

Energy Department Contractors and the Environment: A More "Special Relationship"

By Omer F. Brown, II*

Two decades ago, *The Federal Bar Journal* published an article about the "special relationship" between the federal government and contractors that have been managing the government's nuclear production and research facilities, beginning with the Manhattan Engineer District (MED) of the World War II War Department.¹ The 1969 article touted "the flexibility and utility of the management contract concept."² Today with each passing month, the relationship between the federal government (now acting through the Department of Energy (DOE)) and its nuclear contractors is becoming even more "special." This is due to heightened public and congressional concern about the environmental and safety conditions at DOE's government-owned, contractor-operated (GOCO) facilities.

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At his confirmation hearing last February, DOE Secretary Watkins said the Department had been the victim of "long-term cultural misdirection." He has sought to bring about fundamental changes in DOE's nuclear operations, including the Department's relationship with its contractors. As the redirection was beginning, the "special relationship" was changed forever on June 6, 1989 when about seventy agents of the Federal Bureau of Investigation (FBI) arrived at DOE's Rocky Flats Plant in Colorado with a search warrant looking for criminal environmental violations by DOE, its contractor, and their employees. DOE and perhaps Congress will have even more changes in store for contractors in the coming months. A number of these changes will be good, but many of them that have been suggested ignore history.

History of M&O Contracts

To understand the environmental and safety responsibilities of DOE and its contractors, it is necessary to appreciate the background of the Department's use of contractors. DOE's management and operating (M&O) contractors essentially are alter egos that the Department engages to carry out its statutory missions, instead of using federal employees for those purposes. DOE M&O contractors perform various functions as directed by the Department and federal legislation with funds appropriated annually by Congress and administered by the Department. Thus, DOE contractors are much different from commercial Nuclear Regulatory Commission licensees that can be (and often have been) subjected to various backfit and other safety requirements or from other private contractors subject to environmental regulation.³

For over forty-five years, the federal government (through MED and later the Atomic Energy Commission (AEC), then the Energy Research and Development Administration (ERDA), and now

design, construct, and operate the clear facilities whose environmental mediation and modernization have been the subject of intense media attention for well over a year. Contract have been the means utilized MED/AEC/ERDA/DOE to conduct statutory functions prescribed by Atomic Energy Acts of 1946 and 1954

DOE M&O contracts usually have a five-year term. They involve a unique "partnership" between the federal government and private entities, differ from the typical principal-independent contractor, master-servant, or principal-agent relationships usually found in contract or tort law. Basically, the DOE M&O contractor agrees to use its skill and personnel to manage and operate a particular facility subject to the general direction and control of DOE. The facilities involve technologies ranging from nuclear reactors and chemical processing plants, through electronic communications, and machinery, foundry, and hand-assembly operations. Most were constructed when still-evolving applicable nuclear safety and environmental standards were significantly different from what they are today and when DOE (and Congress) emphasized production over environmental or safety observance.

Contractors were recruited by MED and its successor agencies to "gain the full advantage of the skill and experience of American industry." The alternative (then and now) would be to increase the number of Federal civil service employees.⁵ MED/AEC/ERDA/DOE contractors have received small even no fees for their services. Reflecting this fee structure, these contractors have been indemnified by the federal government for possible nuclear and other losses since the days of the MED. Many other items, such as State and local taxes, and worker's compensation premiums, are "allowable costs" under DOE M&O contracts.⁶ Under various DOE M&O contracts, fines and penalties

federal, state, local, or foreign environmental laws and regulations are allowable costs, unless they result from willful misconduct or lack of good faith on the part of senior contractor officials.⁷ DOE has reimbursed contractors for such costs.

Even for "for-profit" contractors, rigid government cost standards and limited fees have made participation in DOE programs much less remunerative than usual commercial ventures. With little probability of any near-term resurgence of nuclear power plant orders, participation in the federal government's nuclear program no longer presents many attractive opportunities to develop significant new, more profitable commercial nuclear business. (For example, only two teams bid in 1988 after DuPont chose not to renew DOE's multi-billion-dollar Savannah River Plant contract).

Unlike most other federal contractors, DOE M&O contractors typically do not simply furnish products or services on an independent basis; rather, they totally rely on DOE for program direction and funding. This is not to suggest DOE contractors are not concerned with environmental and safety matters. It simply is not credible to think that the large private entities engaged by DOE would sign contracts that would involve them in unacceptable safety or environmental practices. It is Congress and DOE (a creation of Congress and an instrumentality of the Executive Branch) that ultimately are responsible for any and all safety and environmental practices at the GOCO facilities under DOE's charge.

