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2 UNITED STATES DISTRICT COURT  
3 FOR THE DISTRICT OF COLUMBIA

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4 HENRY THOMAS 243 California Road,  
5 Mount Vernon, New York 10552, and  
6 FREEDOM, N.Y., INC. 243 California  
Road, Mount Vernon, New York 10552,

7 Plaintiffs,

8 - against -

CA NO: 89-1531

9 BARNETT & ALAGIA, a/k/a and d/b/a  
10 ALAGIA DAY, MARSHALL, MINTMIRE &  
11 CHAUVIN 1000 Thomas Jefferson Street,  
N.W. Washington, D.C. 20007, et al.

12 Defendants.

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13  
14  
15 June 21, 1989  
16 10:10 o'clock a.m.

17  
18 EXAMINATION BEFORE TRIAL OF MARVIN

19 LIEBMAN, a non-party witness, taken by Defendant,  
20 pursuant to the Federal Rules of Civil Procedure  
21 as applied in Chicago and Illinois and voluntary  
22 consolidation for discovery purposes effected in  
23 consultation with Justice Hubert Will supervising  
24 the Chicago case, held at the offices of Sidley &  
25

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2  
3 Austin, 875 Third Avenue, New York, New York, on  
4 June 21, 1989 at 10:10 o'clock a.m., before Gail  
5 M. Piccolo, a Stenotype Reporter and Notary Public  
6 within and for the State of New York.  
7  
8  
9

10 A P P E A R A N C E S:  
11  
12

13 BARNES & THORNBURG, ESQS.  
14 Attorneys for Plaintiff  
15 1313 Merchants Bank Building  
16 11 South Meridian Street  
17 Indianapolis, Indiana 46204

18 BY: ROBERT D. MACGILL, ESQ.  
19  
20

21 BANKERS LEASING ASSOCIATION, INC.  
22 Attorney for Plaintiff in  
23 Chicago action  
24 155 Revere Drive  
25 Northbrook, Illinois 60062

BY: LESTER A. OTTENHEIMER III, ESQ.

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2  
3 BINGHAM, SUMMERS, WELSH & SPILMAN  
4 Attorneys for Plaintiff in  
5 Washington, D.C. action  
6 2700 Market Tower, 10 West  
7 Market Street  
8 Indianapolis, Indiana 46204-2982

9  
10 BY: JON D. KRAHULIK, ESQ.

11  
12 THE LAW FIRM OF EDNA SELAN EPSTEIN, ESQ.  
13 Attorney for Plaintiff  
14 332 South Michigan Avenue  
15 Chicago, Illinois 60604-4398

16  
17 BY: EDNA SELAN EPSTEIN, ESQ.  
18  
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1 Liebman

2 M A R V I N L I E B M A N,

3 a non-party witness, after first having been duly  
4 affirmed by Gail M. Piccolo, a Stenotype Reporter  
5 and Notary Public in and for the State of New  
6 York, was examined and testified as follows:

7 DIRECT EXAMINATION BY

8 Mrs. Epstein:

9 Q Please state your name and address for  
10 the record.

11 A Marvin Liebman, DCASR New York, GNAA7,  
12 201 Varick Street, New York, New 10014.

13 Q Mr. Liebman, you realize that this  
14 deposition is being taken here at the law office  
15 in New York, but that it may be used in the  
16 future, if you're not available as a witness, to  
17 be read as testimony it before a judge or a jury  
18 in one or two cases.

19 You're aware of that?

20 A Yes.

21 Q And you are represented by your attorney  
22 here today; is that right?

23 A Yes.

24 Q Mr. Liebman, please tell us where you  
25 work?



1 Liebman

2 A I work for the Department of Defense,  
3 specifically the Defense Logistics Agency under  
4 the title Defense Logistics Agency, DCASR New  
5 York, 201 Varick Street, New York, New York  
6 10014. I'm employed as an administrative contract  
7 officer.

8 Q Are you familiar with the initials ACO?

9 A Yes, I am. I am an ACO.

10 Q What is it?

11 A It stands for administrative contracting  
12 officer.

13 Q How long have you held that job?

14 A I've been an ACO for over ten years.

15 Q How long have you worked in the  
16 Department of Defense?

17 A I've been a civilian almost 20 years. I  
18 spent two years in the Military, so almost the  
19 total of 22 years within the Department of  
20 Defense.

21 Q What did you do in the military before  
22 you were employed by the Department of Defense?

23 A I was with the Department of Defense  
24 before I was in the military. After graduating  
25 from college and attending graduate school I

1 Liebman

2 started working for the Defense logistics Agency.  
3 I worked for one year, was drafted, spent two  
4 years in the U.S. Army and came back to my job  
5 with the Defense Logistics Agency after being  
6 honorably discharged from the army.

7 Q Just as a ground rule, Mr. Liebman, very  
8 often when people talk they understand what  
9 somebody's going to say, so they start to answer  
10 before the question is fully completed, but  
11 because we're trying to make a written record and  
12 it will be in a formal manner, it will be hard for  
13 you to follow my question unless you listen to it  
14 entirely.

15 Can you read my question back, please.

16 (Whereupon, the requested portion of the  
17 record was read back by the reporter.)

18 Q Can you tell us what your first job  
19 before you went into the army was?

20 A I was contract assistant.

21 Q What does that mean?

22 A Was basically a trainee at the GS7  
23 level, grade 7 level came into the Government  
24 office under the Federal entrance or FSE exam.

25 Q Where did you do this?

1 Liebman

2 A In New York City at 770 Broadway.

3 Q When you were drafted into the army,  
4 where did you serve and in what capacity?

5 A I served in South Carolina, Fort  
6 Jackson, South Carolina where I took my training  
7 and in Fort Richardson, Alaska where I was in the  
8 infantry.

9 Q What years?

10 A 1968 to 1970.

11 Q When you were honorably discharged from  
12 the army and served in Alaska, what was the next  
13 position you resumed with the Defense Logistics  
14 Agency?

15 A The position I resumed or assumed was  
16 contract administrator grade GS9.

17 Q What was your job as a contract  
18 administrator?

19 A I administered assigned contractors and  
20 contracts up to the point of signature, only the  
21 ACO or administrative contracting officer can sign  
22 for the government.

23 Q How long were you a contract  
24 administrator?

25 A I was a contract administrator from 1970

1                                    Liebman  
2        to 1979, almost nine years.

3                    Q        Was that also in New York?

4                    A        In New York City.

5                    Q        Were you then promoted to an ACO or an  
6        administrative contract officer?

7                    A        Before I was promoted to an ACO I was  
8        promoted to contract administrator GS grade 11,  
9        that was in 1971, one year after I came out of the  
10       army.

11                   Q        And eventually you became an  
12       administrative contracting officer; is that right?

13                   A        Yes, I became an administrative  
14       contracting officer ACO in 1979, that's a grade GS  
15       12.

16                   Q        Have you remained in that position from  
17       then, 1979, until today?

18                   A        Yes, I have.

19                   Q        Can you tell us what the duties and  
20       responsibilities of an administrative contracting  
21       officer are.

22                   A        Administrative contractinbg officer, ACO  
23       to shorten its description, administers Department  
24       of Defense contracts and includes signature  
25       authority which is binding on the Government.    A

1 Liebman

2 brief description or synopsis of the duties would  
3 be -- we have to ensure that the terms and  
4 provisions of the contracts that are assigned are  
5 enforced which in summary would entail assuring  
6 that the supplies that the Department of Defense  
7 has contracted for are delivered in accordance  
8 with the contract, are delivered on time, proper  
9 quality, and that the payment is made to the  
10 contractor.

11 Q What is your understanding of the  
12 obligations of an ACO with respect to the United  
13 States Government?

14 A The ACO represents the Government, he  
15 has to protect the Government's interests. We are  
16 bound by the Federal Acquisition Regulation which  
17 are the enforcer of the contracts that are  
18 assigned, we have signature authority as binding  
19 on the Government.

20 Q When you say that you protect the  
21 Government's interest with respect to a contract,  
22 what do you mean by that?

23 A We have to ensure that the contracts are  
24 fulfilled in accordance with the contract  
25 requirements and in accordance with Federal

1 Liebman

2 Acquisition Regulation, that also entails being  
3 fair, not arbitrary.

4 Q What do you mean by being fair and not  
5 being arbitrary?

6 A In enforcing regulations you have to use  
7 judgment sometimes or interpretation. We have to  
8 protect the Government's interests, that's our  
9 paramount function, but does not mean being  
10 punitive in regards to dealing or administers  
11 assigned contracts.

12 Q Sir, did there come a time that you were  
13 assigned to administer a contract that had been  
14 granted by the United States Government Department  
15 of Defense, Defense Logistic Agency, to a company  
16 at that time that was known as Freedom Industries,  
17 Inc.?

18 A Yes.

19 Q Can you tell us, to the best of your  
20 recollection, when you were assigned to administer  
21 that contract?

22 A Question, there were earlier contracts  
23 besides the one that's involved within this  
24 lawsuit. Should I give you the information  
25 concerning the earlier Freedom contracts or should

Liebman

I restrict myself to the current contract?

Q Were you involved with the administration of the early Freedom contract?

A Yes.

Q You were?

A Yes.

Q For how long have you had any kind of dealings with Freedom on any Government contract?

A I was assigned Freedom's first Department of Defense contract in 1982, I believe October 1982.

Q What was that a contract for?

A It was what they call a production or retort type of contract. There were two contracts that were awarded to Freedom in 1982 and it was production of beef stew and diced beef in gravy.

Q Were there any problems encountered in the fulfillment of those two earlier contracts by Freedom?

A Yes, there was some production delays.

Q Any other problems besides production delays?

A I would have to research the files.

Q Do you recall, if I could refresh your

1 Liebman

2 recollection, whether there were any financing  
3 problems at all in the sense of an overhang of  
4 indebtedness going into the contract that's at  
5 issue in this litigation?

6 A I'm not aware of any. I was not privied  
7 to or involved with what they call the preaward  
8 surveys that might have been involved with those  
9 contracts.

10 Q Were the two contracts that were awarded  
11 to Freedom for the beef stew and the diced beef in  
12 gravy fulfilled?

13 A To the best of my knowledge, they were.  
14 One of the contracts was completed by authorized  
15 subcontracting. The authorization came from the  
16 PCO or procuring contracting officer at the  
17 Defense Personnel Support Center, Philadelphia.

18 Q Let's concentrate on this contract at  
19 issue here. You were assigned in November of  
20 1984. I'm not sure of the exact date, November  
21 17th or 11th?

22 A November 14th.

23 Q November 14, 1984. When you were first  
24 assigned that contract?

25 MR. MACGILL: Can I have a stipulation



1 Liebman

2 that we can just refer to that contract as the  
3 modified contract.

4 MRS. EPSTEIN: No.

5 MR. MACGILL: Okay.

6 A I was assigned the contract actually  
7 before the contract was awarded because I had  
8 handled or I had administered Freedom's contracts  
9 previously. I was told I would be getting the  
10 contract that was going to be awarded to Freedom,  
11 this would be probably -- this would have been in  
12 July of 1984.

13 Q Who told you that Freedom would be  
14 awarded a contract some four months before it was  
15 actually awarded?

16 MR. MACGILL: Objection to the  
17 question. You have not made a record as to which  
18 contract you're referring to, we have no way of  
19 identifying it by contract number, by any other  
20 identification on this record. We have no idea  
21 what you're talking about.

22 Q You know what contract I'm talking  
23 about, don't you?

24 A Yes.

25 Q What contract am I talking about?

1 Liebman

2 A DLA13H-85-C-0591.

3 Q The contract awarded on November 14,  
4 1984; is that right?

5 A That's correct.

6 Q From now on when we talk about the  
7 contract, that's the contract that we will be  
8 referring to unless you or I specify quite  
9 distinctly otherwise. Are we agreed, Mr. Liebman?

10 A Correct.

11 Q Thank you, sir.

12 MRS. EPTEIN: Could you read my  
13 question before the objection, please.

14 (Whereupon, the requested portion of the  
15 record was read back by the reporter.)

16 A In July 1984 when I became involved with  
17 the procurements we were not sure -- I was not  
18 sure if a contract would be awarded, it was the  
19 preaward phase and my involvement started with a  
20 request to attend a conference in Washington  
21 concerning the pending procurement. It was  
22 confirmed that a contract would be awarded, at  
23 least to me, in October 1984, but the contract was  
24 on the way.

25 Q Did anyone tell you prior to the actual

1 Liebman

2 award of the contract that it would be awarded to  
3 Freedom?

4 A Yes.

5 Q Who told you that?

6 A I can only speculate at this point. I  
7 do not remember specific individuals, but it was  
8 people from the buying activity, the Defense  
9 Personnel Support Center as well as people within  
10 my own agency.

11 Q Did you ever learn that any political  
12 clout had, in any way, been brought to bear to  
13 assure an award to Freedom?

14 A Yes.

15 Q What were you told?

16 A That was it.

17 MR. MACGILL: Objection, calls for  
18 hearsay.

19 A That it was a high visibility type of  
20 procurement. High visibility meaning a  
21 congressional and flag officer level, a  
22 congressional and flag officer level, generals or  
23 admiral types.

24 Q Who told you this?

25 MR. MACGILL: Objection, hearsay.

1 Liebman

2 A Again, I would have to research my  
3 filings, but it was from individuals within the  
4 Defense Personnel Support Center and and DCASR in  
5 New York.

6 Q Who within the Defense Personnel Support  
7 Center in Philadelphia told you that, to the best  
8 of your recollection?

9 A This would be, to the best of my  
10 recollection, the PCO involved with the  
11 procurements, Mr. Thomas Barkowitz and his buyer  
12 or contract specialist that worked for Mr.  
13 Barkowitz, Mr. -- I have to check the file for his  
14 name. I think it was Allen Corber or Corter. I  
15 have to check the file on the spelling. It was  
16 the PCO or the procuring officer and the contract  
17 specialist.

18 Q Would within your own agency in New  
19 York, DCASMA I think you said, told you that, to  
20 the best of your knowledge?

21 MR. MACGILL: Same objection as just  
22 before, hearsay.

23 A To my knowledge, there were many  
24 individuals because of the high level interest  
25 involved. Our commander at the time was Colonel

Liebman

Dennis Hill, Lieutenant Colonel Dennis Hill, who was commander. Commander Otto Guenther who was a DCASMA commander. Subsequent to Colonel Hill during the award phase of the contract was Colonel Don Hein who was the commander of DCASMA New York, he was related to Colonel Hill.

There were other individuals. There was Leonard Gutfleisch who was a DCASMA New York deputy. I would say it was common knowledge among the concerned parties involved with this procurement that this was a high level interest procurement with high visibility, as I said, in congressional and flag officer level, that actions concerning award of the contract, at least our involvement in the preaward phase, was to be done on an expedited basis.

Q In terms of?

MR. MACGILL: Pardon me. I move to strike the testimony to the extent that he's referred to in his testimony to the knowledge of third parties.

Q In terms of your own set mind and your own prospective as you came to be administer of this contract, did this common knowledge that

1 Liebman

2 there was high level interest and high level  
3 visibility on this contract create an environment  
4 for you in which you then proceeded to administer  
5 the contract?

6 MR. MACGILL: Objection to the question  
7 as to form. You incorporated information in your  
8 question which is not properly before the court or  
9 the jury.

10 Q You may answer, Mr. Liebman.

11 A Correct.

12 Q Correct in what way, explain?

13 MR. MACGILL: Same objection.

14 A That environment of interest and urgency  
15 was created which caused us to give prompt  
16 attention to any matters concerning this  
17 procurement, whether in the preaward or postaward  
18 phase regarding backtracking, regarding high level  
19 interest.

20 As I said, when I first became involved  
21 in July 1984 I attended a meeting at the Defense  
22 Logistics Agency headquarters in Washington about  
23 Mr. Loenard Gutfleich, my deputy. Another  
24 gentleman, our financial analyst, Mr. -- I forget  
25 his name. It's not Bill Stokes, but it's another

1 Liebman

2 gentleman who's now retired. Major General  
3 Connelly was there who was deputy commander of  
4 headquarters.

5 You don't have two star generals  
6 attending a preaward type of meeting, it's not the  
7 normal. So it was clearly evidence at that  
8 meeting that there was high level interest as  
9 early as July 1984.

10 Q You say Freedom was present at that  
11 meeting at DLA headquarters.

12 A Yes.

13 Q By "Freedom," do you mean Mr. Henry  
14 Thomas?

15 A Yes.

16 Q By "DLA," are you referring to the  
17 Defense Logistics Agency?

18 A Yes, Cameron Station, Virginia which is  
19 our headquarters.

20 Q Can you tell us what all of this  
21 attention in attending such a meeting before the  
22 contract was even awarded at which a deputy  
23 commander two star general is present, what effect  
24 it had on you going into the administration of the  
25 contract?

1 Liebman

2 A Well, it had no effect because other  
3 than creating an environment of knowing that there  
4 was high level interest and that all actions were  
5 to be handled on an expedited basis -- because I  
6 had another contract with high interest, so it did  
7 not alter any of my actions or effect any of my  
8 actions.

9 Q But would it be fair to say that you  
10 were aware that whatever actions you took would be  
11 scrutinized --

12 MR. MACGILL: Pardon me. I'm going to  
13 object, the question is leading.

14 MRS. EPSTEIN: I'm not finished with  
15 the question.

16 Q Would it be fair to say that you were  
17 aware that whenever actions you would take on this  
18 contract would be scrutinized by your superiors?

19 MR. MACGILL: Objection, it's leading.  
20 This is direct examination, you can't lead the  
21 witness.

22 Q You may answer.

23 A Absolutely. There is no doubt about it  
24 that my actions as contracting officer would be  
25 like living in a goldfish bowl, it would be



1 Liebman

2 scrutinized by headquarters, by congress, by the  
3 White House, because the White House was involved  
4 by local politicians, by New York City agencies,  
5 et cetera, et cetera.

6 Q Once the contract was awarded, then you  
7 began the administration of the contract. Can you  
8 tell us what's the first event that you recall?

9 A The first event I recall was actually  
10 the day the contract was signed when I became  
11 aware that Freedom was submitting progress  
12 payments for what they call normally overhead type  
13 costs as opposed to direct type costs.

14 Q Is it customary for a progress payment  
15 to be submitted the day a contract is signed?

16 A Normally it's not the situation, but  
17 that's not the case. But it's not unallowable  
18 because there were certain precontract costs that  
19 Freedom was already incurring, and so it's  
20 unusual, but it's not unallowable.

21 Q You say that a progress payment was  
22 submitted for overhead costs. Why was that a  
23 problem?

24 A Well, we weren't sure if it was a  
25 problem, but it was a new -- a different type of

Liebman

situation. Normally you submit progress payments just for overhead, overhead is normally applied to direct type costs. As an example, if you incur material costs or labor costs, then you can burn that with overhead manufacturing, overhead general administrative expense, et cetera, et cetera.

This situation was a little different. The company, Freedom, was in a startup mode. This was their only contract, so they were only incurring, at that point, overhead type costs. The first question I had in my mind was was this allowable, and I referred the matter through agency channels all the way to our headquarters to get a ruling on this situation concerning progress payments.

Q When you say you referred it through agency channels to get a ruling from headquarters, to whom specifically did you refer to, the DLA in Washington?

A Yes, that was the ultimate destination of the referral. And we have our own internal chain of command as well as I consulted with internal experts as well as external experts.

Q What internal expert did you consult in

1 Liebman

2 order to get a ruling as to whether the overhead  
3 type of costs that were being submitted in the  
4 first progress payment when the contract was  
5 signed were allowable?

6 A The chief of DCASR New York. DCASR New  
7 York is Defense Contract Administrative Services  
8 Region New York. My particular office called  
9 DCASMA New York or Defense Contracts  
10 Administrative Services Management Area New York,  
11 it's part of DCASR New York. We happen to be  
12 located in the same building within DCASMA New  
13 York which is my particular organizational segment  
14 within in New York which in DLA was -- which is  
15 our parent down in Virginia, referred the matter  
16 to the chief of our financial services, Mr. Julius  
17 Wrubel who is now deceased. I also referred the  
18 matter to an outside agency called the Defense  
19 Contract Audit Agency.

20 Q Why did you do that?

21 A Because of the unusual nature of this  
22 situation. I had never run across a situation  
23 where we paid progress payments just for overhead  
24 and I wanted to be sure that the submission was  
25 within our progress payment regulations.

1 Liebman

2 Q Do you believe that you were acting  
3 properly referring your question both to the chief  
4 of the financial services section and to the  
5 Defense Contract Audit Agency for an opinion or  
6 for assistance in helping you determine whether or  
7 not these overhead type costs were allowed?

8 A Absolutely.

9 Q Why do you say that, sir?

10 A I had been at the time with the Defense  
11 Logistic Agency approximately fifteen-and-a-half  
12 years, 15 years, and I had handled many contracts  
13 involving many progress payment situations. I had  
14 never run across such a situation. Normally with  
15 progress payments you don't apply overhead unless  
16 you have direct costs. I also referred the matter  
17 to DCASR New York, an office of New York, for a  
18 legal opinion. I wanted an opinion from the  
19 experts meaning legal, financial services and  
20 audit so I can make a decision as a contractor  
21 officer.

22 Q Do you believe that your actions were  
23 appropriate and proper?

24 A Absolutely.

25 Q Why sir?

1 Liebman

2 A As a contract officer I have a  
3 responsibility to protect the Government's  
4 interest and ensure that my actions, as well as  
5 the contractor's actions, are in accordance with  
6 the contract and the Federal Acquisition  
7 Regulation or at the time -- I'm sorry, the  
8 regulation in effect at the time was what is  
9 called the DAR, Defense Acquisition Regulation.  
10 The regulation has been then changed to FAR or  
11 Federal Acquisition Regulation, but at the time we  
12 were acting under the DAR.

13 Q What were you told by these three  
14 experts you turned to? And let's take them one at  
15 a time, legal first or in any order you want, the  
16 legal, the financial and the audit, and tell us  
17 what each told you.

18 A The chief of the financial services  
19 branch, Mr. Wrubel, stated that it was the -- his  
20 motion that it was unallowable.

21 Q Did he tell you that orally or in  
22 writing?

23 A It was orally. I would have to research  
24 the file to see if it was in writing, but it was  
25 definitely orally.

Liebman

Q Did he explain to you why he felt it was unallowable?

A Yes.

Q What did he tell you?

A Basically that in order to receive progress payments you must have -- in order to be reimbursed or paid progress payments for overhead costs you must have direct payments to apply that overhead cost against.

Q Were you given an opinion in any way by the Defense Contract Audit Agency?

A Yes. They also had the same opinion that Mr. Wrubel had, that the costs were unallowable without direct costs to apply them towards.

Q Was that opinion given to you orally or in writing?

A Definitely orally. I would have to research the file to see if it was in writing.

Q Who gave you that opinion?

A In fact, let me backtrack. I'm sorry, it was in writing on subsequent audit reports, subsequent audit reports in writing disallowed those type costs.

1 Liebman

2 Q Who gave you that opinion orally or in  
3 writing, what individual?

4 A The DCAA supervisor, Mr. Samuel Barken,  
5 his branch manager, Mr. Vito Sorano, and these  
6 were reflected in their opinions, were reflected  
7 in several audit reports on Freedom's first  
8 progress payment submission that were supplied by  
9 Mr. Sorano as branch manager.

10 Q What opinion were you given by the legal  
11 department?

12 A Legal referred the matter to -- they  
13 weren't sure. They referred the matter to their  
14 counterparts, their legal counterparts at the  
15 Defense Logistics Agency headquarters in Cameron  
16 Station, Virginia.

17 Q Did you receive an opinion back  
18 eventually?

19 A There was never any written opinion, to  
20 my knowledge. The oral opinion that came back  
21 through my office of counsel was sort of  
22 inconclusive, to the best of my recollection. I  
23 have to research the file to confirm that, but to  
24 the best of my recollection it was inconclusive,  
25 the opinion was mixed. I also referred the matter

1 Liebman

2 to the buying activity or PCO at the Defense  
3 Personnel Support Center.

4 Q And that is in Philadelphia?

5 A In Philadelphia, Pennsylvania.

6 Q That's the contracting agency that  
7 actually awarded the contract?

8 A Yes.

9 Q To whom did you refer to there?

10 A Mr. Thomas Barkowitz, the procuring  
11 contracting officer or PCO.

12 Q What did he tell you?

13 A He referred the matter to his counsel  
14 Mr. Chuck Wright or Charles Wright, but he always  
15 calls him Chuck Wright.

16 Q What opinion or advise on this issue did  
17 you get from the PCO and his counsel?

18 A To my recollection, there was something  
19 in writing from Mr. Wright who, if I remember  
20 correctly, stated that the progress payments would  
21 be allowable provided progress was made under the  
22 contract.

23 Q Did you take into account all of these  
24 various opinions in reaching a decision as to what  
25 you should do?



Liebman

A Yes.

Q Did you consult with anyone else before you actually took actions one way or another?

A Yes.

Q Whom else did you consult with?

A The commanders of DCASR and DCASMA New York, specifically Colonel Otto Guenther who is the commander of DCASMA New York. The commander of DCASR New York Colonel Donald Hein, the deputy commander DCASR New York Mr. Joseph Donnelly, the chief of contracts, contract manager DCASR New York, Mr. James Driscoll. There were many others. It had the interest of the highest level of DCASMA New York from the commanders on down to myself, it was a whole litany.

Q Were you told or advised what actions to take by your superiors?

A I was furnished advise on opinions. Any decision, of course, is mine and mine alone as the administrative contracting officer. My decision making cannot be abrogated at all, I cannot delegate that to anybody nor can anybody direct me or tell me what to do. It was my decision that had to be made. There was no decision to be made

1 Liebman

2 at this time, for reasons I will get into, there  
3 was no decision that had to be made.

4 Q Why is that, sir?

5 A Because their contract involved progress  
6 payments. Henry Thomas or H.T. contracts prior to  
7 this one never had progress payments. I was  
8 required by government regulations to do what they  
9 call a prepayment review when he submitted his  
10 first progress payment which, I believe, was in  
11 the first week of the award of the contract. I  
12 informed Freedom to -- per my regulations I had to  
13 hold the progress payments for a prepayment review  
14 to determine that Freedom had an adequate  
15 accounting system. An adequate accounting system  
16 was mandatory prior to progress payments.

17 Q It was mandatory pursuant to what?

18 A Federal Acquisition Regulations  
19 including the progress payment clause of Freedom's  
20 contract.

21 Q How did you go about determining whether  
22 Freedom had an adequate accounting system, sir?

23 A As contractor officer I wished the  
24 review in writing through the chief of DCASMA New  
25 York financial services branch. The chief of the

Liebman

DCASMA New York financial services branch requests DCAA, which is the outside audit agency, to actually go into Freedom and review their accounting system which involved review of his first progress payment.

Q Was there anything unusual about what you did?

A Absolutely not.

Q Did you, in any way, treat Freedom differently in terms of being obligated by regulation to conduct a prepayment review?

A No, ma'am. Freedom was treated as any other contractor with one exception, we expedited our actions because of the importance and high visibility of the procurement, but we would have done the same for any other contractor. We were required to do the same for any other contractor that had never received progress payments.

Q So conducting an audit was not punitive in any way?

A Absolutely not. We were required to do the.

MR. MACGILL: I'm sorry, Mr. Liebman, for interrupting.

1 Liebman

2 I move to strike that question as  
3 leading, certainly can't do that on direct.

4 And I apologize for the interruption, I  
5 have to make my objections in most cases before  
6 you answer, if I can.

7 A As contractor officer I was required by  
8 our regulations to do the prepayment audit because  
9 without an adequate accounting system we cannot  
10 pay progress payments, we are prohibited from  
11 paying progress payments.

12 Q Did you in anyway treat Freedom  
13 differently?

14 A The only difference was we expedited his  
15 actions. It wasn't business as usual. Instead of  
16 allowing the same actions as a matter of routine  
17 or within our norm, we expedited Freedoms  
18 actions. Whether we expedited or not, it still  
19 would have been the same type of action, but that  
20 was -- the only difference was the visibility, we  
21 dropped a lot of our work, we treated it in  
22 regards to the type of actions I took or the type  
23 of decision I made.

24 Q What were the results of the prepayment  
25 review and audit that you have told us you were

Liebman

required by law to conduct before you could pay any progress payments?

A Well, before I answer that, during the course of the prepayment review , which involved not only an audit review but a production review, a progress review we are also required to conduct, that review was conducted by a DCASMA New York industrial specialist. The normal review cycle for these types of reviews is 45 days.

During the course of the review, which involved verbal communication with the Defense Contract Audit Agency, it became clear that they were not going to recognize these types of costs, but this particular issue became a sidebar type of issue because during the review of those progress payments, during my review, during the financial analyst review, it had involvement at our DCASMA commander level. We found out that Freedom's financing lending institution or purported lending institution, Dollar Dry Dock, had not fulfilled its financial obligation to Freedom. What I am referring to is the preaward phase where Dollar Dry Dock furnished the \$7,000,000 plus a letter of commitment to Freedom stating that Freedom was

1                   Liebman

2       awarded a contract at the time or was expected to  
3       be, \$21,000,000 I believe, that they would  
4       establish that they would have a line of credit up  
5       to the \$7,000,000 for Freedom.

6               Well, during our review of the progress  
7       payment, this is our review, our financial review,  
8       our commander review, our commander involvement,  
9       we happened to find out that Dollar Dry Dock had  
10      withdrawn its commitment. The only reason Freedom  
11      was given a positive -- what they call preaward  
12      survey in the financial area was because of this  
13      letter of commitment. Without this letter of  
14      commitment, the chief of our financial services  
15      branch stated that it would have been a negative  
16      financial survey. And this letter of -- and  
17      Freedom's financing, his ability to finance the  
18      contract, was highly visible during the preaward  
19      phase at flag officer level at DLA headquarters  
20      because we had to verify that Freedom had the  
21      financial wherewithal to perform the contract.  
22      And it was only with this letter of commitment  
23      that our financial services recommend that -- a  
24      positive in the financial area.

25           Q       Why is it necessary to have a letter of

1 Liebman

2 commitment for up to \$7,000,000 to perform under a  
3 government contract?

4 A Again, I wasn't heavily or deep involved  
5 in the preaward phase, but any contractor before  
6 we award a contract we have to ascertain whether  
7 or not a contractor has the ability to finance the  
8 contract.

9 Q What do you mean by "finance the  
10 contract"?

11 A Well, the contractor has to be able --  
12 must have not just financial, must have production  
13 means. He must be capable of fulfilling the  
14 contract. He must have a total -- he must have  
15 personnel, managerial, production line personnel.  
16 He must have technical expertise to complete. And  
17 he must have a financing officer, you cannot live  
18 on progress payments alone.

19 Q Why not?

20 A Well, in Freedom's situation he had owed  
21 -- during the course of my review we found out  
22 that he had owed about -- he had a deficit of  
23 about \$4,000,000.

24 Q What do you mean by "a deficit of  
25 \$4,000,000"? Your testimony has to be

Liebman

understandable by lay people who may not be as familiar with financing terms as you are, so if we can focus on what is meant by the term deficit of \$4,000,000 or a net worth of minus \$4,000,000, what does it mean in real terms?

A Freedom owed \$4,000,000.

Q Why is that important in any way for the performance of a new Government contract?

A Because he had numerous creditors. He was not in a bankruptcy type situation. The performance of his contract would be in jeopardy as a result of the debts that he owed. The company was insolvent. You had an insolvent company, and before the Government was going to invest money in Freedom, we had to have reasonable assurances that Freedom would be able to complete the contract and that the Government could get its supplies that it had contracted for and be able to recoup its progress payments.

Q Let's focus on the financing. Why is it important to have a letter of commitment or a line of credit from a bank in order to perform a progress payment contract, sir?

A Because of Freedom's situation they



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needed working capital.

Q What do you mean by "working capital"?

A A lot of Freedom's vendors required cash in advance, they would not deliver to Freedom without cash in advance, that was one factor.

Another factor is his past creditors, which there was a whole list that Freedom showed us of -- you know, creditors could conceivably force them out of business, force them into bankruptcy, would jeopardize performance. So the question was how was he going to pay back these creditors, that was another factor.

Third factor would be preprogram progress payment reviews. Obviously the first payment had to be held by regulation to determine whether Freedom had an adequate accounting system, such preprogram reviews normally take 45 days. Freedom would therefore have to have working capital to finance his needs during that 45 day period.

Another factor was the large dollar amount of start up costs that Freedom was incurring. The contract was awarded November 14, 1984, he was not going to start delivering

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supplies until June of 1985. The initial costs that he was incurring were quite substantial, hundreds of thousands of dollars, start up costs, repair the building, pass sanitation inspections. He had to repair the window, the roof, set up the production line, start up costs.

I just cited certain examples, these type of costs could not all be financed by progress payments.

Q Why not?

A Because these are capital type costs which are prohibited from progress payments. The only capital type costs we can pay in the way of progress payments is if these capital costs are depreciated. For example, if Mr. Thomas had to buy an item of capital equipment like a machine, he could only bill us for the appreciable value which might be 20 percent each year depending on the type of depreciation. He would not be able to get full value on those costs on those progress payments, it would have been spanned out over the life of the equipment or machinery or depending what type of depreciation method he used.

Q Did you ever attempt to determine if

Liebman

there was anything written in the contract that permitted Mr. Thomas to recoup the full cost of his capital equipment up front without depreciating it through progress payments namely that the United States would essentially pay the full value in progress payments or his progress payment?

A Yes, I do.

Q How did you do it and when did you do it?

A I contacted the PCO at the Defense Personnel Support Center in Philadelphia.

Q What is his name?

A Thomas Barkowitz.

Q What did you ask him?

A I advised him that Mr. Thomas had stated that it was his understanding that when he negotiated the contract that he would get progress payments through these type costs and had been promised by Mr. Barkowitz.

Q What did Mr. Barkowitz answer to you?

MR. MACGILL: Objection, calls for hearsay.

Q Did you need Mr. Barkowitz's response to

1 Liebman

2 know how to administer this contract?

3 A It was part of my fact finding, the  
4 decision would be my own.

5 Q Was this an element that had to go into  
6 your determination?

7 A Absolutely.

8 Q Was there anything in writing that  
9 substantiated Mr. Thomas' position?

10 A Not completely. Mr. Barkowitz furnished  
11 me a copy of his negotiation memorandum which I  
12 prepared to justify his negotiation of the  
13 contract in his negotiations as part of his costs  
14 that he allowed for, negotiating the contract  
15 contained these costs, contained these capital  
16 type items, but nowhere in this negotiation  
17 memorandum was a commitment to pay progress  
18 payments for these type of costs, it was just his  
19 negotiation of the price.

20 Q So what did Mr. Barkowitz tell you since  
21 you felt that what was in writing was ambiguous?

22 MRS. EPSTEIN: Let me withdraw it.

23 Q Did you feel what was in writing was  
24 clear or ambiguous?

25 A It was clear that these costs were part

Liebman

of the negotiated price, but it was also clear that there was no commitment to pay progress payments for these costs because that would have been in violation, but nowhere in that memorandum was there a written clause to pay the costs, but it was part of the production.

Q That is why you needed to get verbal information from Mr. Barkowitz, to further understand yourself what was contained in the negotiation memorandum?

A Yes.

MR. MACGILL: Objection, leading.

Q What did Mr. Barkowitz tell you?

MR. MACGILL: Objection, hearsay.

A Mr. Barkowitz reviewed the matter. Shall I continue?

Q Yes.

A Mr. Barkowitz reviewed the matter, advised me verbally and furnished me a copy of the negotiation memorandum. He did not commit himself to Mr. Thomas' statement or allegations that he had promised progress payments for these type items. He did not commit himself to that, but he did state it was part of the negotiated price, and

1 Liebman

2 it was clear in the memorandum that it was part of  
3 the price, but nowhere was there a commitment to  
4 pay progress payments for these type of costs.

5 Q Let us go back then to Dollar Dry Dock  
6 withdrawing its commitment.

7 What actions, if any, did you take or  
8 what inquiries did you make when you determined  
9 that Freedom lacked the working capital to fulfill  
10 this contract and that there was no guarantee that  
11 the working capital and equipment costs could be  
12 paid out of the progress payments?

13 A We got command involvement, the  
14 commander of DCASMA New York and other concerned  
15 parties within DCASMA New York, and we totally  
16 checked into the situation, but checking into the  
17 situation included several conference calls to  
18 Dollar Dry Dock.

19 Q What was the purpose of the conference  
20 calls to Dollar Dry Dock?

21 A To check on the status of the financing,  
22 to confirm whether or not the finances were still  
23 there or had been withdrawn. Dollar Dry Dock and  
24 I believe -- I think it was Mr. Noel Siegert, I  
25 have to check the name.

Liebman

Q Noel. I believe it was Noel.

A Noel Siegert who was officer or vice-president of the company of the bank confirmed that the --

MR. MACGILL: Pardon me. I'll object just for the record.

You can go and continue testifying, I want to put my objection on.

Whatever that individual told Mr. Liebman certain is hearsay.

MRS. EPSTEIN: Mr. MacGill, why don't you take a look at the Federal Rules of Evidence.

MR. MACGILL: You don't need to tell me anything. You just ask your questions, I'll make my objections and things will go a lot faster. Proceed with your questions and I'll make my objections and we'll finish today.

Q Was it important for you in terms of your determination as to how to administer the contract to know what the position of Dollar Dry Dock was in respect to its letter of commitment for \$7,000,000?

A Was vital.

MR. KRAHULIK: Read the question back.

1 Liebman

2 (Whereupon, the requested portion of the  
3 record was read back by the reporter.)

4 Q Do you know any way of obtaining that  
5 information which was vital to you for  
6 administering the contract short of asking Dollar  
7 Dry Dock and Noel Siegert what they planned on  
8 doing?

9 A No.

10 Q What were you told?

11 MR. MACGILL: Same objection as  
12 before.

13 A Again, it was a conference call with  
14 high level types present including our commander  
15 Colonel Hein, his deputy Leonard Gutfleich, our  
16 counsel, our financial service people, myself. It  
17 was a group of people, and it was confirmed by Mr.  
18 Noel Siegert in writing that the line of credit  
19 had been withdrawn. We have a letter from Dollar  
20 Dry Dock, I think we may have several letters, but  
21 there definitely is one letter that confirmed the  
22 telephone conversation.

23 I also confirmed the conversation in  
24 writing to Mr. Siegert a day or two later after we  
25 had the conference call. There were several



Liebman

1 letters. There was a letter during the month, I  
2 believe, of December 1984 concerning the Dollar  
3 Dry Dock commitment letter, and it was clear from  
4 these calls and the letter or letters we received  
5 from Dollar Dry Dock that the commitment was no  
6 longer being honored because circumstances, in  
7 quotes, had been changed.

8  
9 Q What did you do when you had that  
10 information and that conformation that there would  
11 be no bank financing available to Freedom on this  
12 government contract?

13 A We alerted everybody concerned. We  
14 spoke to Freedom, we spoke to the PCO at the  
15 Defense Personnel Support Center. We briefed the  
16 high level types, DCASMA and DCASR New York at the  
17 DCAA, Defense Audit Agency, the Defense Logistic  
18 Agency. Anyone that had a need to know.

19 And, again, it was at the highest  
20 level. All the agencies concerned became  
21 involved, and it also included involvement at high  
22 levels at DPSC, you had a navy captain involved.  
23 So the head of all the agencies were involved with  
24 the Freedom situation and we had to keep them  
25 apprized of certain developments.

Liebman

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Q What did you decide needed to be done?

A Well, we had discussions with Freedom, various people at Freedom, probably Mr. Patrick Marra who is Freedom's vice-president or financial type officer, those were the main type of people we were dealing with on the negotiation of payments as well as other people.

And we advised them that apparently the Dollar Dry Dock commitment was no longer there, had they obtained any other type of financing, but otherwise they're in position of -- they're insolvent, you have an insolvent company, and before we pay progress payments we had to ensure that they had the financial wherewithal to perform the contract.

Q What were you told?

A That there was no other financing. That no other financing had been obtained at this time. In fact, there was a letter furnished by Freedom which indicated to us -- I think it was a letter from Mr. Thomas to his wife. There was a letter that was furnished us by Freedom, and I'd have to check the file. It was either from Mr. Thomas to his wife --

Liebman

Q Slow down, Mr. Liebman.

A There was a letter furnished by Freedom because there were two companies involved, Freedom Industries New York and there was another company that Mr. Thomas was involved with, H.T. Food Products. So a letter -- it was either from Mr. Thomas to his wife or from his wife because they were both working at different branches, one of them was president of one company or chairman of the other company -- a letter that indicated clearly that the Dollar Dry Dock financing had virtually evaporated. This letter was dated September 1984, two months before we awarded the contract. Had my office known about that letter or had known that Dollar Dry Dock was drawing its commitment to Freedom, the preaward surveys would have been negative in the financial area unless some other means of financing was obtained.

Q In all events, when you realized that the Dollar Dry Dock letter of commitment was no longer valid and you further realized that Freedom had no other apparent source of financing and you had consulted with these various agencies at the highest levels, what determination did you make or

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what did you do?

A I also had to consult with Freedom, Freedom personnel, which we are required to do per our regulations. There was also an exchange of letters with Freedom.

Q And then?

A After the normal exchange of letters I prepared a letter per government regulations advising Freedom that I was considering suspending progress payments because of Freedom's unsatisfactory financial condition that was in danger of performance of its contract, and that before making a final decision in the matter I was giving Freedom an opportunity to respond.

Q Was this letter approved or shown to anyone before you sent it?

A At the highest levels of DCASMA and DCASR New York and our headquarters at Cameron Station, Virginia and DPSC.

Q Did anyone say to you that you should not send the letter that you have just described wherein you advised Freedom that you were considering suspending progress payments because of Freedom's unsatisfactory financial condition

Liebman

which was endangering the performance of the contract and that before a final decision would be made Freedom would have an opportunity to respond?

MR. MACGILL: Objection, calls for hearsay.

A Before sending the letter I went before an internal contract management board of review. The board approved or recommended approval of my progress payment suspension action.

Q Please describe for us what this internal contract management board of review is?

A It's a internal review board that reviews ACO contractual actions.

Q Were you obligated to go before this board of review or was that an option you yourself took?

A We're not obligated, but it's advised to go before the board of review.

Q Why is it advised?

A Whenever you're dealing with matters such as progress payments, suspensions or other contractual type of actions, sometimes you're required to go before the board, other times it's advised or it's at the option of the ACO.

Liebman

Q Who sits on this board of review?

A It's multi-functional individuals or experts from within DCASMA New York and sometimes from DCASR New York, specifically the office of counsel if they wish to attend.

Q You have used these anagrams a number of times. Tell us what the distinction between DCASMA and DCASR is, what do they do that makes them distinct?

A Our headquarters is DLA headquarters in Cameron Station. There are nine DCASRs throughout the United States. The key letter is R which stands for region, and we have nine contract regions or DCASRs. Within each DCASR there is a DCASMA, we're satellites within the region, within the New York region. We have four DCASMA's of which DCASMA New York is one. We report to the region. The region in turn reports to our headquarters in Cameron Station.

Q Thank you.

What response did you receive from Freedom when you wrote this letter advising them that you were considering suspending progress payments because of Freedom's unsatisfactory

Liebman

financial condition which was endangering performance of the contract?

A There was oral response, and I would have to check the file to confirm written response. I'm almost certain there were written responses, but I'd have to check the file.

Q Do you recall what the nature of the response was?

A Their response did not provide any evidence that financing was in place concerning this contract.

Q So what did you do?

A Upon receipt of Freedom's response I briefed the commanders at DCASMA New York, at DCASR New York, I believe DPSC which is the buying activity in Philadelphia, we briefed DLA headquarters.

Q After this briefing, were you told what to do or did you have input as to what your next action should be?

A I had advice, but the decision was mine and mine alone. I was never told what to do or directed what to do.

Q What step did you take at that point in

Liebman

time?

A I reconvened the DCASMA New York contract management board of review.

Q What did you take before them at that point in time?

A The latest information I had including Freedom's response.

Q What advice, if any, were you given as to what your next action should be?

A I informed the board that I was -- I had made a decision to suspend progress payments. The board --

MR. MACGILL: Objection, hearsay.

A There is written record of this board of review meeting. There was a written record. The board, with one exception, voted to recommend approval of the suspension. Again, I repeat, there is a written record of the board of review meeting.

Q What did you do with the recommendation of the board to approve suspension?

A We had a meeting --

MR. MACGILL: Objection. The question incorporates hearsay.



Liebman

A There was a meeting held in DCASR New York.

Q Before you go on, was the recommendation of the board part and parcel of your decision making process?

A It's part of the decision making process, but they're advisory -- it's my decision. If they had recommended not to suspend, I could still suspend, it was always the ACO's decision.

Q Ultimate decision?

A Ultimate decision.

Q But why did you seek their recommendation in the first instance?

A Concerning progress payment suspensions we -- I'd have to check the regulation. I believe we are required -- we're not required, it's highly advised that we go before the board concerning suspensions.

Q Did you take into account, in reaching your decision, the recommendation of the board?

A I had consulted with the board members because the board members, some of which -- some of them were my experts prior to the meeting. The

1 Liebman

2 board sustained my position. When I went before  
3 the board it was the intent to suspend, and such  
4 action is a drastic action which is arrived at  
5 after careful consideration, careful weighing of  
6 the facts, intensive discussions with the  
7 contractor involved.

8 Q The process that you have described  
9 including going before the board of review to air  
10 what you intended to do and see whether they  
11 approve or recommend or not, is that the usual  
12 operating procedure of your agency and is it  
13 recommended as an operating procedure by Federal  
14 Regulation?

15 A Absolutely. Whenever you're dealing  
16 with a progress payment suspension, I repeat, it's  
17 a drastic action, board of review action is  
18 standard for such type of actions.

19 Q What did you do after the board of  
20 review recommended approval of the suspension that  
21 you felt was appropriate?

22 MR. MACGILL: Objection. Again, the  
23 question incorporates hearsay.

24 A Our region, meaning DCASR New York, was  
25 briefed on the matter, DLA headquarters was

1 Liebman

2 briefed, DPSC was briefed. A meeting was then  
3 convened in DCASR New York in our region with  
4 pertinent DCASR and DCASMA New York personnel  
5 present.

6 Q When did this meeting take place, to the  
7 best of your recollection?

8 A Within a few days. If not the same day,  
9 within a few days after the board met.

10 Q What time frame are we speaking about?

11 A I would have to check the file.

12 Q Do you have anything with you that you  
13 could check rapidly?

14 A I mean are we talking about November or  
15 December of '85 or are we talking January of '86  
16 or February of '86? What time? '85, I'm sorry,  
17 I'm a year off. Are we talking November/December  
18 '84, the year the contract was awarded, or are we  
19 talking early in the next year?

20 Q When was that meeting?

21 A Early February 1985.

22 Q What happened at this meeting that you  
23 say took place in early February 1985, to the best  
24 of your recollection?

25 A The entire situation was discussed

Liebman

including my decision to suspend. I then, in the presence and in the company of our deputy commander, telephoned Mr. Thomas. Again, there were maybe 15 or 20 people present, but I telephoned Mr. Thomas. We had him on a squawk box and I informed Mr. Thomas that I had made a decision with regret to suspend progress payments because of his unsatisfactory financial condition and that a letter confirming this would be forwarded to his attention as quickly as possible. I stated that should his financial arrangements change and should he obtain adequate financing that I, as contracting officer, would consider resuming progress payments. I also stated that this was included in part of a letter concerning conditions for reinstating progress payments.

