing
5 available.

6 Q That's not true, Mr. Liebman. I'm not
7 quibbling with you but based on your testimony, didn't
8 you tell me that Freedom said that it was still
9 discussing financing with Dollar Drydock but that it was
10 considering getting financing from Broadway Bank?

11 A Right. The word is considering.

12 Q And isn't the requirement for a responsible
13 contractor not just having financing but the ability to
14 obtain financing? Isn't that right?

15 A But in Freedom's case you had to have
16 financing. There was no financing in place period.

17 Q Period.

18 A That was the concern.

19 Q Okay. Now, Freedom didn't tell you that there
20 was absolutely -- strike that.

21 Let's take a look at your notes from that
22 meeting. If you will turn to FT-424.

23 A Where would that be?

24 Q I'm sorry. That's wrong. That's the
25 government meeting. FT-73.

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1 A Yes.

2 Q After the first four pages of sign-in sheets,
3 now those are sign-in sheets first for the December 13
4 government meeting and then the December 14 Freedom
5 meeting, correct?

6 A Yes.

7 Q Now, on page 00949 these are your handwritten
8 notes of the financial meeting?

9 A Yes.

10 Q Now, in your notes you do indicate that Dollar
11 is considering using Broadway Bank instead, correct?

12 A No. That Freedom is considering.

13 Q I'm sorry. Freedom is considering using
14 Broadway Bank, correct?

15 A Correct.

16 Q And that they said on page 2 that Dollar is in
17 poor condition, correct?

18 A Yes.

19 Q Now, they note at the bottom of that page, of
20 950, that money is coming in from H.T. Foods Products.
21 Do you see that?

22 A But that was the problem. I see it. But
23 that's the problem.

24 Q It's a problem that there's money coming in?

25 A Because there was no -- Freedom had no -- H.T.

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1 Foods had no bank of record. We were not given any
2 evidence that H.T. Foods -- first of all, they weren't a
3 going concern. There was no bank of record. There was
4 no evidence provided to us that H.T. Foods had any money
5 period.

6 Q What were your other concerns about H.T. Foods?
7 Were there any others that concerned you about their
8 financial stability?

9 A Of course, that's basically it. Also it was
10 owned by Mr. Thomas. He was the president of H.T. Foods.
11 We were not shown anything that H.T. Foods could provide
12 support to Freedom although at the meeting the Freedom
13 people, Mr. Thomas and Mr. Pat Marra, the treasurer,
14 advised us that H.T. Foods had assumed financial
15 managerial responsibility and financial responsibility
16 over Freedom. And also the contract had been assigned
17 under the assignment of claims without even going through
18 our office.

19 Q But none of this gave you any comfort level
20 that H.T. Foods in deed, might be able to help finance
21 Freedom, correct?

22 A I hoped they would by they didn't show us
23 anything. Nothing was shown.

24 Q Wasn't enough for you?

25 A And the other government attendees. That's

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1 correct.

2 Q And, yet, this is the same H.T. Foods to which
3 you mandated a novation of this contract. Isn't that
4 correct?

5 A After they obtained outside financing, yes.
6 They obtained outside financing from Banker's Leasing
7 during the novation process. That's correct.

8 JUDGE JAMES: Who is the "they," that obtained
9 the financing.

10 THE WITNESS: H.T. Foods obtained financing
11 from a company called Bankers Leasing Corporation,
12 Financial Corporation.

13 JUDGE JAMES: Still looking at page 958 what
14 does your note mean, "money coming in from H.T. Foods?"
15 Money coming in to whom?

16 THE WITNESS: This was Freedom's -- I was
17 writing down what Freedom said. That they were getting
18 money. They didn't indicate where. I'm sorry, money
19 coming in from H.T. Foods to Freedom. Where that money
20 was being obtained by H.T. Foods was never provided to
21 us.

22 BY MR. LUCHANSKY:

23 Q Now, at this point, Mr. Liebman, you were
24 requiring that the financing that was to be provided by
25 Freedom would be bank financing. Isn't that right?

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1 A No. I wasn't requiring that. Whatever
2 financing -- however they could obtain financing, as long
3 as it was from a verifiable, reputable source. And we
4 wanted also a time frame for providing the financing.

5 Q Well, find the references in the record to
6 where you required a financial institution to provide the
7 financing. But --

8 A Well, it didn't have to be a financial
9 institution. It --

10 Q Pardon me?

11 A I didn't have to be a financial institution.

12 Q Well, isn't it true, Mr. Liebman, that that's
13 what you communicated to Freedom?

14 A I said -- no. A verifiable reputable source of
15 credit.

16 Q Again, we'll soon get to the references in the
17 record that say otherwise. In any event, where in your
18 notes is there any indication that the government threw
19 up an alarm and told Freedom that if it did not have
20 financing in place at this moment that it was in danger
21 of having progress payment suspended and being declared
22 ineligible?

23 A Oh, no. That was never brought to their
24 attention like that. No. Not at all. We were very
25 surprised and very concerned that there was no money

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1 coming in from Dollar Drydock. Because you're talking
2 many months since that pre-award survey in August '94. I
3 never told Freedom or anybody else never told Freedom we
4 are considering suspending progress payments at that
5 meeting, no. We wouldn't do that.

6 Q Well, you wouldn't do that, Mr. Liebman,
7 because what you did next -- This meeting was on a
8 Friday, right?

9 A I believe it was Friday, I believe the December
10 14 meeting was on a Friday.

11 Q Now, what you did next was on that Monday,
12 December 17, you, Colonel Hein, Sam Stern and Lynn
13 Gutfleiche --

14 A And Karl Herringer.

15 Q -- and Karl Herringer get on the phone, on the
16 speaker phone and all five of you call Noel Seigert at
17 Dollar Drydock. Isn't that right?

18 A That was at the request of our commander.

19 Q Isn't that right?

20 A That's correct. At the request of our
21 commander.

22 Q Now, what you asked Mr. Seigert during that
23 conversation -- Well, let me ask you this first of all,
24 did you get permission from Freedom to call their lender?

25 A No.

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1 Q Did you even tell Freedom that you were
2 planning on calling their lender?

3 A No.

4 Q Now, Mr. Stokes is your financial analyst,
5 isn't he?

6 A Correct.

7 Q And you think that he's credible and has good
8 business judgment?

9 A Yes.

10 Q Now, if you will look at FT-219. Do you see
11 that in a meeting with Mr. Bankoff in January of '86, Mr.
12 Stokes comments at the bottom of a page, "Cannot go
13 directly to Bankers Leasing" who was the lender at the
14 time. "Would be a violation of good business
15 procedures/ethics in this case without Freedom's
16 consent." Do you see that?

17 A Yes.

18 Q Wouldn't you agree with Mr. Stokes that indeed
19 calling Dollar without Freedom's consent or even letting
20 them know you were calling was a violation of good
21 business practice and ethics?

22 A I would say it's not the norm. That would be
23 my answer.

24 Q Wouldn't you agree that it's a violation of
25 good business practice and ethics?

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1 A I'm not going to draw that conclusion. I would
2 say it's not the norm.

3 Q Would you agree that it wasn't right?

4 A I would say it's not the norm.

5 Q Would you agree that it wasn't the right thing
6 to do?

7 A I believe it was the right thing to do to call.
8 But not notifying the contractor was not the norm.
9 That's my statement.

10 Q Now, wouldn't you agree also that what you
11 discussed with Mr. Seigert was whether Dollar was still
12 going to be providing \$7.2 million in financing?

13 A No.

14 Q Isn't that correct?

15 A We were concerned about the issue of financing
16 per se. Realizing that it wasn't a \$21 million contract
17 that was awarded, it was a \$17 million contract.
18 Obviously, \$7 million wasn't needed to perform on a \$17
19 million contract. It would be a lesser amount. We were
20 concerned about adequate financing to perform under this
21 contract.

22 Q Do you remember at the deposition I took of
23 you, do you remember I took your deposition in this case?

24 A Yes.

25 Q Do you remember that I asked you this question

1 about your telephone call to Mr. Seigert?

2 A Yes.

3 Q And do you recall I asked you, "Were you

4 calling to discuss whether they were still going to be

5 providing the \$7.2 million of financing?"

6 A Well, perhaps I didn't answer it --

7 Q Do you remember that I asked you that?

8 A I'm pretty sure it was discussed. Yes.

9 Q And do you remember that your answer was, "Yes.

10 That was why I was calling him?"

11 A In general, yes.

12 Q Isn't that what you answered then?

13 A I don't remember exactly how I answered during

14 the deposition but the intent of the answer really was --

15 Q Now, I'm not asking about the intent of the

16 answer, Mr. Liebman.

17 A I'd have to see the deposition. I don't

18 recall.

19 Q Mr. Liebman --

20 A I don't recall how I answered the question

21 exactly.

22 Q Okay. And at a break I'll pull out the

23 deposition transcript references. But, you do remember

24 me asking you that question?

25 A I'm pretty sure you did. Yes.

1 Q Now, during that phone call it was also at a

2 time when you still believed that Freedom was ineligible

3 for progress payments until it started incurring direct

4 costs for raw materials and direct labor.

5 A No. I don't think so. I think that issue was,

6 in my eyes was dead at that point. I don't remember the

7 exact time frame. But I think it was a dead issue. That

8 wasn't my concern. My concern was the financing.

9 Q Well, you do remember that we reviewed your

10 January 4 letter and there is a reference in there to the

11 fact that progress wasn't being made under the direct

12 cost issue, correct? That was put in your January 4

13 letter?

14 A But not with --

15 Q Wasn't that put as an additional consideration

16 in your January 4 letter?

17 A Well, if you would let me answer the question.

18 Q I'd like you to answer yes or no.

19 A It's in the letter but with a different

20 perspective.

21 Q But it's the same issue?

22 A No. It's not the same issue. It's a different

23 perspective. Totally -- it's different. It's not the

24 same thing.

25 Q And we reviewed your telephone call to Mr. Ford

1 in which you referred to both these reasons, financial

2 condition and no progress as being reasons for your

3 letter being sent to Freedom, correct?

4 A No. I don't agree with that. The matter --

5 Mr. Ford -- I can't speak for Mr. Ford. That's the way

6 he documented his file. But that's not the position we

7 conveyed to Mr. Ford.

8 JUDGE JAMES: Again, I should understand from

9 your testimony that Ford's writing there is false?

10 THE WITNESS: No. Not false. But he probably

11 -- it's the way he probably made his notes. We conveyed

12 to Mr. Ford during that conversation that --

13 JUDGE JAMES: I only asked you whether you

14 thought his statement was false.

15 THE WITNESS: No. I not false but it was just

16 the way he worded his notes. It's incorrect. That's

17 right, it's incorrect, your Honor. I'm sorry.

18 BY MR. LUCHANSKY:

19 Q Now, you also indicated at the December 13

20 government meeting, the post-award government meeting

21 that this direct/indirect issue wasn't resolved for at

22 least a little while, right? A couple weeks?

23 A No. I was saying there was no need to resolve

24 it immediately because Freedom was submitting a revised

25 request the next day another decision would be made

1 shortly. That's what that letter says. Paragraph 4 of

2 that letter which you wouldn't let me read to completion.

3 Q The paragraph says that you weren't going to

4 resolve the issue right then.

5 A That day.

6 Q Correct.

7 A I was waiting until the next day because --

8 Q And you testified earlier that it took you at

9 least a couple of days, if not weeks, to resolve the

10 issue.

11 A No. That issue was resolved. That was a dead

12 issue.

13 Q Is it your testimony that you resolved that

14 issue between December 13, a Thursday, and Monday,

15 December 17?

16 A No. I'm not saying that. I'm saying it was

17 resolved before any suspension notice, proposed

18 suspension notice was provided to Freedom.

19 Q And, in fact, despite Mr. Herringer being

20 present on December 13 and telling you that all costs

21 were direct, you required him to issue a legal opinion,

22 didn't you?

23 A Right. But I'm not sure of the date of the

24 request.

25 Q If you will take a look at FT-078. Do you have

1 that in front of you?

2 A Yes.

3 Q Now, despite -- you had already on December 10,

4 1984 written to Mr. Herringer asking for a legal opinion.

5 Is that correct?

6 A I don't remember the date of the request but I

7 did request an opinion.

8 Q Okay. Well, I'm sorry to have you jump around,

9 but if you look at F-22. Do you have that in front of

10 you?

11 A Yes.

12 Q Do you see that on December 10, 1984, a couple

13 of days after you got DCAA's December 7 rejection of

14 progress payment number one because of the

15 indirect/direct cost issue --

16 A I'm sorry. I thought we were -- What was the

17 date? I thought we were talking about a different.

18 Q Just listen to the question, sir.

19 A Go ahead.

20 Q We are looking, are we not, at F-22, a December

21 10, 1984 letter from you to Mr. Herringer, correct?

22 A Yes.

23 Q Now, to place this letter in context, you do

24 remember that on December 7, 1984, DCAA provided you with

25 a notice rejecting progress payment number one because of

1 their mistaken belief that progress payments could not be

2 paid until direct costs were incurred. Do you remember

3 that?

4 A Is that that 1-page letter that you showed us

5 earlier?

6 Q Yes.

7 A Yes.

8 Q And now on December 10 you write to Mr.

9 Herringer asking him for a legal opinion as to whether

10 you can pay progress payments, correct?

11 A Yes.

12 Q Now, you note in paragraph number 2 that the

13 progress payment request is being held in abeyance

14 pending the results of audit and technical reviews,

15 correct?

16 A Yes.

17 Q Now, after you send this letter to Mr.

18 Herringer, you meet with Mr. Herringer on December 13 at

19 the post-award conference, correct?

20 A Correct.

21 Q And Mr. Herringer tells you again, "All costs

22 are direct, you can pay progress payments," correct?

23 A Correct.

24 Q Nevertheless, you still send him out to do

25 further investigation to make this determination, don't

1 you?

2 A I'm not following you. I'm not sure what you

3 are referring to.

4 Q If you will look at FT-78 you will see that

5 this is a record of a telephone conversation where Mr.

6 Herringer -- Do you have that in front of you?

7 A Yes.

8 Q Do you see that this is a telephone

9 conversation where Mr. Herringer and Mr. Wright who is an

10 attorney for DCASMA. Is that right?

11 A Yes.

12 Q The two of them call Mr. Ford and ask whether

13 the progress payment should be paid, correct?

14 A Yes.

15 Q And the question is that Mr. Wright says, he's

16 wondering if all costs really are considered direct.

17 A Correct.

18 Q And Mr. Ford was the buyer who negotiated this

19 contract, right?

20 A Yes.

21 Q And Mr. Ford confirms, yeah, we awarded all the

22 costs as direct, right?

23 A Yes.

24 Q And so Chuck Wright concurred with Mr.

25 Herringer that Freedom should be paid. Isn't that right?

1 A That's correct.

2 Q Now, in response to your request for a formal

3 opinion letter Mr. Herringer then writes you a letter on

4 December 26 telling you that you can pay these progress

5 payments, correct?

6 A That's correct.

7 Q And that's at F-25.

8 A What's the date of the letter head? I'm sorry.

9 Q December 26, 1984.

10 A Yes.

11 Q And do you recall this letter dated December

12 26, 1984?

13 A I don't recall the date. But I recall the

14 response from Mr. Herringer, yes.

15 Q And you recall that the substance, that Mr.

16 Herringer actually cites the DAR and defines direct costs

17 for you, correct?

18 A Again, I remember the conclusions. I don't

19 remember all the details of the letter. But I remember

20 the conclusions that -- the advice Mr. Herringer provided

21 to me. That it was payable.

22 Q And, so, the advice is that indeed your belief,

23 the confusion you have about direct and indirect costs is

24 incorrect and that progress payments should be paid,

25 correct?

1 A It cleared up the confusion I had.
 2 Q It did?
 3 A Correct.
 4 Q Okay. Good. So now does this not confirm that
 5 at the time of your telephone conversation with Dollar
 6 Drydock on December 17, 1984 you were still under this
 7 mistaken notion that progress payments could not be paid
 8 until direct costs incurred?
 9 A No. That's not correct because I was in
 10 constant communication with Mr. Herringer. He's just
 11 down the hall. The issue was a dead issue before he
 12 issued his legal opinion.
 13 Q Now, in paragraph 7 of Mr. Herringer's letter
 14 --
 15 A Now where -- may I --
 16 Q Paragraph 7.
 17 A I know. What tab are we looking at?
 18 Q I'm still on F-25.
 19 A I don't have that. The 10 December letter, is
 20 that what we are talking about?
 21 Q Yes. --
 22 A Okay.
 23 Q No. I'm sorry. December 26, 1984.
 24 A What tab is that?
 25 Q F-25.

1 A Oh, okay. Yes.
 2 Q Do you see that Mr. Herringer now on this date,
 3 once again confirms -- number one points out that this is
 4 the contractor's first progress payment request. Do you
 5 see that in paragraph 7?
 6 A Yes.
 7 Q Did you understand that to be a concern by Mr.
 8 Herringer that the contractor get paid?
 9 A It just says it should be taken into account by
 10 the ACO. If you read in the next to the last line.
 11 Q That's right. And taken into account meaning
 12 that as a first progress payment request the contractor
 13 really needs this money, correct?
 14 A One can draw that conclusion. Yes.
 15 Q And he also says that as he noted about the
 16 post-award on December 13 and 14 and subsequent meetings
 17 there has been no change in the contractor's financial
 18 position from the time of the award of contract to the
 19 present. Isn't that right?
 20 A That's his --
 21 Q Isn't that what he says here?
 22 A He says that at the --
 23 Q Wasn't Mr. Herringer one of the people on that
 24 telephone conference call from you to Dollar Drydock on
 25 December 17?

