



United States General Accounting Office
Washington, DC 20548

March 8, 2002

The Honorable Jim Gibbons
House of Representatives

Subject: Department of Energy: Contractor Litigation Costs

The Department of Energy (DOE) contracts with not-for-profit universities and private companies to operate its facilities. As part of the cost of operating these facilities, DOE can reimburse its contractors for the legal costs associated with cases brought against them. These cases involve such matters as equal employment opportunity, radiation and/or toxic exposure, personal injury, and wrongful discharge. In a letter dated May 26, 1998, you expressed concern that the federal government might be subsidizing contractors that violate the law. Specifically, you asked us to (1) determine what laws and regulations provide for DOE to reimburse its contractors for the litigation, settlement, and judgment costs in cases brought against them; and (2) provide information on such cases, particularly those involving equal employment opportunity, as to the number of cases and the costs that DOE reimbursed its contractors and that contractors paid themselves. On January 28, 2002, we briefed your staff on information related to the legal basis for DOE's reimbursement of contractor litigation costs and the number of, cost associated with, and disposition of contractor litigation cases. At that time, your staff requested that we transmit this information to you.

In summary, the Federal Acquisition Regulation—which governs acquisitions by all federal executive agencies—and DOE acquisition regulations—which supplement the Federal Acquisition Regulation—provide for the Department to reimburse its contractors for reasonable legal costs. (See encl. I.) Such costs are not reimbursable if there is liability related to the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgment. In practice, DOE reimburses its contractors for most of the legal costs. From fiscal year 1995 through the third quarter of fiscal year 2001, there have been more than 2,100 cases involving various types of complaints against DOE contractors and the Department has reimbursed its contractors more than \$290 million for litigation and disposition (settlement and judgment) costs associated with these cases. (See encls. II through XI.) Conversely, the contractors have spent about \$13 million in their defense. In the same time period, there have been nearly 400 equal employment opportunity cases

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Abstract The Department of Energy (DOE) contracts with not-for-profit universities and private companies to operate its facilities. As part of the cost of operating these facilities, DOE can reimburse its contractors for the legal costs associated with cases brought against them. These cases involve such matters as equal employment opportunity, radiation and/or toxic exposure, personal injury, and wrongful discharge. In a letter dated May 26, 1998, you expressed concern that the federal government might be subsidizing contractors that violate the law. Specifically, you asked us to (1) determine what laws and regulations provide for DOE to reimburse its contractors for the litigation, settlement, and judgment costs in cases brought against them; and (2) provide information on such cases, particularly those involving equal employment opportunity, as to the number of cases and the costs that DOE reimbursed its contractors and that contractors paid themselves. On January 28, 2002, we briefed your staff on information related to the legal basis for DOE's reimbursement of contractor litigation costs and the number of, cost associated with, and disposition of contractor litigation cases. At that time, your staff requested that we transmit this information to you.		
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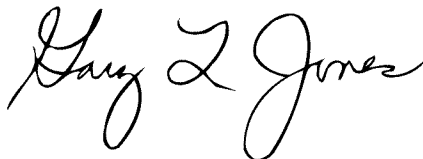
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for which DOE reimbursed its contractors about \$53 million while the contractors spent about \$2 million.

The information presented in enclosures II through XI was developed from data we obtained from the DOE system used to track contractor litigation costs. We did not independently verify the accuracy of the data contained in this DOE system. We discussed the data presented in this report with the DOE official responsible for that system who attested to the data's accuracy. We performed our work from August 2001 through February 2002 in accordance with generally accepted government auditing standards.

As arranged with your office, unless you release its contents earlier, we plan no further distribution of this letter until 30 days after its issuance date. At that time, we will send copies to interested parties. This letter will also be available on GAO's home page at <http://www.gao.gov>. If you or your staff have any questions regarding this letter, please contact me at (202) 512-3841 or William Fenzel at (202) 512-3156.

Sincerely yours,

A handwritten signature in cursive script that reads "Gary L. Jones".

(Ms.) Gary L. Jones
Director, Natural Resources and
Environment

Enclosures - 11

Enclosure I

Legal Basis for DOE Paying Litigation, Settlement, and Judgment Costs for Cases against Its Contractors

Federal Acquisition Regulation (48 C.F.R. 31.205-47) and DOE regulations (48 C.F.R. 970.5228-1) provide for the reimbursement of reasonable legal costs.

