

U.S. COURTS

IN THE UNITED STATES DISTRICT COURT

2004 OCT 29 PM 3:37

FOR THE DISTRICT OF IDAHO

RECEIVED  
CLERK OF COURT  
CLERK, IDAHO

LOCKHEED MARTIN IDAHO )  
TECHNOLOGIES COMPANY, )

Plaintiff, )

Civ. No. 98-0316-E-BLW

v. )

FINDINGS OF FACT

AND

LOCKHEED MARTIN ADVANCED )  
ENVIRONMENTAL SYSTEMS, INC., )  
and )  
LOCKHEED MARTIN CORPORATION, )

CONCLUSIONS OF LAW

Defendants & Third-Party Plaintiffs )

v. )

EG&G IDAHO INC., et al., )

Third-Party Defendants. )

**INTRODUCTION**

The Court held a bench trial in this case beginning in August and ending in November, 2003. The Court then allowed the parties to make further submissions that were completed by April of 2004. The case is now at issue.

The Court's main finding is that the termination for default was proper.

That finding and others are explained below in the Findings of Fact and Conclusions of Law.

## **FINDINGS OF FACT**

### **The Site**

- (1) The Idaho National Environmental and Engineering Laboratory (INEEL) occupies a site almost 900 square miles in size west of Idaho Falls, Idaho.
- (2) The INEEL is operated by the United States Department of Energy (DOE).
- (3) The southwestern portion of the INEEL site – consisting of 144 acres known as the Radioactive Waste Management Complex (RWMC) – was established in the 1950s to store radioactive waste.
- (4) An 88-acre parcel within the RWMC, known as the Subsurface Disposal Area (SDA), consists of about 20 pits and 56 trenches in which radioactive materials were buried.
- (5) One of the pits, known as Pit 9, is about an acre in size, and contains radioactive waste, some of which was shipped from the Rocky Flats Plant in Colorado from November, 1967 to June, 1969.
- (6) These wastes were typically placed in 55-gallon drums or boxes and then buried in a layer of dirt.
- (7) By the late 1980s, most of these containers, including the 55-gallon drums,

had deteriorated and yet no effort had been made to contain or treat the waste.

- (8) Recognizing the serious hazards posed by this radioactive waste, the EPA declared the entire RWMC a Superfund Site in 1989 pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

### **Remediation Plan**

- (9) To plan the remediation of this site, the DOE, EPA, and the State of Idaho, entered into a Federal Facility Agreement and Consent Order (FFA/CO) on December 4, 1991.
- (10) The FFA/CO set various deadlines for the DOE to clean up the site, and contained penalties for the DOE's failure to meet those deadlines.
- (11) The FFA/CO specifically chose Pit 9 for early interim action because its contents (1) posed a serious health threat, and (2) had been subjected to a very rough estimate using the Rocky Flats Shipping Records, an estimate that was not available for the rest of the SDA.
- (12) Moreover, the parties to the FFA/CO believed that the remediation of Pit 9 would provide valuable information about the extent of the contamination in the rest of the SDA.

**Lockheed's pursuit of the Pit 9 remediation project**

- (13) Estimating that the environmental remediation market could be worth billions, Lockheed Martin Corporation (LMC) decided to seek contracts to remediate buried radioactive wastes at DOE sites.
- (14) To further this goal, LMC purchased a soil remediation company known as AWC, and renamed it AWC-Lockheed.
- (15) AWC-Lockheed would later become known as Lockheed Environmental Services and Technologies (LESAT) and then Lockheed Martin Advanced Environmental Services (LMAES). LMAES was the name used during performance of the contract. Therefore, to avoid confusion, the Court will refer to this subsidiary of LMC as LMAES, even though it used other corporate names during the early stages of contract negotiation and performance. The parties have not raised any issue as to whether the change in corporate name or structure has any substantive legal effect on the rights of the parties.
- (16) LMC hired Steve Winston to be the General Manager of LMAES.
- (17) Winston, on behalf of LMAES, vigorously pursued remediation contracts with the DOE.
- (18) Lockheed officials used political pressure to attempt to convince DOE to

- formulate a project to remediate Pit 9.
- (19) Lockheed officials wanted to use the Pit 9 project as an entry into what they viewed as the lucrative business of waste remediation.
  - (20) LMAES hoped to prove itself on Pit 9 so that it would be chosen to remediate the entire RWMC.
  - (21) In January of 1991, Winston met with DOE officials to persuade them to allow Lockheed to remediate Pit 9.
  - (22) Winston proposed that the contract be a cost plus fixed fee contract.
  - (23) Winston opposed a fixed fee contract due to the uncertainties about the Pit 9 contents.
  - (24) A fixed fee contract would place more risk on LMAES if higher-than-estimated dangerous radioactive materials were found in the pit.
  - (25) LMAES proposed to the DOE that the Pit 9 project be deemed a sole source procurement. In other words, LMAES wanted to be awarded the project without competitive bidding.
  - (26) The DOE decided, however, that competitive bidding was necessary.
  - (27) At this time, EG&G was the Management and Operations (M&O) Contractor at the INEEL, responsible for the overall operations at the Site.

### **Request For Proposal (RFP)**

- (28) On November 19, 1991, EG&G issued a Request for Proposal (RFP) for Pit 9.
- (29) The RFP stated that the goal of the project was to use existing technologies, requiring minimum research and development, to remove transuranic waste (TRU) from Pit 9, package the waste for storage, and decommission the site.
- (30) The TRU waste in Pit 9 was primarily plutonium and americium.
- (31) The radiation emitted by TRU waste is in the form of alpha particles.
- (32) Alpha particle radiation can be blocked by a piece of paper, and it posed a threat to health only if it came in direct contact with the body or was inhaled.
- (33) While plutonium posed little danger as a radiation source, it did have the potential for another type of danger known as "criticality."
- (34) A criticality is a nuclear chain reaction causing a burst of radiation and heat, that can cause death or serious injury to workers.
- (35) To produce a criticality event, the plutonium must be of a certain type, in sufficient quantities, and in a certain configuration.
- (36) Estimates indicated the presence of plutonium 239 in Pit 9 in sufficient quantities to raise the danger of a criticality event.

- (37) Other lethal types of waste – known as high-energy gamma-emitters – were also thought to be located in Pit 9.
- (38) Gamma particle radiation is much more dangerous than alpha particle radiation, and requires expensive shielding with materials such as lead or concrete.
- (39) Cesium-137 and Cobalt-60 are two types of gamma-emitters that were thought to be in Pit 9.
- (40) Removal of gamma-emitters was not, however, part of the Pit 9 project.
- (41) While the gamma-emitters would have to be shielded and contained to protect workers, and to allow work to proceed, they would not be removed from the pit or treated in any manner.
- (42) The project was designed instead to remove the TRU waste.
- (43) More specifically, the bidder would have to treat soil that was contaminated with TRU wastes plutonium and americium and assayed greater than 10 nanocuries per gram (10 nCi/g).
- (44) A curie is a defined amount of disintegration per second.
- (45) A nanocurie is one-billionth of a curie.
- (46) The curie measurement identifies how rapidly the material is breaking down.

- (47) The higher the curies, the more radiation is being given off and the more dangerous the substance.
- (48) The goal of the Pit 9 project was to return to the pit only soil that had been assayed (and treated if necessary) at 10 nCi/g or less.
- (49) If soil assayed more than this level after treatment, it would need to be concentrated to some degree so that it assayed at a level greater than 100 nCi/g but less than 250 nCi/g.
- (50) These “floor and ceiling” boundaries were not set at random, but were picked to correspond to the requirements that waste must meet to be stored at the Waste Isolation Pilot Plant (WIPP), a former salt mine in New Mexico that was opened in 1999 to store nuclear waste.
- (51) Most importantly, 90% of the material removed from Pit 9 had to be returned to Pit 9.
- (52) This was known as the 90% Volume Reduction Requirement.
- (53) This requirement sought to avoid the production of a large volume of highly contaminated waste, which is very expensive to store.

### **Three Phases of Work Under the RFP**

- (54) The RFP set forth three phases of work.
- (55) The first phase was the Proof of Process (POP) tests.

- (56) These were small-scale tests designed to show whether the process employed by the bidder would work.
- (57) The second phase was the Limited Production Demonstration (LPT) Test.
- (58) The LPT test would be a full-scale demonstration “in which all integrated systems will function as proposed to give a high degree of confidence that all systems are reliable before the full scale production phase is started.”  
*See Specifications for Pit 9 Comprehensive Demonstration Revision 4A, § 2.3.2.3 at p. 13.*
- (59) The third phase was the full scale remediation operation of Pit 9.
- (60) The project would be halted if the successful bidder failed to complete any one of the phases.
- (61) At each phase, the successful bidder would have to satisfy a DOE panel of experts who would ensure that the contractors were complying with the laws governing the handling of radioactive wastes.
- (62) This review was known as the Operational Readiness Review (ORR).
- (63) In the ORR, every aspect of the project would be reviewed by experts gathered by the DOE. If portions of the project did not pass the ORR inspection, the project would be halted.

### **King Inventory**

- (64) In preparing to solicit bids for the Pit 9 remediation, EG&G prepared an estimate – known as the “King Inventory” – of the type and quantity of nuclear waste contained in Pit 9.
- (65) Instead of using soil samples or field tests to prepare the inventory, EG&G used Rocky Flats shipping records.
- (66) The King Inventory, completed in 1991, identified only trace levels of high-energy gamma emitters, such as cobalt-60 and cesium-137, in Pit 9.
- (67) This information was significant to bidders because, as discussed, the radiation given off by high-energy gamma emitters is lethal and very costly to contain.
- (68) If Pit 9 were found to have high quantities of these emitters, a bidder’s costs would rise dramatically.
- (69) In addition, the construction schedule would be affected as work would typically come to a halt while the gamma emitter was shielded and contained.
- (70) The King Inventory also listed plutonium but did not list the type.
- (71) This missing information is important since some types are easily “leached” out of the soil, while other types – such as “fired” plutonium – are extremely

difficult to separate from the soil.

**LMAES's lack of reliance on accuracy of King Inventory**

- (72) LMAES did not rely, however, on the accuracy of the King Inventory.
- (73) Steve Winston, General Manager of LMAES's predecessor at this time, had learned from his experiences on other jobs that estimates of radioactive materials were frequently inaccurate.
- (74) Winston had earlier authored a study of the plutonium produced at Rocky Flats and had visited that facility in connection with his study.
- (75) From his study, he concluded (1) that the TRU wastes were intermingled with gamma-emitters, (2) that high-fired<sup>1</sup> plutonium may be buried in the RWMC and is difficult to leach from the soil, (3) that the Rocky Flats shipping records were inaccurate, and (4) that there may be much more radioactive waste in Pit 9 than indicated by those shipping records.
- (76) Winston was not overly concerned about the prospect of encountering gamma emitters in Pit 9 because he planned to use the Differing Site Conditions clause in the subcontract to seek additional compensation for

---

<sup>1</sup> Although there is no precise definition of the term "high-fired plutonium," the testimony at trial indicated that it is plutonium oxide that has been heated to a temperature above 600 degrees C.

dealing with these materials.<sup>2</sup>

- (77) In 1992, Winston helped draft a letter for LMAES President John Denison to EG&G, that stated in part that “[n]o one knows the contents of Pit 9. The technologies we proposed will work if the contents are as described by EG&G. Yet we suspect that like any other project of this nature, as we open the pit and proceed, the unknowns in the Pit will cause design and process changes.” *See Plaintiffs’ Exhibit 1066 at p. 3.*
- (78) Moreover, in November, 1993, about nine months before LMAES signed the Letter Subcontract, EG&G provided to LMAES, a report to DOE authored in October, 1993 by three scientists, Einerson, Kudera and Smith, detailing their attempts to get more accurate figures on the Rocky Flats plutonium buried in Pit 9.
- (79) The Court will refer to this report as the Einerson Report.
- (80) The Einerson report explains that “INEEL personnel have long known, based on earlier briefings and miscellaneous unclassified documents, that the ‘official’ numbers for the RFP inventory in the SDA are not believed to

---

<sup>2</sup> The Court recognizes that Steve Winston plays a unique role in this lawsuit as he was a principal player for both sides. While he was a leader in LMAES in the beginning stages of the Pit 9 remediation, he later left and joined the Sequestered Team for LMITCO, and eventually was responsible for terminating LMAES and pursuing the filing of this lawsuit on behalf of LMITCO against LMAES. Thus, he worked for both sides in this case at different times. His testimony was credible and corroborated by other facts, as shown above.

be the best estimates.” *See Plaintiffs’ Exhibit 1088 at p. 11.*

- (81) More specifically, the inaccuracies were apparent since “[Rocky Flats] personnel have stated that [plutonium] quantities in [INEEL] records are significantly lower than the actual amount.” *Id.*
- (82) The Einerson Report then reviewed the primitive methods Rocky Flat personnel used to measure the plutonium they were shipping to the INEEL. The measurements were so imprecise that during some years, Rocky Flat personnel did not even use the results. *Id.*
- (83) The report concludes that because the shipping records would have been so inaccurate, “further analysis of the shipping records was not considered productive.” *Id.*
- (84) The Einerson Report was based on a draft of an on-going inventory of the entire SDA, known as the Historical Data Task (HDT).
- (85) The HDT effort began in the early 1990s, and was an effort to evaluate the wastes that were contained in the SDA as a whole.
- (86) While the HDT evaluated over 300 streams of waste that had entered the SDA, it did not attempt to apportion or track those wastes to any particular pit or trench within the SDA.
- (87) The HDT database eventually grew to four volumes of computer print-outs

of what might have been contained in each of the waste streams studied.

