Raymond W. Stephens, Jr.
[redacted]
Phone 941-953-9628
Fax 941-953-9628
RStephe726@aol.com

October 27, 2014

Rachel Leiton,
Director
U.S. Department of Labor
Office of Workers Compensation Programs
Division of Energy Employees Occupational Illness Compensation
Frances Perkins Office Building
200 Constitution Avenue, N.W.
Washington, DC 20210

Claimant: Raymond W. Stephens, Jr.
[redacted]
Docket #10035076-2006

Petition to Reopen

Dear Ms. Leiton:

I respectfully request the Department of Labor's Office of Workers' Compensation's Division of Energy Employees Occupational Illness Compensation (DEEOIC) reopen my claim based upon new evidence and arguments. The new evidence presented is:

- Exhibit 1 – Subcontract C 83 1001222 "2772" between EG&G, Idaho and Loral American Beryllium Company (LABC) dated, June 27, 1983.

- Exhibit 2 – Management and Operations contract EY-76-C-07-1570 between Energy Research and Development Administration (DOE) and EG&G Idaho, dated December 30, 1976

- Exhibit 3 – Management and Operations contract AT(29-2)-3533 between the Atomic Energy Commission (DOE) and Rockwell International dated June, 1975. Through

December 1980 With Extension and Modifications Of contract From January 1981 through 1989 until LABC Purchase by Lockheed Martin in1996 (2 discs)

- Exhibit 4 – Letter from Division of Energy Employees Occupational Illness Compensation Program (DEEOIC) to Alliance of Nuclear Worker Advocacy Groups (ANWAG) dated June 11, 2013

- Exhibit 5 – Letter from National Nuclear Security Agency's response to Freedom of Information Act Request for contracts between DOE and Rocky Flats.

- Exhibit 6 – Unredacted journals by Dominic Sanchini, Rockwell International's Manager of Rocky Flats

- Exhibit 7 – DOL Final Decision Docket Number 10043931-2006 http://www.dol.gov/owcp/energy/regs/compliance/Decisions/GenericDecisions/DecisionsRef/10043931-2006.htm

- Exhibit 8 HQ-2013-01042F. Files 5535 pages from LABC obtained through FOIA. These documents were in the custody of Lockheed Martin. These files support the term, "Subcontracts". Files include purchase orders under this Order under contract AC04-76DPO3533 as well as other various other Subcontracts.

DISCUSSION

I. Subcontracts and Purchase Orders

DEEOIC denied my previous petition to reopen my claim in a letter dated April 9, 2012. One reason the reopening was denied is because it is DEEOIC's position that the documents I supplied in my March 7, 2012 petition to reopen were nothing more than procurement contracts,

> *"September 11, 2008 opinion of the district court, you have the burden of proof to establish the existence of this alleged construction contract, and as the district court held in that opinion, "[t]here is no evidence in the record of contracts involving [LABC] other than procurement contracts." I see nothing in either your EEOICPA case file or in your latest submission that would cause me to disagree with that holding."*

From my research, it appears that there are two distinct types of "procurement contracts". One is a "subcontract" and another is a "purchase order". As noted above, the agreement between EG&G, Idaho and LABC is designated as a "subcontract" and subject to a various conditions, due to the nature of the classified nature of the work involved.

However, a supplier to an M&O contractor who received a purchase order to supply 100 reams of copy paper would not be expected to agree to the same conditions. For example, the office supply provider would not need to:

- Accept that all records including medical and personnel records will become property of DOE, except those records which the M&O Contractor and DOE agree are exempt, and shall be delivered to DOE.

- Deliver progress reports.

- Allow inspections of the work procured under the contract.

Nor would the office supply company be expected to initiate security measures, as LABC was required to do, to protect the reams of office supplies sold to DOE but not yet shipped, by allowing only Q cleared personnel into the area holding the paper products.

Yet, acceptance of these conditions was required by LABC before the subcontract was awarded.