Q What did Mr. Thomas say?

A Mr. Thomas said he expected that, expected me to suspend progress payments, and then terminated the telephone call.

Q He said nothing else?

A No, not to the best of my recollection, that he expected me to suspend progress payments

Liebman

and terminated the call.

Q Did he say he would get alternative financing?

A No.

Q Did he, in any way, challenge your authority or the validity of your action at that time or the reason that you took that action?

A To the best of my recollection, it was a very brief call, Mr. Thomas hung up the phone.

Q So I take it your answer is, no, he did not challenge the validity of your action in that phone call?

A To the best of my recollection, no, it had been challenged previous times.

Q What is the next event that occurred in your management or administration of the contract?

A Mr. Thomas went topside, meaning to DLA headquarters, possibly to obtain or secure or solicit congressional involvement, and a high level meeting was convened at DLA headquarters in Cameron Station, Virginia on the 14th of February, 1985.

Q Who was present?

A Again, there was a Government meeting

Liebman

the day before, a Government only meeting on the 13th of February, but on the 14th of February you had pertinent high level as well as operating types from DLA headquarters, DCASR New York -- well, let me correct that. There were only three representatives from DCASR, DCASMA New York. Myself from DCASR New York as ACO, our chief contractor from DCASMA New York, Mr. Samuel Stern, Mr. William Stokes, the DCASR New York financial analyst.

Q Who was there from DLA headquarters?

A Again, to the best of my recollection, there were many people present, but, to the best of my recollection, it was Colonel Hackett, I don't recall his first name, who was, I believe, chief of contracts at DLA headquarters. There was a representative group from the various administrative and functional elements. I would have to check the attendance sheet to really refresh my memory, but the areas that some of these people represented were from DLA legal -- by "DLA," meaning the headquarters. DLA legal, DLA procurement. I believe Mr. Chiesa was there. There was a small business type present from DLA

Liebman

headquarters. There were other contractual types there from DLA headquarters, a Mr. William Keating I believe, possibly a Mr. John Albright from DLA headquarters.

Q How many individuals in all were present would you estimate?

A Government individuals, 15 to 20. At least 15. I with say approximately 15.

Q This was a Government meeting?

A The Government as well as the meeting with the contract.

Q On February 14, was Mr. Henry Thomas present?

A Yes, he was.

Q How long did the meeting last?

A Several hours.

Q Was there anyone else representing Freedom present?

A Again, I'd have to check the attendance sheet. I believe there was one other person there, I believe, I could be wrong. I believe it was Mr. Curton Wittick who was Freedom's landlord. I know somebody accompanied Mr. Thomas. I also believe his lawyer was there.

1 Liebman

2 Again, I could be wrong, his lawyer was Mr. Neil  
3 Rettenberg.

4 Q Neil Rettenberg?

5 A I know one or two individuals  
6 accompanied Mr. Thomas, it's possibly these two  
7 individuals.

8 Q Do you recall whether a Colonel Francois  
9 was present?

10 A It's possible Colonel Francois was  
11 present at the meeting. I don't recall if he was  
12 present at the meeting. Also present were  
13 representatives from the Defense Personnel Support  
14 Center in Philadelphia.

15 Q What happened at the meeting?

16 A At the meeting the Government -- and,  
17 again, there were several spokesmen for the  
18 Government. The Government -- well, let me  
19 backtrack.

20 I specifically advised Freedom that the  
21 issue concerning -- the side issue concerning the  
22 overhead type costs in the absence of direct costs  
23 for progress payments had been decided and that  
24 these costs would be allowed, these overhead costs  
25 would be allowed in the absence of direct costs if



Liebman

progress payments were reinstated. The reason for this was that these costs represented costs for his only contract, I had no other contracts, therefore, in theory all costs were really direct costs although normally these type of costs were indirect type costs, but all costs were direct costs, but this was his only contract.

Again, I repeat, there was a side issue, this was not the reason the progress payments were suspended.

Q As for the main issue that you told us, the fact they no longer had any outside financing which was the condition precedent for the contract having been awarded, what was said about that issue?

MR. MACGILL: Objection. You misstated testimony. You led the witness in connection with your questions.

MRS. EPSTEIN: I'll withdraw it.

Q What was said about the issue of lack of outside backing?

A Freedom was advised -- provided he obtained outside financing -- he was advised that 3.8 million would be the amount that would be

1 Liebman

2 required to finance this contract above and beyond  
3 progress payments.

4 Q Where did you get the figure 3.8  
5 million?

6 A The 3.8 million was arrived at the day  
7 before as well as during side discussions that  
8 morning, morning of the 14th, and it was arrived  
9 at collectively by DLA and -- DLA personnel that  
10 were present at the meeting. These were financial  
11 types, legal types, myself, management types,  
12 administrative types, contractual types, that in  
13 consideration of the amount that he owed, the  
14 amount of his insolvency meaning \$4,000,000, that  
15 the 3.8 million was necessary to enable Freedom to  
16 perform on the contract above and beyond progress  
17 payments.

18 Q Was it intended to wipe out the  
19 preexisting debts or was there some other purpose  
20 to obtaining 3.8 million in financing?

21 MR. MACGILL: Objection. Whose  
22 intention you're asking about?

23 A Again, it was collective. Intent was to  
24 enable Freedom to pay back some of his debts to  
25 have working capital to perform the contract,

Liebman

perform on the contract until the prepayment progress payment review or reviews were accomplished, and to enable him to pay vendors who wanted cash in advance.

Q Was this explained to Mr. Thomas?

A I do not recall.

Q What did Mr. Thomas respond to the statement that 3.8 million in outside financing had to be obtained and that if it was obtained progress payments could be reinstated?

A To the best of my knowledge, he showed us a commitment letter from Bankers Leasing. We examined the commitment letter and I pointed out that it had not been signed, therefore, the commitment letter was not valid.

To the best of my recollection, Mr. Thomas was relieved that the indirect cost issue was no longer pertinent and that he was pleased that the Government wished to stay with him and the meeting concluded amicably with Mr. Thomas' assurances or confirmation that he could obtain the financing, whether from Bankers Leasing or from some other source.

Q Did he?

1 Liebman

2 A The meeting ended on a positive note  
3 that the Government was willing to continue with  
4 Henry Thomas -- with Freedom providing the  
5 financing. They were not going to terminate for  
6 the fall, should adequate financing be obtained,  
7 progress payments would resume.

8 Also, there was one other condition,  
9 that the Government insisted on novation of the  
10 contract. By "novation," we meant recognizing a  
11 successor in interest to the contract. The reason  
12 for this was because Freedom owed \$4,000,000 to  
13 creditors, that if -- to protect the Government  
14 from these creditors, because there was a  
15 possibility that the creditors could force Freedom  
16 into bankruptcy, that the Government wished that a  
17 novation agreement be consummated between Freedom  
18 Industries and his other company, H.T. Food  
19 Products, which apparently, according to Mr.  
20 Thomas, was in a satisfactory mode or condition.

21 So there were two conditions basically  
22 placed on the presumption of progress payments,  
23 obtaining the financing and effecting a novation  
24 agreement to H.T. Foods. Again, I repeat, the  
25 meeting ended on a very positive note.

Liebman

Q First of all, so we're clear for lay people, what does novating the contract mean?

A It means recognizing a successor in interest. It involves a transfer of assets. It would mean the transferor would be Freedom Industries. The transferee or the gaining party would be H.T. Foods. The Government is recognizing a successor for this particular contract.

Q Would it be correct, in layman's terms, to say what would happen is that the contract would be taken from an existing company, Freedom Industries Inc. that had a large overhang of debts, and be given to a new company, H.T. Food Products, that was debt free?

A Correct.

Q If that was going to happen, why did you still need 3.8 million in outside financing?

A Because H.T. Food Products needed working capital as well as -- although H.T. Food Products did not owe \$4,000,000. To the best of my recollection, as to what transpired at the meeting, and, again, we had not reviewed H.T. Food Products from a financial standpoint, at the time

Liebman

H.T. Food Products did not have, to the best of my knowledge at the meeting, financing, adequate financing on its own to complete the contract.

Q Did Mr. Thomas in any way state at this public meeting with 15, 20 people present, "I don't need bank financing, I can perform the contract entirely on progress payments"?

A I do not recall.

Q Did Mr. Thomas in any way resist or argue or take exception with the Government's position that outside alternative bank financing had to be put in place for progress payments to continue and go forward?

A At the meeting?

Q Yes.

A I do not recall.

Q Was there any specificity as to what type of bank financing was needed, was it to be a line of credit or what?

A To the best of my knowledge, it was supposed to be a line of credit, an unrestricted line of credit.

Q What is meant in your mind by the term unrestricted line of credit?

Liebman

1  
2           A     The line of credit would not be tied  
3 into any conditions such as account receivable  
4 financing or any other type of conditions or  
5 preconditions, that the recipient of the line of  
6 credit could draw from the line at will, of  
7 course, and would have to pay an interest charge  
8 to the lending institution.

9           Q     Again, in layman's terms, that 3.8  
10 million dollars would be made available at any  
11 time the debtor, in this case Freedom, wanted to  
12 tap that line of credit up to the maximum of 3.8  
13 million, was that your understanding by the term  
14 unrestricted line of credit?

15           MR. MACGILL:   Objection, leading.

16           A     That was my understanding as to what the  
17 Government required of Freedom and that was my  
18 understanding of an unrestricted line of credit.

19           Q     Are you familiar with banking terms?

20           A     I only have layman's experience, I'm not  
21 a banking or financial expert.

22           Q     In the management of Government  
23 contracts, however, have you in other instances  
24 had to check whether a line of credit was  
25 available to a Government contractor?

Liebman

A Absolutely. As part of determining whether or not a company was financially viable, absolutely.

Q So in other cases, therefore, you looked at and reviewed existing bank lines of credit?

A No, that is done by one of DCASMA's financial analysts, in this case Mr. Stokes, he is the expert. He gets involved in the preaward surveys. I have indirect dealings with banking arrangements. I deal with Mr. Stokes who actually does the review who gets involved with the specifics concerning financing, banking arrangements, et cetera, et cetera.

Q Certainly from your prospective of administering the contract, you had to have some understanding of what a line of credit meant.

A Absolutely.

Q What happened after this February 14, 1985 meeting in Alexandria, Virginia at Cameron Station?

A Freedom then proceeded to put the line of credit in place and to prepare the necessary paperwork to effect a novation agreement.

Q To your knowledge, was Freedom



Liebman

operational during this period of time?

A To my knowledge, to the best of my knowledge, they were doing -- they proceeded with rehabilitating the building. They submitted first articles and had the first articles approved.

No, let me correct myself. That was during the January time period I believe, but subsequent to the February meeting they were continuing to rehabilitate the building, continued to hire personnel. They continued in general in a start up mode, in quotes. They were not in production, but they were in a start up or preparation type mode.

Q Did they ever demonstrate, to your satisfaction, that they had put in place an unrestricted line of credit?

A They demonstrated that. Let me correct myself. I believe they demonstrated that to Mr. William Stokes.

Q What do you understand about the whole process of putting together a line of credit from a banking source, in this instance from Bankers Leasing Association, for Freedom?

A Well, Bankers Leasing agreed to

Liebman

1  
2 establish a line of credit. There were certain  
3 provisions that controlled this line of credit and  
4 in return for establishing this line of credit  
5 Henry Thomas from Freedom assigned -- in quotes --  
6 assigned the proceeds of the contract under the  
7 Assignment of Claims Act to Bankers Leasing. This  
8 was the condition -- this was the major condition  
9 of loaning or establishing the line of credit for  
10 Freedom.

11 Q Do you know when this took place,  
12 approximately?

13 A Well, it became effective when I signed  
14 on behalf of the -- no, let me correct myself. I  
15 would have to check the files to see when the  
16 notice of assignment was dated, notarized. I  
17 acknowledged receipt of a notice of assignment as  
18 contracting officer during, I believe, the March  
19 time frame. I believe I signed it in March of  
20 1985. March or April 1985, and then I processed  
21 the paperwork internally within DCASR and DCASMA  
22 New York.

23 Q What happened after that?

24 A Freedom continued to process or work on  
25 the necessary paperwork, prepared the necessary

1 Liebman

2 paperwork for the novation agreement.

3 Q Did you review the financial statements  
4 of the new entity, H.T. Food Products, Inc., to  
5 determine whether they were a viable entity or  
6 what the nature of their assets were?

7 A All financial reviews were conducted by  
8 Mr. William Stokes. I believe it also included  
9 review of H.T. Foods' financial condition as well  
10 as Freedom's financial condition as well as the  
11 line of credit arrangement with Bankers Leasing.

12 Q Did you ever learn that over \$800,000 of  
13 H.T. Food Products' assets were a confession of  
14 judgment from Freedom Industries Inc.?

15 A Not to my recollection.

16 Q Would you consider that a viable  
17 financial position to know that the major assets  
18 of the new company was a purported debt from the  
19 problem company?

20 A That would have been a consideration.

21 Q Were you ever told that?

22 A As I am thinking, I vaguely recollect  
23 something. I think there is something in my  
24 files, something in the reports I had prepared,  
25 for Freedom to change management where this might

1 Liebman

2 have been mentioned. I vaguely recollect  
3 something. I have to check the files, to be  
4 honest with you.

5 Q What is the next thing that happened?

6 A Freedom submitted the novation agreement  
7 paperwork which was inadequate.

8 Q Why was it inadequate?

9 A Speaking generally, I'd have to check  
10 the file for specifics. It was not in accordance  
11 with our requirements, there were errors, there  
12 were omissions, revisions were required, and  
13 Freedom was so informed.

14 Q Then what happened?

15 A After an exchange of requirement  
16 discussions an acceptable package was finally  
17 submitted in April of 1985. I believe the package  
18 was also reviewed by our headquarters. I would  
19 have to check the file to confirm that, but I  
20 signed the novation agreement on behalf of the  
21 United States Government in April 1985, I believe  
22 in April 1985.

23 Q Then what happened?

24 A Backtrack. I did not sign the novation  
25 agreement until I was assured that the financing

1 Liebman

2 was in place because that was part of my  
3 responsibility, determination prior to approving  
4 novation of the contract. It was determined that  
5 Freedom was a responsible company both in a  
6 productive and financial standpoint, therefore, I  
7 signed the novation. I must add that during that  
8 -- subsequent to the February meeting at DLA  
9 headquarters, the 3.8 million was raised to  
10 \$5,000,000.

11 Q Why was the 3.8 million figure that had  
12 been discussed on February 14, 1985 at the Defense  
13 Logistics Agency headquarters in Alexandria,  
14 Virginia raised to five million?

15 A That was per William Stokes who was our  
16 financial analyst. He felt 3.8 million was not  
17 sufficient for Freedom to perform on the contract,  
18 that \$5,000,000 was needed and that the ultimate  
19 amount of credit, to the best of my recollection,  
20 was the \$5,000,000 that Bill Stokes, you know,  
21 desired.

22 Q Did you have an understanding as to why  
23 \$5,000,000 was necessary to adequately perform  
24 this contract?

25 A Yes, for the same reasons that I had

1 Liebman

2 stated previously, that Freedom needed working  
3 capital, that there was going to be at least the  
4 first progress payment and possibly subsequent  
5 prepayment reviews. Vendors wanted cash in  
6 advance, et cetera, et cetera.

7 Q Is it mandatory to conduct these  
8 prepayment reviews before any progress payment can  
9 be paid?

10 A In Freedom's case, yes, because the  
11 initial one had to be reviewed on a prepayment  
12 basis because we had to ensure that Freedom had an  
13 adequate accounting system that was acceptable for  
14 progress payment purposes.

15 Q Was this a special requirement for  
16 Freedom or is it a requirement that is imposed on  
17 any Government contractor before a progress  
18 payment can begin?

19 A It is required of all Government  
20 contractors per the progress payment clause per  
21 the contract.

22 Q This was not a special hoop that Freedom  
23 was being asked to jump through?

24 A Absolutely not.

25 Q What is the next thing that happened?

1 Liebman

2 A After the novation agreement was signed,  
3 I executed a contractual modification synopsisizing  
4 the novation agreement. Freedom was informed that  
5 the contract was novated. Freedom promptly  
6 submitted a new progress payment number one for, I  
7 believe, 1.7 million dollars.

8 Q What did you do when you received a  
9 progress payment? Was this numbered a progress  
10 payment number one resubmitted?

11 A Yes, resubmitted number one.

12 Q What did you do when you received this  
13 progress payment number one resubmitted for 1.7  
14 million dollars?

15 A Again, I'd have to check the file, but I  
16 had discussions with DCAA. I approved the  
17 progress payment within a short period of time, I  
18 believe it was early May of 1965 that -- 1985, I'm  
19 sorry, that I approved the progress payment, I  
20 believe, in its entirety or close to its entirety,  
21 and the check was ready the same day that I had  
22 signed the progress payment and I think it was  
23 picked up the same day by Freedom.

24 MR. KRAHULIK: We keep saying Freedom.

25 THE WITNESS: I'm sorry, it was H.T.

Liebman

Foods.

Q Can we now agree that when we say Freedom it means whatever entity it was at that moment?

A Up until 1985 when it became Freedom Incorporated.

Q How were you able to authorize payment of the progress payment so quickly?

A I had in-depth discussions with the Defense Contract Audit Agency, with my production type, specifically the industrial specialists at DCASMA New York. I did my own review, my own desk review. The costs that H.T. Foods was billing for were, I believe, all indirect type costs. I made a decision to pay. DCAA's position was don't pay because they never recognized allowing the indirect type costs. The review was done on an expedited basis.

Q So although the Defense Contract Audit Agency told you don't pay, you paid anyway?

A Right. Exactly. Correct.

Q And you paid the full amount of the --

A Or close to it. If not the full amount, close to it. I believe I paid the 1.7 million.



1 Liebman

2 If there was any discussion, it was minimal.

3 Q Why did you decide to pay the progress  
4 payment although the Defense Contract Audit Agency  
5 was advising you not to?

6 A In fact, I didn't even want to do the  
7 review, but anyway that was another matter. That  
8 was their position, they're entitled to their  
9 opinion, the decision is ultimately mine. I had  
10 the support on this indirect cost matter because  
11 all the costs involved with this progress payment  
12 were, I believe, indirect costs, but I had the  
13 support of the DCASR New York office of counsel,  
14 DLA headquarter's counsel, contract management in  
15 DCASR New York, contract management DLA  
16 headquarters, DPSC, the Defense Personnel Support  
17 Center. The only elements within any of our  
18 Government organizations that disagreed with  
19 allowing these indirect costs were DCAA and the  
20 pricing. The chief of the financial service  
21 division in DCASMA New York -- I had solid support  
22 to pay from the administrative, legal, contract  
23 management and command types, but it was  
24 ultimately my decision.

25 Q Is there any way that you could have

1 Liebman

2 paid that progress payment or any other progress  
3 payment before May of 1985?

4 A No.

5 Q Why not, Mr. Liebman?

6 A Because prior to that time, prior to  
7 April of 1985, would mean prior to the novation  
8 agreement and prior to obtaining the line of  
9 credit. And as we told Freedom at the February  
10 meeting at Cameron Station, Virginia, DLA  
11 headquarters, I would not resume progress payments  
12 until adequate financing was obtained and the  
13 contract was novated. Those were the conditions  
14 that were set off at this February meeting. Those  
15 were the conditions that had to be met. Those  
16 conditions were not met until April of 1985.

17 Q Did Mr. Gross or anyone from Bankers  
18 Leasing attempt to call you or talk to you  
19 directly prior to the time the first progress  
20 payment was made?

21 MR. MACGILL: He didn't testify as to  
22 what Randy Gross would do --

23 MRS. EPSTSEIN: Thank you, you're  
24 absolutely right. I accept your correction.

25 Q Did anyone call you from Bankers Leasing

1 Liebman

2 prior to the time that you paid the first progress  
3 payment?

4 A Prior to payment of the first progress  
5 payment, I would have to check the file. However,  
6 I can state that throughout the life of the  
7 contract, meaning throughout subsequent to  
8 reinstatement, there were constant calls from  
9 Bankers Leasing weekly, bi-monthly, bi-weekly, but  
10 I cannot, without checking the file, confirm right  
11 now at this meeting, this hearing, whether he made  
12 such calls prior to the payment of the first  
13 progress payment.

14 Q Did you ever discuss with anyone from  
15 Bankers Leasing as to the line of credit that they  
16 were extending to Freedom?

17 MR. MACGILL: There is no proof in this  
18 record of a line of credit. You're representation  
19 is what is not in this record. We'll object to  
20 the form of the question.

21 Q Did you understand that Bankers Leasing  
22 had extended a line of credit to Freedom?

23 A Yes, unless they used some other  
24 terminology, but it was a line of credit.

25 Q Is that what you understand it was?

1 Liebman

2 A A line of credit, an unrestricted line  
3 of credit.

4 Q And that was your understanding?

5 A That was my understanding as a contract  
6 officer.

7 Q Did Bankers Leasing ever discuss the  
8 financing that they were going to make available  
9 for Freedom with you?

10 A To the best of my recollection, such  
11 discussions prior to resumption of progress  
12 payments and prior to novating the contract with  
13 Mr. William Stokes, our financial analyst.

14 Q So none with you directly?

15 A It is possible. I have to check the  
16 file. It is possible. There were calls to make.  
17 It is possible they called me and wanted to know  
18 when I would pay progress payments, how quickly I  
19 would pay progress payments.

20 Q You keep referring to you have to check  
21 the files.

22 A Prior to the first progress payment.

23 Q You keep saying you have to check the  
24 files. Mr. Liebman, do you have the files with  
25 you?

1 Liebman

2 A We have some of the files here, but most  
3 of the progress payment files are back in our  
4 office.

5 MRS. EPSTEIN: I am going to ask, in  
6 view of the number of times that you said you  
7 would have to check the files on a given issue,  
8 that when this deposition is completed, in terms  
9 of exhausting your recollection, that you obtain a  
10 copy of the transcript and that every time you  
11 have said you would have to check the file, that  
12 you do so and I will ask the Judge for permission  
13 to return to clean up those items to see whether  
14 your recollection is not correct so that we do  
15 have a full record and so that there isn't any  
16 implication that the files are different from your  
17 recollection or that we have not done our job in  
18 getting a full record before a finder of fact.

19 There is no way that we have access at  
20 this point in time to the entirety of your files,  
21 no way that we would know where to look since you  
22 clearly seem very knowledgeable about what's in  
23 your files and have a very good memory even  
24 without the files. I would ask you to do that.

25 MR. MACGILL: We'll object to that

Liebman

procedure. You had every document conceivably applicable to what the man's testimony is. If you thought you didn't, you could have subpoenaed them, and I'm sure his counsel would have been delighted to bring them here, but to ask the witness to go back and correct his transcript or come back is completely unacceptable.

You have produced, as we have, all the documents pertaining to this case and my understanding is we have all of Mr. Liebman's papers. You have notebooks in front of you, lots of them, you have lots of notebooks behind you. If you want to test his recollection or refresh his recollection, you have every right to do so, but we're not going to come back time and time again and take Mr. Liebman's testimony. We're all here today, we're going to get the testimony done. I brought my documents, if there is a question about what his memory is, I'll refresh his memory with the documents I brought or hand to him.

We're not going to agree to that. I want it perfectly clear, we're not going to agree to that. I don't think your representation is

Liebman

fair.

Q Mr. Liebman, will you agree that your files are extensive?

A Yes.

Q You will agree that they exceed thousands of documents?

A Yes.

Q And you will concede, will you not, that anyone that does not know those documents inside and out would have some trouble finding a particular piece of paper that would or would not refresh your recollection on a particular item that you are testifying about? Would you agree to that?

A Yes.

Q Do you have any objection in trying to make your testimony and the documents that support it as complete as possible for the benefit of all the parties and so that the truth can be known in this case?

A I have no objection.

Q Do you consider it an imposition upon your time to do what I have requested you to do, sir?

1 Liebman

2 A I do not consider it an imposition.

3 MR. MACGILL: Why don't we bring all  
4 his files here today or tomorrow?

5 MRS. EPSTEIN: I'll tell you why not,  
6 Mr. MacGill, because his recollection and the  
7 extent of the testimony is extensive, and if we  
8 stop to go rummaging for a given piece of paper it  
9 will break what has been a very clear flow of  
10 testimony and it will make it impossible for us to  
11 exhaust his recollection. Mr. Liebman is a party  
12 to this and represents a party.

13 Mr. Krahulik, would you like to say  
14 anything on this position?

15 MR. KRAHULIK: I have no position about  
16 what your process is.

17 MRS. EPSTEIN: Fine.

18 MR. MACGILL: That's fine that you  
19 don't have an objection, I have an objection.  
20 This is just one more attempt to stall.

21 Mr. Liebman, if you're willing to  
22 volunteer your time, I'm delighted, you can  
23 volunteer all the time you want. If you want to  
24 spend hours and hours going through these  
25 documents and checking and rechecking your



1 Liebman

2 testimony, that's fine with me, but we have a  
3 trial date to get to and that's where I want to  
4 go. I want to try this case, we have to get this  
5 done by July 31st, that's my primary purpose.  
6 But, as far as I'm concerned, your deposition is  
7 completed when we leave here. Once the parties  
8 leave the deposition, my position is we're done,  
9 period.

10 If you want documents that you don't  
11 have, go ahead and make arrangements with Mr.  
12 Liebman's lawyer or Mr. Liebman directly to have  
13 them brought tomorrow. I want it perfectly clear  
14 that when this transcript ends it's over.

15 Q Mr. Liebman, are you prepared to stay up  
16 all night tonight looking for these documents?

17 A I'm prepared to, but it shouldn't take  
18 all night.

19 Q If you can bring these documents  
20 tomorrow, I would very much appreciate it. If you  
21 cannot locate the specific documents or cannot  
22 remember each instance where you said you have to  
23 check the files, please tell us tomorrow,  
24 otherwise we will be back in New York the last  
25 week in July unless discovery is continued at

1 Liebman

2 someone's request.

3 Mr. Marra will be deposed on the 25th of  
4 July, the Government audit agency people are now  
5 called, I think, for the 26th and the 27th. If  
6 you could accommodate us on the 28th you may be  
7 able to clean it up then if we can't do it  
8 tomorrow.

9 MR. MACGILL: Just so we're clear, I  
10 don't want you to think I wasn't perfectly clear  
11 in my position. There will be no depositions in  
12 the last week of July, we're going to take Mr.  
13 Liebman's testimony until we're done. If you get  
14 a court order your obligation as a lawyer is  
15 whatever they are, and we're going to go until we  
16 are done, that's my position.

17 MRS. EPSTEIN: Mr. Krahulik, do you  
18 have any objection to what we proposed to do to  
19 make this record as complete as possible?

20 MR. KRAHULIK: I have no objection, but  
21 I'm not agreeing to come back on the 28th either.

22 MR. MEDEIROS: Without a transcript,  
23 Mr. Liebman is not going to recall.

24 MRS. EPSTEIN: I would agree?

25 MR. KRAHULIK: Plus, it may very well

1 Liebman

2 be that we don't have to come back given his  
3 recollection so far.

4 Q Mr. Liebman, after you decided to pay  
5 almost the entirety if not the entirety of the  
6 first progress payment as resubmitted for 1.7  
7 million dollars, what is the next event on the  
8 administration of that contract that you recall?

9 A Well, progress payments then followed on  
10 a regular basis.

11 Q Do you recall any hitch in paying the  
12 progress payments that followed on a regular  
13 basis?

14 A There were problems from the  
15 administrative standpoint because I, as ACO, had  
16 to do desk type reviews because the Defense Audit  
17 Agency refused to recognize payment of direct --  
18 indirect costs without indirect costs to pay  
19 progress payments.

20 Q What was their position continuing  
21 toward?

22 A We have in the file recommending no  
23 payment during the specific '85 time period  
24 without their assistance, without -- I was forced  
25 to do the reviews on my own as well as soliciting

1 Liebman

2 progress type reviews from our industrial  
3 specialist to see that work was proceeding on  
4 preparing the building for production, setting the  
5 contractor up for production, hire people, getting  
6 equipment people, getting material in.

7 Q Did you pay the entirety of each and  
8 every progress payment request?

9 A I would have to check the files.

10 Q Were there occasions that you did not  
11 pay the entirety at the request?

12 A I believe so. I, again, have to check  
13 the -- we ran into problems.

14 Q What problems do you recall running  
15 into?

16 A We ran into accounting system problems.

17 Q What accounting system problems would  
18 you recall that made it difficult for you to pay  
19 the entirety of a given progress payment request?

20 A Again, these problems are supported by  
21 DCAA, unallowable costs were billed for, improper  
22 costs. There were problems with the accounting  
23 system at Freedom. Entry problems, accounting  
24 system or book entry problems. There was billing  
25 for capital type costs at full value which is

1 Liebman

2 unallowable for progress payment purposes.

3 In short, we had accounting system  
4 problems. We had submission problems. By  
5 "submission problems," problems with Freedom's  
6 submission as they were billing for unallowable  
7 costs, improper costs. And then there were  
8 problems with the system also. We had a new  
9 development, some of Freedom's vendors wanted cash  
10 in advance, a way of -- in quotes --  
11 circumventing. Cash in advance was what we call  
12 subcontractor prepayments. Subcontractor and  
13 vendor are synonymous.

14 Q Let's take some of the problems that you  
15 encountered. When you say they were unallowable  
16 costs, can you, of your own recollection without  
17 looking at the files, tell us what some of these  
18 were that in any way delayed your progress  
19 payments or resulted in your paying less than the  
20 full amount requested?

21 A As an example, capital equipment, this  
22 would be billing for a security system at Freedom,  
23 an inventory tracking system which is a computer,  
24 certain capital type production equipment,  
25 rehabilitation of the building, setting up of the

1 Liebman

2 production line.

3 Q I thought, Mr. Liebman, that you had  
4 explained to us that you had decided to pay all  
5 costs incurred under this contract.

6 A Except that capital equipment had to be  
7 depreciated or amortized over the life of the  
8 contract. In other words, let's say we're  
9 speaking about production equipment, capital type  
10 of equipment. Although I had agreed to pay, this  
11 was an indirect type cost in the absence of direct  
12 costs that Freedom could not bill or H.T. Foods  
13 could not bill a hundred percent of these costs  
14 because it would violate our progress payment  
15 regulation. Any capital type costs must be  
16 depreciated or amortized. Only special type  
17 equipment costs could be billed at full value.

18 Q What is the distinction between special  
19 equipment and capital equipment?

20 A Okay. Special equipment or tooling is  
21 for a special purpose. Capital type equipment or  
22 tooling or whatever, is general purpose type  
23 equipment that can be used for production of  
24 various types of commodities. It is not special  
25 or specialized in nature.

1 Liebman

2 This is an example of a progress payment  
3 problem that we faced during that time period,  
4 where we only can pay for the depreciated value of  
5 these types of costs.

6 There are other problems, of course. We  
7 had to do reviews, Government reviews, at his  
8 vendors by the local DCASMA's that were connascent  
9 of these vendors because the vendors were billing  
10 for what they call subcontractor progress  
11 payments. This is where the vendor would request  
12 a progress payment from H.T. Foods, they would  
13 fill out a form, a progress payment request form,  
14 submit it to H.T. Foods, H.T. Foods would then pay  
15 us on that subcontractor progress payment request  
16 to myself as ACO.

17 The same ground rules applied for  
18 progress payments with the subcontractors as  
19 applied with the prime contractor, H.T. Foods. We  
20 had to determine that the subcontractor had  
21 adequate accounting systems, that they were making  
22 satisfactory progress. So we had to do prepayment  
23 reviews, and there were several of them involved  
24 and it involved a lot of money.

25 Q Why do you have to go through all these

1 Liebman

2 hoops?

3 A They are required by Federal Acquisition  
4 Regulation that the subcontractor -- like the  
5 prime contractor, he is treated the same way. The  
6 same progress payment regulations that is allowed  
7 to the prime contractor applied to the  
8 subcontractor. There must be a progress payment  
9 clause in the subcontract. They must have an  
10 adequate accounting system, satisfactory progress  
11 must be made. The same type of conditions apply  
12 to the subcontractor as apply to the prime  
13 contractor in regard to progress payments.

14 Q Were you imposing any special hurdles,  
15 regulations or requirements on paying Freedom's  
16 progress payments?

17 A Not at all, I proceeded as I would  
18 proceed the same way with any other contractor.

19 Q During this period of time that progress  
20 payments were being submitted, were you ever able  
21 to determine whether Bankers Leasing Association,  
22 Inc., in fact, made a line of credit available to  
23 Freedom and how much money they made available?

24 MR. MACGILL: I'm going to object to  
25 the question. He's confirmed to you by his own



1 Liebman

2 testimony that he's not an expert in banking or  
3 financing. You've already asked him what his  
4 understanding was and he told you that he's not  
5 competent to tell you about his own admission  
6 about the line of credit in the backing or  
7 financing sense.

8 MRS. EPSTEIN: I'll rephrase the  
9 question.

10 Q In monitoring and administering this  
11 contract, did you ever determine how much money  
12 Bankers advanced to Freedom?

13 A Yes.

14 Q What did you determine and when did you  
15 determine it?

16 A I cannot state without checking the file  
17 the specific amount and the specific date that the  
18 money was advanced. However, I can state  
19 categorically without any reservation that the  
20 line of credit was in place, the \$5,000,000,  
21 before the contract was novated. I would have not  
22 approved of the novation had the line of credit  
23 not been there. The only thing is I have to check  
24 in regard to the files whether there were calls  
25 from Bankers Leasing prior to novation, prior to

1 Liebman

2 paying the first progress payments and the amount  
3 Henry Thomas initially drew from Bankers Leasing.  
4 That information I do not recall. Bill Stokes is  
5 the expert in that area, I'm sure he can probably  
6 recall that information.

7 Q Do you know if, at any point in time,  
8 Freedom drew \$5,000,000?

9 A I can state they did not draw  
10 \$5,000,000, that was one of the problems. He did  
11 not use the line of credit.

12 Let me correct that. If he used it, it  
13 was used minimally. It was not used during the  
14 life of the contract the way the line of credit  
15 was intended. It turned into what they called  
16 accounts receivable financing where Bankers  
17 Leasing and whoever, H.T. Food -- and subsequently  
18 Freedom New York tied in -- let me backtrack.  
19 Bankers Leasing tied in money to Freedom to  
20 progress payments and that was not the original  
21 intent of this line of credit. It no longer  
22 became a free line of credit, if that's a proper  
23 word, it became a restricted line of credit or  
24 account receivable financing, as they call it,  
25 because using the line was now tied in to myself

1 Liebman

2 as ACO to pay progress payments to Freedom.

3 Q Did you ever object to Bankers in terms  
4 of the fact that they had termed what you  
5 understood was going to be an unrestricted line of  
6 credit into a line of credit tied to accounts  
7 receivable financing?

8 A There was never a formal objection on my  
9 part, it came up in discussions.

10 Q With whom did it come up within  
11 discussion?

12 A H.T. Foods with Bankers Leasing with  
13 H.T. Foods' lawyer with other concerned parties.

14 Q To the best of your recollection, what  
15 did any representative of Bankers state in these  
16 discussions and tell us, if you can, when the  
17 discussions took place?

18 A Concerning this particular point?

19 Q Yes. The fact it was no longer being  
20 used as an unrestricted line of credit, but as a  
21 line of credit tied into accounts receivable to  
22 financing and, therefore, a restricted line of  
23 credit?

24 A To the best of my recollection, there  
25 was no pertinent response because our discussions

1 Liebman

2 were mainly involved with payment of progress  
3 payments, Freedom's loss on the contract, H.T.  
4 Foods' loss when I was going to pay progress  
5 payments, what deductions I was making. The  
6 matter of the line of credit was just mentioned as  
7 part of our discussions. But, to my knowledge,  
8 there was never any direct response to me. There  
9 probably was to Mr. Stokes.

10 Q You say there were discussions of  
11 Freedom's loss, when did discussions of Freedom's  
12 loss begin with Bankers Leasing, to the best of  
13 your recollection?

14 A Definitely categorically in April of  
15 1986, possibly several months earlier if --  
16 possibly as early as December '85, but I can  
17 confirm definitely April 1986 because my files  
18 document it to that effect.

19 Q What was said in April of 1985, did you  
20 say?

21 A No, April of '86, but possibly as early  
22 as December of 1985.

23 Q What was said in April of 1986 with any  
24 representative of Bankers Leasing regarding  
25 Freedom's loss?

1 Liebman

2 A Let me answer that question this way,  
3 Bankers Leasing was in constant communication with  
4 me sometimes weekly, sometimes daily, surely  
5 several times a month. It was mainly Randy Gross  
6 that wanted to know when I am making the progress  
7 payments, when the progress payment was committed,  
8 when I was making the progress payment, what type  
9 of reviews I was conducting, what deductions I was  
10 making, when would the check be issued, et cetera,  
11 et cetera. The matter of the loss -- because it  
12 was a very critical matter at the time, definitely  
13 became the subject of discussion in April '86,  
14 possibly sooner, and continued throughout the life  
15 of the contract until the contract -- until the  
16 contract --

17 Q What loss are we talking about?

18 A This was an admitted loss in writing by  
19 Freedom. There were two loss figures presented to  
20 us in writing, but us, meaning the Government --  
21 one was based on the full contract quantity of  
22 620,000 cases, I believe, and it was a loss of  
23 several million dollars. There was another loss  
24 figure presented based on a lesser quantity of  
25 cases, 500 and something cases. The reason there

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were two figures presented was a hundred thousand cases plus was terminated by the fault by the Government, but the loss was in the two to three million dollar -- I have the loss notice in my file admitted by Freedom in writing with supporting documentation. I had asked for this information so we could evaluate it.

Q What does it mean to say that by no later than April of 1986 this was a loss, what does that mean?

A This meant that Freedom was losing money on its contract.

Q Did that also mean that the contract could not be completed without a loss?

A Yes.

Q Will you tell us the size of the loss, as far as you understood, to complete the contract?

MR. MACGILL: He just did.

A The loss was two to three million dollars depending on the number of cases we were talking about.

Q Is it your testimony that Bankers was aware of this loss?

1 Liebman

2 A Absolutely.

3 MR. MACGILL: It's a leading question,  
4 number one. Number two, he can't testify as to  
5 what Bankers was aware of, he can testify as to  
6 what he told Bankers, he can give us the specific  
7 words, but as to what he told Bankers.

8 MRS. EPSTEIN: I accept your  
9 objection. I withdraw the question and the  
10 answer.

11 Q Tell us what discussions you had with  
12 Bankers?

13 A As I said, Bankers called every week,  
14 sometimes several times a week. Randy Gross would  
15 call from Chicago, he spoke to me, he would speak  
16 to William Stokes. He was interested in --  
17 Bankers was interested in every financial facet  
18 that we were involved with concerning this Freedom  
19 contract, whether it's progress payments,  
20 payments, deliveries, et cetera, et cetera.

21 MR. MACGILL: By the way, can you keep  
22 going that pace, I think we're doing much better.

23 A When I do check my files tonight or  
24 whatever, I will try to locate the attendance  
25 sheet at the big meeting we had in December 1985

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at DPSC. I want to check if a Bankers Leasing representative was present, they would have heard that Freedom at the meeting admitted that it would be a loss contract. At that time the loss, I think, amounted to a 1.4 million dollar loss I believe, but it was admitted at an open meeting. If a Bankers Leasing rep was present, then they knew about it at that point in April 1986, if not sooner.

MR. MACGILL: I move to strike that last statement by the witness. He can not testify as to what Bankers knew.

Q To state that a contract is a loss contract, does that mean that any profit margin in the contract has been eaten up?

A Correct.

Q Does it also mean that in addition to the profit margin being eaten up, it will cost more money to finish the contract than can be recouped under the contract?

MR. MACGILL: I have two objections. One, again, you're leading him. That's objection one. Two is you've not specified who subscribed this meeting. He can testify as to what it means



1 Liebman

2 to him. He can't testify as to what it means to  
3 to the world generally.

4 Q Mr. Liebman, when you say that a  
5 contract is a loss contract, what does it mean to  
6 you in terms of how much money will be necessary  
7 to complete the contract?

8 A It means that there is no profit being  
9 made on the contract, that additional expenses or  
10 costs would have to be incurred by the contractor  
11 above and beyond the contract price to complete  
12 the contract. I must add though, a letter  
13 subsequent to the December meeting, a Cure notice,  
14 a Government Cure notice concerning the loss and  
15 Freedom's unsatisfactory financial situation as a  
16 result of learning about the loss, was sent to  
17 Freedom by the PCO, Defense Personnel Support  
18 Center, advising Freedom that there was a  
19 condition, a financial condition, that was  
20 endangering performance of the contract and that  
21 Freedom had ten days to respond or cure the  
22 condition, so on and so forth.

23 Q When was this Cure notice sent?

24 A I think several days after the December  
25 meeting when Freedom admitted that there was a --

1 Liebman

2 it was a loss contract. It caused a lot of  
3 ramifications within the Government and caused  
4 several actions to be taken, one was the Cure  
5 notice.

6 Q Why did the admission that this was a  
7 loss contract cause ramifications within the  
8 United States Government?

9 A Because that coupled with several other  
10 problems we were having at the time caused us to  
11 have concern over Freedom's ability to complete  
12 the contract on time and within the confines of  
13 the contract price which would enable the  
14 Government to recoup its progress payments.

15 Q Why is that, sir?

16 A During the December 1985 time frame  
17 Freedom was behind schedule, was having production  
18 problems, was having rejections by Government  
19 inspectors, and that coupled with the news that it  
20 would be a loss contract intensified concern by  
21 concerned Government parties.

22 Q You're saying there were rejections by  
23 Government inspectors. What type of rejections,  
24 sir?

25 A The rejections were done by the U.S.

1 Liebman

2 Army Veterinary Core for various reasons. I would  
3 have to check the file to refresh my memory.  
4 There were rejections for various reasons.

5 Q Why does the U.S. Veterinary Core  
6 inspect food for humans?

7 A Veterinary you think of horses, animals,  
8 but they do inspect -- they have a staff of people  
9 that inspect food products.

10 Q Is there concern on the part of the  
11 United States Government that food for human  
12 consumption be safe?

13 A Absolutely.

14 Q Do you recall whether a medical hold was  
15 ever placed on products from Freedom?

16 A There were medical holds at times, yes.

17 Q Were there concerns about the sanitary  
18 conditions in which the food was being produced?

19 A Well, there are always concerns.  
20 Although Freedom had an improved facility at the  
21 time, there were some problems that we were  
22 advised of that caused some problems to be on  
23 medical hold such as what they called leakages.

24 There were some problems with the  
25 product, but these problems were overcome, but we

1 Liebman

2 are always concerned about the sanitary conditions  
3 at a contractor's plant that's assembling food.

4 (Recess was taken at 1:00 p.m. and  
5 resumed at 2:10 p.m.)

6 Q Mr. Liebman, after the fact that  
7 Freedom's loss contract position became known in  
8 December of 1985 and that intensified concern,  
9 what was the next thing that happened in your  
10 management with this contract?

11 MR. MACGILL: Object to the form of the  
12 question. You're characterizing the evidence by  
13 your own words.

14 MRS. EPSTEIN: Well, will the record  
15 reflect we have had an hour and 15 minute break  
16 and that I'm trying to pick up where we left off.

17 A I asked Freedom for estimates to  
18 complete the contract.

19 Q What did you get?

20 A We received a reply from Freedom and we  
21 commenced to review the contractor's package.

22 Q What did Freedom estimate it would take  
23 to complete the contract?

24 A The loss ranged from two to three  
25 million dollars depending on the quantity of

1 Liebman

2 product we were talking about.

3 Q What did you do next?

4 A There were several revised estimates to  
5 complete, there were problems with some of the  
6 data, so on and so forth, but the range stayed  
7 within two to three million dollars.

8 Q Then what happened?

9 A DPSC, the buying activity, elected to  
10 revise the delivery schedule.

11 Q When did that happen?

12 A To the best of my recollection, in  
13 January 1986. This was based on Freedom's  
14 response to the Cure notice that DPSC had issued  
15 in December 1985.

16 Q How would the revision and the delivery  
17 schedule cure the two to three million dollar loss  
18 that was now projected on this contract?

19 A I do not know. The delivery schedule  
20 revision modification also encompassed termination  
21 for the fault for over a 100,000 cases with a  
22 provision for reinstatement of the terminated  
23 quantity should Freedom show satisfactory progress  
24 or adherence to the new delivery schedule from the  
25 January to April time period, April '86 time

Liebman

period.

Q What happened next?

A During the time frame January '86 to March, April '86 Freedom performed in a satisfactory manner and met the schedule.

Q Then what happened?

A In April '86 I applied the loss ratio formula on Freedom's progress payments 13 and 14.

Q What does that mean?

A Loss ratio formula is a formula outlined in the Department of Defense regulations, specifically the DAR, Defense Acquisition Regulation, which states that a contract officer must apply a formula to reduce progress payment requests when a contractor is in a loss position.

Q Did you advise Freedom that you were doing this?

A Yes.

Q Did you explain to Freedom why you were doing this?

A Yes.

Q Did you advise Bankers Leasing that you were doing this?

A Yes.

1 Liebman

2 Q Whom did you advise at Bankers Leasing?

3 A Mr. Randy Gross.

4 Q Did you explain to him why you were  
5 doing this?

6 A Yes.

7 Q Did he tell you what he proposed to do  
8 in view of the fact that you were going to be  
9 applying a loss ratio that would reduce the amount  
10 of progress payments that were to be paid?

11 A I do not recall.

12 Q Do you recall anything he said in  
13 response to that?

14 A I do not recall.

15 Q Did you ever ask Freedom or Henry Thomas  
16 or Pat Marra of Freedom why the full amount of  
17 what you understood to be the line of credit was  
18 not taxed?

19 A It came up in discussion.

20 Q Do you recall with whom, when and what  
21 was said?

22 A With Mr. Patrick Marra of Freedom, Mr.  
23 Henry Thomas of Freedom. I cannot recall when and  
24 I cannot recall what their response was.

25 Q Did it ever come up within your

1 Liebman  
2 discussions with Randy Gross?

3 A Yes.

4 Q Do you recall when?

5 A I cannot recall when nor what his  
6 response was.

7 Q Is there anything that would refresh  
8 your recollection on either?

9 A Perhaps if I reviewed the files. If I  
10 reviewed the files and -- that's my choice, if I  
11 review the files.

12 MR. MACGILL: For the record, is this  
13 deposition being taken place pursuant to subpoena  
14 or agreement?

15 MRS. EPSTEIN: I don't remember  
16 anymore. It was initially subpoenaed.

17 MR. MACGILL: Was it a subpoena duces  
18 tecum?

19 MRS. EPSTEIN: I don't remember. I  
20 don't have it with me.

21 MR. MEDEIROS: Originally it was.

22 THE WITNESS: Through the U.S. District  
23 Court in New York.

24 MR. MACGILL: Did that ask the witness  
25 to bring his files?



1 Liebman

2 MRS. EPSTEIN: I don't recall. I don't  
3 have it with me.

4 MR. MACGILL: Okay.

5 MRS. EPSTEIN: But as I have said to  
6 you, Mr. MacGill, I'm very satisfied with the  
7 clarity of his testimony and I have no desire to  
8 break up that clarity or that flow at this point  
9 in time by rummaging through documents to the  
10 extend that anything needs to be cleaned up  
11 afterwards, that is my intention. It is not my  
12 intention to break up the narrative flow by wading  
13 through a lot of papers.