- (88) The Einerson Report relied on a draft of the HDT and discussed it at length.
- (89) At the same time EG&G provided a copy of the Einerson Report to LMAES, EG&G also provided a copy of the Forsberg Inventory.
- (90) The Forsberg Inventory had been prepared in November, 1993, and applied the HDT data discussed in the Einerson Report to Pit 9.
- (91) The Forsberg Inventory noted that Pit 9 waste inventories were estimates and are based in part on the faulty assumption that wastes are assumed to be evenly distributed when the shipping records fail to support this assumption.
- (92) Thus, LMAES knew at least by November 23, 1993, that the HDT study was going to develop a data base on waste shipments into the SDA, and that at least one study (the Forsberg Inventory) had attempted to use draft HDT data to estimate Pit 9 contents.
- (93) The final HDT report was issued in June, 1994, about four months before LMAES entered into the Definitive Subcontract.
- (94) The HDT report itself did not contain any estimate of Pit 9's contents.
- (95) However, experts could extrapolate from the HDT data base to estimate the contents of Pit 9.
- (96) Despite the importance of the HDT study, and LMAES's knowledge of that

study, there is no evidence that LMAES sought to obtain copies of the HDT study.

- (97) On September 15, 1994, over one month before the Definitive Subcontract was signed, officials from LMAES, EG&G, and DOE, among others, discussed the fact that a study was going to be commissioned that would take the HDT data and attempt to estimate Pit 9's contents.
- (98) On October 13, 1994, five days before LMAES signed the Definitive Subcontract, LMITCO informed LMAES (at a meeting in Idaho Falls) of its intention to use the HDT data base to estimate the contents of Pit 9.
- (99) Thus, when LMAES signed the Definitive subcontract it was aware (1) that the HDT report had raw data on the radioactive wastes in the entire SDA; (2) that the Forsberg Inventory had attempted to use draft HDT data to estimate Pit 9's contents; and (3) that a new report would soon be issued using the data from the final HDT report to estimate Pit 9's contents.
- (100) Another example of LMAES's pre-subcontract knowledge is contained in a March 7, 1994 memo (completed five months before the subcontract was signed), by LMAES's chief scientific advisor stating that "[o]ne of the biggest problems that the design team is facing in [INEEL] Pit 9 clean up is the poor characterization of the contaminants and their distribution

throughout the Pit.” *See Plaintiff’s Exhibit 1128 at p. 2.*

(101) This evidence shows that LMAES understood that the contents of Pit 9 were largely unknown, that the King Inventory estimates were not reliable, that the HDT data was available, and that a report was forthcoming that used HDT data to estimate Pit 9's contents.

#### **Award of POP Test Subcontracts**

(102) In November of 1992, EG&G entered into separate subcontracts with two companies, Rust and LMAES, agreeing to pay each \$8 million if they successfully completed the POP tests.

(103) As discussed previously, the POP tests were small-scale tests to determine the feasibility of the bidders’ clean-up proposals.

(104) LMAES had proposed to use a chemical leaching process to extract the TRU waste from the soil, and to use a “melter” to reduce the size of contaminated waste.

(105) Thus, LMAES had to demonstrate in its POP tests that its melter could run for 100 hours, and that its chemical leach process would be successful on the project.

#### **Chemical Leach POP Test**

(106) The chemical leach POP test was designed to test LMAES’s Counter

Current Ion Exchange (CCIX) process to see if it could successfully leach contaminants from the soil.

- (107) The CCIX process leaches the soil with nitric acid and cerium.
- (108) These leaching agents dissolve the plutonium and americium (and many other materials such as iron and aluminum).
- (109) The dissolved material leached from the soil forms a sludge that is then pumped to an ion exchange vessel.
- (110) There, resins are used that bind first with the plutonium and later with the americium and remove them from the sludge, so that the now-clean sludge can be dried and returned to Pit 9.
- (111) LMAES and EG&G jointly agreed on the parameters of the POP test using the CCIX process.
- (112) While the POP test would ideally involve plutonium and americium (the wastes actually present in Pit 9 soil), those materials were difficult to obtain and, if used, would produce radioactive contamination.
- (113) To avoid these problems, LMAES and EG&G agreed to use surrogate materials, substituting uranium for plutonium and thorium for americium.
- (114) These surrogates would be mixed with 75 pounds of soil to form the sludge that LMAES would treat with its CCIX process.

- (115) LMAES used a concentration of nitric acid in the POP test that was twice the concentration LMAES expected to use in the actual remediation process.
- (116) The choice of surrogates, and the parameters of the POP test, were the product of a collaborative process between LMAES and EG&G.
- (117) LMAES understood that this POP test was only a very rough approximation of the conditions they would actually encounter in Pit 9.
- (118) Consequently, the Court finds that the POP test was not imposed on LMAES by EG&G in a way that misled LMAES about either the contents of Pit 9 or the ease of remediation.
- (119) The POP tests were completed in late 1993, and both LMAES and Rust passed the tests and were each paid \$8 million.

### **Record of Decision**

- (120) On September 23, 1993, while the POP tests were underway, but before they were completed, the DOE and the State of Idaho completed a Record of Decision (ROD) that selected a method for proceeding with the remediation of Pit 9 agreed to in the Consent Order.
- (121) The ROD evaluated five alternative methods of remediation of Pit 9.
- (122) The alternatives were largely based on the proposed POP tests submitted by LMAES and RUST.

- (123) The ROD concluded that “the selected remedy for Pit 9 will use a combination of chemical extraction, physical separation, and/or stabilization technologies to recover contaminants and reduce the source of contamination.”
- (124) This appears to require that chemical extraction be part of the remedy, although it may be used in combination with other methods.
- (125) As will be discussed below, however, this was modified somewhat by the Definitive Subcontract.
- (126) The ROD also states that some commercially available technologies would not be effective. It stressed the need to test the bidders’ proposals, and to re-evaluate the entire project if those proposals were not cost-effective.
- (127) The ROD stated that “Pit 9 was selected for an interim action because accurate records exist indicating the nature and quantity of wastes buried in the pit . . . since the types of waste in Pit 9 are known, the risks they pose are more easily understood and are a good candidate for early treatment.”
- (128) The ROD also states that “the records give DOE a relatively high degree of confidence in the types and amounts of the various contaminants within the pit.”
- (129) The completion of the ROD triggered a provision in the Consent Order

requiring remediation work to begin within 15 months or else the DOE would be subject to monetary penalties.

(130) Consequently, on November 23, 1993, EG&G agreed to pay both subcontractors an additional \$1 million to produce a 30% design and preliminary safety documents concerning their respective processes.

(131) EG&G provided LMAES and Rust with the ROD, the King Inventory, the Forsberg Inventory, and the Eisinore Report.

### **LMAES's 30% Design**

(132) On April 29, 1994, LMAES submitted its 30% design to EG&G and DOE.

(133) LMAES proposed to retrieve contaminated soils in Pit 9 inside a large, movable, steel-braced frame structure.

(134) This structure was known as the "Retrieval Facility."

(135) The Retrieval Facility, as designed, was to employ "double confinement" in order to prevent the release of radioactive materials.

(136) The concern was that contaminated dust, stirred up by the retrieval process, could migrate out of the facility. At the simplest level, double confinement employs a lower air pressure within the Retrieval Facility than without, to ensure that air (or contaminated dust) cannot escape.

(137) Once contaminated soil and waste had been dug up in the Retrieval Facility,

they would be placed in sealed bags and transported to the Treatment Building.

- (138) There they would be assayed for transuranic waste (TRU).
- (139) Soil or waste that assayed greater than 100 nanocuries per gram of TRU (100 nCi/g TRU) would be sent to the melter.
- (140) Soil that assayed less than 10 nCi/g would be returned to the pit.
- (141) Soil that was between 10 nCi/g and 100 nCi/g would be sent through the Basic Extraction Sludge Treatment (BEST), that extracted volatile organic compounds.
- (142) The soil would then be treated with a strong solution of hot nitric acid and cerium to dissolve out the plutonium and americium.
- (143) The resulting sludge would be run through the CCIX units where, as discussed above, resin beads would attract the plutonium and americium and remove them from the sludge.
- (144) The process would result in two waste streams -- one containing material with less than 10 nCi/g TRU which would be returned to the pit, and the other containing material with more than 100 nCi/g TRU which would be sent to the melter.

### **Problems with CCIX design**

- (145) LMAES had hired Dr. Earl Wheelwright, an expert in chemical leaching systems, to be a consultant on the Pit 9 project.
- (146) In January of 1994, over 2 months before LMAES issued its 30% design, Dr. Wheelwright expressed concerns to LMAES about the CCIX system.
- (147) Specifically, Dr. Wheelwright noted that many common minerals, such as iron and aluminum, were binding to the resins designed to attract americium.
- (148) Those minerals would overwhelm the resins designed to attract americium, resulting in a failure to leach out the americium.
- (149) Dr. Andrea Chow, a scientist with Lockheed, voiced similar concerns about a month before LMAES submitted its 30% design.
- (150) Dr. Chow advised LMAES that the CCIX process had the highest risk of failure, and that it had performed poorly in her experience on other projects.
- (151) The concerns of Dr. Wheelwright and Dr. Chow were realized, and by late 1994, LMAES decided to drop the CCIX process due to the fact that the americium-attracting resins were being overwhelmed by common minerals, resulting in a failure to leach the americium.
- (152) LMAES replaced the CCIX process with a calcium oxalate co-precipitation

process. The Court will refer to this process as the Chemical Treatment System (CTS), and discuss it further below.

**LMAES's Technical Assumptions**

- (153) On April 25, 1994, about the same time LMAES submitted its 30% design, it also submitted its Cost Proposal, setting its price for Phases II and III at \$207,180,000.
- (154) With its Cost Proposal, LMAES also submitted a list of 20 technical assumptions on which the Cost Proposal was based.
- (155) One of those technical assumptions contained a statement that LMAES made a "literal interpretation" of the King Inventory in assuming the contents of Pit 9.
- (156) However, as discussed above, LMAES was well-aware of the uncertainties surrounding the pit contents, and was planning on using the Differing Site Conditions Clause to receive payment for the extra costs incurred if the contents were worse than estimated.
- (157) This strategy was confirmed in meetings between LMAES and LMITCO to address questions raised by LMAES's Cost Proposals and technical assumptions.
- (158) In those meetings, held in June, 1994, the parties agreed that if LMAES had

to process gamma emitters on a routine basis, LMAES would provide shielding and then submit requests for equitable adjustment to recover these extra costs.

(159) Another technical assumption that LMAES had submitted with its April 25, 1994, Cost Proposal was Assumption 13 stating that “EG&G and DOE will be signatories on the Systems Requirement Document [SRD] signifying approval.”

(160) The SRD was LMAES’s attempt to obtain an approved technical baseline for the project.

(161) EG&G and DOE informed LMAES that they refused to approve the SRD because the performance risk associated with the design approach was the sole responsibility of LMAES.

(162) Thus, post-Cost Proposal discussions resolved questions raised by two of LMAES’s technical assumptions: (1) the “literal interpretation” assumption was resolved by an agreement that equitable adjustments would be made to address uncertainties as to Pit 9’s contents; and (2) the SRD approval assumption was rejected by EG&G and DOE.

(163) That LMAES accepted these changes is shown by the fact that both technical assumptions were dropped from LMAES’s final bid known as its

Best and Final Offer (BAFO), filed July 12, 1994.

(164) Moreover, in the BAFO submission letter, LMAES's President John Denison states that "[t]he technical baseline of the proposal is defined in the technical volume as submitted on April 11, 1994, and modified by the revised requirements contained in Addendum 6 and 7." *See Exhibit 1177 at p. 1.*

(165) This is further evidence that LMAES had acceded to the position of EG&G and the DOE that the technical baseline was LMAES's responsibility, and that SRD approval was not required.

(166) In its BAFO, LMAES also dropped its assumption that it was literally interpreting the subcontract inventories, including the King Inventory.