1 A I didn't answer the first question.
 2 Q The question was does he say that here?
 3 A It says that as of the government post-award
 4 the government post-award, December 13. The day before
 5 the formal post-award. The government post-award which
 6 is Q.
 7 Q It says that as he noted in the government's
 8 post-award conference and subsequent meetings there has
 9 been no change in the contractor's financial position.
 10 A Right. Mr. Herringer did not attend to formal
 11 post-award at the contractor's plant.
 12 Q Right.
 13 A He's at the government meeting. The government
 14 meeting.
 15 Q But he was at that meeting and he was on the
 16 phone call with Dollar Drydock on December 17.
 17 A That's correct.
 18 Q And he's concluded here that as he confirmed
 19 numerous times with you there has been no change in the
 20 financial condition of Freedom. Isn't that right?
 21 A But he's incorrect. It says that here.
 22 Q Isn't that what he says?
 23 A That's what he says. That is what he says
 24 here.
 25 Q Okay. Now, after your meeting -- After your

1 telephone call with Dollar Drydock even then you didn't
 2 go to Freedom and say, uh-oh, Freedom, it looks like your
 3 financing has been pulled, you might be in danger of
 4 losing progress payments, did you?
 5 A That's not correct. We did inform the company
 6 subsequent --
 7 Q When did you first inform Freedom that they
 8 were in danger of having their progress payment
 9 suspended?
 10 A That was letter, the formal letter was January
 11 -- whatever it was, January 4 or January 5, 1985.
 12 Q So you agree that the first time you ever told
 13 Freedom that you were considering suspended progress
 14 payments was January 4, 1985?
 15 A That's correct. Formal. Yes. That was
 16 correct.
 17 Q Formally or informally?
 18 A Yes.
 19 Q That's the first time you even hinted to
 20 Freedom that they were in danger of you suspending their
 21 progress payments. Isn't that right?
 22 A I would say it's a logical conclusion, yes.
 23 Q I don't want a logical conclusion. I want
 24 facts, sir. Do you not recall that that's the first time
 25 you even suggested to Freedom that they might be in

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1 danger of you suspend their progress payments?
 2 A I disagree with that.
 3 Q Okay. When did you communicate that to them
 4 before January 4?
 5 A I cannot give you a specific date. There were
 6 numerous --
 7 Q How did you communicate it to them?
 8 A Numerous, well, there were numerous discussions
 9 with Freedom, verbally. We had meetings. We sent them
 10 letters but not mentioning suspension of progress
 11 payments.
 12 Q Is it your testimony that between December 17,
 13 1984 and January 4, 1985 you informed Freedom during a
 14 meeting, any meeting, that you were considering
 15 suspending progress payments?
 16 A I can't say that categorically.
 17 Q I just want your recollection.
 18 A I don't have any recollection.
 19 Q You do not recall ever telling them that you
 20 were considering suspending progress payments until you
 21 sent your January 4 letter. Isn't that correct?
 22 A That's correct.
 23 Q What you did do was on December 18, 1984 you
 24 sent a letter to Freedom innocuously asking them about
 25 their financial arrangement, didn't you?

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1 A Not innocuously.
 2 Q Let's take a look at it. It's at government
 3 Rule 4 file, Tab 12. Do you have the letter in front of
 4 you sir?
 5 A Yes. I do.
 6 Q Do you see that in this letter you asked a
 7 number of questions about Freedom's financial situation,
 8 correct?
 9 A Correct.
 10 Q Now, some of these questions are generated by
 11 your discussion with Freedom at the December 14
 12 post-award, correct?
 13 A Correct.
 14 Q Where they were telling you they were thinking
 15 of using Broadway Bank instead of Dollar, correct?
 16 A Correct.
 17 Q And they were also telling you their belief
 18 that they needed a lot less financing than they needed as
 19 of the pre-award, correct?
 20 A Less financing.
 21 Q They were saying a lot less, right?
 22 A I don't recall.
 23 Q Okay. And so in response to that your initial
 24 questions are: Well, how much funding do you think you
 25 need? Where do you propose to get it from? What's the

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1 specific time frame? When do you think you can get it?
 2 So you asked a number of questions which are reasonable
 3 to know, correct?
 4 A Yes.
 5 Q In addition you asked questions that are based
 6 upon your telephone call to Dollar Drydock whom you have
 7 now just called on a 5 to 1 call without Freedom's
 8 permission, without warning to them and talked to them
 9 about \$7.2 million worth of financing, correct?
 10 A Yes.
 11 Q And, for example, you asked Freedom "Has the
 12 \$7.2 million in credit cited in Dollar Drydock's
 13 commercial letter of 9 August 1984, been changed since
 14 the contract was awarded, correct?
 15 A Yes.
 16 Q So that does confirm that indeed what you were
 17 discussing with Dollar Drydock was \$7.2 million worth of
 18 funds, correct?
 19 A It was brought up, yes.
 20 Q And if you turn the page to J, then there was
 21 some question about an August 10 letter, that's something
 22 that was mentioned by Dollar Drydock on December 17,
 23 correct?
 24 A Yes.
 25 Q And yet no where in this letter do you even

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1 mention to Freedom that you have talked to Dollar
 2 Drydock, do you?
 3 A Well, I'm sorry that I --
 4 Q You don't tell Freedom that you spoke to Dollar
 5 Drydock?
 6 A That's correct.
 7 Q To Freedom it's still a mystery, they are just
 8 getting a letter from you, please put in writing the
 9 information we just talked about on Friday. Isn't that
 10 right?
 11 A Correct.
 12 Q You don't mention anything in here that you are
 13 considering suspending progress payments, do you?
 14 A That is correct.
 15 Q And you don't give Freedom any indication that
 16 they have a certain amount of time to secure financing,
 17 have it in hand, or else you are going to be taking some
 18 kind of drastic action, do you?
 19 A I was not considering suspending progress
 20 payments at that time.
 21 Q And, so, do I understand correctly that even as
 22 of the time of your December 17 phone call with Dollar
 23 Drydock you were not considering suspending progress
 24 payments?
 25 A That's correct. Not at that time.

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1 Q And no where in this letter, at the end of the
2 letter you don't even provide a time limit, a specific
3 time within which Freedom has to respond, correct? You
4 just say on page 2, "Your timely response to the
5 foregoing is requested," right?

6 A Right. There was no specific date mentioned.

7 Q No particular urgency.

8 A By timely that would mean urgent. Timely is
9 important, signifies importance.

10 Q Is it your testimony that my saying, "Your
11 timely response to the foregoing is requested," that you
12 are communicating a sense of urgency to Freedom?

13 A That's correct.

14 Q And do you provide them with any indication of
15 what the consequences would be if they don't provide a
16 timely response?

17 A No.

18 Q And how does Freedom know what you consider to
19 be timely?

20 A I can't speak for Freedom.

21 Q How would you expect them to know?

22 A Freedom knew because of what happened at the
23 post-award, at that side meeting, that the government was
24 very concerned about their financing. They knew that.
25 There was quite a heated discussion of that post-award.

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1 Q And where is that reflected?

2 A This was in my -- those exact words I believe
3 are in my post-award minutes in the Rule 4.

4 Q You just reviewed it. What specific words?

5 A Oh, no. Not the handwritten notes. But the
6 actual formal post-award orientation record that I made
7 that's in the Rule 4. I believe the words heated
8 discussion were there or something of a similar nature.

9 Q I will not take a look at that. I'm not sure
10 the record bears you out. But that's your testimony.

11 Freedom responds to this letter, does it not?

12 A I do not recall.

13 Q Freedom provided you with a list of various
14 sources of places -- well, responded paragraph by
15 paragraph, didn't it?

16 A I don't recall the response.

17 Q If you will take a look at government Rule 4,
18 Tab 13.

19 A Yes.

20 Q This is in response to your December 18 letter,
21 isn't it?

22 A Yes.

23 Q And indeed Mr. Thomas provides you with the
24 answers to your questions about how much financing he
25 thinks he needs, which is \$415,000, correct?

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1 A I'm sorry. Where are you referring to?

2 Q Page 1, funding.

3 A Yes.

4 Q See, he says, \$415,000 plus funding on some
5 production equipment, correct?

6 A Yes.

7 Q Then he gives you the list of funding sources
8 that he discussed with you back on Friday December 14,
9 correct?

10 A Possible sources, yes.

11 Q Okay. Including \$400,000, I'm looking on page
12 2, number 2, financing direct from H.T. Foods Products,
13 Inc., \$400,000, correct?

14 A Yes.

15 Q Now, he did tell you at the post-award that
16 that \$400,000, which you reference in your handwritten
17 notes as well, was money that H.T. expected to get in
18 from a sale of its option on the lease that it held with
19 Mr. Penzer, didn't it?

20 A May I refer back to that tab. I don't recall

21 --

22 Q Forget about those notes.

23 A I don't recall if that was -- I don't recall
24 that being discussed at the post-award. It could have
25 been. I don't recall.

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1 Q Okay. He also talks about financing either
2 from a financial institution or from H.T. Foods, correct?
3 In subcontractor financing, equipment financing from
4 manufacturer, all these different sources, correct?

5 A Yes.

6 Q Now, there's no problem with Mr. Thomas
7 obtaining financing from other than a financial
8 institution, is there?

9 A I see no problem with it.

10 Q In any event, turning to page 3, letter (i),
11 concerning Dollar Drydock Freedom confirms what it has
12 been saying all along, which is, no formal change in
13 credit cited by Dollar Drydock, it's just, we don't think
14 we need \$7.2 million. That was based upon a much higher
15 contract.

16 A Right.

17 Q And the August 10 letter was sent to the
18 government. It says that.

19 A I disagree. Well, where is he saying that
20 about -- Okay. I see what you are saying. Okay.

21 Q The point is, Mr. Liebman, that no where is
22 there any discussion in your letter or their response
23 that Freedom had any knowledge of the drastic action that
24 you are considering taking, correct?

25 A Of suspension?

1 Q Yes.

2 A Not in my letter of 18 December and there's

3 nothing mentioned here in the response.

4 Q Now, you contend that when you wrote your

5 letter December 18, 1984, you were not contemplating

6 suspending Freedom's progress payments, is that what you

7 said?

8 A I had not made any decisions to propose

9 suspension at that time.

10 Q Didn't you say that you weren't even

11 contemplating it? Isn't that what you said?

12 A At that time we were concerned about --

13 Q Isn't that what you said?

14 A At that time I had no --

15 JUDGE JAMES: Gentlemen, he said he wasn't

16 considering suspension. Let's go ahead.

17 MR. LUCHANSKY: Okay. Thank you.

18 BY MR. LUCHANSKY:

19 Q Mr. Liebman, at what point did you begin to

20 consider suspension of Freedom's progress payments?

21 A During, around the New Year's, that New Year's

22 of the year 1985. That weekend of New Year's.

23 Q And what event triggered your consideration of

24 suspending progress payments?

25 A Because during the past several weeks nothing

1 were legitimate or not, did you?

2 A No. I didn't.

3 Q And so at the time of your January 4, 1985

4 letter you didn't have any knowledge one way or the other

5 of whether these proposed sources of financing were

6 legitimate or not, did you?

7 A I would say so, yes.

8 Q Meaning correct?

9 A Correct.

10 Q And it very well could be that these sources of

11 financing were verifiable, legitimate and adequate as of

12 January 4, 1985; isn't that correct?

13 A I don't know.

14 Q Isn't that correct, they might have been?

15 A (No response.)

16 Q They might have been but you didn't find out?

17 A In the way of a possible source of credit,

18 there might have been.

19 Q And by way of a certain source of credit they

20 might have been?

21 A Absolutely not. There's no indication in this

22 letter that any credit has been confirmed. These are all

23 possibilities. That was the problem. These were

24 possibilities.

25 Q And you did not inform Freedom at any time, at

1 had been provided to me or the government -- nothing

2 concrete in the way of an alternate source of financing

3 if Dollar Drydock's commitment had fallen through.

4 Q Now, on December 26 Freedom just wrote to you

5 in that letter that we just discussed proposing various

6 sources of financing, didn't it?

7 A Proposing, yes.

8 Q And you certainly did not, between the time you

9 received this December 26 letter and New Year's, you

10 didn't have time to investigate whether these sources of

11 financing were valid or not, did you?

12 A Well, it's not my job to --

13 Q You didn't do it, did you?

14 A It's not my job to do that.

15 JUDGE JAMES: Please answer the attorney's

16 question.

17 THE WITNESS: I'm sorry. No. I'm sorry, your

18 Honor.

19 JUDGE JAMES: Answer his question.

20 THE WITNESS: No. We did not investigate --

21 Well, I didn't. I don't know if Mr. Stokes our financial

22 analyst did.

23 BY MR. LUCHANSKY:

24 Q And you didn't ask anyone else to investigate

25 on your behalf whether the proposed sources of financing

1 any time prior to January 4, 1985 that in order to avoid

2 the suspension of progress payments they must provide you

3 with proof positive of financing in place in an amount to

4 be determined, and that was the only way that they would

5 avoid progress payment suspension, you didn't do that,

6 did you?

7 A I would say that's correct. I had no intention

8 of even considering suspending progress payments. We

9 were still in a review mode at that time.

10 Q And once you decided at the New Year's, I guess

11 at a New Year's function.

12 A No. That's not correct.

13 Q Over New Year's weekend?

14 A During that weekend --

15 Q Over New Year's weekend?

16 A Yes.

17 Q Okay. New Year's day off you decided to

18 propose suspending progress payments?

19 A That's correct.

20 Q And upon that decision you didn't inform

21 Freedom of that decision in any way other than sending

22 that January 4 letter, correct?

23 A Well, that was the -- the letter had to be

24 written.

25 Q Isn't that right? You didn't call --

1 A Yes. You are right.
 2 Q You didn't call Freedom and say, "Freedom, this
 3 is Marv Liebman, I've got some real concerns about your
 4 letter here, can we sit down and talk?" You didn't do
 5 that?
 6 A No. We might have called Freedom.
 7 Q I don't want might have?
 8 A I don't know. I don't recall.
 9 Q You don't calling?
 10 A I don't recall.
 11 Q What you did instead was when you got back from
 12 the January 1 holiday you convened an emergency meeting
 13 of the review board in order to have them review the
 14 propriety of letting you send out a letter proposing the
 15 suspension, didn't you?
 16 A That's correct.
 17 Q And you said that ordinarily it requires a lot
 18 of members but you went around gathering everyone up from
 19 their offices to have a hurry-up meeting so you could
 20 propose that suspension, didn't you?
 21 A That's correct.
 22 Q And that happened right after you got Mr.
 23 Herringer's letter confirming once again that not only
 24 can you pay progress payments but you really should,
 25 wasn't it?

1 A That's correct.
 2 MR. LUCHANSKY: Your Honor, can we take a break
 3 for a couple of minutes?
 4 JUDGE JAMES: Sure. Let's go off the record.
 5 (Off the record.)
 6 JUDGE JAMES: Let's go back on the record.
 7 BY MR. LUCHANSKY:
 8 Q Mr. Liebman, do you recall giving a statement
 9 to Colonel Hein in 1987 about this contract?
 10 A Yes.
 11 Q Do you recall telling Colonel Hein that this
 12 direct and indirect issue remained an issue for you until
 13 the meeting in February of 1985 with DLA?
 14 A I don't recall that.
 15 Q Do you recall that in your letter to Freedom
 16 dated February 6, 1985 informing Freedom that you had
 17 decided to, in fact, suspend progress payments that one
 18 of the reasons you provided was that Freedom Industries,
 19 is that there has been no physical progress, i.e.,
 20 receipt of materials, equipment, work in process, labor,
 21 assembly at Freedom Industries to date? Do you recall
 22 that?
 23 A That's not correct. It's in the letter but
 24 that's not the reason for suspension as the letter
 25 indicates.

1 Q Okay. You remember that it's in your letter?
 2 A It's in the letter as background information.
 3 Q Does it not reflect that at that time it was
 4 still your understanding, your misunderstanding that
 5 direct costs could not be billed until -- that indirect
 6 costs could not be billed until direct costs were billed?
 7 A No. That's not correct.
 8 Q And, in fact, direct costs on this contract
 9 were not going to be billed until I believe raw materials
 10 in February of '85, and direct labor in April of '85, do
 11 you recall that?
 12 A That's not correct. It was a dead issue in
 13 late, in December of 85.
 14 Q I'm just asking you if you remember that that
 15 was the plan. You did understand when you review the
 16 cash flows for this contract, didn't you?
 17 A I've looked at them, yes.
 18 Q In fact, you reviewed them in connection with
 19 your pre-award activities?
 20 A That's correct.
 21 Q And then Freedom sent you a letter at the end
 22 of December with another settlement saying look, let's
 23 both make sure we comply with the schedule set forth in
 24 these cash flows, right?
 25 A I don't remember the details and all the

1 events.
 2 Q But you do remember getting a letter to that
 3 effect, right?
 4 A I don't remember.
 5 Q Okay. And you do recall, if you don't remember
 6 the exact letter, you do recall being informed by Freedom
 7 and confirming on the cash flows that raw materials and
 8 direct labor were not going to be, those costs were not
 9 going to be incurred until months after the beginning of
 10 the contract, correct?
 11 A Not exactly. No. Not exactly. Because you
 12 have to cost through the first articles early-on. Those
 13 first articles were being produced by Freedom
 14 subcontractors early-on.
 15 Q I'm talking about costs incurred directly by
 16 Freedom.
 17 A Well, those are costs incurred by Freedom. The
 18 work was performed by subs but those are Freedom costs
 19 and they were incurred early-on.
 20 Q Other than first articles, you do recall that
 21 raw materials and direct labor costs weren't going to be
 22 incurred on this contract for months after the award of
 23 the contract?
 24 A That's correct.
 25 Q And during those first three, four, five months

1 only building repair and occupancy costs, those kind of
 2 costs were going to be incurred?
 3 A Correct.
 4 Q And you did understand that point when you
 5 called Dollar Drydock on December 17, correct?
 6 A Correct.
 7 Q Now, let's take a look at your proposed
 8 suspension letter of January 4 which is Rule 4, Tab 16.
 9 Do you have that?
 10 A The 4 January letter? Yes.
 11 Q If you see the second paragraph where you
 12 discuss the Dollar Drydock situation, you say that the
 13 reason for -- that this reason for proposing suspension
 14 is that Dollar now says that no credit will be
 15 forthcoming until such time as an arrangement is in place
 16 to settle the amounts owed by Freedom Industries to
 17 creditors, correct?
 18 A Yes.
 19 Q Now, according to your notes Freedom had
 20 already told you that at the post-award conference; isn't
 21 that right?
 22 A It wasn't as categorical as --
 23 Q They told you that, didn't they?
 24 A They told us that --
 25 Q They told you?

1 A They told us that, yes. I would say that.
 2 Yes.
 3 Q So this wasn't new news to you when you called
 4 Dollar Drydock?
 5 A That's correct.
 6 Q And yet that's what you are saying in this
 7 letter is that you found out that information when you
 8 called Dollar Drydock on December 17, correct?
 9 A Well, we are referring to a conversation with
 10 Dollar. Let me read -- may I just read it again, please,
 11 I want to see the exact wording?
 12 Well, there's no reference in this paragraph to
 13 the post-award conference on December 14 or to any call
 14 to Dollar Drydock. It's just saying evidence available
 15 to me. It doesn't give the date of the evidence or the
 16 time of the evidence. It's just talking about evidence.
 17 Q So is it your position that the only reason
 18 that you proposed suspending progress payments on January
 19 4, 1985 is because Dollar Drydock now wanted some
 20 arrangement with Freedom whereby Freedom would agree to
 21 have a plan to pay back creditors, is that right?
 22 A That's not right.
 23 Q How is that incorrect? Isn't that what it says
 24 here?
 25 A Let me just look at the letter again. If you

1 look at the fourth and fifth sentences --
 2 Q Tell me what you --
 3 A Evidence available to me indicates that Freedom
 4 Industries is in such unsatisfactory -- that's the reason
 5 to suspend. That's the answer.
 6 Q Okay. That's your conclusion.
 7 A That's correct.
 8 Q That's the language that's in the DAR and in
 9 the DLAM and that's the basis on which -- that's a basis
 10 that -- that's a reason you have to give if you are going
 11 to suspend a contractor's progress payments. Isn't that
 12 right?
 13 A Or propose to suspend.
 14 Q Now, what I'm asking you for are the facts that
 15 led to that conclusion because that's your conclusion,
 16 isn't it?
 17 A That's correct.
 18 Q And the only fact identified here in your
 19 proposed suspension letter is that Dollar has said it
 20 won't extend any more credit until an arrangement is in
 21 place to pay off past creditors, correct?
 22 A That's what it says here.
 23 Q Now, an arrangement to pay off creditors can
 24 come in many varieties, can't it?
 25 A Yes.