II. Management and Operations Contracts

In my earlier attempts to have LABC designated as a covered DOE facility, the district court ruled that my arguments were without merit because I was unable to "point to a specific contract or document that shows that DOE contracted with EG & G and Rocky flats with respect to security at Loral American."

Exhibit 2 is copy of the management and operations contract, number EY-76-C-07-1570, between the United States Government, "acting through the United States Energy Research and Development Administration", now known as the Department of Energy (DOE) EG&G Idaho, Inc. (EG&G) This contract is offered as new evidence.

This contract between DOE and EG&G Idaho, Inc. spells out specific requirements EG&G must follow when awarding sub-contracts (pages 24 through 26):

"G. Subcontracts. The Contractor further agrees to require the inclusion of provisions similar to those in paragraphs A. through this paragraph G. of this article in all subcontracts (including lump-sum or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor, except when and to such an extent as the Contracting Officer may waive such requirements."

According to this contract a subcontractor to EG&G must:

- Maintain separate and distinct set of accounts, records, documents and other evidence showing and supporting all allowable costs incurred.

- Allow inspection and audit of accounts and records

- Accept that all records including medical and personnel records will become property of DOE, except those records which EG&G and DOE agree are exempt, and shall be delivered to DOE.

- Deliver progress reports.

- Allow inspections of the work procured under the contract.

- Agree that the Comptroller of the United States will have access to and the right to examine any directly pertinent books, documents, etc.

In addition, EG&G agrees that "title to all materials, equipment, supplies and tangible personal property of every kind…shall pass directly from the vendor to the Government [DOE] and not to the Contractor [EG&G)."

Exhibit 1 is a copy of the contract between Loral American Beryllium and EG&G Idaho, Inc. with the contract number C 83 1001222 "2772" of June 23, 1983 and is offered as new evidence.

It is important to note that this document is designated as a "subcontract" and not a purchase order. LABC was required to accept and adhere to the standard terms and conditions including accepting that EG&G's designee had "overall direction of the subcontract work."

ARTICLE VI – ADMINISTRATIVE

1. *The Subcontractor agrees that Ferd Thompson will have overall direction of the subcontract work. Changes in this assignment must be agreed to in writing in advance by the parties hereto.*
2. *It is agreed that, unless the subcontractor is otherwise notified in writing, all the Contractor's responsibilities and authorities under this subcontract, including but not limited to issuance of notices…at the Subcontractor's place of business, or elsewhere, shall be administered solely and exclusively by the Manager, Subcontract Administration of the Contractor…"*

It is also important to note that this contract, C 83 1001222"2772", references the Management and Operations contract stating that EG&G is "acting under Contract DE AC07-762IDO1570 with the United States Department of Energy…" Contract number DE AC07-762IDO1570 is Exhibit 2.

It is also evident that EG&G acted on behalf of DOE when issuing this subcontract as noted on note on page 12,

> *"The Subcontractor agrees to release and discharge the Contractor* ***and DOE*** *from all claims and demands…"*

Similarly, page 14 of the contract between DOE and Rockwell International, Exhibit 3, states,

> *"The Contractor shall, when directed by the Commission, and may,* ***but only when authorized by the Commission,*** *(emphasis added) enter into subcontracts for the performance of any part of the work under this article."*

Nonetheless, it is evident that DOE enjoys and did enjoy a very close relationship with not only the M&O contractor but also with the M&O contractors' subcontractors.

Chapter 17.6 of DOE's Acquisition Guide spells out the nature of this relationship.

http://energy.gov/sites/prod/files/17.6_Origin%2C_Characteristics%2C_and_Significance_of_the_DOE%27s_Management_and_Operating_0.pdf

> ***"5. Special Contractual Features of DOE's M&O Contracts.***
> *In recognition of the circumstances consistent with the establishment of a DOE M&O Contract, the terms of the contract differentiate it from typical contracts awarded by other*
> *agencies and other contracts awarded by DOE under the FAR. These terms, listed below, are indicia of a "special relationship," the M&O contractors share with DOE:*
>
> ***…3. DOE's significant involvement in M&O contractor management controls.***
> ***4. DOE's involvement with the M&O contractor's purchasing process…"***