(167) Confirming the consensus that had developed at the pre-BAFO meetings, LMAES conditioned its BAFO with the following technical assumption: "Any item found in the pit which is not in inventory and which cannot be treated safely by the process will be left in place or returned to the pit in a manner consistent with the requirements of the ROD."

(168) That BAFO set a price of \$199.8 million.

### **Letter Subcontract**

(169) On August 26, 1994, EG&G awarded a letter subcontract to LMAES for

Phases II and III of the Pit 9 project.

(170) The Letter Subcontract was effective for three months, authorized limited work in the pit, and authorized the parties to negotiate over a Definitized Subcontract.

(171) LMAES retained the right to pull out of the deal before signing any Definitive Subcontract.

### **Sequestered Team**

(172) On October 1, 1994, Lockheed took over from EG&G as the M&O Contractor at the INEEL.

(173) To resolve the conflict of interest inherent in having Lockheed supervising LMAES, an Organizational Conflict of Interest (OCI) Plan was set in place.

(174) The plan required LMITCO to create a Sequestered Team of LMITCO employees to administer the Pit 9 subcontract.

### **Definitized Subcontract**

(175) On October 18, 1994, LMITCO's Sequestered Team awarded the Definitized Subcontract to LMAES for \$178,608,000.

(176) The following schedule was established:

(177) Begin staging & installation	January 1, 1995
Initiate Limited Production Test (LPT)	August 15, 1996
Complete LPT	December 13, 1996

Complete Pit 9 remediation  
Remove all equipment/facilities

February 13, 1998  
February 13, 1999

### **The Nature of the Definitized Subcontract**

- (178) The Definitized Subcontract incorporated by reference EG&G's Specifications for Pit 9 Comprehensive Demonstration, known as "Spec.Rev.4A." See Plaintiff's Exhibit 1174.
- (179) The first paragraph in Spec.Rev. 4A is entitled "Mission Statement."
- (180) That paragraph begins by stating that "[t]he mission of the [project] is to excavate, characterize, treat as necessary, and dispose or store all wastes from Pit 9 at a minimum cost to DOE. The method of achieving this is to acquire the services of a qualified private subcontractor to perform an integrated 'turnkey' pilot project."
- (181) Later in the document, the "turnkey" nature of the project is again emphasized: "This objective [to remediate Pit 9] will be accomplished by acquiring the services of a qualified private subcontractor to perform an integrated "turnkey" pilot project."
- (182) In common industry parlance, the characterization of a project as a "turnkey project" means that the subcontractor will use its own means to produce the end result desired by the owner.

(183) At the other end of the spectrum is a design specification project, where the owner supplies the plans and requires the contractor to follow them to the letter, thereby impliedly warranting that adherence to the plans will lead to the desired result.

(184) In a design specification project, detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced.

(185) In a pure turnkey project, however, the owner does not provide detailed designs containing such an implied warranty. The owner simply gets out of the way, and allows the contractor to use his ingenuity to complete the project. The owner reappears only when the contractor is done and ready to turn over the keys to the project. Hence the term “turnkey.”

(186) In the present case, Spec.Rev. 4A not only labels the project as a turnkey project but also contains various provisions that are consistent with that label.

(187) For example, Spec.Rev. 4A states that the “[a]ttributes of the subcontract include . . . [LMAES] assuming maximum responsibility, authority, and liability for the project . . . [and] [m]inimal involvement by the DOE and [LMITCO].”

- (188) A turnkey project places “maximum liability” on the subcontractor and features “minimal involvement” by the contractor or owner, just as Spec.Rev. 4A provides.
- (189) The Definitized Subcontract also contains a Guarantee of Performance Clause stating that if LMAES does not “provide complete compliance with the specifications for Phase II by the completion date identified in the subcontract,” LMAES must “provide complete reimbursement of monies paid to [it] for work performed under Phase II.”
- (190) There is a complete lack of any detailed designs for a particular remediation method.
- (191) The effect of the absence of such language, in conjunction with the labeling of the project as a turnkey project, and the Guarantee of Performance Clause, all operate to place the entire risk of design failure on LMAES.
- (192) There are, however, instances in the Definitized Subcontract where documents are submitted to LMITCO for approval. For example, § 4.1.4.1 of Spec.Rev. 4 states that “[LMAES] shall submit a [Project Management Plan] and a baseline for approval by the contractor that meets the requirement of DOE Orders.”
- (193) Importantly, the contract documents anticipated, and then expressly

rejected, the argument that LMITCO's approval of a baseline might shift the burden of risk and entitle LMAES to payment simply for following the baseline. Article 11 of the Standard Terms and Conditions governing the Definitized Subcontract states that "[t]he granting of approvals by [LMITCO] o[f] [sic] design, work drawings, specifications, reports, and any other data submitted by [LMAES] under provisions of the subcontract or specifications shall not affect or relieve [LMAES] from such responsibility as [LMAES] otherwise has with respect to adequacy or correctness of the design . . . ."

(194) This language makes it clear that LMAES is not entitled to a design or baseline approval with its corresponding implied warranty that following that design or baseline will satisfy contractual milestones or entitle LMAES to payment.

(195) That is not to say that LMITCO has no right under the contract to comment on LMAES's design or baseline submissions.

(196) Section 4.8 of Spec.Rev. 4A states that LMITCO's oversight duties "include review and comment" on all submitted plans.

(197) This "review and comment" function must be read together with the rule laid out in Article 11 that approvals do not alter the allocation of risk.

- (198) Reading these provisions together, it is clear that LMITCO's "review and comment" upon a design or baseline submitted by LMAES would not alter the contractual allocation of risk that places on LMAES the risk that the design or baseline might fail.
- (199) These provisions contemplate that LMAES would submit design and baseline plans to LMITCO for its "review and comment." Once LMITCO was done commenting, whether favorably or not, LMAES would proceed forward, giving whatever weight it desired to LMITCO's comments.
- (200) It is important to note, however, that LMAES could not proceed ahead without LMITCO's approval if LMAES was proposing to change terms of the Definitized Subcontract it had signed.
- (201) There was nothing in the Definitized Subcontract that altered the well-established principle of contracts that no party to a contract may unilaterally change a fundamental term of that contract.
- (202) This distinction between design submissions (that LMITCO reviewed and commented on but did not approve) and proposals for contract changes (that LMITCO had to approve to become effective), is a crucial distinction in this case that will be discussed in more specific terms later in these findings.

### **Important Provisions of the Definitized Subcontract**

(203) The Disputes Clause in the Definitized Subcontract stated as follows:

“There shall be no interruption in the prosecution of the work, and the subcontract shall proceed diligently with performance of this subcontract pending final resolution of any dispute, claim, or litigation arising under or relating to this subcontract between the parties hereto or between the subcontractor and subtier subcontractors or suppliers.”

(204) The Differing Site Conditions Clause required LMAES to notify LMITCO in writing if LMAES uncovered subsurface physical conditions materially different from those indicated in the subcontract, or if conditions were materially different than those which would be anticipated even if the subcontract did not make any representation. If the subsurface conditions were materially different, LMITCO was required to equitably adjust the subcontract price, schedule, or both.

(205) When read together, the Disputes Clause and the Differing Site Conditions Clause set forth a clear method for resolving disputes when unexpected conditions are encountered in Pit 9.

(206) In that situation, LMAES was to submit a Request for Equitable Adjustment, but is not permitted to slow down or stop work.

- (207) By improperly slowing down or stopping work, LMAES is at risk for being terminated for default.
- (208) The Termination for Default Clause permits LMITCO to terminate the Definitized Subcontract if LMAES “fails to . . . [m]ake progress, so as to endanger performance of this subcontract” so long as LMAES “does not cure such failure within 10 business days . . . after receipt of notice from [LMITCO] specifying the failure.”
- (209) The Termination for Default Clause further states that “[e]xcept for defaults of lower tier subcontractors, [LMAES] shall not be liable for any excess costs or damages if the failure to perform the subcontract arises from causes beyond the control and without the fault or negligence of [LMAES].”
- (210) Examples of such causes are “acts of God, . . . floods, . . . epidemics, . . . [etc].
- (211) If the failure to progress is caused by the default of a lower tier subcontractor, and if the cause is unforeseeable, beyond the control of both LMAES and the lower tier subcontractor, and without the fault or negligence of either, LMAES “shall not be liable for any excess costs or damages for failure to perform, unless the lower tier subcontractor’s supplies or services were obtainable from other sources in sufficient time

for the subcontractor to meet the required delivery schedule.”

(212) If, after termination, it is determined that LMAES was not in default, or that its default was excusable, “the rights and obligations of the parties shall be the same as if the termination had been issued pursuant to the Standard Terms and Conditions Article, ‘Termination for Convenience.’”

(213) The Termination for Convenience Clause states that LMITCO may terminate the Definitized Subcontract “when it is in [LMITCO’s] interest.”

(214) If that is done, LMAES is entitled to compensation in accordance with Part 49 of the Federal Acquisition Regulations.

(215) Finally, the Definitized Subcontract stated that LMAES was responsible for decontamination and decommissioning (D&D) costs at the conclusion of the project.

(216) If LMAES failed to “comply with Phase II requirements, the cost associated with [D&D] shall be at the expense of [LMAES].”

#### **Definitized Subcontract & the ROD**

(217) As discussed above, the ROD required that a chemical extraction process be part of the remediation process, although it could be used in combination with other processes.

(218) The ROD was incorporated by reference into the Definitized Subcontract.

- (219) There is some question as to whether the Definitized Subcontract, by incorporating the language of Spec.Rev. 4A, modified the ROD's language approving a specific remediation process.
- (220) Spec.Rev. 4A states, in section 2.3.2, that "selected treatment process(es)" were "a physical separation *and/or* chemical extraction unit." (Emphasis added).
- (221) This language appears to allow either a physical separation process or a chemical extraction process.
- (222) That is not consistent with the ROD. Thus, there is an ambiguity in the Definitized Subcontract, which incorporated by reference both the ROD and Spec.Rev. 4A.
- (223) However, Spec.Rev. 4A evinces no intent to alter the ROD.
- (224) There is absolutely no evidence that the parties negotiated with any intent that Spec.Rev. 4A modify the ROD.
- (225) This is significant, because the ROD was the primary document governing the entire project and has primacy over lesser contract documents, like Spec.Rev. 4A.
- (226) In other words, Spec.Rev. 4A was designed to set forth the means to accomplish the goals established in the ROD, and was not designed to

modify or supplant the ROD in any way.

(227) This ambiguity could mislead a subcontractor, like LMAES, into thinking that it could drop the chemical extraction process altogether in favor of a physical separation process like the Soil Sorter.

(228) However, there is no evidence that LMAES in fact relied upon this language in executing the Definitized Subcontract.

(229) As will be discussed below, LMAES did, at one point, drop its chemical extraction process in favor of a Soil Sorter. However, when challenged by LMITCO and DOE, LMAES responded immediately to LMITCO and DOE's challenge by indicating that it intended to use the Soil Sorter in conjunction with a chemical extraction process – precisely what was envisioned by the ROD.

(230) LMITCO was within its rights to question the dropping of the chemical extraction method since it was required by the ROD.

#### **Replacement of CCIX process with CTS**

(231) Just weeks after the Definitized Subcontract was signed, LMAES decided to replace the CCIX process with the CTS system, as discussed briefly above.

(232) LMAES did not seek LMITCO's approval for this change.

(233) In March of 1995, LMAES submitted its 90% Design that substituted the

CTS process for the CCIX process.

(234) While the CTS system was, like the CCIX system, a chemical extraction system, it was much more complex than the CCIX process.

(235) The complexity of the CTS process required the manufacture of much larger tanks than those associated with the CCIX process.

(236) For example, a certain 30-gallon tank in the CCIX process had to be enlarged to hold 1500 gallons in the CTS process.

(237) LMAES planned to construct the entire CTS system in Salt Lake City where it could be tested. Once tested, the "test bed," as it was known, would be disassembled, shipped to Pit 9, and reassembled on-site.

(238) The testing went poorly.

(239) Many months of delay were caused by LMAES tinkering with the CTS process, requiring changes to the test bed machinery.

(240) Pumps designed to move the sludges were clogging, and the powerful acids used in the leaching were causing the machinery to corrode.

(241) By October of 1995, an internal LMAES report concluded that "we failed."