1 Q And indeed the arrangement to pay off
 2 creditors, there's no indication here that there are any
 3 specific terms to that arrangement, is there?
 4 A That's correct.
 5 Q And yet you didn't go back to Freedom and say,
 6 Look, what's the likelihood of you setting an arrangement
 7 in place to fix this problem, did you?
 8 A I don't recall.
 9 Q And it could be that Dollar would have been
 10 agreeable to saying if Freedom had said, okay, our
 11 arrangement is we are going to pay off our creditors from
 12 the profits of this contract, that might have been
 13 agreeable to Dollar at the time for all you know from
 14 this letter, correct?
 15 A I can't speculate. Could be.
 16 Q Now, about this time, Mr. Liebman, Freedom --
 17 you are getting calls from people that Freedom is lining
 18 up to tell you that they are willing to provide
 19 financing, aren't you?
 20 A Possible financing, yes.
 21 Q Okay. For example, one of the things that
 22 happens is that Freedom calls you from Dick Lanza's
 23 office at Broadway Bank in Patterson, New Jersey and
 24 Henry Thomas says, Look, I'm in Dick Lanza's office he
 25 needs to confirm that you are going to be paying progress

1 payments in order to give me my financing, will you do
 2 that? Do you remember that call?
 3 A I don't remember that call.
 4 Q You don't remember telling Mr. Thomas at that
 5 time that you are not going to confirm that to Mr. Lanza?
 6 A I don't remember the Lanza call. I remember
 7 that there was a call or maybe several calls but there
 8 was a call. Whether or not it involved Broadway Bank, I
 9 know Broadway Bank was one of the banks being considered
 10 as a possible source of credit. But, I don't remember
 11 that particular calls.
 12 Q Who were those other calls from to you?
 13 A I don't remember the names but there was calls
 14 from, one or more calls from a financial institution,
 15 some calls from vendors wanting me to guarantee that I
 16 was going to pay progress payments.
 17 Q When you got these calls would you confirm --
 18 When you got these calls didn't you insist that -- When
 19 you got a call from somebody other than a bank, did you
 20 insist that you couldn't talk to them, you wanted to talk
 21 to a bank?
 22 A These calls were made at Freedom -- As far as I
 23 knew they were made -- Because sometimes Mr. Thomas would
 24 be on the phone. If I did receive a call from a vendor
 25 in all likelihood I would have told them, Well, I need

1 Mr. Thomas' permission to talk to you. And I remember
 2 calls where Mr. Thomas was on the phone with 3-way calls.
 3 Q Right. So you had a 3-way call, for example,
 4 from Mr. Thomas with Zeb Robbins, correct?
 5 A From where?
 6 Q A gentleman named William or Zeb Robbins?
 7 A I don't recall.
 8 Q Do you recall any calls where Mr. Thomas said,
 9 "Look, I've got an investor on the phone?"
 10 A I don't think he used the word investor. I
 11 remember calls from the bank or --
 12 Q Do you recall --
 13 A -- a vendor.
 14 Q Do you recall telephone calls from Mr. Thomas
 15 on conference call with somebody other than a bank who
 16 was willing to provide financing for this contract?
 17 A I don't recall.
 18 Q You only recall telephone calls from Mr. Thomas
 19 with a bank on the line?
 20 A I didn't say that. I said I recall --
 21 Q I'm asking.
 22 A I don't recall -- there were some calls, one or
 23 more calls but I don't remember who was --
 24 Q From whom?
 25 A Mr. Thomas and I don't know who -- I don't

1 remember --
 2 Q From potential --
 3 A I'm trying to answer the question. I don't
 4 remember who the third-party was.
 5 Q Do you recall that they were potential sources
 6 of financing?
 7 A I believe they were, one or more calls, yes.
 8 Q And do you recall that their purpose was to
 9 confirm that progress payments will be paid on this
 10 contract?
 11 A They wanted to guarantee that progress payments
 12 would be paid.
 13 Q To the best of your recollection -- well,
 14 indeed if you haven't suspended progress payments then
 15 progress payments would have been paid, right?
 16 A If the progress payment was proper, of course.
 17 And progress was being made on the contract. Not -- I'm
 18 not talking now relating to physical progress. But
 19 progress on the Freedom contract meant building repairs,
 20 rehabilitating the building. That was considered
 21 progress because of the unique nature of this contract.
 22 Q And as of December and January Freedom was
 23 making that kind of progress, wasn't it?
 24 A Yes.
 25 Q Now, despite these calls that you received, did

1 you do anything other than field these calls to confirm
 2 whether Freedom had the financial backing they needed?
 3 A Did I investigate these calls or look into
 4 these calls? No. Not that I recall.
 5 Q Now, let's take a look at the actual suspension
 6 letter. Between January and February the proposal and
 7 the actual, first of all, it was just a proposed
 8 suspension, correct?
 9 A Yes.
 10 Q It wasn't an actual suspension so --
 11 nevertheless, you didn't pay a request for progress
 12 payments in January, did you?
 13 A No. I didn't.
 14 Q But there was no actual suspension of progress
 15 payments, was there?
 16 A There was no formal suspension, no.
 17 Q Pardon me?
 18 A No formal suspension.
 19 Q And, therefore, there's nothing in the regs
 20 that allows you to preclude -- allows you to hold those
 21 progress payments, is there?
 22 A Yes. I have the right to hold progress
 23 payments for prepayment review and a prepayment review
 24 could mean just the financial review.
 25 Q So is it your testimony that the reason you

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1 didn't pay Freedom in January is because it failed the
 2 financial review of your prepayment audit?
 3 A Freedom failed to demonstrate that it was
 4 financially capable of performing under the contract in
 5 the absence of outside financing and no financing had
 6 been provided to me at that time from, firm financing.
 7 Q How firm did it have to be, Mr. Liebman?
 8 A How firm do you have to be, speaking generally?
 9 Q No. Speaking very, very, very specifically for
 10 Freedom.
 11 A Okay. Let's reflect -- yes.
 12 Q How firm did the financial commitments have to
 13 be?
 14 A As reflected in the Rule 4, there's a report
 15 here from our --
 16 Q I just want your testimony.
 17 A I'm trying to -- well, let me answer. In
 18 Freedom's case --
 19 Q Don't refer me to the document. Tell me.
 20 A Can I answer the question or do you want to
 21 provide the answer to me?
 22 Q You can answer the question.
 23 A Well, let me answer the question. We had --
 24 per review of our financial analyst, Mr. William Stokes,
 25 he issued a post-award surveillance financial report the

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1 end of January of 1985 after review of all the documents
 2 that Freedom provided and he deemed that Freedom needed
 3 \$3.8 million in outside financing to perform under this
 4 contract and that document is in this Rule 4 file.
 5 Q Excellent point. Let's take a look at it.
 6 Let's take a look at government Rule 4 file 25.
 7 A Yes.
 8 Q Now, if you look under paragraph 1, first of
 9 all, the information Mr. Stokes got for this survey was
 10 from you, wasn't it?
 11 A The information that -- not completely.
 12 Q Okay. Let me be more specific. Paragraph
 13 number 1, you see at the bottom that Mr. Stokes says that
 14 the August 9, 1984 letter from Dollar Drydock was
 15 subsequently withdrawn.
 16 A I'm sorry. Where are you reading from?
 17 Q The bottom of paragraph 1.
 18 A On the first page of the report? Oh, yes.
 19 Yes. Okay.
 20 Q Do you see that?
 21 A Yes.
 22 Q He got that information from you, didn't he?
 23 A Possibly, yes.
 24 Q Do you not recall that that's where he got it
 25 from?

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1 A No. I don't because it was general knowledge
 2 about this within our office among the concerned parties
 3 about this 9 August, 10 August scenario from the top on
 4 down. So I don't know if --
 5 Q Mr. Liebman.
 6 A I can't say he got this directly from me. He
 7 got it obviously as part of participating in the Freedom
 8 financial surveillance aspect.
 9 Q So you don't know where he got it from?
 10 A I can't say where exactly he got it from.
 11 Q Now, it also says the recall of the bank letter
 12 left Freedom Industries without that source of financing,
 13 correct?
 14 A That's what he says.
 15 Q Now, again, based upon you January 4 letter
 16 there was no withdrawal of that August 9 letter, was
 17 there?
 18 A I'm sorry. Based on --
 19 Q Your January 4 letter to Freedom there was no
 20 withdrawal of that financing, was there?
 21 A I don't remember the exact wording. But I
 22 mention the 9 August letter and I mention that 10 August
 23 letter.
 24 Q Your statement January 4 is that Dollar Drydock
 25 wants some arrangement in place to pay off creditors,

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1 correct?
 2 A Correct. Right.
 3 Q That doesn't constitute a withdrawal of the
 4 letter, does it?
 5 A No. It just hasn't been honored but it's no
 6 withdrawal.
 7 Q Moreover not being honored you knew at that
 8 time that the August 9 letter was conditional and was no
 9 longer binding, correct?
 10 A For that amount. For the \$7 million, yes.
 11 Q There was nothing else in that August 9 letter
 12 that bound Dollar to provide any financing if the
 13 contract was awarded at a lower amount?
 14 A I can't answer that. That might be a legal
 15 question.
 16 Q Now, if you look at paragraph -- turn to page 2
 17 of this report, paragraph E, just before conclusion, you
 18 see the Mr. Stokes says that, "Since the withdrawal of
 19 bank support by Dollar, Freedom has not approached any
 20 other financial institution other than Broadway Bank at
 21 least to the best of our knowledge." Do you see that?
 22 A Yes.
 23 Q Now, he got that information from you, didn't
 24 he?
 25 A No. He did not. Mr. Stokes did his own

1 evaluation of the financial package submitted by
 2 Freedom's Mr. Pat Marra. It was a Stokes evaluation.
 3 Q What submission is that, Mr. Liebman?
 4 A Mr. Pat Marra, I believe in the latter part of
 5 January, must be the third week in January submitted all
 6 sorts of financial documents to my office for review,
 7 balance sheets, income statements, cash flows, possible
 8 sources of credits.
 9 Q I'm talking about the information for alternate
 10 sources of financing.
 11 A Yes. That was part of the package submitted by
 12 Mr. Patrick Marra the third week in January. That's what
 13 I said. And there might have been other letters during
 14 the month of January and to that effect.
 15 Q Now, is it not true that Mr. Stokes is reaching
 16 an incorrect conclusion if he is concluding that in order
 17 to have adequate financing Freedom had to have approached
 18 a financial institution?
 19 A Again, he's the expert but I would say no. Not
 20 based on my knowledge. He's just saying that he's not
 21 approached any other financial institution. He's not
 22 saying that it's mandatory. He just said he didn't
 23 approach any to the best of his knowledge other than
 24 Broadway Bank.
 25 Q Were you at that time reevaluating at that time

1 repairs, et cetera, et cetera.
 2 Q And this is what you are telling them at the
 3 time that you hadn't paid three progress payments?
 4 A I might have said that, yes.
 5 Q Now, let's take a look at your February 6
 6 suspension letter.
 7 A Could you refer me to the tab?
 8 Q Tab 26.
 9 A Yes.
 10 Q If you turn to page 2.
 11 A Yes.
 12 Q Do you see that in paragraph B, you state that,
 13 "Freedom Industries has advised that it has not applied
 14 for or received loans from any other financial
 15 institutions."
 16 A That was my understanding at the time.
 17 Q Now, you did understand that Freedom had
 18 obtained a willingness, had obtained prior to that
 19 investors who were willing to finance this contract,
 20 didn't you?
 21 A I believe they -- that was explored. That was
 22 explored. Yes.
 23 Q It was explored and those private investors
 24 were presented to you, correct?
 25 A I don't recall to be honest with you.

1 Freedom's responsibility as a contractor?
 2 A Yes. From a financial standpoint.
 3 Q Now, on February 6 -- before you get to
 4 February 6. You said that you got calls from potential
 5 sources of financing and they asked for guarantees that
 6 you pay progress payments. What kind of guarantees did
 7 they ask for?
 8 A They wanted to know if I would guarantee a
 9 payment of progress payments if they advance -- and they
 10 wanted to know that prior to any commitments to finance
 11 monies to Freedom.
 12 Q And what did you tell them?
 13 A Basically that progress payments would be paid
 14 provided the contractor submitted an acceptable progress
 15 payment request that could be subject to government
 16 reviews whether on a pre or post payment basis. And that
 17 as long as the company was a viable company was capable
 18 of performing financially from a production vantage
 19 point, from a quality standpoint. And as long as the
 20 costs that were submitted in the progress payment
 21 requests were reasonable, allocable, proper and that the
 22 contractor had an adequate accounting system, then costs
 23 could be paid -- progress payments could be paid in the
 24 ordinary course of business provided that there was
 25 progress on the contract. Which included building

1 Q Okay. Do you remember it was explored?
 2 A I believe -- yes. Freedom was exploring the
 3 sources of financing from private sources as far as I
 4 know.
 5 Q And you refused to confirm to them that this
 6 was a contract eligible for progress payments, correct?
 7 A I refused to guarantee progress payments for
 8 the reasons I cited earlier.
 9 Q Now, you don't note here, Mr. Liebman, anything
 10 about any sources of financing other than financial
 11 institutions, do you?
 12 A I'm sorry?
 13 Q You don't note in your final suspension letter
 14 that Freedom had been seeking financing from sources
 15 other than financial institutions, correct?
 16 A That's correct.
 17 Q And on the next page, the last page of the
 18 letter, do you see where you state that, "As a further
 19 consideration there has been no physical progress, i.e.,
 20 receipt of materials, or equipment, work in process,
 21 labor, assembly of Freedom Industries to date?" Do you
 22 see that?
 23 A Yes.
 24 Q Doesn't that refresh your recollection that
 25 even as of the date of this suspension letter you were

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1 still under the mistaken understanding that those acts
 2 had to take place before Freedom could be paid its
 3 progress payments?
 4 A That's not correct. In hindsight I should have
 5 added that into the letter. But that's not correct. As
 6 I stated earlier during the testimony the issue of
 7 progress, you know, application of indirect costs against
 8 direct costs was resolved during the December time frame.
 9 JUDGE JAMES: If it was resolved in December
 10 why did you bring it up in January and again in February?
 11 THE WITNESS: Your Honor, it was just as a side
 12 issue in the way of title. Because Freedom was in such
 13 unsatisfactory financial condition and couldn't perform
 14 and in the event a default, the company went out of
 15 business and x-dollars in progress payments were paid,
 16 the government would have nothing to offset those
 17 progress payments against. It was just in the way of
 18 background information.
 19 BY MR. LUCHANSKY:
 20 Q If you will turn to FT-095.
 21 A Yes.
 22 Q This is a fact sheet that you prepared.
 23 A Yes.
 24 Q That purports to spell out the reasons for the
 25 suspension, correct?

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1 A Yes.
 2 Q In paragraph 2 you now add in a new reason why
 3 you decided to suspend progress payments, didn't you?
 4 A What reason are you referring to?
 5 Q You note here that the government never
 6 received a copy of the August 10, '84 letter which tied
 7 in any credit to Freedom with the governmental guarantee.
 8 A I'm saying, DCASMA New York which was my
 9 office, never received a copy of the 10 August letter
 10 which tied in any credit to Freedom with a government
 11 guarantee.
 12 Q Well, in fact, that letter had been received by
 13 the PCO, correct?
 14 A No. The PCO said -- it was received by the PCO
 15 because I provided him with a copy. He claimed he never,
 16 during conversations with Mr. Barkewitz he said he had
 17 never received that letter.
 18 Q You don't say that here, do you?
 19 A No. I don't.
 20 Q Now, under paragraph 3 you see once again you
 21 complain or you contend that Freedom hadn't received any
 22 loans from any other financial institution, correct?
 23 A Yes.
 24 Q And then in paragraph b, you said that "Freedom
 25 would not reveal the source and amount of claimed private

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1 financing except for H.T. Foods Products, correct?
 2 A That's correct.
 3 Q Now, that's a lie, isn't it?
 4 A No. I can't -- that is not a lie.
 5 Q Indeed, as you admitted during your testimony,
 6 you got phone calls from various potential lenders that
 7 were not just financial institutions but private
 8 investors. Isn't that right?
 9 A I would have to say it was a mistake. It's not
 10 a lie. A lie is a very strong word. It might be a
 11 mistake but not a lie.
 12 Q It's not true is it, Mr. Liebman?
 13 A I wouldn't even say that. It might be a
 14 mistake. It might be incorrect.
 15 Q Let's forget characterization, Mr. Liebman,
 16 let's talk about true and false. This statement in
 17 FT-095, your document dated February 12, 1985, paragraph
 18 3(b), that's false?
 19 A I'm not going to answer it that way. My answer
 20 is: it might be incorrect. To me false is a strong word,
 21 so is lie. It's not my intention to intentionally create
 22 any false --
 23 Q In your definition of incorrect, does that mean
 24 not true?
 25 A No. It's a mistake. If it is a mistake.

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1 Q Mr. Liebman, what happens now you do become
 2 aware because Mr. Thomas tells you that Gemini
 3 Construction is willing to finance the renovation costs
 4 for this contract, correct?
 5 A Gemini was one of the vendors that were willing
 6 or proposed to set up lines of credit to Freedom. There
 7 were several others.
 8 Q So that means they were willing to provide some
 9 financing, correct?
 10 A Provided the government would guarantee
 11 progress payments.
 12 Q And I can't remember if I asked you if Freedom
 13 did also tell you that H.T. Foods was going to have
 14 \$400,000 coming in from a sale of a lease option that it
 15 was going to use to finance Freedom. Is that correct?
 16 A It was referred -- there were notes to that
 17 effect at the post-award, handwritten notes. I believe
 18 it was alluded to.
 19 Q Mr. Liebman, did every one of these potential
 20 lenders who contacted you ask for a guarantee?
 21 A I would say if not all in the main they did,
 22 yes. There were letters to that effect --
 23 Q I'm sorry. If not all?
 24 A I'm saying -- I can't say categorically all of
 25 the time did but in the main they did. They submitted

1 letters to that effect that Freedom provided to me and in
2 the letters they specifically state, we are willing --

3 Q I'm just asking you if every single one --

4 A I can't say every single one. I say in the
5 main they did, yes.

6 Q Now, despite -- what did you understand --
7 strike that.

8 Despite the fact that you haven't provided a
9 penny to Freedom as of January -- oh, let's take a look.
10 January 14 of '85, progress payment request number 2 has
11 been submitted. So now you have \$299,683 in outstanding
12 of that --

13 A I can't see the chart. I'm sorry.

14 Q On January 14, 1985, Freedom submits a progress
15 payment in the amount of \$299,683, correct?

16 A Yes.

17 Q And so as of that date they are now \$399,993 in
18 costs that Freedom has incurred in work on this contract
19 that you haven't paid a penny on. Is that correct?