III. Dominic Sanchini unredacted journal

While it is accepted that Rocky Flats contracted with LABC to machine certain beryllium parts, page 18 of Exhibit 6 provides at least one reason the decision to subcontract this work out. The design of the nuclear warheads requires that certain components be manufactured from beryllium. Mr. Sanchini was the Manager of Rocky Flats for Rockwell International. He was informed that there was a high incidence of either sensitivity to beryllium, a precursor to Chronic Beryllium Disease (CBD), or CBD itself. The journal is not clear on this point. A person identified only as "Steve", suggested that Rocky Flats should send the beryllium "work out". Speed Ring and LABC or recommended.

Rockwell International held an M&O contract with DOE to manage the Rocky Flats facility. DOE required Rocky Flats to provide the beryllium components for the warheads. Therefore, DOE had proprietary interest in those components. DOE did not relinquish proprietary interest in those components simply because Rocky Flats decided it would be better if their direct employees were not exposed to this deadly substance.

IV. United States v. New Mexico et al.

In a letter dated April 14, 2013 to the Alliance of Nuclear Worker Advocacy Groups (ANWAG), Exhibit 4, DEEOIC recommended ANWAG to research Chapter 17.6 of DOE's *Acquisition Guide* (October 2007), http://1.usa.gov/1iAiOlS, for more information concerning the history and nature of "how DOE contracts with entities at its DOE facilities."

Footnote 14, found on page 6, of the Acquisition Guide cited the Supreme Court case United States v. New Mexico, 455 U.S. 720, 723(1982) as their sole argument that the M&O Contractors do not act on behalf of DOE.

> *Finally, the Supreme Court opined that management and operating contracts are a unique type of contract, in that they have a special identity with DOE and indicia of agency without actually causing the contractors to be agents of the Department.*

I read the case and I do not believe this citation is germane to my claim. While the Supreme Court found that the State of New Mexico was entitled to tax on sales made by the DOE contractors managing the Sandia facility, this decision applied to only those purchases that were made by the contractors "in connection of [their] own commercial activities."

> *Yet the Court had no difficulty upholding the application of the Tennessee tax, concluding that the "[t]he vital thing' is that [the contractors are] 'using the property in connection with [their] own commercial activities.'" Id. At 378 U.S. 45, quoting United States v. Township of Muskegon, 355 U.S. at 355 U.S. 486. That the federal property involved was being used for the Government's management contract – was irrelevant, for the contractors remained distinct entities, pursuing "private ends," and their actions remained "commercial activities carried on for profit." 378 U.S. at 378 U.S. 44. For that reason the contractors Page 455 U.S. 740 had not become "instrumentalities" of the United States. Id at U.S. 48 [Footnote 13]*

The key factor which New Mexico prevailed in this case was the fact that the purchases for which it sought sales and other taxes ended up being used by Sandia's M&O contractor and subcontractors themselves. As noted above, these purchases were likely for items such as copy paper, pens, etc. This merchandise was likely used by Sandia personnel solely and in "connection with its own commercial activities" under the cost plus contract with DOE. While DOE would have been ultimately responsible for any outstanding debts incurred by the Sandia Contractors for these purchases, the fact remains that this type of office supply purchases would have been made to facilitate the Contractors' commercial interest in managing and operating the Sandia Laboratory on behalf of DOE.

In stark contrast, Idaho National Lab and Rocky Flats, EG&G, Idaho and Rockwell International specifically, were ***not*** purchasing custom-made parts from LABC for classified nuclear weapons

so that they could be used in those sites' " own commercial activities." How could they? Sandia was not developing nuclear weapons for their own commercial use but on behalf of the United States government. These fabrication contracts were for parts that DOE itself needed to utilize in the assembly of specific thermonuclear weapons that were, in the day, deemed necessary to protect our country.