14 Q Mr. Liebman, was there any objection  
15 voiced to your application of the loss ratio  
16 formula to the progress payment requests thereby  
17 reducing the amount that you could pay on progress  
18 payments?

19 A Yes.

20 Q Who voiced such an objection?

21 A The Freedom personnel.

22 Q What did you say in response?

23 A I said I was required to apply the loss  
24 ratio formula per the Defense Acquisition  
25 Regulation or DAR.

1 Liebman

2 Q Did you discuss or confirm with any of  
3 your supervisors or other agency personnel in your  
4 determination that the loss ratio formula needed  
5 to be applied?

6 A Absolutely, in writing as well as  
7 orally.

8 Q What were you advised?

9 A That I was doing --

10 MR. MACGILL: Objection, it's hearsay.

11 A My actions were the actions I took  
12 regarding Freedom's progress payments, in  
13 particular, the loss formula application of -- the  
14 loss ratio formula was supported by command  
15 elements at DCASMA, DCASR, DLA headquarters and  
16 DPSC.

17 Q In fact, did it ever come to your  
18 attention, Mr. Liebman, that there was some  
19 concern at headquarters that you were being too  
20 lenient and, if anything, paying Freedom more than  
21 they were technically entitled to?

22 MR. MACGILL: Objection, hearsay.

23 A Correct.

24 Q You say answer, sir.

25 A Yes, but most of the comments was that I

1 Liebman

2 was being too strong. There were two schools of  
3 thought -- three schools of thought. The majority  
4 said I was doing things properly. The majority of  
5 people at all agencies. Some people said I was  
6 being too tough. Some said I was being too  
7 lenient, but there were -- in answer your to  
8 question specifically, yes, there were some people  
9 that said I was being too lenient at flag officer  
10 level.

11 Q By "flag officer level," whom are you  
12 referring to?

13 A In this particular case, General Adsid  
14 or Adsib who was a DLA general at DLA headquarters  
15 who did a review of my role on this contract in  
16 1985 issued a formal report. There was also  
17 another review done by a Colonel Holland in 1987  
18 concerning my handling or administration of the  
19 Freedom contract. There was also a DODIG  
20 investigation -- DOD meaning Department of  
21 Defense, IG meaning Inspector General --  
22 investigation in the fall of 1987 concerning my  
23 administration of the Freedom contract.

24 Q Did any one of these investigations in  
25 any way criticize decisions you took to protect

1 Liebman

2 the interest of the United States Government?

3 MR. MACGILL: Objection.

4 A No.

5 MR. MACGILL: Again, calling for  
6 hearsay.

7 A I have three of the reports on file. In  
8 one of the reports it stated that my actions were  
9 proper, and when I did err it was in Freedom's  
10 favor.

11 Q Which report concluded that?

12 A It was either in General Adsid's or  
13 Colonel Holland's report, if not in both.

14 Q Sir, once you applied the loss ratio  
15 formula -- and just so we're clear, perhaps you  
16 can explain to us what the reasoning behind the  
17 loss ratio formula is.

18 A Okay. It's when there is a disparity  
19 between progress and costs. It's a whole  
20 formula. It's an elaborated formula that's sited  
21 in our regulation and the purpose is to lessen the  
22 Government's exposure in a questionable  
23 situation. Instead of paying X in progress  
24 payments we would wind up paying Y, the Y being  
25 the smaller amount based upon a FAR formula that's

1 Liebman

2 sited in our regulations.

3 Q What is the next thing that happened  
4 after you began applying the loss ratio formula in  
5 approximately April of 1986 to the -- I think you  
6 said 14 and 15 --

7 A 13 and 14.

8 Q -- 13 and 14 progress payment requests.

9 A Well, I should say preceding that there  
10 was a major development, that was the meeting in  
11 DPSC in March of '86, concerning an overall  
12 settlement of all matters that have arisen under  
13 the Freedom contract.

14 Q DPSC is in Philadelphia?

15 A Philadelphia.

16 Q Do you recall who was present at the  
17 meeting to settle all matters arising under the  
18 Freedom contract?

19 A Yes. That was the first time I met Mr.  
20 David Lambert who was representing Freedom at the  
21 time. There was a representative from Freedom, I  
22 don't recall which representative.

23 Q Was it Colonel Francois?

24 A It might have been Colonel Francois. I  
25 was there, our counsel Mr. Edward Hintz from DCASR

1 Liebman

2 New York was there, as well as representatives  
3 from DPSC including Mr. Frank Bancroft who had  
4 replaced Mr. Thomas Barkowitz as PCO or procuring  
5 contracting officer. And Mr. Robert Apelian who  
6 was at the New York DPSC who is now deceased.

7 Q Was there anyone present at that meeting  
8 from Bankers?

9 A It is possible. I do not recall.

10 Q What was discussed in this March 1986  
11 meeting in Philadelphia?

12 A A settlement of all outstanding matters  
13 which included Freedom's 3.4 million dollar claim  
14 against the Government, reinstatement of the  
15 terminated quantity which was over a 100,000 cases  
16 of rations valued at about \$3,000,000, the  
17 delivery schedule, payment for capital equipment  
18 in the form of progress payments, further MRE  
19 buys. MRE meaning meals ready to eat,  
20 procurements or buys, and Freedom's role  
21 concerning these buys.

22 Q Anything else?

23 A Not to my recollection.

24 Q Were there any positions taken regarding  
25 any of these issues?

1 Liebman

2 A Nothing was resolved at that meeting.

3 Q What instructions or suggestions were  
4 given to Freedom's representatives regarding how  
5 to go about revolving these issues?

6 A DPSC took strong exception to any  
7 promise -- to the promise Freedom wanted for  
8 further awards. The Government would not tie in  
9 settlement of outstanding matters to a promise of  
10 future awards.

11 Q Any other positions taken?

12 A Not to my recollection.

13 Q Were you present at any other meetings  
14 dealing with settlement of outstanding issues and  
15 the outstanding default mods?

16 A No, I was not.

17 Q Sir, when there is a default notice  
18 issued, does that stop your ability to pay  
19 progress payments?

20 A In this case, no, because it was a  
21 partial termination for default, it terminated  
22 only a 100,000 cases out of 600,000 on the  
23 contract, but did effect the overall posture of  
24 the contract, obviously.

25 Q If Freedom ceased production, would that

1 Liebman

2 effect your ability to continue to make progress  
3 payments?

4 A Absolutely, I would have to stop  
5 progress payments.

6 Q Would you be able to pay on any  
7 outstanding progress payments?

8 A No.

9 Q If there was a finding of a total  
10 default, would you be able to go on paying on  
11 progress payments?

12 A Absolutely not.

13 Q What is the next thing that happened?

14 A After April 1986?

15 Q Let me ask you one thing. If there had  
16 been no settlement leading up to the modification  
17 after contract number 25, May 29, 1986, would  
18 Freedom have been in default of its contract?

19 A That would be speculation. I can't  
20 comment on that.

21 Q How much time was Freedom given to cure  
22 the default under the contract?

23 A Well, then we're now backtracking  
24 several months. They had mod P20, P00020, which  
25 was issued in January -- I believe in January



1 Liebman

2 1986, terminated a 100,000 cases for default, but  
3 had a stipulation that if Freedom showed  
4 satisfactory performance or adhered to the new  
5 delivery schedule that was put into modification  
6 P20 that the Government would consider reinstating  
7 the terminated quantity.

8 MR. KRAHULIK: What time was that?

9 THE WITNESS: The mod I believe was  
10 January 1986.

11 Q What happened after the March meeting?

12 A Okay. I was not privied to the behind  
13 the scenes development, I went about business as  
14 usual. In April, as I said previously, I applied  
15 the loss ratio formula. We were reviewing  
16 Freedom's estimates to complete, we were doing  
17 reviews on every progress payment on a prepayment  
18 basis. In May of 1986 came the big settlement  
19 modification.

20 Q Were you in any way involved with  
21 negotiating that?

22 A Not at all, that was done at a very high  
23 level.

24 Q Did you receive any kind of information  
25 as to the nature of the settlement discussions?

1 Liebman

2 A No. I was quite surprised by the  
3 settlement, but I was not involved in the  
4 negotiations at all.

5 Q Why were you surprised by the  
6 settlement?

7 A I was surprised Freedom waived its claim  
8 against the Government, that was one surprise, 3.4  
9 million dollars. I was surprised that the  
10 Government returned \$200,000 to Freedom. The  
11 \$200,000 had been a consideration that the  
12 Government had extracted from Freedom for previous  
13 delivery schedule revisions. I was surprised the  
14 Government agreed to pay the roughly \$400,000 in  
15 capital equipment costs, capital type costs as  
16 well as building rehabilitation to Freedom,  
17 although I was happy to say would not be in the  
18 form of a progress payment, it was to be in the  
19 form of an invoice. I was happy that they  
20 reinstated the \$100,000 cases.

21 Q Why?

22 A In my opinion, to give Freedom a better  
23 chance to complete the contract, possibly  
24 eliminate some of the loss.

25 Q If Freedom did not complete the

1 Liebman

2 contract, was there any way of eliminating the  
3 loss that they had already incurred under this  
4 contract?

5 MR. MACGILL: I'm going to object. It  
6 calls for a legal conclusion, at least in part.

7 Q From your prospectus as a contract  
8 administrator as of May 1986, am I correct that  
9 contract was in a loss position?

10 A Correct.

11 Q Was there any way of eliminating that  
12 loss to --

13 MR. MACGILL: Objection to the  
14 question, because it's ambiguous as to whether  
15 you're referring to after Freedom's claim was  
16 waived in April 1986 or before.

17 Q You may answer that.

18 A The loss could not be eliminated in its  
19 entirety. My hope was that Freedom would become a  
20 viable contractor eventually. The only way to do  
21 that was to get future awards. That contract was  
22 a loss, there was nothing we could do about it.  
23 It was a matter of lessening the loss, lessening  
24 the risk to the Government. And if Freedom  
25 received new awards, then again, there was no --

Liebman

if they got new awards, if they received new awards, perhaps profit gain from those awards to allow Freedom to establish itself as a viable contractor, but there lots -- was a loss, no two ways about it. And there was no way of eliminating the loss under those presence circumstances.

Q Did you discuss what you had just stated with Randy Gross?

A I do not recollect. It is possible. I do not recollect.

Q Will you explain to us why there was no way of eliminating the loss under the contract as of May 1986?

MR. MACGILL: Same objection as before, not specified if this was before or after May 29, 1986.

A There was no way that Freedom could make up these costs, it was an admitted loss. We were reviewing every progress payment. Our review showed a 25 percent, roughly, disparity between progress and costs. We performed several types of reviews on each progress payment. We do a DCAA audit. We do a production review which determines

1 Liebman

2 a percentage of completion. We do a pricing  
3 review. All three reviews were performed by  
4 myself as the ACO during the January '86 to May  
5 '86 time period. Month after month showed 20, 25,  
6 28 percent loss. There was just no way it would  
7 make this a profitable contract. Again, even with  
8 the settlement, even with the reinstatement of the  
9 quantity.

10 Q Why were you surprised that he had gave  
11 up his claim?

12 A Freedom's personnel, Freedom's  
13 representatives had always said that there would  
14 be a claim against the Government, disagreed with  
15 the positions we had taken, whether the claim was  
16 valid or not. I did not think they would give up  
17 such a claim.

18 I'm not attesting to the validity of the  
19 claim, but I just felt that -- I was surprised  
20 that they had given that away as part of their  
21 settlement. And, again, I emphasize, I'm not  
22 saying the claim was valid or not.

23 Q Do you believe the claim was valid?

24 A I do not know.

25 Q Are you aware of the fact that the basis

1 Liebman

2 of the claim is your own actions?

3 A As far as my actions are concerned, the  
4 claim is -- I acted properly. And if I'm  
5 involved, I am aware that I am part of the claim.  
6 And, as far as my actions are concerned, the claim  
7 is invalid.

8 Q Why is that your position, Mr. Liebman?

9 A The actions that I took were proper,  
10 were in accordance with Government regulations and  
11 were fair and reasonable.

12 Q Why do you believe that?

13 A Because I had been supported by high  
14 level Government representatives at various levels  
15 of authority at various agencies.

16 Q Do you have any animous against Freedom?

17 A Not at all.

18 Q Did you wish to see Freedom succeed?

19 A Absolutely.

20 Q After the modification was signed in May  
21 of 1986, did you continue to make progress  
22 payments?

23 A Yes.

24 Q Did you continue to apply the loss ratio  
25 formula?

1 Liebman

2 A Yes.

3 Q What is the next big event that happened  
4 in your administration of that contract?

5 A I believe it was August 1986 when there  
6 was another modification issued by DPSC in  
7 Philadelphia.

8 Q To what use did that modification go?

9 A That modification tied in progress  
10 payments to deliveries. Prior to that time,  
11 progress payments had been tied into incurred  
12 costs which is the way we pay progress payments  
13 per the progress payment's clause of Government  
14 contracts.

15 Q How did tying the progress payments to  
16 deliveries change or not change, what effect did  
17 it have on the payments you were making?

18 A It meant that progress payments could  
19 not be paid until Freedom made a delivery as  
20 opposed to when Freedom incurred cost. It meant  
21 that progress payments would be paid later to  
22 Freedom than under normal conditions, you know,  
23 regular conditions.

24 Q Did you have any discussions with Randy  
25 Gross or anyone else from Bankers regarding this

Liebman

development?

A To the best of my knowledge, it was mentioned in discussions subsequent to issuance of the mod. I was not involved in the negotiation of the modification, that was strictly between DPSC and Freedom.

Q Do you have any knowledge of what factors went into the modification that was entered into in August of 1986?

A No, it was done solely by DPSC. I did not take part in the negotiations, nor was I, to the best of my knowledge, asked for any input.

Q What was the next event that occurred under your administration of that contract?

A The next major event was in November, I believe, 1986 when Freedom abruptly stopped production.

Q Do you know why Freedom abruptly stopped production?

A In my opinion, it was because the remainder of the cases that had to be assembled under the contract was a different MRE configuration.

Q M --



1 Liebman

2 A MRE meaning meals ready to eat. Prior  
3 to that time it was MRE V, Roman numeral five. I  
4 believe the next configuration, the last, one  
5 hundred thousand cases was MRE VI, and Freedom  
6 would have to make adjustments to its production  
7 line which would involve obviously cost to Freedom  
8 to accommodate this different production lot which  
9 had a different configuration. If there are other  
10 factors involved, I am not aware of. I was quite  
11 surprised by that development, but that's another  
12 matter.

13 Q Did you ever become aware of the fact  
14 that Freedom was having a great deal of difficulty  
15 meeting its day-to-day expenses in the October,  
16 November time frame?

17 A Absolutely.

18 Q Did you ever became aware that Freedom  
19 was requesting funds from its banker, Bankers  
20 Leasing, and that Bankers Leasing was not  
21 providing requested funds?

22 A I was I was not of such a situation.

23 Q Was there ever a time that you yourself  
24 had to cut a check in order to have the  
25 electricity at Freedom's plant turned back on?

1 Liebman

2 A There were two such cases. One I was  
3 directly involved with, another one a contract  
4 officer had to get involved because I was out for  
5 a Jewish holiday.

6 Q Tell us when it occurred?

7 A In September 1985 there was the day I  
8 was out for a Jewish holiday. There was an  
9 emergency at Freedom where apparently -- I think  
10 there was a problem with the refrigeration or the  
11 electricity and an emergency payment of about  
12 \$11,000 had to be made, I believe, to Con Edison  
13 and the check was cut that day. It involved an  
14 emergency type of scrambling among several  
15 agencies to get the -- to effect the matter and  
16 issue the check, but that was the first instance.

17 Q Do you know why Bankers Leasing did not  
18 provide those funds at that time?

19 A I do not know.

20 Q What is the next occasion?

21 MR. MACGILL: Did you answer  
22 affirmatively? Did you say yes or no?

23 A The next occasion was after Freedom had  
24 stopped production. I'm talking about the winter,  
25 either March or -- possibly early spring, April of

1 Liebman

2 '87. It was either March or April of '87. After  
3 Freedom had stopped production the Government  
4 desired to perform an inventory of what we owned  
5 at Freedom because Freedom had no money. The  
6 Government elected to pay Con Edison and I  
7 personally was involved with the payment to Con  
8 Edison. We paid for the electricity so the  
9 Government could do its inventory and remove its  
10 products from Freedom's facility.

11 Q Did you ever get complaints from  
12 Freedom's suppliers that they were -- although the  
13 product that they had supplied to Freedom was  
14 listed on progress payments -- not reimbursed by  
15 Freedom?

16 A Many times.

17 Q Can you tell us some instances of that.

18 A Star Food Products in Texas, for  
19 example. There were others, many others.

20 Q Is that appropriate behavior in terms of  
21 contract performance?

22 A No.

23 Q Why not?

24 A Per Government regulations, a contractor  
25 is required to pay his costs of performance which

1 Liebman

2 include vendor costs within the ordinary course of  
3 business, and usually that means after 30 days.

4 Q Do you know of any reason to justify a  
5 submission for reimbursement by the Government in  
6 a progress payment for a supplier cost and then  
7 got to pay the supplier in turn after the  
8 Government pays the progress payment?

9 A Well, if the product is a defective  
10 product, there could be a payment -- you know,  
11 problem between the contractor and the  
12 subcontractor. And if the product is not accepted  
13 by Freedom from the subcontractor or vendor we  
14 expect them -- if we had advanced monies to  
15 Freedom in the form of progress payments or paid  
16 Freedom in the form of progress payments -- that  
17 the funding would be returned to the Government.

18 Q Was it ever returned to the Government?

19 A No.

20 Q So, in other words, Freedom took the  
21 money and kept it?

22 MR. MACGILL: Objection. Objection.  
23 It's leading.

24 A No.

25 Q What did Freedom do with the money if

1 Liebman

2 they asked for it from the Government, were paid  
3 by the Government, and then did not pay the  
4 supplier?

5 A Freedom was in the position of robbing  
6 Peter to pay Paul. What happened is they had  
7 limited funding, it was a loss contract. They had  
8 trouble meeting their commitments. Pat Marra had  
9 told me outright that they had a meeting in-house  
10 to decide how they were going to pay, who was more  
11 important to pay, do they take money from this  
12 person and pay somebody else. They didn't pay  
13 everybody so -- they didn't have the funds, so  
14 they were robbing Peter to pay Paul.

15 MR. MACGILL: I move to strike that  
16 reference, an out of court statement, with Mr.  
17 Marra.

18 A We had numerous DCA audit reports saying  
19 they're not paying their vendors. It's well  
20 documented that the cost of performance was not  
21 being paid, whether it was a landlord or vendor.

22 That one report states that in that time  
23 frame, the April time frame of '86, March of '86,  
24 Freedom owed about \$700,000 in taxes, New York  
25 City, federal. So what I'm saying is non-payment,

Liebman

not just the vendors, landlords, Government, it was pervasive throughout the contract. And it's well documented in audit reports citing who the vendors were, the amounts that were owed, the time period that they were owed, because part of our job involved checking payments. DCA did that, Mr. William Stokes, the DCASMA New York financial analyst did that. We looked at payment periods 0 to 30 days, those were 60 to 90 days old. We looked at it as aging of a contract throughout the life of the contract.

Q Did you ever ask Freedom in this context or any representative of Freedom, "why are you not getting these funds from your bank, Bankers Leasing, on the line of credit?"

A It came up in numerous discussions that I had, as well as Mr. William Stokes had, with Freedom personnel.

Q What were you told?

A I am not in a position to answer that.

Q Why not?

A I do not recollect. Mr. William Stokes will probably recollect better than I can. Well, let me -- I do recollect something. I'm sorry.

1 Liebman

2 Part of the problem was we believed Freedom did  
3 not want to pay the interest involved with tapping  
4 or using the line of credit. There is a large  
5 amount of interest and that was one of the reasons  
6 that I believed. And I believe I was told that --  
7 by Freedom personnel, I believe it was Mr. Patrick  
8 Marra, that they just didn't want to pay the  
9 interest if they could void it.

10 MR. MACGILL: Move to strike the  
11 reference to Mr. Marra.

12 Q Did you determine what the effected  
13 interest rate charged by Bankers Leasing was on  
14 any loans they made to Freedom?

15 A It's cited in the agreement. I don't  
16 recall the specifics, but it's in the agreements  
17 that on file.

18 Q Did you ever become aware that the  
19 National labor Relations Board had conducted a  
20 union election at Freedom's plant and that the  
21 employees voted to become united in the November  
22 1986 time period?

23 A I had heard something about that, but  
24 years after the contract, after Henry Thomas was  
25 out of business, after Freedom was out of

1 Liebman

2 business. This came up in discussions, I think,  
3 about six months ago for the first time. At least  
4 that was the first time I became aware of it. And  
5 if this was the case, then this conceivably could  
6 be a reason why Freedom would elect to shut down.  
7 Obviously if the plant became unionized, they  
8 would want higher wages.

9 MR. KRAHULIK: Speculation.

10 A Speculation, right. I don't know about  
11 the situation at that time. I was told because it  
12 was a new MRE configuration Banker could not  
13 release any more money. I was surprised they shut  
14 down abruptly in November 1986 from production.

15 Q Were you at all involved in the preaward  
16 survey that was taking place in the fall of 1986  
17 for the MRE VII configuration with respect to  
18 Freedom's bidding?

19 A My only involvement was that I was asked  
20 to attend the meeting at DLA headquarters in the  
21 end of July 1984, and I was accompanied by two --

22 MR. MACGILL: '84?

23 THE WITNESS: '84. In July of '84 at  
24 DLA headquarters in a preaward --

25 Q We're talking about MRE VII?



Liebman

A I'm sorry.

Q There was a preaward --

A I thought you meant --

Q No. There was a preaward survey, was there not, going on in the fall of '86 in order to determine whether Freedom could be found to be a qualified bidder for the MRE VII configuration; is that right?

A Right.

Q Were you at all involved in that preaward survey?

A I did not provide input, I was present at one or two discussions. Do you want me to be specific or --

Q You did not provide any input?

A I did not provide any input. I was present at some discussions, but I did not.

Q What discussions were you present at?

A There were two types of preawards, one for a higher quantity and one for a lower quantity. And I remember attending a meeting in an agency in DCASMA New York, and they were going to the smaller quantity. Again, I did not provide input, I was just observing.

1 Liebman

2 Then I remember hearing talk among the  
3 people that were directly involved that there was  
4 a new survey. They did another survey for some  
5 reason and the positive survey was changed to a  
6 negative survey. My only direct involvement was  
7 subsequent to the surveys when Mr. Thomas appealed  
8 to high level types in Washington and I had to  
9 attend a meeting with my commander, the new  
10 commander at the time was Colonel Bruce Witty who  
11 was the new DCASMA commander, and we were asked to  
12 attend a high level meeting in December 1986 at  
13 the preaward at DLA headquarters.

14 Q Before we get to that, did you ever  
15 learn the reason the new survey had to be done,  
16 was it because Freedom closed its doors and  
17 terminated production?

18 A That was brought out at a meeting at DLA  
19 headquarters. Prior to that time I did not know  
20 that, but that was an important factor, that the  
21 people from various Government agencies took the  
22 position that how can we say they are a good  
23 performer or satisfactory performer if they  
24 couldn't complete their current contract, so how  
25 can we give them a positive survey?

1 Liebman

2 Q Would it be fair to say that the fact  
3 that Freedom failed to complete MRE V impacted  
4 negatively on its ability to get a second  
5 contract?

6 A No doubt about it, yes.

7 Q Did Freedom ever attempt to resume  
8 production after it had shut its doors and stopped  
9 production in November of 1986?

10 A Yes. In January 1987 Freedom proceeded  
11 with some minimal production, cracker bags and I  
12 think and accessory bags, but it was never full  
13 scale production, it was a minimal type effort.

14 Q Did you ever learn why Freedom resumed  
15 production in January 1987?

16 A To the best of my recollection, I  
17 believe there was a new delivery schedule. I  
18 think the Government established a new schedule,  
19 but -- again, it's only speculation. Perhaps  
20 Freedom --

21 Q Don't speculate. So you don't know?

22 A No. I can't say I knew for sure, no.

23 Q Were you at all charged with the  
24 administering of that minimally resumed production  
25 in January of 1987?

1 Liebman

2 A Absolutely, sure.

3 Q What, if anything, were you asked to do  
4 regarding that or were you supposed to do  
5 regarding that minimal production that took place  
6 in January of 1987?

7 A Well, it was just routine contract  
8 administration. I had stopped his progress  
9 payments and he stopped full scale production.  
10 There was really very little involvement until the  
11 next development which was February of '87. There  
12 were actually two developments.

13 Q What were they?

14 A One development was a high level review  
15 of the whole contract situation by DLA  
16 headquarters headed by Colonel Holland who brought  
17 a team up for a week to investigate the entire  
18 situation, and this meant, from day one,  
19 traveling. They had to travel to DPSC to DCASMA  
20 New York to DCASR New York to SBA in New York,  
21 Small Business Administration, to Chicago, I  
22 believe, to see Bankers Leasing. So that was in  
23 January 1987.

24 The other developement around that time  
25 period, February, March 1987, was Freedom's

1 Liebman

2 eviction by his landlord, by Mr. Kirk Wittick,  
3 from his facility which caused us to take proper  
4 action to take inventory and remove Government  
5 owned material, work and completed products at  
6 Freedom's facility.

7 Q Do you know what caused Freedom's  
8 eviction from its plant?

9 A Non-payment of rent to the landlord for  
10 -- I don't know, perhaps six months, seven  
11 months. I think he totaled six or \$700,000, but  
12 what was the -- I guess the final nail was the  
13 fact that DPSC elected not to award part or all of  
14 the new procurement -- part of the new procurement  
15 to Freedom. Freedom, in essence, had a deferred  
16 -- had a referral agreement with Kirk Wittick for  
17 the outstanding rent with the expectation that the  
18 rent would be paid per, whatever the payout  
19 arrangement was, once he received a new contract.

20 When Kirk Wittick learned that a new  
21 contract was not forthcoming and there was no  
22 means of repaying the rent -- and again, the rent  
23 was very high, it was \$110,000 a month and six or  
24 \$700,000 was already owed, Kirk Wittick decided to  
25 take action and evict Freedom and an eviction

Liebman

notice was written.

Q Who funded Freedom from the time it resumed minimal production in January of 1987 until the eviction?

A I don't believe there was any from Freedom. Perhaps there was still some money left within the corporation, perhaps it was personal funds. There were very small expenses at the time that they were incurring other than the overhead type of expenses like the rent and electricity, taxes and things like that.

Q So you don't know if Bankers was involved in that minimal salvage operation at all?

A I have no knowledge. I doubt that they were involved, but I cannot confirm that because they did not fund them when they shut production down in November '86.

Q How do you know that Bankers did not fund Freedom when they shut down production in November of '86?

A Bill Stokes is in a better position to answer that, but if they had funded Freedom, obviously Freedom -- if Freedom was able to obtain funds from Bankers Leasing or some other source --

Liebman

they had continued if they wanted to aside from any union problems, that there was union problems or whatever -- they could have continued and completed the contract.

Q Once Freedom stopped production, did you pay any more progress payments?

A Absolutely not.

Q Why not?

A Per my regulations, he was not complying with the contract, he was not making progress. He stopped progress and I put him on notice, put Freedom on notice, that I was considering suspending progress payments. It was an addendum of the contract. In essence, you can't pay progress payments without making progress.

Q Mr. Liebman, how much money remains in this contract not paid out in progress payments?

A To my knowledge, all the monies that were allowed per modification P28, I believe that was the number, in August '86 which tied in progress payments to deliveries was paid to Freedom. To the best of my knowledge, he had run out of money. He had run out of eligible progress payments at the time, to the best of my knowledge.

Liebman

Q     However, isn't it true that you did not pay out the entire 17.1 million dollars approximately of the contract?

MR. MACGILL:     Objection.     That's a leading question.

Q     Had you paid out the entire 17.1 some odd million dollars?

A     No, he would have been entitled, under normal circumstances, to 95 percent of the \$17,000,000 which was \$16,000,000, whatever. And I believe he was paid -- again, to the best of my recollection, I believe he was paid 14 or 15 million. He was paid what he was allowed to be paid per the settlement modification. The settlement modification changed the -- to the best of my knowledge, he was paid up to the maximum of the 95 percent. If that settlement mod had not been put in place, it could have been theoretically up to 95 percent of the contract price or 95 percent of his incurred cost. He was not paid the 95 percent, he was paid a less amount because of that settlement mod. I believe he was paid 14 to 15 million. And if that mod didn't exist, he could have been paid theoretically up to



1 Liebman

2 \$16,000,000.

3 Q We're talking about mod 25 that was  
4 entered into on May 29, 1986; is that correct?

5 A That's correct.

6 Q We are talking about some other  
7 modification entered into at some later point in  
8 time; is that correct?

9 A That's correct.

10 Q And the one we're talking about  
11 specifically is which one, sir?

12 A I believe it was 300028 issued in August  
13 1986 which tied in progress payments to  
14 deliveries, not to incurred costs.

15 Q However, from what you have told us, am  
16 I correct that there are sums of money remaining  
17 in this contract?

18 MR. MACGILL: Objection. Leading.

19 A To the best of my knowledge, that is  
20 correct.

21 Q How much remains in this contract  
22 theoretically available for payment to Freedom?

23 A I would have to look at the file.

24 Q Can you give us an approximation from  
25 what you have told us?

1 Liebman

2 A I can do it right now if we can take --  
3 I just have to look at my reports. Can I look at  
4 the fact sheets because every report is spelled  
5 out.

6 Progress payments paid to date, 14.8  
7 million, that was the last progress payment.  
8 That's because that was tied into deliveries, had  
9 that mod not existed Freedom would have gotten --  
10 \$3,000,000, four roughly, it was over a million  
11 dollars theoretically.

12 Q How much remains in the contract, sir?  
13 First of all, how much was he actually paid?

14 A Is this for progress payments for --

15 Q Sir, can you just listen to my  
16 question. How much was Mr. Thomas of Freedom  
17 actually paid?

18 A Freedom was paid for shipped products  
19 14.2 million dollars.

20 MR. MACGILL: Mr. Liebman, maybe to cut  
21 this short --

22 MRS. EPSTEIN: Just a minute, Mr.  
23 MacGill.

24 MR. MACGILL: I can hand him a document  
25 that may refresh his --

1 Liebman

2 MRS. EPSTEIN: No.

3 MR. MACGILL: He's looking at a  
4 document.

5 Will you tell us what file you're  
6 looking at?

7 THE WITNESS: I'm looking at an account  
8 management alert or it may also be called a SMART  
9 file. It's an alert report that I sent to my  
10 headquarters on the 9th of April 1987.

11 MRS. EPSTEIN: Can we have it marked,  
12 please.

13 Defendants Exhibit 278 will be a  
14 document that is in the original of Mr. Liebman's  
15 files that he has brought with him called  
16 "contract management alert report" with the date  
17 of 9th April 1987.

18 Defendants Exhibit 279 will be another  
19 document which comes from also an original of Mr.  
20 Liebman's files. The file is entitled "Freedom  
21 fact sheet, weekly report" with a date of 19th  
22 December '86 on it.

23 (Whereupon, the items referred to above,  
24 Contract management alert report and Freedom fact  
25 sheet, were marked as Defendants Exhibits 278 and

1 Liebman

2 279 for Identification, as of this date.)

3 Q Mr. Liebman, now that we have marked the  
4 two documents that were looking at 278 and 279,  
5 please tell us how much money was actually paid to  
6 Freedom under the progress payments that you paid?

7 A On the progress payments \$14,894,725.

8 MR. MACGILL: I'm sorry, can we hear  
9 that figure again.

10 (Whereupon, the requested portion of the  
11 record was read back by the reporter.)

12 Q Did Freedom receive any other payments  
13 from the United States Government pursuant to the  
14 mods that were signed, particularly mod 25, in  
15 addition to the progress payments that you paid?

16 A Yes, they received it in the form of an  
17 invoice, almost \$400,000 for capital type costs  
18 including building rehabilitation, that was in the  
19 form of an invoice.

20 Q Is that the total amount that Freedom  
21 was paid under this contract?

22 A To the best of my knowledge, yes.

23 Q Can you tell us, therefore, how much  
24 money, to the best of your knowledge, remained in  
25 the 17.1 million contract?

1 Liebman

2 A To the best of my knowledge, perhaps a  
3 million eight, round figure. It's a rough  
4 figure. It's my best guess, my best opinion on  
5 this matter. The exact amount could be verified  
6 from records at DCASMA.

7 Q Sir, are there certain kinds of files  
8 and records that you kept in your ongoing  
9 administration of that contract?

10 A Yes.

11 Q Have you brought them with you?

12 A We have a good number of the files here,  
13 yes.

14 Q Why don't you bring them to the table  
15 and identify them for us.

16 Sir, first of all, I want to make sure  
17 we can photocopy the ones that are marked. I  
18 assume you know your files well enough so we can  
19 retrieve them.

20 A Sure.

21 Q First of all, the by categories, can you  
22 identify the types of documents?

23 A Again, these are only a portion of the  
24 files, but --

25 Q Let's do it systematically. Mr.

1 Liebman

2 Liebman, first put them in the nature of the  
3 documents.

4 A These are correspondence files  
5 (indicating).

6 Q By "correspondence files," you have  
7 brought with you --

8 A There are several back at the office.

9 Q Seven separate folders, they are not  
10 all, however, consecutively numbered; is that  
11 right?

12 A Correct.

13 Q In fact, the file folders that you have  
14 designated correspondence files that we have here  
15 are file number one, file number two, file number  
16 four with three missing, folder five, folder six  
17 is missing, correspondence seven is here, eight is  
18 here and nine is here.

19 A Correct, the balance are back at the  
20 office.

21 Q Can you tell us why you brought these,  
22 but left a couple behind?

23 A Well, again, these were contained  
24 documents that we felt were pertinent. Some of  
25 these documents I think were discussed when you

1 Liebman

2 visited us several months ago. Again, these are  
3 general purpose documents although these are  
4 general type files although excluding progress  
5 payment information.

6 Q The files that we have now designated as  
7 correspondence files are approximately eight  
8 inches high?

9 MR. KRAHULIK: Eight to ten inches  
10 high.

11 Q Are they arranged chronologically?

12 A Yes.

13 Q In terms of correspondence, do they  
14 contain only letters or do they contain other  
15 types of memorandum and written documents that are  
16 sent back and forth?

17 A All types of documents, again, for the  
18 most part, excluding progress payment documents.

19 Q What is the purpose of keeping such  
20 correspondence files?

21 A We are required to keep all  
22 correspondence pertaining to a contract in  
23 correspondence files.

24 Q Are these official Government records?

25 A It is the official Government contract

Liebman

file.

Q Are these kept pursuant to law by your office?

A That's correct.

Q Do they reflect official actions that were taken in respect to this contract?

A Yes, it does.

Q What is the second category of documents that you have brought with you?

A I have some of the ACO progress payment files, only some of them. In fact, only two of them, but I have a separate folder Greg and I formulated yesterday of progress payment reviews that we extracted from the approximately 25 or so progress payment files I have back in the office which would be maybe two feet high of progress payment folders.

Q Am I correct that in respect to each progress payment request in official Government files kept under your jurisdiction and control there is a folder in respect to each progress payment request?

A That's correct. And, in fact, for some progress payments I have several folders.



Liebman

Q Are you, once again, required to keep such folders?

A Yes, I am.

Q Will those folders tell us what the progress payment request was and the back up supplied in support of that question?

A Yes.

Q Will they also give us information of any audit that was conducted on that particular progress payment request?

A Yes, they will.

Q Do they also indicate what action you took and what amount they paid?

A Yes, they do.

Q Will they also indicate any rational or any explanation for why you paid that amount and not some other amount?

A Most of them do, if -- let me state something. If they are not contained in the progress payment files, they are documented in the various reports that I issue.

Q You say that you compiled a separate progress payment review file which you have also labeled progress payment reviews. Can you tell us

Liebman

what's contained in this folder?

A The reviews on all the progress payment contracts. The reason we did it was because we didn't want to start carrying 25 files here, so we took out the reports that were involved with Freedom's progress payments and consolidated it in one file. All the files here are progress reports.

Q Are these extracts of records that are kept in the ordinary course of the Government's business in administering a Government contract?

A Yes.

Q Are you required by law to keep them?

A Yes, agency regulation. When we use "law," I mean a federal agency, yes.

Q And these are kept under your jurisdiction and control?

A Yes.

Q What is the other category files that you brought with you?

A These are the reports that I was required to prepare during the life of Freedom's contract from my management both here and DLA headquarters.

1 Liebman

2 Q There are three of those folders, is  
3 that correct, that you brought with you today?

4 A That's correct.

5 Q And those three folders are  
6 approximately five inches thick, would you --

7 A Little less, maybe two inches. About  
8 two inches. Three inches, maybe. Whatever, two  
9 to three inches.

10 Q Is there a difference in the nature of  
11 the reports in those three files?

12 A Yes, there are three types of reports.

13 Q Tell us what the three types of reports  
14 are.

15 A First of all, there is what they call a  
16 SMART report, in caps, it's sometimes called a  
17 contract management alert report. That report was  
18 submitted monthly to DLA headquarters.

19 Q Do you always submit a SMART or contract  
20 management monthly alert report to DLA  
21 headquarters?

22 A No, only for contractors that were put  
23 on this SMART program. It used to go under the  
24 name separate emphasis program and it's for high  
25 visible or key contracts.

Liebman

Q How does one determine whether a contract is high visibility or a key contract?

A Well, for the purpose of this program determination is made by our region, the DCASR region, and the DLA headquarters.

Q What about the criterion placed in the --

A Importance of the contract -- visibility of the contract, it's limited to several -- very few contractors.

Q Again, what do you mean by "important of the contract"?

A High interest type contracts where it has visibility and high interest at high levels of DLA, the DLA program, and obviously this contract had high interest, high visibility.

Q By that do you mean to say a contract that is receiving particularly close scrutiny?

MR. MACGILL: Objection, leading.

Q I'm trying to understand how you use the words importance and visibility.

A It's a subjective thing in the sense that -- for example, at the time I was administering a thousand contracts, this was the

1 Liebman

2 only contract on the SMART program. I have had  
3 other contractors on the program over the years,  
4 but this was a very high level interest contract,  
5 it had interest at a three star general level at  
6 DLA headquarters. It had interest at  
7 congressional level and it was a big candidate for  
8 the program.

9 The purpose of the program is for  
10 reporting -- purpose is to ensure the concerned  
11 parties at all levels of the Government that they  
12 are advised of Freedom's progress. It places no  
13 burden on the contract. It concerns burdens on  
14 the ACO because I have to prepare reports monthly  
15 and I have to have input from people. It's just a  
16 burden on myself from an administration  
17 standpoint.

18 Q Did you mind the burden?

19 A I did, yes.

20 Q Why did you?

21 A Let me backtrack. I had mixed feelings  
22 about it because there were three reporting  
23 requirements, this was one of the three.

24 I felt there were two pluses. One, it  
25 made everybody do their job in the Government

1 Liebman

2 prepared the report, so it kept everyone on their  
3 toes in the Government. Two, it served as a good  
4 record as to what transpired under the  
5 Government. Those were the two pluses I saw.

6 The negative was it was a tremendous  
7 burden on me because there were three reports.  
8 There was a SMART report due monthly, there was  
9 another report due bi-weekly, and there was a  
10 third report that was due weekly.

11 Q Let's turn to the bi-weekly report.  
12 What was it called?

13 A That was a bi-weekly report -- whatever  
14 the exact title was -- to DLA headquarters, but to  
15 a different area of DLA headquarters than the  
16 SMART report. The SMART report went to the  
17 production people at DLA headquarters. The  
18 bi-weekly went to the contract management type at  
19 DLA headquarters. And it had different  
20 requirements, different information, different  
21 formal contractual matters, a lot of cost matters,  
22 progress payment matters, financial matters as  
23 opposed to the SMART report which was mainly  
24 involved with production per se.

25 Q Did the bi-weekly report have a name?

1 Liebman

2 A I think it was just -- I don't know if  
3 we have the bi-weekly folder here. In fact, we  
4 do. I think it was just called a bi-weekly  
5 report.

6 Q The top one you have in front of you is  
7 called "contract management alert"?

8 A That's the same as SMART. Here's the  
9 bi-weekly. See what we called it early on. I  
10 don't know. I'll have to check for you. Here's  
11 one, we didn't label it, but we say this is the  
12 ninth report or whatever the thing was.

13 Q The 13th status report?

14 A We didn't list the title on this one,  
15 but it was a bi-weekly status report to DLA  
16 headquarters, but in a certain formula that we  
17 were required to comply with written direction by  
18 DLA.

19 Q What about the weekly report?

20 A That was a weekly report to the  
21 commander in New York briefing DCASMA New York, as  
22 well as DCASR New York, as of the latest status.  
23 Again, it covered all areas of Freedom's contract.

24 Q And that was generally labeled facts  
25 sheet?

1 Liebman

2 A Facts sheet or point paper.

3 Q Point paper or facts sheet; is that  
4 right?

5 A Yes.

6 Q These documents that you have now  
7 described, some of which you have brought with  
8 you, I take it constitute official Government  
9 records?

10 A Correct.

11 Q The total volume of documents that you  
12 have brought with you are about --

13 A There is more over here on the chair,  
14 that's Bill Stokes' file over there (indicating).

15 Q It's about, what, two feet?

16 A Again, this is only a portion of what's  
17 back at the office.

18 Q The totality of the documents involved  
19 in this file of this contract management are about  
20 what linear footage?

21 A Oh, I would say a minimum of three legal  
22 drawers, possibly four legal drawers.

23 Q By "legal drawers," what size are we  
24 talking about?

25 A File cabinets. Well, again, I'm -- the



Liebman

normal standard legal file cabinets. I don't know, maybe --

Q So the full length of the drawer?

A Full length of the drawer, definitely three drawers because they are kept right by my desk, and possibly a fourth drawer when you add all the other drawers.

Q So you are talking about at least three, four feet per drawer?

A At least three, four feet per drawer.

MRS. EPSTEIN: I'd like to take a brief break to gather my thoughts.

Off the record.

(Whereupon a discussion was held off the record.)

MRS. EPSTEIN: What I would propose to do at this point is to give you a chance to cross-examine at this stage. I think we have laid enough of a record for the voluminousness of these records and files that I don't want to take any unnecessary time since there should not be, as Judge Will said, any question of authenticity of Government documents, and I don't want to burden the time pressures we're all under by asking Mr.

1 Liebman

2 Liebman about detailed records, questions about  
3 Government documents, they'll speak for  
4 themselves.

5 So, therefore, with that statement, I  
6 would turn over the cross-examination to you.

7 MR. MACGILL: So we're clear, you're  
8 done with Mr. Liebman?

9 MRS. EPSTEIN: As of this moment. I  
10 want to give you a chance. I may well want to ask  
11 him about one or two documents tomorrow. I didn't  
12 want to burden it with a lot of documents. I'm  
13 essentially done with my direct. I may want to go  
14 back with a few key documents. I think we laid  
15 the foundation for all of us from any of his  
16 documents that you may or I may have or Mr.  
17 Krahulik may get or Mr. Thomas may have or Mr.  
18 Liebman may supply to any party in the future, it  
19 will all be admissible for whatever purpose for  
20 whatever anybody wants to make of it without  
21 burdening the time of everybody, I'm going into  
22 specific documents at this point.

23 MR. MACGILL: I cannot foresee, as far  
24 as Bankers, any problem on stipulating to that. I  
25 don't anticipate any problem stipulating to the

Liebman

1  
2 authenticity of the material in Mr. Liebman's file  
3 so long as we're given some adequate assurance  
4 that that's where it came from, so long as we have  
5 adequate assurance if they're in his files per the  
6 Government's files. I see no reason why we should  
7 not be able to stipulate to their authenticity. I  
8 don't think we need the witness to authenticate  
9 documents as long as Mr. Liebman and everyone else  
10 can tell us they came from his file.

11 MRS. EPSTEIN: With that in mind, I'd  
12 like to turn over the questioning. Mr. Mederios  
13 has to leave, we have another defendant tomorrow  
14 to get to, so rather than burden it any further,  
15 I'd rather turn it over to you.

16 MR. MACGILL: Off the record.

17 (Whereupon a discussion was held off the  
18 record.)

19 CROSS-EXAMINATION BY

20 MR. KRAHULIK:

21 Q Mr. Liebman, do you know of any way that  
22 Bankers could have gotten paid under this  
23 contract, continued to have gotten paid under this  
24 contract, other than the contract going forward?

25 MR. MACGILL: Objection, calls for a

Liebman

1 legal conclusion.

2 A I know of no other way.

3 Q Why do you say that, sir?

4 A Unless Mr. Thomas utilized his own  
5 funding or some other source of funding, the  
6 company had no money. It was a loss contract.  
7 Unless money was obtained elsewhere, I see no way  
8 he could have completed this contract.  
9

10 Q Would you have gone on making any  
11 payments if you did not see evidence that progress  
12 was being made under the contract and that  
13 production was continuing?

14 MR. MACGILL: Objection. Assumes facts  
15 not in evidence. It's a hypothetical question,  
16 can't be answered with any reasonable degree of  
17 certainty.

18 A I do not agree. My progress payments  
19 were tied to that modification P28, I was  
20 prohibited. I believe he had reached the maximum,  
21 he could not be paid any more progress payments.  
22 I believe he had reached the ceiling per that  
23 modification P28 which tied in progress to  
24 deliveries.

25 Q Could you have continued to make any

Liebman

1  
2 payments on outstanding progress payment requests  
3 unless you saw continuing evidence that progress  
4 was being made under the contract and that  
5 production was continuing?

6 A Absolutely not.

7 MR. MACGILL: Same objection.

8 A Progress with costs incurred, these are  
9 -- the Government mod 28, it tied in progress  
10 payments to deliveries as opposed to progress  
11 payments and costs, but still you must have  
12 progress.

13 Q I take it if Mr. Thomas, at any point in  
14 time, ceased production there would be no more  
15 payments made?

16 A Progress payments would be stopped,  
17 appropriate procedures would be undertaken. We  
18 would go through due process, but I could not pay  
19 any more progress payments until progress resumed.

20 MR. KRAHULIK: No further questions.

21 CROSS-EXAMINATION BY

22 MR. MACGILL:

23 Q Mr. Liebman, I take it from your direct  
24 testimony that you yourself have exclusive  
25 responsibility for approving progress payments, is

Liebman

responsibility for approving progress payments, is that a fair statement?

A That's correct.

Q When you answered that question in the affirmative, it is clear, isn't it, that that authority was solely the authority of Marvin Liebman?

A That's correct.

Q Could you describe for us, sir, what standards you utilized in making your own personal determination of which progress payment requests Henry Thomas would be honored?

A It was based on input that I received from my technical specialists, specifically the Defense Contract Audit Agency, my production representative or industrial specialist within DCASMA New York, the financial services branch within DCASMA New York. Those three areas provided the main input as well as the intentions and desires of the PCO or procuring contracting officer at the Defense Personnel Support Center in Philadelphia. Everything was taken into consideration, but the decision was ultimately my own.

Liebman

that are contained in federal statutes?

A Yes, I did, the Federal Acquisition -- I'm sorry. The Defense Acquisition Regulation, at the time DAR or Defense Acquisition Regulation specifically.