20 A I'm a little confused. That 293 -- I can't see
21 how the numbers add up.

22 Q This is the amount of the request.

23 A I'm looking at the prior requests, 100,000 on
24 number one. Resubmitted number one 252,000, number two,
25 is that an additional 299 or is that the cumulative, I

1 subcontractors?

2 A I don't recall.

3 Q Okay. Do you recall that the subcontractors'
4 agreements added up to about \$8 million in work under
5 this contract?

6 A I don't recall.

7 Q Do you recall that that would have then
8 resulted in \$800,000 worth of financing under the
9 contract?

10 A I don't recall.

11 Q Now, when you proposed suspending progress
12 payments to the Board, did you provide any written
13 findings, written findings to the Board to support your
14 position?

15 A No. I think because of the emergency nature we
16 provided documents --

17 Q Just yes or no.

18 A We did provide documents, written documents.

19 Q Did you provide any findings that you had made
20 in writing to the Board as required under Appendix E --

21 A Yes. We provided documents to the Board.

22 Documents were provided. Relevant documents.

23 Q What documents were those?

24 A I don't know the specific documents but any new
25 pertinent to the case, any --

1 think that might be the Que.

2 Q I'll have to check.

3 A Because the numbers don't add up when you add
4 up the three.

5 Q In any event we are dealing with several
6 hundred thousand dollars without progress payments?

7 A Yes. On two progress payments. The
8 resubmitted one and number two.

9 Q Now, despite the fact that you hadn't paid a
10 penny Freedom succeeds in meeting some milestones in
11 January, correct?

12 A Yes.

13 Q They meet their first articles milestone,
14 correct?

15 A Yes.

16 Q And they meet their subcontractor milestone of
17 arranging agreements with subcontractors, correct?

18 A I can't attest to -- I don't recall the
19 subcontractor.

20 Q Well, they sent you seven subcontractor
21 agreements on January 28, 1985, correct?

22 A I believe so. I don't recall the details.

23 Q Do you recall that in those subcontractor
24 agreements Freedom had arranged for a 10 percent
25 withholding, a 10 percent reserve with those

1 Q Now, in February the Board convened again,
2 correct?

3 A Right. In February the Board convened, in
4 early February considering my proposed suspension of
5 progress payments.

6 Q And the Board voted in favor of suspending
7 progress payments only by a majority vote, isn't that
8 right?

9 A I think it was four to one. Or five to one.

10 Four to one I believe. It must be five to one.

11 Q Let's take a look at F-40.

12 A Yes.

13 Q Do you see in paragraph 2 that three of the
14 Board members found the proposal to suspend, that three
15 Board members voted in favor?

16 A No. It's not saying that. It's saying that
17 three Board members found the proposal to suspend
18 progress payments factually-well-founded and in the best
19 interest of the government. There were five members
20 present.

21 Q And only three voted in favor, correct?

22 A No. It doesn't say that. No. Let me read --
23 it's kind of blurred at the bottom. It's my impression
24 four of the five members voted to suspend.

25 Q By impression you're not recalling, you are

1 just reading this document?

2 A No. I do recall. There were five members

3 present including the chairman, Mr. Stern, who was in

4 favor of my position. Five members -- again, I did not

5 write these minutes. But I attended the Board meeting.

6 Q Let me ask you this, Mr. Liebman.

7 JUDGE JAMES: Well, wait a minute. It doesn't

8 say you attended the Board meeting, how come you say that

9 you were there?

10 THE WITNESS: I'm sorry. I was there. I'm

11 sorry. I was there and, again, the person who made the

12 minutes --

13 JUDGE JAMES: These minutes are incorrect?

14 THE WITNESS: Yes, sir.

15 BY MR. LUCHANSKY:

16 Q Now, you certainly didn't give Freedom an

17 opportunity to address this Board either at the proposed

18 suspension meeting or at the actual suspension meeting,

19 did you?

20 A No. It's not the procedure --

21 Q You did not?

22 A No. This is a Government Board meeting. The

23 contractor does not attend these meetings. It's an

24 internal Board meeting.

25 Q Now, one of the people who voted in February in

1 favor of the suspension was Julius Rubel, correct?

2 A Yes.

3 Q And he was chief of contracting?

4 A No. He was the chief of pricing, financial

5 services and pricing.

6 Q I'm sorry. Chief of pricing. Now, do you

7 remember that at a June 16, 1985 meeting that you and Mr.

8 Rubel attended with Freedom, that Mr. Rubel actually said

9 to Mr. Thomas that progress payments are handouts?

10 A He didn't say it to Mr. Thomas. He said it to

11 Mr. Thomas' lawyer at the time during a heated argument.

12 And he immediately apologized for that. It was heat of

13 the moment. It was immediately -- He was given an

14 immediate apology.

15 Q He also said that, "You people come down here

16 expecting handouts," didn't he?

17 A No. I don't recall him ever saying that. I

18 remember in the heat of the moment, in an argument with

19 the lawyer saying, you already have your handout, you

20 already have your progress payments. Never said, "you

21 people," to my knowledge. I don't recall anyone, him

22 saying that. I'm not saying it didn't happen. But, I

23 don't recall that.

24 Q What did you understand him to mean by,

25 "Progress payments are handouts?"

1 A I'm not going to speak for Mr. Rubel.

2 Q I'm asking you what your understanding is. You

3 were at the meeting, weren't you?

4 A I'm not even going to get into that. I was

5 there.

6 Q No. You are.

7 A I can't speak for Mr. Rubel.

8 Q Mr. Liebman, stop talking, please.

9 A What is the question?

10 Q You were at that meeting, correct?

11 A Yes.

12 Q You heard Mr. Rubel make that statement, did

13 you not?

14 A Yes.

15 Q What was your understanding as to what he

16 meant?

17 A I don't know what he meant. I can't go into

18 Mr. Rubel's mind. It was an incorrect statement.

19 Q I want to go into your mind.

20 A I would say, it's my understanding it's an

21 incorrect statement. He was incorrect.

22 Q If you don't even know what he meant, how do

23 you know that it was incorrect?

24 A Because progress payments are not a handout.

25 They are not a handout. They are a means of the

1 government sharing in the financing of a contract. I

2 cannot speak for Mr. Rubel. I don't know what goes on in

3 his mind.

4 Q That was a meeting that you were in charge of,

5 correct?

6 A I probably was. There were maybe 20, 25 people

7 there, yes.

8 Q Now, at that time of the February 6 suspension

9 in which you noted that no physical progress was being

10 made, in fact, tremendous physical progress was being

11 made, wasn't it?

12 A I wouldn't say -- no. I wouldn't tremendous.

13 There was progress. First --

14 Q If you will please --

15 A Can I answer the question? Tremendous is

16 incorrect. There was progress, first articles. He was

17 repairing the building. Freedom was repairing the

18 building. So there was progress but the word tremendous

19 is incorrect.

20 Q Do you recall that at that time, in January,

21 Freedom was in the process of ordering production

22 equipment?

23 A I don't recall.

24 Q If you will take a look at F-39.

25 A Yes.

1 Q Do you have that open?
 2 A Yes.
 3 Q Do you see that this is a plant visit report?
 4 A Yes.
 5 Q And is this by the industrial specialist?
 6 A (No response.)
 7 Q Do you recognize the name at the bottom?
 8 A Well, he was a supervisory industrial
 9 specialist, yes.
 10 Q Do you see that according to this plant visit
 11 report personnel had been hired, both direct and
 12 contractual?
 13 A May I read this, please? Yes.
 14 Q The company has established a cadre of
 15 employees subject to call?
 16 A Yes.
 17 Q Contractors working with the City of New York
 18 to obtain various tax credits and funding available for
 19 training needs of their production employees?
 20 A Yes.
 21 Q Although they don't have equipment in-house yet
 22 but they are in the process of ordering equipment?
 23 A Yes.
 24 Q And you see that included in that equipment is
 25 special high tech production equipment, like multi-vacs,

1 Koch multi-vacs, Tieramats, Do-Boy model CBS-B,
 2 continuous band sealers, S&B Conveyor Company conveyor,
 3 do you see all that?
 4 A Yes.
 5 Q That's a lot of progress, isn't it?
 6 A Well, it says it's in the process which is part
 7 of progress but the equipment wasn't there. But it's
 8 part of progress. The word tremendous seems to me is
 9 something super-colossal, which wasn't the case but there
 10 was progress.
 11 Q Mr. Liebman, let me ask you a question. If you
 12 are a contractor whom everyone knows has negative numbers
 13 on the books and is relying upon 95 percent progress
 14 payments to finance its production as the DLAM provides
 15 and yet they have incurred several hundred thousand
 16 dollars in costs up to this point and, nevertheless, has
 17 somehow managed to get the money from somewhere and
 18 accomplish these things, don't you consider that to be
 19 tremendous progress?
 20 A No. It's progress.
 21 JUDGE JAMES: Therefore, your testimony, Mr.
 22 Liebman, is tremendous physical progress is incorrect,
 23 right?
 24 THE WITNESS: That's correct.
 25 JUDGE JAMES: But equally no progress is also

1 incorrect?
 2 THE WITNESS: That is correct, your Honor.
 3 JUDGE JAMES: So in hindsight that's an
 4 incorrect statement?
 5 THE WITNESS: From the counsel, you mean?
 6 JUDGE JAMES: Your statement.
 7 THE WITNESS: Well, right. There was progress
 8 but I wouldn't classify it as tremendous progress. Of
 9 course, there was no progress -- I'm sorry. Maybe I'm
 10 confused.
 11 JUDGE JAMES: Confused.
 12 THE WITNESS: No. It may be me. I'm sorry.
 13 JUDGE JAMES: Go ahead, Mr. Luchansky.
 14 BY MR. LUCHANSKY:
 15 Q And that record does reflect that agreements
 16 had actually been entered into for some of this
 17 equipment, for this equipment, correct?
 18 A May I read this again, please? Well, I don't
 19 see anything here finalized. If you can pinpoint
 20 something for me. It's in the process of finalizing and
 21 negotiating. Can you show me something concrete? I
 22 don't see that offhand.
 23 JUDGE JAMES: Mr. Liebman, you don't ask the
 24 questions. You answer them.
 25 THE WITNESS: I'm sorry. I'm sorry.

1 JUDGE JAMES: I've reminded you of that
 2 repeatedly yesterday and today.
 3 THE WITNESS: I'm sorry, your Honor.
 4 JUDGE JAMES: I want you to desist from asking
 5 the attorneys questions. Do you understand that?
 6 THE WITNESS: Yes, your Honor.
 7 BY MR. LUCHANSKY:
 8 Q Mr. Liebman, do you not see that in the middle
 9 of the page this report confirms that in addition the
 10 purchase agreement was made for 12 Do-Boy model CBS-B
 11 continuous band sealers, as well as the purchase of
 12 conveyor on from S&B Conveyor Company, Inc.?
 13 A Yes.
 14 Q And this equipment alone will cost
 15 approximately \$1 million?
 16 A Yes.
 17 Q So do you now agree with me that agreements had
 18 been made to purchase production equipment?
 19 A Some agreements, yes.
 20 Q Despite the fact that in February of 1985,
 21 according to a Colonel Hollins interview, you finally
 22 were convinced by DLA that your position on indirect and
 23 direct cost was wrong. DCAA didn't get the message for
 24 many, many, months after that. Isn't that correct?
 25 A That's correct.

1 Q And, in fact, if we were to look at DCAA's
2 audit reports for each of the progress payment requests
3 from the ones we've seen and continuing all the way
4 through H.T. progress payment number eight we will see
5 that in each one of those audit reports DCAA recommends a
6 payment to Freedom of zero dollars. Isn't that correct?
7 A It's correct for progress payment six. I don't
8 think it's correct for seven and eight.
9 Q Well, let's take a look. Let's take a look at
10 H.T. progress payment number one, which can be found at
11 FT-422 tab. If you look behind the tab it says, H.T.
12 P.P. number one. Do you have that? And I'm going to ask
13 you to look behind Tab B, beta.
14 A I have it.
15 Q Do you see that this is an advisory report of
16 DCAA's review of Freedom's H.T. progress payment number
17 one?
18 A Yes.
19 Q It's dated May 15, 1985 and you see that,
20 turning to the second page, or the first page after the
21 cover sheet, 03036, at this point the incurred costs, the
22 progress payment request is up to \$1,766,923, correct?
23 A Yes.
24 Q And that request was submitted on April 16,
25 1985, correct?

1 Is that correct?
2 A Correct.
3 Q Instead you get the same excuses in paragraph A
4 on page 2, no evidence that salaries have been paid,
5 correct?
6 A Correct.
7 Q Which you know is wrong?
8 A I don't know that offhand.
9 Q You know that progress payments are not based
10 on costs paid for a small contractor, small business?
11 A Yes. I do.
12 Q Rather of costs incurred?
13 A Correct.
14 Q So you know that paragraph A of the DCAA audit
15 report is wrong?
16 A No. I don't.
17 Q You do agree with me that their conclusion that
18 to the extent that they are disallowing costs to Freedom
19 because they hadn't been paid, they are incorrectly
20 applying the progress payment clause?
21 A Correct.
22 Q Turn the page, paragraph B. Disallowing costs
23 associated with setting up a new business that are
24 administrative in nature and not related to production.
25 Do you see that?

1 A I don't recall the date of the request.
2 Q It's somewhere after April. And as of this
3 point still not a penny had been paid for reason that
4 we'll get into shortly. But you will agree that not a
5 penny had been paid, correct?
6 A Correct.
7 Q Now, if you turn the next page and see DCAA's
8 treatment -- I'm sorry. On that same page, paragraph 2,
9 conclusions: Based on our review we recommend that zero
10 dollars be paid on the subject request. Do you see that?
11 A That's on page 1, yes.
12 Q Page 1, first page after the cover page, it's
13 the second page of this exhibit?
14 A Yes.
15 Q Then you turn the page and you see a whole
16 list, costs claimed, questioned costs, correct?
17 A Yes.
18 Q Now, despite that if you turn to page 3.
19 A Yes.
20 Q You do see in the middle of the page circled,
21 we consider the contractor's current cost accounting
22 system adequate for accumulating contract costs in
23 support of progress payment requests, right?
24 A Yes.
25 Q So the accounting system wasn't the problem.

1 A Yes.
2 Q Therefore, since production has not started
3 these costs do not qualify for progress payments,
4 correct?
5 A Correct.
6 Q And if you turn back to page 2, you see that
7 that note B applies to almost all of the costs requested?
8 A Correct.
9 Q Now, they were wrong, weren't they?
10 A Yes. They were.
11 Q And certainly as of May 15, 1985, which is
12 after February when the DLA straightened you out, you
13 knew they were wrong when you got this article approved?
14 A Yes. DLA did not straighten me out but they
15 were wrong.
16 Q And according to you, you would have known it
17 from long before that, correct?
18 A Yes.
19 Q Nevertheless, in H.T. progress payment number
20 two they stick by the same conclusions.
21 MR. LUCHANSKY: Now, your Honor, this is found
22 in the file at a government Rule 4 number but it's also
23 here at this point in the record. I will refer to either
24 one. If we can look at progress payment H.T. P.P. number
25 3, and for the benefit of the government it's also found

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1 at government Rule 4, Tab 54. I'm sorry. If I said
 2 three, I meant number two. H.T. P.P. number two.
 3 BY MR. LUCHANSKY:
 4 Q You see under Tab B.
 5 A Yes.
 6 Q Here it's H.T. progress payment request number
 7 two for \$673,000.74, correct?
 8 A Yes.
 9 Q Do you see once again the conclusions on that
 10 page, we recommend that zero dollars be paid on the
 11 subject request?
 12 A Yes.
 13 Q The explanation for those denials are the same
 14 as in the previous audit report, correct?
 15 A Can I look at the report just to refresh my
 16 memory?
 17 Q Please.
 18 A In the main, yes.
 19 Q Paragraph A, for example, is accusing Freedom
 20 of withholding approximately six weeks payments from its
 21 employees, correct?
 22 A Yes.
 23 Q Now, until the previous progress payment, until
 24 May of 1985, Freedom hadn't been getting paid by the
 25 government, correct?

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1 A Yes.
 2 Q So rather than this being a problem, isn't the
 3 employee's devotion to still working without getting
 4 paid, wouldn't you consider that to be a source of
 5 financing?
 6 A I'm not sure if I would classify it that way.
 7 But I would --
 8 Q Wouldn't you see this as a tremendous effort by
 9 Freedom to perform this contract despite being
 10 financially starved by you?
 11 A I would see it as a positive effort.
 12 Q Have you ever gone six weeks without being
 13 paid, Mr. Liebman, at the same time that you were working
 14 for it?
 15 A No.
 16 Q Have you ever made \$3.50 an hour and tried to
 17 support your family?
 18 A No.
 19 Q Have you ever been in a position as a single
 20 parent who is going to work in a factory and still be
 21 willing to go for six weeks without being paid?
 22 MS. HALLAM: Your Honor, I object to this. He
 23 hasn't demonstrated that these salaries of production
 24 workers that are working at \$3.50 an hour.
 25 JUDGE JAMES: I sustain the objection.

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1 BY MR. LUCHANSKY:
 2 Q Mr. Liebman, if you will turn the page to H.T.
 3 progress payment number three. Nevertheless, I'm sorry.
 4 Before we leave that. You do see on page 4, Bates stamp
 5 number 03050, once again DCAA says, "All costs recorded
 6 in book by the contractor are related to preproduction
 7 costs applicable to a new entity prior to actual
 8 production?"
 9 A Yes.
 10 Q Contractor doesn't have any raw materials or
 11 production labor force in-house, right?
 12 A Yes.
 13 Q Not prepared to commence operations and
 14 production, and that's the basis for the denial of most
 15 of these costs, correct?
 16 A Correct.
 17 MS. HALLAM: Your Honor, I object again. I
 18 thought we had an agreement that we weren't going to go
 19 through these documents and just confirm what's written
 20 in them. That's all he's asking Mr. Liebman to do for
 21 the most part, to say, yeah, that's what the letter says.
 22 He's been doing it for several hours.
 23 JUDGE JAMES: That's an objection. I overrule
 24 the objection.
 25 MS. HALLAM: Okay.

