

United States Senate

WASHINGTON, DC 20510

February 27, 2018

The Honorable Rick Perry
Secretary
Department of Energy
1000 Independence Ave. SW
Washington, DC 20585

Dear Mr. Secretary:

We are writing to you regarding the reimbursement of legal fees and litigation expenses incurred by Department of Energy (DOE) contractors engaged in whistleblower-related litigation. As you may know, DOE is generally prohibited from reimbursing contractors or subcontractors for legal fees or expenses incurred in whistleblower cases subsequent to an adverse administrative or judicial determination on the merits.¹

We have expressed concern about this issue to DOE numerous times. In 2014, at a subcommittee hearing, Senator McCaskill asked about the criteria used by DOE to determine the allowability of contractor reimbursements for settlement costs.² Those questions were followed up in a subsequent letters.³ Senator Wyden also has raised concerns about legal fee reimbursements and whistleblower retaliation, including at a hearing in 2013.⁴ In 2016, at our request, the Government Accountability Office (GAO) reviewed whistleblower protections at DOE. GAO found numerous issues, including that DOE has “infrequently used its enforcement authority to hold contractors accountable” for whistleblower retaliation.⁵ GAO also noted how the reimbursement of legal costs can be an impediment for whistleblowers who must pay their own legal fees.⁶ In 2016, DOE’s Office of Inspector General (OIG) also identified problems with DOE’s process for determining whether settlement costs and legal fees were appropriately

¹ 42 U.S.C. § 5853.

² Subcommittee on Financial and Contracting Oversight, *Hearing: Whistleblower Retaliation at the Hanford Nuclear Site*, 113th Cong. (Mar. 11, 2014) (S. Hrg. 113-370).

³ Letter from Senator Claire McCaskill to Secretary Ernest Moniz, Department of Energy (June 24, 2014).

⁴ Senate Committee on Energy and Natural Resources, *Hearing: The Nominations of Dr. Steven P. Croley to be General Counsel of the Department of Energy, Mr. Christopher A. Smith to be Assistant Secretary of Energy (Fossil Energy), and Ms. Esther P. Kiaaina to be Assistant Secretary of the Interior for Insular Areas*, 113th Cong. (Nov. 14, 2013) (S. Hrg. 113-141).

⁵ Government Accountability Office, *Department of Energy: Whistleblower Protections Need Strengthening* (GAO-16-618) (July 2016).

⁶ *Id.*

reimbursed in whistleblower complaint cases, finding that DOE was still authorizing settlement payments without performing settlement reviews to determine whether costs were allowable.⁷

We recently received information that appears to show significant reimbursement of legal costs related to whistleblower litigation, particularly by the National Nuclear Security Administration (NNSA).⁸ According to documents provided by NNSA to a whistleblower case litigant, NNSA reimbursed Lawrence Livermore National Security (LLNS) over \$24 million for six cases, with several still ongoing.⁹

In order to better understand how NNSA determined the reasonableness and allowability of costs it reimbursed to LLNS for legal costs associated whistleblower complaints, and what steps DOE is taking to ensure contractors are not improperly reimbursed, please prove a written response to the following questions no later than March 20, 2018:

1. In its 2016 report, the DOE OIG made three recommendations that DOE strengthen management of contractor settlement agreements and to ensure DOE does not reimburse contractors for unallowable legal and settlement costs. In response to Senator McCaskill's inquiry, DOE stated that it anticipated it would implement the recommendations by the end of FY2016.¹⁰ Has DOE implemented all of the 2016 recommendations? Please describe the specific steps taken to incorporate the OIG's recommendations.
2. Please describe in detail the criteria NNSA used to determine the allowability for the reimbursements to LLNS listed in the attached spreadsheet. Did NNSA, or DOE, perform a settlement review before reimbursing LLNS? If so, please describe that process. If not, why not, and will NNSA, or DOE, be performing a post-settlement review to ensure the money reimbursed to LLNS was allowable?
3. Please describe any other steps DOE has taken to ensure it does not reimburse contractors for unallowable legal and settlement costs.

If you have any questions please contact Sarah Garcia with Sen. McCaskill's Committee staff at (202) 224-1448 or David Berick with Sen. Wyden's staff at (202) 224-5244. Please send any official correspondence related to this request to Lucy Balcezak at Lucy_Balcezak@hsgac.senate.gov. Thank you for your prompt attention to this matter.

⁷ U.S. Department of Energy Office of Inspector General Office of Audit Services, *Audit Report: Followup Audit of the Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs* (DOE-OIG-16-06) (Feb. 2016).

⁸ Letter from [REDACTED], National Nuclear Security Administration, to [REDACTED] (Sept. 18, 2017).

⁹ *Id.*

¹⁰ Letter from Eric J. Fygi, Deputy General Counsel, Department of Energy, to Senator Claire McCaskill, (Apr. 22, 2016).

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Sincerely,

A handwritten signature in blue ink that reads "Claire McCaskill". The signature is fluid and cursive, with the first name "Claire" being more prominent.

Claire McCaskill
U.S. Senator

A handwritten signature in blue ink that reads "Ron Wyden". The signature is fluid and cursive, with the first name "Ron" being more prominent.

Ron Wyden
U.S. Senator

Document 1

Case Name	Court	Date Filed	Outside Counsel	Date Retained	Close-out Date(if applicable)	Case Number	Court Award or Settlement	Fees/Litigation Expense Reimbursed by NNSA from Contract Funds
Andrews, et al. v. LLNS, et al. (130 individual plaintiffs)	Alameda Superior	05/21/09	Orrick, Herrington & Sutcliff	4/22/2009	ongoing	RG9453596	EX 6	\$22,735,913.79
			Munger, Tolles & Olson LLP	10/9/2013	ongoing		EX 6	\$985,791.93
Beattie v. LLNS	Alameda Superior	08/09/12	Greenan, Peffer, Sallander & Lally LLP	9/11/2012	4/30/2015	RG12042955	EX 6	\$174,026.24
Nguyen v. LLNS	Alameda Superior	04/18/12	Hanson Bridgett LLP	6/5/2012	5/7/2015	HG12626277	EX 6	
Totaro V. LLNS	Northern District of California	10/31/11	Reed Smith LLP	11/19/2011	5/7/2014	4:11-cv-5446	EX 6	\$381,231.74
Balasubramanian v. LLNS	Alameda Superior	02/03/15	Sedgwick LLP	7/2/2015	9/28/2016	HG15757097	EX 6	\$72,825.78
Fluss v. LLNS	Alameda Superior	06/06/16	Orrick, Herrington & Sutcliff	3/25/2016	ongoing	RG168184623	EX 6	
Rivera v. LLNS, et al.	Northern District of California	01/19/16	Hanson Bridgett LLP	4/6/2016	ongoing	3:16-cv-304	EX 6	\$57,374.87
Atwal v. LLNS, et al.	U.S. District Court / Distict of Columbia	06/30/10	Patton Boggs LLP	9/22/2010	1/31/2012	1:10-cv-01111	EX 6	\$130,126.53
Basso v. LLNS	Alameda Superior	04/18/08	No Outside Counsel Retained			RG08382650	EX 6	0
Total Awards/Settlements Reimbursed from Contract Funds							\$38,230.000	