*See Exhibit 1513 at p. 6.*

(242) In that report, LMAES blamed the test bed failure on, among other things, poor design, a failure to staff the test bed project with experts, corrosion,

and a failure to do small-scale testing before proceeding with the building of the full-scale test bed. *Id.*

- (243) For example, despite the fact that it was well-known that stainless steel tanks and piping should not be used in combination with a nitric-acid based process, LMAES nevertheless chose to use stainless steel in its tanks and piping, and corrosion became a significant problem.
- (244) A further example of the poor design lies in the unwieldy size of the machinery. As discussed above, the size of the tanks and associated piping increased dramatically when the CTS process displaced the CCIX process. However, there was no more space to house this burgeoning mass of machinery. The result was that much more machinery was crammed in the same space, making it very difficult for maintenance and radiation monitoring crews to access crucial parts of the machinery.
- (245) It was these engineering and design flaws that led to LMAES's abandonment of the CTS process.
- (246) The Court concludes, that the CTS failure was not, as argued by LMAES, due to an alleged late disclosure by LMITCO that high-fired plutonium may be in Pit 9.
- (247) As discussed above, LMAES was aware even before the Definitized

Subcontract was signed that high-fired plutonium may be in Pit 9.

(248) Moreover, by August 1995, after months of unsuccessful attempts, LMAES finally got the chemistry right to leach high-fired plutonium.

(249) By that date, LMAES was leaching 99% of plutonium fired at 600 degrees, while the plutonium expected to be found in Pit 9 was likely to have been fired at Rocky Flats at only 500 degrees. *See Plaintiff's Exhibit 1584.*

(250) Thus, LMAES was successfully leaching plutonium fired at even higher temperatures than that expected to be found in Pit 9.

(251) To reach this point, LMAES had discovered a combination of ozone, cerium, and nitric acid that was successfully leaching the plutonium.

(252) While LMAES had the chemistry to be successful, they did not have the machinery.

(253) As discussed above, the CTS pumps clogged, the pipes corroded, the staffing was too low, and the engineering design was poor.

(254) Ultimately, it was LMAES's failure to design an efficient CTS system that caused the failure of the CTS process, not any "discovery" of high-fired plutonium or any failure of the chemistry of the CTS process.

#### **LMAES Process Modification Proposal**

(255) On July 17, 1996, LMAES submitted a Process Modification Proposal

(PMP) to LMITCO stating, among other things, (1) that LMAES would be eliminating the CTS process entirely and substituting it with a Soil Sorter system, a mechanical process that did not use any chemical extraction process, and (2) that the 90% volume reduction requirement would need to be changed.

(256) LMITCO had two serious concerns with this PMP.

(257) First, as discussed above, LMITCO felt the ROD required that chemical extraction be included in the remediation method, and yet LMAES was representing in the PMP that it was eliminating any chemical extraction method.

(258) Second, the Definitized Subcontract required 90% volume reduction and yet LMAES was representing in the PMP that this provision should be modified.

(259) Certainly as to the second concern, LMAES's PMP was proposing a change to a fundamental term of the Definitized Subcontract.

(260) With regard to the first concern, LMAES could argue that it was not a major change because the Definitized Subcontract, by incorporating Spec.Rev. 4A, arguably modified the ROD and permitted the dropping of the chemical extraction process.

(261) However, as discussed above, the Court has resolved that ambiguity in favor of LMITCO's view that Definitized Subcontract required that some form of chemical extraction process be included in the system.

(262) The Court also finds that the contract specifications had been largely built around the chemical extraction process, so that dropping the chemical extraction process would have required major contractual changes.

(263) Thus, both of LMAES's requests proposed changes to fundamental terms of the Definitized Subcontract.

(264) As discussed previously, such changes could not be unilaterally imposed by LMAES, but could be adopted only if approved by LMITCO.

(265) Thus, LMITCO, in a letter discussed below, directed LMAES to explain its proposals in more detail so that LMITCO might assess whether it should accept or reject the proposals.

(266) By this letter, LMITCO was not recognizing that the project was a design specification project. LMITCO was instead asserting its right to approve fundamental changes in the Definitive Contract. This important distinction was discussed earlier in these Findings.

(267) In the same letter, LMITCO, recognizing that LMAES would never meet the rapidly approaching LPT deadline of August 15, 1996, granted LMAES an

extension of that deadline.

### **Letter of Forbearance**

(268) On August 6, 1996, LMITCO issued a Letter of Forbearance to LMAES directing LMAES to provide a more detailed version of the PMP by October 28, 1996, and agreeing to extend the LPT deadline only, and not any other deadline.

(269) The Letter of Forbearance stated that “[u]pon receipt and evaluation of the [LMAES] proposal [to more fully explain the PMP], LMITCO will notify LMAES of acceptance or rejection of the proposed solution and, if necessary, discuss a possible path(s) forward for the remediation of Pit 9.”

*See Plaintiff's Exhibit 1469.*

(270) The “acceptance or rejection” that LMITCO mentions in the Letter of Forbearance pertains to LMAES’s proposals to change the Definitized Subcontract by eliminating the CTS system and modifying the 90% volume reduction requirement.

(271) LMITCO was within its rights under the Definitized Subcontract to insist on approving these changes before they could be effective.

(272) As discussed above, there is a distinction under the Definitized Subcontract between design submissions and changes to terms.

(273) LMAES was proposing major changes to the Definitized Subcontract and thus LMITCO had the right under the Definitized Subcontract to insist on its right to approve those changes.

**Path Forward**

(274) On October 28, 1996, LMAES submitted its more detailed explanation of the PMP.

(275) The document it submitted is referred to as the Path Forward.

(276) LMAES's Path Forward proposed to delete the CTS process entirely and substitute in its place a Soil Sorter system.

(277) The Soil Sorter was a remotely operated machine in the Retrieval Building with a soil brush on the end.

(278) The brush would sweep dirt from the pit into a box, that would then be loaded on a conveyor belt.

(279) The dirt would then be assayed for its radiation content.

(280) Depending on the type of waste encountered, the soil was sorted at the end of the conveyor belt by a series of gates.

(281) LMITCO was concerned that the elimination of any chemical extraction system was a major change to the Definitized Subcontract as would be the dropping of the 90% volume requirement.

(282) DOE & LMITCO relayed its objections to LMAES.

**Combined Soil Sorter & CTS Process**

(283) On November 22, 1996, in response to LMITCO objections, LMAES responded that its process was misunderstood, and explained that the process would employ a CTS process along with the Soil Sorter.

(284) In meetings held on April 11, 1997, LMAES represented to LMITCO that this combined system would be successful and would comply with the 90% volume reduction requirement.

(285) LMITCO's Steve Winston had been a vocal opponent of the Soil Sorter because he had a bad experience with that process on another project.

(286) However, after hearing LMAES's presentation, Winston changed his mind and felt that the combination would achieve the design objectives.

(287) Winston had real confidence in Ed Squires, LMAES's Program Manager, that he would make the combined system work.

(288) As discussed above, LMITCO had the right to "review and comment" on design submissions, and LMITCO did so here, passing its favorable comments on the combined CTS and Soil Sorter system to LMAES at the meeting held on April 11, 1997.

(289) The next step was for LMAES to submit a 30% Design Plan to LMITCO for

the combined CTS and Soil Sorter system.

**LMAES's 30% Design Plan for Combined CTS & Soil Sorter**

- (290) In June of 1997, LMAES submitted its 30% Design Plan for the combined CTS and Soil Sorter system.
- (291) In meetings held on July 7 and 8, 1997, LMAES's William Cole, who was in charge of the implementation of the combined system, represented to LMITCO that the combined system would meet the 90% volume reduction requirement.
- (292) LMITCO agreed that any past objections it had were resolved by Coles' presentation.
- (293) On August 13, 1997, LMITCO wrote to LMAES that all of its objections were "closed out," signaling to LMAES that it should begin the 90% design process, including the preparation of a 90% design for the combined CTS and Soil Sorter system.
- (294) After receiving this letter, LMAES's Program Manager Ed Squires wrote to LMC's President Peter Teets on August 28, 1997, that "LMITCO and DOE agreed in the 30% Design Review, held July '97, that our current approach [the combined CTS and Soil Sorter system] was acceptable."
- (295) LMAES's Project Manager responsible for implementing the combined

CTS and Soil Sorter system, William Cole, understood that after receiving LMITCO's August 13, 1997, letter, the next step for LMAES was to proceed to a 90% design on the combined system.

- (296) Cole testified at trial that the combined system could handle high-fired plutonium and at the same time meet the 90% volume reduction requirement.
- (297) Cole testified at trial that "I kind of thank LMITCO and DOE for sticking to their guns there because the thing that we ended up proposing [the combined CTS and Soil Sorter system], I think, ended up being probably the best system that we could have ever designed to handle soil using nitric acid leach and soil sorting." *See Transcript for September 16, 2003, at p. 4529, ll. 8-13.*
- (298) When all of this evidence is considered, it shows (1) that the combined CTS and Soil Sorter system would work on high-fired plutonium and would meet the 90% Volume Reduction Requirement; (2) that LMITCO believed the combined system would work; (3) that LMITCO gave LMAES a favorable review of the combined system; and (4) that LMAES understood as of mid-August of 1997, that it needed to provide a 90% Design to LMITCO.

### **LMAES Failure to Provide a 90% Design on CTS & Soil Sorter system**

(299) By July of 1997, as will be discussed further below, LMAES had started its work slowdown.

(300) On September 12, 1997, LMAES informed LMITCO that it would not be submitting its 90% Design on the combined CTS and Soil Sorter system during its work slowdown.

### **LMAES Assertion that LMITCO Changed its Mind on CTS/Soil Sorter**

(301) LMAES now asserts that it did not proceed with the CTS and Soil Sorter system because LMITCO changed its mind just 6 days after telling LMAES that all its objections had been closed out.

(302) LMAES asserts that on August 19, 1997, Winston wrote to Peter Teets, the Chairman of LMC, telling him that the Soil Sorter would not work.

(303) There is no evidence, however, that Winston was retracting his favorable comments on the combination CTS and Soil Sorter system, only that he was repeating his earlier statements about the weaknesses of the Soil Sorter.

(304) The exhibit cited by LMAES, Exhibit 1644, was an outline prepared by Steve Winston that he used in making a presentation to Peter Teets. Teets had requested that Winston make this presentation to bring him up to speed on the history of the project.

- (305) Winston's outline of his presentation and shows that he was talking about the Soil Sorter only, not the combined system. *See Plaintiff's Exhibit 1644.*
- (306) When Ed Squires, LMAES's Project Manager who worked closely with Winston, was asked to comment on Winston's presentation to Teets, Squires explained (1) that Winston's comments on the Soil Sorter "are valid," (2) that Winston was not commenting on the combined CTS and Soil Sorter system, and (3) that Winston agreed with the combined system. *See Plaintiff's Exhibit 1648.*
- (307) Thus, the August presentation by Winston to Teets does not contain any retraction of Winston's favorable comments about the combined system.
- (308) LMAES also asserts that on September 8, 1997, Winston again retracted his favorable comments about the combined system in a presentation to Robert Stevens, the President of LMAES.
- (309) Stevens testified at trial and never mentioned this point. *See Trial Transcript for October 14, 2004, pp. 7276 to 7349.*
- (310) Stevens asked for Winston to make this presentation to give Stevens, who was new on the job, a historical review of the project.
- (311) There was no testimony at trial that Winston used this presentation to make a retraction of his prior favorable comments on the combined CTS and Soil

Sorter system.

(312) The presentation was accompanied by Winston's 220 page historical outline of the project. *See Plaintiff's Exhibit 1652.*

(313) There was no testimony at trial that anyone believed that a sentence or two buried in that 220 page outline was intended to signal a major change of opinion by Winston.

(314) Winston's outline simply states the consistent position of LMITCO that LMAES cannot make "complete elimination or substitutions" without LMITCO's consent. *See Plaintiff's Exhibit 1652.*

(315) This refers to LMITCO's consistent position that the Definitized Subcontract and ROD prohibited the complete elimination of a chemical extraction process, although it could be used in combination with other processes.

(316) In fact, the contemporaneous evidence shows that LMAES itself did not believe that any retraction occurred in either the Teets presentation in August of 1997 or the Stevens presentation on September 8, 1997.

(317) Weeks after both of these events, on September 25, 1997, Paul Hoff of LMAES gave a presentation summarizing the issues that were still unresolved between the parties.

- (318) Hoff did not list the combined system as being unresolved.
- (319) In fact, Hoff lists the combined system on a system flowchart, showing it as part of the design. He makes no mention of any retraction by LMITCO of its position.
- (320) This contemporaneous evidence shows that at the time of Winston's presentations to Teets and Stevens, LMAES officials were not interpreting Winston's presentations as retractions or changes of position.
- (321) Finally, LMAES asserts that LMITCO retracted its favorable comments in a November 26, 1997, letter.
- (322) Once again, those comments clearly apply only to the Soil Sorter itself and not to the combined system.
- (323) The letter states that "the *wholesale elimination* of described subsystems [chemical extraction systems] is not permitted." (emphasis added).
- (324) This once again simply reflects LMITCO's long-standing position and cannot in any way be interpreted as a retraction of Winston's favorable comments on the combined system which did not contain a "wholesale elimination" of the CTS process.
- (325) LMITCO's position, made clear to LMAES in the 30% Design review and by letter thereafter, as discussed above, was that the combination CTS and

Soil Sorter system would work, but (1) that LMITCO had no responsibility to “approve” the combined system and potentially alter the burden of risk; and (2) that LMITCO was not willing to accept any system that relied entirely on the Soil Sorter.