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1 BY MR. LUCHANSKY:
 2 Q And Mr. Liebman, on H.T. progress payment
 3 number three, the same situation, correct? DCAA
 4 recommends zero dollars be paid?
 5 A Yes.
 6 Q For the same reasons?
 7 A The same reasons are included as well as
 8 others, yes.
 9 Q Do you now recall that that same -- those same
 10 conclusions were being reached by DCAA with respect to
 11 their audit of progress payment number four, progress
 12 payment number six, progress payment number seven, and
 13 five is only missing because that got renumber because of
 14 subcontractors, and progress payment number eight?
 15 A As I stated a few minutes ago, to my
 16 recollection they recommended zero payment through
 17 progress payment six, not seven, and not eight.
 18 Q Okay. Let's take a look at government Rule 4,
 19 Tab --
 20 JUDGE JAMES: Mr. Luchansky, I think you've
 21 made your point.
 22 MR. LUCHANSKY: Yes, your Honor.
 23 JUDGE JAMES: And, it's also clear to the Board
 24 that notwithstanding the DCAA auditor's recommendations
 25 that somehow money began to get paid.

1 MR. LUCHANSKY: Yes, your Honor.
 2 JUDGE JAMES: So you've made your point. Why
 3 don't you go on to the next question?
 4 MR. LUCHANSKY: Yes, your Honor.
 5 BY MR. LUCHANSKY:
 6 Q Mr. Liebman, it was your testimony that in
 7 making all of your deduction from Freedom's progress
 8 payment requests you relied on DCAA's recommendations.
 9 Isn't that right?
 10 A Yes. I placed principal reliance on the DCAA
 11 recommendations. That's correct.
 12 Q And this is the same DCAA and the same and the
 13 same reports that are reaching these erroneous,
 14 absolutely flat-out wrong conclusions?
 15 A That's correct.
 16 Q And you didn't make any efforts at the time to
 17 challenge DCAA on their conclusions, did you?
 18 A That's not correct. I don't want to use -- I'm
 19 sorry. That's not correct. If you want me to elaborate,
 20 I will. That's not correct.
 21 JUDGE JAMES: Well, Mr. Liebman, after the very
 22 first audit report, report of what you have characterized
 23 as wrong or incorrect conclusions, did you disabuse them
 24 for that and say, Hey, DCAA, get squared away?
 25 THE WITNESS: Yes. Not just myself but many

1 other people. There was a big battle going on. DCAA
 2 refused to budge from their position. There were
 3 meetings about this. There were calls, discussions of
 4 higher echelons but DCAA maintained their position.
 5 JUDGE JAMES: So eventually a point came you
 6 just disregarded their position?
 7 THE WITNESS: With H.T. Foods progress payment
 8 number one I overruled them and I made the progress
 9 payment.
 10 JUDGE JAMES: You overruled DCAA?
 11 THE WITNESS: DCAA is advisory in regards to
 12 review of contract costs for progress payment purposes.
 13 I as the contracting officer had the final decision
 14 concerning payment. And I overruled DCAA.
 15 BY MR. LUCHANSKY:
 16 Q And that's different than what you said
 17 earlier, isn't it?
 18 A No. It's not. Because what you said earlier
 19 had to do with acceptability of an accounting system.
 20 DCAA determines the acceptability of the accounting
 21 system for the government per DAR. Concerning propriety
 22 of costs I could overrule --
 23 Q Fine. I accept that.
 24 A Okay.
 25 Q So you have the final say on progress payments.

1 They have the final say on adequacy of the accounting
 2 system?
 3 A That's my understanding. Yes.
 4 Q But even with respect to adequacy of accounting
 5 system you do have the right to challenge those
 6 conclusions, correct?
 7 A I could challenge it, sure.
 8 Q And there was a procedure by which you could
 9 pursue that?
 10 A A standard procedure, yes.
 11 Q Now, eventually the only thing that caused DCAA
 12 to change its position at all and allow the
 13 recommendation of any payments was meeting with
 14 Washington, D.C. DCAA auditors down in the fall of 1985.
 15 Is that correct?
 16 A That is correct. Well, that's partially
 17 correct.
 18 Q That's when Frank Sommers --
 19 A Yes.
 20 Q -- came to a meeting at DLA headquarters and he
 21 explained to DCAA that there was a problem?
 22 A I was also there and I also explained that
 23 there was a problem. And also the buying command was
 24 there and the concerns of the buying command and their
 25 position was taken into account by our local DCAA office

1 based on that meeting.
 2 Q And do you believe that they responded in part
 3 to the fact that you were objecting?
 4 A That was part of it because I personally met
 5 with Mr. Sommers at the meeting.
 6 Q And yet it's your testimony that you had been
 7 objecting for months and months but DCAA didn't respond
 8 to you?
 9 A They didn't respond but I overruled their
 10 position.
 11 Q Now, let's pick up with February of 1985. At
 12 this point you require a couple of things in order for
 13 Freedom to get paid any progress payments. Is that
 14 correct?
 15 A Yes.
 16 Q What you require is that adequate financing be
 17 obtained, correct?
 18 A And I specified it. Yes. That is correct.
 19 Q And the amount that you specified was \$3.5
 20 million, correct?
 21 A \$3.8 million?
 22 Q \$3.8 million. And the second condition was
 23 that a proper accounting system be in place?
 24 A No. In the letter that I sent to Freedom the
 25 day after the February 14 meeting at headquarters I

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1 specified the two conditions, \$3.8 million from a
 2 reliable, from verifiable, reliable, source of credit.
 3 And, two, that proper documentation must be in place at
 4 Freedom in the way of back up documentation to support
 5 any progress payment costs. And that these two
 6 conditions, meaning the \$3.8 million in credit and the
 7 proper supporting documentation for progress payments
 8 would apply to Freedom --

9 Q Well, if we look at F-49, that's the document
 10 you are referring to, isn't it?

11 A Yes.

12 Q So \$3.8 million in credit?

13 A Yes.

14 Q And under B, that's the sufficient information
 15 you're talking about.

16 A Yes.

17 Q And that's to support some finding by DCAA
 18 concerning the adequacy and reliability of the accounting
 19 system, right?

20 A That's what it says, yes.

21 Q Doesn't that indicate that what you are saying
 22 here is that a determination has not yet been made
 23 verifying the adequacy of Freedom's accounting system?

24 A Right. I would say it's incorrectly implied
 25 here, yes.

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1 Q Incorrectly what?

2 A Implied.

3 Q You misstate --

4 A It's incorrectly stated here. I shouldn't have
 5 stated it that -- I should have stated it differently.
 6 The system was adequate. There was no problem with the
 7 system at that time.

8 Q And in addition down in the bottom paragraph,
 9 you mention something about the financing having to apply
 10 to H.T. Foods products should a novation agreement be
 11 entered into, correct?

12 A Yes.

13 Q Now, in fact, Mr. Liebman, number one the
 14 financing that you were requiring for \$3.8 million was
 15 not financing simply to perform this contract, was it?

16 A Yes. It was. To my understanding it was.

17 Q Oh, weren't you requiring financing not only to
 18 allow the performance of this contract but also to
 19 satisfy the outstanding creditors who already existed at
 20 the time of award?

21 A I don't recall that. I don't believe that was
 22 the case. I could be wrong but I don't believe that was
 23 the case.

24 Q Let's take a look at your testimony from the
 25 first hearing in this case. We are going to be referring

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1 to transcript volume 1, page 90.

2 MR. LUCHANSKY: Does the government have the
 3 page?

4 MS. HALLAM: Yes.

5 BY MR. LUCHANSKY:

6 Q Do you recall that on direct examination in
 7 response to Ms. Hallam -- Do you remember Ms. Hallam
 8 asking you the question: "Could you tell us exactly what
 9 it was that you were looking for by way of a response to
 10 your questions," dealing with your request for
 11 information about financial capability?

12 And your answer was: "A commitment. A
 13 commitment from a financial institution to help fund this
 14 contract. Freedom could not fulfill this contract on
 15 progress payments alone, it needed outside financing. We
 16 needed something from them. We didn't receive that in
 17 his response. And when I say, firm, I mean, not just to
 18 cover the current contract, we also covered the past
 19 debts, enough in there in that pool to address both
 20 issues."

21 Do you recall that testimony?

22 A I don't recall the specifics but obviously it's
 23 in the record and perhaps I made a mistake during the
 24 testimony. I just don't recall. Nothing was
 25 intentional.

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1 JUDGE JAMES: So should I understand your
 2 testimony then, Mr. Liebman, that prior testimony was
 3 wrong, present testimony is right?

4 THE WITNESS: I would say the present testimony
 5 is correct, your Honor.

6 BY MR. LUCHANSKY:

7 Q Okay. Do you recall that Ms. Hallam asked you
 8 another question shortly thereafter that elicited a
 9 similar response, where she asked in connection with
 10 Freedom's providing information to you about what
 11 financing resources they had available, she asked, "Will
 12 you tell us if you were satisfied with the responses that
 13 they provided at least as to these issues?"

14 And your answer --

15 MS. HALLAM: Tell me where you are reading
 16 from.

17 MR. LUCHANSKY: I'm sorry. Page 99.

18 MS. HALLAM: Ninety-nine?

19 MR. LUCHANSKY: Yes.

20 BY MR. LUCHANSKY:

21 Q And specifically you said, "Well, again, this
 22 is -- the issues raised here weren't -- didn't address
 23 the heart of the matter or the heart of the problem which
 24 was some sort of commitment from a financial source to
 25 fund this, you know, to help fund this contract and pay

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1 back its past debts." Do you recall that testimony?

2 A That was part of the problem. Yes. I recall
3 -- I mean, I can't recall from seven years ago. But,
4 obviously, if it's in the record I did say that.

5 Q Is it your testimony that on both of these
6 occasions in your prior testimony, you made a mistake?

7 A On the -- I would say -- well, let me answer it --
8 this way. As part of financing --

9 Q Well, I just want you to answer my question.
10 Is it your contention that both with respect to the first
11 answer I read that you gave --

12 A Could you repeat the first answer, the first
13 question?

14 Q No. I don't think that we need to take up the
15 record with that. I'm simply asking whether it's your
16 contention that both of these former answers were
17 incorrect?

18 A I'd like -- this is an important answer. I'd
19 like the question repeated if possible.

20 Q Mr. Liebman, was your recollection of these
21 events fresher back in 1993 than they are today?

22 A Probably. For the most part.

23 JUDGE JAMES: Mr. Luchansky, what I'm wanting
24 to know is, if you are able to answer from that
25 transcript, or make a representation or proffer, as to

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1 whether either of the two excerpts that you read about
2 Mr. Liebman's testimony had any relation to either 13 or
3 15 February 1985 and the specific requirement to get \$3.8
4 million in credit?

5 MR. LUCHANSKY: Yes, your Honor. I would
6 proffer, your Honor, that the testimony from the second
7 quote I gave, page 98 of the transcript, Ms. Hallam asks
8 the question, "Returning to Tab 22 of the government's
9 Rule 4, is that a copy of Freedom's response?"

10 Tab 22 is Freedom's January 18, 1985 letter
11 responding to the January 4 proposed suspension. And so
12 this discussion we proffer was a discussion of the
13 financing Mr. Liebman was requiring during the course and
14 in connection with his suspension of progress payments.

15 JUDGE JAMES: I guess your proffer tells me
16 then that it doesn't relate to the 13 or 15 February
17 document about which you are interrogating him right now?

18 MR. LUCHANSKY: Your Honor, my proffer is that
19 it does because the financing that was required as of the
20 February 15 document that we are talking about now, is
21 the same financing that was being required of Mr. Thomas
22 to go out and find. It appears -- that's our proffer,
23 your Honor.

24 JUDGE JAMES: I hear your proffer. Go ahead,
25 for what it's worth.

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1 BY MR. LUCHANSKY:

2 Q Now, Mr. Liebman, as we pointed out in the
3 F-49, in the letter that you sent to Mr. Thomas telling
4 him about the conditions -- let me ask you this, Mr.
5 Liebman. How was the \$3.8 million calculated?

6 A I don't recall.

7 Q Who calculated that figure?

8 A It was done at the meeting at DLA headquarters
9 on 14 February and there were various government people
10 there. I don't remember what went into the calculation.
11 We had our financial people there. I really don't know.

12 I don't recall the specifics. But they were -- it was a
13 good number of people involved with that computation.

14 Q Now, in this letter to Mr. Thomas you simply
15 refer to in the event that novation will occur with H.T.
16 Foods, correct?

17 A Yes.

18 Q In fact, however you are the one who required
19 the novation, isn't that right?

20 A That's not correct.

21 Q You have a clear recollection of that?

22 A Pretty clear, yes.

23 Q Even though you testified a little bit earlier
24 that you weren't sure exactly who suggested it?

25 A I wasn't sure who brought up the issue. I

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1 remember it being discussed. But I don't recall who
2 brought up the issue.

3 Q Well, then let's take a look at FT-104.

4 A Yes.

5 Q Do you have that in front of you?

6 A Yes.

7 Q Do you recognize this as the memorandum for the
8 director of DCAA?

9 A I think I have a different -- oh, FT-104? I'm
10 sorry.

11 Q Yes. Do you have that?

12 A Yes.

13 Q If you look in the middle of the page, do you
14 see that this memo describes a conversation between you
15 and the acting branch manager? Do you see that?

16 A Yes.

17 Q And do you see that this says that, "As a
18 result of the meeting at DLA headquarters the past week
19 you decided to back off of DCAA's recommendation that the
20 initial progress payment request be disapproved,"
21 correct?

22 A Where are you reading? I'm sorry.

23 Q The same paragraph.

24 A I don't see it.

25 Q The middle paragraph.

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1 A The middle paragraph. Yes.
 2 Q Do you recall that?
 3 A Do I recall --
 4 Q Do you recall that meeting where you decided to
 5 back off of DCAA's recommendations as a result of your
 6 meeting at DLA headquarters?
 7 A Yes.
 8 Q And that was the --
 9 A Yes. As a result of agreements reached at
 10 headquarters on 14 February.
 11 Q Now, despite your decision at that point you,
 12 nevertheless, decided that there would still be now
 13 additional conditions to progress payments?
 14 A I'd say that's incorrect.
 15 Q Well, let's go on and see. This indicates that
 16 you further stated that you told the contractor that
 17 requests for progress payments would be approved provided
 18 the following three conditions are met. Now, the first
 19 one is that adequate financing is obtained, correct?
 20 A Yes.
 21 Q And that tracks your letter to Mr. Thomas where
 22 you say \$3.8 million, correct?
 23 A Yes.
 24 Q The next thing is that a proper accounting
 25 system is in place, correct?

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1 A Correct.
 2 Q That would seem to correspond with the plain
 3 reading of F-49 rather than your saying what you stated,
 4 right?
 5 A I --
 6 Q This would seem to confirm, would it not --
 7 A What was the F-49 again? I'm sorry.
 8 Q Your letter to Mr. Thomas.
 9 A Right. That he had to have documentation and
 10 backup. Not a, you know, that was referring to
 11 documentation and backup to support --
 12 Q That he had to have a proper accounting system?
 13 A Well, yes. That would be a general statement.
 14 Yes.
 15 Q And the third thing is, that the contract be
 16 novated from Freedom to H.T. Foods. Do you see that?
 17 A I see it, yes.
 18 Q So it's true, is it not, that you insisted on
 19 this condition being fulfilled before you would resume
 20 progress payments?
 21 A Now, that's not correct. I don't agree with
 22 this.
 23 JUDGE JAMES: So it's your testimony then that
 24 this memorandum is false, is that correct, with respect
 25 to C?

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1 THE WITNESS: I would say it's incorrect, your
 2 Honor.
 3 BY MR. LUCHANSKY:
 4 Q Now, Mr. Liebman, in connection with the
 5 Board's question to you about the transcript testimony
 6 you were talking about, certainly at that time in January
 7 when Freedom was writing back to you and providing the
 8 conditions for financing, providing a description of the
 9 financing that it would be able to obtain, even if a
 10 certain number hadn't been attributed to it, that
 11 testimony confirms that you were looking in January of
 12 1985 for financing from Freedom that would cover contract
 13 performance and past creditors, correct?
 14 A I don't recall that was the case. I really
 15 recall that we were concerned about financing on the
 16 current contract. We also were concerned about settling
 17 with the creditors but I cannot tell you -- I don't
 18 recall that the settlement of the creditors' amount was
 19 part of the \$3.8 million.
 20 Q Well, turn to F-68.
 21 A FT-068.
 22 Q I'm sorry. No. F-68.
 23 A I don't know where it is. Yes.
 24 Q If you will look at paragraph 3 of this
 25 memorandum, who is William Gordon?

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1 A William Gordon was the executive director of
 2 contract management.
 3 Q For what agency?
 4 A For the Defense Logistics Agency.
 5 Q For DLA?
 6 A Yes.
 7 Q And this is a memo to DCASMA New York
 8 commander?
 9 A Yes.
 10 Q Does paragraph -- isn't it true that paragraph
 11 3 confirms that at that meeting of February 14, 1985 what
 12 was required was that Freedom or H.T. Foods obtain
 13 additional working capital of \$3.8 million both in order
 14 to protect the government's progress payments against
 15 unsubordinated creditors and to meet the contractor's
 16 financial requirements not reimbursed under the progress
 17 payments clause?
 18 A Yes.
 19 Q Does that not refresh your recollection that's
 20 what was being required at the time?
 21 A No. Not completely because -- not exactly.
 22 Bear with me a moment. Well, it just says to protect the
 23 government's progress payments. It doesn't say to pay
 24 those unsecured creditors. It doesn't say they were
 25 going to use that money to pay the creditors. It just

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1 says to protect.
 2 Q In your understanding, as it may be of finance,
 3 is it possible for a company to protect against
 4 unsubordinated creditors if it doesn't have available to
 5 it financing in an amount to cover those debts in case
 6 claims are brought?
 7 A I'm not a financial expert. I can't really
 8 answer that with expertise.
 9 Q This memorandum is directed to the commander
 10 and it says, "Attention DCASR, New York-NAA-7." Do you
 11 know what that means?
 12 A Yes. That's my code as a contracting officer.
 13 I am code A-7.
 14 Q So this was to your attention?
 15 A Yes.
 16 Q Now, Mr. Liebman, in February of 1985 Freedom
 17 Industries brought to your attention Bankers Leasing
 18 Association. Is that correct?
 19 A I don't remember the exact month. I don't know
 20 if it was February, surely it was March.
 21 Q Now, do you recall that Bankers Leasing was
 22 willing to provide, extend financing to Freedom
 23 Industries?
 24 A Yes.
 25 Q And, in fact, on February 11, 1985 Freedom

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1 produced a letter of commitment from Bankers Leasing
 2 extending to Freedom Industries in its original corporate
 3 form, financing that met your requirements?
 4 A Did you say February 11?
 5 Q Yes.
 6 A If I remember correctly that letter was
 7 unsigned. It was letter presented to the government at
 8 the DLA meeting on 14 February but it was unsigned.
 9 Q Your background in finances is relatively
 10 limited, isn't it?
 11 A That's correct.
 12 Q Freedom represented to you at that time that
 13 that letter of commitment was standard in the sense that
 14 letters of commitment like that do come unsigned,
 15 correct?
 16 A I don't recall that.
 17 Q When you said, "Hey, this letter of commitment
 18 isn't signed," didn't Freedom say to you, "Well, yes, of
 19 course, but it's issued to me, has got my name on it, and
 20 if you want to confirm it, just call Bankers Leasing.
 21 This is the way commitment letters are frequently
 22 provided." Didn't they say that?
 23 A I don't recall.
 24 Q Are you aware that letters of credit are always
 25 issued without the signature of the lending authority?

