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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

MICHAEL L. ALEXANDER, STAFF DIRECTOR
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October 25, 2010

Thomas P. D'Agostino
Under Secretary for Nuclear Security and
Administrator of the National Nuclear Security Administration
National Nuclear Security Administration
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

Dear Mr. D'Agostino:

As you know, the National Nuclear Security Administration (NNSA), which is responsible for the management of the nation's nuclear weapons programs, relies extensively on contractors. As part of the Subcommittee's ongoing oversight of contract management, I am writing to request information and documents relating to these contracts.

NNSA's activities are conducted at 8 separate sites: Nevada Test Site; Los Alamos National Laboratory; Lawrence Livermore National Laboratory; Sandia National Laboratories, Pantex Plant; Savannah River Site; Y-12 National Security Complex; and Kansas City Plant. Each of these facilities is managed and operated by contractors, whose responsibilities include research and development relating to nuclear weapons and the manufacture of nuclear and non-nuclear weapons components.¹

In addition to receiving reimbursements for their costs, NNSA's contractors can earn additional award fees and contract extensions based on annual performance assessments.² NNSA evaluates the contractors' performance based on their compliance with detailed performance measures and targets, which are outlined in an annual Performance Evaluation Plan (PEP).³ The annual evaluation, known as a Performance Evaluation Report (PER), also includes

¹ U.S. Government Accountability Office, *Nuclear Weapons, Actions Needed to Identify Total Costs of Weapons Complex Infrastructure and Research and Production Capabilities* (June 2010) (GAO-10-582).

² *Id.*

³ *See, e.g.*, Management and Operating Contract for the Los Alamos National Laboratory, NNSA, Contract No. DE-AC52-06NA25396, Section H-12(b)(1)(i) (Dec. 21, 2005) ("The Performance Evaluation Plan shall document the process and associated performance objectives, performance incentives, award term incentives and associated measures and targets by which the

detailed information underlying NNSA's determination regarding the contractors' award fees for the year.⁴

I recently learned that NNSA may have weakened the PEPs to the extent that it may no longer be able to effectively evaluate the contractors' performance. In at least one case, the PEP for one of NNSA's nuclear security sites no longer includes sufficient detailed performance measures to assess the contractor's performance. According to recent published accounts, "the government will now rely on [the contractor] to take the lead and apply its expertise to identify and apply the appropriate standards, measures, metrics, and evidence"⁵ In other words, the contractor will be responsible for measuring and evaluating its own performance.

This development is troubling in light of NNSA's decision to withhold the PEPs and PERs from the public. As President Obama stated when announcing his Transparency and Open Government initiative, transparency promotes accountability and enhances the government's effectiveness.⁶ Until last year, PEPs and PERs were made available to the public, press, and all interested parties. However, on October 19, 2009, the NNSA's Director of Office of Acquisitions and Supply Management directed NNSA officials to cease publishing or providing PERs to the public until three years after completion of the award fee period.⁷

On average, NNSA spends approximately \$6.4 billion per year on these nuclear security programs, which include some of the most sensitive work performed by contractors for the United States.⁸ It is imperative that NNSA ensure that these contractors are accountable for their performance. I am concerned that NNSA's recent actions may have jeopardized its ability to do so.

Contractor's performance will be evaluated.") (online at <http://www.doeal.gov/laso/NewContract.aspx>).

⁴ See, e.g., FY2008 Performance Evaluation Report for the Los Alamos National Security, LLC's Management and Operation of the Los Alamos National Laboratory, Contract No. DE-AC52-06NA25396 (online at http://www.lanl.gov/news/newsbulletin/pdf/LANL_PEP_FY08.pdf).

⁵ *New Performance Evaluation Plan Marks Maturation of Sandia/NNSA Relationship*, Sandia Lab News (July 30, 2010).

⁶ President Barack Obama, *Memorandum: Transparency and Open Government* (Jan. 21, 2009).

⁷ Memorandum from David O. Boyd, Director, Office of Acquisition and Supply Management, NNSA, to Site Office Contracting Officers and the Director of the Office of Business Services, NNSA Service Center (Oct. 19, 2009).

⁸ U.S. Government Accountability Office, *Nuclear Weapons, Actions Needed to Identify Total Costs of Weapons Complex Infrastructure and Research and Production Capabilities* (Jun. 2010) (GAO-10-582).