Q Let's slow down. Let me slow you down. First I'm asking you about federal statutes as opposed to regulations. Do you understand that there is a difference?

A Yes, federal statutes -- I do not come across federal statutes as part of my day-to-day operations.

Q So in terms of your work concerning Freedom's progress payment request, you personally did not consult or rely on any federal statutes?

A I did not personally. However, as part of legal research that involved many of the issues that arose on the Freedom -- it is possible that the lawyers did consult or referenced statutes in legal opinions that were furnished to me.

Q Fine. I'm not concerned about what they did, I'm only concerned about Marvin Liebman.

Did Marvin Liebman rely on any federal statutes?

1 Liebman

2 MRS. EPSTEIN: Mr. Liebman, I'd like to  
3 inform you that it is perfectly in your right to  
4 explain your answer in the way you have  
5 particularly since your answer included the  
6 statements that you relied on lawyers opinions or  
7 may have included relying on statutes, and you are  
8 not obligated to force your answers into whatever  
9 mold he may chose other than to the extent that  
10 you should be responsive to his questions.

11 Q You heard what lawyer Epstein just  
12 advised you about. Is there any other advise that  
13 you'd like to inquire about?

14 A No.

15 MR. MACGILL: Mrs. Epstein, is there  
16 any other legal advice that you would like to  
17 give?

18 MRS. EPSTEIN: I may as your questions  
19 elicit.

20 MR. MACGILL: Let the record reflect  
21 that Mr. Liebman has counsel. Let's clear that up  
22 now.

23 Q Do you personally regard Ms. Epstein as  
24 your lawyer?

25 A No.



Liebman

Q Are you going to follow the legal advise that she just gave you?

A I follow the legal advice of Mr. Mederios as well as Epstein.

Q You take it from your counsel and not the lead of Ms. Epstein?

A That's correct.

MRS. EPSTEIN: Mr. MacGill, my name is Mrs. Epstein and I'd appreciate if you give me the courtesy in calling me in the way that professional grownup attorneys address one another when they are in litigation to one another.

MR. MACGILL: If you have an objection -- I'm not going to listen to any more comments. I want to be perfectly clear, we'll not have any more of that, period.

MR. MEDEIROS: As Mr. Liebman's counsel, I think we're wasting a great deal of time, we are leaving at four.

Q Mr. Liebman, did you or did you not rely on federal statutes personally in terms of your decision in terms of what to do with Freedom's progress payment request?

A I have to explain that rather than just

Liebman

say yes or no. My reliance was on -- again, I'll get to your question, but I must state first my reliance concerning progress payments concerned the administration of progress payments, the Defense Acquisition Regulation or DAR, specifically section E, appendix E, which is the progress payment section, the progress payment clause in the DAR which I think is 7-104.35B which is the progress payment clause.

The Defense Logistics Agency contracts manual, which is DLAN8105.1 and various agencies, is DLA's or DCASR's progress payment regulation Bible concerning statutes. The only involvement -- again, I don't recall any statute. I didn't look for statutes, but there were various progress payment issues that did involve lawyers at various agencies. Probably part of their research involved cases or statutes perhaps in some legal opinions too may be on various matters that they may have referenced to statutes.

Q Do you recall personally any federal statute that you relied on yourself on any progress payment determination to Freedom?

A No. To the best of my knowledge, I have

Liebman.

notes referring to statutes.

Q Did you ever refer to the DAR statute?

A Yes.

Q Can you give us a list of each of the statutes you relied on with relation to Freedom and the progress payment?

A Yes. The main one is the progress payment clause, the DAR 7-140 which is the progress payment clause in Freedom's contract, that's in DAR section seven, appendix E. The DOD policy, Department of Defense policy, on the administration of progress payment.

Q When you say "DAR section seven," are you referring to 5094 and 5095?

A No, it's section E. I don't know 504 or -- it is E50.

Q My understanding is DAR Regulation Memorandum 5, 509.4.

A Oh, yes.

MRS. EPSTEIN: Can we have that marked?

A It's the incurred costs.

Q Sir, with respect to the two relations, did you rely on DAR E509.4 and 509.5?

A I relied on all of appendix E as well as

1                                    Liebman  
2        the progress payment clause.

3            Q        Sir, do you recall any other DAR  
4        regulation you relied on in relation to your  
5        treatment of Freedom progress payment requests?

6            A        No. As well as the manual that I  
7        mentioned, the DLA 8105.1 which is a DLA manual  
8        for contract administration, and in that manual  
9        there is a progress payment section. I don't  
10       recall the number offhand.

11           Q        Fine. Thank, you sir. Have you then,  
12       with the explanations you have given, given us  
13       each of the regulations that you relied upon?

14           A        Yes.

15           Q        Did you also rely on your own personal  
16       memorandum in making the determination as to  
17       whether to pay progress payments to Freedom or in  
18       determining how many of those progress payment  
19       requests to make?

20           A        Absolutely. The decision is mine which  
21       has, you know, a lot of issues that arise in  
22       administration of progress payments, not just with  
23       Freedom, not yes or no type issues. They involve  
24       interpretation, judgement, opinion, position, and  
25       I have to make a decision that's in the best

Liebman

interest of the Government, weighing all the factors, and it must be consistent with our regulations.

Q You've now listed for us a number of different considerations and circumstances that you would consider in relation to Freedom's progress payment request. Can you tell us any other type of consideration that you customarily make in relation to those progress payment requests?

A Sources of input or determination.

Q Other than what you already listed for us?

A Other than the financial services, the DCA audit, the production, we also consult at the time with our legal department, also with our contract management division within our agency which usually starts at the DCASMA level, the management area, legal, although legal is in the DCASR department, escalate the matter to our region which is down the hall from us.

We have a contract section, we have a financial services section, we have a production section, our counterpart to our DCASMA group at

Liebman

the time if we can't get an answer or if they input higher up our region we'll refer the matter to our headquarters, DLA in Cameron Station, Virginia. So there is a team of experts that we can seek advise from from within the agency or outside the agency all the way to Washington.

Q Can you think of any other factor, circumstance or source that you utilize in connection with your evaluation of progress payment requests made by Freedom other than the ones that you've listed for us?

A Sure, I can consult with the Board of Review members. Remember during my testimony I mentioned a local agency, contract agency, Board of Review. I convene a meeting to the Board of -- I can bring any matter, not just progress payments, but any contractual matter before the Board. I can talk to my colleague, other contracting officers that might have had experience with similar sections. I talk to the people at the buying activity or procuring activity as they're called. There are various sources I can seek advise from. I can talk to our commander, so on and so forth, the Small Business

1 Liebman

2 Administration, but the decision is ultimately  
3 mine.

4 Q Have you given us, as best you can, the  
5 sources that you used personally in your  
6 evaluation of Freedom's progress payment requests?

7 A Yes, I have.

8 Q When you had a progress payment request  
9 made by Freedom, I take it you go through a list  
10 of these various factors that you just described?

11 A That's correct.

12 Q Would you mandate your ascent to any  
13 progress payment request made by Freedom in any  
14 particular request?

15 A I don't understand.

16 Q How would you go about approving a  
17 progress payment request made by Freedom?

18 A Well, with Freedom we were doing  
19 prepayment reviewing. And again, until I received  
20 the results of the review -- a lot of times I  
21 would proceed on an oral opinion prior to getting  
22 a written opinion, but until I received the result  
23 of the reviews -- and by "reviews" I mean the  
24 audit review, the production review -- I did not  
25 have to wait for the financial service review, but

Liebman

1  
2 until I received the review I could not pay, I  
3 could not make a decision, but it is standard we  
4 when making a review when it is prepayment or  
5 postpayment that you do go for audits, technical  
6 or both.

7 Q When you complete your review, how would  
8 you treat the progress payment request, what would  
9 you do in order to get the progress payment  
10 request paid?

11 A Regarding Freedom?

12 Q Yes.

13 A Regarding Freedom with Freedom towards  
14 the end before I actually carried out my descision  
15 I made the decision -- my commander at DCASMA New  
16 York wanted to be briefed, so I would brief him.  
17 Sometimes, you know, management above me would  
18 accompany him to the commander and after I might  
19 sign the progress payment and payment was made  
20 sometime within a day, two days.

21 We arranged sometimes for check up pick  
22 ups. In fact, we performed services above and  
23 beyond the normal. We made arrangements to  
24 express mailing the check to Bankers Leasing. So  
25 once I made the decision to pay I signed the



Liebman

progress payment. We paid it on an expedited or special type basis, sometimes express mailing the checks to Bankers Leasing. Payment was rapid once I decided to pay.

Q And you had, in fact, actually put your signature on the progress payment request?

A Absolutely, yes.

Q In fact, as far as Freedom was concerned, you put your signature indicating how much of that progress payment request would, in fact, be paid by the Government?

A That is it.

Q When you put your signature on that progress payment request in the manner you just described, what are you affirming to on behalf of the Government?

A I'm authorizing a payment, that a payment be made to Freedom or his assignee, in this case Bankers Leasing, that that amount is to be paid to Freedom. It's the authority for our financial center to pay.

Q Are you affirming then, at least in your own judgment, that you believe the amount requested and the amount that you've authorized in

1 Liebman

2 relation to that request is an amount which ought  
3 to be paid and is applicable to federal statute  
4 and regulation?

5 A That is correct.

6 Q Are you also indicating your agreement  
7 that that amount should be paid in accordance with  
8 the contract executed with Freedom?

9 A I would authorize an explanation that's  
10 the amount that I am authorized -- that I can pay  
11 in accordance with the progress payment clause of  
12 the contract and applicable progress payment  
13 regulations.

14 Q So by signing a progress payment request  
15 and indicating an amount which should be remitted  
16 pursuant to that progress payment request, you, as  
17 administrative contract officer, are confirming to  
18 the Government that the amount that you're  
19 authorizing that payment on is in accordance with  
20 the contract, in this case with Freedom's, federal  
21 statute and federal regulations?

22 A That it's not in accordance with the  
23 contract's progress payment provisions.

24 Q Is the rest of the statement true  
25 though, that you're also warranting that, at least

Liebman

to the best of your knowledge, that the amounts you've authorized payment on is in accordance with federal statutes or applicable federal regulation?

A Progress payment regulation statutes I have no comment on.

Q So your signature signifies to the Government that -- as far as you are personally concerned -- that the amount you're suggesting or authorizing be paid is an amount which is justified under applicable federal regulation?

A Federal progress payment regulations.

Q With respect to Freedom, did you, to your knowledge, ever authorize an amount which was not a properly incurred cost under applicable progress payment federal regulations?

A To my knowledge, no.

Q What is a properly incurred cost?

A It's a cost that's defined in DAR appendix E as well as in the progress payment clause. Again, I'm speaking from memory, it helps to have the thing in front of you, but an incurred cost -- and, again, I'm just speaking from memory, I could be leaving out certain words, but an incurred cost for progress payment purposes is a

Liebman

cost that is reasonable, allowable, applicable to the contract and in accordance or consistent with the general contracting principals and practices, and they're cited in the clause -- in the progress payment clause -- and in the DAR what these types of costs are. They give examples, material costs, work in process, overhead type costs, general administrative expense, but the key words are reasonable, allowable to the contract and, course of, accept accounting principals and practices.

Q And those three elements make up, in your mind, an appropriate incurred cost?

A That is correct.

Q As far as you are personally concerned, the progress payment authorizations that you made only were for properly incurred costs under the contract?

(Continued on next page to include jurat.)

Liebman

A Yes. To the best of my knowledge,  
that's correct, in accordance with the progress  
payment cost.

MR. MACGILL: Off the record.

(TIME NOTED: 4:05 P.M.)

MARVIN LIEBMAN

Subscribed and sworn to  
before me this day  
of , 19 .

Notary Public

Liebman

EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
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Defendants		
Exhibit 279	Freedom fact sheet	143

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Liebman

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CERTIFICATION

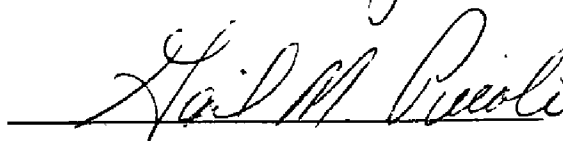
STATE OF NEW YORK     )  
                                  )  
COUNTY OF NEW YORK    )

I, Gail M. Piccolo, a stenotype  
reporter and Notary Public within and for the  
State of New York, do hereby certify, that:

MARVIN LIEBMAN

The witness(es) whose Examination(s) Before Trial  
is (are) hereinbefore set forth, was (were) duly  
sworn by me, and that such Examination(s) Before  
Trial is (are) a true and accurate record of the  
testimony given by said witness(es); and I  
further certify that I am not related to any of  
the parties to this action by blood or marriage  
and that I am in no way interested in the outcome  
of this matter.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 11<sup>th</sup> day of July, 1989



Gail M. Piccolo



CERTIFICATION

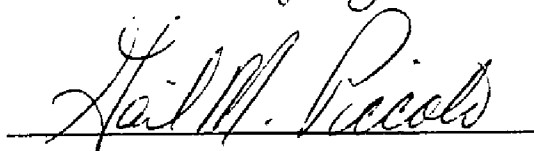
STATE OF NEW YORK     )  
                                  )  
COUNTY OF NEW YORK    )

I, Gail M. Piccolo, a stenotype  
reporter and Notary Public within and for the  
State of New York, do hereby certify, that:

MARVIN LIEBMAN

The witness(es) whose Examination(s) Before Trial  
is (are) hereinbefore set forth, was (were) duly  
sworn by me, and that such Examination(s) Before  
Trial is (are) a true and accurate record of the  
testimony given by said witness(es); and I  
further certify that I am not related to any of  
the parties to this action by blood or marriage  
and that I am in no way interested in the outcome  
of this matter.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 11<sup>th</sup> day of July, 1989



Gail M. Piccolo

1  
2 UNITED STATES DISTRICT COURT  
3 FOR THE DISTRICT OF COLUMBIA

---

4 HENRY THOMAS 243 California Road,  
5 Mount Vernon, New York 10552, and  
6 FREEDOM, N.Y., INC. 243 California  
Road, Mount Vernon, New York 10552,

7 Plaintiffs,

8 - against -

CA NO: 89-1531

9  
10 BARNETT & ALAGIA, a/k/a and d/b/a  
11 ALAGIA DAY, MARSHALL, MINTMIRE &  
CHAUVIN 1000 Thomas Jefferson Street,  
N.W. Washington, D.C. 20007, et al.

12 Defendants.  
13

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14 June 22, 1989  
15 9:15 o'clock a.m.  
16  
17

18 CONTINUED EXAMINATION BEFORE TRIAL OF MARVIN  
19 LIEBMAN, a non-party witness, taken by Defendant,  
20 pursuant to the Federal Rules of Civil Procedure  
21 as applied in Chicago and Illinois and voluntary  
22 consolidation for discovery purposes effected in  
23 consultation with Justice Hubert Will supervising  
24 the Chicago case, held at the offices of Sidley &  
25

1  
2  
3 Austin, 875 Third Avenue, New York, New York, on  
4 June 22, 1989 at 9:15 o'clock a.m., before Gail M.  
5 Piccolo, a Stenotype Reporter and Notary Public  
6 within and for the State of New York.  
7  
8  
9

10 A P P E A R A N C E S:  
11

12 BARNES & THORNBURG, ESQS.  
13 Attorneys for Plaintiff  
14 1313 Merchants Bank Building  
15 11 South Meridian Street  
Indianapolis, Indiana 46204

16 BY: ROBERT D. MACGILL, ESQ.  
17

18 BANKERS LEASING ASSOCIATION, INC.  
19 Attorney for Plaintiff in  
20 Chicago action  
155 Revere Drive  
Northbrook, Illinois 60062

21 BY: LESTER A. OTTENHEIMER III, ESQ.  
22  
23  
24  
25

1  
2  
3 BINGHAM, SUMMERS, WELSH & SPILMAN  
4 Attorneys for Plaintiff in  
5 Washington, D.C. action  
6 2700 Market Tower, 10 West  
7 Market Street  
8 Indianapolis, Indiana 46204-2982

9  
10 BY: JON D. KRAHULIK, ESQ.  
11  
12

13 THE LAW FIRM OF EDNA SELAN EPSTEIN, ESQ.  
14 Attorney for Plaintiff  
15 332 South Michigan Avenue  
16 Chicago, Illinois 60604-4398  
17

18 BY: EDNA SELAN EPSTEIN, ESQ.  
19  
20  
21  
22  
23  
24  
25

Liebman

(Whereupon, the items referred to above, Chart pertaining to progress payments, Photocopy of check dated 5-6-85, Photocopy of check dated 6-6-85, Photocopy of check dated 6-24-85, Photocopy of check dated 7-29-85, Photocopy of check dated 10-11-85, Photocopy of check dated 11-13-85, Photocopy of check dated 12-6-85, Photocopy of check dated 1-3-86, Photocopy of check dated 3-4-86, Photocopy of check dated 3-18-86, Photocopy of check dated 4-25-86, Photocopy of check dated 11-20-86, Photocopy of check dated 6-18-86, Photocopy of check dated 7-15-86, Photocopy of check dated 8-19-86, Photocopy of check dated 9-8-86, Photocopy of check dated 9-23-86, Photocopy of check dated 10-9-86, were marked as Plaintiffs Exhibits 280 through 298 for Identification, as of this date.)

CONTINUED CROSS-EXAMINATION BY

MR. MACGILL:

Q Mr. Liebman, you said off the record a minute ago there was some name you --

A Wish to correct.

Q -- wish to correct.

A Yes. I mentioned that Mr. Allen Corber

1 Liebman

2 was the prior or contract specialist that worked  
3 for Mr. Thomas Barkowitz. Upon further thought  
4 last night I learned it was not Mr. Corber, it was  
5 Mr. Keith Ford who was the buyer that worked for  
6 Mr. Tom Barkowitz when the contract was awarded.

7 Q All right, sir. Sir, I put in front of  
8 you what the reporter has marked for  
9 identification purposes as Exhibit 281.

10 Can you tell us the documents which  
11 consist of Exhibit 281?

12 A Okay. There are three documents here.  
13 I see a progress payment request form from H.T.  
14 Food Products and I see my signature on the bottom  
15 of the form. It's progress payment request number  
16 one, and I approved for payment \$1,700,730.

17 Do you want me to go with the dollars  
18 and cents numbers?

19 Q I think that's a great way to approach  
20 it in the way of your description of the document,  
21 sir.

22 A Second document I see is a Government  
23 form, a DLA form 477, which is an advice of  
24 payment which advises the contractor, in this case  
25 H.T. Foods, that \$1,700,730 was processed for

Liebman

payment on 7 May, 1985 by the DCASR office of finance.

Q Is there a third page, sir, to that exhibit?

A Yes there is a copy of a U.S. Government check for the amount of \$1,700,730 addressed or payable to Bankers Leasing dated 6 May '85.

Q I take it those three payments of Exhibit 281 are then documents which the Government creates or maintains in the ordinary course of their business?

A They appear to be. Obviously I have to compare them to the originals that are in my files, but these are Government forms. These are documents that are normally involved with requesting, approving and paying progress payments.

MR. MACGILL: We'll put Exhibit 281 into evidence.

(Whereupon, the item referred to above, Photocopy of check, was deemed marked as Plaintiffs Exhibit 281 in Evidence as of this date.)

Q Sir, I'll hand you back again Exhibit

Liebman

282, and I have a few questions for you about the contractor's request for progress payment.

On line 27 there is a pay only reference, is that a reference that you personally made on that document (handing)?

A Yes.

Q Why did you make that reference?

A Because I was reducing the progress payment request from the \$1,766,923 reflected in block 19 of the progress payment request form.

Q And that was a decision you personally made?

A Yes.

Q Did your reference to pay only \$1,700,730 then in turn cause a check to be issued in that amount by the United States Government to Bankers Leasing Association?

A Yes, it did.

Q Sir, did you sign the third page of Exhibit 281?

A Yes, I did.

Q Why did you put your signature on that document?

A Because I'm the only authorized



1                   Liebman  
2       representative to approve progress payments.

3           Q       By that signature were you then  
4       confirming that the amount of payments approved by  
5       Marvin Liebman were, as far as you were concerned,  
6       properly incurred costs under the status  
7       regulation for the MRE contract?

8           A       I was concerned they were appropriate  
9       costs under the DAR progress payment provision and  
10      the progress payment provision in Freedom's  
11      contract or H.T. Food's contract.

12          Q       Sir, I'll put in front of you now what  
13      the reporter has marked as Exhibit 282. Would you  
14      identify for us what that exhibit is, sir  
15      (handling)?

16          A       There are four documents that are part  
17      of this exhibit. The first document is Freedom's  
18      progress payment number two, and I approved it and  
19      reduced the amount to \$332,421.

20          Q       Why did you approve it in a reduced  
21      amount?

22          A       I do not recall, but the rational or the  
23      reasoning for the reduction is contained my  
24      progress payment file.

25          Q       Sir, what else is in Exhibit 282?

1 Liebman

2 A Second page is a certificate of overhead  
3 costs signed by Freedom which is required to be  
4 completed to certify that their overhead costs are  
5 proper and submitted in accordance with account  
6 requirements of defense contracts and, you know,  
7 Government regulations.

8 Q What is the third page?

9 A DLA form 477, advice of payment  
10 evidencing that \$332,421 -- looks kind of blurry.  
11 Yes, looks like \$332,421 was approved for payment,  
12 was processed for payment by DCASR on 6th June  
13 1985.

14 MRS. EPSTEIN: Mr. MacGill, we're not  
15 going to dispute the authenticity of the document,  
16 it will take a lot of time to go through each of  
17 the documents in this way.

18 MR. MACGILL: May I hand you each of  
19 those exhibits, and I would just like to get them  
20 into evidence and make sure there is no dispute  
21 about it, number one, Edna, and then ask him two  
22 or three questions about each of the documents.

23 MRS. EPSTEIN: To the extent they're  
24 Xeroxed from stuff in his files that will probably  
25 follow the same pattern, namely a request for

1 Liebman

2 payment, some authorization to pay, and some check  
3 issued.

4 MR. MACGILL: Let me hand them to you,  
5 you can --

6 MRS. EPSTEIN: Mr. Liebman, why don't  
7 you look them --

8 MR. MACGILL: He has looked through  
9 them this morning. Let's make a record of that  
10 that will help Edna, maybe it wouldn't.

11 Q Mr. Liebman, have you had an opportunity  
12 to look at each of the exhibits that the reporter  
13 has marked?

14 A Yes, I have.

15 Q To the best of your knowledge, sir, are  
16 those Government documents maintained in the  
17 ordinary course of the business of the Government  
18 pertaining to the MRE V contract?

19 A They appeared to be. Of course I have  
20 to match them up with the documents in my my  
21 file. Can I have give an explanation?

22 Q Yes.

23 A Some of the progress payment forms lack  
24 my signature and I would have to match those up,  
25 you know, with documents in my files, probably

1 Liebman

2 just an oversight.

3 Q For the record, I think you identified  
4 progress payment 12 and progress payment 21 are  
5 lacking your signature; is that correct?

6 A Correct. I think there may be one or  
7 two more, I think progress payment 19 or 20.  
8 There was another one.

9 MRS. EPSTEIN: Progress payment 3  
10 doesn't have your signature; progress payment 4  
11 doesn't have your signature; progress payment 12  
12 doesn't have your signature; progress payment 20  
13 and progress payment 21 do not.

14 THE WITNESS: Obviously our financial  
15 department would not have paid without my  
16 signature, so apparently it's an oversight.

17 MRS. EPSTEIN: Is it possible there is  
18 another copy with your signature?

19 THE WITNESS: Yes, I'm going to check  
20 in my file back in the office.

21 MRS. EPSTEIN: Is there also a  
22 possibility that the one with your signature is an  
23 earlier version?

24 THE WITNESS: It's possible.

25 MRS. EPSTEIN: Do we know from whose

1 Liebman

2 file --

3 MR. MACGILL: Yes.

4 MRS. EPSTEIN: Whose file?

5 MR. MACGILL: It came from Bankers'  
6 files.

7 MRS. EPSTEIN: It could possibility be  
8 the one that was not paid.

9 MR. MACGILL: When supplied I  
10 understand it we were supplied by Mr. Liebman.  
11 These documents, we were given the checks with his  
12 sign off or his lack of sign off as we see here  
13 and we were given the checks. If you compare the  
14 check amounts with the pay only reference with  
15 each of the progress payments, they match.

16 THE WITNESS: I think that's the  
17 explanation, because we had a Freedom of  
18 Information Act request a while back from Bankers  
19 Leasing where they wanted numerous payment  
20 documents pertaining to the contract and probably  
21 in the haste or rush to supply the documents we  
22 probably had extra documents in my files that were  
23 unsigned, so we probably furnished those documents  
24 rather than spend the time to reproduce extra  
25 documents by our side. I think that's the

Liebman

explanation.

MR. MACGILL: So may we stipulate they are authentic? If you would stipulate that they are authentic, then we don't need to go through these 21 exhibits.

MRS. EPSTEIN: To the extent that those were documents that were paid, to the extent that a check was issued which established it was a progress payment request, it seems to be acted on, but we have different versions from time to time to the extent that that's what we're dealing with.

MR. KRAHULIK: Let's identify the exhibit numbers and I would stipulate the authenticity based upon the record as it is right now.

MR. MACGILL: We'll do the same.

Will you do the same, Edna?

MRS. EPSTEIN: I'm not going to give you a fuss. I'm not going to give you a blank check at this point in time. At this point in time, as the record stands, I don't have a problem. What more do you want?

MR. MACGILL: I want you to stipulate they're authentic.

1 Liebman

2 MRS. EPSTEIN: I'm not going to. You  
3 can take three hours and accomplish no more. The  
4 record stands for itself. I told you that I'm not  
5 going to make a fuss about it. If I don't find  
6 them accurate for any reason I will substantiate  
7 it. I'm not going to give you the magic word  
8 right now, and it wouldn't mean anything if I did.

9 Q Mr. Liebman, with respect to Exhibits  
10 282, 283, 284, 285 through 298, are they not  
11 accurate copies of documents maintained by the  
12 Government in the ordinary course of its business  
13 in connection with the Freedom MRE V contract?

14 A They appear to be accurate subject, of  
15 course, to my files because I have to match them  
16 with my files.

17 Q As you sit here today, sir, do you have  
18 any reason that any of those exhibits that I've  
19 listed are not authentic?

20 A No, I have no reason to believe that.

21 MR. MACGILL: At this time I offer into  
22 evidence Exhibits 282 through 298.

23 (Whereupon, the items referred to above,  
24 Photocopy of check dated 6-6-85, Photocopy of  
25 check dated 6-24-85, Photocopy of check dated

Liebman

7-29-85, Photocopy of check dated 10-11-85,  
Photocopy of check dated 11-13-85, Photocopy of  
check dated 12-6-85, Photocopy of check dated  
1-30-86, Photocopy of check dated 3-4-86,  
Photocopy of check dated 3-25-86, Photocopy of  
check dated 4-25-86, Photocopy of check dated  
11-20-86, Photocopy of check dated 6-18-86,  
Photocopy of check dated 7-15-86, Photocopy of  
check dated 8-19-86, Photocopy of check dated  
9-8-86, Photocopy of check dated 9-23-86 and  
Photocopy of check dated 10-9-86, were deemed  
marked as Plaintiffs Exhibits 282 through 298 in  
Evidence as of this date.)

MR. KRAHULIK: Mr. Liebman, looking at  
the exhibit, especially the contractors request  
for progress payment, can you show me -- I'm  
referring now to Exhibit 282 -- show me how much  
was requested by the contractor on that.

THE WITNESS: That's \$673,074.

MR. KRUHULIK: That's line 19?

THE WITNESS: Line 19 of the progress  
payment.

MR. KRAHULIK: What does line ten  
represent?



1 Liebman

2 THE WITNESS: Line ten represents total  
3 incurred costs under the contract, it includes the  
4 \$673,074. In this case line ten reflects  
5 \$2,279,711.

6 MR. KRAHULIK: Then what is line 14D?

7 THE WITNESS: 14D is subcontract  
8 progress billings approved for current payment and  
9 that's \$209,268.

10 MR. KRAHULIK: Is that in addition to  
11 the \$673,074?

12 THE WITNESS: No, it's in addition to  
13 the \$2,000,000 that I mentioned previously. This  
14 represents progress payments that were requested  
15 by Freedom's subcontractors that Freedom had  
16 approved for payment.

17 MR. KRAHULIK: So the total dollar  
18 amount requested for progress payments would be  
19 shown then on this line 15 which would include  
20 what Freedom has directly requested plus what  
21 Freedom's subcontractors have requested in the  
22 form of progress payments on this contract?

23 THE WITNESS: With one correction, in  
24 this case it's in total incurred costs on  
25 Freedom's side plus subcontractor progress payment

1                   Liebman  
2       billings approved by Freedom, not subcontractor  
3       progress payment requests, it's subcontractor  
4       progress payment billings.

5                   MR. KRAHULIK:    Then on line 27 is what  
6       you approved and how much was paid?

7                   THE WITNESS:    Correct.

8                   MR. KRAHULIK:    And that would be true  
9       on each one of the progress payments?

10                  THE WITNESS:    That's correct.

11                  MR. KRAHULIK:    I have no objection to  
12       the authenticity if I understand that correctly.

13                  Thank you.

14                  MRS. EPSTEIN:    If you don't mind my  
15       doing follow-up questions on that.

16                  MR. MACGILL:    No.

17       CROSS-EXAMINATION BY

18       MRS. EPSTEIN:

19                  Q       Mr. Liebman, can you explain to us why  
20       there is a discrepancy between the total dollar  
21       amount of 2.3 million dollars approximately on  
22       this Exhibit 282 and the actual amount of the  
23       previous progress payment requested, what happens  
24       to that difference?

25                  A       May I see the exhibit.

1 Liebman

2 Q (Hanging.)

3 A Okay, line 17 of the progress payment  
4 form represents total costs incurred by Freedom  
5 plus subcontract progress billings approved by  
6 Freedom for current payment, and that figure in  
7 block 17 is \$2,374,994. Subtract from that amount  
8 the figure in block 18 which is the total amount  
9 of the previous progress payments requested, that  
10 figure is \$1,000,000 --

11 Q Let me stop you, Mr. Liebman, just  
12 conceptually if you don't mind. If there is a  
13 figure there that includes subcontractor billings,  
14 they are being paid by whom and how?

15 A In this particular case, meaning  
16 Freedom's progress payment request number two, I  
17 do not recall the rationalization for paying.  
18 What I did is contained in my progress payment  
19 file.

20 Q Again, my question wasn't clear. It  
21 seems that there is more money that has been spent  
22 on this contract or has been incurred on this  
23 contract in one way or another that was even asked  
24 by Freedom that you paid. Where is that  
25 difference? I mean, will the subcontractor bill

1 Liebman

2 you directly or does it all have to go through  
3 Freedom, and are they telling you this is what I  
4 have incurred, but I didn't put in the plan money  
5 request yet for you to pay?

6 A The subcontractor bills Freedom, they  
7 fill out a progress payment request form. Freedom  
8 then incorporates these requests with its own  
9 progress payment request as a prime contractor to  
10 myself as a Government representative. The  
11 \$2,374,994, which is the total costs plus the  
12 subcontractor's billing, subtract that from the  
13 amount that I previously paid in progress  
14 payments, which is \$1,701,920, leaves a maximum  
15 amount eligible for current payment of \$673,074.

16 Q So in all events what happens is that  
17 any amount that's going to be paid under this  
18 contract has to flow through Freedom?

19 A Could you rephrase that.

20 Q I mean they ask for it and they get  
21 paid, then they had to go out and pay their  
22 subcontractors; is that right?

23 A In the ordinary course of business,  
24 yes.

25 CONTINUED CROSS-EXAMINATION BY

1 Liebman

2 MR. MACGILL:

3 Q Let's back up. We talked about the  
4 documents and what they are. What I'd like to do  
5 is do a couple of things. I'd like to take you  
6 through each one of these exhibits in two or three  
7 respects and at the same time I'd like to create a  
8 chart where we describe and indicate on this chart  
9 various information that we'll pull from these  
10 progress payments. I put together two papers that  
11 are stapled together that is marked as Plaintiffs  
12 Exhibit 280 and at the top of that exhibit I would  
13 like you to create four columns.

14 MRS. EPSTEIN: Mr. MacGill, do we  
15 really have to do it this way?

16 MR. MACGILL: Yes.

17 MRS. EPSTEIN: I will not make any fuss  
18 if you create this type of exhibit later from  
19 those documents if the figures are on your  
20 document. I'm not going to make any kind of fuss  
21 and say they're not. I am going to make a fuss  
22 with your introducing it into evidence if we  
23 didn't have a live witness, but we have Mr.  
24 Liebman at this point in time.

25 You read this. Now, are you

1                   Liebman  
2       understanding what I'm saying? You don't have to  
3       take two hours of everyone's time to create a  
4       chart if the facts and figures on the chart have  
5       been created at leisure whenever you want. If the  
6       facts and figures are correct, you're not going to  
7       get a fight from me about it.

8                   MR. MACGILL:    So I'm clear and there is  
9       no mistake here, we want to present to the jury a  
10      chart showing the date of the progress payment  
11      request, the progress payment number, the amount  
12      Mr. Liebman approved with each progress payment  
13      and the date and amount paid.

14                  MRS. EPSTEIN:   What problem could you  
15      possibly get from me doing that?

16                  MR. MACGILL:    So we agree, we may  
17      represent such a chart?

18                  MRS. EPSTEIN:   Right.

19                  MR. MACGILL:    Without any evidentiary  
20      problem at all?

21                  MRS. EPSTEIN:   Yes, and you can blow it  
22      up as big as you want and we'll probably make it a  
23      joint exhibit.

24                  MR. MACGILL:    We're not going to  
25      consolidate it at this juncture.

1 Liebman

2 Do you have any problem, Jon?

3 MR. KRAHULIK: No.

4 Q Sir, I do want to take you through your  
5 authorizations on Exhibit 282. And, if you would,  
6 would you refer to Exhibit 282 and tell us if you  
7 authorized the payment of certain amounts to  
8 Freedom when you received progress payment request  
9 number two?

10 A I authorized a payment of \$332,421 and  
11 it appears to be 3rd June 1985.

12 Q And I take it you signified the fact  
13 that you authorized that payment by signing  
14 Exhibit 282?

15 A Yes, I did.

16 Q By your signature, sir, were you  
17 affirming that the cost that you had paid have  
18 been properly incurred pursuant to DAR regulation  
19 and the progress payment regulation in the Freedom  
20 MRE contract?

21 A Yes, I did.

22 Q And I take it after you signed that  
23 document and gave your authorization, a check was  
24 issued in the amount of \$332,421?

25 A Yes, it was.

1 Liebman

2 MRS. EPSTEIN: Mr. Liebman, every  
3 single progress payment -- I can't imagine his  
4 answer would be any different --

5 Would it, Mr. Liebman?

6 THE WITNESS: I can't conceive it would  
7 be any different.

8 MR. MACGILL: Can we stipulate on the  
9 record that with respect to Exhibits 281 through  
10 298 that he signed or authorized the payment of  
11 the figures referenced in the checks ultimately  
12 issued by the United States Government?

13 MRS. EPSTEIN: Of course.

14 MR. MACGILL: May we also stipulate  
15 that his signature on Exhibits 282 through 298  
16 were an affirmation by Mr. Liebman that the cost  
17 referenced in these progress payment requests that  
18 he approved were properly incurred cost pursuant  
19 to DAR regulation and the progress payment  
20 provision and the Freedom MRE contract?

21 MRS. EPSTEIN: That's slightly  
22 different than the question that you asked him  
23 before.

24 MR. KRAHULIK: Ask him.

25 THE WITNESS: Would you repeat the



1 Liebman

2 question.

3 MR. MACGILL: Sure.

4 Q I wanted your affirmation that with  
5 respect to each of your authorizations to make  
6 payment included in Exhibits 281 through 298 that  
7 your signature on those exhibits amounted to your  
8 affirmation that the cost that approved per  
9 payment were properly incurred under applicable  
10 DAR regulations and the progress payment provision  
11 in the Freedom MRE V contract.

12 A That is correct. Of course, as I said  
13 previously, I would have to match up my figures,  
14 you know, figures that are reflected on these  
15 exhibits with the figures that are in my files,  
16 but they appear to be correct. And if they are  
17 correct, then I affirm your question.

18 Q Well, I don't want any doubts about it,  
19 it's an important point as far as we're  
20 concerned. Perhaps we ought to go exhibit by  
21 exhibit until we have a stipulation.

22 A Well, I stipulate that all the exhibits  
23 would be -- I affirm all the exhibits appear to be  
24 correct, but, of course, I would have to match  
25 them up with the originals in my file or copies in

1 Liebman

2 my files. But if they do match up, then the  
3 question you have -- I would have to state  
4 affirmatively that you're correct.

5 Q You tell me if I'm wrong, I don't even  
6 think this is something we ought to have any  
7 problem on, but, for example, we have copies with  
8 your signature on them, and with respect to each  
9 of these exhibits I just want to confirm that you  
10 signed or authorized either one or both because  
11 you concluded these were properly incurred costs  
12 under the DAR regulation and the progress payment  
13 provision of the Freedom contract and that a check  
14 by the Government was issued on your  
15 authorization?

16 A That's correct.

17 MR. MEDEIROS: The witness has  
18 repeatedly pointed out without checking those  
19 there is no reason to speculate that they are, but  
20 without going back to the originals there is no  
21 way that he can say that.

22 MR. MACGILL: Will you, Edna, stipulate  
23 that with respect to each of the exhibits in front  
24 of him that when he authorized payment with  
25 respect to each of those exhibits that he was

1 Liebman

2 affirming that those were properly incurred costs  
3 pursuant to DAR regulation and the progress  
4 payment provision in the MRE V Freedom contract?

5 MRS. EPSTEIN: Ask the witness. Why  
6 are you asking me to testify for the witness? Ask  
7 him if he affirms. If he doesn't, I'm going to be  
8 bound by what he says.

9 MR. MACGILL: Let's go back and start  
10 from the beginning so there is no mistake here  
11 because nobody's clear.

12 Q We've talked about 281, do you recall  
13 your testimony on 281 and what you indicated your  
14 signature on 281 meant?

15 A That is correct.

16 Q Let's go to 282.

17 MRS. EPSTEIN: You don't have to do it  
18 one by one.

19 MR. MACGILL: No, unless I have a  
20 stipulation -- I want to be perfectly clear on  
21 what these things mean.

22 MRS. EPSTEIN: With respect to 282, Mr.  
23 Liebman, did you indicate on the fourth page of  
24 that exhibit that \$332,421 ought to be paid?

25 THE WITNESS: Yes. We're referring to

1 Liebman

2 the bottom page as the fourth page?

3 MRS. EPSTEIN: Yes, sir.

4 THE WITNESS: Yes, I did.

5 MRS. EPSTEIN: By signing that progress  
6 payment request, sir, were you affirming that, as  
7 far as you personally were concerned, that the  
8 cost which totaled \$332,421 were properly incurred  
9 costs under DAR regulation and the progress  
10 payment provision in Freedom's MRE V contract?

11 THE WITNESS: Yes, I was.

12 MRS. EPSTEIN: Would your testimony be  
13 the same if you were asked that question with  
14 respect to each and every progress payment?

15 THE WITNESS: Yes, I would. In some  
16 cases the signature is lacking, but if the  
17 signature were there, yes. I would state, yes,  
18 that would represent my affirmation of the proper  
19 costs, and the amount I approved was proper on the  
20 Government regulations.

21 MRS. EPSTEIN: Fine. Thank you.

22 MR. MACGILL: Will you now stipulate?

23 MRS. EPSTEIN: I'm now bound by his  
24 exhibit which couldn't be clearer.

25 Q Sir, I refer you now to --

1 Liebman

2 MRS. EPSTEIN: We're going to put a  
3 phone call through to Judge Will.

4 MR. MACGILL: No, the deposition is  
5 going through.

6 MRS. EPSTEIN: No, we're going to call  
7 Judge Will and tell him what you're doing.

8 Q Exhibit 283, sir, would you tell us what  
9 the second page of that is (handing)?

10 A Do I continue?

11 MR. MEDEIROS: We'll stipulate on the  
12 record --

13 MRS. EPSTEIN: Let's go off the record  
14 because I'm going to call the Judge.

15 Off the record.

16 (Whereupon, an off the record discussion  
17 was held.)

18 MRS. EPSTEIN: Let the record reflect  
19 that it is now 10:30 and that --

20 MR. MACGILL: It's ten o'clock.

21 MRS. EPSTEIN: I'm sorry. It's now ten  
22 o'clock, that we not only have Mr. Liebman's  
23 deposition to finish, but Mr. Stokes -- who is a  
24 very important witness to key things in this  
25 litigation -- to do.

1 Liebman

2 Will the record reflect that we have  
3 spent at least half an hour trying to get these  
4 questions answered and that it has been answered.

5 Mr. Liebman has stated if he were asked  
6 the same question with respect to each one of the  
7 documents before him his answer would be the same.

8 Mr. MacGill insists on a stipulation  
9 from me, which I'm not prepared to give, because  
10 the witness has testified and we're all bound by  
11 the witness' testimony. I am not going to  
12 stipulate to and I'm certainly not going to argue  
13 about anything that he has already said. I have  
14 asked Mr. MacGill not to proceed with each one of  
15 those piece by piece to save everyone time, the  
16 testimony will not be any different anyway.

17 I will stipulate the testimony will be  
18 no different if you did it one by one other than  
19 what he has already said. And no matter how many  
20 times we go through it, that's what it will be,  
21 that is what Mr. Greg Medeiros indicated as well.

22 I'm imploring you to go on and save all  
23 of our time.

24 MR. MACGILL: Will you stipulate that  
25 with respect to each exhibit that with respect to

1 Liebman

2 his signature or with respect to each payment that  
3 was automatically made, that his signature was  
4 given or a payment was made only after Mr. Liebman  
5 concluded that the costs reimbursed were properly  
6 incurred costs under DAR regulations and properly  
7 incurred costs under progress payment provisions  
8 of the MRE V contract with Freedom?

9 MRS. EPSTEIN: You have the witness, why  
10 don't you ask him that question?

11 MR. MACGILL: That's exactly what I'm  
12 doing, I'm going to do it in an organized fashion.

13 MRS. EPSTEIN: You don't have to do it  
14 one by one.

15 MR. MACGILL: So the jury can understand  
16 it, do you stipulate?

17 MRS. EPSTEIN: No. Ask him that  
18 question.

19 MR. MACGILL: Just be quite and --

20 MRS. EPSTEIN: You are a member and an  
21 officer of the court, I implore you to go and talk  
22 with Mr. MacGill and cut this short.

23 MR. OTTENHEIMER: I agree with Mr.  
24 MacGill, you're way out of line. If you don't  
25 agree with him --

1 Liebman

2 MRS. EPSTEIN: I would stipulate that  
3 his answer would be the same as he's already given  
4 you.

5 MR. MACGILL: That's not the question,  
6 you don't understand.

7 MR. OTTENHEIMER: That's not the  
8 issue.

9 THE WITNESS: Can I interrupt a second?

10 MR. MACGILL: Off the record.

11 (Whereupon, as discussion was held off  
12 the record.)

13 MRS. EPSTEIN: Mr. MacGill, we're all  
14 here, the other two lawyers here are confused  
15 about what it is you're trying to accomplish.

16 MR. MEDEIROS: Mr. Liebman repeatedly  
17 stated the amounts reflected on the check and the  
18 supporting paperwork indicates the amounts that he  
19 authorized for payment which, in his opinion,  
20 represented allowable progress payment costs in  
21 the case of each check issued on a progress  
22 payment request submitted by Freedom. Beyond  
23 that, he's not really prepared to state that the  
24 actual number reported on the lines of the various  
25 documents are --



Liebman

MR. MACGILL: I'm not going to ask him that.

MR. MEDEIROS: -- are accurate. There is no reason to believe they are not, however, without comparison with the original files at the DCASR New York's region office he's unable to say more than what he has said already. He's said that he's willing to make that statement regarding progress payments 282 through 298. I believe going through them individually -- I don't see how it will serve purpose other than saying the same thing on each progree payment.

MRS. EPSTEIN: That's our position.

MR. MACGILL: Will you stipulate to that?

MRS. EPSTEIN: I'll stipulate to what he just said. I will stipulate to what he said. He said --

MR. MACGILL: We have to get Edna pinned down on this, she's not pinned down unless we get a stipulation from Edna on what Greg just indicated, we'll go exhibit by exhibit.

MRS. EPSTEIN: I just told you I stipulated.

1 Liebman

2 MR. MACGILL: After I indicated it many  
3 times if I'm wrong or if I've been right, fine,  
4 we'll move on.

5 In light of what Mr. Liebman's counsel  
6 has said and in light of what Mr. Liebman said in  
7 relation to some of the exhibits, we would propose  
8 the following stipulation:

9 That all parties stipulate to the fact  
10 that with respect to Exhibits 281 through 298 that  
11 Mr. Liebman, by either signing those exhibits or  
12 by processing them, confirmed and affirmed to the  
13 United States Government that the amount of cost,  
14 which were either approved or ultimately paid,  
15 were properly incurred costs under DAR regulations  
16 and the progress payment provision in the  
17 Freedom's MRE V contract.

18 MRS. EPSTEIN: Mr. Liebman, is that  
19 correct?

20 THE WITNESS: That would be correct,  
21 but, of course, it's subject to my matching these  
22 documents -- these exhibits with the documents in  
23 my own files.

24 MRS. EPSTEIN: I'll stipulate to that  
25 subject to what he has just said.

1 Liebman

2 MR. MEDEIROS: Would your answers be the  
3 same if we went progress payment by progress  
4 payment and identified specific amounts on each,  
5 would you say the same?

6 THE WITNESS: Yes, my answer would be  
7 the same.

8 MR. MACGILL: When you said "subject to  
9 what he said," are you proposing some kind of  
10 verification on your own part where you would come  
11 back to us and say or confirm to us prior to the  
12 trial of this case that there is something  
13 inaccurate about the stipulation that we have just  
14 entered into?

15 MRS. EPSTEIN: I have no reason to  
16 believe there is, Mr. MacGill. I am not going to  
17 stipulate or affirm at this moment in time or go  
18 beyond his testimony, I'm adopting his testimony.

19 MR. MACGILL: You've adopted the  
20 stipulation?

21 MRS. EPSTEIN: I'm adopting his  
22 testimony.

23 MR. MACGILL: And you agree to the  
24 stipulation on the record?

25 MRS. EPSTEIN: I agreed to the

1 Liebman

2 stipulation based on his testimony.

3 MR. MACGILL: I just want to make sure  
4 there is no mistake between you and me, you and I  
5 have made a stipulation on the record; is that  
6 correct?

7 MRS. EPSTEIN: We made a stipulation  
8 that his testimony is what it is, and if you asked  
9 him the same question with respect to each of the  
10 progress payment requests, his statement, which  
11 he's told us, would be identical.

12 MR. MACGILL: I'm not asking for your  
13 rational, I'm asking you agree to the stipulation  
14 that I put on the record; is that correct? If it  
15 is, we can move on.

16 MRS. EPSTEIN: The record speaks for  
17 itself. I'm stipulating that his testimony --  
18 Miss reporter, read it back.

19 MR. MACGILL: Do you agree to the  
20 stipulation I put on the record, that's all I want  
21 to know? If you do, then we will move on. If you  
22 do not agree with the stipulation read on the  
23 record, then I have know.