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1 A No. I'm not aware of that.
 2 Q So you are not aware of, in fact, in every day
 3 business commercial circles commitment letters like
 4 these, even though unsigned still constitute a valid
 5 commitment letter from the lender?
 6 A I'm not aware of that.
 7 Q And you didn't make any effort at that point to
 8 call up Bankers Leasing and say, "Hi, I'm Marc Liebman, I
 9 have a document here from Henry Thomas, is this a valid
 10 document?"
 11 A Certainly not.
 12 Q Even with Mr. Thomas sitting there saying,
 13 "Look, we can call them up?"
 14 A I think he -- the banker might even have been
 15 at the meeting I don't recall. But, no, the issue did
 16 not come up.
 17 Q Now, what you did instead was you required Mr.
 18 Thomas to have Bankers reissue the commitment letter to
 19 H.T. Foods, correct?
 20 A No. That's not correct. I disagree with that.
 21 Q Well, if we can look at FT-095 and FT-096. I'm
 22 sorry. FT-096 is correct. It's FT-094 and 096. Do you
 23 see FT-094?
 24 A Yes.
 25 Q Is this that letter we were just talking about,

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1 the letter of commitment from Bankers to Freedom
 2 Industries?
 3 A Yes.
 4 Q And you see that on page 2 it's signed and
 5 accepted by Henry Thomas, correct?
 6 A Yes.
 7 Q So that would suggest to you that certainly Mr.
 8 Thomas is on the hook to Bankers Leasing because he has
 9 now signed this letter of commitment, correct?
 10 A Yes.
 11 Q Yet if you look at FT-096, two days later,
 12 there's a new letter of commitment on February 13 issued
 13 to H.T. Foods Products, correct?
 14 A Yes.
 15 Q Now, it is your recollection, is it not, that
 16 Freedom wasn't doing this voluntarily, correct?
 17 A We had requested Freedom to obtain adequate
 18 financing to complete the contract.
 19 Q You required -- you rejected the commitment
 20 letter that as addressed to Freedom Industries and
 21 required them to get a commitment to H.T. Foods. Isn't
 22 that correct?
 23 A I don't recall that. All I recall at that
 24 meeting on 14 February was a letter was presented from a
 25 financial institution, copies were handed out to the

1 attendees, I raised the point that --

2 Q I don't want to know everything you recall. I

3 just want to know if you recall this point.

4 A No. I don't.

5 Q Now, acknowledging that Freedom Industries now

6 have a commitment letter -- Well, let me ask you this,

7 this Freedom Industries commitment letter, FT-094, aside

8 from it not being signed, it was acceptable to you,

9 correct? The terms of it were acceptable?

10 A No. I'm not a financial expert. This had to

11 be reviewed by my financial expert. It was looked at by

12 the attendees. I was not in a position to say yea or nay

13 on this letter.

14 Q And indeed ultimately this same commitment

15 letter was the one accepted by the government, albeit,

16 addressed to H.T. Foods?

17 A Yes.

18 Q Mr. Liebman, please tell me why if Freedom

19 Industries was now capable of satisfying your financing

20 requirements, why was Freedom required to go through a

21 novation process to H.T. Foods?

22 A Well, we didn't require Freedom to go through

23 the novation process. In fact, the novation was even

24 suggested by the lawyer at the time, Mr. Neil Ruttenburg.

25 Not at that meeting, but there's documents in the Rule 4,

1 there's a document in the Rule 4 that he had suggested

2 this and recommended a novation.

3 Q Is it your testimony that as of February 11,

4 1985 or February 12 when this was presented at the DLA

5 meeting, as of that moment it would have been acceptable

6 to you to release progress payments to Freedom Industries

7 at that point?

8 A As of February 14?

9 Q As of the time that Freedom presented to you

10 the February 11 commitment letter from Bankers to Freedom

11 Industries?

12 A No. Because at that time, as I said before, it

13 wasn't signed. I wanted a signed document. And then it

14 had to be evaluated by the financial experts.

15 Q Assuming that this letter met all of the

16 standards of reliability that you required and that it

17 was real, which it was, would you have been willing to

18 release progress payments to Freedom Industries at that

19 time?

20 A Not necessarily because there were problems

21 with the commitment.

22 Q By commitment you mean this February 11?

23 A There were problems with both letters, the 11

24 and the 13.

25 Q So you are now saying that it was -- that you

1 rejected the commitment letters themselves?

2 A No. There were just reservations by me and

3 also higher headquarters concerning the letters, these

4 commitment letters because they were based on accounts

5 receivable financing.

6 Q But they were accepted eventually?

7 A The decision was made to --

8 Q They were accepted?

9 A They were accepted ultimately.

10 Q And they were accepted as accounts receivable

11 financing, weren't they?

12 A Ultimately, yes.

13 Q And these -- we are talking about this single

14 commitment letter because it's the same letter with

15 different borrowers, correct?

16 A I made the decision --

17 Q Isn't that right?

18 A I'm sorry. Yes. That's correct.

19 Q These two letters are the same identical

20 letters, same terms except it's a different borrower.

21 A I didn't match up the letters. But --

22 Q Don't you recall that to be the case?

23 A I don't recall offhand but, obviously, they are

24 made out to different borrowers.

25 Q Now, assuming the acceptability, in light of

1 the fact that these letters were acceptable in their

2 terms, because they were ultimately accepted by the

3 government, once again I ask you, Mr. Liebman, at that

4 point once Freedom Industries had financing under these

5 terms and conditions, would you have been willing to then

6 release progress payments?

7 A In the absence of a novation?

8 Q Yes.

9 A Probably, yes.

10 Q So is it your testimony that Freedom wanted to

11 do this novation even though you would have been willing

12 to release progress payments without it?

13 A That issue never came up. It didn't come up --

14 that issue never came up not in that vein.

15 Q Did you ever tell Freedom at that point, "Hey,

16 look, if this February 11 commitment letter bears out,

17 and it looks good, and you get it signed and it's okay,

18 we can skip this whole novation stuff?"

19 A I don't recall that was ever discussed.

20 Q You never told them that?

21 A I don't recall that was ever discussed.

22 Q And then you went right ahead with that

23 novation, which DLA headquarters attributes as being one

24 of your requirements, correct?

25 A That's --

1 Q You went ahead through that novation process,
2 correct?
3 A That's correct.
4 Q And that novation process took two months,
5 didn't it?
6 A Less than that because you have to -- less than
7 two months.
8 Q February 11 is when the commitment letter,
9 February 12 or 14 is the date of the DLA meeting, what
10 was the date?
11 A All right. Two months from the date of the
12 meeting. That's correct. Possibly two months.
13 Q Because ultimately you signed the novation
14 agreement on April 17, 1985, isn't that right?
15 A Correct.
16 Q So you held up progress payments until this
17 novation agreement, this novation was consummated,
18 correct?
19 A Correct.
20 Q And wouldn't release progress payments until
21 that happened and you told Freedom that, correct?
22 A Correct.
23 Q And that's why they went through the scenario
24 of going through the novation, correct?
25 A Incorrect.

1 Q And it was a problem, Freedom had to provide
2 additional documentation because your lawyers said we
3 needed board minutes, correct?
4 A And plus --
5 Q And we didn't have certified financial
6 statements, correct?
7 A Correct.
8 Q And Freedom went through --
9 JUDGE JAMES: Hold on a second, Mr. Luchansky,
10 until the local traffic subsides.
11 (Off the record.)
12 BY MR. LUCHANSKY:
13 Q And Freedom went through the trouble of
14 complying with all of the legal requests, correct?
15 A Correct.
16 Q They provided the additional documentation over
17 the course of this two months, correct?
18 A Yes.
19 Q And then you finally signed the novation
20 agreement on April 17, 1985, correct?
21 A Yes.
22 Q And then on April 18, 1985 you wrote in one of
23 your fact sheets that you are holding progress payments
24 in abeyance because of a cure notice that had just been
25 issued about a week before. Isn't that right?

1 A I don't recall.
2 Q And, Mr. Liebman, you recall that that cure
3 notice that was issued, that cure notice that had been
4 issued was a cure notice that said that Freedom had
5 failed to prepare its plant adequately to accept GFM, you
6 do remember that?
7 A I don't recall.
8 Q And indeed, do you recall, that no progress
9 payments were then made until May 6, 1985, that much you
10 recall?
11 A I believe that was the date. Yes.
12 Q About three weeks after you signed the novation
13 agreement, correct?
14 A Yes.
15 Q And that's only after Freedom resolves the cure
16 notice by paying \$100,000 to get an extended delivery
17 schedule. Isn't that right?
18 A That's not correct. There was also the --
19 That's not correct.
20 MR. LUCHANSKY: Your Honor, if I might either
21 suggest we break for the day or take a five minute break
22 if we are going later tonight. I would suggest we break
23 now because I think I'm at a good stopping point.
24 JUDGE JAMES: What's your estimate as to the
25 duration of your cross-examination?

1 MR. LUCHANSKY: I'll reassess my notes tonight
2 but I would expect an hour.
3 JUDGE JAMES: You expect to complete in one
4 hour?
5 MR. LUCHANSKY: Well, that might be a little
6 optimistic. It's hard for me to say, your Honor.
7 JUDGE JAMES: All right. Let's go off the
8 record, take five minutes, and then try to complete in an
9 hour.
10 MR. LUCHANSKY: Okay.
11 (Recess.)
12 BY MR. LUCHANSKY:
13 Q Mr. Liebman, I ask you to take a look at
14 FT-116, please.
15 JUDGE JAMES: It's in book 5, Mr. Liebman.
16 THE WITNESS: What was the tab number? I'm
17 sorry.
18 BY MR. LUCHANSKY:
19 Q FT-116.
20 A Yes.
21 Q Do you recognize this as an update that you
22 prepared?
23 A Yes.
24 Q And does this refresh your recollection that a
25 cure notice was issued on April 9 because Freedom's

1 building wasn't ready to accept GFM?
 2 A Yes.
 3 Q Does this also refresh your recollection in
 4 paragraph 7, that now one day after you signed the
 5 novation agreement, and after telling Freedom you've got
 6 to get this novation agreement completed then I'll
 7 release progress payments, that now you are going to hold
 8 progress payments in abeyance until Freedom responds to
 9 the cure notice and DPSC's intended course of action is
 10 known?
 11 A Yes.
 12 Q And indeed that's what happened, you held
 13 progress payments in abeyance until the cure notice was
 14 resolved?
 15 A That was part of the scenario, yes.
 16 Q Well, before we move on to the next topic, I
 17 know this is a little out of sequence. Do you recall
 18 specifically back in December or January a meeting
 19 between Henry Thomas and a Clarence Stanley of CitiBank
 20 that took place in the commander's office in DCASMA?
 21 A I don't recall. I know -- I don't recall.
 22 JUDGE JAMES: December or January? Which
 23 years, Mr. Luchansky?
 24 MR. LUCHANSKY: December of '84 or January of
 25 '85.

1 THE WITNESS: I don't recall.
 2 BY MR. LUCHANSKY:
 3 Q Do you remember a situation in which at the
 4 conclusion of a meeting Mr. Thomas jumped up and pulled a
 5 chair and you thought he was going to throw a chair at
 6 you?
 7 A No. I don't recall that.
 8 Q Thought it would prod your memory. Okay. Now,
 9 during this period of January through March of 1985 you
 10 were aware that Mr. Thomas is now arranging again to
 11 order production equipment and get its computer system in
 12 place and up and running, correct?
 13 A Yes.
 14 Q Now, do you recall that one of the phone calls
 15 you got to confirm that progress payments were going to
 16 be made was a call from somebody at AT&T?
 17 A I don't recall.
 18 Q Do you recall in March of 1985 -- Well, do you
 19 recall that Freedom was arranging its computer hardware
 20 and software to be purchased from AT&T.
 21 A Some sort of item from AT&T. I remember the
 22 AT&T, there was an item that was being arranged, yes.
 23 Q Do you recall that that computer hardware and
 24 software was going to do a lot of things including
 25 provide the lot tracking system that Freedom had provided

1 for in its cost proposal?
 2 A Yes.
 3 Q And as we discussed at your deposition, you
 4 recognized how essential that lot tracking system was to
 5 Freedom, correct?
 6 A Yes.
 7 Q You realize that Freedom would be dealing with
 8 millions of different of items in the course of this
 9 contract, correct?
 10 A Yes.
 11 Q And Freedom was obligated to keep track of each
 12 and every one of those components, correct?
 13 A Yes.
 14 Q And it simply couldn't do that manually, it
 15 needed this lot tracking system, correct?
 16 A Yes.
 17 Q Do you recall refusing to confirm to anybody at
 18 AT&T that progress payments were going to be forthcoming?
 19 A I don't recall.
 20 Q If you will look at government Rule 4, Tab 38.
 21 A Could you bear with me a moment, the binder
 22 just broke open, please?
 23 Q Take your time. We've got an hour.
 24 (Off the record.)
 25 BY MR. LUCHANSKY:

1 Q Tell me when you've had a chance to review that
 2 letter. Do you recall this letter?
 3 A I've seen it, yes.
 4 Q Do you recall getting it at or about the time
 5 it's dated, March 15, 1985?
 6 A Yes.
 7 Q And do you recall that Freedom complains here
 8 of the fact that AT&T called you for confirmation of
 9 payment of progress payments and that you refused to
 10 confirm that to AT&T, isn't that what this letter says?
 11 A That's what the letter says. Yes.
 12 Q Freedom tells you about the favorable terms
 13 they had arranged with AT&T on this equipment including
 14 favorable financing terms, correct?
 15 A I don't see the word favorable here. I can't
 16 answer that that it's correct. I see terms here but not
 17 the word favorable.
 18 Q In the third paragraph were it says, "We
 19 negotiated a 35 percent discount off the normal costs
 20 which is a net savings of \$14,000." Would you consider
 21 that to be favorable?
 22 A Yes. It appears to be.
 23 Q And Freedom was telling you that they lost this
 24 equipment because of you, correct?
 25 A Yes.

1 Q Do you recall writing back to Freedom in
2 response to this letter?
3 A No. I don't.
4 Q Do you recall -- Okay. Now, indeed there were
5 similar problems with Freedom's ability to obtain other
6 equipment, and I'm referring now to production equipment.
7 Do you recall that the -- I'm sorry. Do you still have
8 that letter open in front of you?
9 A Yes.
10 Q If you will turn to page 2.
11 A I'm sorry.
12 Q If you will turn to the second page.
13 A Yes.
14 Q Do you see that Freedom is also complaining
15 that it basically cannot function without this equipment
16 and that it has to -- it was effectively shut down
17 because you won't confirm the payment of progress
18 payments to its vendors?
19 A That is what the letter says.
20 Q And they also told you that the same was true
21 with respect to trying to get financing from Gemini and
22 New Ventures, correct?
23 A Yes.
24 Q And those were other vendors who were doing
25 building renovations, correct? Gemini was building

1 intended to purchase state-of-the-art production
2 equipment, correct?
3 A I do remember that, yes.
4 Q Now, do you recall that Performance Financial
5 met with you or spoke with you, called you trying to get
6 confirmation from you that at least some routine costs
7 would be forthcoming in progress payments?
8 A I don't recall.
9 Q Do you recall Performance Financial complaining
10 to you that you had reneged on this agreement to provide
11 at least routine costs?
12 A I don't recall.
13 Q Do you recall that a meeting was held on June
14 19 or June 10, 1985 between you and a number of people
15 from the government, representatives of H.T. Foods and
16 Warren Rozen of Performance Financial?
17 A I don't recall.
18 Q I'll ask you to look at G-16.
19 A Yes.
20 Q Now, this is a document put into the record by
21 the government. I'll ask you to take a look at the first
22 page and start reading the first paragraph, and see if
23 that refreshes your recollection about this meeting
24 taking place?
25 A I don't remember the details.

1 renovations?
2 A Yes.
3 Q And New Ventures was providing other services?
4 A Personnel, yes.
5 Q And you still don't recall responding to this
6 letter?
7 A That's correct.
8 Q Now, you became aware that beginning in
9 February 1985, Freedom had entered into an agreement with
10 Performance Financial Services, a leasing company to
11 obtain is production equipment? Do you recall that?
12 A I remember the name Performance Financial
13 Services and they are from Potomac, Maryland. I don't
14 recall the details.
15 Q Do you recall a gentleman named Warren Rozen
16 who was the head of Performance Financial?
17 A Yes.
18 Q Do you recall that Freedom was going to arrange
19 the purchase of high tech production equipment? That
20 that's what they planned on purchasing?
21 A I don't recall. In relation to the Performance
22 bank or whatever the name was.
23 Q Performance Financial.
24 A I don't recall.
25 Q Just in general you do recall that Freedom had

1 Q Do you now remember that the meeting took
2 place?
3 A Very vaguely.
4 Q But you do recall that it took place --
5 A Yes.
6 Q -- even though you can't recall the details?
7 A Yes.
8 Q Do you recall that indeed the meeting was being
9 called in order to give Mr. Rozen a warm feeling about
10 progress payments being made?
11 A I do not recall.
12 Q Do you recall that Mr. Rozen, in addition to
13 being a leasing company, that Mr. Rozen was the agent for
14 Bankers Leasing, the lender, the lender for the operating
15 capital?
16 A That he was the agent for Bankers Leasing?
17 Q Yes.
18 A Is that your question?
19 Q Yes. That in addition to doing the leasing
20 directly Performance Financial also was an agent for
21 Bankers Leasing.
22 A I don't recall that aspect.
23 Q Do you recall that that's how Bankers Leasing
24 -- that's how Freedom found Bankers Leasing in the first
25 place was through Warren Rozen of Performance Financial?

1 A Not that I'm aware of. No. I don't recall
2 that.
3 Q Now, if you will turn to page 2, under progress
4 payments, if you can read that first paragraph, under
5 paragraph 1. Do you remember anyone at this meeting
6 explaining to you their primary concern being a telephone
7 call from Mr. Rozen to you to certify that an invoice had
8 been approved?
9 A That's -- I don't remember it but that's what
10 it says here. I don't remember it. I don't remember the
11 scenario.
12 Q Okay. And you don't recall what it goes on to
13 say here, that later you said that the invoice was not
14 going to be paid even though it was approved?
15 A I don't recall the whole scenario.
16 Q Do you recall any part of the scenario?
17 A No.
18 Q Okay. It does indicate here that since
19 Performance Financial is the leasing agent for the
20 production equipment the leasing arrangement for
21 production equipment was cancelled pending a higher level
22 of comfort. Do you --
23 A I don't recall that.
24 Q Do you have any information that contradicts
25 that?

