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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

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June 23, 2003

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The Honorable Spencer Abraham  
Secretary  
U. S. Department of Energy  
1000 Independence Avenue, SW  
Washington, DC 20585

Dear Mr. Secretary:

I am writing to request information on the Department of Energy's policies for reimbursement of DOE contractors for litigation defense costs. Specifically, I am interested in whether and under what circumstances DOE may pay a contractor's legal defense costs in a lawsuit to recover government payments that were allegedly fraudulently obtained by the contractor.

My inquiry arises in the context of the ongoing whistle-blower lawsuits at the Paducah Gaseous Diffusion Plant. As numerous news stories,<sup>1</sup> congressional hearings,<sup>2</sup> and government

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<sup>1</sup>See e.g., *In Harms's Way, and in the Dark; Workers Exposed to Plutonium at U.S. Plant*, Washington Post (Aug. 8, 1999); *Richardson Orders Probe of Uranium Plant in Ky.*, Washington Post (Aug. 9, 1999); *A Deathly Postscript Comes back to Life; After Being Rejected, Warnings of Paducah Atomic Worker Now Hailed as Heroism*, Washington Post (Aug. 11, 1999); *Radioactive Gold: Did It Go to Market?; Metal Recycled From Warheads Wasn't Screened, Nuclear Workers Charge*, Washington Post (Aug. 14, 1999); *Paducah's Silent Witness; Excessive Uranium Level Found in Worker's Bones*, Washington Post (Aug. 22, 1999); *Radioactive Ooze Found in Paducah; Seepage Outside Plant May Denote Illegal Waste*, Washington Post (Aug. 29, 1999); *Radiation Risks Long Concealed; Paducah Plant Memos Show Fear of Public Outcry*, Washington Post (Sept. 21, 1999); *Plant Hid Risk from Workers; Paducah Bosses Knew Some Had High Radiation Levels*, Washington Post (Dec. 23, 1999).

<sup>2</sup>See House Committee on Commerce, Subcommittee on Oversight and Investigations, *Hearing on the Paducah Gaseous Diffusion Plant: An Assessment of Worker Safety and Environmental Contamination*, 106<sup>th</sup> Cong. (Sept. 22, 1999) (H. Rept. 106-87); Senate Committee on Energy and Natural Resources, Subcommittee on Energy Research, Development, Production and Regulation, *Hearing to Review the Department of Energy's Findings at the Gaseous Diffusion Plant in Paducah, Kentucky and to Receive Testimony Regarding the Department of Energy's Plans for Cleanup at the Site* (Mar. 31, 2000); Senate Committee on

investigations<sup>3</sup> have detailed, a catastrophe has occurred at Paducah. Workers have lost their health and in some cases their lives through unknowing exposure to radioactive and hazardous chemicals. Releases from the plant have caused widespread contamination of land and groundwater in the area. And U.S. taxpayers will likely have to pay billions of dollars to contain and mitigate the environmental damage.<sup>4</sup>

Throughout much of the time this damage was occurring, Lockheed Martin ran the Paducah plant and received tens of millions of dollars in payment from the federal government. Several current and former workers at the plant blew the whistle in 1999, bringing two *qui tam* lawsuits against Lockheed Martin under the False Claims Act. This law allows whistleblowers to represent the federal government in an action to recover damages for misconduct from a federal contractor. A few weeks ago, DOJ announced that the government will join these suits against Lockheed Martin with respect to the major claims in each suit.<sup>5</sup>

I understand that DOE reimburses its contractors for reasonable legal costs, unless there is liability related to the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgment.<sup>6</sup> DOE has defined "prudent business judgment" as acting in the

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Energy and Natural Resources, Subcommittee on Energy Research, Development, Production and Regulation, *Hearing to Receive Testimony on the April 2000 GAO Report Entitled "Nuclear Waste Cleanup — DOE's Cleanup Plan for the Paducah, Kentucky Site Faces Uncertainties and Excludes Costly Activities,"* (June 27, 2000).