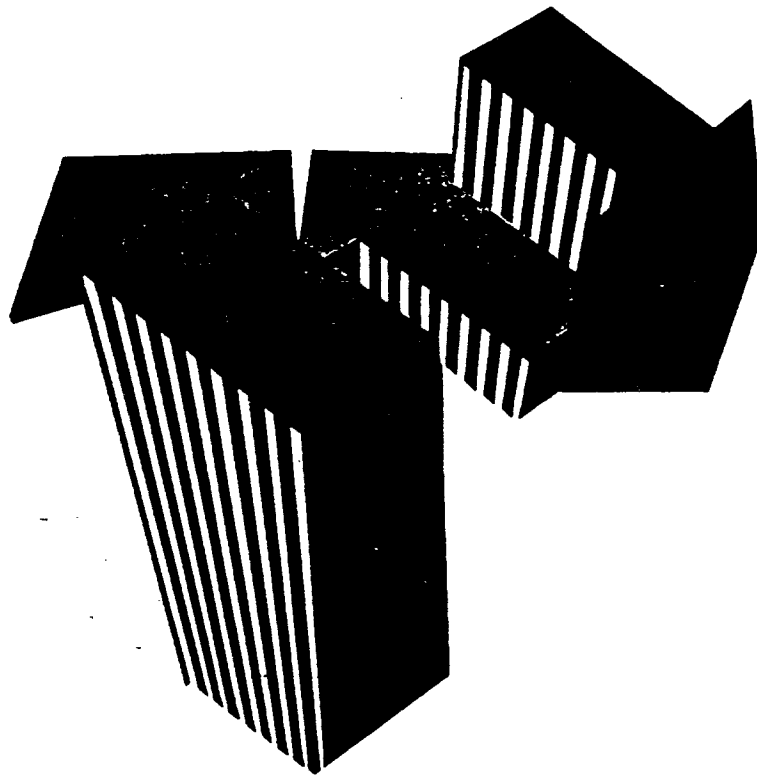
Tendency Toward "Contractor Accountability"

Even though DOE directs its contractors and Congress and DOE control the "purse strings," there has been a growing tendency to blame DOE contractors or otherwise attempt to hold them financially accountable for certain environmental and safety conditions at DOE nuclear facilities. The reason for this is simple: DOE itself, as an instrumentality

sulated from liability.⁸ Thus, we are beginning to see fundamental legislative and administrative changes in the relationship between DOE and its contractors being made or proposed.

Statutory Changes

Statutory changes contained in the Price-Anderson Amendments Act of 1988⁹ and the FY 1989 Defense Authorization Act¹⁰ will affect the relationship between DOE and its contractors in ways that are not yet evident. As required by the 1988 Price-Anderson Amendments, DOE is in the process of adopting policies and regulations to implement various new statutory provisions. This process involves, among other things: (1) adoption of guidelines governing new DOE contractor/sub-contractor civil¹¹ and criminal¹² penalties; and (2) designation of which DOE



rules, regulations, and orders are "related to nuclear safety" (the identification that invokes applicability of the new penalties).¹³

The FY 1989 Defense Authorization Act created a new five-member, independent safety oversight board for DOE defense nuclear facilities. The Defense Nuclear Facilities Safety Board has broad authority to investigate events and practices at DOE's defense facilities.¹⁴ The Secretary of Energy then

Board recommendations with a re detailing whether or not they will be lowered.¹⁵ The Board's first function evaluate the content and implementation of DOE standards relating to design, construction, operation, and commissioning of each defense nuclear facility.¹⁶ This important task presumably will take considerable time and effort. Meanwhile, DOE could attempt to impose civil or criminal penalties based on violations of existing internal DOE standards that have not been promulgated in accordance with the Administrative Procedures Act.

