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United States Senate

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The Honorable Ernest J. Moniz
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585-1000

Dear Secretary Moniz:

I am writing to request information about the Department of Energy's (DOE's) efforts to ensure that public funds are not being used to reimburse contractors for legal fees and settlement costs that are not permissible due to illegal conduct on the part of the contractor or its employees.

The Energy Policy Act of 2005 included provisions that I sponsored to increase the protections afforded to DOE whistleblowers and to limit the circumstances under which DOE contractors could receive federal reimbursement for legal fees they incurred in the defense of whistleblower cases. These provisions were meant to protect individuals like Dee Kotla, who was fired in 1997 from Lawrence Livermore National Laboratory (LLNL) — allegedly for making \$4.30 worth of personal phone calls — after she testified for the plaintiff at a sexual harassment trial involving other LLNL personnel.

The statutory changes I sponsored were also meant to prevent DOE from indiscriminately reimbursing contractors for legal fees resulting from cases in which they were at fault. Despite losing its wrongful termination case against Ms. Kotla, LLNL continued to appeal the case, ultimately costing taxpayers more than \$10 million in legal fees and costs. Indiscriminate reimbursement wastes taxpayer money, endangers public safety, and discourages whistleblowers from coming forward to report security or safety violations or fraudulent activity. That is why I am alarmed to have learned that this wasteful and potentially illegal practice has continued at several DOE facilities.

Specifically, according to a February 5, 2016 Audit Report by DOE's Office of Inspector General (OIG), entitled "Followup Audit of the Department of Energy's Management of Contractor Fines, Penalties, and Legal Costs" (DOE-OIG-16-06), DOE has failed to implement a series of legal decisions and policies holding that it cannot reimburse a contractor for fees or costs associated with complaints of discrimination or whistleblower retaliation unless the contractor establishes during a settlement review that the plaintiff had little chance of success on

the complaint. This failure to implement these policies is also inconsistent with the purpose of the 2005 law.

In conducting its investigation, the OIG found that no settlement review was conducted in 36 of the 46 settlement agreements that it examined, or 78 percent. Seven of these settlements involved allegations of discrimination against the contractor, while three involved complaints of whistleblower retaliation. Most disturbing is that in examining several of these settlement agreements, the OIG discovered evidence of “acknowledged improper conduct on the part of the contractor and/or its employees.” The total cost of these settlement agreements to the taxpayers was \$62 million.

DOE’s failure to consistently conduct settlement reviews where they are required makes it impossible to determine whether public funds are going to contractors that engaged in illegal discrimination or whistleblower retaliation. Furthermore, by neglecting to consistently conduct reviews before providing reimbursements for legal fees and costs, DOE is failing to exercise basic due diligence in avoiding waste, undermining public trust in federal agencies’ consistent application of regulations and policies, and weakening protections against discrimination and whistleblower retaliation.

If contractors do not expect to suffer a financial penalty for misconduct, they have little incentive to strictly police such misconduct, or to implement policies for avoiding it in the first place. And by indiscriminately reimbursing their legal fees, DOE encourages contractors to engage in endless appeals, exhausting the resources of whistleblowers and potentially enabling contractors to win by default despite engaging in illegal conduct. As such, the failure to conduct settlement reviews undermines your September 20, 2013 promise to promote a safety-conscious environment free from fear of reprisal.

Please provide my office with detailed answers to the following questions:

1. In an audit released in September 2009 (“The Department of Energy’s Management of Contractor Fines, Penalties, and Legal Costs,” DOE/IG-0825), the OIG reported that DOE had reimbursed contractors for settlements that had not been reviewed.
 - a. What steps, if any, did DOE take following this audit to ensure that contractors were not being reimbursed for unallowable legal costs and fees?
 - b. Why did these steps not lead to systematic implementation of a policy of reviewing all settlements where discrimination or whistleblower retaliation was alleged?
2. The OIG identified seven settlements involving allegations of discrimination where no documented settlement review was performed. DOE’s reimbursements for costs and legal fees associated with these settlements totaled more than \$1,172,000.
 - a. Why were no settlement reviews performed in these instances, in contravention of DOE policy?
 - b. Had settlement reviews been performed, what proportion of the reimbursements would have been ruled unallowable, and what would have been the savings to the DOE?

- c. Can DOE still conduct post-settlement reviews and withdraw reimbursements if they are found to have been improperly provided? If so, please provide a detailed plan for doing so. If not, please explain the specific legal impediments that prevent you from recovering improperly transferred federal funds.
3. According to the OIG's Audit Report, the U.S. Court of Appeals for the Federal Circuit held in 2009 in *Secretary of the Army v. Tecom, Inc.* (Tecom) that reimbursements for contractors' legal costs and fees related to allegations of illegal discrimination or contract violations were only allowable when the contracting officer determined that the plaintiffs had very little chance of success on the claim. However, it was not until February 2012 that the Department's Office of Legal Counsel stated that Tecom applies to DOE's contractors, and it took almost two more years for DOE to issue Acquisition Letter 2014-3, which specifically addressed the permissibility of reimbursement costs in Tecom-implicated cases.
 - a. Why did it take three years for DOE to determine that the Tecom decision applied to its contractors?
 - b. Why did it take two additional years following that legal statement to issue Acquisition Letter 2014-03?
 - c. What specific steps is DOE taking to ensure compliance with Tecom?
4. According to the OIG, Acquisition Letter 2014-3 "applies only to settlements involving allegations of discrimination by the contractor where the discrimination is prohibited by the terms of the contract." The OIG's investigation found that all of the contracts for each of the contractors examined in the audit report contained such prohibitions.
 - a. Do any of DOE's contracts not prohibit discrimination against the contractor's employees?
 - b. If not, please list the contractors whose contracts with DOE do not contain these provisions. What steps are you taking to ensure that all DOE contracts contain prohibitions against discrimination?
 - c. If yes, why were contractors reimbursed in instances where they acknowledged discrimination in a settlement, as the OIG found in its investigation?
5. The OIG's report states that DOE's policy with regard to reimbursements of legal costs requires contracting officers to determine the allowability of costs after considering, among other things, "the relevant facts and circumstances, including Federal law and policy prohibiting reprisal against whistleblowers." As mentioned earlier, three of the settlements that OIG examined contained allegations of whistleblower retaliation on the part of the contractor, yet there was no evidence that DOE conducted a settlement review before awarding reimbursement.
 - a. Why did DOE fail to conduct settlement reviews in these cases?
 - b. Does DOE's policy require the same level of diligence for settlements pertaining to whistleblower retaliation as it does for settlements pertaining to allegations of discrimination? If not, why not? What, if any, are the differences between the two circumstances?
 - c. When, if ever, is it permissible for DOE to reimburse legal costs and fees for settlements of whistleblower retaliation allegations?