24 MRS. EPSTEIN: I'm agreeing based on  
25 his testimony.

1 Liebman

2 MR. MACGILL: To the stipulation I put  
3 on the record?

4 MRS. EPSTEIN: Yes.

5 MR. MACGILL: Would you read back the  
6 stipulation for the benefit of everyone. Read the  
7 stipulation back a final time.

8 (Whereupon, the requested portion of the  
9 record was read back by the reporter.)

10 MR. MACGILL: If we're all in agreement  
11 that you stipulated to what the reporter read back  
12 to us, I have no further questions in relation to  
13 progress payments.

14 Have we so agreed?

15 MR. MEDEIROS: Yes.

16 MRS. EPSTEIN: Yes.

17 MR. KRAHULIK: Yes.

18 MR. OTTENHEIMER: Yes.

19 MRS. EPSTEIN: Will the record reflect  
20 that this has taken us a half an hour to  
21 accomplish this, it is now 10:30.

22 MR. MACGILL: Is there anything else  
23 you would like to say; is there anything you would  
24 like to add? Would you like to go out to lunch  
25 and scold me?

1 Liebman

2 MRS. EPSTEIN: I would not like to go  
3 out with you for lunch today or any other day.

4 MR. MACGILL: I told you not to do this  
5 on the record, I told you you could take me  
6 outside and scold me, but please don't do it on  
7 the record.

8 MRS. EPSTEIN: The reason I'm doing  
9 this is the second witness is here, Mr. William  
10 Stokes, he's ready to be deposed.

11 MR. MACGILL: Just for the record, I'll  
12 leave with you -- since I marked these pages  
13 Exhibit 280 and will not make that graph based on  
14 the stipulation that we entered into.

15 Q Mr. Liebman, I would like to take you to  
16 another exhibit which you testified about  
17 yesterday.

18 MRS. EPSTEIN: Can we have Mr. Stokes  
19 sitting in on this so he's not cooling his heels?  
20 Is there any reason why he cannot?

21 MR. MACGILL: I would rather he not  
22 during this cross-examination, but if you want him  
23 brought in after my cross-examination I have no  
24 objection.

25 MRS. EPSTEIN: All right.

1 Liebman

2 MR. KRAHULIK: I would prefer to leave  
3 him outside.

4 Q Mr. Liebman, I want to take you back to  
5 one of your areas of testimony yesterday, and  
6 specifically I want to refer you to your statement  
7 that, as far as you understood it, Bankers Leasing  
8 was giving an unrestricted line of credit. Do you  
9 recall that general line of testimony?

10 A I do.

11 Q Are you telling us that, in fact, you  
12 understood that there was first a line of credit,  
13 and, second, that that line of credit would be  
14 completely unrestricted?

15 A It was my understanding that it would be  
16 a restricted line of credit, yes.

17 MRS. EPSTEIN: Restricted or  
18 unrestricted?

19 THE WITNESS: I'm sorry, unrestricted  
20 line of credit.

21 MRS. EPSTEIN: Thank you.

22 Q Where did you get that understanding?

23 A From the discussions with the pertinent  
24 parties that were involved.

25 Q You didn't get that from a discussion

1 Liebman

2 directly with Randy Gross?

3 A It's possible, but I do recall getting  
4 that. I do recall getting that information --  
5 gettting that information in discussions with  
6 William Stokes and perhaps other pertinent  
7 representatives at the time.

8 Q Let's just be perfectly clear. You  
9 didn't get that understanding directly from Randy  
10 Gross?

11 A I do not recall.

12 Q So we're clear, you don't recall having  
13 any direct conversations with Bankers Leasing or  
14 Randy Gross concerning your understanding that it  
15 was an unrestricted line of credit?

16 A I do not recall.

17 Q I take it by virtue of what you  
18 testified to, your understanding was that this was  
19 an unrestricted line of credit, that you must have  
20 confirmed that understanding in writing to Bankers  
21 Leasing?

22 A I do not recall. Well, let me correct  
23 myself. I can state that I never confirmed that  
24 in writing with Bankers Leasing.

25 Q You never confirmed your understanding?



1 Liebman

2 A To the best of my knowledge, I never  
3 confirmed that in writing.

4 Q But isn't it the general nature of  
5 Government work, as far as you're concerned, to  
6 confirm things like this in writing?

7 A Yes, it is.

8 Q If you did write to Bankers Leasing  
9 about what you understood it to be, an  
10 unrestricted line of credit, you, in the ordinary  
11 course of things, would have stated that you  
12 understood it to be an unrestricted line of  
13 credit?

14 A It is possible.

15 Q But isn't it fair to conclude that if  
16 that was your understanding and if you did write  
17 Bankers Leasing a letter concerning that line of  
18 credit that you would have stated it was, to your  
19 understanding, an unrestricted line of credit?

20 MRS. EPSTEIN: Objection to the  
21 hypothetical nature of the question.

22 MR. MEDEIROS: The witness has stated  
23 that he did not write a letter.

24 THE WITNESS: Can I offer an  
25 explanation?

Liebman

Q Again, answer the question if you can.

A I definitely did not write a letter to Bankers Leasing because I was not involved with the setting up of the line of credit, Mr. William Stokes was the representative from our office, he was communicating with Bankers Leasing during the set up of the line of credit. I received my information secondhand mainly from Bill Stokes. I did not have, to the best of my knowledge, any discussions with Bankers Leasing, I don't recall any discussions with Bankers Leasing on setting up the line of credit, and I believe I did not send any letter. If a letter was sent, it was probably sent by William Stokes, if anybody would, from my office.

Q Do you recall writing a letter to Henry Thomas concerning what you understood to be an unrestricted line of credit?

A I do not recall. It's possible, but I do not recall.

MR. MACGILL: Would you mark that as Exhibit 299, please.

(Whereupon, the item referred to above, Letter dated 2-15-85, was marked as Plaintiffs

1 Liebman

2 Exhibit 299 for Identification, as of this date.)

3 Q Sir, I'd like you to tell us at this  
4 time only what this exhibit is in terms of is that  
5 a letter that you wrote to Henry Thomas?

6 A Yes.

7 Q Is that a letter you wrote February 15,  
8 1985?

9 A Yes, it is.

10 Q Did you write that in the ordinary  
11 course of your responsibilities as an  
12 administrative contract officer?

13 A Yes, I did.

14 Q Sir, you were telling Mr. Thomas by  
15 virtue of this letter some things about this line  
16 of credit, weren't you, sir?

17 A Yes, I was.

18 Q At no time in that letter did you  
19 specify or indicate that it was a Government  
20 requirement that the line of credit be  
21 "unrestricted?"

22 A That is correct.

23 Q Do you recall shortly after that time,  
24 don't you, sir, that Maury Gross wrote you a  
25 letter on March 25, 1985 concerning the financing

1 Liebman

2 that Bankers Leasing was willing to provide to  
3 Freedom?

4 A I do not recall.

5 MR. MACGILL: Mark this, please.

6 (Whereupon, the item referred to above,  
7 Letter dated 3-25-85, was marked as Plaintiffs  
8 Exhibit 300 for Identification, as of this date.)

9 Q Sir, I'll hand you Exhibit 300, is that  
10 a letter that you received from Maury Gross dated  
11 March 25, 1985?

12 A Apparently it is, yes.

13 Q There are some highlights on that  
14 letter, aren't there, sir?

15 A Yes, there are.

16 Q And those, in fact, are your highlights,  
17 aren't they?

18 A I cannot confirm that.

19 Q Can we go to your files which are on the  
20 floor so we can confirm those are your highlights  
21 on that letter, can we do that, sir?

22 A I have no objection.

23 Q Sir, if you took a minute to read that  
24 letter carefully and reflect back on its contents,  
25 would that refresh your memory perhaps on whether

1 Liebman

2 those are your highlights on the letter which is  
3 Exhibit 300?

4 A It's possible, but normally when I  
5 highlight something I underline. I don't use the  
6 yellow highlight. I don't strike out a whole  
7 sentence word by word, I underline.

8 Q Rather than going along, sir, right now  
9 through your record, you at least concede that  
10 it's certainly possible that it was your  
11 highlights?

12 A It's possible.

13 MR. MEDEIROS: You just stated that's  
14 not the way you highlight.

15 THE WITNESS: Normally I underline using  
16 as Magic Marker. It's possible, but it's not the  
17 normal way that I highlight something.

18 Q Since there is some dispute let's search  
19 the file.

20 MRS. EPSTEIN: How is that going to tell  
21 us anything, Mr. MacGill?

22 MR. MACGILL: Shush, shush, shush.

23 MRS. EPSTEIN: Mr. MacGill, don't shush,  
24 shush, shush me, please. How is his looking going  
25 nto tell you any more of whether he highlighted it

1 Liebman

2 or not?

3 MR. MACGILL: That letter is in his  
4 files.

5 MRS. EPSTEIN: Do you hear me, Mr.  
6 MacGill? I'll tell you what we'll do, you'll  
7 finish the cross, I don't know, maybe you can keep  
8 moving this way.

9 Q Sir, let's go back to Exhibit 300. You  
10 knew, didn't you, sir, on March 25, 1985, based on  
11 what Maury Gross told you directly, that the  
12 financing that Bankers Leasing was going to  
13 provide was going to have conditions, didn't you  
14 sir?

15 A I did not know that.

16 Q Well, he told you by his own person in a  
17 letter that you admitted receiving that the  
18 financing would be given "subject to the  
19 acknowledgement of the Government by the  
20 performance by H.T. Food Products," that's what he  
21 told you, isn't it, sir?

22 A That's correct.

23 Q And that meant to you, didn't it, that,  
24 in fact, this was not an unrestricted method of  
25 financing by Bankers Leasing?

1 Liebman

2 A I cannot say I understood that to be the  
3 interpretation at the time that I read the letter.  
4 Upon reflection now, I can see that it is  
5 conceivable to draw that conclusion, but at the  
6 time my understanding of the line of credit was  
7 that it was always to be unrestricted.

8 Q You're saying your understanding was  
9 that?

10 A At the time. Again, that was my  
11 understanding of the nature of the financing  
12 arrangement with Bankers Leasing, that it would be  
13 an unrestricted line of credit. Upon closer look,  
14 now I can see where you can draw a conclusion that  
15 there would be some restrictions, but at the time  
16 it was always my understanding that it was an  
17 unrestricted line of credit, but I can see where  
18 you can draw reference from this.

19 Q Sir, there were other officials in the  
20 Government that also came to the conclusion that  
21 Bankers' financing of Freedom was only an accounts  
22 receivable memorandum of financing, isn't that  
23 true?

24 MRS. EPSTEIN: Objection. How can he  
25 testify as to what other people came to the

Liebman

conclusion of, unnamed other people?

MR. MACGILL: That's a fair objection.

Q Sir, you would agree that you were told by other Government officials that, in fact, they understood that it was an accounts receivable financing arrangement that Bankers had entered into with Freedom?

MRS. EPSTEIN: Objection, hearsay.

But go ahead and answer over the objection.

MR. MEDEIROS: Could you refine your question as to a given point in time? We seem to be staggering from several years back to the present.

Now, Mr. Liebman's view of this has apparently changed or he's acquired subsequent knowledge, but at what point in time is your question directed at? At the time of this here or now or --

Q Sir, in the same period of time, February, March 1985, you know that other people in the Government had been told that Bankers was only going to agree to an accounts receivable financing arrangement with Freedom?



1 Liebman

2 MRS. EPSTEIN: Objection. I think it's  
3 double or triple hearsay at this point time.

4 MR. MEDEIROS: You can answer yes or  
5 no.

6 A To my knowledge, at least during  
7 February 1985, it was my understanding from --  
8 would be an unrestricted line of credit.  
9 Subsequently, later down the road, it didn't turn  
10 out to be the case, you know, advances from  
11 Bankers Leasing was tied into progress payments,  
12 but it was my understanding initially that it  
13 would be an unrestricted line of credit. If I had  
14 the wrong interpretation, it would be something  
15 else.

16 Q The course of dealings that, in fact,  
17 followed March 1985 confirmed to you, didn't it,  
18 sir, that Bankers Leasing was doing an accounts  
19 receivable for Freedom only?

20 A That's correct, but when that  
21 confirmation occurred, I just do not recall, it  
22 was down the road. It could have been in '85, it  
23 could have been in '86, but it did occur  
24 subsequent to formalization of the financing  
25 arrangements, I just don't recall what month, what

Liebman

year.

Q So you clearly understood at some point after you received the March 25, 1985 letter from Maury Gross, in fact, bankers was providing financing an account receivable basis only?

A Absolutely.

MR. MACGILL: Would you mark this as Exhibit 301, please.

(Whereupon, the item referred to above, Correspondence coordination record, was marked as Plaintiffs Exhibit 301 for Identification, as of this date.)

Q Sir, I put in front of you what the reporter has marked as Exhibit 301, and I'll ask you if reviewing this document, and in particular reviewing the portion of the document which states "comprehensive of facts sheet" at the top, refresh your recollection concerning the agreement to do accounts receivable financing only?

A Can I turn --

Q You certainly may. I just want to show you the reference I was particularly interested in.

A Again.

Liebman

Q Is that the first time you've seen that document?

A This is the first time I've seen this document.

Q Does reviewing that document, Mr. Liebman, remind you about anybody telling you at the time that this was going to be an accounts receivable financing arrangement?

A No, it doesn't, sir.

MR. MACGILL: Mark this, please.

(Whereupon, the item referred to above, Letter dated 11-3-86, was marked as Plaintiffs Exhibit 302 for Identification, as of this date.)

Q Sir, I hand you Exhibit 302 and ask you if that is a document that you remember receiving from Randy Gross (handing)?

A I do not recall receiving it.

Q Sir, could you take a second to look at this letter and see if that refreshes your memory?

See if your reading of that letter refreshes your memory and tell me whether you received a copy of that?

MR. MEDEIROS: A yes or no answer is what is called for.

Liebman

A I don't recall receiving the letter.

MR. MEDEIROS: You received it or --

THE WITNESS: I don't recall.

Q Do you have your correspondence file here with you, sir?

A We have some of them.

Q Can you pull your correspondence file out for November 3, 1886.

A Yes, it's probably in the latter files.

Q Sir, have you had a chance to look through your file dated November 5, 1986?

A Yes, I have.

Q Is that correspondence file in chronological order?

A Not completely.

Q Did you find the November 5, 1986 letter in that file?

A I did not.

Q Could this be a letter that you would have put in the progress payment file?

A It's possible, yes.

Q Do you have that progress payment file with you, sir?

A No, we do not.

Liebman

1  
2 Q Let me ask you a question about this  
3 letter. Rather than ask you about the letter, let  
4 me ask you about your recollection in general. Do  
5 you remember reviewing the origination commitment  
6 letter issued by Bankers Leasing on February 28,  
7 1985?

8 A I do not recall.

9 Q You don't recall looking at that at any  
10 time?

11 A No, sir. Can I offer an explanation?

12 MR. MEDEIROS: No.

13 THE WITNESS: Okay.

14 Q Sir, you've talked about various of your  
15 discussions in relation to the Freedom MRE V  
16 contract in your direct examination by Mrs.  
17 Epstein. Do you recall that testimony?

18 A I'm not sure what testimony you're  
19 referring to.

20 Q Do you recall that testimony about  
21 various discussions you had in relation to the MRE  
22 V contract that you gave on direct?

23 A Yes.

24 Q You indicated that, as part of your  
25 discussions, making progress on certain of the

Liebman

issues that came up that you would consult with counsel, do you recall that?

A That's correct.

Q Do you recall consulting with a lawyer by the name of?

A Yes.

Q Is Mr. Herringer a person you respect?

A Yes.

Q And he was a lawyer, I take it, from what you explained?

A Yes.

Q And you sought him as counsel because you respected his opinion?

A Yes.

Q Did you talk to a lawyer by the name of Montefinise?

A Yes.

Q Sir, do you recall what issue you consulted with Mr. Herringer on?

A On many issues involving Freedom.

Q Do you recall discussing or consulting with Mr. Herringer in December of 1984 on the subject of how certain costs would be treated under the Freedom MREV contract?

Liebman

A Yes.

MR. MACGILL: Would you mark this our next Exhibit.

(Whereupon, the item referred to above, Letter dated 12-26-84, was marked as Plaintiffs Exhibit 303 for Identification, as of this date.)

Q Sir, I'll hand you what the reporter marked as Exhibit 303. Can you tell us what that is (handing)?

A This is a legal opinion that I had requested from the DCASR New York office of counsel concerning payment of progress payments for indirect costs.

Q And I take it that's something you received in the ordinary course of your employ?

A Yes, I recall receiving this.

Q Sir, did you agree with the opinion given to you by Mr. Herringer?

A At the time I was not sure and I had requested that the matter be referred to DLA headquarters because I was getting conflicting opinions from my financial experts, both within my agency and outside my agency.

Q As of December 1984, is it fair to say

Liebman

1  
2 that you didn't agree to act in accordance with  
3 the advice given here on Exhibit 303?

4 A No, I was not sure. I did not know  
5 which way to act or what decision to make in this  
6 matter. Legal was just one party -- my legal  
7 office was just one party providing me advice and  
8 I was -- didn't know if legal was correct at that  
9 time.

10 Q As of December 1984, had you personally  
11 come to the conclusion that it was required that  
12 there be actually physical progress on the Freedom  
13 MRE V contract in order for a progress payment to  
14 be valid?

15 A No, I had received no conclusion. As I  
16 said, I was getting advice from various sources.  
17 As I said yesterday, our chief of financial  
18 services, Mr. Wrubel, said don't pay. My legal  
19 department said pay. Again, I was getting advice  
20 from other sources and because of the sensitivity  
21 and nature of this particular progress payment  
22 request. I requested that we get guidance from  
23 our headquarters in Cameron.

24 Q December 1984 legal, as you said, said  
25 pay. How long did it take for you to pay in



Liebman

accordance at least with what Mr. Herringer advised on December 26, 1984?

A Legal was recommending payment, however, I have to answer your question with an explanation.

Q Can you just tell us initially how long it took to pay in accordance with what Mr. Herringer advised on December 26, '84?

MR. MEDEIROS: I believe Mr. Herringer had not advised Mr. Liebman to pay, he offered a legal opinion as to his opinion whether these were payable under the progress payment clause. He did not advise or recommend that Mr. Liebman pay. I think Mr. Liebman stated that several times.

MR. KRAHULIK: I think the witness stated, however, that legal said pay, that's a matter of record. I don't want to argue about what you said before. The record is what the record is.

Q How long did it take after December 26, 1984 for you to remit payment to Freedom in relation to the progress payment that was issued in December 1984 which was the subject of the Herringer memo dated December 26, 1984?

Liebman

1  
2 A Before I respond, could I offer an  
3 explanation, because if I just gave you a date it  
4 would not give justice to, you know, any answer I  
5 might give and it might be misleading?

6 Q Can you tell us first the date, sir, and  
7 then we'll allow you to explain thereafter?

8 A I paid the first progress payment  
9 request in May 1985.

10 Q I'm sorry, May what?

11 A Early May 1985.

12 Q I take it then, based on what you said  
13 just a second ago, that there were quite a few  
14 different types of inquiries you made after you  
15 got the Herringer morandum?

16 A That's correct. Before I got the memo  
17 as well as after I received the memo, that's  
18 correct.

19 Q Did you get the legal opinion from Mr.  
20 Herringer in the time which intervened between  
21 December 26, 1984 and May 1985?

22 A I received a verbal opinion. I do not  
23 know -- I do not recall -- several other written  
24 opinions, but there was definitely verbal opinions  
25 both from Mr. Herringer as well as other legal

Liebman

representatives.

Q And Mr. Herringer did not recant or change what he had written to you in any substantial way as of December 26, 1984?

A Pertaining to the issue of direct and indirect costs, no.

Q Do you recall Mr. Herringer telling you in December of 1984 that, in fact, the contract with Freedom was negotiated by DPSC provided that all costs incurred by the contractor, which would ordinarily be indirect costs, are to be treated as direct costs?

A Yes, I do.

Q Did that persuade you as to how you ought to handle the issue of progress payment requests provided Freedom --

A No, because, as I stated previously, I was getting conflicting advice, DCAA said do not pay, financial services said do not pay, other personnel within my office, command and managerial types, recommended do not pay. Legal said pay. Again, I was not sure and I felt -- I tried to refer the matter to higher authority.

Q Wasn't it made unmistakably clear to you

1 Liebman

2 in December 1984 by Mr. Herringer that to pay in  
3 the manner suggested by Mr. Herringer it would not  
4 have violated DAR principals of direct?

5 A That's correct.

6 Q You also in the 1985 period of time  
7 talked to Mr. Montefinise, the other lawyer that  
8 you described, do you recall that, sir?

9 A That's correct.

10 Q Didn't you also talk to him about what  
11 should be treated as direct expenses?

12 A I do not recall. I spoke to Mr.  
13 Montefinise during 1985 on other issues, I do not  
14 recall speaking to him on this particular issue.

15 Q Let me go back, just if I could a  
16 minute, to the period of time in the winter of  
17 1985 when you were totaling the payment of  
18 progress payment number one. Did you understand  
19 at that time that that was having some financial  
20 effect on Freedom?

21 A Absolutely.

22 MR. MACGILL: Let's go ahead and mark  
23 that as Exhibit 304.

24 THE WITNESS: But will I be given a  
25 chance to explain the thought that I gave you?

1 Liebman

2 MRS. EPSTEIN: Why don't you, you asked  
3 three times to explain it.

4 MR. MACGILL: Let's get the exhibit  
5 marked.

6 (Whereupon, the item referred to above,  
7 Letter dated 7-15-85, was marked as Plaintiffs  
8 Exhibit 304 for Identification, as of this date.)

9 Q You've indicated that you want to make  
10 some kind of explanation, please do.

11 A Thank you. Around the December of 1984  
12 time period, whether before the Herringer letter  
13 or subsequent to the Herringer letter, a new issue  
14 arose. The main issue that was the falling  
15 through, or evaporation of the Dollar Dry Dock  
16 line of credit, that changed, the whole picture,  
17 that changed, the whole predominant issue. After  
18 each evaluation -- considerable evaluation by  
19 parties at various agency levels, I made a  
20 determination to suspend progress payment to  
21 consider -- to suspend progress payment. A board  
22 of review within my agency, within DCASMA New  
23 York, was present. At the board meeting was Mr.  
24 Herringer and his boss, Mr. Marcotulio, I believe,  
25 he was the counsel Mr. Herringer, was deputy

1 Liebman

2 counsel. I believe they were both present at the  
3 board of review meeting, and they both supported  
4 my decision to consider suspending progress  
5 payment.

6 MR. MACGILL: Move to strike your  
7 conversation as hearsay.

8 You're not here to testify as to what  
9 other people told you. As far as I'm concerned, I  
10 need to make that record.

11 Q This is the February meeting you  
12 testified to in direct yesterday?

13 A No, that's not correct.

14 Q You do recall your testimony yesterday  
15 where you had described to Mrs. Epstein the  
16 meeting that took place in February 1985?

17 A Let me clarify.

18 Q Yes.

19 A I have to explain. I can't say yes or  
20 no, I have to explain my answer.

21 Q But let me ask you, isn't it a fact that  
22 in February 1985 the Government was provided with  
23 a letter of commitment, as you've characterized  
24 it, from Bankers Leasing?

25 A No, they never received a letter of

1 Liebman

2 commitment from Bankers Leasing in February 1985.  
3 We received a letter in either January, maybe  
4 February 1985, from Bankers Leasing stating that  
5 the reason they did not honor their commitment  
6 regarding the letter of credit was because it had  
7 changed since --

8 MR. MEDEIROS: I think the witness is  
9 confusing the facts.

10 A Oh, Bankers Leasing -- I'm sorry.

11 Q I'm not referring to Dollar Dry Dock.  
12 Bankers Leasing did provide you with a letter of  
13 commitment in February 1985?

14 A That's correct.

15 Q And again, I'm using the word  
16 commitment?

17 A That's correct.

18 Q You had that letter, however you  
19 characterized it, in February 1985?

20 A Would you repeat the question.

21 Q You had that letter in February 1985  
22 from Bankers Leasing?

23 A That's correct.

24 Q And it still took three months to honor  
25 progress payment number one?

1 Liebman

2 A That is correct. Can you tell me the  
3 date of the letter again, the Bankers Leasing  
4 letter.

5 Q February 28, 1985?

6 A Two months, one week.

7 Q You also went to Mr. Montefinise June  
8 12, 1985 with a letter of your own asking how to  
9 treat certain costs incurred in connection with  
10 equipment, didn't you, sir?

11 A Before I answer that I'm not being given  
12 a chance to answer or explain my previous, you  
13 know, date that I gave you. I think we're going  
14 to another issue.

15 Q You'll be given an opportunity if Mrs.  
16 Epstein wants to ask you that in re-direct.

17 MR. MEDEIROS: The witness was answering  
18 the previous question and he has the opportunity,  
19 you cut him off. You either give him the  
20 opportunity now --

21 MC. MACGILL: As far as I'm concerned,  
22 he answered my question.

23 MR. MEDEIROS: He's not finished.

24 MR. MACGILL: He answered my question.  
25 If you're going to insist that he bout a monolog



1 Liebman  
2 on the record, you can insist that.

3 MR. MEDEIROS: He said he wanted to give  
4 you an explanation of that date, you did not allow  
5 him to explain that date.

6 MRS. EPSTEIN: Please allow him to  
7 explain that date.

8 MR. MEDEIROS: We have nothing to hide.

9 MRS. EPSTEIN: That's what we want as I  
10 hope you want.

11 MR. MACGILL: I'm trying to make things  
12 very clear to you. You don't listen sometimes.  
13 If you have an objection to make, make them.

14 As I said, if you need to scold me, you  
15 can do that outside of the record. Just make your  
16 objections and be quiet, otherwise --

17 MRS. EPSTEIN: I join in Mr. Medeiros'  
18 request, that Mr. Liebman be required to give the  
19 full answer, you cut off his answer. I join his  
20 request, if he wishes to explain. We're not  
21 afraid of the truth, we want it to come out. We  
22 don't want a structured testimony that keeps facts  
23 out.

24 MR. MACGILL: I think it's disruptive of  
25 the proceeding. I have no choice, given your

1 Liebman  
2 lawyer's request, that you make a statement on the  
3 record. I'm not agreeing to honor his request.

4 THE WITNESS: Can I proceed?

5 MRS. EPSTEIN: Yes.

6 A The Carl Herringer 1984 opinion really  
7 was a move in academic because a new more  
8 important issue evolved, that is the withdrawl of  
9 the Dollar Dry Dock commitment letter for a  
10 \$7,000,000 line of credit.

11 MRS. EPSTEIN: Let the record reflect  
12 that Mr. MacGill has walked out of the room in  
13 which the deposition is being held while Mr.  
14 Liebman was giving his explanation?

15 A Subsequent to learning that Dollar Dry  
16 Dock's line of credit had evaporated, an intensive  
17 review of the entire matter, the matter being  
18 Freedom's financing, was conducted by various  
19 Government, you know, sources from within my  
20 agency and outside my agency which included  
21 contact in writing and verbally with Dollar Dry  
22 Dock, Mr. Noel Siegert I believe.

23 Upon an intensive review and discussions  
24 with Freedom, I, as contract officer, made a  
25 decision to consider suspending progress payments.

1 Liebman

2 I called an emergency meeting up in DCASMA New  
3 York for a board of review. At the meeting were  
4 Mr. Marcotulio, the DCASR counsel, and Mr.  
5 Herringer, his deputy. The meeting was well  
6 documented and subsequently I sent Freedom a  
7 letter. I was advising them I was considering  
8 suspending Freedom's progress payments and he had  
9 ten days to reply.

10 A reply was received and there were  
11 further discussions and I made the final  
12 decision-- strike out the words final decision. I  
13 made the decision to formally suspend progress  
14 payments. Before I carried out the decision, I  
15 reconvened the DCASMA New York board of review, it  
16 was early either February 1985 or late January  
17 1985. Present at the board of review, to the best  
18 of my knowledge, were Mr. Marcotulio and Mr.  
19 Herringer. We had legal present, whether it was  
20 one or both, but we had legal present. There were  
21 minutes of the meeting, there is an attendance  
22 list.

23 The board, with one exception, voted  
24 that they support me in my suspension of Freedom's  
25 progress payment because of an unsatisfactory

Liebman

financial condition that was endangering performance of Freedom's contract, it had nothing to do with the indirect costs versus direct costs type of issue.

Approximately one week after my suspension letter, a major meeting was convened at DLA headquarters in Washington or Camerson Station, Virginia. There was a Government meeting on the 13th of February and a meeting with the contractor meeting Freedom on the 14th of February, and at that meeting Freedom was formally told by me that the indirect versus the direct cost issue was dead. We had agreed to reimburse these costs, reimburse Freedom for these costs, provided that Freedom demonstrate that it was a viable contractor from a financial standpoint. We set certain conditions which Freedom tried to -- or acquiesced to these conditions -- were a 3.8 million dollar line of credit that was to be established. Also, that the contractor would have to be novated to H.T. Food Products, Incorporated.

Again, the date of this meeting was the 14th. I confirmed the results of this meeting on the 15th of February in writing to Freedom. There

1 Liebman

2 is a letter in the file to that effect and I think  
3 that letter is one of our exhibits.

4 Obviously, it takes time to arrange for  
5 a line of credit and it takes time to effect a  
6 novation agreement. Freedom did not submit  
7 Government required documents concerning the  
8 novation agreement until around the middle of  
9 March of 1985. The documents Freedom submitted  
10 were erroneous. There were errors, corrections  
11 were required, pages were missing. We did not get  
12 a proper set of documents until sometime  
13 afterwards.

14 Finally, after receipt of the proper  
15 documents and appropriate review by numerous  
16 parties within the Government, I deemed Freedom a  
17 responsible contractor and I signed the novation  
18 agreement in mid April, I believe April 17, 1985,  
19 on behalf of the United States of America. I also  
20 signed a notice of assignment -- I'm sorry. I  
21 signed an acknowledgment of receipt of a notice of  
22 assignment which I assigned the proceeds under  
23 Freedom's contract to Bankers Leasing. I signed a  
24 modification in April 1985 synthesizing the  
25 novation agreement, all part of Government

Liebman

procedure.

I paid the first progress payment early May 1985. Again, the reasons for the delay from the Herringer opinion of indirect costs versus direct costs in 1984 -- December 1984 to May of '85. The time I paid the first progress payment was because of the financial issue. The need for Freedom to secure a line of credit, the need to effect the novation agreement. That is why there is a gap of about six or five months, the December '84 opinion to the May '85 date that I paid the first progress payment.

This adequately explains the sequence of events and why there was a time gap.

MR. MACGILL: Greg, is there anything you'd like to ask him to clarify anything he said?

MR. MEDEIROS: No.

MR. MACGILL: Edna, is there anything you'd like to add?

MRS. EPSTEIN: No, I think he explained why.

MR. MACGILL: Is there anything else conceivable, Mr. Liebman -- and now I'm talking about inviting you to this, that if you want to

1 Liebman

2 explain anything that you didn't explain in  
3 relation to the last question.

4 A Indirect to direct costs was decided at  
5 the February 14th meeting at DLA headquarters in  
6 Freedom's favor, that was no longer an issue, that  
7 was a dead issue.

8 Q And you said 2-14-86 is when that  
9 became an issue?

10 A '85.

11 Q I'm sorry. Yes, '85. Two weeks later  
12 you got Bankers' commitment as to what you  
13 characterized as a commitment.

14 A I have to see the letter again. There  
15 were several letters. I don't recall the date, I  
16 have to see the letter.

17 Again, can I explain?

18 MRS. EPSTEIN: There is no question.

19 Q We don't need to get into lengthy  
20 explanations on every answer, we'll be here until  
21 tomorrow.

22 Mr. Liebman, you do agree that between  
23 the time February 28, 1985 Freedom had no payment  
24 fore progress payment number one.

25 A That is correct.

1 Liebman

2 Q Later in that same year you went to Mr.  
3 Montefinise and asked him for a legal opinoin,  
4 didn't you, sir?

5 A Yes, I did.

6 Q What was the subject of any inquiry that  
7 you made of Mr. Montefinise?

8 A Again, I haven't seen the letter. If I  
9 recall correctly, we had several issues, but I  
10 remember Michael Montefinise was involved in the  
11 capital issue. We had several issues going, but I  
12 think the letter you were about to -- so those  
13 involved the capital equipment.

14 Q Tell us what the capital equipment  
15 involved?

16 A Can I see the letter?

17 Q I just want to test your recollection  
18 apart from the letter at this time.

19 A Again, I'm not sure, without seeing the  
20 letter, if that letter addresses or his opinion  
21 addresses that issue, but Michael was involved  
22 with several issues involving Freedom. One of  
23 which, if I recall correctly, was an issue of  
24 capital equipment. Again, I could be.

25 Q I understand you don't have the letter



1 Liebman

2 in front of you and that's perfectly clear.

3 A There were numerous letters from my  
4 office involved with Freedom's issue depending who  
5 was available at the time. Michael Montefinise  
6 was involved with several issues, I believe he was  
7 involved in the capital issue. I believe he was  
8 involved with an issue of Freedom's lease.

9 Q When you say "capital equipment issue,"  
10 are you referring to the manner in which certain  
11 "capital" costs would be treated in terms of  
12 progress payment?

13 A That is correct.

14 Q Aren't we talking about whether or not  
15 you as the ACO were going to authorize certain  
16 expenditures in the progress payment issue?

17 A This is not correct. I defined capital  
18 equipment cost for progress payment purposes  
19 because it violated the progress payment clause.

20 Q Of what?

21 A This is DAR because DAR 140.35B which is  
22 the progress payment clause, Freedom's contract.  
23 Specifically we did not pay progress payments for  
24 capital type costs unless these costs are  
25 depreciated. We cannot pay the full value, only

Liebman

pay for the cost. We did not pay the full value, it has to be depreciated.

Q And your position with respect to that DAR regulation was that Freedom would not be given payment for those capital items?

A Only if those items were depreciated. Let me correct that. For progress payment purposes only I would say pay them for depreciated value, depreciated value regarding the contract price, because apparently those items were part of the negotiation price. He would ultimately receive payment for these prices when he shipped the items on invoices submitted. He can get paid in the form of invoices when he shipped product.

His contract was not affected by my decision, only affected progress payments and -- but he would ultimately be reimbursed for capital type costs that were allowed by the PCO, procuring contracting officer. Although he did not receive progress payments for these items, he would ultimately be paid the full amount or the allowable allowed by the PCO when Freedom shipped its products and was paid by the Government.

Q Your conclusion was no deviation to that

1 Liebman

2 particular DAR regulation as you interpreted in  
3 this situatin?

4 A I could not grant him a deviation.  
5 However, Freedom did come in with a formal  
6 deviation request.

7 Q Mr. Montefinise did suggest to you,  
8 didn't he, that there were unusual circumstances  
9 in the Freedom case which may require a deviation  
10 from that DAR clause?

11 A I do not recall that statement, but  
12 subsequently -- ultimately in 198 -- it was either  
13 85 or 1986 it did come in with a deviation request  
14 to allow those costs.

15 Q What was that request?

16 A The request was processed through agency  
17 channels all the way to our headquarters in  
18 Washington.

19 Q With what result?

20 A I don't recall the ultimate result to be  
21 quite honest with you.

22 Q But you will agree that that request for  
23 a DAR deviation was pending for many many months?

24 A I do not recall. I cannot say in all  
25 honesty.

Liebman

Q Can you agree that in the summer of 1985, the early summer of 1985, it was suggested to you by Mr. Montefinise that there were circumstances in the Freedom case that a DAR deviation may be wise?

A I do not recall.

Q Do you recall discussing the expressed agreement made between the PCO in this case and Mr. Thomas in relation as to how certain capital costs are to be treated under the Freedom contract?

A Yes, I was furnished a copy of the PCO memorandum which reflected the costs. Adding to my statement concerning memorandum, in the PCO's file a copy, of which was furnished to me, the memorandum should be described as negotiation memorandum.

Q And, in fact, that negotiation memorandum confirmed to you personally that there had been an agreement between Freedom and the United States Government's PCO on how certain capital costs would be treated under the contract?

A Rather than agreement, I would rather describe it as the PCO allowing these type costs

1 Liebman

2 in negotiation of the contract price. I would  
3 rather describe it that way, they allowed for  
4 these type costs, he agreed on a price with  
5 Freedom.

6 Q In fact, that information was shared  
7 with Mr. Montefinise, correct?

8 A I cannot recall.

9 Q Would you agree that there was an  
10 agreement between the PCO and the contractor to  
11 treat certain capital equipment as direct cost to  
12 the contract?

13 MRS. EPSTEIN: Objection, asking him to  
14 define what two other parties agreed to in  
15 negotiations to which he was not a party or  
16 present.

17 Q As you administered this contract, you  
18 understood, didn't you, circumstances that there  
19 be an agreement between the PCO and Freedom to  
20 treat certain capital equipment as direct cost to  
21 the contract?

22 A That is correct.

23 Q You also knew, as you administered this  
24 contract in the years 1985 and 1986, that if  
25 Freedom were not allowed to treat certain capital

Liebman

equipment as direct cost under the contract that it may make Freedom unable to successfully perform the contract?

A I did not have that understanding.

Q Were you told that by Mr. Montefinise?

A I do not recall.

Q Did Mr. Montefinise ever warn you in any conversation that you had with him that if Freedom were not allowed to have certain capital equipment treated as direct cost under the contract that there might be a possible bankruptcy of Freedom?

A I do not recall.

Q I'll hand you what the reporter has marked as Exhibit 304, sir, and ask you what that is (handing)?

A This is a legal opinion dated 15th July 1985 from Mr. Michael Montefinise, DCASR assistant counsel, DCASR New York assistant counsel, to Marvin Liebman DCASMA New York ACO.

Q I take it that's something you requested from Mr. Montefinise?

A Yes, it is.

Q I take it you received that and reviewed that as part of your work as ACO on this contract?

1 Liebman

2 A Yes, I did.

3 MR. MACGILL: We'll offer it into  
4 evidence, Exhibit 304.

5 MRS. ESTEIN: No objection.

6 (Whereupon, the item referred to above,  
7 Letter dated 7-15-85, was deemed marked as  
8 Plaintiffs Exhibit 304 in Evidence as of this  
9 date.)

10 Q Did you agree with the opinions that Mr.  
11 Montefinise supplied you as a general matter in  
12 Exhibit 304?

13 A Before I comment, I must read the  
14 opinion.

15 Q Before we get into the details of the  
16 opinion, do you have any recollection as to, apart  
17 from that document, whether you agreed or  
18 disagreed?

19 A No, I do not recall the opinion. I do  
20 not remember the contents of his opinion. I would  
21 have to refresh my memory. I can't say yea or  
22 nay.

23 Q As you sit here today, you don't recall  
24 --

25 MR. MEDEIROS: The witness has stated

1 Liebman

2 that --

3 Q As you sit here today, you don't recall  
4 generally agreeing or generally disagreeing with  
5 what Mr. Montefinise wrote in that letter?

6 A Correct.

7 MRS. EPSTEIN: Objection. You phrased  
8 the question in as different way, he told you  
9 three times. Now, can you please get on with it?

10 A As I recall, I don't recall what Mr.  
11 Montefinise's opinion was on the record.

12 MRS. EPSTEIN: Can you let him read the  
13 opinion?

14 MR. MACGILL: I have a right to ask him  
15 his recollection apart from the letter.

16 MRS. EPSTEIN: He told you he dosen't  
17 remember.

18 Q Sir, apart from this specific opinion,  
19 do you have a recollection as to whether you  
20 agreed or disagreed?

21 MR. MEDEIROS: The witness said no a  
22 couple of times. If you keep badgering the  
23 witness I'll have to take him away.

24 MR. MACGILL: We have this whole thing  
25 written up as well as the prior stipulation.



1 Liebman

2 MRS. EPSTEIN: Will the record reflect  
3 it is now a quarter to 12 and Mr. Stokes has been  
4 waiting outside, from a request of Mr. MacGill's,  
5 since ten o'clock.

6 MR. MACGILL: Not my request.

7 MRS. EPSTEIN: My request noticed that  
8 we would take his deposition this morning, he's  
9 sitting waiting outside because of the request of  
10 Mr. MacGill.

11 Q You can answer the question.

12 A Yes. I just do not recall what Mr.  
13 Montefinise's position was on this particular  
14 matter.

15 Q I refer you to the last paragraph on  
16 page two and ask you whether you agree with that  
17 sentence?

18 MR. MEDIROS: I think the witness should  
19 have the opportunity to read the full opinion. I  
20 don't know that he can read a statement out of  
21 context and possibly make any full comment.

22 Q Go ahead and read the opinoin.

23 A Okay.

24 Q Sir, have you now had the chance to  
25 study the opinion which is Exhibit 304?

1 Liebman

2 A Yes.

3 Q With respect to Exhibit 304, sir, do you  
4 now remember whether or not you agreed or  
5 disagreed with what Mr. Montefinise wrote to you  
6 on July 15, 1985?

7 A I agreed that the proper way to address  
8 the capital equipment issue would be for Freedom  
9 -- would be for a DAR deviation request to be  
10 submitted. Only upon approval of such a DAR  
11 deviation request by appropriate authority could I  
12 pay full progress payments for the capital type.

13 Q Did you read the letter of Mr.  
14 Montefinise telling you that a DAR deviation  
15 request is?

16 A Absolutely.

17 Q Why do you use the word absolutely?

18 A I think it means stronger than yes  
19 without question.

20 Q Why do you say without question, did he  
21 tell you that in black and white terms, did he  
22 tell you that within expressed terms with his  
23 letter?

24 A With Mr. Montefinise?

25 Q Right.

1 Liebman

2 A No, it was my position that the only way  
3 I would pay progress payments for such capital  
4 equipment was if a DAR request was approved by a  
5 higher authority.

6 Q I just want to make sure that we're  
7 clear. Those were his words and not yours?

8 A Those were my interpretations and  
9 position on that entire matter.

10 Q Clearly not Mr. Montefinise's word to  
11 you in the July 15, 1985 letter?

12 A I would have to check the letter again  
13 to see. Well, Mr. Motefinise covers many areas,  
14 different possibilities, but one of his  
15 conclusions is that a DAR deviation request is  
16 required to pay full progress payments, or as he  
17 described it, to treat capital equipment as a  
18 direct cost for progress payment purposes. So in  
19 essence he may be explaining it a little  
20 differently, but he's including the same clause.

21 MRS. EPSTEIN: You're referring to page  
22 four of Exhibit 304 which says, does it not, that  
23 progress payments may only be made based on the  
24 depreciable portion of that equipment and to treat  
25 the costs otherwise would require a DAR

1 Liebman

2 deviation. Is that what you're referring to?

3 MR. KRAHULIK: I'd appreciate if you  
4 read the full sentence.

5 I believe that appropriately states that  
6 the equipment is capital equipment and no special  
7 classification is appropriate to permit treatment  
8 as a direct expense, that progress payments may  
9 only be made based on the depreciable portion of  
10 that equipment and to treat the costs otherwise  
11 would require a DAR.

12 THE WITNESS: Not only on that page,  
13 but that position is also reflected on several  
14 other pages of this document.

15 MR. MACGILL: There is no question  
16 pending before you.

17 I move to strike her question, it's not  
18 her turn.

19 Q Sir, he didn't write to you and tell you  
20 you must get a DAR deviation request in order to  
21 treat capital equipment as direct cost under the  
22 contract, did he, sir?

23 A I am not able to answer that question.  
24 In other words, I had asked for a legal opinion  
25 concerning the capital equipment issue, this was

1 Liebman

2 his reply to me. His reply basically did not tell  
3 me -- I was aware of the need for a DAR deviation  
4 before I had made the inquiry, so in that  
5 particular instance, it regarded this particular  
6 matter concerning the deviation. I was aware of  
7 it before I received Mr. Michael Montefinise's  
8 written opinion.

9 Q Did you ever treat capital costs in the  
10 manner suggested by Mr. Montefinise's letter dated  
11 July 15, 1985?

12 A I never paid any progress payment for  
13 capital type equipment. What was paid was an  
14 invoice for capital type equipment which was part  
15 of the overall settlement agreement that was  
16 incorporated in mod P00025 which, I believe, was  
17 issued in May of 1986, I think.

18 Q Other than that one time payment, sir,  
19 you never did pay on a progress payment basis any  
20 capital costs for equipment?

21 A That is correct, but I must state that I  
22 never paid the invoice, the invoice was submitted  
23 and paid pursuant to the modification which was  
24 authorized by the PCO, Mr. Frank Bancroft.

25 Q So Marvin Liebman never authorized the

1 Liebman

2 payment of any progress paymenet through any other  
3 means?

4 A That is correct.

5 Q After you got Mr. Montefinise's letter  
6 of July 15, 1985, did you call Henry Thomas and  
7 tell him what he ought to do is prepare a formal  
8 DAR deviation?

9 A Freedom was informed, I do not recall if  
10 I informed Mr. Henry Thomas or another  
11 representative, but there was a communication to  
12 Freedom and they knew that this was the route that  
13 they had to follow.

14 Q I want to refer you to the first page of  
15 the letter and read to you this portion, "based  
16 upon the material submitted, discussions with  
17 Charles Wright of DPSC's Office of Counsel and the  
18 applicable laws and regulations, it is the opinoin  
19 of this office that to the extend that said  
20 equipment is not ordinarily capitalized or falls  
21 under some other category which permits treatment  
22 as direct costs (i.e. specialized equipment  
23 obtained only for this contract) such equipment  
24 should be treated as a direct contract expense and  
25 progress payments may be made based on that

1 Liebman

2 equipment's total cost."

3 With respect to that statement, do you  
4 agree with that opinion?

5 A I'd have to read it again, I'm sorry.

6 That is correct. However, we were not  
7 dealing with special type or specialized  
8 equipment, these were capital type costs. Had  
9 they been classified as special type costs, then  
10 progress payment would have been allowable. This  
11 is my interpretation of Mr. Michael Montefinise's  
12 statement that's on page one of his memorandum.

13 Q It was you who determined that you were  
14 not dealing with "specialized equipment;" is that  
15 correct?

16 A No, that is not correct. The  
17 classification of the types of the equipment was  
18 determined by a technical representative from  
19 DCASMA New York who made a review of the terms at  
20 the contractor's plant.

21 Q Do you want to correct your prior  
22 answer, sir?

23 A Let me expand on that. I make decisions  
24 to pay or not to pay progress payments. My  
25 decisions are not based to any large extent on

1 Liebman

2 input I receive from functional specialists  
3 regarding the equipment issue. A review of the  
4 equipment was made by a technical specialist from  
5 DCASMA New York. The technical specialist from  
6 DCASMA New York confirmed that the costs in  
7 question were capital type costs for equipment,  
8 for building rehabilitation, et cetera. Based on  
9 this input from the technical representative, I  
10 made a determination that these costs could not be  
11 paid in full in the form of a progress payment or  
12 progress payments, that these type costs would  
13 have to be depreciated before I could pay progress  
14 payments.

15 Q There is no question, is there, sir,  
16 that Marvin Liebman made the determination  
17 ultimately of what constituted specialized  
18 equipment?

19 A I made the determination as to what was  
20 payable or not payable, the classification was the  
21 input concerning the classifications provided by  
22 the technical specialist.