EPA Regulation and Rocky Flat Investigation

For the last few years, DOE contractors have found themselves in the middle of a dispute between DOE and the Environmental Protection Agency (EPA) over the applicability of the Resource Conservation and Recovery Act (RCRA) to DOE facilities. This long-simmering dispute came to a climax on June 6, 1989, when EPA agents arrived at the Rocky Flats Plant in Colorado with a search warrant.¹⁷ It later was announced that a special grand jury was investigating possible criminal environmental violations by DOE, Rockwell, and employees.¹⁸

Last September, Rockwell International Corporation filed a lawsuit in U.S. district court, alleging that it has been "placed in an untenable position by the United States Government" with respect to a DOE M&O contract at the Rocky Flats Plant.¹⁹ Rockwell stated that, as a result of contradictory positions taken by the government, it could not continue to operate Rocky Flats as required by the DOE contract without risking criminal prosecution, and could not cease operating the plant without risking substantial civil liability for breach of contract. Rockwell's lawsuit apparently was prompted by its inability to continue "closure" with the government over the continued operation of Rocky Flats. This was illustrated in large part by a Ju

dated September 14, 1989,²² which had declined to rule out criminal prosecution for future environmental violations.²³

In October, the court entered an order denying Rockwell's motion for a preliminary injunction. The judge noted that Rockwell did "appear to be exposed to a dilemma," but found that Rockwell was unlikely to prevail on the merits of its underlying claims, other remedies were available to the company. The court found it was unlikely that Rockwell would be able to show that it could not defend against any indictment in a criminal proceeding, that any civil judgment obtained on behalf of EPA would not be reviewable in a federal Court of Appeals, or that any contract dispute could not be adjudicated using the disputes mechanism that culminates in the Claims Court. It was unfortunate (but predictable) that the court did not use the opportunity presented by the Rockwell case to delineate the respective roles of DOE, EPA, and the Justice Department. Without that delineation, DOE contractors continue to be vulnerable to criminal environmental investigations.

DOE Initiatives

Following the Rocky Flats search warrant, DOE established "Tiger Teams" to investigate its nuclear facilities for environmental and safety compliance. DOE "Tiger Teams" were to be accompanied by agents of the EPA, FBI, the Occupational Safety and Health Administration, and/or state authorities. The first "Tiger Team" assessment was made at DOE's Feed Materials Production Center near Fernald, Ohio. The report indicated findings, among other things, that the facility was not operating in accordance with DOE "safety and operating parameters" and its current staff capabilities were not sufficient to ensure that all environmental, safety, and health requirements would be met on a timely basis.²⁴

Earlier last year, the DOE had announced that the Deputy Secretary would be conducting a thorough analysis of the Department's award-fee contracts with markedly increasing emphasis on compliance with environmental, safety, and health requirements. In July, DOE issued a Notice of Proposed Rulemaking regarding its M&O contractor award-fee program.²⁵ The Notice said that a study conducted by the Depart-

Mandatory changes in the standard award-fee clause subsequently were issued as a final rule, effective December 26, 1989.²⁶

In September, DOE's Inspector General (IG) released a report on indemnification of the Department's M&O contractors.²⁷ The IG Report discussed both DOE indemnity for claims (e.g., for "nuclear incidents" under Price-Anderson) and payment for "allowable costs" for various other contract expenses (including environmental fines and penalties). In fact, at some points, the IG seemed to confuse the two. Three of the Report's recommendations²⁸ could prove troublesome: these would involve modifying M&O contracts to allow DOE to require firing of individual contractor employees and to subject "all costs" to some new "reasonableness" test; and, suggesting assessing whether contractors should be held "financially responsible" in "additional circumstances" (specifically mentioning environmental fines and penalties).

Attempts to shift liability for the Department's nuclear facilities to contractors only will drive out more private concerns. The loss of private contractors would leave us with more federal employees . . . and not necessarily any more safety.

DOE announced in October that, as part of the Department's reevaluation of its relationship with contractors, a Notice of Proposed Rulemaking would be issued to seek public comments on "what changes are necessary and desirable in our M&O contracts."²⁹ Secretary Watkins indicated that "[i]n addition to ensuring that these contracts satisfy our present management priorities [safety and environment over production], this will have the salutary effect of providing consistency of contractual requirements throughout all our facilities." What all this means remains to be seen, but this rulemaking could have significant impacts on DOE M&O contractors. At the

Congressional Initiatives

Congress has been considering statutory changes that would affect DOE and its contractors in a number of significant ways. For example, a Glenn (S.1304) would make several changes the way DOE operates, including projecting the Department to the jurisdiction of the Occupational Safety and Health Administration and EPA and requiring DOE to enter into compliance agreements with State government. Wirth bill (S.972) would transfer to Department of Health and Human Services DOE's epidemiological research programs. A Wyden bill (H.R.21) would prohibit DOE from reimbursing contractors for environmental fines and penalties. A Johnston-McClure measure (S.1802) is a comprehensive bill to enhance nuclear safety at Department Energy nuclear facilities." For the part, DOE has opposed new legislation on the ground the Department is doing what is set forth in the bills