DOE has issued guidelines on what legal costs are reasonable.

Legal costs include attorney fees and other litigation costs, and costs of settlements and judgments.

These costs are not reimbursable if there is liability caused by the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgment. DOE has defined "prudent business judgment" as acting in the same manner as a prudent person in the conduct of a competitive business. "Willful misconduct" and "lack of good faith" are determined on a case-by-case basis by DOE.

Enclosure II

Number and Type of Contractor Cases (FY 1995 through third quarter of FY 2001)

Type ^a	Number of cases closed							Ongoing	Total
	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001		
Equal employment opportunity	34	67	56	58	62	44	20	40	381
Radiation and/or toxic exposure	4	3	1	1	3	0	28	11	51
Personal injury ^b	23	16	18	21	19	18	12	27	154
Wrongful discharge	9	16	18	10	8	10	8	7	86
Whistle-blower	8	17	16	17	16	23	12	20	129
Worker compensation ^b	12	65	72	100	87	100	46	186	668
Other ^c	56	59	92	79	94	70	44	153	647
Total	146	243	273	286	289	265	170	444	2,116

^aSome cases involved more than one legal issue but have been categorized according to the primary basis for the case as listed in DOE's contractor litigation tracking system.

^bWorker compensation involves an employee who has suffered an injury on the job whereas personal injury may or may not involve an employee who may or may not have suffered an injury on the job.

^cThis includes various types of cases such as breach of contract and Resource Conservation and Recovery Act cases.

Source: Developed by GAO based on DOE data.

Enclosure III

Disposition of Contractor Cases (FY 1995 through third quarter of FY 2001)

FY closed	Number of cases			Total
	Dismissed	Settlement reached	Judgment	
1995	59	74	13	146
1996	94	119	30	243
1997	104	151	18	273
1998	118	149	19	286
1999 ^a	113	147	27	289
2000 ^a	96	143	25	265
2001	77	85	8	170
Total	661	868	140	1,672^b

^aFiscal year 1999 had two cases that were closed, but no final dispositions were identified. Fiscal year 2000 had one such case.

^bThis total does not include 444 cases that are still ongoing.

Source: Developed by GAO based on DOE data.

Enclosure IV

Disposition of Contractor Cases Involving Equal Employment Opportunity (FY 1995 through third quarter of FY 2001)

FY closed	Number of cases			Total
	Dismissed	Settlement reached	Judgment	
1995	14	17	3	34
1996	26	33	8	67
1997	28	21	7	56
1998	28	25	5	58
1999	29	27	6	62
2000 ^a	15	22	6	44
2001	6	10	4	20
Total	146	155	39	341^b

^aFiscal year 2000 had one case that was closed, but no final disposition was identified.

^bThis total does not include 40 cases that are still ongoing.

Source: Developed by GAO based on DOE data.

Enclosure V

Cost of Contractor Cases Reimbursed by DOE (FY 1995 through third quarter of FY 2001)

Litigation costs on open cases	\$105,877,877
Litigation costs on closed cases	66,673,583
Disposition costs on closed cases	119,398,592
Total	\$291,950,052

Source: Developed by GAO based on DOE data.

Enclosure VI

Cost of Contractor Cases Paid for by the Contractor (FY 1995 through third quarter of FY 2001)

Litigation costs on open cases	\$1,855,807
Litigation costs on closed cases	9,359,142
Disposition costs on closed cases	1,738,509
Total	\$12,953,458

Source: Developed by GAO based on DOE data.

Enclosure VII

Cost of Contractor Cases Involving Equal Employment Opportunity Reimbursed by DOE (FY 1995 through third quarter of FY 2001)

Litigation costs on open cases	\$24,206,953
Litigation costs on closed cases	18,761,018
Disposition costs on closed cases	10,098,475
Total	\$53,066,446

Source: Developed by GAO based on DOE data.

Enclosure VIII

Cost of Contractor Cases Involving Equal Employment Opportunity Paid for by the Contractor (FY 1995 through third quarter of FY 2001)

Litigation costs on open cases	0
Litigation costs on closed cases	\$1,534,893
Disposition costs on closed cases	552,009
Total	\$2,086,902

Source: Developed by GAO based on DOE data.