DOE, under the authority of federal statutes, controlled who could see, know about, fabricate and transport the parts subcontracted to LABC. These parts, at least those ordered by Rocky Flats, were given a Government Property stamp upon manufacture. I am confident that a government stamp was not placed on the ream of paper purchased by Sandia at a local office supply provider. As explained in Sections I and II of this petition, there is an explicit difference between what DOE required to be inserted into a Subcontract for manufactured parts as opposed to which terms would be inserted into a purchase order for office supplies.

When EG&G and Rocky Flats, as DOE Management and Operations Contractors, entered into a subcontract with LABC to purchase manufactured parts specifically required for the nuclear weapon's design those M&O Contractors acted true agents of the U.S. government. Additionally, the evidence shows that the very contract between Rocky Flats and LABC was modified to include the special construction terms required by DOE-affiliated parties. These construction terms clearly fulfills the "construction contract" which triggers the "DOE facility" definition under EEOICPA.

Lastly, page 743 states:

> *Even accepting the Government's representation that it is directly liable to vendors for 743*743 the purchase price, see Tr. of Oral Arg. 42-45,[16] Sandia and Zia nevertheless make purchases in their own names — Sandia, in fact, is contractually obligated to do so, App. 37 — and presumably they are themselves liable to the vendors. Vendors are not informed that the Government is the only party with an independent interest in the purchase, as was true in Kern-Limerick, and the Government disclaims any formal intention to denominate the contractors as purchasing agents. Similarly, Sandia and Zia need not obtain advance Government approval for each purchase.*[17]

This section proves the point that EG&G and Rocky Flats did indeed act as an agent for DOE.

V. DEEOIC's Definition of Proprietary Interest

Within the past few months, I located a DEEOIC Final Decision which identifies specific criteria that must be met in order to prove proprietary interest. To the best of my knowledge, this is a recent addition to DEEOIC's website, since I have often searched for precedents during my years of research into this topic.

When I first filed my claim for Part E compensation in 2006, DEEOIC had yet to interpret the legislative term of "proprietary interest". The Final Decision offered as Exhibit 7 confirms that,

> *The statute and the governing regulations do not define the term "proprietary interest," as that term is used in subsection (B)(i) of § 7384l(12).*

In fact, DEEOIC did not define the term until March 10, 2008. This date is important to remember and it will become clear why that is so.

In my original claim and subsequent administrative adjudication procedures, I offered arguments which I thought proved that DOE had proprietary interest in LABC. Those arguments were a) DOE, through its contractor Rockwell International, required a special "Q" cleared facility be constructed and b) required LABC to lease a Zeiss machine.

DEEOIC rejected those arguments despite the fact that they had yet to a clear definition of the term had not been issued.

I filed my federal lawsuit on May 8, 2007 and DEEOIC had still not yet rendered a clear definition of proprietary interest.

By the time the DEEOIC opinion, offered in Exhibit 7, the federal case I filed was well underway in federal court. Therefore, even if this Final Decision was posted to DEEOIC's website, I would have been barred from entering it into evidence.

This Final Decision states,

> *Black's Law Dictionary defines the term as: "The interest of an owner of property together with all rights appurtenant thereto such as the right to vote shares of stock and right to participate in managing if the person has a proprietary interest in the shares." Black's Law Dictionary, p.1098 (5th ed. 1979). See also Evans v. U. S., 349 F.2d 653, 658 (5th Cir. 1965) (holding that the phrase "proprietary interest" is "not so technical, or ambiguous, as to require a specific definition" and assuming that the jury in that case gave the phrase "its common ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.'") Employing the common accepted definition of the term,* ***in order to meet the "proprietary interest" test, the evidence must establish that the MED had rights of ownership, use, or control in the buildings in which the employee worked*** *(emphasis added)…"*

The Fifth Edition of Black's Law Dictionary defines "control" as follows:

> *Control, v. To exercise retraining or directing influence over. To regulate; retrain; dominate; curb; to hold from action; overpower; counteract; govern.*
>
> *Control, n. Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee…*

It is obvious from the evidence presented here that DOE, through its contractors, had the power and authority to direct, restrict, regulate and oversee the activities of the entire LABC facility. DOE not only required LABC to lease the Zeiss machine and construct a "Q" area but DOE placed upon them many restrictions that would not be required by a non-government customer.