- d. Can DOE still review these settlements and withdraw reimbursements that were improperly provided? If so, please provide a detailed plan for doing so. If not, please explain the specific legal impediments that prevent you from recovering improperly transferred federal funds.
6. According to the OIG's report, in cases involving legal matters other than discrimination or whistleblower retaliation allegations, "the Department had not established a requirement" for settlement reviews. However, such reviews, when used in other cases, frequently "produced substantial savings" for DOE, since they identified costs that were not allowable for a variety of reasons.
 - a. Why does DOE not have requirements for settlement reviews in cases involving legal issues other than discrimination or whistleblower retaliation?
 - b. What efforts is DOE undertaking to ensure that settlements in these cases do not lead to cost reimbursements that are not allowable or appropriate?
 - c. Will DOE develop guidelines for recommending settlement reviews in these cases?
 - d. Please provide a detailed description of the legal and policy basis for developing those guidelines, and a specific schedule according to which you expect them to be developed and implemented.
7. The OIG's report noted that in the 10 instances where settlement reviews were conducted, DOE officers discovered that more than \$1 million in costs were non-allowable, resulting in savings. Of those 10 reviews, 5 were done post-settlement. What procedures is DOE developing for performing post-settlement reviews? Could these procedures be used to receive money back for reimbursements of non-allowable or inappropriate legal fees or settlement costs? Please provide a detailed description of how DOE could go about doing that, and when DOE plans to complete implementation of such efforts. If no such efforts are planned, why not?
8. In previous letters, I have raised concerns about retaliation against several employees of DOE contractors at the Hanford Waste Treatment Plant who acted as whistleblowers. These include Dr. Walt Tamosaitis, who was improperly removed from his managerial position and subsequently laid off after raising grievous safety issues at Hanford. Dr. Tamosaitis subsequently reached a settlement against Hanford contractor URS for \$4.1 million.¹
 - a. What proportion of Dr. Tamosaitis's settlement, as well as any legal fees and costs incurred as a result, has URS requested to be reimbursed by DOE? How much has DOE reimbursed or disallowed, and why?
 - b. How much has URS requested in reimbursement for legal fees and costs incurred as a result of a lawsuit against it by Donna Busche? What proportion has been reimbursed or disallowed, and why?
 - c. How much has Washington River Protection Solutions requested in reimbursement for legal fees and costs incurred as a result of a lawsuit against it

¹ Jack Sheridan, "Whistleblower Dr. Walter Tamosaitis Settles Case Against Hanford Contractor URS For \$4.1 Million," Sheridan Law Firm, August 12, 2015, <http://sheridanlawfirm.com/whistleblower-dr-walter-tamosaitis-settles-case-against-hanford-contractor-urs-for-4-1-million/>

- by Shelly Doss, a former environmental specialist who was dismissed after 23 years of employment at Hanford? What proportion has been reimbursed or disallowed, and why?
- d. How much has Computer Sciences Corp., a DOE contractor at Hanford, requested in reimbursement for legal fees incurred as a result of its termination of Kirt Clem and Matt Spencer, which the Department of Labor's Occupational Safety and Health Administration found to be improper? What proportion has been reimbursed or disallowed, and why?
9. In January 2015, Sandra Black, an employee at DOE's Savannah River Site, was terminated by Savannah River Nuclear Solutions (SRNS) after she spoke with GAO investigators looking into allegations of whistleblower retaliation and harassment. As the manager of the Employee Concerns Program at SRNS, Ms. Black had an exemplary record of investigating the concerns of SRNS whistleblowers. Between 2008 and 2015, however, Ms. Black was subject to repeated harassment and intimidation by her superiors, who obstructed her investigations, pressured her to illegally disclose the identity of whistleblowers, and attempted to remove her from her position when she refused to compromise her integrity.
- a. Has SRNS requested reimbursement for any legal fees it has incurred from litigation resulting from its termination of Ms. Black? If so, how much have they requested? What proportion has been reimbursed or disallowed, and why?
- b. Given the evidence that Ms. Black was terminated after speaking with GAO investigators, will DOE conduct a review of any settlement resulting from her case before reimbursing SRNS for legal fees?
- c. What actions is DOE taking to ensure that contractors can speak freely to investigators from the GAO? What steps are you implementing to penalize contractors that retaliate against employees who cooperate with lawful federal investigations?

Thank you for your consideration of this important issue. Please provide your responses to my office by May 7, 2016. For any questions or concerns, please contact Dr. Michal Freedhoff (Michal_Freedhoff@markey.senate.gov) or Dr. Gene Gerzhoy (Gene_Gerzhoy@markey.senate.gov).

Sincerely,



Edward J. Markey
United States Senator