(326) LMITCO did not retract its favorable comments about the combined CTS and Soil Sorter system.

(327) The course of dealing between the parties clearly put the burden on LMAES to go forward with a 90% Design on the combined CTS and Soil Sorter system.

(328) LMAES failed to submit that 90% Design.

#### **LMAES's New Proposed Schedule**

(329) With the Letter of Forbearance having left open the LPT deadline, LMAES submitted a new proposed schedule on April 4, 1997, proposing to lengthen the time for completion by 24 months.

(330) Soon thereafter, LMAES modified its proposal by extending it an additional three months to handle contaminated overburden. Thus, LMAES's total proposed schedule extension was 27 months.

(331) LMAES conditioned agreement on this new schedule on LMITCO's approval of the technical baseline and the Soil Sorter.

### **New Pit Inventory Estimates**

(332) During 1995 and 1996, scientists Smith and Kudera had issued reports extrapolating from the HDT data to estimate the waste in Pit 9.

(333) They issued a draft report in 1995, and a final report in 1996.

(334) Those two reports are discussed below.

### **1995 Smith & Kudera HDT Comparison Draft**

(335) On February 16, 1995, about six months after LMAES entered into the subcontract, LMITCO received, and immediately passed on to LMAES, a draft report of the HDT Comparison done by Smith and Kudera.

(336) The Smith & Kudera study, using the previously-established HDT data base, discussed above, contained estimates of gamma-emitters in Pit 9.

(337) The study used different methodologies that arrived at different estimates.

(338) Under one methodology, known as the simplified methodology, the estimate for the gamma emitter Cobalt-60 in Pit 9 jumped from .301 curies (in the King Inventory) to 18,000 curies. The estimate for Cesium-137 jumped from 4.46 curies to 5,230 curies.

(339) The simplified methodology was the worst-case scenario.

(340) It assumed that all the waste streams into the SDA were deposited in Pit 9.

This was highly improbable, since Pit 9 consisted of little more than 1% of

the total acreage of the SDA.

- (341) The study then looked to see if some of those waste streams were actually deposited elsewhere.
- (342) This analysis, producing values known as the “recommended values,” resulted in substantially reduced numbers when compared to the simplified methodology.
- (343) The recommended values for Cobalt-60 were 3125 curies and for Cesium-137 were 825 curies.
- (344) The draft report stated that these recommended values were the “reasonable upper bound for the activity that could be in Pit 9.” *See Exhibit 1251.*
- (345) LMAES responded to this report by sending a list of concerns to LMITCO, but the list did not indicate that LMAES viewed the draft as posing an insurmountable, or even a serious, problem.
- (346) LMITCO requested an estimate from LMAES of the extra costs LMAES would incur if it encountered this level of gamma emitters in the pit.
- (347) LMAES did not respond to that inquiry, but did state that more money needed to be spent to study the impacts.
- (348) LMAES also noted that additional safety measures must be taken, and used the recommended values (rather than the simplified methodology values) in

its analysis.

**1996 Final Smith & Kudera Report**

(349) In 1996, Smith and Kudera issued their final report.

(350) It reduced the recommended estimated curies of Cobalt-60 from 3125 to 860 and of Cesium-137 from 825 to 30.

(351) These levels represented the best estimate as to what was actually in Pit 9.

(352) The report stated that these estimates were as of the late-1960s when the waste was deposited. The gamma emitters decay over time and so give off less radiation today.

(353) When adjusted for radioactive decay up to 1996, the estimate for Cobalt-60 was 22 curies and the estimate for Cesium-137 was 16 curies.

(354) While these levels were higher than earlier estimates, they were not so high that the extra costs incurred could not be handled through the Differing Site Conditions Clause.

(355) These levels did not require substantial changes to the nature and design of the project.

(356) In a May 1, 1997, meeting with LMITCO and DOE (long after LMAES had received the 1996 Final Smith & Kudera HDT Comparison), LMAES represented that its design was sufficient to handle the gamma emitters and

that the extra costs incurred could be handled through the Subcontract provisions.

(357) LMAES suspected all along that it might encounter gamma emitters in greater quantities than estimated in the King Inventory.

(358) While LMITCO concurred in LMAES's request to modify the subcontract to include the 1995 HDT figures for gamma emitters, it did so out of safety concerns rather than design concerns.

#### **Technical Baseline Discussions**

(359) In early 1997, Ed Squires, LMAES's Pit 9 Program Manager, and Steve Winston of LMITCO, had extensive discussions on LMAES's attempt to set a technical baseline.

(360) Squires wanted an agreed-upon technical baseline so that any adjustments either above or below the baseline could be easily identified for purposes of cost reimbursement and schedule changes, and also so that when challenges arose from the experts during the ORR, LMAES and LMITCO would present a united front to answer those challenges.

(361) Steve Winston from LMITCO also wanted to reach an agreement on a technical baseline.

(362) Winston had worked both sides of this project – for LMAES and now for

LMITCO – and he had a strong personal interest in seeing the project succeed.

(363) On February 20, 1997, LMAES submitted a document that summarized their proposal for a technical baseline entitled Systems Requirements Document (SRD).

(364) At the same time, Winston notified the DOE that he planned to reach a full agreement with Squires on a technical baseline by March of 1997, and that they would submit a Path Forward at that time.

(365) The SRD contained the combined CTS and Soil Sorter system.

(366) Squires and Winston took different approaches to the technical baseline issue.

(367) Winston's approach was to assist without approving.

(368) Winston read the Performance Guarantee Clause to place the risk of design failure on LMAES. He felt that if he "approved" the SRD, he might modify that Clause and shift the risk of failure to LMITCO.

(369) At the same time, Winston wanted to assist LMAES in preparing a technical baseline. An agreement on that baseline (*i.e.*, an agreement on the SRD), Winston hoped, would lead to an agreement on a new schedule.

(370) Ultimately, Winston reached agreement with Squires on most issues in the

SRD.

- (371) As discussed above, Winston had told Squires by April of 1997, that he thought that the combined CTS and Soil Sorter system would work.
- (372) Nevertheless, consistent with his contractual rights and duties, and as discussed earlier, Winston refused to approve the combination CTS and Soil Sorter system.
- (373) This did not prevent LMAES from proceeding, however, since the Definitized Subcontract contained no requirement that LMAES obtain LMITCO's approval.
- (374) LMITCO protected itself, not by blocking LMAES from proceeding, but by having the Performance Guarantee Clause that placed on LMAES the entire risk of design failure.
- (375) Squires read Winston's attempts much differently. Squires felt that Winston had agreed to approve the SRD, but after a May 1, 1997, meeting with DOE, changed his mind and rejected the SRD.
- (376) Squires speculates that the DOE prevailed on Winston to change his mind, and retract his promise to approve the SRD.
- (377) The Court disagrees.
- (378) The Court finds that Winston never agreed to approve the SRD, and agreed

only to assist LMAES in establishing a technical baseline to help move the project forward.

(379) The Court further finds that DOE did not prevail on Winston to change his mind or retract any promises.

(380) With regard to that portion of the SRD containing the combined CTS and Soil Sorter system, Winston, as discussed above, (1) felt that the system would work, (2) never felt that the Soil Sorter by itself would work; (3) communicated all of this to LMAES from April to August of 1997, (3) never retracted those statements, (4) expected LMAES to proceed with the 90% Design of the combined system; and (5) consistently refused to formally approve the combined system.

#### **LMAES's Loss of Another Bid**

(381) In December of 1996, LMAES learned that it had lost a very important bid on another project. LMAES had submitted an \$813 million bid on the Advanced Mixed Waste Treatment Program (AMWTP).

(382) This was a real blow to LMAES because it was sustaining losses on the Pit 9 project in the hope of generating profitable business on other projects.

(383) A short time later, on December 23, 1996, LMAES notified DOE that it would soon be filing a Request for Equitable Adjustment (REA) on the

many cost overruns it had incurred on the Pit 9 project.

### **Request for Equitable Adjustment**

(384) On March 28, 1997, LMAES submitted its Request for Equitable Adjustment (REA) seeking \$127 million in additional payments, interim payments of \$10 million per month, and a reformation of the contract from a fixed-price contract to a cost-plus contract.

(385) LMAES gave a two-day presentation on its REA to LMITCO from April 1 to April 3, 1997.

(386) At the presentation, LMAES made it clear that they would consider stopping work if the interim funding request was denied.

### **Audit of REA**

(387) On April 7, 1997, LMITCO referred the REA to the Defense Contract Audit Agency (DCAA) for an audit.

(388) LMAES refused to provide any information to the DCAA to assist the audit.

(389) The DCAA ultimately found that LMAES had not established that it was entitled to the requests it made in the REA.

(390) Specifically, the DCAA found that LMAES itself was responsible for a significant portion of the contract cost increases. *See Plaintiff's Exhibit 1678.*

**May 1, 1997 Presentation to LMITCO & DOE**

(391) On May 1, 1997, Squires and his staff gave a presentation on the project's status to DOE and LMITCO.

(392) Squires reviewed the technical baseline issues he and Winston had been discussing, and the REA they had filed earlier.

(393) Squires' staff member, Paul Hoff, discussed the HDT Comparison, stating that LMAES's design was adequate to handle expected levels of gamma emitters but if higher levels were encountered, the project would need to be shut down while the gamma was shielded.

(394) During Squires' presentation, he told the DOE and LMITCO that the extra costs would push the project from its original fixed price of \$179 million to \$517.4 million.

(395) Squires stated that LMAES was prepared to go forward and complete the project for \$517.4 million so long as the soil sorter and technical baseline were approved.

(396) Winston was at this meeting.

**LMITCO Imposes New Schedule Unilaterally**

(397) Immediately after the May 1, 1997, meeting, Winston directed that LMITCO issue a unilateral modification to the Definitized Subcontract.

- (398) Specifically, the modification – known as Modification 20 – used the proposed 27-month schedule proposed by LMAES earlier.
- (399) Winston issued Modification 20 in reliance on (1) the schedule LMAES had proposed, (2) his belief that the combined CTS and Soil Sorter system could work, (3) his knowledge of Lockheed’s vast resources and his confidence in the abilities and resources of LMAES, and (4) his consultations with other Sequestered Team members.
- (400) Winston did not issue Modification 20 due to any pressure from DOE.
- (401) After Winston issued Modification 20, Squires (LMAES’s Project Manager) told Winston that he thought LMAES could do the job within that schedule, even though “the company” felt otherwise. *See Transcript August 11, 2004, at p. 849.*
- (402) The new schedule, issued by Winston in early May 1997, required the LPT test to be started August 21, 1998 (a 27 month extension) and to be completed on March 8, 1999, with the complete Pit 9 remediation to be done by May 6, 2000, and the removal of all equipment and facilities to be done by May 13, 2001.

**Partial Denial of REA**

- (403) On May 14, 1997, LMITCO advised LMAES that its requests for interim

funding of \$10 million per month and a conversion to a cost-plus contract would be denied.

(404) LMITCO further stated that it would need additional time to review the other requests in the REA.

#### **LMAES's Technical Direction Demands**

(405) Having lost their attempt to transform the Subcontract into a cost plus contract, LMAES began an effort to transform the Subcontract into a design specification contract.

(406) LMAES made numerous demands for approval of a technical baseline.

(407) For example, on May 22, 1997, LMAES advised LMITCO that "LMAES needs direction now because without the necessary direction, LMAES will continue to incur significant risk that its future performance will be found to be deficient."

(408) LMAES sent a similar demand to LMITCO on February 6, 1998, stating that "[w]hen we refer to an agreement on the technical baseline, we mean a written agreement by LMAES and the stakeholders (LMITCO, DOE, EPA, and the State of Idaho) on a system design that, when faithfully implemented, will result in the requisite approval after the [ORR] to begin the [LPT]."

(409) These two letters, and others, show that LMAES sought to turn the project into a design specification project, with an approved technical baseline that would be an implied warranty that if the baseline was followed, LMAES would be paid, even if there was no successful remediation.

(410) These demands essentially seek to change the turnkey nature of the design process and delete the Guarantee of Performance, with the effect that the risk of design failure would be shifted from LMAES to LMITCO.

(411) LMITCO had no obligation to re-write the contract in this manner.

#### **LMAES's Work Stoppage**

(412) On May 9, 1997, LMAES's Project Manager Ed Squires sent an internal memo to LMAES's President Jim Tegnalia entitled "Program Actions for Contract Termination." *See Plaintiff's Exhibit 1607.*

(413) The memo states that "Pit-9 management is preparing to execute the following actions," including "partial shutdown on 15 May 1997."