For example, according to the contracts, LABC was subject to site inspections as evidence on pages XXX of Exhibit **8,**

> *Since the subject Aft Heels are classified secret, Loral's "Q" cleared facility is required and is presently the only vendor who has all WR products* ***source inspected and DOE accepted at their facility****. (Emphasis added).*
>
> *Rockwell's requirements are: final source inspection by Rocky Flats inspector at their facility and* ***DOE inspection and acceptance by the Pinellas DOE inspector at Loral****. (Emphasis added)*
>
> *The procurement is the eighth requirement for this part. The Subcontractor has established a "Q" cleared area and large machines in order to fabricate these parts. The completed parts are then inspected at the Supplier's facility,* ***accepted by a local DOE inspector,*** *and then shipped to Rocky Flats for use. (Emphasis added)*

These contract requirements further prove that not only was Rockwell International acting as an agent for DOE but that DOE was intimately involved in the control of LABC facility. DOE would not have had an inspector at an office supply provider to make sure the reams of paper measured exactly 8 ½" x 11".

It is unfortunate that DEEOIC did not develop the definition of proprietary interest until after I filed my claim in federal court. It is my opinion that DEEOIC should have advised the court of this Final Decision and remanded my claim back to the DEEOIC District Office for further development.

If DEEOIC did remand my claim back for further development and my claim was subsequently denied because I did not offer contracts as evidence, I may have realized DEEOIC's requirement to produce the contracts between LABC and Rockwell International is more restrictive than the statute or their own regulations.

Please bear in mind the statute, regulations employ the word "or" followed by a semi-colon when defining the criteria one must meet to have a facility designated as a DOE facility. Exhibit 7 also uses the word "or" when laying out the test to establish proprietary interest.

If the Final Decision offered as Exhibit 7 was available to me prior to this petition to reopen, I may have had the opportunity to argue that DEEOIC erred in its decision to reopen my claim because DEEOIC placed more stringent evidentiary demands than the statute or their own

regulations and definition of proprietary interest require. I may have cited these two court cases to support my argument:

> Metwest Inc v Secretary of Labor, 560 F 3d (D.C. Circuit 2009) " *We have also held that so long as a new guidance document "can reasonably be interpreted" as consistent with prior documents, it does not significantly revise a previous authoritative interpretation..."*

> 5 USC 551(5) "*When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment"* Paralyzed Veterans of America v. D.C. Arena 117 F.3d 579,586 (D.C. Cir.1997);

Summary

The above contracts clearly show that DOE had proprietary interest in LABC from at least June 27, 1983 when EG&G, Idaho entered into a Subcontract with LABC. EG&G entered into this contract as an agent of DOE. This is evidenced by the notation that EG&G entered into this Subcontract by the authorization of its contract with DOE. DOE required EG&G to insert certain terms and conditions in all Subcontracts.

It was necessary for LABC to agree to these terms and conditions set forth by EG&G and Rockwell. As provided in my previous petitions one of the requirements was for LABC to provide a secure area, with access allowed to only DOE Q-cleared personnel.

DOE had proprietary interest in the beryllium components. Whether they were machined at EG&G Idaho, Rocky Flats or at a subcontractor's facility, DOE was involved with the specifications required to machine the parts, delivery dates and national security interests, etc. involving these components.

DEEOIC, in its March 10, 2008 Final Decision, defined the term proprietary interest and developed criteria evidence must meet to prove DOE had proprietary interest in a facility. One criterion is to provide evidence which shows DOE had control of a facility.

It is my belief that I have now provided the evidence required by the court and DEEOIC that is sufficient to prove that DOE had proprietary interest in LABC. I respectfully request that my claim be reopened and that LABC be designated as a covered facility under Part E of EEOICPA.