23 Q And that input was analyzed and  
24 concluded upon by Marvin Liebman?

25 A That is correct.



1 Liebman

2 Q Sir, do you agree with the following  
3 statement, "it was understood by Freedom and the  
4 former PCO that the successful performance of the  
5 contract would require Freedom to have sufficient  
6 working capital for preproduction and production  
7 costs"?

8 A Could you, please, repeat the question.

9 MR. MACGILL: Please read it back.

10 (Whereupon, the requested portion of the  
11 record was read back by the reporter.)

12 A I do agree with the statement?

13 Q Yes.

14 A Yes, I agree with the statement. I do  
15 not know if the statement was made -- I cannot  
16 confirm that, but I agree that Freedom would --  
17 logically conclude that Freedom would need working  
18 capital.

19 Q You agreed with the statement read into  
20 the record?

21 A Yes.

22 Q Would you, treating the equipment as a  
23 direct cost to the contract, had permitted the  
24 contractor to receive progress payments based on  
25 the entire cost of this equipment rather than only

1 Liebman

2 on the depreciable portion of the equipment cost?

3 A Is it yes, do I agree with the  
4 statement?

5 Q Yes, only what you agree.

6 A Would you please repeat that, I'm sorry.

7 MRS. EPSTEIN: Why don't you let him  
8 look with you so you are reading the same  
9 document, Mr. MacGill? Don't be a stubborn mule.  
10 If you both look at the document together, maybe  
11 we don't have to have each question repeated and  
12 maybe we can focus on it more easily. If you are  
13 not going to look at the document together I ask  
14 that we stop so we can make a photocopy.

15 MR. MACGILL: Please read back the  
16 question.

17 MRS. EPSTEIN: Will you please write up  
18 this portion showing, once again, the refusal to  
19 accommodate me in this way.

20 (Whereupon, the requested portion of the  
21 record was read back by the reporter.)

22 A The statement is an erroneous statement.  
23 I'm not saying the statement was not made, I'm  
24 saying we cannot by law, by Federal Acquisition  
25 per the Defense Federal Acquisition Regulation,

Liebman

meaning specifically that the progress payment clause -- unless a DAR deviation was obtained, treatment of such costs for capital equipment costs as a direct cost is unallowable per the DAR. And the only way for progress payment purposes -- the only way I could have paid a progress payment for such type costs would be if a DAR deviation was approved. So, therefore, the statement, although the statement might have been made, I could not have paid progress payments without such a DAR deviation request.

Q Are you making that conclusion based on your understanding of the applicable regulations?

A The applicable Defense Acquisition Regulations, that is correct, the progress payment regulations.

Q Sir, I'm going to put in front of you now Exhibit 304, specifically paragraph number four, and I would like you to read the first sentence in the first numbered paragraph four on page two of that exhibit, and tell me only whether you agree or disagree with that sentence.

A The first sentence?

Q Yes, sir.

1 Liebman

2 A This I answered. My answer is that this  
3 is the approach that Freedom would have to take to  
4 be paid for these type costs, that a DAR deviation  
5 request would be the only means to enable me to  
6 pay progress payments.

7 Q Do you agree with the first portion of  
8 this, sir?

9 MR. MEDEIROS: Could the witness read  
10 aloud the statement so that we know what he's  
11 commenting on?

12 MRS. EPSTEIN: Yes, good idea.

13 Q Do you agree with the statement, the  
14 portion I'm pointing to (indicating)?

15 MR. MEDEIROS: Would you tell us the  
16 location, please?

17 MR. MACGILL: When I said "that  
18 statement," I'm referring back to the statement  
19 that I just referred him to.

20 MRS. EPSTEIN: First sentence, paragraph  
21 four.

22 MR. MACGILL: First sentence, paragraph  
23 four.

24 MR. MEDEIROS: Okay.

25 Q Sir, I'm referring to the statement you

1 Liebman

2 just read and I'm referring you to the first  
3 clause in that statement. Do you agree, as stated  
4 on that document in that statement, with the  
5 following words "the expressed agreement between  
6 the former PCO (the Government's duly authorized  
7 representative) and the contractor to treat this  
8 equipment as direct costs to the contract."

9 Do you agree that there was such an  
10 expressed agreement between the PCO and Freedom?

11 A Such an agreement for contract price,  
12 not progress payments, was reflected in the PCO's  
13 negotiation memorandum, a copy of which was  
14 furnished to me.

15 MR. MEDEIROS: Could I interrput. Could  
16 we stop having comments on the witness'  
17 testimony?

18 MR. MACGILL: I'm not commenting.

19 MR. MEDEIROS: There are people that are  
20 comenting.

21 MR. KRAHULIK: I think there are times  
22 when -- we'll try and cool it.

23 MR. MEDEIROS: I don't object to a  
24 question, but when people are uttering remarks  
25 during his testimony I have a problem.

1 Liebman

2 MR. KRAHULIK: If you have a problem,  
3 let me respond, if I may. There may be times when  
4 I comment, I apologize.

5 MR. MEDEIROS: I've heard several. I  
6 want it on the record that I --

7 MR. KRAHULIK: I heard one comment down  
8 here and we'll try not to comment on the  
9 testimony. At times it's difficult, so we'll try.

10 MRS. EPSTEIN: In terms of the nature of  
11 your question, the sentence you're asking him to  
12 comment upon is a very long one consisting of --  
13 if I'm counting correctly -- twelve lines. To  
14 take one clause of that sentence and ask him to  
15 agree or disagree and to leave out in your  
16 question the conclusion that you've been asking  
17 him about and asking him about when he's told you  
18 namely the conclusion of that sentence, "this  
19 office recommended a DAR deviation to permit  
20 implementation of the agreement to treat all the  
21 equipment in question as a direct cost to the  
22 contract for progress payment purposes" is  
23 misleading.

24 You have suggested, in the course of  
25 your questioning, that that was not the

1 Liebman

2 recommendation of Mr. Montefinise, that in some  
3 way Mr. Liebman failed to follow Mr. Montefinise's  
4 recommendation. Now you're asking him about this  
5 15 line sentence and not reading it in context,  
6 not reading the whole thing, and saying do you  
7 agree with the first clause and I don't think  
8 that's fair.

9 MR. MACGILL: If you have an objection,  
10 make the objection that it's misleading. All you  
11 need to say is it's misleading and you made your  
12 record. For you to coach the witness is  
13 completely inappropriate.

14 MR. MEDEIROS: I, as the witness'  
15 counsel, ask that that sentence be read into the  
16 record so the witness knows what he's commenting  
17 on.

18 Q Mr. Liebman, let's forget about this  
19 document and all the bickering that's going on.

20 Would you agree with the fact that there  
21 was an expressed agreement between the former PCO,  
22 the contractor and Freedom to treat its equipment  
23 as direct cost to the contract?

24 MRS. EPSTEIN: You are asking him to  
25 imply, Mr. MacGill, as to what two other

1 Liebman

2 individuals did or did not agree to. He was not  
3 present at those negotiations. I think it's an  
4 unfair question that this witness cannot possibly  
5 answer. You're also asking this witness for a  
6 legal opinion.

7 Q Let's have you answer the question,  
8 sir.

9 A Yes. Again, I'm basing this response on  
10 a copy of the PCO's negotiation memorandum that  
11 was furnished to me, I believe, during the 1984 to  
12 1985 time period which contained certain capital  
13 type costs for certain equipment and building  
14 rehabilitation. And, of course, those costs are  
15 spelled out -- or the specifics concerning those  
16 costs -- are in the memorandum that the PCO  
17 allowed in the negotiation of the contract price.

18 There is nothing in writing or nothing  
19 contained in the memorandum concerning any  
20 commitment or promise on the part of the PCO to  
21 allow progress payments for these type costs, it  
22 was only an accounting of his negotiated price and  
23 the elements that comprised this price, this final  
24 price of \$17,000,000, which included this type  
25 cost. I'm basing my response on that.



1 Liebman

2 Q Based on your review of that memorandum,  
3 is it inaccurate to say there was an expressed  
4 agreement between the former PCO and Freedom to  
5 treat this equipment as direct cost of the  
6 contract?

7 A I don't know if there was a -- I cannot  
8 confirm or deny if the PCO agreed during the  
9 negotiation session, you know, during verbal  
10 discourse during the negotiation that he was  
11 allowing those costs. All I can confirm is that  
12 the PCO has allowed for this in his price. I  
13 don't know if these matters were discussed during  
14 the negotiation sessions because I wasn't present  
15 or he made a verbal comment or expressed that he  
16 was allowing these costs in the final negotiation  
17 price.

18 Q So you personally don't know if that  
19 former PCO made an expressed verbal commitment to  
20 be advanced into the progress payment?

21 A I don't know if he made a verbal  
22 agreement. I emphasize again, that he has allowed  
23 for these costs, certain type of equipment costs,  
24 building rehabilitation costs, in his negotiated  
25 memorandum. I don't know if individual items or

1 Liebman

2 elements or items of equipment or elements of cost  
3 were discussed at the session.

4 Q Do you agree with Mr. Montefinise's  
5 words that there were "valid business reasons  
6 behind the agreement" concerning the equipment in  
7 treating them as direct cost to the contract?

8 MR. MEDEIROS: That calls for an  
9 opinion. Mr. Liebman has stated he has no factual  
10 knowledge of what happened in the negotiations.  
11 He's here as a factual witness, not to offer  
12 opinions.

13 MR. MACGILL: I'm not asking him for an  
14 opinion, I'm just asking if he agrees.

15 Read the question back.

16 MR. MEDEIROS: I stated that he has  
17 stated that he was not involved in the  
18 negotiations, how should he know what the purpose  
19 of the agreement was, it's only an opinion?

20 MR. MACGILL: Let's read it back.

21 MRS. EPSTEIN: I will object to asking  
22 this witness also for legal opinions, he wasn't  
23 there. You are trying to get testimony from him  
24 that --

25 MR. MACGILL: Just make your objection,

1 Liebman

2 Edna, You're not here to coach him.

3 MRS. EPSTEIN: Object to the form of the  
4 question, object to asking for legal opinions,  
5 object to asking him to agree or disagree to what  
6 two other parties agreed to.

7 (Whereupon, the requested portion of the  
8 record was read back by the reporter.)

9 A I'm not in the position to say whether I  
10 agreed or that I disagreed with that particular  
11 opinion.

12 Q You're not in the position because you  
13 don't understand the business reasons that existed  
14 for the apparent agreement between the PCO and  
15 Freedom?

16 A I understand that there was -- that  
17 those costs were allowed, certain type costs,  
18 equipment, building rehabilitation, et cetera, was  
19 allowed by the PCO when he negotiated the contract  
20 price. Any further explanation would be strictly  
21 hearsay and just be a supposition on my part.

22 Q You understood, Mr. Liebman, that the  
23 advancement of capital costs to Freedom in  
24 progress payments would dramatically help  
25 Freedom's cash flow?

Liebman

A One can draw a logical conclusion.

Q I'm asking what you personally understood, you understood that?

A I do not know if -- I never formed that conception or ever gave it any thought at the time, but at this table at this particular moment, one can draw a logical conclusion. Obviously if we did pay the full cost it would benefit Freedom's position, but I cannot say if -- the thought process entered into my mind at the time, the costs were just unallowable. I could not pay because the progress payments prohibited paying for the full value of capital equipment costs.

Q But there was no question in your own mind, Mr. Liebman, when you received Mr. Montefinise's letter that he had, in fact, recommended a DAR deviation?

A That is correct.

Q And I take it then that with everyone that you communicated with in the Government that you confirmed Mr. Montefinise's counsel to the Government had recommended that DAR deviation?

A That would be correct. I do not recall specific individuals or parties that I might have

1 Liebman

2 spoken to, but that would be a logical conclusion,  
3 yes.

4 Q I'm not asking you to make a conclusion,  
5 I'm just telling you I would like you to represent  
6 to us one way or the other whether you did tell  
7 other people in the Government that, in fact, Mr.  
8 Montefinise had recommended a DAR deviation?

9 A I believe there were individuals, that  
10 is correct. I recall several individuals within  
11 my agency that would have known of Mr.  
12 Montefinise's recommendation because when we  
13 process the DAR deviation request it had to go  
14 through various channels within DCASMA and DCASR  
15 New York.

16 Q Sir, you never wrote any letters to  
17 anybody where you confirmed that Mr. Montefinise  
18 had recommended that DAR deviation concerning  
19 these capital costs?

20 A Let me answer the question this way, I  
21 just do not recall any letters. It's conceivable,  
22 it is possible that when the package was processed  
23 -- the package meaning the DAR deviation package  
24 -- and it's conceivable that when it was processed  
25 through channels I might have prepared letters, I

Liebman

don't recall.

Q You don't recall writing a letter confirming that the DAR deviation capital costs --

A To be honest with you, I do not recall.

Q And you also don't recall any specific conversations you had with anyone after July 1985 where you confirmed that Mr. Montefinise had recommended the DAR deviation concerning treatment of capital costs?

A No, that's not correct, because I remember one specific meeting we had with Mr. Joseph Donnelly who is the DCASR deputy. Mr. Montefinise and I went into Mr. Donnelly's office, I think it was on a Friday late in the afternoon, with the entire DAR deviation package ready -- I forget his review comments, because we wanted to forward it to DLA headquarters that afternoon.

Q You don't recall any other specific conversations where you confirmed what Mr. Montefinise had recommended?

A I believe there probably were other conversations that occurred during the processing of the request other than in the conversation which was the final stop in DCASR New York before

1 Liebman

2 it was a loss contract. It caused a lot of  
3 ramifications within the Government and caused  
4 several actions to be taken, one was the Cure  
5 notice.

6 Q Why did the admission that this was a  
7 loss contract cause ramifications within the  
8 United States Government?

9 A Because that coupled with several other  
10 problems we were having at the time caused us to  
11 have concern over Freedom's ability to complete  
12 the contract on time and within the confines of  
13 the contract price which would enable the  
14 Government to recoup its progress payments.

15 Q Why is that, sir?

16 A During the December 1985 time frame  
17 Freedom was behind schedule, was having production  
18 problems, was having rejections by Government  
19 inspectors, and that coupled with the news that it  
20 would be a loss contract intensified concern by  
21 concerned Government parties.

22 Q You're saying there were rejections by  
23 Government inspectors. What type of rejections,  
24 sir?

25 A The rejections were done by the U.S.

1 Liebman

2 under a very very tight discovery schedule with a  
3 cutoff and we have a crucial witness on the issue  
4 of whether there was or was not an unrestricted  
5 line of credit and what kind of commitments were  
6 made by your client, the banker in this case,  
7 directly to the United States Government.

8 I would request, in order to be able to  
9 maintain the schedule, that we get on to issues  
10 that are relevant to your lawsuit and not to some  
11 others. The questoins you are asking are  
12 certainly relevant to Mr. Thomas' lawsuit, but we  
13 cannot face a scheduled cutoff date of July 31st.  
14 In the interest of your client, you should be  
15 protected, so I ask you to please move on so we  
16 can get this discovery done in your lawsuit.

17 MR. MACGILL: I'm not going to waste  
18 time answering.

19 MRS. EPSTEIN: Miss reporter, will you  
20 also make an index of the entire conversation,  
21 namely starting with the Montefinise letter, and  
22 make sure you identify for me in my index my  
23 request.

24 MR. MACGILL: Let me make it clear, if  
25 you didn't interrupt and be quiet and make



1 Liebman

2 objections and not coach, it would get a lot  
3 faster. If you have objections to make, make them  
4 and I can go on, I do not have that. Just make  
5 your objections, I don't have that much more of  
6 Mr. Liebman.

7 Q Mr. Liebman, on July 15, 1985 you were  
8 warned, weren't you, that if the deviation were  
9 not granted to Freedom on the treatment of these  
10 capital costs, that there would be perhaps an  
11 inability on Freedom's part to successfully  
12 perform the contract?

13 A That is correct. This is Mr. --  
14 MRS. EPSTEIN: Would you let him  
15 finish?

16 MR. MACGILL: He answered the question.

17 MR. MEDEIROS: He didn't answer that.

18 A I would not use the word "warned." I  
19 was advised by Mr. Montefinise's opinion. This is  
20 his opinion, his advice.

21 Q You're not willing to characterize that  
22 as a warning?

23 A My own description would be his advice.

24 Q We'll get your description. You were  
25 advised, no mistake about it, the fact that you

1 Liebman

2 were advised on July 15, 1985, that if a deviation  
3 were not granted there was a possible bankruptcy  
4 of Freedom?

5 A That is correct.

6 Q So as you put this letter down on July  
7 15, 1985, or whenever you received it, you clearly  
8 had been advised of both of those possibilities?

9 A That is correct.

10 Q At the beginning of the deposition, Mr.  
11 Liebman, not much was covered in terms of your  
12 background. I have a few questions.

13 Could you tell us real quickly about  
14 your educational background.

15 A Sure. I have a BBA, Bachelor of  
16 Business Administration, from the City College of  
17 New York, specifically the Baruch School. I've  
18 had the BBA since 1966. I have all my credits to  
19 a master's degree in public administration, an  
20 MPA, also the City College of New York, Baruck  
21 School. I have also continued my education -- you  
22 mean Government schools or just outside?

23 Q No, your former education. Was it a  
24 four year business degree that you obtained in  
25 1966?

Liebman

A That is correct.

Q I take it you grew up here in the New York area?

A Yes.

Q And you have lived here all your life?

A The New York general area, yes, that is correct.

Q What is your residence?

A Queens County, 199-33 22nd Avenue, Whitestone, New York.

Q Who do you live with at that address?

A I live with my parents.

Q How long have you lived there?

A We've been at this address for twenty-three-and-a-half years.

Q What is your date of birth, sir?

THE WITNESS: Is this necessary? Is this certain information --

MR. MEDEIROS: I have no objection if it doesn't go on too much further. I don't see the relevance.

Q Sir, what is your date of birth?

A July 22, 1943.

Q Sir, you referred in your direct

1 Liebman

2 testimony about some investigations into your  
3 administration of that contract.

4 A That is correct.

5 Q As I understand it, the inspectors  
6 generally looked into your administration of this  
7 contract.

8 A That is correct.

9 Q Colonel Holland reassured or  
10 investigated your administration of the Freedom  
11 contract.

12 A A tream lead by Colonel Holland, that is  
13 correct.

14 Q I take it that you didn't like those  
15 three groups looking over your shoulder in terms  
16 of what you did?

17 A No, I welcomed the investigation because  
18 we had nothing to hide. We believed that we  
19 accomplished our actions appropriately. We had  
20 nothing to hide at all.

21 Q You would agree with me, wouldn't you  
22 sir, that those investigations have left you  
23 somewhat unhappy about your dealings with Freedom?

24 A No, because again, I haven't seen the  
25 results of the DODIG investigation. I believe

Liebman

they were favorable. Again, I haven't seen them. There was one statement in one of the letters, I don't recall offhand. It was the General Absid letter.

Q I'm just asking you how you felt about it.

A Oh, I took exception to one of the times in one of the letters that said whenever I did err it was on Freedom's behalf. It sort of implied I was too liberal in administering Freedom's contract, but the results of the three investigations -- they were favorable and supported what I did as contracting officer.

The only investigation I had -- again, I don't remember if it was Colonel Holland or -- the General Absid letter said that whenever I erred or made a mistake it was on Freedom's behalf. You know, if I did err -- I think my answers were conservative, fair and reasonable. If I did make a mistake, you know -- I just didn't like the wording of the letter. I came out favorably as a result of these letters, so did my investigation.

Q Those investigations have now left you irritated with Henry Thomas?

1 Liebman

2 A No, not at all.

3 Q Sir, is it your testimony that you  
4 didn't make any mistake in terms of your  
5 administration of Freedom's contract?

6 A That is correct, I do not recall offhand  
7 --well, let me answer it this way. I do not  
8 recall if and when I made the mistake. If I did  
9 make a mistake, they were few and far between.

10 Q Sir, as far as you were personally  
11 concerned, you made only a few mistakes upon  
12 Freedom's --

13 A "If," I said, "any mistakes at all."  
14 Whether they be more or substantive, I don't  
15 recall.

16 Q So you're not willing to admit any  
17 mistakes?

18 A I do --

19 MRS. EPSTEIN: What this question is is,  
20 "have you stopped beating your wife?"

21 Q Sir, you, as I understand it, were the  
22 administrative contracting officer on the WEDTECH  
23 matter.

24 A That's correct, but I don't think it's  
25 relevant.

1 Liebman

2 MR. MEDEIROS: I take it the WEDTECH  
3 experience took place prior to the time of your  
4 experience with Freedom?

5 A At the same time. That's around the  
6 same time.

7 Q Did you give grand jury testimony in the  
8 WEDTECH matter?

9 THE WITNESS: Is this relevant?

10 MR. MEDEIROS: I don't believe so.

11 MR. OTTENHEIMER: There is a proper  
12 method by which you make your objections.

13 Q Were you subpoenaed to give testimony in  
14 the WEDTECH matter.

15 THE WITNESS: Can I answer these  
16 questions?

17 MR. MEDEIROS: You can say whether you  
18 were or not. If there are any questions on  
19 testimony --

20 MR. MACGILL: I'm not going to ask him  
21 about his?

22 A I testified once, that was before a  
23 federal grand jury.

24 Q Did you testify before the federal grand  
25 jury during the time that you were administering

1 Liebman

2 the Freedom contract?

3 A Let me think a moment. At the tail end  
4 of my testimony before the grand jury, and again  
5 --

6 Q I don't want to know what you said to  
7 the grand jury, just the time.

8 A I testified in January 1987 before the  
9 federal grand jury for about forty minutes and  
10 that was at the end of the Freedom situation  
11 basically.

12 Q In the year 1986 you knew of the  
13 impending investigation of the WEDTECH matter?

14 A I don't know if I should answer. There  
15 are still WEDTECH matters going on and there is  
16 still criminal actions that I'm a party to, and  
17 I'm assisting investigators without approval of  
18 DLA, i.e., the Defense Criminal Investigation  
19 Services.

20 I don't think I'm prepared to answer any  
21 questions on WEDTECH facts because I'm still  
22 assisting investigators and I cannot jeopardize  
23 any parties or individuals that still might be  
24 called for prosecution.

25 Q I'm not asking about the merits of the



1 Liebman

2 WEDTECH case, I'm asking about the fact that you  
3 now in 1986 there were potentially serious  
4 criminal allegations involving WEDTECH.

5 A I will not answer that question without  
6 approval from the U.S. Attorney's Office for  
7 Criminal Investigation Services.

8 Q We're not --

9 A I cannot answer without --

10 Q I think we have a right to know whether  
11 he knew about the WEDTECH investigation in 1986  
12 when he was involved with Henry Thomas and the  
13 Freedom situation.

14 A One of Freedom's lawyers was also a  
15 WEDTECH lawyer and that person has been indicted  
16 and sentenced. I cannot answer those questions.

17 Q We want an answer.

18 MR. MACGILL: Greg, I don't think we're  
19 asking about them, we're not talking about the  
20 merits. We're asking if he knew in the year 1986  
21 of the serious problems of WEDTECH.

22 THE WITNESS: I don't think that's  
23 relevant.

24 MR. MACGILL: Asking your lawyer.

25 MR. MEDEIROS: If you were generally

1 Liebman

2 aware of them, you can say yes. If they're  
3 specific directions or something coming from the  
4 U.S. Attorney's Office or the Defense Criminal  
5 Investigation Services which were conveyed to you  
6 under some privileged way, don't answer. But if  
7 you were generally aware --

8 MR. MACGILL: I'm comfortable with those  
9 arrangements.

10 A I'd have to know where this line of  
11 questioning is leading to, what the next question  
12 will be. Will there be more WEDTECH questions?

13 Q I'm comfortable --

14 A Repeat the question.

15 Q In the year 1986, were you at least  
16 generally aware that serious criminal matters or  
17 issues were being raised in connection with the  
18 WEDTECH matter?

19 A I don't want to answer any WEDTECH  
20 questions unless I'm instructed to by Court or the  
21 Attorney General's Office or DCIS. I refuse to  
22 answer these questions.

23 MR. MEDEIROS: If you have general  
24 knowledge.

25 THE WITNESS: I don't want to answer

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it.

MRS. EPSTEIN: What's the point?

MR. MACGILL: Be quiet.

MRS. EPSTEIN: What do you mean "be quiet," Mr. MacGill?

MR. MACGILL: Be quiet.

MRS. EPSTEIN: This is not a torture rack. This is not communist country. He is entitled to make his own decision. He's entitled to decide whether or not he will follow his lawyer's advice. He has made that decision, stop badgering him.

MR. MACGILL: I'm not badgering him. I have not raised my voice. The only person who has raised his voice in here is you, Edna.

MR. MEDEIROS: My advice is if you had general knowledge, if you had any kind of general knowledge. Not being privied to what happened in the investigation, I was no way involved, but if you were some way directly involved with DCIS or the U.S. Attorney's Office, I would say not to disclose that information, if you had some general knowledge.

A The WEDTECH situation was in the press

1 Liebman

2 in 1986, other than that I don't want to say  
3 anything else.

4 MR. OTTENHEIMER: Just answer the  
5 question.

6 Q So we're clear, you are at least  
7 acknowledging that in early 1986 there was  
8 information pertaining to the WEDTECH  
9 investigation in the press of the City of New  
10 York?

11 A That is not correct. The criminal  
12 matters concerning WEDTECH did not come out in the  
13 press until approximately October 1986.

14 Q There were several matters pertaining to  
15 WEDTECH, correct?

16 A I'm not answering any more WEDTECH  
17 questions, I'm sorry, without the approval of the  
18 proper authorities.

19 Q Were you generally aware in 1986 that  
20 there were serious matters raised with WEDTECH, in  
21 early 1986?

22 A I'm not answering any more WEDTECH  
23 questions, I'm sorry.

24 Q I take it WEDTECH has been something of  
25 a personal crisis for you?

1 Liebman

2 A Can we take a break? I need a break. I  
3 will not answer any more WEDTECH questions without  
4 approval from the proper authorities.

5 Q I want the last question answered.

6 A I'm sorry, I will not answer your  
7 question.

8 MRS. EPSTEIN: Off the record.

9 (Whereupon a recess was taken from 12:35  
10 p.m. and resume at 1:50 p.m.)

11 Q Mr. Liebman, is it fair to say that you  
12 personally became aware of some of the allegations  
13 that had surfaced in connection with WEDTECH prior  
14 to the time that the New York area papers  
15 publicated articles concerning those issues that  
16 arose in connection with WEDTECH?

17 A That is not correct. I first became  
18 aware of any criminal matter or civil -- well,  
19 cirriminal matter -- the WEDTECH Corporation was in  
20 the paper, I believe, October 1986, and, in fact,  
21 Freedom was mentioned in one of the articles. In  
22 fact, two companies were mentioned. If you want  
23 me to elaborate --

24 Q Did you become aware of some of these  
25 civil problems arising from WEDTECH?

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A The only thing I recall was Henry Thomas -- Freedom's president, Henry Thomas, and a Mr. Bernard Erlich who was one of WEDTECH's lawyers. Both had mentioned to me upon occasion -- because they both know I was handling their companies, I was administering their Government contracts, that there was bad blood between the two of them. In fact, Henry joked and Bernard Erlich joked about it. They both know I handled the contractors. I was not aware there were any lawsuits or any criminal action among those two parties. And I don't recall what time period, I believe it was probably before October '86, but I can't say for certain. I was not aware of any pending litigation or anything like that.

Q Did you, at any time during the year 1986, have a conversation with Henry Thomas where you indicated that you were too busy to process his progress payment request because of the problems that has arisen in connection with WEDTECH?

A During 1986?

Q During 1986.

A I do not recall such a conversation.

1 Liebman

2 Q Do you have any recollection of any  
3 conversations along that line during the year  
4 1986?

5 A I have no recollection of such a  
6 conversation.

7 Q Sir, with respect to Exhibits 281  
8 through 298, is it fair to say as a general matter  
9 that you would pay only 95 percent of the properly  
10 incurred costs referenced on those various  
11 progress payment requests?

12 A That's correct, up to the time of  
13 modification P28 which was issued by the PCO in  
14 August of 1986 I believe. Correct, 1986, because  
15 at that time when that modification was issued  
16 progress payments were tied to deliverables or  
17 deliveries, so prior to issuance of that  
18 modification I paid 95 percent of costs that were  
19 allowable and proper pursuant to, you know,  
20 Defense Acquisition Regulations.

21 Q So if we looked through these series of  
22 exhibits that I just identified, Exhibits 281  
23 through 298, we can look at those exhibits and add  
24 five percent to the amount that you have described  
25 as properly incurred costs to determine the total

1 Liebman

2 amount of properly incurred costs in relation to  
3 each progress payment request?

4 A Up to that would be through -- prior to  
5 the August 1986 modification based on the amount  
6 that I approved, not the amount that Freedom  
7 requested. If you add five percent to the amount  
8 I approved -- no, let me -- yes, that would be  
9 deemed to be a hundred percent. If you add five  
10 percent to the amount I approved, which was based  
11 on 95 percent, then it would equal a hundred  
12 percent of incurred cost that I, as contracting  
13 officer, was recognizing for progress payment  
14 purposes.

15 Q Recognizing as properly incurred costs?

16 A That is correct.

17 MR. MACGILL: That's all I have.

18 Thank you.

19 CROSS-EXAMINATION BY

20 MR. KRAHULIK:

21 Q Mr. Liebman, I have a few questions. I  
22 represent Freedom and Henry Thomas as in a  
23 separate lawsuit from the one that you've been  
24 deposed on. My lawsuit is pending in Washington  
25 which we're the lawfirm of Barnett & Alagia, the



1 Liebman

2 same defendant, but different lawsuits. I just  
3 have a couple of background questions. I know Mr.  
4 MacGill asked you where you lived, et cetera.

5 Are you a married man?

6 A I don't see the relevance of personal  
7 questions.

8 Q Background question whether --

9 MR. MEDEIROS: To administrate  
10 Government contracts?

11 MR. KRAHULIK: Well, I believe it's  
12 going to be relevant with regard to a proper  
13 background request that I may ask or inquire into.  
14 I think it's a proper question the judge will let  
15 me ask.

16 MR. MEDEIROS: I don't see the  
17 relevance.

18 A Are you going to ask further questions  
19 along this line?

20 Q Why don't you wait and see what happens?

21 A I don't see the relevance of these  
22 questions, whether I'm black, white, grey, I don't  
23 think it's relevant to administration of  
24 Government contracts.

25 Q I didn't ask you those questions.

1 Liebman

2 A I don't choose to answer those questions  
3 unless I have to.

4 MR. MEDEIRLOS: I don't see the  
5 relevance.

6 Q Are you refusing to answer?

7 A No, I don't choose to unless I have to.  
8 I don't prefer --

9 Q Do you refuse to answer my question  
10 with respect to whether you are or not married?

11 A Any personal questions unless I'm  
12 required to answer. I don't see the relevance.  
13 If I'm authorized by my counsel that I have to  
14 answer the question I don't see the relevance to  
15 this particular --

16 Q Do you refuse to answer the question are  
17 you or are you not married?

18 A Yes, at this time.

19 MRS. EPSTEIN: Why is it relevant?

20 MR. KRAHULIK: I think it's a very  
21 proper, relevant background question. Do you  
22 recall with Mr. Thomas I inquired into his  
23 background, married, children. I think it gives a  
24 jury a basis to test his testimony. It's a  
25 question asked every day, as you are well aware.

1 Liebman

2 MRS. EPSTEIN: Mr. Thomas I inquired at  
3 length of his family, a lot of it involved issues  
4 that were representations to the Government in  
5 terms of his financial situation.

6 MR. OTTENHEIMER: What does it have to  
7 do with his marital status? Let's not argue.

8 MR. MEDEIROS: I don't see the  
9 relevance. I don't think a judge would force you  
10 to answer that question.

11 THE WITNESS: If the judge, at this  
12 point --

13 Q Do you have a master's degree?

14 A I have all my credits to a degree, but I  
15 don't have the degree because I never wrote the  
16 thesis.

17 Q You do not at this time have a master's  
18 degree?

19 A No.

20 Q You're entire employment has been  
21 administration of Government contracts; is that  
22 correct?

23 A Except for one week with the Social  
24 Security Administration when I first started with  
25 the Government. Other than that, it's Government

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contracts with this agency.

Q Except for the two years that you were in active duty in South Carolina and Alaska, your entire employment from college and administration of Government contracts, except as you said for the Social Service work you did for one week --

A That is correct.

Q And you are an ACO?

A That is correct.

Q And have you been during the entire life of the MRE V contract?

A That is correct.

Q Does an ACO participate in preaward surveys?

A The ACO is invited to provide comments. He is really a very indirectly involved -- he can choose to provide comments or he does not have to provide comments. He's not a principal factor or participant or principal player in the survey, nor does he sit on the preaward survey board.

Q Did you make any comments on the Freedom New York MRE VII?

A I do not recall if I made any written comments. I provided some oral comments at a

1 Liebman

2 meeting, a meeting we had within DCASMA New York  
3 among concerned parties.

4 Q Did you have any authority to approve or  
5 disapprove Mr. Thomas in the preaward?

6 A No, not at all. My only role in  
7 surveys, if any, I'm invited to provide comments.  
8 I have no authority to approve, disapprove, et  
9 cetera, et cetera.

10 Q That is a separate --

11 A That's a separate function, that is  
12 correct.

13 Q Do you as ACO have the function of  
14 auditing solvency of a contractor?

15 A No, that's the DCAMA New York financial  
16 analyst who, during the life of Freedom's  
17 contract, has been Mr. William Stokes, also been  
18 Mr. Morris Lester, retired, but mainly Mr. Stokes.

19 Q Whether a contractor is solvent or not  
20 is not in your area of expertise in your area of  
21 administering contracts?

22 A I cannot answer it by saying that's  
23 correct or not correct, I have to answer it a  
24 different way. I have to give addresses of  
25 companies, whether it's from a technical

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standpoint, production standpoint, financial standpoint position. And I rely on my experts in the financial area, that is Mr. William Stokes, and he has a responsibility to comment on a contract's financial condition, review a contractor's financial statements as part of when a contractor -- especially when a contractor is submitting progress payments, we're required to per the progress payment clause.

Q Is it a separate group who performs the function of analyzing a contractor's solvency after he contract has been awarded as opposed to the group that analyzes the contractor's solvency in the preaward survey?

A It's the same group, in this case Mr. William Stokes, the DCASMA New York financial analyst.

Q So Mr. Stokes would be the same person who analyzed Freedom's solvency prior to the award of the contract and also after the award of the contract; is that correct?

A Also Morris Lester who is involved in the preaward phase.

Q Whose function within the Government is

1 Liebman

2 it to analyze whether a contractor has a valid  
3 claim against the Government?

4 A That is decided by the PCO, procuring  
5 contracting officer. The PCO decides what role,  
6 if any, the ACO plays. He may say do nothing, he  
7 may say please review the claim and provide me  
8 with a recommendation or he may say review the  
9 claim and negotiate settlement with the claim --  
10 it's up to the PCO, it's his position.

11 Q But the PCO is the authority, the  
12 officer that has authority, to approve or  
13 disapprove a contractor's claim?

14 A Absolutely, as well as the ACO.

15 Q But that delegation would be from the  
16 PCO to the ACO. You as ACO would not have  
17 authority to --

18 A That is correct.

19 Q -- administer or deny a contractor's  
20 claim except that authority which is delegated  
21 from the PCO?

22 A That is correct.

23 Q Is it the PCO also who has the authority  
24 to bind the Government in the original negotiation  
25 of the contract?

1 Liebman

2 A Administration of the contract is  
3 assigned to DCASMA, in this particular case  
4 specifically the ACO. The ACO's responsible for  
5 enforcement of the provisions of the contract.

6 Q The PCO is the officer though who  
7 negotiates the contract at the inception of the  
8 contract; is that correct?

9 A That is correct.

10 Q And then the ACO can bind the Government  
11 on modifications on the contract after the  
12 contract --

13 A That is not correct.

14 Q How does the ACO have authority to bind  
15 the Government in any manner outside of -- no, you  
16 tell me.

17 A Okay. In the administering office we  
18 administer the contract after award. We have  
19 certain delegated functions in the Defense  
20 Acquisition Regulation. These functions in the  
21 DAR I believe were -- I think it was DAR 1-804  
22 which lists all the DCASMA functions, and there  
23 are many delegated functions. There are many  
24 delegated to DCASMA. There are many delegated  
25 functions, they are delegated to DCASMA upon



1 Liebman

2 receipt of a contract administration. The ACO is  
3 solely responsible for administration of the  
4 progress payment. Wherever you see the word  
5 contractor in the DAR, it means administrative  
6 contracting officer, not procuring contracting  
7 officer.

8 Q Does the PCO have authority to bind the  
9 Government with regard to progress payment at the  
10 initiation of the contract?

11 A No, sir.

12 Q That is your position?

13 A Let me rephrase that. The PCO has to  
14 approve a progress payment clause, he's the one,  
15 the PCO authorizes incorporation of the progress  
16 payment clause into the contract. I didn't have  
17 to provide that authorization, but once he puts in  
18 that clause and the contract is awarded and the  
19 contract is then transferred to DCASMA for  
20 administration, then I as ACO become the  
21 contracting officer for enforcement of the  
22 provision of the progress payment clause that the  
23 PCO inserts into the contract.

24 Q In making that determination, are you in  
25 any manner what soever interested in the

1 Liebman

2 negotiations that occur with respect to progress  
3 payments between the PCO and the contractor prior  
4 to the signing of the contract?

5 A Normally, no, because it's a standard  
6 clause. And if there are any special arrangements  
7 or conditions concerning progress payments, it has  
8 to be clearly spelled out in the contract, but  
9 normally all you see is a progress payment  
10 clause. It's a standard progress payment clause  
11 that's cited in the Defense Acquisition  
12 Regulation. If there are any other arrangements  
13 or deals between the PCO and the contractor  
14 concerning progress payments, it must be clearly  
15 spelled out in that contract.

16 Q If it is not clearly spelled out and the  
17 PCO, in fact, did negotiate on the basis of  
18 progress payments being made even for capital  
19 items, if you will, are you at all interested in  
20 the fact that negotiations occur prior to the  
21 signing of the contract?

22 A As a matter of peripheral information,  
23 but it would have no effect on the way I  
24 administer the contract unless it's in that  
25 contract. As an example, if you are referring to

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the capital equipment -- if you're referring -- perhaps there was a promise on the part of the PCO to pay progress payments to capital equipment for Freedom's reimbursement of -- first of all, that wasn't in the contract. Second of all, if the PCO put that in the contract he would need a DAR deviation. Even if it wasn't in the contract, you would need that DAR deviation. I can't say because it won't be legal.

Q Have you heard of the word estoppel?

A I'd have to refresh my memory on the legal --

MR. MEDEIROS: You don't have to give legal opinions.

A I've heard the term, I know it has to do with stopping something or --

Q That would be something that you would want to ask the attorney, whether it is or is not applicable to a given situation?

A Absolutely, sure.

Q Would you not take it upon yourself to make that legal upon absent attorney?

A Correct.

Q How many times, if at all, during the

1 Liebman

2 administration of that contract did you and Mr.  
3 Barkowitz negotiate who was going to be the PCO  
4 concerning the negotiations that led up to the  
5 signing of this contract?

6 A Many times. More so initially, you  
7 know, immediately subsequent to award of the  
8 contract when these issues arose, but there were  
9 many conversations concerning this particular  
10 matter, that is correct.

11 Q At any time did Mr. Barkowitz tell you  
12 that he had negotiated with Mr. Thomas on the  
13 basis of Mr. Henry Thomas and Freedom receiving  
14 progress payment on equipment that would otherwise  
15 be classified as capital equipment?

16 A To the best of my recollection, Mr.  
17 Barkowitz did indicate that he allowed for capital  
18 type costs as part of negotiation of the price.  
19 To the best of my recollection, that he had  
20 committed himself or the Government to payment of  
21 progress payment for these costs.

22 Q Did you ever ask Mr. Barkowitz whether  
23 he had or not committed the Government to payment  
24 of these costs in the form of progress payments as  
25 opposed to just including them as priced?

1 Liebman

2 A To the best of my recollection, I just  
3 don't recall. I recall talking about the -- you  
4 know, did he allow for these when he negotiated  
5 the contract. I asked him if he allowed for these  
6 costs when he negotiated the contract price. I  
7 just don't recall if I had asked him if he had  
8 promised to pay progress payments. I't  
9 conceivable, but I just don't recall.

10 Q You do recall that you asked him about  
11 negotiating these as part of the price?

12 A Absolutely.

13 Q The issue at the point that you asked  
14 him that was whether these were progress payments  
15 or not; isn't that correct?

16 A That is correct, I just do not recall.

17 Q With that being the issue as to whether  
18 these should or should not be treated as progress  
19 payments, it's your testimony you have no  
20 recollection of discussing with him whether he  
21 negotiated these to be paid as progress payments;  
22 is that correct?

23 A To be honest, I just don't recall.

24 Q You have no recollection as you sit here  
25 today?

1 Liebman

2 A Concerning prices, yes. Concerning  
3 mentioning the word progress payment, I just don't  
4 recall.

5 Q You testified yesterday that the  
6 spotlight was on this contract.

7 A That is correct.

8 Q And that was from the inception of the  
9 contract?

10 A That is correct, prior to inception of  
11 the contract.

12 Q At the time that you were administering  
13 this contract, was this the largest contract that  
14 you were administering?

15 A No, it wasn't.

16 Q You had other larger contracts other  
17 than \$17,000,000 at the time?

18 A I had one larger contract at the time.  
19 No. In fact, I had two larger contracts at the  
20 time.

21 Q All the contracts that you were  
22 administering on behalf of the Government, this  
23 was the third largest contract you had at that  
24 time?

25 A Individual contracts, yes.

1 Liebman

2 Q How many contracts did you have at that  
3 time that required progress payments?

4 A I can just probably give you a  
5 guesstimate. Perhaps 30 to 40 at the time.

6 Q How many contracts during the time that  
7 you were administering this contract required the  
8 Government to pay 95 percent of incurred costs in  
9 the form of progress payments?

10 A Many of them did depending on the period  
11 involved. The progress payment rates had  
12 fluctuated greatly during the last four or five  
13 years. Depends on the -- I think from the start  
14 of the solicitation when solicitation was issued.  
15 At that time I think many of my contracts had the  
16 -- I don't know. There might have been some with  
17 a lesser amount, but 95 I think during that time  
18 frame. I think the solicitation was issued in  
19 April of '84 I think the rate in effect for April  
20 '84 to whenever was 95 percent. So I had many  
21 contracts with 95.

22 Q And that was for 95 percent of all  
23 incurred costs?

24 A Properly incurred costs in consistence  
25 with the Defense Acquisition Regulation.

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Q Progress payments are a form of working capital for a contractor, are they not?

A That is correct. Well, let me change that. Let me correct that. Progress payments represent payment for incurred costs, any type of description above and beyond payment for incurred costs such as extra costs, to be used as a pool. To pay for something else would be not allowable. It's only for properly incurred costs, it's not to give a contractor --

Q You may finish. Not to give a contractor what, sir?

A I know what you're doing. You're reading -- I know what the purpose and philosophy of progress payments are.

Q What was the purpose and philosophy of the progress payments during the life of this contract?

A Again, the definition has varied from year to year depending on which regulation you're looking at, but it's the latter definition per my Defense Logistics Agency manual. It's a means where the Government and contractor share in the course of performance under the contract. And



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2 you'll see in some other regulations -- I don't  
3 know. Maybe in the one you're reading. It's a  
4 means of easing the burden that the contactor has,  
5 the financial burden. An example of working  
6 capital are requirement that a contractor has to  
7 endure, has to endure or encounter when performing  
8 on a contract, so it's a means of providing  
9 financing to a contractor.

10 Q By "financing," that would be a form of  
11 working capital, would it not?

12 A I don't know if it's proper to use the  
13 words working capital. It's a means to pay for  
14 costs to enable the contractor to perform on the  
15 contract. I'm not sure if working capital might  
16 be a description, although it might be in these  
17 descriptions.

18 Q When the Government considers to pay  
19 progress payment it asks for a lower financing.  
20 In other words, if the Government is financing  
21 part of the contract, then the Government wants to  
22 have a lower price for the contract?

23 A That's the present, that is correct.

24 Q And the purpose of that is so that the  
25 contract is being financed by the Government and

1 Liebman

2 not by an outside source; isn't that correct?

3 A That is correct.

4 Q When Mr. Thomas first made his proposal  
5 on MRE V, it was a high price, was it not?

6 A Yes. Again, I wasn't directly involved,  
7 but it's my understanding that it was. They were  
8 talking about something in the area of \$21,000,000  
9 or so.

10 Q And he had commitments from Dollar Dry  
11 Dock Savings Bank for financing of \$7,000,000  
12 based upon a contract of \$21,000,000; isn't that  
13 correct?

14 A That is correct.

15 Q As the contract eventually was written  
16 though, and that was at a time, was it not, when  
17 the proposal was for a \$21,000,000 contract to be  
18 performed over a period of 21 months with fifty  
19 percent progress payments?

20 A I'm not aware of that, to be honest with  
21 you.

22 Q Did you not look into that during the  
23 time that you were making a determination from  
24 November 15, 1984 through and including the demise  
25 of this contract in March 1987 as to whether or

1 Liebman

2 not an outside source of financing would be  
3 necessary in this contract?

4 A No, because I was not involved in the  
5 preaward phase. As I said, in the preaward phase  
6 my only involvement was I attended a meeting with  
7 two other DCASMA representatives down in DLA  
8 headquarters in July 1984, a meeting with Mr.  
9 Thomas present.

10 Subsequent to award of the contract we  
11 were looking at Dollar Dry Dock financing  
12 arrangements. There was a letter from Dollar Dry  
13 Dock that was addressed to us subsequent to the  
14 award of the contract which stated that they were  
15 not honoring the \$7,000,000 line of credit because  
16 conditions had changed. One of the conditions was  
17 it was no longer a \$21,000,000 contract, it was a  
18 \$17,000,000 contract that was awarded. Concerning  
19 fifty percent of the progress payments, that is  
20 the first I'm hearing of that, you know, it's the  
21 first I heard of it.

22 Q Would that not have been relevant on  
23 whether or not there had been a change in the  
24 financing of this contract and a shift from Dollar  
25 Dry Dock at \$21,000,000 over with fifty percent

1 Liebman

2 progress payments to the Government financing 95  
3 percent progress payments with no requirement for  
4 an outside financing institution because financing  
5 was then going to be performed by the Government?

6 A Well, the fifty percent progress payment  
7 matter, I can't comment on that because the going  
8 rate -- I don't know how they arrived at fifty  
9 percent. The going rate was 95 percent.

10 Q My question was: Won't that be relevant  
11 in determining whether there be a change in the  
12 financing or the financial situation of this  
13 contract?

14 A If that fifty percent figure was  
15 considered and the only way they can consider such  
16 a figure would be what they call an unusual  
17 progress payment request which is a different  
18 percentage from the standard percentage, but if  
19 that was the case, whether it was fifty percent or  
20 sixty percent, and the amount of the contract  
21 award changed subsequent to attending the  
22 preaward, obviously it's taken into consideration.  
23 They were concerned about the financing Freedom  
24 needed at the time subsequent to the award of the  
25 contract.

1 Liebman

2 Q As of the date of the request for  
3 progress payment number one, November 15, 1984  
4 when that progress payment was requested, there  
5 had been no change in the financial situation of  
6 Freedom from the time of the execution of that  
7 contract on that date to the time the request for  
8 the progress payment was made within a few hours  
9 of that execution; isn't that correct?