Effects of Changes

Coupled with new civil and criminal penalties contained in the Price-Anderson Amendments Act of 1988 changes in the award-fee program new "avoidable costs" provisions prohibiting, among other things, reimbursement of environmental fines and penalties) would be a strong disincentive for the dwindling number of existing or potential contractors to do business with DOE. In fact, DOE contractors already have been asking provisions that will allow them to terminate their contracts should changes be mandated by statute otherwise.

In implementing its new enforcement program, the Department should routinely review and designate its regulations, and orders "related to clear safety." DOE and its contractors need to know the new ground rules for safety compliance and contractor accountability under the new program can be achieved. Standards should be clear and definitive and should stand alone. Standards should reflect a specific "uniqueness" where appropriate. They should take into account that DOE and its contractors operate a number of diverse facilities at various locations, some of which have only small quantities of radioactive materials. Standards should a

ing DOE facilities, and the fact that Congress and DOE control funds for "upgrades." Penalties should be related to award fees (where applicable) to avoid "double jeopardy" where fines are imposed. In short, standards should take into account the long-standing "special relationship" between DOE and its contractors (and thousands of sub-contractors), and recognize that it is fundamentally different from the typical federal regulator/licensee situation.

DOE and Congress need to weigh carefully further changes in the relationship between the Department and its contractors. If the relationship gets much more "special," contractors simply will have to walk away. In this regard, simply raising fees to compensate for added risk may not be sufficient, because the risk is not readily quantifiable.

Conclusions

As they have for over forty-five years, private contractors can assist DOE in carrying out its vital national defense functions. But, if there are to be new "rules of the road" for nuclear safety or environmental compliance, contractors need to know what they are. Attempts to shift liability for the Department's nuclear facilities to contractors only will drive out more private concerns. The loss of private contractors would leave us with more federal employees (cloaked with sovereign immunity)—and not necessarily any more safety.

ENDNOTES

¹Hiestand & Florsheim, *The AEC Management Contract Concept*, 29 FED. BAR J. 67 (1969).

²*Id.* at 101.

³DOE exercises various controls to assure safety, environmental compliance, personnel administration, etc. A large number of compliance orders have been issued over the years by DOE's headquarters, operations offices, and contracting officers. DOE M&O contracts long have included provisions requiring contractors to take all reasonable precautions to protect the safety and health of the public and on-site employees. In the event a contractor fails to comply with applicable DOE safety and health requirements, M&O contracts specifically have provided that DOE may stop all or part of the work. Additionally, poor contract performance could lead to DOE termination of or failure to renew contracts or reduction of award fees (if any). It also could be damaging to a contractor's reputation, and erode its ability to continue in the nuclear field. In short, contractors have every reason to observe all applicable safety and environmental standards.

contracts. Contractors include universities and both profit and non-profit corporations, with contracts that are cost plus award fee (29 contracts), cost plus management allowance (10 contracts), cost plus no fee (7 contracts), and cost plus fixed fee (6 contracts). See DOE Inspector General, Report on Indemnification of the Department of Energy's Management and Operating Contractors, DOE/IG-0272 (Sept. 1989), at 1-2 (hereinafter Indemnification Report). Some contractors are private industrial companies (like EG&G, General Electric, Martin Marietta, and Westinghouse). Other contractors are universities (like the Universities of California and Chicago, and Stanford), non-profit institutions (like Battelle), or entities created specifically for the purpose of operating a DOE facility (like Associated Universities, a consortium of universities).

⁴The Department now has about 16,600 federal employees, while there are about 127,000 DOE contractor employees. DOE's FY1989 budget was about \$13.9 billion.

⁵See 48 C.F.R. Part 31 (1988); 48 C.F.R. 970.5204-1 *et seq.* (1988).

⁶See 42 U.S.C. § 7256a(a)(4) (1988).

⁷For example, under the Justice Department's "unitary executive" theory, federal agencies are not supposed to sue each other under the environmental laws or otherwise. The Federal Tort Claims Act makes it more difficult to make claims against federal agencies than private contractors. Thus, DOE contractors are becoming "targets of convenience" for plaintiffs and for federal and state environmental regulators.