(414) It states further that on June 2, 1997, they will "commence with Full Shutdown and proceed with contract termination."

(415) On June 27, 1997, LMAES notified LMITCO that beginning on June 30, 1997, LMAES would (1) "reduce effort", (2) "advise its subcontractors to take aggressive steps to reduce activity," (3) "reduce personnel staffing,"

and (4) “defer making purchases or equipment, services, and materials, including certain major facility components, until the necessary technical direction is received.”

(416) Beginning in July, 1997, LMAES reduced its work effort on all aspects of the Pit 9 project except critical path activities.

(417) For example, LMAES continued to fund its subcontractor Parsons who was working on the combination CTS and Soil Sorter system, although the funding was at a reduced rate.

(418) However, LMAES stopped all progress on the project by November, 1997, and was only engaged in moth-balling activities thereafter.

(419) Eric Fruchtman, LMITCO’s expert, testified persuasively, and the Court finds, that LMAES could not have ramped up to start LPT by the deadline of August 21, 1998.

### **Cure Notice**

(420) On February 27, 1998, about three months after all progress on the project had ceased, LMITCO sent a cure notice to LMAES.

(421) The cure notice demanded that LMAES resume full-scale activities on the project, and asked for adequate assurances demonstrating how LMAES intended to fulfill its contractual obligations.

(422) The cure notice defined “adequate assurances” as “a definitive plan (and demonstrable actions toward implementing that plan) for LMAES fulfilling its obligations under the subcontract.” *See Plaintiff’s Exhibit 1670 at p. 10.*

(423) On March 6, 1998, LMAES responded with a letter from Robert Stevens, the President and Chief Operating Officer of Lockheed Martin Energy and Environmental Sector, the sector of which LMAES was a part.

(424) His letter failed to provide any assurances that LMAES would perform its obligations.

(425) On April 13, 1998, LMAES provided a second response to the cure notice.

(426) That letter likewise failed to provide any assurances that LMAES would perform its obligations.

### **Termination for Default**

(427) Having failed to provide the assurances called for in the cure notice, LMAES was terminated for default on June 1, 1998.

(428) LMITCO gave two reasons for the termination: (1) LMAES failed to make progress on the subcontract work; and (2) LMAES’s letters of March 6, 1998, and April 13, 1998, constituted anticipatory repudiation.

(429) Pursuant to the Performance Guarantee Clause, the termination letter demanded the return of \$54,386,165, representing payments made to

LMAES for work under the Subcontract.

(430) The decision to terminate was made by LMITCO without any pressure or coercion by DOE.

**Staged Interim Action Project or Alt Pit 9 Work**

(431) In October of 1997, prior to LMAES's termination, LMITCO and DOE presented a contingent path forward in the event that LMAES was unable to complete the project.

(432) This alternate path was formally called the Staged Interim Action Project (SIAP) but was referred to informally during trial as "Alt Pit 9."

(433) When LMAES was terminated, DOE implemented the Alt Pit 9 path forward.

(434) The Alt Pit 9 path forward set forth a three stage program.

(435) Stage I was designed to probe the pit to determine where the highest concentrations of waste were located.

(436) Stage II would focus on those "hot spots" and rapidly remove dirt that could then be tested and treated off-site.

(437) This process in Stage II was known as a "muck and truck" operation because it was a simple and quick method for removing dirt from the pit.

(438) With the knowledge gained in Stages I and II, the DOE could then

remediate Pit 9 in Stage III.

(439) A schedule was set for Stages I and II only.

(440) However, other agencies demanded that Stage II be changed to study the migration of plutonium through the soil.

(441) This required DOE to take an archeological dig approach to Stage II.

(442) This approach required DOE to examine the soil layer by layer, and not only identify each piece of waste they find, but also note its location on a Global Positioning System.

(443) In addition, DOE needed to take samples of soil around the waste they had located, to determine if any of that waste had leaked into surrounding soils.

(444) This archeological dig approach transformed Stage II into a substantially more sophisticated, costly, and lengthy undertaking than the muck and truck operation planned originally.

(445) While the muck and truck operation would remove 80 barrels of dirt a day from Pit 9, the archeological dig operation would remove only 8 barrels per day.

(446) Moreover, DOE's budget was "flat-lined" (neither increased nor decreased) and so DOE could not spend any more money on the project.

(447) This meant that DOE's only option was to seek a schedule extension.

(448) At this time, the DOE's Director of Environmental Management was Kathleen Hain.

(449) In a letter to EPA and the State of Idaho, Hain sought a seven-year extension, concluding that meeting the original schedule was a "physical impossibility" because DOE was "constrained by the limits of reasonable science." *See Defendant's Exhibit 3131.*

(450) By this language, Hain did not mean that technology did not exist to remediate Pit 9 or that remediation was commercially impracticable.

(451) Instead, Hain meant that an archeological dig approach to Stage II would be substantially more time-consuming than allowed for in the original schedule.

(452) Hain's request was denied and the parties entered into negotiations.

(453) Out of those negotiations came an agreement (1) to reach a compromise between the muck and truck and archeological dig approaches by adopting a Glove Box Excavator Method; and (2) to establish a new schedule.

(454) The Glove Box Excavator Method uses an excavator to dig up the dirt in a 20 square-foot area of Pit 9 and place it in trays that go to a glove box.

(455) The box protects operators who use the gloves to separate the waste.

(456) The separated waste will then be identified and treated, to determine the

best way to proceed during the remediation process at Stage III.

**Estimated Costs of Completing Alt Pit 9 Work**

(457) The estimated cost to complete Stages I and II was \$91 million.

(458) With regard to Stage III, the M&O contractor in 2003, Bechtel BWXT Idaho, Inc., estimated that it would cost \$1.58 billion to remediate Pit 9 using a chemical treatment system that could satisfy the 90% volume reduction.

(459) While this number is far above the LMAES contract of \$179 million, there are many costs included in the \$1.58 billion figure that are not at all comparable to the LMAES project.

(460) When those costs are separated out, so that the programs are roughly comparable, the Alt Pit 9 estimate for all three stages comes to about \$760 million.

(461) As discussed earlier, LMAES represented that it could complete the project for \$517.4 million.

(462) In fact, LMAES President Robert Stevens testified that Lockheed was willing to pay even more than the \$517.4 figure to get the job done.

(463) Given the resources of LMAES, the gap between \$760 million and \$517 million (or more) is not great, and certainly does not indicate that the project

is commercially impracticable.

(464) Moreover, it must be noted that the cost estimates for the Alt Pit 9 work are extremely speculative since at the time of trial, Stage III had not even progressed to a 10% design.

#### **Comparison Between Alt Pit 9 and LMAES Project**

(465) It is very difficult to make a meaningful comparison between the Alt Pit 9 work and the LMAES project for three reasons.

(466) First, Stage II of Alt Pit 9 seeks to examine the migration of waste products through the soil and hence is substantially more complex and costly than the LMAES project, which did not seek to collect that type of information.

(467) Second, costs for Stages I and II were artificially high because DOE and LMITCO did not have time under the schedule to put the work out for bid, and could not use LMAES's equipment and proprietary processes. As a result, DOE and LMITCO had to ramp up quickly to become experts in doing something that they were used to contracting out.

(468) Third, Stage III is merely a concept, having not even passed onto the 10% design stage at the time of trial.

#### **Alleged Construction Delays**

(469) LMAES alleges that LMITCO caused various delays on the construction of

the project.

(470) These allegations are analyzed below.

**Site Access & Control**

(471) LMAES complains that LMITCO and DOE delayed granting site access to LMAES causing construction delays.

(472) Although the Definitized Subcontract provided that staging and installation would begin in January of 1995, LMAES had access to the construction site beginning on December 5, 1994 for certain purposes.

(473) Because LMAES was required to file certain safety documents, which it had not yet done, LMAES could only engage in certain construction activities.

(474) These included mobilization, survey work, excavation, drilling and blasting, underground utility work, pile driving, berm construction, site fencing, and site maintenance.

(475) LMAES took advantage of this broad scope of permissible activities and engaged in them between December 5, 1994, and May of 1995 when it was given full control of the site.

(476) During that period from December to May, LMAES was scheduled in large part to be conducting the permissible activities listed above.

(477) The Court cannot find that LMAES was precluded from conducting any

activities by the actions of LMITCO or DOE.

**PSAR**

(478) LMAES was required to provide a Preliminary Safety Analysis Report (PSAR) to ensure that both construction and operation of the Pit 9 project will be safe.

(479) The PSAR must be approved by DOE.

(480) LMAES submitted its first PSAR for review in February of 1995, and it was rejected.

(481) The Court finds persuasive the testimony of Phillip Morrill, LMITCO's nuclear safety expert, who testified that the February 1995 PSAR was not approvable because (1) it was internally inconsistent, (2) it failed to adequately consider the safety of construction workers, (3) it failed to consider routine releases of radiation, and (4) it contained no programs for decontamination or hazardous controls.

(482) LMAES waited over a year-and-a-half before filing another PSAR in July of 1996, based on the CTS process, and then another PSAR in November of 1996, based on the Soil Sorter.

(483) These delays cannot be attributed to LMITCO or DOE but are instead attributable to the delays of various LMAES subcontractors.

(484) Ultimately, LMAES started its work slow-down in July of 1997, and directed work stoppages to many of its subcontractors working on various aspects of the PSARs.

(485) An internal LMAES memo dated June 11, 1997, concluded that "nothing was delayed or discontinued as a result of [DOE's] failure to approve the PSAR." *See Plaintiff's Exhibit 1620.*

(486) The Court finds that DOE was justified in not approving the PSARs submitted by LMAES.

(487) The Court finds that DOE's failure to approve the PSARs did not cause any delays or construction problems.

### **DOE Conspiracy**

(488) LMAES asserts that DOE was pressuring LMITCO officials Winston and Longhurst to terminate LMAES, and that the termination was a result of this pressure.

(489) The Court disagrees.

(490) Winston and Longhurst testified persuasively that they were making their own decisions, without DOE pressure, when they imposed Modification 20 and when they terminated LMAES for default for failing to make progress on the work.

(491) In addition, DOE did not sabotage negotiations between LMITCO and LMAES on the technical baseline.

(492) Winston testified persuasively that he was making the calls, not DOE, during those negotiations.

### **LMITCO's Payments to LMAES**

(493) LMITCO paid to LMAES \$54,386,165 in progress payment for work on the Pit 9 project.

(494) LMITCO demanded return of that full sum in its June 1, 1998, termination letter, but no amount has yet been returned.

### **Decontamination & Decommissioning Costs**

(495) LMITCO's expert, John Lundblade, testified persuasively that LMITCO will likely incur \$11,706,000 to decontaminate and decommission the Pit 9 facilities.

(496) The Court finds that estimate to be reasonable.

## **CONCLUSIONS OF LAW**

### **Status of the Pleadings & Remaining Claims**

(1) LMITCO's Amended Complaint contains claims for (1) breach of the Definitized Subcontract against LMAES; (2) a declaratory judgment that the termination for default was proper against LMAES; and (3) breach of the

Guarantee of Performance Clause against LMAES and LMC.

- (2) LMITCO's claims are all at issue.
- (3) LMAES filed a number of claims in its Counterclaim.
- (4) In prior decisions, the Court has dismissed the following claims contained in LMAES's Counterclaim: Counts I, II, VII, IX, X, and XI (to the extent it seeks breach of contract damages).
- (5) Thus, the Counterclaim Counts that are still at issue are: III, IV, V, VI, VIII, XI (without breach of contract damages), XII, XIII, and XIV.
- (6) In an earlier decision, the Court examined LMAES's Counterclaim Counts I (breach of contract—failure to provide technical direction), II (breach of contract—termination based on unenforceable schedule), and IX (breach of the duty of good faith and fair dealing).
- (7) In those Counts, LMAES sought damages above and beyond those permitted by the Equitable Adjustment provisions of the Definitized Subcontract.
- (8) Both sides agreed that the extra measure of damages provided by contract law were only applicable if LMAES showed that there was a cardinal change in the work or if LMITCO was guilty of misrepresentations or of withholding superior knowledge that wrongfully induced LMAES into

entering the Definitized Subcontract.

- (9) Thus, it was apparent that Counterclaim Counts I, II, and IX, were redundant with Counts III (cardinal changes), V (material misrepresentation), and VI (superior knowledge).
- (10) The Court therefore dismissed Counterclaim Counts I, II, and IX, and read them into Counterclaim Counts III, V, and VI.
- (11) This meant, the Court held, that for LMAES to be entitled to a contract measure of damages, it would have to prove that the alleged failure to provide technical direction, the imposition of an unenforceable schedule, or the breach of the duty of good faith and fair dealing must rise to the level of a cardinal change or a material misrepresentation or the withholding of superior knowledge.