10 A I can only say it is unlikely, but not  
11 impossible. It is likely that it can change  
12 within a few hours.

13 Q After you made the determination that  
14 the 95 percent progress payment could be made for  
15 these indirect costs, you then had decided that  
16 there was a change in the financial situation of  
17 Freedom?

18 A That is not correct.

19 Q I'm sorry, requiring a bank to come in  
20 because Dollar Dry Dock is no longer in.

21 A I think you might have misstated the  
22 question. Can I have it repeated.

23 Q Let me back up. As I understand your  
24 position, your testimony, Mr. Thomas on November  
25 15, 1984 on behalf of Freedom submits a request

1 Liebman  
2 for progress payment, correct?

3 A Correct.

4 Q You had a legal question as to whether  
5 you could or could not pay that progress payment  
6 because -- whether the costs included in that  
7 progress payment were direct costs.

8 A That is correct.

9 Q You asked for a legal opinion and got a  
10 legal opinion saying that you could make that  
11 progress payment.

12 A That is correct.

13 Q So that no longer was an issue as of the  
14 date of December 1984.

15 A That is incorrect.

16 Q When did you make the determination that  
17 you could pay that progress payment on that issue  
18 as to whether it was direct or indirect?

19 A At the February 14, 1985 meeting at DLA  
20 headquarters.

21 Q You had not made a determination prior  
22 to that time?

23 A That is correct.

24 Q But at that meeting you told Mr. Thomas  
25 that that was no longer a big issue?

Liebman

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A That was no longer an issue period.

Q You decided you could do that?

A That is correct.

Q But here is the real issue, you told him at that meeting?

A No, that is not correct. I told him that the real issue, meaning unsatisfactory financing, was conveyed to Mr. Thomas several months before. It was either in late November 1984 or -- definitely was conveyed December 1985, possibly late November '84. I know it was discussed at the postaward conference we had in December 1984 and numerous conversations, we had numerous meetings. It was definitely December. Possibly later.

Q What changed in his financial situation from November 15, 1984 to the December 1984 to call into question his financial responsibility for being able to perform this contract?

A Zero dollars being submitted by Dollar Dry Dock.

Q As of November 15, 1984 --

A Not correct.

Q -- Dollar Dry Dock had a commitment to

Liebman

go \$7,000,000 based on a contract that was executed on that date?

A Not correct, based on the review that concerned parties, including myself, accomplished at DCASMA which included discussions with Dollar Dry Dock as well as an exchange of letters. We concluded that several months earlier -- apparently several months earlier Dollar Dry Dock had backed out of the picture before the award of the contract.

Q So as of the date of the signing of the contract on November 15, 1984 Dollar Dry Dock wasn't in the picture?

A That is correct, but the concerned parties did not know that, the Government concerned parties did not know that.

Q Did Mr. Barkowitz know that?

A To the best of my knowledge, he was not.

Q Did you ask Mr. Barkowitz, prior to signing the contract on November 15, 1984, as to whether or not Dollar Dry Dock was still in the picture committed to a \$7,000,000 line of credit?

A Yes, in several conference calls with Mr. Barkowitz and other high level types at DPSC



1 Liebman

2 Philadelphia as well as high level types at DCASMA  
3 being present. That was asked of Mr. Barkowitz  
4 and other DPSC representatives, and they conveyed  
5 they did not know or were not aware Dollar Dry  
6 Dock honoring its line of credit.

7 Q Did Mr. Barkowitz's state to you or in  
8 your presence that he was not aware, as of the  
9 time of the execution of this contract, that  
10 Dollar Dry Dock was no longer committed to a  
11 \$7,000,000 line of credit that he had previously  
12 seen based on a contract price of \$21,000,000?

13 A That is correct, as well as individuals  
14 above Mr. Barkowitz in the chain of command as  
15 high as a navy captain.

16 Q I'm asking about Mr. Barkowitz. Do you  
17 have a memory as you sit here today?

18 A That is correct.

19 Q When you first received the first  
20 progress payment request and within a first few  
21 weeks following that, did you have conversations  
22 with Mr. Thomas concerning this progress payment  
23 request?

24 A Yes, as well as other representatives  
25 from Freedom.

1 Liebman

2 Q Did you, at any time during those  
3 discussions, tell Mr. Thomas that you felt that  
4 Mr. Barkowitz or DPSC "screwed up" in agreeing to  
5 pay progress payments as set forth in that  
6 contract?

7 A I don't recall. I just do not recall.

8 Q Did you feel that way at the time that  
9 the PCO had negotiated a bad contract for the  
10 Government?

11 A Are you talking about progress payments  
12 or just the bad contract? What are you referring  
13 to?

14 Q In terms of progress payments.

15 A Again, the progress payment clause that  
16 was included in Freedom's contract was the  
17 standard progress payment clause to be  
18 conceivable. I just could not recall. Henry  
19 Thomas might have said he was promised progress  
20 payments by the PCO, it is conceivable. Well, if  
21 he had promised, it's not in the contract. And if  
22 he did promise it, he violated the progress  
23 payment provision of the DAR.

24 Q In November and December 1984, were you  
25 of the opinion that the PCO had, in fact,

1 Liebman  
2 negotiated a bad contract on behalf of the  
3 Government?

4 A I would not describe it that way.

5 Q How would you describe it?

6 A The Government wanted a third source, a  
7 third assembler of rations. There were two  
8 sources at the time. The government, of course,  
9 had to pay \$6,000,000 extra then. They could have  
10 gotten, if they wanted to, the other two  
11 established suppliers, but that was a negative.  
12 But the positive was we had a third assembler.

13 I grew up in the depreciated area of the  
14 South Bronx for 17 years. I went to minority  
15 schools, so I was very happy, it was my old  
16 neighborhood. I was happy it was going to be  
17 Freedom as well as -- you know, WEDTECH were going  
18 to be part of the rejuvenation of the Bronx. And  
19 I could commiserate with that because I grew up in  
20 that neighborhood.

21 Again, I thought it -- you know Freedom  
22 was employing or would have been employing 400  
23 minority personnel, and I thought it was, in that  
24 sense, it was a good thing. The only negative  
25 part was we were paying \$6,000,000 extra, but yet

1 Liebman

2 we would have a good assembler at the end of a  
3 third year.

4 Q Did you make any statement to Mr. Thomas  
5 that it wasn't right for the Government to set  
6 people up in business in that manner?

7 A I don't recall making such a statement.

8 Q Did you discuss with Mr. Thomas that you  
9 were familiar with a failed black contractor in  
10 Chicago?

11 A No, Mr. Thomas asked me if I wasn't --  
12 in fact, made me aware of it. I said I had never  
13 heard of it, and he went into a situation of -- I  
14 forget the name of the company. I think it was a  
15 black Moslem in Chicago.

16 Now that I recollect the situation, I  
17 remember Mr. Thomas I think said something to the  
18 effect that the Government is nervous because they  
19 had one failed black company in Chicago also in  
20 the food business. I said I didn't hear of such a  
21 situation. It was my first ration contract, in  
22 fact, I had very little, almost no experience in  
23 the food industry. And one contractor had been in  
24 the food industry that made yellow -- or something  
25 because -- the answer to your question is I had

1 Liebman

2 not heard of that contractor until Mr. Thomas told  
3 me about it.

4 MRS. EPSTEIN: Can we take a break to  
5 consult with our schedule. We have two people  
6 coming to the deposition. It's now 2:30, we have  
7 Mr. Stokes waiting outside. I'd like to finish  
8 Mr. Stokes before we go on with the SBA people. I  
9 don't want more witnesses cooling their heels all  
10 day at our pleasure. I would like to call ahead  
11 to tell them to call later if we're not finished  
12 today.

13 THE WITNESS: Mr. Stokes has some  
14 problem with his stomach.

15 MRS. EPSTEIN: He's been waiting all day  
16 and it's 2:30.

17 MR. KRAHULIK: I want to take a break.

18 MRS. EPSTEIN: What I'm saying is I have  
19 to call people.

20 MR. KRAHULIK: I don't think I'm going  
21 to be unduly long.

22 MRS. EPSTEIN: How long do you think you  
23 will be so we can tell people to come or not  
24 come?

25 MR. OTTENHEIMER: How many hours do you

1 Liebman

2 think you'll have for Mr. Stokes?

3 MRS. EPSTEIN: But I have a lot of  
4 redirect with Mr. Liebman or at least some  
5 redirect with Mr. Liebman.

6 MR. KRAHULIK: I'll be approximately 45  
7 minutes.

8 MRS. EPSTEIN: What I'll then do is call  
9 the SBA people and tell them we probably won't  
10 start them until morning, we'll probably go into  
11 the afternoon.

12 Let the record reflect that we have been  
13 informed that Mr. Stokes -- let's have him come  
14 in.

15 (Whereupon Mr. Stokes entered the  
16 deposition room.)

17 MRS. EPSTEIN: It is now 2:35, you have  
18 been waiting out there since ten o'clock this  
19 morning; is that right?

20 MR. STOKES: Yes.

21 MRS. EPSTEIN: How are you feeling?

22 MR. STOKES: I don't know, just  
23 something with my stomach.

24 MRS. EPSTEIN: Would you prefer if we  
25 excused you for the rest of the day and would

1 Liebman

2 yoube able to come back tomorrow morning? We  
3 don't want to inconvenience you.

4 MR. MEDEIROS: We may be running, I'm  
5 guessing, another two hours.

6 MRS. EPSTEIN: We don't want to  
7 inconvenience you any more, we have another  
8 witness scheduled for tomorrow, but you are more  
9 important I think in the Chicago case. So I'd  
10 like to finish you if possible tomorrow, but I  
11 don't want to inconvenience you, you're cooling  
12 your heels indefinitely out here at our pleasure.

13 MR. MACGILL: Would you like to get  
14 this done today or tomorrow?

15 MR. STOKES: I think if it's good if I  
16 come in first thing tomorrow.

17 MRS. EPSTEIN: Could you come here  
18 around nine with the hope we'll be done with Mr.  
19 Liebman?

20 MR. STOKES: Yes.

21 (Whereupon Mr. Stokes left the  
22 deposition room.)

23 Q Mr. Liebman, the first progress payment  
24 request was submitted to you on what date?

25 A I do not recall the exact date, but it

1 Liebman

2 was very shortly after award of the contract,  
3 could have been the same day, the next day. The  
4 award of the contract was 14th November 1984.

5 Q If it was November 14th or 15th, would  
6 that surprise you?

7 A No.

8 Q The regulations at the time that first  
9 request for progress payment -- I believe the  
10 contract was signed on the 15th, so --

11 A Perhaps, yes.

12 Q The regulations at that time required  
13 that progress payment are to have payment made in  
14 an expeditious manner normally five to ten days  
15 after receipt of a request; isn't that true?

16 A That's not a full reading of the  
17 regulation. The regulation will also show that  
18 before we pay progress payments a contractor must  
19 have an approved accounting system as this was  
20 Freedom's first progress payment contract. He  
21 never had progress payments before under a  
22 Government contract prior to placement. Had a  
23 review had to be conducted to see that he had an  
24 approved accounting system for progress payment.  
25 The normal time span for such a review is 45 days,



1 Liebman

2 whenever you're asking for a DCA audit DCAA  
3 performs the account system review. I requested  
4 that this review include a technical evaluation of  
5 Freedom's progress payment, become accomplished on  
6 an expedited basis because of the need for  
7 financing, funding on the part of Freedom and  
8 because of the importance of this contract.

9 Q Didn't the regulations provide that  
10 these reviews generally will be conducted on an  
11 annual basis?

12 A That is not correct. Let me explain.  
13 The DAR states that if a contractor has an  
14 approved accounting system, that he's making  
15 satisfactory progress, that there are no problems,  
16 he's delivering his product in accordance with the  
17 schedule, that the product is a proper quality,  
18 that we place principal reliance in such cases on  
19 the contractor's own management concerning  
20 progress payments, and that reliance on his own  
21 management system, and in such cases the ACO can  
22 elect to review progress payments on an annual  
23 basis. It's his election on the part of the ACO,  
24 it's always the ACO's decision, we do not go for  
25 yearly reviews.

1 Liebman

2 Q Yesterday you did not mean to imply then  
3 you had to have a review prior to payment of any  
4 progress payment; isn't that correct?

5 A No, I said it is mandatory that we  
6 conduct a prepayment review to determine if a  
7 contractor has an adequate accounting system. If  
8 a contractor did not have an adequate accounting  
9 system it is a judgement call based on the  
10 individual system pre or postpayment type of  
11 review or any review at all.

12 Q Yesterday I believe I may  
13 misunderstood. I thought that you were implying  
14 yesterday prior to making any progress payment it  
15 was mandatory to conduct a review.

16 A No.

17 Q Are you saying it's mandatory to conduct  
18 a review to determine that the contractor hadcx a  
19 proper accounting system, that after that you can  
20 start making progress payment without review?

21 A Depending on the particular situation,  
22 you must have an adequate accounting system. In  
23 this case it was the first progress payment  
24 contract, we had to determine if the system was  
25 adequate, therefore, I was compelled by regulation

1 Liebman

2 to conduct the prepayment review.

3 Q Does the regulation provide that the ACO  
4 should not routinely review requests for progress  
5 payment requests?

6 A That is not a proper interpretation, it  
7 did not say routinely in the regulation. Again, I  
8 don't recall if it was the intent of the  
9 regulation --

10 Q We're going to be here for ever. You  
11 just said that's not a correct interpretation and  
12 that's fine, that's your answer.

13 A It requires a little explanation, short  
14 brief explanation, very brief.

15 Q I don't think that's possible.

16 A But I'll try. The DAR policy is to  
17 place principal reliance on the contractor's  
18 account, own management and control. I'm sorry,  
19 let me repeat that because there was discussion.

20 The DAR policy concerning progress  
21 payments is for the Government to place principal  
22 reliance on the contractor's own management and  
23 control provided he has an adequate system for  
24 delivering his product on time, the food meets the  
25 quality requirements of the contract. If that's

1 Liebman

2 the case, there are no problems, et cetera, et  
3 cetera. Legal problems, financial problems, there  
4 is no need to review every progress payment,  
5 that's the DAR policy. In such cases we would  
6 review them periodically, it could be every three  
7 months, every six months, yearly, it's all a  
8 judgement call.

9 Q How often did you review Freedom?

10 A I reviewed every progress payment on a  
11 prepayment basis for valid reasons.

12 Q Thank you. So the first payment request  
13 came in approximately on the 15th of November and  
14 on December 10th you asked for a legal opinion,  
15 did you not?

16 A I don't recall. May I see the document.

17 Q I hand you a document I believe may  
18 already be in evidence (handing).

19 MRS. EPSTEIN: Can we have it marked?

20 Q So on December 10th you requested --  
21 because of a possible legal implications -- that  
22 DCASR New York Office of Counsel review the  
23 progress payment request and provide a written  
24 opinion concerning payment/nonpayment?

25 A That is correct.

1 Liebman

2 Q And then on December 26th of 1984 within  
3 16 days DCASR gave you a legal opinion in writing  
4 concerning payment/nonpayment, did it not?

5 A I do not recall the date. May I see one  
6 of the --

7 Q One of the exhibits, you may look at  
8 this, that is the letter of December 26th which I  
9 believe you looked at this morning. It is already  
10 in evidence as Plaintiffs 303.

11 A That is correct.

12 Q Within this December 26, 1984 written  
13 opinion concerning payment/nonpayment there is a  
14 recommendation of legal counsel in response to  
15 your December 10th request that payment be made;  
16 is that correct, sir?

17 A That is correct. Based on this issue,  
18 that is correct.

19 Q So upon your request for legal advise  
20 concerning payment/nonpayment, the legal advice  
21 you received was pay?

22 A That is correct.

23 Q Also it was pointed out to you in  
24 paragraph seven of that letter that it is the  
25 contractor's first progress payment request, as

1 Liebman

2 has been noted in the Government postaward  
3 conference, and in subsequent meetings there  
4 aapparently had been no change in the contractor's  
5 financial position from the time of the award of  
6 the contract to the present, this should be taken  
7 into account by the ACO in weighing any financial  
8 basis for nonpayment of the progress payment;  
9 isn't that correct, sir?

10 A That's what it says, but I have to  
11 explain this answer.

12 Q Well, if you have a chance to explain  
13 we'll go on forever.

14 A It's an important point.

15 Q I think it was important also. That was  
16 advice given to you at that time by legal counsel;  
17 isn't that correct?

18 A I have to explain, I have to provide an  
19 explanation.

20 Q You may answer my question by providing  
21 an explanation.

22 A That was the advice, that is correct.  
23 The explanation I'm providing --

24 Q I will give you a chance. You did not  
25 follow that advice?

Liebman

A Because of a new development.

Q Thank you. What was the new development as of December 26, 1984 that did not exist as of the date of the postaward conference and subsequent meetings leading up to December 26, 1984?

A My response is as follows: Either in December 1984 -- whether before the date of this -- in December 1984 -- either before the date of this letter that you have just presented as an exhibit or subsequent to the date of that letter, but definitely by January 1985 or -- either December '84 or January '85 we had learned that Dollar Dry Dock was -- had withdrawn or not honored its letter of commitment for \$7,000,000, therefore, it was the conclusion of the contracting officer that Freedom was in an unsatisfactory financial condition and, therefore, its performance under the contract was in danger.

That was a development -- I don't know offhand without referring to the file if that -- we learned of the Dollar Dry Dock withdrawal prior to the date of the letter referenced, and I think the letter was dated December 26th, if it was

Liebman

prior to or subsequent to, that would just require checking the file, but that was the development therefore making the issue raised in Mr. Herringer's letter on December 26th really totally irrelevant because the financial issue now came into play.

Q Did you ask Mr. Herringer if he knew as of December 26, 1984 whether the condition had changed or not changed as of the date of the meeting of the contract and the postaward conference?

A Prior to the date of the letter or after?

Q After receiving the letter, did you ask Mr. Herringer if he meant to include within this letter any changes that may or may not have occurred postaward conference?

A I don't recall.

Q If you had done so, would you have made any kind of a note of having followed up with Mr. Herringer concerning any change in the contract or status?

A Absolutely, I would have insisted the letter be amended.



1 Liebman

2 Q Was the letter amended, to your  
3 knowledge?

4 A To the best of my knowledge, no.

5 Q Thank you. Then we go to February 1985,  
6 the middle of February, when you had a meeting in  
7 Washington D.C., and my understanding is that  
8 February 1985, with regard to this first request  
9 that had been submitted in November, you had  
10 determined that no longer was there any legal  
11 issue with regard to the payment or nonpayment,  
12 but that the issue became a financial issue?

13 A The financial issue came into play in  
14 December '84 or early January '85 well before the  
15 February 14th meeting at DLA headquarters.

16 Q As of February 14th the financial issue  
17 was the only remaining obstacle to be overcome as  
18 far as you were concerned as far as paying  
19 progress payment number one?

20 A The financial issue was the main, but  
21 there was an issue of the novation issue, but that  
22 had to be put into effect before I could start  
23 progress payment.

24 Q Did you, meaning the ACO or Government,  
25 require Freedom to novate, sign the contract, from

1 Liebman

2 Freedom's industry at H.T. Food as a precondition  
3 to receiving progress payment number one?

4 A I wouldn't use the word assigned. We  
5 required that the contract be novated, that was  
6 one of the conditions for continuing the contract.

7 Q And that was a Government requirement?

8 A That was a collective requirement  
9 arrived at by three Government agencies, the DLA  
10 headquarters, DPSC, and DCASR New York.

11 Q And the purpose of that requirement, as  
12 I understand it, was to get a new contract entity  
13 that had no debt?

14 A That is correct.

15 Q So that any preexisting creditors  
16 Freedom Industry would have no claim against H.T.  
17 Foods?

18 A That is correct.

19 Q And that was a requirement of the  
20 Government, not a request of Mr. Thomas?

21 A That was a requirement of the  
22 Government, that is correct.

23 Q And if there is an audit report to the  
24 contrary, that audit report would be incorrect?

25 A Yes. DCAA was not present at the

Liebman

meeting at DLA headquarters, DCAA did not recognize the whole arrangement until I think the summer of 1985 they refused to honor the whole arrangement and disagreed with all the goings-on.

Q Are you familiar with the fact that DCAA in official Government records accused Mr. Thomas of hiding from creditors through the transfer of this contract from one corporate entity to another corporate entity?

A I don't recall if they ever used those words. I know they did not approve paying any progress payments for direct versus indirect costs. I know they did not -- I don't know if it's in writing. I know they did not, at least verbally -- they did not approve of the whole arrangement with Freedom and H.T. Food. I do not recall what, if anything, is mentioned in the audit report regarding this matter, but I know it was finally recognized and accepted by DCAA in the summer of 1985.

Q So the second requirement was that Freedom get a creditor to provide financial security or financial backing to this contract?

A That is correct, in the amount of 3.8

1 Liebman

2 million dollars at the time, subsequently it  
3 changed to \$5,000,000.

4 Q Is the purpose of progress payments to  
5 provide the Government financing for the  
6 performance of contracts?

7 A It's where the Government and the  
8 contractor share in the financial burden of  
9 performing on Government contracts.

10 Q And that method or that mechanism is  
11 especially beneficial to small businesses which,  
12 in many instances, otherwise would be unable to  
13 compete for Government contracts because they  
14 could not obtain commercial financing or could not  
15 sustain the high rate of interest for the period  
16 between the contract award and the first delivery  
17 for which they could be paid under standard  
18 standard payment provisions?

19 A That is correct.

20 Q And progress payments are used by the  
21 Government to save the Government additional  
22 expenses which would be incurred if the Government  
23 had to reimburse contractors for the cost of  
24 additional financing through higher bid prices?

25 A That is correct. That is right out of

1 Liebman

2 the DAR, I assume you're reading out of the DAR.

3 Q Right. And you were well aware of that,  
4 were you not, in February 1985 when you required  
5 Freedom on this contract to obtain commercial  
6 financing?

7 A That is correct.

8 Q Did the price of this contract increase  
9 at the time that the Government required Freedom  
10 to obtain commercial financing in order to  
11 continue with this contract?

12 A It did not, no.

13 Q And within this contract itself provided  
14 for 95 percent progress payment type financing for  
15 this contract at the price of \$17,100,00, isn't  
16 that correct?

17 A That is correct.

18 Q The contract did not specify that there  
19 would be commercial financing of this contract,  
20 did it?

21 A In the contractual documents per se, no,  
22 but in the preaward survey documents, yes.

23 Q But the contractual document itself did  
24 not require commercial financing?

25 A Factors that lead to awarding the

1 Liebman

2 contract did, yes, but there is no mention, to my  
3 knowledge, in the contractual document per se, but  
4 there would not have been a contractual document  
5 without the financing in the preaward phase.

6 Q The document itself didn't require did  
7 it does it?

8 A It's not required, no. To my knowledge,  
9 no.

10 Q When you did the review or ordered the  
11 review prior to payment of the first, you were  
12 aware of the preaward survey, were you not?

13 A That is correct.

14 Q And you were aware that the preaward  
15 survey had certified the accounting system of  
16 Freedom, were you not?

17 A I do not recall, but I will take your  
18 word for it.

19 Q That is ordinarily part of a preaward  
20 survey?

21 A But I have to explain that. May I  
22 explain?

23 Q If you'll answer my question.

24 A That is normally part of a full type of  
25 -- or full blown type of preaward survey, that is

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correct.

Q Isn't it true that of the five methods of contract financing cited in DAR customary progress payments are rated second only to private financing in order to preference?

A That's correct.

Q This preferential arranging is due to the fact that this characterizes that a contractor must demonstrate in order to qualify for an award containing progress payment and may make it unnecessary for the Government to monitor progress payments as closely as it does on cost type contracts; isn't that correct?

A Yes, that is correct.

Q And as of November 1984 a preaward survey had been conducted on Freedom Industries, had it not?

A That is correct.

Q And within a month you asked for another survey?

A That is incorrect.

Q When did you request the survey prior to the progress payment?

A Your misinterpreting. Government

Liebman

progress payment requirements -- relating to an adequate accounting system in a preaward survey -- encompasses a review, that's one thing, however, the accounting system must be tested, that is mandatory. In Freedom's case he never had a progress payment -- the system had to be tested, that was the reason for a preprogress payment accounting during -- the system is one thing, the system must be tested, it is mandatory that we do that, it is the purpose for the prepayment review.

Q Is it your testimony that it is mandatory, prior to paying a progress payment where there has been a preaward survey, to have another survey prior to making that payment?

A That is correct. In such a -- in the case of Mr. Thomas because that was his first progress payment contract, the survey just checks to see if he has books, records. I'm talking about the preaward survey, accurate recording of the costs must be tested, paperwork relating to those costs, that must be tested. The system has to be tested, that is standard operating procedure from an ACO standpoint, from a DCAA standpoint.

Q Had you had any other contractor where



1 Liebman

2 you had performed a preprogress payment survey  
3 each and every time a progress payment has been  
4 requested?

5 A Yes.

6 Q How many other contractors have you done  
7 that?

8 A I can't give you an exact number, but  
9 again I've been in this business 20 years and  
10 there have been -- I've had many contractors,  
11 especially new contractors, contractors that were  
12 in jeopardy, et cetera, et cetera. It has  
13 occurred many times, yes.

14 Q What percentage of contracts that you  
15 administered have you had a survey performed each  
16 and every time prior to approving the progress  
17 payment?

18 A Every progress payment or just prior to  
19 approving a progress payment.

20 Q Prior to approving of progress payments  
21 as you testified I believe was done in the case of  
22 Freedom Industries?

23 A I just -- without further thought or  
24 more in-depth thought, I can't give you a -- I  
25 can't say ten percent or 20 percent or 30

Liebman

percent. It has occurred many times, but definitely not more so leaning in the direction of -- but there had been many instances of prepayment. Every one I just cannot, without further thought, give you a percent.

Q You wouldn't be able to say whether it was one percent or two?

A No, not without further thought of the contracts I had over the years. Obviously it's predominantly --- the answer is negative, but I cannot, you know -- scratch that from the record.

Obviously prepayment on every contract -- obviously it's less than fifty percent, I just can't give you a percentage. It's more in favor of postprogress payment reviews. Let me add to that, it was predominantly postpayment type reviews, prepayment on ever request has occurred --

Q It would be very rare though; isn't that true?

A I wouldn't use the word rare.

Q It would not be rare in your experience to do a prepayment review prior to paying each and every progress payment request, is that your

Liebman

testimony?

A Let me think for a minute. May I think for a minute?

Q Sure.

A Trying to recollect from 20 years experience. All right. Upon further thought I would have to confirm your statement, that it is rare. By "rare," I don't mean one-tenth of a percent, I would say that it is rare that we do prepayments on every progress payment request.

Normally if we do reviews it's done normal on a postpayment basis or prepayment, but not just with Freedom, other contractors we had, because of the circumstances, to conduct prepayments on every request, but I would say, yes. It's not common, it's, you know, rare as you say, but I can't say whether it's one percent or a half of a percent.

Q Isn't it true for contracts in which a preaward survey has been performed that you are allowed to use the data from the preaward survey in approving a progress payment request?

THE WITNESS: Can you please repeat the question.

1 Liebman

2 (Whereupon, the requested portion of the  
3 record was read back by the reporter.)

4 A Yes. As far as background information,  
5 we may look at the survey, yes.

6 Q And you can approve a progress payment  
7 without doing a survey if a preaward survey has  
8 recently been conducted and performed; is that  
9 correct?

10 A Even if no preaward survey has been  
11 performed, was it an experienced contractor, did  
12 they pay prepayments in the past, et cetera, et  
13 cetera.

14 Q If I incorrectly heard you testify that  
15 it is mandatory to do it on each new contract for  
16 the first progress payment made, then I was  
17 hearing you incorrectly.

18 A Incorrectly for any --

19 Q Thank you.

20 A For any new contractor. Not new  
21 contract, but any new contractor that never had  
22 progress payments before as was the case with  
23 Freedom. It was mandatory that we test the  
24 accounting system prior to the payment of the  
25 first --

1 Liebman

2 Q Even though it had been done in the  
3 preaward survey?

4 A That was not done in the survey, what  
5 was done in the survey was -- when DLA audit goes  
6 on a preaward survey they check to see if he has  
7 books and records, it does not test the progress  
8 payment submission from a contractor because the  
9 progress payment submission occurs after award of  
10 the contract, the contract didn't submit a  
11 progress payment prior to award.

12 Q The survey that you requested be  
13 performed on the first progress payment for  
14 Freedom Industries though did raise questions in  
15 your mind, as you've testified, concerning the  
16 financial capability of Freedom to perform the  
17 contract?

18 THE WITNESS: Please repeat the  
19 question.

20 (Whereupon, the requested portion of the  
21 record was read back by the reporter.)

22 A That's not correct. First of all, it is  
23 not a survey request, it was a review. And the  
24 final concerns were raised during my own desk type  
25 of review myself as well as other DCASMA members

1 Liebman

2 within house. We learned about the financial  
3 problem prior to receipt of any DCAA report, it  
4 was something we discovered ourselves during our  
5 desk review of the Freedom progress payment  
6 submission.

7 Q And the "financial problem" that you  
8 discovered was the fact that Dollar Dry Dock's  
9 letter of credit which had been previously  
10 extended based on a contract price of \$21,000,000  
11 was not extended on a contract price of 17.1  
12 million dollars, correct?

13 A We found that no monies had been  
14 committed to Freedom, zero, regardless of the  
15 contract price.

16 Q Is what I just stated correct, that the  
17 \$17,000,000 line of credit from a commercial  
18 lender is applicable to a contract of \$21,000,000  
19 and the contract became 17.1 million with 95  
20 percent Government financing, correct?

21 A I don't know what the -- in essence of  
22 what you're saying is correct, that Dollar Dry  
23 Dock was no longer honoring its commitment because  
24 of changing circumstances.

25 Q They honored the commit because the

1 Liebman

2 commitment was based on the circumstances, was it  
3 not?

4 A Again, I would have to see the letter.  
5 Again, I believe the letter from Dollar Dry Dock  
6 to DCASMA in December or January -- December '84  
7 or January '85 -- stated that the commitment was  
8 not being honored. The condition had changed, the  
9 contract price had been reduced from \$21,000,000  
10 to \$17,000,000. And I think there was also  
11 another condition that there was no payout  
12 arrangement in place to pay off the creditors. I  
13 believe there were two conditions or perhaps this  
14 was a new condition that Dollar Dry Dock was  
15 imposing, that they wanted to see a payout  
16 arrangement with creditors, but Dollar Dry Dock  
17 had withdrawn.

18 Q But the only commitment that you're  
19 aware that Dollar Dry Dock ever had was one in  
20 writing which they committed to a \$17,000,000 line  
21 of credit based on the contract price of  
22 \$21,000,000 --

23 A Correct.

24 Q Is that correct?

25 A Correct.

1 Liebman

2 Q And the contract became one for  
3 \$17,000,000 with 95 percent Government financing;  
4 isn't that correct?

5 A That's correct.

6 Q And that financing of the 95 percent was  
7 for all incurred costs; isn't that correct?

8 A That were in accordance with the Defense  
9 Acquisition Regulation and the progress payment  
10 provision of the contract.

11 Q And the only contract this contractor  
12 had was this contract?

13 A That is correct.

14 Q When the amount of the contract dropped  
15 from \$21,000,000 to \$17,000,000, was that not a  
16 response of the contractor's bid dropping the  
17 price in exchange for increased Government  
18 financing of the contract? ✓

19 A I do not know. I believe Mr. Thomas has  
20 mentioned that as -- implied that to me at times,  
21 but again, I was not privied to any such  
22 discussions because these discussions were between  
23 Mr. Thomas of Freedom and DPSC. Again, I have no  
24 way of verifying it, but Mr. Thomas did, I  
25 believe, convey this to me verbally. ✓



1 Liebman

2 Q And the PCO would be Mr. Barkowitz?

3 A That's correct.

4 Q And he's one branch of the Government --

5 A Yes.

6 Q -- in Philadelphia. Were you another  
7 branch of the Government in New York?

8 A That's correct.

9 Q And there was a communication by those  
10 two through a telephone; isn't that correct?

11 A I assume so.

12 Q When Mr. Thomas explained that to you,  
13 did you pick up the telephone in New York, dial  
14 Mr. Barkowitz in Philadelphia and say to Mr.  
15 Barkowitz something to the effect "Mr. Thomas  
16 claims that Dollar Dry Dock is out of this because  
17 the price has dropped from 21 to \$17,000,000  
18 Government financing if 95 percent is no longer  
19 requiring a commercial lender," is that true, Mr.  
20 Liebman, did you do anything like that?

21 A If that's the interpretation of Mr.  
22 Thomas' statement. That was not my  
23 interpretation, that might be yours. I believe  
24 Mr. Thomas said something to the effect --

25 Q I am --

1 Liebman

2 A No, I can't answer the question because  
3 it relates to the previous statement. I believe  
4 Mr. Thomas had mentioned to me that the price had  
5 dropped. He agreed to dropping the price from  
6 \$21,000,000 to \$17,000,000 in return for the  
7 Government doing something else, but it had  
8 nothing. Mr. Thomas never conveyed to me that the  
9 consideration would be dropping the letter of  
10 commitment from Dollar Dry Dock, that was never  
11 mentioned to me by Mr. Thomas. If that had been  
12 the case, it would have been a negative preaward  
13 survey. That was never mentioned to me by Mr.  
14 Thomas.

15 Q That was your interpretation, whether it  
16 was to be negative or positive, you have no way of  
17 knowing that as you sit here today, do you?

18 A Yes, I do, because there were other  
19 DCASMA representatives that were there in the  
20 presence of Dollar Dry Dock. And Mr. Stokes was  
21 present, Mr. Wrubel, who is now deceased. There  
22 are other names I can name from DCASMA who were  
23 there when we spoke to Dollar Dry Dock, Mr.  
24 Wrubel, the chief of pricing, and Mr. Stokes. We  
25 gave a negative in the financial area without that

1 Liebman

2 letter of commitment. And regarding any deal with  
3 Mr. Barkowitz and Mr. Thomas to drop the  
4 commitment from Dollar Dry Dock in return for  
5 lowering the contract price, I'm not aware of any  
6 such deal. I thought you were referring to  
7 something else Mr. Thomas alleged that he reduced  
8 price and turned it into something else for  
9 capitol costs. I think that might have been the  
10 thing the Government gave in on, not the Dollar  
11 Dry Dock thing, that's definitely not --

12 Q Did you make any attempt to communicate  
13 with Mr. Barkowitz to find out precisely what had  
14 happened in negotiation with that contract on or  
15 about November or December 1984?

16 A Yes, regarding the capital equipment  
17 type issue, you know, capital type costs.

18 Q Did Mr. Barkowitz verify Mr. Thomas had  
19 told you with regard to the negotiations leading  
20 up to that issue?

21 A They furnished me a copy of the  
22 negotiation memorandum which cited these costs,  
23 but there is no mention of any Dollar Dry Dock --  
24 there was no mention of any approval or any  
25 sanction with Dollar Dry Dock's withdrawal.

1 Liebman

2 Q The preaward survey did show a negative  
3 working capital deficit for Freedom Industries,  
4 did it not?

5 A I'm not aware of this survey. This is  
6 the November '84 survey?

7 Q Yes.

8 A I don't recall. I just don't recall if  
9 it was in the survey, I was not involved in it. I  
10 might have looked over it. I just don't recall  
11 what's in this.

12 Q I believe yesterday you testified that  
13 the financial capable of the contractor had  
14 decreased from the time of the survey to the time  
15 that you asked for the review pending the progress  
16 payment. I believe you testified to that  
17 yesterday.

18 A Yes, I believe so, that was from  
19 \$1,000,000 up to \$4,000,000, '1.4 million, but it  
20 was up to \$4,000,000.

21 MRS. EPSTEIN: Go off the record.

22 (Whereupon a discussion was held off the  
23 record.)

24 MR. MACGILL: Stay the on the record.

25 MRS. EPSTEIN: Mr. Liebman, we're all

1 Liebman

2 tired, it's already four o'clock. You have been  
3 under examination all yesterday and all today, it  
4 will go much faster for all of us if you stop --  
5 if you think of your answer and then give it  
6 clearly, precisely and simple ones instead of  
7 three or four times.

8 If you can answer yes or no without it  
9 being misleading, please do so. If you feel you  
10 have to explain because otherwise it will be  
11 misleading and incomplete, please do so, but  
12 please only do it once.

13 THE WITNESS: Okay.

14 MRS. EPSTEIN: Thank you, sir.

15 Q Are you aware that a financial position  
16 of the contractor in the preaward survey had a net  
17 worth of negative 2.16 million dollars?

18 A I do not recall. As I said, I was not  
19 directly involved in the survey.

20 Q Do you recall whether or not that net  
21 worth changed in any way, negative net worth, it  
22 changed in any way from November through February?

23 A Yes, it did.

24 Q It's your testimony that it did?

25 A Yes.

1 Liebman

2 Q What in ways did it change?

3 A It was \$4,000,000 by February 1985. It  
4 increased whatever it was before, \$1,000,000 or  
5 \$2,000,000.

6 Q How much was the progress payment  
7 request that had been submitted?

8 A I do not recall. I have to explain.

9 Q You can't explain.

10 A It's misleading if I don't explain.

11 Q Let me ask the question. Isn't it a  
12 fact that the negative 2.1 which had been  
13 increased was increased by the amount that had  
14 been requested but had not been paid?

15 A I don't understand the question, I'm  
16 sorry.

17 Q Preaward survey as of November 1984  
18 showed a negative net worth of 2.1 million  
19 dollars.

20 A Okay. Net worth deficit, 2.1 million  
21 dollars, okay.

22 Q If that had increased to the figure that  
23 you related, isn't a substantial part of that  
24 increase in the negative net worth due to the fact  
25 that there had been no progress payment made for

1 Liebman

2 1.6 which had been requested?

3 A I cannot answer that without further  
4 review of the documents, further study.

5 Q In any event, Mr. Thomas did acquiesce  
6 in the Government requirements that a banking or  
7 financial commercial institution be brought into  
8 the deal, and that, number two, a novation occur?

9 A Yes, he agreed.

10 Q An both of those were accomplished by the  
11 middle of April 1985?

12 A That is correct.

13 Q First progress payment was made May 7,  
14 1985?

15 A That is correct.

16 Q A second progress payment was the  
17 requested shortly thereafter?

18 A I do not recall the date.

19 Q Was there a third progress payment  
20 requested then which you refused to honor in early  
21 June 1985?

22 A I do not recall these facts. I do not  
23 recall the facts.

24 Q Please look at the exhibit in front of  
25 you.

1 Liebman

2 A Which one?

3 Q I would say the progress payment  
4 exhibits, and look for the third progress  
5 payment.

6 MR. MACGILL: It should be Exhibit  
7 283.

8 A I just don't see the first one. Well,  
9 the second one the day of the request was 15th May  
10 1985 and I paid it -- it looks like -- blurry --  
11 looks like 3rd June 1985.

12 Q Was there a third progress payment  
13 request?

14 A Third request was dated 3rd June 1985  
15 and this is one of the progress payments without  
16 my signature, but the check was issued 24th June  
17 1985.

18 Q What was the requested amount?

19 A Well, the requested amount -- well, no.  
20 Yes. The requested amount was \$535,767 and that's  
21 the exact amount I paid.

22 Q I thought that one was --

23 A No, I paid the exact number. The other  
24 one I cut in half.

25 Q You paid number one, then the very



1 Liebman

2 second one that was on May 15th you cut in half?

3 A That's correct.

4 Q Was that because of this equipment  
5 problem that was raised?

6 A I don't recall. I would have to review  
7 all the documents.

8 Q Number three you paid. Number four was  
9 for \$800,000 and you approved \$170,00?

10 A Can I interject? If we are going to go  
11 by progress payment by progress payment I'm going  
12 to have to state I do not recall. I have to  
13 review all my documents.

14 Q I'm not going that far with you at this  
15 time.

16 A I see number -- I don't see number  
17 four. Here it is, I'm sorry. Number four was  
18 submitted July -- the date of the request was July  
19 5, 1985 and it was paid in a reduced amount.  
20 Again, this is one without signature. I see a  
21 check here in a reduced amount dated 29th July  
22 1985.

23 Q That reduced amount was for \$200,000?

24 A \$170,689 was the reduced amount,  
25 \$807,348 --

1 Liebman

2 Q In any event, you paid the May 7th, May  
3 15th. And then by June 12th a new problem had  
4 developed; isn't that correct?

5 A Again, I would --

6 Q And on June 12th --

7 A I would have to refresh my memory.

8 Q On June 12, 1985 within one month and  
9 five days of approving the first progress payment  
10 you wrote a letter asking for new legal advise on  
11 whether another progress payment should or should  
12 not be paid; is that correct?

13 A I do not recall, although -- is this an  
14 exhibit (indicating)?

15 Q Yes, this is an exhibit.

16 A This should be recorded.

17 MR. MEDEIROS: It's the Montefinise  
18 letter, it should be, it's a copy.

19 THE WITNESS: Oh, this is the  
20 Montefinise letter.

21 MRS. EPSTEIN: 303 or 304?

22 MR. KRAHULIK: 304.

23 MRS. EPSTEIN: Why don't you look at  
24 the letter.

25 THE WITNESS: Okay.

1 Liebman

2 A Again, this was -- I don't know if --

3 Q Let me ask you a question.

4 MRS. EPSTEIN: Hold on.

5 Q You made a payment on May 7th, you made  
6 a payment on May 15th. By June 12th were you  
7 again asking for another legal opinion?

8 A Didn't make a payment on May 12th, I  
9 made a payment on May 6th or May 7th and on June  
10 3, I don't see a June 12th --

11 Q Then by June 12th you were asking for a  
12 new legal opinion on whether or not quality  
13 control equipment, supplies, automated building  
14 management and control systems and office  
15 equipment may be treated at direct cost for the  
16 purpose of making progress payment?

17 A That is correct.

18 Q You interpreted Exhibit Number 304 as  
19 requiring a DAR deviation?

20 A That is correct.

21 Q Would you agree that had this equipment  
22 been classified as "specialized equipment," a DAR  
23 deviation would not have been requested and the  
24 progress payment could have been paid for this  
25 "specialized equipment?"

Liebman

A Provided that other conditions were met such as DCASR technical verification that the material was there, that it was applicable to the contract, that there was an audit, trail of costs of the equipment, et cetera, et cetera. Had these issues been satisfied, obviously I would have paid it.

Q So if it was specialized equipment and it was actually there, et cetera you, had the authority to pay it without requesting a DAR deviation?

A Provide there is also a special tooling clause in the contract, it's another condition, a DAR special tooling clause.

Q But the legal opinion that you received told you that this was specialized equipment that could be paid without a DAR deviation request?

A That is correct.

Q You had made the determination that this was not specialized equipment?

A Correct, based on technical input from a specialist in this particular area.

Q Who was the specialist in this particular area that you relied on?

1 Liebman

2 A Raymond Troiano, plus possibly some  
3 other technical types from my office.

4 Q I believe you testified that you told  
5 Mr. Thomas he would have to seek a DAR deviation?

6 A That's correct.

7 Q Did you seek it or did he seek it?

8 A Well, subsequent to that I learned that  
9 it is normally -- the Government should seek it,  
10 but in this particular case I asked, you know, for  
11 a request from the contractor because it was  
12 really for his benefit, but normally the  
13 Government is the one that seeks it.

14 Q But in this case you felt the contractor  
15 should seek it?

16 A I felt for the record that we have a  
17 request from the contractor on file, but it was  
18 the Government that had to forward the thing on,  
19 you know, higher up and make a recommendation.

20 Q Was this equipment not eventually paid  
21 for in cash in May 1986 without a DAR deviation  
22 ever being received by anybody? ✓

23 A It was paid as a result of the  
24 settlement modification P00025 which allowed for  
25 payment of these costs in the form of an invoice,

1 Liebman

2 not in the form of progress payment.

3 Q Are progress payments invoices?

4 A Progress payments, no, there is a  
5 difference. Progress payments are requests for  
6 payment for incurred costs and as work  
7 progresses. An invoice -- the way we normally --  
8 again, I don't know what you're going to read  
9 from, but the way we interpret -- well, you may --

10 Q Is receipt of a progress payment on a  
11 voucher?

12 A We don't consider it to be an invoice,  
13 although I say consider it to be under the  
14 definition of an invoice, normally the way we  
15 interpret an invoice.

16 Q If, in fact, you receive a progress  
17 payment voucher, would it be considered a received  
18 invoice?

19 MR. MEDEIROS: I believe, for the  
20 record, that relates to the payment act, this is  
21 not a matter of how DCASR considers a progress  
22 payment or an invoice for a shipped item.

23 A As far as DCASR is concerned, recording  
24 our day-to-day operation and invoices directly  
25 from progress payment request for costs incurred

1 Liebman

2 based on progress an invoice is paid on -- shipped  
3 and paid by the Government.

4 Q But this equipment was eventually paid  
5 in cash without any DAR deviation ever being  
6 given, do you remember this; is that correct?

7 A As a result of the mood P25, that's  
8 correct.

9 Q From the time that you withheld payment  
10 of this progress payment through and including May  
11 1986, did you withhold other progress payments  
12 from Freedom?

13 A Please restate the question, I'm sorry.

14 Q Isn't it a fact that you refused to pay  
15 progress payments as requested to the point that  
16 by November Mr. Thomas had requested, or Freedom  
17 Industries had requested by January 1986, over  
18 \$4,000,000 worth of progress payment had been  
19 requested by Freedom and had not been paid?

20 A That from January 1984 -- from November  
21 '84 to January '85?

22 Q January '86.

23 A I cannot answer that without checking  
24 the record.

25 Q Would that surprise you in general? I'm

1 Liebman

2 just asking in general.

3 A Again, I can't comment without examining  
4 my records.

5 Q Would there be any reason that, just  
6 because you challenged part of Freedom's progress  
7 payment, that you wouldn't pay the part that you  
8 didn't challenge?

9 A There were certain costs that were just  
10 unallowable and couldn't be -- were not recognized  
11 that Freedom kept including in their progress  
12 payment, those were disallowed on prior requests.

13 Q Which costs?

14 A Again from memory now -- and, for  
15 example, there were several issues, but one issue  
16 that strikes my mind was this forgiveness where  
17 one of Freedom's landlords at the time forgave, I  
18 think, four months rent I think at about \$100,000  
19 month. Their cost is \$350,00, \$400,00 that I had  
20 pay to Freedom in the form of progress payment.

21 Subsequent to these payments I learned  
22 that this rental for this four month period had  
23 been forgiven by the landlord, therefore, I  
24 considered it to be a void cost and, therefore, I  
25 deducted that amount, whether it was 400 or ✓



1 Liebman

2 \$350,000, from subsequent progress payment  
3 requests.

4 Q To go through the progress payments you  
5 would need your progress payment files to say why  
6 you didn't make these payments?

7 A Absolutely, yes.

8 Q In January and March of 1986, did you  
9 attend meetings in which assessment of the  
10 problems between Freedom and the Government was  
11 discussed?

12 A I am sorry, did you say January?

13 Q January 1986, and again March 1986, did  
14 you attend meetings with representatives of  
15 Freedom at which the difficult that's arisen  
16 between Freedom and the Government was discussed?

17 A Well, I remember one main meeting.

18 MRS. EPSTEIN: Yes or no.

19 A I remember one meeting, yes.

20 Q And and others made a report of that  
21 meeting, did they not?

22 A I do not recall. Now, I have to change  
23 that. Upon recollection now, it's mentioned in  
24 one of my facts sheets or alert reports.