1 A I just don't recall anything about it. I have
2 no information that contradicts that no.
3 Q Okay. And do I understand correctly that you
4 don't recall the other points that are listed here in
5 this memorandum?
6 A Well, I would have to -- may I have the
7 opportunity to look at the other points?
8 Q Yes. Sure.
9 A To be honest with you I just don't recall.
10 Q Okay. So, once again, after having reviewed
11 the rest of this you don't have any information that
12 would contradict what's being discussed here, correct?
13 A Not to my recollection.
14 Q If I were to tell you that Performance
15 Financial did, in fact, cancel it's leasing arrangements
16 with Freedom for this production equipment because of the
17 problems described in this memo, would you have any
18 information that contradicts that?
19 A I don't know. I would have -- I really don't
20 know. I would have to check the record.
21 Q Now, Mr. Liebman, stepping back very, very
22 briefly, I neglected to clean up one point. When you
23 said with respect to the commitment letters that you
24 required Freedom to go back and get it signed --
25 A No. I just raised -- I raised the -- I just

1 raised the point that it wasn't signed.
2 Q Okay. Do you recall that there was an
3 additional delay because after requiring it to be issued
4 to H.T. Foods, it was issued unsigned and then you
5 required to go back and have it signed?
6 A I don't recall anything about that.
7 Q Mr. Liebman, I think you testified earlier that
8 around this time, which is progress payment request and
9 now I'm just going to refer to them as 1, 2, 3, 4 and
10 when I do that I'm referring to the post novation
11 progress payment requests. All right?
12 A Okay.
13 Q So that we have no confusion. And around this
14 time you paid costs, that you testified before, for
15 occupancy costs which you later deducted, correct? You
16 later took them out of progress payment number eight,
17 correct?
18 A That's correct.
19 Q Now, that was \$400,000, correct?
20 A That's correct.
21 Q Now, in fact, H.T. Foods did have an option in
22 its lease arrangement with Mr. Penzer that granted H.T.
23 Foods had an option to buy the building, correct?
24 A Yes.
25 Q And you were aware that Mr. Penzer was selling

1 the building at that time, correct?
2 A I'm not aware of that. I don't recall.
3 Q Okay. Don't you remember getting phone calls
4 from a Mr. Kurt Wittig who expressed he had an interest
5 in buying the building?
6 A I spoke to Mr. Wittig. I don't recall if I
7 spoke to Mr. Wittig at that time and about that matter.
8 Q And, in fact, you testified earlier about Pilot
9 Realty, Pilot was Mr. Wittig's company which bought the
10 building from Mr. Penzer, correct?
11 A Yes.
12 Q So you do remember that Mr. Penzer sold the
13 building to Mr. Wittig?
14 A Yes. Ultimately, yes.
15 Q Now, you are aware, are you not, that in fact,
16 Mr. Penzer needed to negotiate a purchase of the option
17 from H.T. Foods before he could sell the building to Mr.
18 Wittig, aren't you?
19 A I'm not aware of that and was not involved with
20 that scenario. I wasn't involved with that.
21 Q Well, when you deducted \$400,000 at the
22 suggestion of DCAA, what efforts did you make to confirm
23 whether, in fact, the sale of this option was a real
24 transaction?
25 A Well, Freedom provided a -- I had numerous

1 meetings with Freedom, telephone calls, Freedom had his
2 lawyer contact us. I had discussions with Freedom. They
3 provided me with a copy of the agreement, and compromise
4 between the two landlords, the former and successor
5 landlord and Freedom. So I had the document.

6 Q Did you speak with Mr. Penzer?

7 A I don't recall speaking with Mr. Penzer.

8 Q What would have satisfied you that H.T. Foods'
9 sale of its option to Mr. Penzer was indeed a real and
10 valid transaction separate and apart from any payment of
11 occupancy costs?

12 A I always recognized it as a real and valid
13 transaction.

14 Q Is it your testimony that you recognized that
15 the sale of that option for \$400,000 constituted income,
16 taxable income to Freedom?

17 A It was my -- no. Not exactly. No.

18 Q Okay. So what would have satisfied you that
19 that was the case?

20 A I never questioned the -- I'm not a lawyer.
21 But, I never questioned as a contracting officer the
22 legitimacy of that agreement.

23 Q And nevertheless, it's your testimony that you
24 deducted from progress payment number eight \$400,000
25 based on the contention that this was now a forgiveness

1 of rent rather than the sale of an option?

2 A Right. As a reduction in expenditures or a
3 forgiveness of rent. That's the way I saw it and that's
4 the way DCAA saw it.

5 Q And as we sit here today, in light of your
6 recognition right now that the \$400,000 sell of the
7 option was a separate and real transaction. Is it still
8 your contention now today, that that actually constituted
9 a forgiveness of rent?

10 A Yes. As a contracting officer -- that's my
11 perspective as a contracting officer and a reduction in
12 expenditures.

13 Q Mr. Liebman, let's now go to May 6, 1985, and
14 which you withhold \$66,000 from progress payment number
15 one. You testified before that you withheld those
16 payments, that amount for these capital type
17 expenditures, correct?

18 A That was about two thirds of the amount
19 deducted. About two thirds of the sixty-some-thousand I
20 deducted, there were some other reasons.

21 Q Okay. Part of those costs were deducted
22 because you believe that they were capital type
23 expenditures?

24 A That I believe and DCAA believed. Some forty
25 thousand of the sixty thousand.

1 Q DCAA, the same DCAA who was recommending zero
2 be paid because no progress had been made?

3 A Correct.

4 Q Now, when that happened Freedom kicked up a
5 tremendous fuss, didn't it?

6 A They submitted some letters, I believe. I
7 don't recall exactly what happened. I believe there were
8 some letters, there was a letter or letters that they
9 submitted about the deduction.

10 Q Indeed they called you and said, "We had
11 negotiated these costs as all direct and all to be
12 expensed," correct?

13 A That's correct.

14 Q Something at that point you had known because
15 you had been told by Mr. Herringer and you had been told
16 by numerous other people, you knew that all costs now
17 were to be expensed under this contract other than
18 production?

19 A That's correct.

20 Q Nevertheless, you refused to pay at this point,
21 correct?

22 A For those forty thousand, yes.

23 Q Now, Mr. Thomas went to Peggy Rowles at that
24 point, correct?

25 A This is about --

1 Q This is June of 1985?

2 A Yes. It's about a month later. Towards the
3 end of May. Yes. Towards the end of May, beginning of
4 June 1985, yes.

5 Q And on June 5, 1985 Ms. Rowles sent you a telex
6 confirming that all of these costs had been negotiated as
7 direct and should be paid, correct?

8 A No. That's not exactly correct.

9 Q Well, let's take a look at F-77.

10 A Could you tell me what volume?

11 Q Do you have that, Mr. Liebman?

12 A Yes.

13 Q Tell me when you have reviewed it, please.

14 A I have.

15 Q Now, you got this telex after Freedom had
16 complained to you that it didn't receive these
17 capital-type costs via a progress payment, correct?

18 A Yes.

19 Q And you knew that Freedom's complaint was that
20 it should be paid progress payments on 100 percent of all
21 of these costs, correct?

22 A Well, 95 percent, yes.

23 Q Ninety-five percent payment on 100 percent of
24 these costs?

25 A That's correct.

1 Q And that included the costs now listed in Tab
2 F-77, correct?
3 A Correct.
4 Q And you understood when you got this telex from
5 Ms. Rowles that that's she was talking about, correct,
6 she was talking about the payment of these costs through
7 progress payments?
8 A No. That's not correct. The telex doesn't say
9 that.
10 Q I understand. I'm asking you whether you
11 understood at the time that that was the issue that was
12 brewing over these costs?
13 A The issue was progress payments, yes.
14 Q And then you got this telex dated June 5, 1985
15 and in it Ms. Rowles says that these costs for quality
16 control equipment, automated billing equipment, and
17 office equipment, all was negotiated to be paid as a
18 one-time expense, correct?
19 A Correct.
20 Q And she said that DCAA did not take exception
21 to these costs as being handled in this way, correct?
22 A Correct.
23 Q And in this way is in the context of Freedom's
24 demand to be paid progress payments on these costs?
25 A That's not correct.

1 Q That's the context in which you got this
2 letter?
3 A That's the context, yes.
4 Q Now, you understood that Ms. Rowles was telling
5 you you could pay these costs, didn't you?
6 A That's not correct. Pay these costs -- that's
7 not correct. That's my answer.
8 Q You understood that the term "one-time cost
9 rather than a depreciable element," meant that they could
10 be paid through progress payments, didn't you?
11 A That's not correct.
12 Q Now, you were aware, weren't you, that Mr.
13 Thomas had not only complained to Ms. Rowles orally by
14 phone but in writing as well, correct?
15 A Correct.
16 Q And you got a copy of that letter, didn't you?
17 A Yes.
18 Q And if you look at, I think it's F-78 -- Well,
19 let's look first at F-74. No. It is F-78. I'm sorry,
20 F-78. Do you see that?
21 A Yes.
22 Q This is a letter from Ms. Rowles to Mr. Thomas
23 dated June 7, 1985, correct?
24 A Correct.
25 Q And you were copied on this letter, correct?

1 A Yes.
2 Q Do you recall now that Ms. Rowles was saying
3 that the information she was providing to you was in
4 connection with the issue of handling the purchase of
5 certain equipment as direct cost for progress payment
6 purposes under this contract?
7 A Yes.
8 Q So you did understand at the time you got the
9 telex from Ms. Rowles, that what she was telling you was,
10 that she believes these costs should be paid as progress
11 payments?
12 A No. I don't have that interpretation.
13 Q Despite this letter at Tab F-78, where she
14 concludes that -- where she tells Mr. Thomas "I mailed a
15 telegram to Mr. Liebman containing data which should
16 expedite the resolution of this issue?" "This issue"
17 being the payment of progress payments for these costs?
18 A Well, the issue, the resolution of the issues.
19 She's not telling me to pay progress payments, just
20 resolution of the issue.
21 Q You do now remember that the issue we are
22 talking about is the payment of these costs as progress
23 payments?
24 A Well, I recommended that in the very beginning
25 when you started this line of questioning, yes.

1 Q Perhaps I misheard you. I thought you said
2 that with respect to Ms. Rowles' June 5, 1985 telex to
3 you, that it didn't say anything in there about progress
4 payments and, therefore, she wasn't talking about
5 progress payments?
6 A Right.
7 Q Did I misunderstand you?
8 A Right. That's correct.
9 Q I misunderstood you?
10 A Yes.
11 Q So now, my correct understanding of your
12 testimony is that you did understand when you got the
13 June 5, 1985 telex that what Ms. Rowles was talking about
14 was the payment of these costs through progress payments?
15 A There was a connection between the Rowles' 5
16 June telex and this 7 June letter. There's a connection.
17 Q Right. And the connection is that in both of
18 them she's talking about paying for these costs through
19 progress payments?
20 A No. That's not correct. That's not exactly
21 correct.
22 Q Now, in fact, what happened next was that you
23 went ahead and requested a legal opinion, correct?
24 A I don't recall.
25 Q If you will turn to Tab F-79.

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1 A Yes.
 2 Q This is a letter from you to counsel, Michael
 3 Montefinese, correct?
 4 A Yes.
 5 Q Now, in it you reference a letter from
 6 Freedom's lawyers regarding progress payments on the
 7 subject contract, correct?
 8 A Yes.
 9 Q And what you are asking a legal opinion for is
 10 whether legal agrees that progress payments can be paid
 11 on these costs, correct?
 12 A Yes.
 13 Q So you did understand that that's what was
 14 going on with Ms. Rowles?
 15 A (No audible response.)
 16 Q Okay. We'll go on. All right. Mr.
 17 Montefinese answered your letter, did he not?
 18 A Yes.
 19 Q If you would please turn to F-85.
 20 A Yes.
 21 Q Do you remember this letter or do you need a
 22 minute to kind of --
 23 A No. I remember the letter.
 24 Q Now, isn't it true, Mr. Liebman, that Mr.
 25 Montefinese confirms here to you that the parties had

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1 negotiated these costs to be expensed 100 percent under
 2 the contract?
 3 A Could you please refer me to the specific part
 4 of the letter?
 5 Q Well, do you recall? Because, to tell you the
 6 truth, Mr. Liebman, I don't want to just walk through the
 7 letter and read it. What I'm asking you is what you
 8 remember about being told by Mr. Montefinese?
 9 A Well, the opinion from Mr. Montefinese was
 10 that, you know, consequently -- Mr. Montefinese was the
 11 -- based on discussions with some people at DPSC --
 12 Q Mr. Liebman, I don't think that answers my
 13 question.
 14 A What's the question? I'm sorry.
 15 Q The question is, whether you remember what Mr.
 16 Montefinese told you?
 17 A Bottom line, yes.
 18 Q Well, according to you, it's your
 19 interpretation that Mr. Montefinese was telling you we
 20 needed a DAR deviation in order to pay these costs, isn't
 21 that right?
 22 A It's stated clearly. In order to implement the
 23 agreements --
 24 Q Mr. Liebman, I'm just asking you --
 25 A Yes. That's what the letter says.

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1 Q Now, he did confirm in this letter that an
 2 agreement was reached with DPSC not only to pay for these
 3 costs but to pay for them through the progress payments,
 4 correct?
 5 A That's what he's saying, yes.
 6 Q Now, he also tells you in the first paragraph,
 7 that it's the opinion of this office that "To the extent
 8 this equipment is either not ordinarily capitalized or
 9 falls under some other category which permits treatment
 10 as direct costs, such equipment should be treated as a
 11 direct contract expense and progress payments may be made
 12 based on that equipment's total cost," correct?
 13 A May I have a chance just to read this quickly?
 14 Q Well, let me direct you to where I'm reading
 15 which is in the middle of the first paragraph.
 16 A On page 1?
 17 Q Yes.
 18 A And where did you start reading from? I'm
 19 sorry. To the extent -- did you start reading from to
 20 the extent?
 21 Q Based upon the material submitted discussions
 22 with Charles Wright of DPSC --
 23 A Sure. Will you bear with me a moment? Yes.
 24 Q So did you understand at the time that Mr.
 25 Montefinese was telling you that either, to the extent

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1 that this equipment is not ordinarily capitalized or
 2 falls under some other category which permits treatment
 3 as direct costs, such as, specialized equipment obtained
 4 only for this contract, well then you can pay progress
 5 payments on these costs? Did you understand that at the
 6 time?
 7 A That's what the legal opinion says.
 8 Q And what Mr. Montefinese is confirming in this
 9 opinion is that indeed these costs for this contract were
 10 negotiated to be all direct costs, correct?
 11 A (No response.)
 12 Q I mean, that's what Ms. Rowles told you on June
 13 5 and that's what Mr. Montefinese is telling you here,
 14 correct?
 15 A Yes. That's correct.
 16 Q And indeed that's consistent with the DAR cost
 17 principals that we discussed before which is that anytime
 18 you have one particular cost objective, like a contract,
 19 all of the costs that are associated with the single cost
 20 objective are indeed to be considered as direct costs,
 21 correct?
 22 A Yes.
 23 Q And that's what happened here? That's how this
 24 contract --
 25 A Yes.

1 Q So if you turn to the last page of this
2 opinion, on page 4 --

3 A Yes.

4 Q -- you see in the next to the last sentence, in
5 the middle of the paragraph, where it says, the
6 determination as to the classification of the equipment
7 in question is not a legal question, but rather an
8 accounting question.

9 A Yes.

10 Q Do you not agree that as an accounting matter
11 it was determined at negotiations that all of these costs
12 would be treated as expensed costs and would not be
13 depreciated?

14 A For those specified items and capital
15 equipment, yes.

16 Q And that's in addition to all of the other
17 costs which we have -- we don't have any dispute about?

18 A In terms of classified --

19 Q The agreement for expenses.

20 A No. In terms of classifying all the other
21 costs as direct costs because they only had one contract,
22 yes.

23 Q And that is true with respect to these costs as
24 well, correct?

25 A Right. Because there was only one contract --

1 yes.

2 Q And, Mr. Liebman, the negotiation of these
3 costs as being direct that was a special situation for
4 Freedom because they only had the one contract, correct?

5 A By these costs --

6 Q All of the costs including these capital type
7 costs that Ms. Rowles listed in her telex to you?

8 A Yes.

9 Q Now, despite that advice to you you read Mr.
10 Montefinese's letter as telling you needed to get a DAR
11 deviation in order to pay 95 percent progress payments on
12 100 percent of these costs, correct?

13 A That's correct.

14 Q And indeed you then spent a long time trying to
15 get that DAR deviation, correct?

16 A Well, not me, but the government did.

17 Q You didn't pay for these direct -- you didn't
18 pay for these costs that we have been discussing during
19 the time that your request for DAR deviation was pending,
20 correct?

21 A That's correct.

22 Q Now, you -- it was your interpretation but when
23 you submitted your DAR deviation request you acknowledged
24 that if Freedom doesn't get paid for these costs, that
25 the result could be contractual failure, correct?

1 A Yes.

2 Q Because you knew that these costs were for
3 items that Freedom absolutely needed to perform this
4 contract, correct?

5 A Yes.

6 Q Now, according to your interpretation you
7 believed that you were permitted under the progress
8 payment clause to pay only the depreciable portion of
9 these costs through progress payments, correct?

10 A That's correct.

11 Q And it was your belief, your contention, that
12 the balance of those costs would be paid with deliveries,
13 correct?

14 A Right. Yes. That's correct.

15 Q Let me ask you, Mr. Liebman, during that year
16 between May of 1985 and May of 1986, when the \$311,000
17 for these costs was finally paid in one check, you never
18 actually paid, included in a progress payment the
19 depreciable portion of any of these costs, did you?

20 A I don't recall. I just don't recall.

21 Q You didn't, did you?

22 A I don't recall.

23 Q And, in fact, you held 100 percent of those
24 costs during that entire year and didn't pay any portion
25 of them as they were being incurred, isn't that correct?

1 A That's not correct. Because --

2 Q Except for the part that you paid by mistake?

3 A Yes. Over \$100,000. Yes.

4 Q Referring to the 311,000 --

5 A I don't know offhand if the requests during
6 that 1-year period included -- I don't recall if it
7 included the depreciation. And if it did whether or not
8 it was part of my progress payment approval amounts. I
9 just don't recall.

10 Q Well, you know for a fact that that \$311,000
11 figure remained constant from the time that Freedom first
12 incurred the 311,000 until the time it was paid at MOD
13 25, correct?

14 A Well, actually it was 399,000.

15 Q 399,000, I'm sorry. And did you ever tell
16 Freedom that progress payments were payable at your
17 discretion?

18 A Sure.

19 Q And that applied to this as well, didn't it?

20 A Sure.

21 Q Now, you recall that in August of 1985, August
22 23 to be exact, you proposed suspending progress payments
23 once again to Freedom because of a claim of inadequate
24 accounting system, correct?

25 A Because DCAA determined that the system was

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1 inadequate, I then was considering suspending progress
2 payments, yes.