To assist with its investigation, the Subcommittee requests the following information and documents relating to contracts for the management and operation of NNSA's eight nuclear security enterprise sites for the period from fiscal year 2005 through and including fiscal year 2009:

- (1) All contracts, including modifications, to manage and operate these sites;
- (2) All Performance Evaluation Plans and Performance Evaluation Reports;
- (3) All documents relating to the contractors' compliance with contract requirements, federal regulations, and/or applicable security and nuclear safety policies and directives;
- (4) All documents relating to any contractor action or inaction that may have jeopardized the security or safety of, or increased the security or safety risk to any of, NNSA's nuclear security enterprise sites or their operations; and
- (5) All cure notices and responses to such cure notices.

I request that you provide this information as soon as possible, but in no case later than **November 5, 2010**. If you determine that you will be unable to make a complete production by this date, please contact Subcommittee staff to discuss possible modifications to this schedule.

I also request that you provide a briefing for Subcommittee staff on these issues on or before **November 12, 2010**.

The jurisdiction of the Subcommittee on Contracting Oversight is set forth in Senate Rule XXV clause 1(k); Senate Resolution 445 section 101 (108th Congress); and Senate Resolution 73 (111th Congress). An attachment to this letter provides additional information about how to respond to the Subcommittee's request.

Please have your staff contact Margaret Daum at (202) 228-3862 with any questions. Please send any official correspondence relating to this request to kelsey_stroud@hsgac.senate.gov.

Sincerely,



Claire McCaskill
Chairman
Subcommittee on Contracting Oversight

cc: Scott Brown
Ranking Member
Subcommittee on Contracting Oversight

**Responding to Document Requests from
the Subcommittee on Contracting Oversight**

In responding to the document request from the Subcommittee on Contracting Oversight, please apply the instructions and definitions set forth below.

Instructions

1. In complying with the request, you should produce all responsive documents in your possession, custody, or control.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Subcommittee.
3. In the event that any entity, organization, or individual denoted in the request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.
4. Each document produced should be produced in a form that renders the document capable of being copied.
5. When you produce documents, you should identify the paragraph or clause in the Subcommittee's request to which the documents respond.
6. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph or clause of the request to which the documents are responsive, should be provided in an accompanying index.
8. It is not a proper basis to refuse to produce a document that any other person or entity also possesses a non-identical or identical copy of the same document.
9. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer backup tape), you should consult with Subcommittee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above. Documents produced in an electronic format should also be produced in a searchable format.

10. In the event that a responsive document is withheld on any basis, you should provide the following information concerning the document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
11. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
12. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
13. This request is continuing in nature and applies to any newly discovered document. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
14. All documents should be bates-stamped sequentially and produced sequentially.
15. Two sets of documents should be delivered, one set to the majority staff and one set to the minority staff. The majority set should be delivered to the majority staff in Room 613B of the Hart Senate Office Building, and the minority set should be delivered to the minority staff in Room 442 of the Hart Senate Office Building. You should consult with Committee staff regarding the method of delivery prior to sending any materials.
16. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Subcommittee or identified in a privilege log provided to the Subcommittee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto). The term also means any graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “documents in your possession, custody, or control” means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that you have placed in the temporary possession, custody, or control of any third party.
3. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
4. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of the request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms “person” or “persons” means natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.
6. The terms “referring” or “relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

CERTIFICATION

I, (*insert name*), am the (*insert title*) of (*Agency name*) (“the Agency”), and have served in this position for (*number of years*) years. I am authorized by the Agency to provide this certification to the U.S. Senate, Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight regarding the Agency’s production of documents responsive to the Subcommittee’s document request letter of (*insert date*).

I hereby certify that the Agency has conducted a diligent search of all files and places under its custody and control, including computer servers and other electronic storage media, which reasonably could contain documents responsive to one or more of the enumerated requests in the Committee’s document request letter. I certify that as of the date listed below, the Agency has produced to the Subcommittee, in accordance with the instructions and definitions provided by the Subcommittee with the document request letter, all documents located during the search that are responsive to one or more of the enumerated requests.

Under the pains and penalties of perjury, I attest that the foregoing is true and accurate to the best of my knowledge.

Name

Date