25 Q Mr. Liebman, I'm going to hand you

1 Liebman

2 what's been marked by the court reporter as  
3 Freedom/Liebman Exhibit Deposition letter A.

4 (Whereupon, the item referred to above,  
5 Memoranda, was marked as Defendants  
6 Freedom/Liebman Exhibit A for Identification, as  
7 of this date.)

8 Q I ask you if these are memoranda  
9 prepared by various Government -- (handing)

10 A In fact, this is the May one you were  
11 missing, the alert report that you were missing.

12 Q I ask you if that is your report, Mr.  
13 Liebman, on the meeting of March 27, 1986  
14 (handing)?

15 A That is correct, this is my report.

16 Q And At that meeting discussion was had  
17 concerning settlement of the contractor's claim  
18 for equitable adjustment; is that correct?

19 A That is correct.

20 Q What was offered to Mr. Thomas at the  
21 meeting to try to resolve the dispute that had  
22 arisen between the Government and Freedom?

23 A Well, again, I don't remember all the  
24 specifics, but a few things that were discussed  
25 was a revised delivery schedule, waiver of the

1 Liebman

2 claim for equitable adjustment. Freedom wanted a  
3 guarantee of the next MRE procurement, return of  
4 \$200,000 in consideration that Freedom had given  
5 the Government. There were other things, I  
6 believe, that were discussed, I just don't recall  
7 what they were.

8 MR. KRAHULIK: Mark this, please.

9 (Whereupon, the item referred to above,  
10 Memorandum, was marked as Defendants Exhibit  
11 Freedom/Liebman B for Identification, as of this  
12 date.)

13 Q I'll hand you what's been marked by the  
14 court reporter as Freedom/Liebman Deposition  
15 Exhibit B which is an April 4th 1986 memorandum  
16 from Samual Stern, Chief Contract Management  
17 Division, concerning the March 26th meeting, and  
18 I'll ask if you have seen this three-page document  
19 before, Mr. Liebman (handing)?

20 A Yes, I have.

21 Q Did you get a copy of that document?

22 A Yes, I did.

23 Q At or about April 4, 1986?

24 A Yes, I did.

25 Q Can you describe for the record what

Liebman

that document is.

A This is the 24 bi-weekly status report concerning the Freedom contract that had to go to DLA headquarters dated 4th April 1986.

Q At that time what was offered to Freedom to settle all outstanding actions --

A May I review the --

Q Certainly.

A Okay. The Government offered to reinstate the previously defaulted quantity of 144,758 cases. The Government would also agree to extend the delivery schedule to October '86 on a no-cost basis. And the Government was willing to agree to return \$200,000 in consideration taken for past delivery extensions. And the Government was willing to agree to pay Freedom, and they used the figure \$500,000 in capital type cost. That had been allowed by the PCO in negotiation of the contract.

Q Are those the four things that the Government offered to Freedom at that time?

A Yes.

Q And that \$500,000 capital type cost had been allowed by the PCO in negotiation of the

1 Liebman

2 basic contract payment for the equipment that had  
3 been requested to be paid back in June 1985 that  
4 we've been discussing; isn't that correct?

5 A Payment in the form of an invoice, but  
6 not progress payment, but that was discussed at  
7 the meeting.

8 Q So those are the four things that the  
9 Government offered at that time?

10 A That's correct.

11 Q What did the Government, according to  
12 that memoranda, want in return from Freedom?

13 A Well, this is what the Government was  
14 offering and Freedom wanted in return. The  
15 Government wanted in return a waiver of the 3.4  
16 million dollar claim that Freedom had against the  
17 Government. And also, there was another thing  
18 that took place, Freedom would not honor the  
19 settlement until it was guaranteed a part of the  
20 next ration procurement. So the meeting ended  
21 with DPSC stating we were going to refer the  
22 matter to DLA headquarters.

23 Q So on March 8th the Government was  
24 offering to reinstate the cases, the delivery  
25 schedule on a no-cost basis, the return of

1 Liebman

2 \$200,000, payment of half a million for these  
3 equipment costs for a release of a claim of 3.4  
4 million dollars --

5 A Correct, and --

6 Q -- and Mr. Thomas at that meeting  
7 refused to except that unless he also got a  
8 guarantee of getting an MRE VII contract?

9 A That is correct.

10 Q When you received a copy of modification  
11 25, I believe you testified that you were  
12 surprised.

13 A Yes, I was surprised with the  
14 modification.


15 Q In modification 25 the Government gave  
16 Mr. Thomas exactly what they had offered to him in  
17 March 1986, did it not?

18 A I believe so. I would have to see the  
19 modification again, but I believe so.

20 Q And were you surprised because that deal  
21 had been refused in March by Mr. Thomas unless he  
22 also got a guarantee of MRE VII?

23 A And he waived his claim.

24 Q And waived his claim.

25 A That was probably my main surprise. 

1 Liebman

2 Q That he waived his claim?

3 A That's correct. ✓

4 Q So what he got in May is exactly what  
5 had been requested of him March and refused by him  
6 in March?

7 A Except for the guarantee of a piece of  
8 the next contract.

9 Q He refused in March unless he got a  
10 guarantee?

11 A That's correct.

12 Q He, according to your information,  
13 experienced that just two months later with no  
14 guarantee or do you know?

15 A That is correct. Again, other than  
16 attending that meeting, I was not involved with  
17 the negotiations, but I can base my statements on  
18 what I see here in the letter, in my report, plus  
19 the modification.

20 Q Are you aware of any information, as  
21 administrative contract officer, on this contract  
22 that Mr. Thomas was, in any way, promised an MRE  
23 VII contract for Freedom?

24 A I know -- I remember vaguely, possibly  
25 Mr. Thomas or someone else from Freedom stating

1 Liebman

2 that they had -- you know, again, also all  
3 hearsay. Mr. Thomas has alleged that in the past,  
4 I can't substantiate that at all.

5 Q You have no opinion concerning the legal  
6 validity of Mr. Thomas' 3.4 million --

7 A As it relates to progress payments, the  
8 claim, as far as I'm concerned, would not be  
9 recognizable. I don't recall --

10 Q That is not my question. My question  
11 is: Do you have any legal opinion as to the  
12 validity or lack of validity of Mr. Thomas' 3.4  
13 million dollar equitable adjustment consideration?

14 A It's not my role to furnish a legal  
15 opinion.

16 Q So you have none?

17 A I have none.

18 Q Thank you. I understand you believe you  
19 acted within the regulations?

20 A That is correct.

21 Q Do you agree that others would disagree?

22 A Absolutely, yes.

23 Q And you're not expressing any legal  
24 opinion one way or the other?

25 A That is correct.



1 Liebman

2 Q You acted in good faith, you're  
3 testifying to when you did it and what you did?

4 A That's correct.

5 Q Whether it was legally correct or  
6 legally incorrect, you have no opinion on that?

7 A No. I have an administrative opinion.  
8 What I did administratively was correct, but I'm  
9 not prophetting a legal opinion. I received the  
10 input from legal services, but I'm not --

11 Q ACO's could discuss it with you?

12 A Yes. Yes or no, the issue is a black  
13 and white issue, that is correct.

14 Q When no new business was forthcoming  
15 around May 1986, as ACO, was it obvious to you  
16 that Freedom was due to lose several million  
17 dollars on MRE V?

18 A It was obvious to me he would lose money  
19 as early as December 1985 when Freedom admitted it  
20 was a 1.4 million dollar loss at the meeting held  
21 at DPSC.

22 Q When Freedom did not receive the MRE VII  
23 bid, was it absolutely clear to you as  
24 administering contracting office that Freedom  
25 could not survive financially?

Liebman

A That is correct, unless some other procurement was received.

Q And I believe Freedom performed 82 percent of the contract in this case even though it was not paid any progress payment for the period of six months; isn't that correct?

A I cannot answer that because I would have to check the files to verify the six month period.

Q Six month period being from November 9, 1984, when the request was made, through May 1985 when the first progress payment was received.

A Well, about five-and-a-half months I would say, that's correct. That's correct. A

Q I believe it's five months.

A No, because Freedom withdrew its progress payment and submitted a revised request.

Q Freedom, from the date of the contract, went six months before it received any money from the United States Government, is --

A Five, a little less, five-and-three-quarters.

Q Items shipped from Freedom were rejected for quality; isn't that correct?

Liebman

A During that period?

Q Any.

A During that six month period?

Q No, during the entire life of the contract.

A Shipped?

Q Shipped is the question.

A I have to review my files, I have no knowledge.

Q You have no recollection that Freedom actually was put out the door for being lacking in quality?

A I have no recollection. I have to check the files.

Q Was there any medical hold on any shipped item that actually left Freedom's premises?

A Prior to, to the best of my knowledge. Again, no -- I would have to check the files on that, but I would say prior to shipment, yes.

Q The medical hold that was placed was placed on subcontracted products; isn't that correct?

A I do not know. I would have to review

1 Liebman

2 the files.

3 Q Do you agree that lack of financing  
4 caused Freedom's failure?

5 A I would say one of the factors that  
6 caused Freedom to be unable to complete the  
7 contract was the withdrawal of the Dollar Dry Dock  
8 commitment, there were other factors.

9 Q My question is lack of financing whether  
10 from Dollar, whether from Bankers or whether from  
11 the United States Government, a lack. The  
12 financing caused Freedom's failure, did it not?

13 A It was one of the causes. ✓

14 Q It was the primary, major cause though,  
15 was it not?

16 A Can I not say without further reflection  
17 and check of my files, but it was an important  
18 cause.

19 Q A major cause?

20 A It was a major cause. Whether it was a  
21 predominant cause or 30 percent or 50 percent, I  
22 cannot give you that answer.

23 Q Do you agree that if Freedom had  
24 received 95 percent of progress payment requested  
25 within five to ten days of the request, that

1 Liebman

2 Freedom would have succeeded in fulfilling of this  
3 contract including returning a profit?

4 A Can I not answer that without further  
5 reflection, further review of the document.

6 Q Do you have any opinion, as you sit here  
7 today, with regard to whether that is a factual  
8 statement or not?

9 A I have no opinion at this time.

10 Q In other words, in order to answer that  
11 you would need to look at your progress payment  
12 files and other files that are not here today?

13 A That is correct.

14 MR. KRAHULIK: I would ask, on behalf  
15 of my case, without the case between Bankers and  
16 Barnett & Alagia, that I be allowed to come back  
17 with those files and go through those progress  
18 payments and whatever files Mr. Liebman would need  
19 to answer those questions around that contract  
20 date, and stay away from your case so I don't slow  
21 anything down or cause any problems.

22 I'd like to adjourn the deposition, as  
23 far as Freedom until we have the progress payments  
24 available, at this time.

25 MRS. EPSTEIN: My position is that we

1 Liebman

2 should let the truth come out at the table. And  
3 to the extent that this will clarify the answers  
4 in your case, we will be down one way or another.  
5 I don't know how you want to angle the two. And I  
6 would certainly join in any request you may make  
7 to come back.

8 Q Mr. Liebman, before we adjourn and allow  
9 you to look at your progress payment files at a  
10 later date, in making your decisions concerning  
11 progress payments you were relying on incurred  
12 costs and not percentage of completion of the ✓  
13 contract, were you not?

14 A We rely on both. We pay progress  
15 payments based on incurred costs as work  
16 progresses, progress must be more or less  
17 commiserate with incurred cost, does rely on both.

18 Q Was it proper, in your opinion, to use a  
19 waiting value progress payment chart in  
20 determining the percent of progress payments that  
21 you would allow Freedom throughout say in February  
22 1986?


23 A Well, the progress payment waiting  
24 element is a mandatory requirement imposed on my  
25 technical review, and he computes the percent used

1 Liebman

2 in these waited elements and he arrives at what  
3 ought to be a percent of completion which I use in  
4 my firm to pay or not pay. ✓

5 Q So you used a waiting progress payment  
6 work sheet in determining how much to pay Freedom  
7 on the progress payment throughout this contract?

8 A Absolutely, sure.

9 MR. KRAHULIK: Thank you. 

10 CROSS-EXAMINATION BY

11 MRS. EPSTEIN:

12 Q Mr. Liebman, on cross-examination Mr.  
13 MacGill asked you at length whether you ever  
14 authorized a progress payment that did not  
15 properly have your signature in some way affirming  
16 that every progress payment you were paying was  
17 appropriately incurred and an allowable cost.

18 A That is correct.

19 Q Each progress payment file that you  
20 received was quite thick, was it not?

21 A Yes.

22 Q What you have before you, and that Mr.  
23 MacGill has marked, are only a very, very, small  
24 portion of each progress payment file; is that not  
25 correct?

1 Liebman

2 A That is correct.

3 Q And is it also correct that each  
4 progress payment request was accompanied by  
5 certain documents?

6 A That's correct.

7 Q What types of documents accompanied each  
8 progress payment request?

9 A A break out a separate sheet breaking  
10 out the costs that were involved with the progress  
11 payment into the various cost elements as well as  
12 supporting documents such as vendor invoices,  
13 copies perhaps of time cards, et cetera, et  
14 cetera.

15 Q You also told us that there was a period  
16 of time that you had to do what you called a desk  
17 audit of the progress payment request. Would you  
18 explain to us what you mean by "desk audit."

19 A That's when I personally had to review  
20 the entire progress payment file myself including  
21 all the supporting documentation because I wasn't  
22 getting cooperation from DCAA at the time. *KA*

23 Q In order to review the progress payment  
24 request and conduct what you called a desk audit,  
25 did you ever personally go out to Freedom's



1 Liebman

2 facility to check that what was on their books and  
3 records matched what you were receiving?

4 A I did not. ✓

5 Q Did you ever go out to check and  
6 determine whether, in fact, the requests submitted  
7 to you had been paid?

8 A I did not.

9 Q You had to rely, did you not, on the  
10 information being certified to you by the  
11 contractor, Freedom, as being true, accurate and  
12 correct?

13 MR. MACGILL: I'll going to object. I  
14 let you lead him for four, five minutes now. We  
15 are going to put an end to it, it's a leading  
16 question. If you have a question to ask him, ask  
17 him, but do it in a proper form.

18 Q On what did you have to rely to  
19 determine the accuracy of the submissions?

20 A Three things, the contractor's  
21 certification on the progress payment request, the  
22 desk review that I conducted, as well as the DCA  
23 reviews that were being conducted.

24 Q But the DCA reviews were not being  
25 conducted at all on certain of the progress

1 Liebman

2 payment requests; is that correct?

3 MR. MACGILL: Objection, leading.

4 A Not correct. To the best of my  
5 recollection, I requested reviews on every  
6 progress payment request. DCAA, I believe on  
7 almost all of them if not all of them, did an all  
8 out review and did check the costs, but  
9 recommended zero payment because they didn't  
10 recognized the indirect cost issue and because  
11 Freedom was in an unsatisfactory financial  
12 condition. Based on those two reasons, they said  
13 zero payment on some of the costs or it might not  
14 have been all of them. There are maybe one or two  
15 occasions that DCAA decided to go check the files.

16 Q Is the financial condition of a  
17 contractor an important factor throughout the life  
18 of a Government contract?

19 A That it is a vital factor, because  
20 without it a contractor being in a -- say  
21 refinancial condition, the ACO must seriously  
22 consider suspending progress payment.

23 Q That is throughout the life of the  
24 contract?

25 A That is correct.

1 Liebman

2 Q Is it true at any point in time in the  
3 life of a contract, an ACO must consider the  
4 financial condition of a Government contractor?

5 A That is correct.

6 Q Sir, Mr. MacGill also referred you on  
7 what has heretofore in a previous deposition been  
8 marked as Defendants Exhibit 130 and what has here  
9 been mark the as Plaintiffs Exhibit --

10 MR. MACGILL: (Hanging.)

11 MRS. EPSTEIN: Once again, Mr. MacGill,  
12 thank you for your courtesy.

13 MR. MACGILL: Did you expect me to jump  
14 up and look for your exhibits for you, is that  
15 what you wanted?

16 MRS. EPSTEIN: No, I was asking for  
17 your assistance in locating your exhibits.

18 MR. MACGILL: They're right in front of  
19 you is what I told you.

20 MRS. EPSTEIN: And I thank you for your  
21 assistance for helping me find them, I always  
22 appreciate male courtesy.

23 MR. MACGILL: I thought you were being  
24 sarcastic?

25 MRS. EPSTEIN: No, Mr. MacGill, I

1 Liebman

2 always appreciate it.

3 Q Mr. Liebman, you recall that Mr. MacGill  
4 asked you and turned your attention to Plaintiffs  
5 301, which is identical to Defendants 130, to one  
6 page in this multi-page document, namely a summary  
7 of something that occurred on 28th, February 1985.

8 Will you take a look at the prior pages  
9 and tell us whether they refresh your recollection  
10 as to a meeting that you attended on October 2,  
11 1985 at the DCASMA New York office.

12 Does this document refresh your  
13 recollection (handing)?

14 A I would have to --

15 Q Take a look at it and see if it  
16 refreshes your recollection as to the meeting that  
17 took place on October 2, 1985?

18 A This is a memorandum from the PCO that  
19 -- yes.

20 Q Does it, first of all, refresh your  
21 recollection that you were present at such a  
22 meeting?

23 A Yes, because I'm listed here as one of  
24 the attendees.

25 Q Take a look that the document so that I

1 Liebman

2 can ask you questions as to what transpired in  
3 that meeting.

4 MR. MACGILL: Do you want him to read  
5 the whole thing?

6 MRS. EPSTEIN: No.

7 A Just this page.

8 Q Can you tell us whether, first of all,  
9 how many people were present at that DCASMA  
10 meeting on the morning of October 2, 1985?

11 A Can I just see that, I'm very sorry.

12 Q (Handing. )

13 A Okay. Strictly a Government meeting,  
14 approximately 15 or so Government personnel.

15 Q Was there any discussion at that meeting  
16 of Freedom's unsatisfactory financial condition?

17 A Yes.

18 Q Was there any consideration of  
19 suspending progress payments because of that  
20 unsatisfactory financial condition?

21 A I see nothing reflected on the page I  
22 read, nor do I recall anything concerning progress  
23 payment especially.

24 Q Was there any discussion, however, at  
25 that meeting among Government officials of the

1 Liebman

2 need to obtain an additional line of credit for  
3 Freedom in order to remedy its precarious  
4 financial position?

5 A Yes.

6 Q Was it represented that Bankers Leasing  
7 had committed itself to increasing a line of  
8 credit?

9 MR. MACGILL: Objection, hearsay.

10 A I would have to look at the page again.  
11 I remember mentioning another half a million.

12 MR. MACGILL: Let the record reflect  
13 the witness is now looking at the exhibit, and to  
14 that extent the witness is now going to be  
15 answering to the exhibit. I have an objection to  
16 the form of the question.

17 A Yes, the page indicates than an  
18 additional half --

19 Q Does it refresh your recollection as to  
20 what was said regarding any representations that  
21 Bankers Leasing had made to any Government  
22 official?

23 MR. MACGILL: Objection. Hearsay, at  
24 least two layers.

25 Q Does it refresh your recollection?

1 Liebman

2 A Yes.

3 Q Can you tell us the --

4 MR. MACGILL: Same objection.

5 A Again, other than what's reflected on  
6 the page, I just do not recall any more  
7 specifics. There were just so many meetings we  
8 had on Freedom.

9 Q What I'm asking you, Mr. Liebman, and  
10 it's for technical evidentiary reasons, does it  
11 refresh your recollection as to what was said?

12 A Yes.

13 Q Tell us what was said?

14 A Well, --

15 MR. MACGILL: Same objection as before,  
16 two layers of hearsay. He already testified he  
17 didn't remember anything more than what's recorded  
18 on the pages.

19 A The sentences that I read on this page  
20 does trigger some nerve cells in my memory, but I  
21 just can't add any more.

22 Q What nerve cells does it trigger?

23 A (Indicating.)

24 Q Mr. Liebman, I can't get that into  
25 evidence. I can get into evidence maybe your

1 Liebman

2 recollection. I'm asking you to tell us if this  
3 refreshes your recollection?

4 MR. MACGILL: I'm sorry, Mr. Liebman.

5 I'm going to make the same objection to  
6 hearsay. Further, his recollection has been  
7 exhausted, he has no recollection different or  
8 additional to what's recorded on the document.

9 Q Please tell us what your recollection is  
10 regarding what, if anything, was said about any  
11 commitment Bankers Leasing had made?

12 MR. MACGILL: Same objection as before,  
13 it's leading.

14 A Commitment in the way of additional  
15 funding.

16 Q Yes?

17 A Again, upon reading the page I remember  
18 these issues being pertinent. Other than that, I  
19 don't understand -- I can't comment about the  
20 additional half a million such as some other of  
21 the matters discussed on the page. I remember  
22 these were pertinent issues, but I can't remember  
23 any more regarding that particular meeting.

24 Q Do you recall that on the following day,  
25 October 3, 1985, there was yet another meeting,



1 Liebman

2 DPSC, DLA, DCASMA New York, DCAA personnel, and  
3 included at that meeting were these  
4 representatives of Freedom, Henry Thomas, Colonel  
5 Frank Francois, a Joe Clark, a Jerry Goldstein who  
6 is Freedom's accountant, a Neil Ruttenberg, a  
7 Dante Albieri who is Freedom's counsel, a Warren  
8 Rosen, Performance Financial Services, who was  
9 Bankers Leasing agent?

10 MR. MACGILL: Objection, leading.

11 A In honesty, after I read the first page  
12 you showed me I started reading the page you're  
13 now looking at and I just do not recall -- there  
14 were so many meetings on Freedom I cannot focus  
15 solely on any one meeting of the many, many  
16 meetings that we had. Surely was an important  
17 meeting, but there were so many important  
18 meetings. Other than that, I just can't remember.

19 Q Do you recall whether there was any  
20 discussion of Freedom extending the 3.5 million  
21 dollars at which a representative of Bankers  
22 Leasing was present?

23 A This is on the next day?

24 Q Correct on --

25 A I just don't recall, to be honest with

1 Liebman

2 you.

3 Q Mr. Liebman, you were also asked on  
4 cross-examination, either by Mr. MacGill and/or by  
5 Mr. Krahulik, whether you paid for capital  
6 equipment as a direct cost under the contract.  
7 And I believe your answer was that you did not.  
8 Is that correct?

9 A That is correct.

10 Q Is it not a fact, sir, that you did,  
11 however, pay least payments for capital equipment  
12 under the progress payment of the contract?

13 MR. MACGILL: Objection, leading.

14 A I do not know. I would have to check  
15 the files. I did pay progress payments for lease  
16 payments, but it might have been for special  
17 equipment, possibly capital equipment or a  
18 combination of both. I do not know without  
19 checking my files.

20 Q Does the name TECHNIC mean anything to  
21 you?

22 A Yes. TECHNIC was involved with progress  
23 payments, yes.

24 Q What do you know about TECHNIC?

25 A That I recollect, I believe they were

1 Liebman

2 supplying or leasing equipment to Freedom.  
3 They're involvement with the progress payments,  
4 costs, bits of my recollection, was early on in  
5 the progress payment submissions.

6 Q Were you ever aware of the fact that  
7 TECHNIC was in any way an affiliated company of  
8 Freedom?

9 A Not until you visited our office a month  
10 or so. As prior to that time, no, not at all.

11 Q Would you have been authorized to approve  
12 progress payments to an affiliated company of  
13 Freedom's?

14 A We would have looked at it carefully and  
15 questioned it. I can't say whether it would be  
16 allowed or disallowed, it would have required  
17 further careful review because it would be less  
18 than an arms length type transaction.

19 Q Why would that require careful review?

20 A Former relations between a prime  
21 contractor and a subcontractor must be at arms  
22 length. If you have one party being the owner of  
23 the prime as well as the subcontractor, it  
24 represents less than an arms length transaction  
25 and possibly could be a DAR violation, but further

1 Liebman

2 review by legal, by DCAA and myself.

3 Q Do you recall whether Freedom ever  
4 submitted to you documentation incating that it  
5 had no relationship with TECHNIC?

6 A I do not recall any such documentation.

7 MRS. EPSTEIN: Rather than take up all  
8 of the time, I'll probably wrap up and ask you to  
9 return very briefly tomorrow, since it's already  
10 5:30 anyway, and ask that we end at this time.

11 MR. MACGILL: If it helps, I don't have  
12 any recross-examination. I don't think.

13 Q Can we address the issue of the DAR  
14 deviation request, sir.

15 A Yes.

16 Q Is a DAR deviation something that you  
17 alone could decide?

18 A No.

19 Q What is a DAR deviation request?

20 A It's a request for approval of something  
21 that's not authorized by a DAR Regulation.

22 Q What is the process for obtaining a DAR  
23 deviation request?

24 A Okay. I would have to refresh my  
25 memory, but I believe it's initiated by the

1 Liebman

2 contracting officer and it goes through a review  
3 process internally within DCASR New York. Then  
4 it's forwarded down to headquarters, to DLA  
5 headquarters in Virginia, with a recommendation.  
6 I believe it goes -- again, I have to refresh my  
7 memory with the DAR. I think it has to go to the  
8 DOD financing center in the Washington area, and I  
9 think it also goes to the Secretary of Defense  
10 level. I'm speaking from memory, I could be  
11 wrong. I know it has to be approved above and  
12 beyond my office down to the Washington area.

13 Q In other words, when Mr. MacGill was  
14 asking you questions regarding a DAR deviation and  
15 Mr. Montefinise's letter, there is no way that you  
16 alone could have granted a DAR deviation?

17 MR. MACGILL: Objection, it's a leading  
18 question.

19 Q Was there any other way that you allowed  
20 --

21 A No, I have no authority.

22 Q Wait, we don't have a question.

23 Was there any way that you alone could  
24 have granted a DAR deviation?

25 A No.

1 Liebman

2 Q Does the procurement contracting officer  
3 have the authority to allow for direct costs under  
4 the progress payment clause when he enters into  
5 the contract?

6 A Well, progress payment --

7 MR. MACGILL: Pardon me.

8 I'm going object to the extent that it  
9 calls for a legal conclusion.

10 Q Is it your understanding that a  
11 procurement contracting officer has the authority  
12 to modify or revise progress payment relations by  
13 virtue of what he negotiated on a contract?

14 A Does not have that authority without a  
15 DAR deviation approval.

16 Q You also told us that at the time this  
17 contract was awarded in November of 1984, the  
18 standard progress payment clause was 95 percent;  
19 is that correct?

20 A That is correct.

21 Q Would a procurement contracting officer,  
22 to your knowledge, have the authority to modify  
23 that standard and make it only fifty percent?

24 A No.

25 MR. MACGILL: Same objection as before,

1 Liebman

2 it calls for a legal conclusion.

3 Q What is your understanding of what the  
4 process would have to be in order to modify the  
5 standard progress payment clause which provides  
6 for 95 percent --

7 A It would fall under what they call an  
8 unusual progress payment request and the  
9 contractor would have to submit a request, it  
10 would have to be processed through DCASMA and  
11 DCASMA channels or procurement channels, submitted  
12 it to DPSC, and the decision would have to be made  
13 by higher headquarters down in the Washington  
14 area, perhaps as even as high as the  
15 Undersecretary of Defense.

16 Q At what time, to your knowledge, did  
17 anyone in the Government learn that Dollar Dry  
18 Dock had refused to finance any portion of that  
19 contract?

20 MR. MACGILL: Objection. You can't ask  
21 him as to what other people knew, you can ask him  
22 what he knew.

23 MRS. EPSTFIN: You're right.

24 Q When did you learn it?

25 A I, as well as my colleagues, as well as

1 Liebman

2 DCASMA and DCASR, first learned of this Dollar Dry  
3 Dock withdrawal of this letter of commitment  
4 either in December 1986 or early January 1985.

5 Q Will you tell us what the significance,  
6 to your understanding, of the preaward survey is?

7 A Preaward survey determines whether or  
8 not a contractor is capable of performing on a  
9 particular contract.

10 Q And is status of his financial crucial  
11 to that determination?

12 A Yes, it is.

13 Q What is a postaward conference?

14 A Most award conferences are conducted  
15 either by the ACO or the PCO after award of the  
16 contract. The purpose of it is to go over any  
17 problem areas, et cetera, et cetera. It's  
18 reviewed, the contract requirements discussed,  
19 problem areas, answer questions with the  
20 contractor.

21 Q This is a unusual step in the  
22 administration of any contract?

23 A It's not held regarding -- we don't hold  
24 a conference regarding every contract. A  
25 determination concerning postaward determinations



1 Liebman

2 made on an individual basis, but postaward  
3 conferences are common.

4 Q What is the purpose of a postaward  
5 conference?

6 A As I just stated, it's to discuss  
7 contract requirements, answer any questions that  
8 the Government may have or the contractor, to  
9 prevent possible future problems that might occur  
10 during the life of the contract.

11 Q Are you permitted in a postaward  
12 conference to look at the financial situation of  
13 the contractor and determine if there has been a  
14 change?

15 A Yes, postaward conferences can cover --  
16 it's all encompassing. We set an agenda and it  
17 could include the financial aspect, sure,  
18 absolutely.

19 Q Do you know whether an interest factor  
20 was included in the contract awarded to Freedom in  
21 order to cover outside financing?

22 A Again, I was not involved with the  
23 negotiation of the contract, but obviously would  
24 have to be considered in negotiating the price  
25 because obviously with -- the commitment letter

1 Liebman

2 from Dollar Dry Dock was \$7,000,000, obviously  
3 that would be a consideration.

4 Q You also answered a question of Mr.  
5 Krahulik regarding whether or not equipment was  
6 capital equipment or special equipment. I think  
7 you told us there would have to be a DAR tooling  
8 clause in the contract.

9 A Special tooling or special test  
10 equipment clause, that was the case, yes.

11 Q Are we to understand by that statement  
12 that in order for you to be able to consider  
13 equipment as special equipment there's got to be a  
14 contract clause so providing?

15 A Not consider it special equipment, but  
16 to pay progress payments, yes.

17 Q And that would have to be included as a  
18 special agreement within the contract?

19 A A provision of the contract, yes, it  
20 must be in the contract.

21 MR. MACGILL: Objection.

22 Q Was there a DAR tooling clause in this  
23 contract?

24 A I do not recollect. I don't think so,  
25 but I would have to check the file.

1 Liebman

2 Q Mr. Krahulik also asked you about the  
3 receipt of certain progress payment requests that  
4 you did not pay, one instance that you stated was  
5 that you had paid for rent for four months of  
6 \$100,000 for each month.

7 A That's correct.

8 Q So you paid and found that all the rent  
9 had not, in fact, been paid by Freedom; is that  
10 correct?

11 A That is also correct.

12 Q What did you do when you found that out?

13 A I reduced his progress payment by that  
14 amount.

15 Q Did Mr. Thomas and Freedom continue to  
16 resubmit a request for that amount of money?

17 A Several times in the next submission or  
18 several submissions they included those costs plus  
19 other disallowed costs in subsequent progress  
20 payment submissions.

21 Q So part of the \$4,000,000 is  
22 resubmissions of multiple types of the same item  
23 of cost that had already been disallowed?

24 MR. MACGILL: Objection, leading.

25 A It's the \$4,000,000 cost or progress

1 Liebman  
2 payment cost that I did not pay during the life of  
3 the contract.

4 Am I correct saying that I believe that  
5 is what the other attorney said? In other words,  
6 the \$4,000,000, what does that represent again?

7 Q That's what I'm asking you.

8 A I remember the other Freedom attorney  
9 mentioned \$4,000,000, I think he said --

10 Q That's right.

11 A I have to check the record. I think he  
12 said that they represented costs that were not  
13 paid in the form of progress payment.

14 Q I believe so.

15 A Without doing an audit, I have no way of  
16 verifying that, I have to audit that \$4,000,000.

17 Q But you can tell us that Freedom  
18 resubmitted several times the same request for  
19 \$4,000,000?

20 A That, plus other disallowed costs.

21 Q Can you think of another instance where  
22 Freedom submitted costs that you had disallowed?

23 A I have to check the files. I just don't  
24 recollect.

25 Q Could you give us any explanation of how

Liebman

it is that Freedom lost 2.7 million dollars or 3.4 million dollars under this contract?

A Yes.

Q Please do so.

A The original delivery schedule for product was from June of 1985 -- I'm sorry, from July of 1985 to December 1985. Obviously with all the problems that arose delivery was late. Each month that delivery was late meant an additional month of incurred indirect costs. We had huge amounts of indirect costs every month. As an example, I think it was \$110,000 rent each month.

There were costs to be paid, there were office salaries to be paid, employees salaries to be paid, heat, light, electricity, et cetera, et cetera. So you're talking about 200 -- I don't know \$300,000 a month. Each month that production was delayed meant more incurred costs for Freedom. That was, I think, probably the main reason that accounted for this loss.

Q In the beginning of the contract were all of those costs incurred up front? By that I mean from the moment he submitted that progress payment to -- he was paying \$110,000 every month

1 Liebman

2 in November, December, January, February?

3 A He was required to. Whether he actually  
4 paid, I don't know. There were a lot of cases  
5 where Freedom did not pay its costs of  
6 performance. For example, my records show -- my  
7 reports show that he owed for a long time about  
8 six or \$700,000 in federal, state and city taxes  
9 for long periods of time. What I'm getting at is  
10 he was allowed to pay a lot of direct costs, but  
11 he did not.

12 Q So if what I understand you in terms of  
13 taxes and rent, Freedom is stating that it lost  
14 money even though it did not necessary incur and  
15 pay out those sums of money?

16 MR. MACGILL: Objection, leading.

17 A He had certain monthly commitments in  
18 the way of cost that he was required to pay and  
19 these would be incurred type costs, and he's  
20 expected to pay these costs in the ordinary course  
21 of business. Whether there were progress payment  
22 in a contract or not, all contracts provide for  
23 progress payment.

24 Q But you're aware of the fact that these  
25 cost he never paid?

1 Liebman

2 A I am aware of that fact, yes.

3 MR. MACGILL: Objection.

4 Q Can you detail some of those costs that  
5 you're aware of, without an audit, that Freedom  
6 never paid?

7 A Never at all or never?

8 Q Did not pay.

9 A For example, the taxes were months  
10 behind schedule, I think New York City taxes were  
11 over a year behind schedule. We insisted that he  
12 pay that and I think he drew money from Bankers  
13 Leasing, whatever, and he did pay some of the  
14 taxes. Whether he paid all of them, I don't  
15 know. I'm sure there were many vendors that were  
16 never paid. We had one vendor camp outside our  
17 commander's office, the president of Star Foods,  
18 was so distraught about Freedom not paying its  
19 bills almost pitched his tent in our commander's  
20 office here in DCASMA New York to voice his horror  
21 and, you know, distress that he was not being paid  
22 by Freedom.

23 MRS. EPSTEIN: It is 20 of six.

24 MR. MACGILL: Edna, really you have to  
25 be done. I mean there is no reason to have him

Liebman

come back.

Q Mr. Liebman, do you mind coming back very briefly tomorrow?

A No, because I have a personal commitment.

MR. MACGILL: I'm just going to show an objection. You can do whatever you want. If you want to come back -- we can clearly finish within the next few minutes, my cross-examination -- although I may go back and find out I want to go back to additional questions subject to my cross which would be one question. I'm not saying if we come back in the morning it will be a lengthy cross. I think we can get this done in the next five minutes.

MR. MEDEIROS: Mr. Liebman has a commitment. I'm more concerned about Mr. Stokes coming and sitting out there for hours.

Off the record.

(Whereupon a discussion was held off the record.)

MRS. EPSTEIN: Mr. Liebman, since Mr. Krahulik has indicated the desire to question you in detail regarding the progress folders once you



1 Liebman

2 have had an opportunity to read them, I reserve  
3 any additional questions at this time since it  
4 requires a detailed look at those progress payment  
5 folders and what discussions were made with regard  
6 to certain elements as well.

7 MR. MACGILL: May I now cross-examine?

8 MRS. EPSTEIN: Yes.

9 MR. MACGILL: This is the Liebman  
10 deposition. As far as our Chicago case is  
11 concerned, if you have questions ask him now.

12 CROSS-EXAMINATION BY

13 MR. MACGILL:

14 Q We had a break, Mr. Liebman, I thought  
15 the deposition was over and then we came back in  
16 here five or ten minutes after the break for the  
17 day. What happened? What was discussed outside  
18 the deposition room here?

19 A Well, it was matter of TECHNIC.

20 Q What said to whom?

21 A Mrs. Epstein spoke about TECHNIC to  
22 myself and Greg Medeiros, my counsel, and  
23 suggested that I perhaps look at some documents  
24 concerning TECHNIC.

25 Q What documents?

1 Liebman

2 A Well, she had furnished me certain  
3 documents in the mail concerning TECHNIC and I  
4 have not had a chance to look at the document, and  
5 she suggested I stop by my office in the morning  
6 and perhaps look at my documents.

7 Q What else did they say about TECHNIC?

8 A That I should -- you know, again she  
9 would possibly be asking some questions concerning  
10 the leasing arrangements, the progress payment and  
11 the issue of capital, and being I was coming back  
12 tomorrow she requested perhaps I bring the  
13 documents with me, perhaps read them on the way  
14 up.

15 Q Then what happened?

16 A They we came back in here.

17 MR. MACGILL: I don't understand why  
18 we're going back in here.

19 MR. MEDEIROS: A decision was made,  
20 instead of forcing Mr. Liebman just to come back  
21 tomorrow to testify on that one element, it might  
22 be better if -- in fact, there will be depositions  
23 somewhere down the road in the fairly near future,  
24 for him to comment on those grounds at the time  
25 when he's had the opportunity to review his files

1 Liebman

2 which contains documentation relating to that  
3 contract or the leasing arrangements.

4 THE WITNESS: I really didn't give  
5 adequate testimony.

6 MR. MACGILL: You don't need to. If  
7 you want to explain something you can.

8 MRS. EPSTEIN: You asked him --

9 MR. MACGILL: I'm satisfied with his  
10 explanation. If you want to go ahead --

11 THE WITNESS: I just felt that I needed  
12 more time to really look at the matter because I  
13 have another legal meeting tomorrow afternoon.

14 Q You have met with Mrs. Epstein before?

15 A One time.

16 Q How long was that meeting?

17 A For a few hours in DCASMA New York.

18 Q What was discussed at the meeting?

19 A One of the things that was discussed  
20 here, the history of the procurement, what my role  
21 was, discussions about progress payments, why I  
22 paid, why I didn't pay, some of the pertinent  
23 meeting we had, why I suspended, many of the  
24 issues discussed here.

25 Q Was it mainly started early one morning

Liebman

and continued most of the day?

A No, she came in the afternoon and I was present, Greg Medeiros was present, Bill Stokes came later on. And it was a few hours, looked at some of the documents, put yellow tags on some of the pertinent documents.

Q Did she basically give you an idea of some of the questions she would be asking you?

A No. I was given the impression it would be a few questions, six or seven questions like why did I pay a progress payment, what problems did I have with the contractor, what was my role under the contract. I didn't expect something like this hundred questions.

Given the impression, it would be something very general and basically what my understanding of the procurement was, did I pay progress payment, what did I know about Bankers Leasing, about the loss ratio, things like that, questions maybe ten or under.

Q Did she tell you what she thought happened here?

A What she thought happened? You mean outside?

1 Liebman

2 Q In relation to the Freedom contract in  
3 the early meeting.

4 A I don't know what you mean.

5 Q When she came to your office, did she  
6 have discussions with you in terms of why Freedom  
7 failed?

8 A No. She had asked us those questions,  
9 what happened, what were the problems. She was  
10 really asking us the questions.

11 Q I take it you showed her your documents  
12 when she was there?

13 A Yes.

14 Q Did you make this pretty clear that she  
15 was welcome to look at whatever documents you had?

16 A Yes, sure.

17 MRS. EPSTEIN: Will the record reflect  
18 that Mr. MacGill has said we will be done soon and  
19 that Mr. MacGill --

20 MR. MACGILL: No. He said "will you go  
21 long," and I said "I doubt it."

22 MRS. EPSTEIN: I apologize.

23 A Do you still want me tomorrow?

24 Q No.

25 MRS. EPSTEIN: No, get it done today.

1 Liebman

2 Q I take it you copied some of your  
3 documents for Mrs. Epstein as a result of your  
4 meeting at your office?

5 A Yes.

6 Q Did you copy everything that she asked  
7 you to copy?

8 MR. MEDEIROS: I did the copying, she  
9 used yellow stickers and I copied the documents  
10 that were indicated with yellow stickers.

11 Q To your knowledge, Mr. Liebman, were  
12 those documents forwarded out prior to the  
13 deposition beginning here yesterday?

14 A Yes. I think there was one missing  
15 document that may have been an alert report which  
16 you're looking for which --

17 MRS. EPSTEIN: Which plaintiffs had and  
18 Plaintiffs Freedom had and introduced into  
19 evidence.

20 A And the Bill Stokes document.

21 Q You were subpoenaed to bring documents  
22 with you to the deposition?

23 A I don't know if we actually --

24 MR. MEDEIROS: Yes, the subpoena did  
25 call for that. I brought, to the best of my

1 Liebman

2 knowledge, the items that had been yellow tagged.

3 Q And the items that had been subpoenaed?

4 A Well, I could not carry the supporting  
5 documentation, for instance, for the progress  
6 payment which has several information of  
7 supporting invoices. And things which I did not  
8 bring, they are available in our office.

9 MR. MACGILL: Just so you know and the  
10 record, we produced all those documents to Mrs.  
11 Epstein.

12 Q The loss ratio that you applied after  
13 April 1986, what percentage was that loss ratio?

14 A It varied. It depended on the  
15 percentage of progress versus percent of cost  
16 incurred, so the ratio changed each month.

17 Q Can you give us a general order of  
18 magnitude?

19 A Again, I have to have --

20 MRS. EPSTEIN: Objection, outside the  
21 scope of cross-examination.

22 A I would have to review the files.  
23 Again, I remember there was a disparity from 20 to  
24 30 percent, usual 25 percent in progress, in  
25 costs. Again, I have to go over the computations

Liebman

in the file.

MRS. EPSTEIN: Will the record reflect that it is three to six, that Mr. Liebman asked that he be permitted to leave at six, that he represented --

MR. MACGILL: If you be quiet we'll be done by six.

MRS. EPSTEIN: -- that you represented that you had one question, but if you went ahead tomorrow you --

Would you indicate that is the third time that Mr. MacGill has told me to be quite.

MR. MACGILL: I don't know how else to say it, you're being impolite.

Q When you came up with a loss percentage from 20 to 30 would you apply it to a progress payment within that period of time?

A It would be the costs. The ratio is arrived at by going through a whole formula, let's say a ratio of 85 percent. Again, I'm speaking hypothetically. Again, it's a calculation that's set forth in the DAR Regulations. And depending on the ratio that was arrived at by using the formula, that I would need to see -- review the



1 Liebman

2 progress payment files that are in question and  
3 see what ratio I had applied based on -- outlined  
4 the formula in the DAR.

5 MR. MEDEIROS: I note that counsel said  
6 two minutes, I think we --

7 MR. MACGILL: If everybody is quiet  
8 we'll get done.

9 MR. MEDEIROS: You said two minute and  
10 that was two minutes ago.

11 MR. MACGILL: And we had two-and-a-half  
12 minutes from Edna. Be quiet and we will be done  
13 in two minutes.

14 Q Sir, you indicated there was a 20 to 30  
15 percent figure or general order of magnitude as  
16 far as this loss ratio was concerned.

17 A At times. At times, yes.

18 MRS. EPSTEIN: Objection, outside the  
19 scope of cross-examination.

20 Q If that was the general order of  
21 magnitude of what you calculated to be the loss  
22 ratio, what adjustment would you make to the  
23 progress payment to Freedom?

24 A Again, I have to look at individual  
25 progress payment submission and see what I did at

Liebman

the time. I can't give you an answer without looking at the files, looking at the figures. I'm just not in a position to do that, but the records would speak for themselves, if you look at the files.

Q If you came up with the loss ratio of 20 percent and Freedom was requesting \$5,000,000, how would you use the loss ratio or 20 percent on \$5,000,000?

A Again, can I just take a ratio for example?

Q Sure.

A Again, I would need the files. Normally if you're using the ratio -- off the top of my head -- which would have to be confirmed by looking at files, if you're using a loss ratio say of 80 percent and there is a \$5,000,000 submission, obviously I can pay \$4,000,000 out of the \$5,000,000. Again, this is subject to formation of the formula and specific circumstances.

Q I understand. All I asked for is an understanding generally of how you operated with those figures, giving us an understanding of how

1 Liebman

2 you operated with those general figures.

3 A Yes.

4 Q Had production stopped let's say in the  
5 middle of June 1986, Freedom stopped production,  
6 nothing happened under the contract? Is it fair  
7 to say you can't give us any legal opinion of what  
8 the rights of Freedom would be and what the rights  
9 of the United States Government would be at this  
10 juncture?

11 A That's correct, I do not have any  
12 opinions.

13 MR. MACGILL: That's all I have.

14 MRS. EPSTEIN: I have a question, I'm  
15 sorry, Mr. Liebman.

16 CONTINUED CROSS-EXAMINATION BY

17 MRS. EPSTEIN:

18 Q Had Freedom stopped production in June  
19 of 1986 would you have paid anything further on  
20 outstanding progress payments?

21 A I would not have paid any further  
22 progress payments.

23 Q Did you receive a Freedom of Information  
24 Act request from Bankers Leasing Association, Inc.  
25 asking you to produce documents in this case or

Liebman

before this case?

A Well, a while back, yes, I did have a request from Bankers Leasing.

Q Did you give Bankers Leasing whatever documents they requested as a result of that request?

A To the best of my knowledge, yes.

MRS. EPSTEIN: No further questions.

MR. MACGILL: One follow up to her.

CONTINUED CROSS-EXAMINATION BY

MR. MACGILL:

Q Mr. Liebman, had you stopped paying progress payments, is it fair to say you can't offer us any legal opinion of any kind as to what the legal rights would have been of Freedom and of the United States Government in those circumstances in June 1986?

(Continued on next page to include jurat.)

1 Liebman

2 I can't offer a legal opinion. I can  
3 offer contract management or contract  
4 administration over the policy, but I can't give  
5 you a legal definition.

6 Q You can't define for us the rights of  
7 Freedom in that circumstance?

8 A Legal right, no.

9 MR. MACGILL: That's all I have.

10 (TIME NOTED: 6:03 P.M.)  
11  
12  
13

14 \_\_\_\_\_  
MARVIN LIEBMAN

15 Subscribed and sworn to  
16 before me this \_\_\_\_\_ day  
17 of \_\_\_\_\_, 19 .  
18  
19 \_\_\_\_\_

20 Notary Public  
21  
22  
23  
24  
25

Liebman

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CERTIFICATION

STATE OF NEW YORK     )  
                                      )  
COUNTY OF NEW YORK    )

I, Gail M. Piccolo, a stenotype  
reporter and Notary Public within and for the  
State of New York, do hereby certify, that:

MARVIN LIEBMAN

The witness(es) whose Examination(s) Before Trial  
is (are) hereinbefore set forth, was (were) duly  
sworn by me, and that such Examination(s) Before  
Trial is (are) a true and accurate record of the  
testimony given by said witness(es); and I  
further certify that I am not related to any of  
the parties to this action by blood or marriage  
and that I am in no way interested in the outcome  
of this matter.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 11<sup>th</sup> day of July, 1989.

  
Gail M. Piccolo

[illegible]