<sup>3</sup>See e.g., DOE Office of Oversight, Environment, Safety and Health, *Phase I Independent Investigation of the Paducah Gaseous Diffusion Plant, Environment, Safety, and Health Issues* (Oct. 1999); DOE Office of Oversight, Environment, Safety and Health, *Phase II Independent Investigation of the Paducah Gaseous Diffusion Plant, Environment, Safety, and Health Practices 1952–1990* (Feb. 2000); DOE (submitted by University of Utah, Center for Advanced Medical Technologies, Center of Excellence in Nuclear Technology, Engineering and Research; and Paper, Allied Industrial, Chemical and Energy Workers (PACE) International Union), *Exposure Assessment Project at the Paducah Gaseous Diffusion Plant* (Dec. 2000); DOE, Oak Ridge Operations, *Report on the Paducah Gaseous Diffusion Plant Metals Recovery Program* (Dec. 2000) (DOE/ORO-2105).

<sup>4</sup>See U.S. General Accounting Office, *Nuclear Waste Cleanup: DOE's Paducah Plan Faces Uncertainties and Excludes Costly Cleanup Activities* (Apr. 2000) (GAO/RCED-00-96).

<sup>5</sup>DOJ, *U.S. Joins Paducah Gaseous Diffusion Plant Suit Against Lockheed Martin* (May 30, 2003) (press release) (online at [http://www.usdoj.gov/opa/pr/2003/May/03\\_civ\\_316.htm](http://www.usdoj.gov/opa/pr/2003/May/03_civ_316.htm)); Courier-Journal, *U.S. to Join Second Suit at Paducah Plant* (June 4, 2003).

<sup>6</sup>Letter from Ms. Gary L. Jones, Director, Natural Resources and Environment, GAO, to Congressman Jim Gibbons (March 8, 2002) (GAO-02-418R DOE Contractor Litigation Costs).

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same manner as a prudent person in the conduct of a competitive business.<sup>7</sup> DOE determines “willful misconduct” and “lack of good faith” on a case-by-case basis.<sup>8</sup>

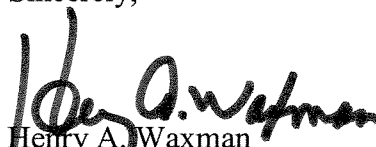
According GAO, “[i]n practice, DOE reimburses its contractors for most of the legal costs.”<sup>9</sup> For example, from 1995 through 2001, DOE reimbursed its contractors for over 95% of the total roughly \$358 million the contractors spent on defending and settling lawsuits.<sup>10</sup>

Now that DOJ has joined the whistle-blower lawsuits against Lockheed Martin, the government has formally taken the position that Lockheed Martin has submitted false claims for millions of dollars in payments while improperly and illegally storing and disposing of radioactive and hazardous wastes. It certainly appears that the challenged actions constitute, at a minimum, failure to exercise prudent business judgment. More likely, the actions constitute a lack of good faith or willful misconduct. The government has joined the litigation on the basis of evidence uncovered during a four-year investigation conducted by DOE’s Office of Inspector General, the Defense Criminal Investigative Service, the FBI, and EPA’s Office of Criminal Enforcement.<sup>11</sup> DOE alone spent over \$6 million on this investigation.<sup>12</sup>

The attached questions ask for information about DOE’s policies and practices regarding reimbursement of contractor legal costs, particularly in the context of the Paducah litigation. I hope that you can respond to the attached questions by July 7, 2003.

Thank you in advance for your prompt response to this inquiry.

Sincerely,



Henry A. Waxman  
Ranking Minority Member

Enclosure

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See DOJ, supra note 5.*

<sup>12</sup> Letter from Lee Liberman Otis, General Counsel, DOE, to Congressman Henry A. Waxman, Ranking Member, Committee on Government Reform (Feb. 14, 2003).