### **Termination for Default**

#### **1. Reasonableness of Schedule**

- (1) Under the Termination for Default Clause, LMITCO had the right to terminate LMAES for failing “to make progress, so as to endanger performance of this subcontract.”
- (2) Both sides agree that work progress must be measured against a properly imposed schedule.

- (3) The schedule by which LMITCO measured LMAES's progress was the schedule imposed unilaterally by LMITCO in Modification 20.
- (4) LMITCO had the right to impose a new schedule unilaterally so long as it took into account the performance capabilities of LMAES. *See McDonnell Douglas v. United States*, 323 F.3d 1006 (Fed.Cir. 2003).
- (5) The unilateral schedule "must be both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given." *Id.* at 1019.
- (6) The reasonableness of the action turns on "what the government knew or should have known at the time it imposed the new schedule." *Id.*
- (7) The schedule set forth in Modification 20 was reasonable for the following reasons.
- (8) First, it was essentially the same schedule proposed by LMAES.
- (9) LMAES complains that its proposal was conditioned upon LMITCO's approvals of the CTS and Soil Sorter system and a technical baseline, approvals that were never issued.
- (10) However, LMAES was not entitled to the type of approvals it wanted from LMITCO.
- (11) LMAES wanted an approval that "when faithfully implemented will result

in the requisite approval after the [ORR] to begin the [LPT].” See *LMAES Letter of February 6, 1998*.

- (12) That type of approval, consistent with a design specification project, would re-write the contract, which was a turnkey project as to design issues.
- (13) The risk of design failure was entirely on LMAES, and thus any shifting of that risk would constitute a change in a fundamental term of the Definitized Subcontract.
- (14) LMITCO had no obligation to accede to LMAES’s demand for approval.
- (15) Thus, LMAES’s insistence on the approvals in its schedule proposal was unreasonable, since LMAES was not entitled to those approvals.
- (16) LMITCO merely had to review and comment on the submissions, which it did.
- (17) Thus, the issuance of Modification 20 without the approvals sought by LMAES was reasonable and in accord with the Definitized Subcontract.
- (18) Second, LMITCO took into account the resources of LMAES, and the fact that LMC had committed to completing the job and providing its resources as one of the nation’s largest defense industry contractors.
- (19) Third, LMAES had repeatedly represented, in meetings in April and May of 1997, that it was committed to completing the project.

- (20) Fourth, LMITCO took into consideration the fact that LMAES had already been on the job for 31 months, and completed a substantial amount of construction projects, and was now getting almost the same amount of time (27 months) to finish the project.
- (21) Finally, LMITCO issued Modification 20 without any pressure or coercion from DOE.
- (22) Thus, LMITCO engaged in the same "methodical inquiry" when issuing Modification 20 that was approved in *McDonnell Douglas*, 323 F.3d at 1019.
- (23) For all of these reasons, the Court concludes that Modification 20 was both reasonable and specific from the standpoint of the performance capabilities of LMAES at the time it was issued.

## **2. Failure to Make Progress**

- (24) LMAES began its work slow-down in July, 1997, and had stopped all construction work by November 1997.
- (25) After November 1997, there was very little work being done at the site by the remaining 17 core workers, as the other workers had been laid off and the contracts with suppliers terminated.
- (26) Thus, by the time LMITCO sent its cure notice to LMAES in February

1997, LMAES was failing to make progress and had endangered performance of the subcontract.

- (27) LMITCO gave LMAES thirty days to give adequate assurances that it would perform its obligations.
- (28) LMAES failed to give adequate assurances.
- (29) Under these circumstances, the Termination for Default of LMAES on June 1, 1998, was proper under the Definitized Subcontract for LMAES's failure to progress with the work.

#### **Anticipatory Repudiation**

- (30) LMITCO also based its termination for default on its claim that LMAES engaged in an anticipatory repudiation of its obligations under the Definitized Subcontract.
- (31) If LMITCO had reasonable grounds to believe that LMAES may not be able to perform the contract on a timely basis, LMITCO had the right to issue a cure notice to LMAES as a precursor to a possible termination of the contract for default. *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed.Cir. 2000).
- (32) "Reasonable grounds" do not just include the situation where LMAES has given an unambiguous and unequivocal statement that it will not perform.

*Id.*

- (33) Instead, a cure notice is justified when the contractor has “by word or deed created uncertainty about their ability or intent to perform . . . .” *Id.* at 1338.
- (34) Once the Government justifiably issues a cure notice, the contractor “has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor.” *Id.* at 1338.
- (35) On May 27, 1997, LMAES wrote to LMITCO demanding that LMITCO provide technical direction and other relief. The LMAES letter states that “[w]ithout this resolution, it may be economically impracticable and technically impossible to continue performance.” The letter goes on to state that “[w]e will consider a number of actions including notifying subcontractors and suppliers to take reasonable steps to reduce costs during this period, . . .to selectively issue stop work orders to those . . .not on the critical path, . . . to provide selected employees notice [of layoffs], and to delay award of a subcontract for fabrication and installation of the soil sorter.”
- (36) LMAES’s internal documents confirm that it planned to engage in a “partial

shutdown” in May of 1997.

- (37) LMAES did in fact engage in a slowdown of the subcontract work, and laid off workers.
- (38) By November of 1997, LMAES had stopped construction work.
- (39) These facts show that LMAES had created uncertainty about whether it would perform its obligations.
- (40) Thus, by February 27, 1998, LMITCO had “reasonable grounds” to send its cure notice.
- (41) In that cure notice, LMITCO gave LMAES thirty days to provide adequate assurances that LMAES could fulfill its contractual duty to remediate Pit 9 or “LMITCO may terminate the subcontract for default.”
- (42) The cure notice defined “adequate assurances” as “a definitive plan (and demonstrable actions toward implementing that plan) for LMAES fulfilling its obligations under the subcontract.”
- (43) Under *Danzig*, the cure notice triggered LMAES’s obligation to “take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor.” *Id.* at 1338.

- (44) LMAES took the latter approach – it did not give assurances of performance but did attempt to explain, in two letters, why it was not at fault.
- (45) In the first of those two letters, dated March 6, 1998, LMAES's President, Robert Stevens, argued that under the Guarantee Clause, LMITCO had no authority to terminate LMAES for default if LMAES failed to complete Phase II by the deadline date of September 13, 1997. Stevens reasoned that since LMAES failed to complete Phase II by that date, "LMAES's obligation to perform the Pit 9 subcontract terminated on September 13, 1997, notwithstanding LMITCO's attempt to extend the contract schedule unilaterally." Stevens concluded that LMAES and LMC are "not required to continue to attempt to remediate Pit 9."
- (46) LMAES sent its second letter about a month later on April 13, 1998.
- (47) In that letter, LMAES blames its inability to make substantial performance in the initial months of the subcontract on "DOES's unwillingness to engage in a meaningful discussion of a technical baseline." LMAES states that "[w]ithout the specific direction contained in an approved technical baseline, LMAES cannot continue to perform the Pit 9 subcontract with any assurances" that its work will be accepted. The lack of a technical baseline could be remedied, LMAES asserted, if DOE would either accept the

subcontract interpretations proposed by LMAES, or direct LMAES to adopt DOE's interpretation.

- (48) The letter concluded with an 77-page legal brief arguing that DOE and LMITCO have no legal basis to terminate LMAES for default.
- (49) These two letters contain no "adequate assurance" as that term is defined in the cure notice ("a definitive plan . . . for LMAES fulfilling its obligations under the subcontract"). Moreover, they constitute a repudiation of LMAES's obligations to perform under the definitized subcontract.
- (50) They also do not contain any reasonable explanation for LMAES's failure to progress on the work.
- (51) LMITCO's schedule extension was proper and LMAES's obligations did not end on September 13, 1997.
- (52) Moreover, LMAES was not entitled to the approvals it demanded.
- (53) LMITCO was justified in basing its termination for default in part on LMAES's anticipatory repudiation because LMAES (1) failed to give either adequate assurances or a reasonable explanation in response to the cure notice, (2) unequivocally stated its position that it was relieved from further performance under the definitized subcontract, and (3) took specific steps indicating an intent not to proceed with the subcontract, including the

termination of all but a handful of its employees, terminating subcontractors, and taking steps to mothball the project.

**LMAES's Claim that LMITCO Failed to Give Technical Direction**

- (54) LMAES claims that LMITCO failed to give technical direction, thereby excusing LMAES's failure to proceed.
- (55) The Disputes Clause of the Definitized Subcontract forbids any interruption in the prosecution of the work to settle disputes.
- (56) The Disputes Clause applies very broadly to "*any* dispute, claim, or litigation arising under or relating to this subcontract . . . ." (emphasis added).
- (57) By this language, LMAES contracted away its right to use work slow-downs or stoppages as dispute resolution tools.
- (58) LMAES was required to continue prosecuting the work while it resolved its disputes with LMITCO.
- (59) LMAES breached the Disputes Clause by stopping work on the ground that LMITCO failed to give technical direction.
- (60) Importantly, the type of technical direction demanded by LMAES was not required by the Definitized Subcontract.
- (61) Under the Definitized Subcontract, LMITCO was only to review and

comment on LMAES's design and technical baseline submissions, not to approve those submissions and warrant that LMAES would pass ORR.

(62) LMITCO fulfilled its "review and comment" responsibility, triggering LMAES's obligation to proceed.

(63) Thus, LMITCO's failure to give the type of approvals demanded by LMAES did not justify LMAES in stopping work.

**LMAES's Claim that LMITCO Told It Not To Proceed**

(64) LMAES alleges, however, that LMITCO told it not to proceed with the Soil Sorter thereby justifying the work stoppage.

(65) This argument is not persuasive.

(66) LMITCO's initial opposition to LMAES's attempt to eliminate the CTS system entirely and substitute a Soil Sorter in its place prompted LMAES to modify its process and propose a combined CTS and Soil Sorter system.

(67) The combined system alleviated LMITCO's concerns.

(68) Thereafter, LMITCO gave favorable comments on that combined system contained in LMAES's 30% Design.

(69) By August 13, 1997, LMITCO had formally notified LMAES that all of its objections were "closed out."

(70) At that point, LMAES had an obligation to proceed to a 90% Design.

- (71) Instead, LMAES had been engaged in a work slow down since July 1997, and would soon cease all construction work.
- (72) LMAES never provided the 90% Design on the combined system.
- (73) As set forth in the Findings of Fact, LMAES's claim that LMITCO retracted its favorable comments on the combined system is not persuasive.
- (74) The Court concludes that LMITCO did nothing to block the progression of work, and that by August of 1997, LMAES had an obligation to progress with the work but failed to do so.

**LMAES's Claim of Commercial Impracticability**

- (75) LMAES claims that the presence of high-energy gamma emitters and fired plutonium in Pit 9 was an unforeseen occurrence that was not discovered until after the subcontract was signed, and that drove costs high enough to make performance commercially impracticable.
- (76) LMAES also points out that over six years have passed since its termination in 1998, and yet no remediation has been accomplished in Pit 9.
- (77) To establish the defense of commercial impracticability, LMAES must establish that (1) a supervening event made performance commercially impracticable, (2) the event was unforeseen, (3) the risk of the event occurring was not allocated by contract or otherwise to LMAES, and (4) the

event was not the fault of LMAES. *See Seaboard Lumber Company v. United States*, 308 F.3d 1283, 1292, 1294 (Fed.Cir. 2002).

- (78) LMAES has failed to establish the second and third elements of this defense.
- (79) With regard to the second element, LMAES knew when it signed the Definitized Subcontract that Pit 9 could contain high-energy gamma-emitters and fired plutonium.
- (80) LMAES was not misled by the low estimates of gamma-emitters in the King Inventory because LMAES's General Manager at the time, Steve Winston, suspected that those estimates were low.
- (81) Moreover, Winston's past experience with Rocky Flats led him to believe that high-fired plutonium could have been shipped from Rocky Flats to Pit 9, and that such shipments may not have been recorded on the shipping records relied upon by the King Inventory.
- (82) Thus, the higher estimates that came later were no surprise.
- (83) LMAES has also failed to establish that it did not bear the risk that Pit 9's contents could include gamma-emitters and high-fired plutonium.
- (84) LMAES took upon itself, by signing the Definitized Subcontract, the entire risk that its design of a remediation process might fail.