⁸Act of Aug. 20, 1988, Pub. L. No. 100-408, 102 Stat. 1066.

⁹Act of Sept. 29, 1988, Pub. L. No. 100-456, title XIV, § 1441(a)(1), 102 Stat. 2076.

¹⁰42 U.S.C. § 2282a (1988).

¹¹42 U.S.C. § 2273(c) (1988).

¹²See 54 Fed. Reg. 38,865 (1989). The new civil penalties are inconsistent with the special relationship between DOE and its M&O contractors, but were the "price" that had to be paid for congressional renewal of Price-Anderson indemnity authority.

¹³42 U.S.C. § 2286a (1988).

¹⁴42 U.S.C. § 2286c (1988).

¹⁵42 U.S.C. § 2286a(1) (1988).

¹⁶See, e.g., Legal Environment Assistance Foundation v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984); DOE Final Rule on "Byproduct Material," 52 Fed. Reg. 15,937 (1987); DOE Inspector General, Flash Report on Compliance With the Resource Conservation and Recovery Act and Other Environmental Requirements, CR-F-89-1 (Jul. 14, 1989).

¹⁷United States v. Rocky Flats Plant, No. 89-730M (D. Colo.).

¹⁸At an October 5, 1989 House Transportation and Hazardous Materials Subcommittee hearing on prosecution of environmental crimes at DOE weapons facilities, the EPA witness indicated that the agency had been "especially active" last year in investigative actions at federal facilities, and that he anticipated that this initiative will continue in the future. EPA had initiated seven investigations involving federal facilities within the last year. Three involved DOE nuclear weapons facilities (but only the Rocky Flats investigation had been publicly acknowledged).

¹⁹Rockwell International Corp. v. United States, No. 89-2607 (D.D.C.). Defendants are

the United States, the Department of Justice, DOE, EPA, the Attorney General, the D. Secretary, and the EPA Administrator. Re well alleged Defendants' actions amount to a violation of the Fifth Amendment's due process clause and were arbitrary and capricious under the Administrative Procedure Act.

²⁰A day after the suit was filed, Rocky and DOE announced that they had mutually agreed to amend the term of the management and operating contract for the Rocky Flats Plant in Colorado to provide for the orderly transition to a new operator in the future. In light of that development, the Justice Department filed a "Suggestion of Mootness." The case was dismissed with prejudice on mootness grounds on Jan. 4, 1990, just after the new contractor assumed responsibility for the Rocky Flats site.

²¹Letter from Asst. Atty. General Stewart DOE Sec'y Watkins and EPA Adm'r Re Concerning Criminal Prosecution Environmental Violations at Rocky Flats (Sept. 14, 1989).

²²On October 5, 1989, the Senate Energy and Natural Resources Committee held hearing on the "status of Department of Energy nuclear weapons complex," with Secretary Watkins as the principal witness. Interestingly, the Secretary pointed out that a vast majority of DOE contractors are making very little of their total corporate profit from operation of DOE plants. He acknowledged that "there are not many countervailing incentives to keep the M&O contractors from walking away altogether." Yet, at the same time, Secretary Watkins opined that in September 14, 1989 Justice Department "sets forth a road map of fairness which will provide our employees and contract with every incentive to disclose environmental violations. . . ." He added that the laws brought by Rockwell against DOE, EPA and the Justice Department was "inaccurate" referring to contradictory positions among agencies. The Secretary did acknowledge that this "fairness doctrine" should be codified in statute. Senator James McClure (ID) pointed out that the Attorney General does not "control" individual United States Attorneys or state prosecutors, implying that the Justice Department letter is of limited value to contractors.

²³See DOE News Release N-89-049 (Sep. 13, 1989). Similar findings were made by "Tiger Teams" that assessed DOE's Mound Plant in Ohio and Pantex Plant in Texas. DOE News Release N-89-70 (Dec. 1, 1989) and DOE News Release N-89-71 (Dec. 1989).

²⁴54 Fed. Reg. 30,230 (1989).

²⁵54 Fed. Reg. 48,611 (1989).

²⁶Indemnification Report, *supra* note 4.

²⁷*Id.* at 21-22.

²⁸DOE published its Notice of Proposed Rulemaking on January 26, 55 Fed. Reg. 2796 (1990). It introduced a new concept "avoidable costs," which would become unallowable under DOE M&O contracts. If adopted as proposed, the rule change would radically alter the relationship between DOE and its contractors. Comments are due March 27, 1990.



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