## QUESTIONS

1. Has DOE reimbursed any of Lockheed Martin's legal costs related to the Paducah whistle-blower lawsuits that the contractor has incurred while the government has been investigating the claims? If the answer to this question is yes, please respond to the following:
  - a. How much has DOE paid to Lockheed Martin to date as reimbursement for legal costs related to these whistle-blower charges?
  - b. In light of the fact that the government has now joined the Paducah *qui tam* lawsuits, will DOE continue to reimburse Lockheed Martin for litigation defense costs incurred since the date that DOJ joined the suits?
  - c. On what basis has DOE determined that Lockheed Martin exercised prudent business judgment, acted in good faith, and did not engage in willful misconduct with respect to each of the actions at issue? How is such a determination consistent with the evidence on which DOJ based its decision to join the lawsuits?
2. Will DOE reimburse Lockheed Martin for its litigation defense costs related to the portion of the whistle-blower charges that the government is not pursuing, if the whistle-blowers continue to pursue those charges independently? If so, on what basis has DOE determined that Lockheed Martin exercised prudent business judgment, acted in good faith, and did not engage in willful misconduct with respect to each of the actions at issue? How is such a determination consistent with the evidence of misconduct uncovered in the government investigation?
3. Has DOE reimbursed any of Lockheed Martin's legal costs related to the tort lawsuit for injuries to workers at Paducah, which is based on many of the same activities at issue in the *qui tam* cases? If the answer to this question is yes, please respond to the following:
  - a. How much has DOE paid to Lockheed Martin to date as reimbursement for legal costs related to these tort claims?
  - b. In light of the fact that the government has now joined claims that Lockheed Martin engaged in misconduct at Paducah, will DOE continue to reimburse Lockheed Martin for legal costs related to the tort claims?
  - c. On what basis has DOE determined that Lockheed Martin exercised prudent business judgment, acted in good faith, and did not engage in willful misconduct with respect to each of the actions at issue in the tort claims? How is such a determination consistent with the evidence of misconduct uncovered in the government investigation?

4. Has DOE reimbursed any of Lockheed Martin's legal costs related to any other ongoing litigation regarding Lockheed Martin's activities at Paducah? If the answer to this question is yes, please identify each case and respond to the following:
  - a. How much has DOE paid to Lockheed Martin to date as reimbursement for legal costs related to this litigation?
  - b. In light of the fact that the government has now joined claims that Lockheed Martin engaged in misconduct at Paducah, will DOE continue to reimburse Lockheed Martin for legal costs related to this litigation?
  - c. On what basis has DOE determined that Lockheed Martin exercised prudent business judgment, acted in good faith, and did not engage in willful misconduct with respect to each of the actions at issue in this litigation? How is such a determination consistent with the evidence of misconduct uncovered in the government investigation?
4. If DOE has previously reimbursed Lockheed Martin for all or a portion of its litigation costs in any case related to its activities at Paducah and if DOE has now determined that it should not continue to reimburse Lockheed Martin in such a case or cases, will DOE ask Lockheed Martin to return to the government the reimbursements that DOE has provided to date? If not, why not?
5. If DOE has not yet made a decision regarding how it will handle reimbursement for Lockheed Martin's legal costs in any of these areas, by what date will DOE make such a decision? How will DOE handle any legal cost reimbursement requests submitted by Lockheed Martin in the interim?
6. Does DOE's policy for reimbursement of its contractors' legal defense costs explicitly address whether DOE will reimburse a contractor for defense of a *qui tam* case? Does the policy address whether any such reimbursement may continue if the government joins the suit? If so, what does the policy require?
7. Does such a DOE policy address the circumstances under which DOE would pursue recoupment of previously paid reimbursements?
8. Please provide a copy of all DOE policy documents that guide DOE reimbursements for its contractors' legal defense costs.
9. Please provide a copy of any documents (such as case-specific guidance, responses to inquiries from the contractor, letters, internal memoranda, or formal determinations) related to any DOE decision about how to handle Lockheed Martin's reimbursement requests for legal costs for the contractor's activities at Paducah.