- (85) LMAES did protect itself to some degree with the Differing Site Conditions Clause, which allowed it to recoup any extra costs it incurred for dealing with unexpected conditions.
- (86) LMAES had also signed a Guarantee of Performance Clause that required it to return all monies to LMITCO if it was not successful.
- (87) So LMAES had to succeed to be paid.
- (88) To summarize the contract, if LMAES encountered unexpected pit contents, it (1) had to proceed with the work under the Disputes Clause and make a claim for Equitable Adjustment, (2) seek compensation under the Differing Site Conditions Clause, and (3) ultimately be successful in its remediation efforts or be forced to return all money under the Performance Guarantee Clause.
- (89) In other words, the risk of encountering unexpected pit contents was placed squarely on LMAES.
- (90) Perhaps it was unwise for LMAES to accept such risk.
- (91) But that is the deal it struck, and this Court will not re-write the deal.
- (92) Moreover, there was no evidence that the estimates of the extra costs LMAES would need to expend to process the estimates of pit contents could not be handled through the Differing Site Conditions Clause.

- (93) The proof on the Alt Pit 9 work did not show that LMAES's project was commercially impracticable.
- (94) The estimated and incurred costs of the Alt Pit 9 project, when made comparable to LMAES's project were not so different that they signaled commercial impracticability.
- (95) Moreover, there was no hard evidence from the Alt Pit 9 project that the technology did not exist for LMAES to be able to remediate Pit 9 in the late 1990s.
- (96) For all of these reasons, the Court finds that LMAES has not established its commercial impracticability defense.

**Misrepresentation & Superior Knowledge**

- (97) LMAES contends that EG&G and LMITCO had superior knowledge of the contents of Pit 9 that they kept hidden in order to induce LMAES to sign the subcontract.
- (98) LMAES also alleges that the Source Evaluation Board had concerns that were never communicated to LMAES.
- (99) To establish this defense, LMAES must show that (1) it undertook to perform without vital knowledge of a fact that affects performance costs or direction; (2) LMITCO and EG&G were aware that LMAES had no

knowledge of and had no reason to obtain such information; (3) contract specifications misled LMAES, or did not put it on notice to inquire; and (4) LMITCO and EG&G failed to provide the relevant information. *GAF Corp. v. U.S.*, 932 F.2d 947, 949 (Fed. Cir. 1991).

- (100) With regard to pit contents, the Court has fully discussed this issue and concludes that no information was hidden from LMAES and that LMAES knew of the substantial uncertainty about pit contents.
- (101) Moreover, there is no evidence that the Source Evaluation Board (SEB) had any evidence unavailable to LMAES.
- (102) While they may have had opinions, they had no duty to discuss them with LMAES.
- (103) For these reasons, the Court concludes that LMAES has failed to establish its defenses of superior knowledge and/or misrepresentation.

**Breach of the Duty of Good Faith and Fair Dealing**

- (104) LMAES alleges that LMITCO breached the duty of good faith and fair dealing.
- (105) LMITCO had a duty, under the covenant of good faith and fair dealing imposed in every contract, to cooperate with LMAES and not willfully or negligently interfere with LMAES's performance. *Malone v. United States*,

849 F.2d 1441, 1445 (Fed.Cir. 1988).

- (106) As discussed above, LMITCO attempted to assist LMAES through the review and comment process.
- (107) The additional demands LMAES made for certain approvals were not required by the Definitized Subcontract, and hence LMITCO's failure to give those approvals cannot be described as bad faith.
- (108) Moreover, as found above, LMITCO did nothing to hide the uncertainties over pit contents and thus did not act in bad faith in that regard.
- (109) Based on the Findings of Fact above, the Court concludes that LMAES has not proven this claim.

**LMAES's Claim that LMITCO failed to Consider FAR 49 Criteria**

- (110) Count XI of LMAES's counterclaim alleges in part that LMITCO failed to consider Part 49 of the Federal Acquisition Regulations (FAR 49).
- (111) FAR 49 contains a list of factors a contracting officer should consider in determining whether to terminate a contractor.
- (112) LMITCO's Subcontract Administrator Gary Longhurst testified persuasively at trial, and the Court finds, that LMITCO considered the FAR 49 criteria before the termination for default letter was issued on June 1, 1998. *See Trial Transcript for August 14, 2004, at 1479-80.*

(113) The Court therefore finds no merit to this claim.

**Cardinal Change Issue**

(114) LMAES claims that LMITCO made a cardinal change to the scope of LMAES's work.

(115) A cardinal change is a change "so profound that it is not redressable under the contract and thus renders [LMITCO] in breach." *See Allied Materials & Equip. Co. Inc., v. United States*, 569 F.2d 562 (Ct.Cl. 1978).

(116) LMITCO made no such profound changes to the work.

(117) As discussed above, there is no evidence that the estimated extra costs that might be incurred to meet the levels of gamma-emitters and high-fired plutonium in the pit could not be handled under the Differing Site Conditions Clause and Disputes Clause.

(118) The Court therefore concludes that LMITCO made no cardinal change to the work.

**Conflicts of Interest**

(119) LMAES claims in Count XII of its Counterclaim that LMITCO has improper conflicts of interest in supervising its sister company, LMAES.

(120) The Court concludes that the Organizational Conflict of Interest Plan addressed any conflicts of interest.

(121) There is no evidence that this Plan was not followed or that it interfered with LMAES's ability to perform in any way.

(122) The Court will therefore dismiss Count XII of the Counterclaim.

**Constructive Changes**

(123) LMAES asserts in Counterclaim Count XIII that LMITCO is liable for constructive changes.

(124) LMITCO is liable if it ordered extra work or if the extra work was caused by the fault of LMITCO.

(125) Under the Differing Site Conditions Clause, LMAES had an obligation to provide written notice to LMITCO of the extra work it had to perform due to unexpected site conditions.

(126) No such notice was ever provided by LMAES.

(127) Thus, Counterclaim Count XIII must be dismissed.

**Promissory Estoppel**

(128) In Counterclaim Count XIV, LMAES asserts that LMITCO is precluded from terminating LMAES for default by the doctrine of promissory estoppel.

(129) LMAES claims that various promises were made to it, which were broken during the course of the project and which now preclude the default

termination.

(130) Under the Findings of Fact set out above, the Court finds no such promises having been made.

(131) Thus, Counterclaim Count XIV shall be dismissed.

**Final Conclusion on LMAES's Counterclaims**

(132) Pursuant to the Findings of Fact and the Conclusions of Law set forth above, the Court concludes that the remaining Counterclaim Counts – namely, Counts III, IV, V, VI, VIII, XI, XII, XIII, and XIV – must be dismissed.

**Final Conclusion on LMITCO's Claims**

(133) The Court concludes that by June 1, 1998, LMAES had failed to progress with the work, failed to give adequate assurances that it would perform in the future, and failed to adequately explain its failure to progress, justifying the termination for default.

(134) The Court concludes that the LMAES letters in March and April of 1998 constituted an anticipatory repudiation that provided an additional justification for the termination for default.


(135) Pursuant to the Guarantee of Performance Clause, LMAES must therefore return the monies paid to it by LMITCO in the sum of \$54,386,165, with

- interest at the rate of 12% per annum, simple interest, beginning July 1, 1998, until the date of this decision, pursuant to Idaho Code § 28-22-104.
- (136) Pursuant to the D&D Clause, LMAES is responsible for the reasonable estimate of \$11,796,000 for D&D work.
- (137) The following pending motions are rendered moot by the Court's decision: motions by LMITCO to exclude testimony of Keevan (docket nos. 558 & 566); motion to expedite (docket no. 520); motion to strike (docket no. 543); motion to extend time (docket no. 506).
- (138) The following pending motions are denied: motion for reconsideration (docket no. 569); LMITCO's Rule 52©) motion (docket no. 566 part 2); LMAES's motion to deny admission of deposition testimony (docket no. 510); LMITCO's motion for admission of exhibits (docket no. 509); oral Rule 50 motion (docket no. 508).
- (139) The motion by LMAES to admit documents (docket no. 555) is granted in part and denied in part. It is denied as to exhibits D1540, D2426, D1513, and D2119, and is granted as to all other exhibits.
- (140) The Objection by LMITCO to exhibit 3319 (docket no. 550) is granted in part and denied in part. The Frank Schwartz Journal is admitted to the extent that it impeaches LMITCO's witnesses who testified to rebut

LMAES's DOE conspiracy theory but is inadmissible for any other purpose.

- (141) The Court will reserve ruling on attorney fee and cost matters, and will resolve those after counsel have filed their petitions following this decision.
- (142) Counsel shall prepare a proper form of Judgment consistent with these Findings and Conclusions.

Dated, this 29<sup>th</sup> day of October, 2004.

  
\_\_\_\_\_  
B. LYNN WINMILL  
CHIEF JUDGE, UNITED STATES DISTRICT COURT

United States District Court  
for the  
District of Idaho  
October 29, 2004

\* \* CLERK'S CERTIFICATE OF MAILING \* \*

Re: 4:98-cv-00316

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

B Michael Schestopol, Esq. 1-206-682-6234  
OLES MORRISON RINKER & BAKER  
701 Pike St #1700  
Seattle, WA 98101

James F Nagle, Esq. 1-206-682-6234  
OLES MORRISON RINKER & BAKER  
701 Pike St #1700  
Seattle, WA 98101

Christopher B Butler, Esq. 1-206-682-6234  
OLES MORRISON RINKER & BAKER  
701 Pike St #1700  
Seattle, WA 98101

Arthur D McGarry, Esq. 1-206-682-6234  
OLES MORRISON RINKER & BAKER  
701 Pike St #1700  
Seattle, WA 98101

Robert J Burke, Esq. 1-206-682-6234  
OLES MORRISON RINKER & BAKER  
701 Pike St #1700  
Seattle, WA 98101

Phillip S Oberrecht, Esq. 1-208-395-8585  
HALL FARLEY OBERRECHT & BLANTON  
PO Box 1271  
Boise, ID 83701-1271

Thomas J Madden, Esq. 1-202-344-8300  
VENABLE  
Terrell Pl  
575 7th St NW  
Washington, DC 20004-1601

Charles R Marvin Jr, Esq. 1-202-344-8300  
VENABLE  
Terrell Pl  
575 7th St NW  
Washington, DC 20004-1601

Paul Albert Debolt, Esq. 1-202-344-8300  
VENABLE  
Terrell Pl  
575 7th St NW  
Washington, DC 20004-1601

Lawrence Bradley Bernard, Esq. 1-202-344-8300  
VENABLE  
Terrell Pl  
575 7th St NW  
Washington, DC 20004-1601

Richard F Ensor, Esq.  
VENABLE  
Terrell Pl  
575 7th St NW  
Washington, DC 20004-1601

David E Alexander, Esq. 1-208-232-6109  
RACINE OLSON NYE BUDGE & BAILEY  
PO Box 1391  
Pocatello, ID 83204-1391

W Marcus W Nye, Esq. 1-208-232-6109  
RACINE OLSON NYE BUDGE & BAILEY  
PO Box 1391  
Pocatello, ID 83204-1391

Durward E Timmons, Esq. 1-719-635-4576  
SHERMAN & HOWARD  
90 S Cascade Ave #1500  
Colorado Springs, CO 80903

Walter H Bithell, Esq. 1-208-343-8869  
HOLLAND & HART  
PO Box 2527  
Boise, ID 83701

B Newal Squyres, Esq. 1-208-343-8869  
HOLLAND & HART  
PO Box 2527  
Boise, ID 83701

Douglas L Abbott, Esq. 1-303-295-8261  
HOLLAND & HART  
PO Box 8749  
Denver, CO 80201-8749

Stephen G Masciocchi, Esq. 1-303-295-8261  
HOLLAND & HART  
555 17th St #3200  
Denver, CO 80202

James R Buckley, Esq.  
LOCKHEED MARTIN CORPORATION  
633 W 5th St #1700  
Los Angeles, CA 90071

A Wayne Lalle Jr, Esq. 1-703-821-8949

VENABLE  
8010 Towers Crescent Dr #300  
Vienna, VA 22182

Samuel O Gaufin, Esq.  
VAN COTT BAGLEY CORNWALL & MCCARTHY  
PO Box 45340  
Salt Lake City, UT 84145

David A Greenwood, Esq.  
BENDINGER CROCKETT PETERSON GREENWOOD & CASEY  
170 S Main #400  
Salt Lake City, UT 84101

David M Cohen, Esq.  
DEPT OF JUSTICE  
Commercial Litigation Branch  
Civil Division-Classification Unit  
1100 L St  
Washington, DC 20530

Donald E Kinner, Esq.  
DEPT OF JUSTICE  
Commercial Litigation Branch  
Civil Division-Classification Unit  
1100 L St  
Washington, DC 20530

Matthew P Reed, Esq.  
DEPT OF JUSTICE  
Commercial Litigation Branch  
Civil Division-Classification Unit  
1100 L St  
Washington, DC 20530

Chief Judge B. Lynn Winmill  
 Judge Edward J. Lodge  
 Chief Magistrate Judge Larry M. Boyle  
 Magistrate Judge Mikel H. Williams

Visiting Judges:

Judge David O. Carter  
 Judge John C. Coughenour  
 Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 10-29-04

BY: *Jill A. Gels*  
(Deputy Clerk)