3 Q Now, you testified before that you certainly
4 can challenge DCAA's findings, even on this issue,
5 correct?

6 A Sure.

7 Q You didn't challenge them on this finding, did
8 you?

9 A The matter was discussed as part of the --

10 Q You didn't challenge them on it, did you?

11 A Well, the word -- I wouldn't use the word
12 challenge. No.

13 Q Did you believe they were wrong?

14 A I had no basis to believe they were wrong.

15 Q So you believed they were right?

16 A I accepted their findings, yes. I agreed with
17 their findings.

18 Q Did you make any independent determination at
19 all, as to whether they were right and wrong, right or
20 wrong?

21 A I made a contracting officer determination,
22 that's my role.

23 Q So what did you decide? Did you decide that
24 they were right or did you decide that they were wrong?

25 A Yes. That's why I issued the letter advising

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1 Freedom that I was considering suspending their progress
2 payments because their system was inadequate.

3 Q Okay. So you thought that they were right?

4 A I agreed with them, yes.

5 Q Now, the primary reason that they declared
6 Freedom's accounting system to be inadequate at the time
7 was because Freedom was carrying on its books these costs
8 we have been discussing, the \$522,000 worth of costs.
9 They were carrying them as an expensed item on their
10 books. Isn't that right?

11 A Yes.

12 Q And the main focus of the discussion about the
13 adequacy of Freedom's accounting system was the need to
14 treat those costs on the books as capitalized items
15 rather than as expensed items, correct?

16 A I don't agree with that. That was part of the
17 scenario involved with the inadequate system. There were
18 many, many factors involved --

19 Q That's the one you were a part of, correct?

20 A It's was an important part, yes.

21 Q And in fact, one of the things you told Freedom
22 was, look, I'm not -- or DCAA told them and you agreed
23 that they are not -- DCAA is not going to declare
24 Freedom's accounting system to be adequate again until
25 Freedom backed out these items from the expense column

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1 and then entered them on to the books under a capital
2 depreciable column. Isn't that right?

3 A Yes.

4 Q And ultimately once Freedom agreed to do that
5 and adjusted its books like that, then DCAA declared the
6 accounting system to be adequate, correct?

7 A No. The tie-in is incorrect, not completely
8 correct.

9 Q Well, was after Freedom agreed to do that that
10 DCAA declared the accounting system to be acceptable?

11 A From a chronological perspective, yes.

12 Q And indeed that was one of the factors that
13 DCAA took into account by saying that now the accounting
14 system is adequate?

15 A Yes. It was one of the factors.

16 Q Now, in fact, from day one Freedom had always
17 accounted for these costs on its books as expensed items,
18 correct?

19 A I believe so. Yes.

20 Q From the time it ever started incurring these
21 costs, correct?

22 A Yes.

23 Q And DCAA had approved these costs as expensed
24 items even during the pre-award surveys, that's what Ms.
25 Rowles told you on her June 5 telex, correct?

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1 A No. That's not -- that's misleading it's not
2 correct. Ms. Rowles told me that was included as a part
3 of the contract price but not part of the progress
4 payments.

5 Q She did say that DCAA had no objection to
6 treating these costs as expensed items. Isn't that
7 correct?

8 A As expensed items regarding contract price,
9 yes.

10 Q And during the time that Freedom was carrying
11 these costs on its books as expensed items, DCAA was
12 performing audits that still approved the adequacy of
13 Freedom's accounting system, correct?

14 A Yes.

15 Q Now, as a result of taking these costs off of
16 Freedom's books as expensed items, and putting them as in
17 an asset account, one of the consequences of that was
18 precluding Freedom from submitting progress payment
19 requests for these items, correct? Because they were no
20 longer being treated as costs on their books.

21 A I'm not following you. I'm sorry.

22 Q Ultimately when Mr. Montefinese advised you
23 July of 1985 that this is an accounting question, not a
24 legal question --

25 A Yes.

1 Q -- that advice bears on this very issue,
 2 correct?
 3 A Yes.
 4 Q And what Mr. Montefinese was telling you was
 5 that it is appropriate, was agreed to by the parties,
 6 that these items be expensed and be treated as expensed
 7 by Freedom, correct?
 8 A That's what he was saying. Yes.
 9 Q And what you did, when you didn't challenge
 10 DCAA and you agreed that they were right in requiring
 11 Freedom to change those items on their books, you were
 12 authorizing a reclassification of those items from
 13 expensed to capitalized.
 14 A No. That's not correct.
 15 Q From an accounting standpoint?
 16 A No. I disagree.
 17 Q Do you agree that for accounting purposes that
 18 an expensed item versus a depreciated item, those are
 19 classifications, expensed versus depreciated?
 20 A Yes.
 21 Q So would you agree that when Freedom was
 22 required to change the accounting for those items from
 23 expensed to depreciated, that that changed the
 24 classification of those items?
 25 A No. Because -- Well, no. That's my answer.

1 If you want me to explain it, I can but, no.
 2 Q When you proposed suspending progress payments
 3 on August 23, 1985, did you convene the advisory board to
 4 consider your request?
 5 A No.
 6 Q Did you put in writing your rationale for
 7 requesting a suspension of progress payments?
 8 A I submitted -- I sent the letter to Freedom
 9 that was the rationale. Yes.
 10 Q But you didn't put in the contract file a
 11 specific document to explain your rationale?
 12 A I did. It was reflected in the various reports
 13 that I issued during that time period to various
 14 government entities. And those reports were part of the
 15 contract file.
 16 Q Now, it's true, is it not, Mr. Liebman, that
 17 you did not like Henry Thomas?
 18 A That's not true. That's not true. Absolutely
 19 not true.
 20 Q Isn't it true that you considered him to be a
 21 wheeler-dealer?
 22 A I considered Henry Thomas to be a lot of
 23 things. But I liked Henry Thomas. And --
 24 Q Did you consider him to be a wheeler-dealer?
 25 A I wouldn't describe it that way. No. No.

1 Q Well, let's take a look at FT-338.
 2 A I'm sorry, FT?
 3 Q Three thirty-eight.
 4 A Yes.
 5 Q Okay. This is a copy of a transcript of your
 6 statement to Colonel Hollins on February 27, 1987,
 7 correct?
 8 A Yes.
 9 Q Do you recall giving that interview to Mr.
 10 Hollins?
 11 A Yes.
 12 Q To Colonel Hollins rather, I'm sorry.
 13 A Yes.
 14 Q Now, do you see up on page 1, in response to
 15 the first question about whether you would deal with
 16 Henry Thomas, if you had a choice, you say you wouldn't
 17 because he repeatedly doesn't pay his bills in the
 18 ordinary course of business, right?
 19 A Correct.
 20 Q And in this case, of course, for a substantial
 21 period of time Mr. Thomas wasn't being paid his progress
 22 payments on this contract, correct?
 23 A I'm sorry. Would you repeat that?
 24 Q For substantial period of time on this contract
 25 Mr. Thomas wasn't receiving progress payments on this

1 contract, correct?
 2 A For periods of time. Yes.
 3 Q And not getting those payments would make it
 4 difficult for Mr. Thomas to pay his bills in the ordinary
 5 course of business, wouldn't it?
 6 A Yes.
 7 Q Now, you then say that "Thomas is a shrewd
 8 businessman, wheeler-dealer." Does that refresh your
 9 recollection that that's how you considered Mr. Thomas?
 10 A Well, yes. I have to stand corrected but in a
 11 positive way. He was a very smart businessman. And I
 12 meant -- if I said, wheeler-dealer, apparently I did, I
 13 meant it in a positive light.
 14 Q Oh, I see. And is that true with respect to
 15 this entire paragraph?
 16 A May I have a moment to refresh my memory?
 17 Q Sure. I mean, let me ask you, did you mean in
 18 a positive light that Mr. Thomas feels he can get away
 19 with a violation of normal business practices and
 20 government regulations? You meant that in only the
 21 kindest of ways?
 22 A No. I meant that as fact. That that's was --
 23 that's the way Mr. Thomas presented himself to the
 24 government at times.
 25 Q So you were still a big fan of Mr. Thomas' just

1 you wanted to let Colonel Hollins know that he violates
 2 lost of business practices?
 3 A Right. I liked him personally. But, yes,
 4 that's correct.
 5 Q You believe that he could get whatever he
 6 wanted through political clout, minority contracting
 7 status, right?
 8 A That's correct.
 9 Q Now, you thought he got this contract through
 10 political clout, didn't you?
 11 A Yes.
 12 Q In fact, you said here, later on, that you
 13 think he had a godfather who wanted him to get a
 14 contract, right?
 15 A That's correct.
 16 Q And that godfather was Congressman Addabbo?
 17 A That's correct.
 18 Q Didn't you realize that Congressman Addabbo was
 19 chairman of the House Arms Services Appropriations
 20 Committee?
 21 A Yes.
 22 Q Did you have any factual basis for believing
 23 that Henry Thomas, who was not even a constituent of
 24 Congressman Addabbo, had any political pull with him?
 25 A You mean for him or with him?

1 Q Political pull with him?
 2 A Yes. Based on what was conveyed to me from
 3 higher authority, from various government entities. This
 4 is what I heard. Yes.
 5 Q And what was conveyed to you was that
 6 Congressman Addabbo was very, very interested in this
 7 contract, correct?
 8 A Yes.
 9 Q And that Congressman Addabbo very much wanted
 10 this contract to be awarded to Freedom?
 11 A Yes.
 12 Q Now, this was your only MRE contract other than
 13 Mr. Thomas' MRE 3 contracts that you ever administered,
 14 correct?
 15 A That's correct.
 16 Q So you are not very familiar with the MRE
 17 program, are you?
 18 A No. I'm not.
 19 Q You certainly weren't very familiar with it at
 20 the time, correct?
 21 A That's correct.
 22 Q And you didn't understand the importance of
 23 MREs to the national defense at the time, correct?
 24 A That's not correct. I did understand the
 25 importance.

1 Q You certainly didn't understand the
 2 procurement, the aspects of procurement that went into
 3 determinations of which contractors would get awards,
 4 correct?
 5 A That's not correct.
 6 Q In the context of the MRE program?
 7 A Yes.
 8 Q You didn't know at the time, did you, that
 9 Freedom had established to the satisfaction of the
 10 Department of Defense that indeed the current two
 11 assemblers, Rafco and Sopakco could not produce and
 12 mobilize all of the MRE cases necessary to meet the war
 13 mobilization requirements?
 14 A That's correct. Because they wanted -- they
 15 needed a third producer, a third assembler.
 16 Q Didn't it then make sense to you that
 17 Congressman Addabbo's interest in developing and
 18 maintaining Freedom as a third MRE producer was out of a
 19 legitimate concern for this country's national defense
 20 rather than because he was a godfather to Henry Thomas?
 21 A Well, I would say both. National defense is
 22 paramount, it's primary and absolutely, yes. But, there
 23 was also that other fact of which I have no personal
 24 knowledge of other than word of mouth.
 25 Q And nevertheless, the only thing you tell

1 Colonel Hollins is that you think Freedom got this
 2 contract because Congressman Addabbo and other, and state
 3 politicians put pressure on DLA headquarters to put Henry
 4 in business, correct?
 5 A That is a correct statement.
 6 Q And you point to the PCO as the instrument to
 7 do this, correct?
 8 A May I read the --
 9 Q Sure.
 10 A Where am I?
 11 Q At the end of that paragraph.
 12 A Well, I think you mean the next paragraph, I'm
 13 not sure where you're -- Okay.
 14 Q I withdraw the question.
 15 A Okay. I see what it says.
 16 Q Now, at this point and by this point I'm
 17 talking about, wouldn't you agree that the inadequate
 18 accounting system issue came up around September of '85?
 19 Does that sound right?
 20 A No. August 1985.
 21 Q August. And then it wasn't resolved until a
 22 couple of months later after that meeting with
 23 Washington, D.C., DCAA, correct?
 24 A Well, the next -- the end of September. About
 25 a month and a half later.

1 Q Okay. Now, is it your contention that you are
2 concerned about getting progress payments to Freedom at
3 this time?
4 A You're talking now August 1985?
5 Q This period August through September of 1985.
6 A Well, yes, because the system was deemed
7 inadequate by DCAA. Yes.
8 Q Well, let me address your attention to page 6
9 of your statement to Colonel Hollins and ask you to look
10 at the bottom paragraph. Do you see here that you state,
11 "I was faced with the problem that DLA and DPSC wanted to
12 keep Freedom alive?"
13 A That's what it says. Yes.
14 Q And that's what you told Colonel Hollins?
15 A That's what I told him. Yes.
16 Q And based upon the top of the page, where you
17 indicate in this chronology September 25, 1985, am I
18 reading this statement correctly that this statement was
19 describing that period of time, September 1985?
20 A Yes.
21 Q Let me turn your attention to page 3, do you
22 see two-thirds of the way down the page where it says,
23 "Colonel Hollins?"
24 A Yes.
25 Q Do you see that at the end of the sentence that

1 "He falsely represented his position to the government of
2 having sufficient financial backing for an award of this
3 size?" Do you agree that that sentence is not accurate?
4 A Well, the bottom part I don't think that's
5 correctly worded. But the bottom line --
6 Q So wait - and that's what I'm talking about.
7 The bottom part --
8 A The bottom, but the last part --
9 Q You do not agree that Mr. Thomas falsely
10 represented his position to the government?
11 A No. I don't agree with that at all.
12 Q I'm sorry?
13 A I don't agree with the way it's worded.
14 Q You do not agree with that statement?
15 A That last part, yes. That's not worded right.
16 Q Do you recall, Mr. Liebman, that on two
17 different occasions, at least two different occasions,
18 Mr. Bankoff asked you to hold progress payments and not
19 make them until certain modifications were signed?
20 A I believe there were one or two cases. I don't
21 recall specifics. But there was that scenario. Yes.
22 Q And indeed you remember that one of those
23 scenarios was progress payment 21 and you quoted that in
24 one of your fact sheets dated October 3, 1986. Do you
25 recall that?

1 A I don't recall.
2 Q But you do recall that that happened on at
3 least one or two occasions?
4 A Yes.
5
6 Q And does October 3, 1986 sound about right?
7 A Yes.
8 Q Okay. It's in the record at F-164. To the
9 extent that it's in one of your fact sheets that's in the
10 record you would agree that your fact sheets are
11 accurate?
12 A Yes.
13 Q And you knew at that time that the modification
14 that was being -- that Mr. Bankoff wanted Freedom to sign
15 was MOD 29, correct?
16 A I don't recall.
17 Q Well, then, you know, we better pull it out.
18 F-164.
19 A Yes.
20 Q If you will take a look at page 29
21 A Yes.
22 Q Do you see that you had made a decision to pay
23 progress payment number 21 in the amount of \$700,000?
24 A Yes.
25 Q And that in the note you indicate that Mr.

1 Bankoff asked you to hold that payment until MOD 29 was
2 signed?
3 A Yes.
4 Q And you did that, didn't you?
5 A Yes.
6 Q And you knew at the time that MOD 29 had a
7 release in it, didn't you?
8 A A waiver of claims. Yes.
9 Q A waiver of all the claims?
10 A Yes.
11 Q And yet you complied with Mr. Bankoff's
12 request, didn't you?
13 A I didn't know the content of the MOD.
14 Q You did know that it had a waiver of claims in
15 it?
16 A I -- no. I don't recall that. I wasn't
17 involved with the negotiation of MOD 29. And I don't
18 recall anything about that. I really didn't -- I wasn't
19 involved in the deliberations of MOD 29.
20 Q You knew it was --
21 JUDGE JAMES: Mr. Liebman, a minute ago you
22 testified yes, you knew that it was a waiver. And now
23 you say you didn't recall there was a waiver. Which
24 should I believe of those two pieces of testimony?
25 THE WITNESS: I'm sorry. There was a waiver in

1 the MOD that was issued but prior to issuance of the MOD
 2 and during negotiation of modification, I don't have any
 3 recollection of that because I wasn't involved with that,
 4 your Honor.
 5 JUDGE JAMES: Okay. Take a look at this F-164
 6 document. Who wrote it, do you know?
 7 THE WITNESS: I wrote that document, your
 8 Honor.
 9 JUDGE JAMES: Thank you. Go ahead, Mr.
 10 Luchansky.
 11 MR. LUCHANSKY: Thank you.
 12 BY MR. LUCHANSKY:
 13 Q Isn't it true that at other points during the
 14 performance of this contract, specifically October of
 15 1985, that you participated with Mr. Bankoff in requiring
 16 Freedom to obtain even additional outside financing?
 17 A October 1985, I don't recall.
 18 Q Was there any time after the initial period of
 19 February 1985 where you required Mr. Thomas to obtain
 20 \$3.8 million in outside financing? Were there any other
 21 occasions when you required Freedom or H.T. Foods to
 22 obtain additional financing?
 23 A I don't recall.
 24 Q To the extent that you were doing this, Mr.
 25 Liebman, doesn't this reflect your preference that

1 A Yes.
 2 MR. LUCHANSKY: Your Honor, I realize it's
 3 late, if we could go off the record.
 4 JUDGE JAMES: Sure.
 5 (Whereupon, at 6:30 p.m. the hearing was
 6 recessed, to reconvene Friday, May 26, 2000 at 8:45 a.m.)
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1 Freedom be financed by outside financing rather than
 2 progress payments?
 3 A No. That's not correct.
 4 Q Isn't it true, Mr. Liebman, that you wanted to
 5 minimize the amount of progress payments that were being
 6 paid to Freedom to keep the risk to the government as
 7 minimal as possible? Isn't that right?
 8 A I wouldn't word it that way. I would word it
 9 differently.
 10 Q Are you saying that what I have just said is
 11 not true?
 12 A I'm saying I wouldn't word it that way. It's
 13 not correct. It's not the way I would word it.
 14 Q Okay. I know because it's the way I would word
 15 it.
 16 A Exactly.
 17 Q That's why I said it. But the way I worded it,
 18 wouldn't you agree with the principle that I just stated?
 19 A No. Not entirely. No.
 20 Q Partially?
 21 A Partially.
 22 Q And that partially is that you wanted to
 23 minimize the risk to the government of putting progress
 24 payment -- paying progress payment money to a contractor
 25 that you had serious problems with?

1 CERTIFICATION OF TRANSCRIPT
 2
 3 This is to certify that the attached
 4 proceedings before Administrative Judge DAVID W. JAMES,
 5 Department of Defense, Armed Services Board of Contract
 6 Appeals, in the matter of FREEDOM NY, INC., at Brooklyn,
 7 New York, on Thursday, May 25, 2000 were had as therein
 8 appears, and that this is the original transcript thereof
 9 for the files of the Department of Defense.
 10 We, the undersigned, do hereby certify that
 11 this is a true, accurate and complete transcript prepared
 12 from the tape made by electronic recording by Ken Gerber,
 13 Official Reporter, on the aforementioned date, and have
 14 verified the accuracy of the transcript by comparing the
 15 typewritten transcript against the verbal recording.
 16 Date: 7/24/00
 17 _____
 18 Transcriber
 19 _____
 20 Proofreader
 21
 22
 23
 24