Enclosure IX

Examples of Large DOE Reimbursed Judgment Costs on Closed Contractor Cases^a

Case	Category	DOE reimbursed litigation costs	DOE reimbursed judgment costs	Total DOE reimbursed costs
HAMTC/JURISDICTIONAL v. BHI	Labor relations	\$97,698	\$1,225,000	\$1,322,698
TRUMPP BROS v. SLAC	Bankruptcy	\$0	\$462,204	\$462,204
GRANT-APOLLO v. ICF KH & FDNW	Contract – other	\$348,108	\$402,343	\$750,451
BOTT v. ROCKWELL	Whistleblower	\$69,232	\$309,077	\$378,309
COUSINS CONSTRUCTION v. MK- FERGUSON	Contract – other	\$19,703	\$252,061	\$271,764
BRADLEY, W.T. v. WAUSAU INSURANCE COMPANIES	Worker compensation	\$0	\$124,787	\$124,787

^aThe costs shown are for fiscal year 1995 through the third quarter of fiscal year 2001. Some of the cases listed may also have had pre-fiscal year 1995 costs, which are not included in the totals above.

Source: Developed by GAO based on DOE data.

Enclosure X

Examples of Large DOE Reimbursed Settlement Costs on Closed Contractor Cases^a

Case	Category	DOE reimbursed litigation costs	DOE reimbursed settlement costs	Total DOE reimbursed costs
DAY ET AL. v. NLO, INC., ET AL.	Tort – radiation and/or toxic exposure	\$1,971,871	\$20,000,000	\$21,971,871
GREEN v. MK-F	Breach of contract	\$874,764	\$13,379,869	\$14,254,633
MARTINEZ, GLORIA v. UC REGENTS, WILLIAMS AND MC CORKLE	Personal injury or liability/ wrongful death	\$415,861	\$13,000,000	\$13,415,861
OCAW v. MMES (CONSOLIDATED)	Labor relations	\$161,594	\$4,350,000	\$4,511,594
LMES (1) v. RUTH JOHNSON, COMMISSIONER	Tax	\$0	\$3,632,737	\$3,632,737
OPTIMA CHEMICALS v. WSRC	Contract – other	\$43,930	\$3,532,946	\$3,576,876
HATHAWAY v. SANDIA	Contract – other	\$52,593	\$3,400,000	\$3,452,593
ANDERSON (SGT) v. WACKENHUT SERVICES	Fair Labor Standards Act	\$58,508	\$3,024,398	\$3,082,906

^aThe costs shown are for fiscal year 1995 through the third quarter of fiscal year 2001. Some of the cases listed may also have had pre-fiscal year 1995 costs, which are not included in the totals above except for DAY ET AL.

Source: Developed by GAO based on DOE data.

Enclosure XI

Examples of Large DOE Reimbursed Litigation Costs on Open Contractor Cases^a

Case	Category	DOE reimbursed litigation costs	DOE reimbursed disposition costs	Total DOE reimbursed costs
COOK v. ROCKWELL & DOW	Class action	\$25,564,478	\$0	\$25,564,478
DUPONT – HANFORD CLASS ACTION	Class action	\$19,217,728	\$0	\$19,217,728
LOTT v. WSRC	Equal Employment Opportunity – Discrimination	\$17,085,157	\$0	\$17,085,157
LMITCO v. LMAES AND LOCKHEED MARTIN CORPORATION	Contract – other	\$8,641,830	\$0	\$8,641,830
SMITH & WRAY v. LMES, ET AL.	Tort – radiation and/or toxic exposure	\$4,843,262	\$0	\$4,843,262
MEACHAM ET AL. v. KAPL ET AL.	Equal Employment Opportunity – Discrimination	\$2,800,205	\$0	\$2,800,205
BOGGS, TERESA, ET AL. v. GOODYEAR, ET AL.	Tort – radiation and/or toxic exposure	\$1,894,961	\$0	\$1,894,961
RAINER (1), ET AL. v. UCC, ET AL.	Tort – radiation and/or toxic exposure	\$1,771,320	\$0	\$1,771,320

^aThe costs shown are for fiscal year 1995 through the third quarter of fiscal year 2001. Some of the cases listed may also have had pre-fiscal year 1995 costs, which are not included in the totals above.

Source: Developed by GAO based on DOE data.