UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

May 17, 2000

Department of Energy
Board of Contract Appeals
Attn: Betty A. Hudson
HG-50, Building 950
Washington, DC 20585

Re: EBCA Docket Nos. C-98-2282 & C-98-2283

Dear Ms. Hudson:

Enclosed for filing with the Board are the original and two copies of the Respondent's Motion for Request for Ruling on Counter-Claim. I have mailed a copy of the Motion to the Appellant and have enclosed a Certificate of Service.

If you should have any questions, please feel free to contact me at (301) 415-1569.

Respectfully,

Debra S. Engel
Counsel for Respondent
Nuclear Regulatory Commission

Enclosures: As stated

cc: Pal Consultants, Inc.
Attn: Dr. Nick Pal, Ph.D., P.E.
14380 Story Road
San Jose, CA 95127-3818

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DEPARTMENT OF ENERGY
BOARD OF CONTRACT APPEALS

Appeal of Pal Consultants, Inc **Under Nuclear Regulatory Commission** **Contract Nos. NRC-03-89-033 and NRC-04-91-073**	**EBCA Nos. C-98-12282 & C-98-12283**

RESPONDENT'S MOTION FOR REQUEST FOR RULING ON COUNTER-CLAIM

On April 21, 2000, the Energy Board of Contract Appeals ("Board") issued decisions in the above-mentioned appeals. Although the decision issued on C-98-12293 states that "the Contracting Officer issued a letter to Pal stating that there had been an overpayment in the amount of $10,412.39, and demanding payment." This issue was never addressed in the decision rendered in this matter. The Respondent is now requesting the Board to rule on this issue.

The amount mentioned in the decision is incorrect since the Contracting Officer's Decision dated September 25, 1998 on Contract No. NRC-04-91-073 states on page 2 that "The difference between the total allowable contract amount ($164,082) and the total amount paid ($174, 694.39) is $10,612.39 and constitutes an overpayment on the contract." Rule 4 File, Tab A-1. Therefore, the proper amount is $10,612.39. The Respondent once again asserts the position as reflected on page 5 of the Contracting Officer's decision, that "Based on the DCAA audit report as corrected, the NRC considers the allowable costs of the contract to be $153,518 plus a fixed fee of $10,564 for a contract total of $164,082. Since the NRC records show that payments totaling $174,694.39 have been made to your firm [Pal Consultants, Inc.], the NRC reasserts its demand for repayment which we issued in our letter to you of April 30, 1998."

There are numerous references to the demand for payment in the pleadings. The Appellant's complaint dated July 21, 1999 at Paragraph 23 addresses the demand for payment of $10,612. Furthermore, the Respondent's Answer dated August 26, 1999 asserts their demand for payment under Paragraph 23. The Complaint has the figure of $10,412.39 but as noted above, the correct amount is $10,612.39. Moreover, the Respondent's List of Issues dated November 19, 1999 (Paragraphs 10 & 11) raised the issue of whether the Appellant owes the Respondent the amount of $10,612.39 on Contract No. NRC-04-91-073. Finally, the Appellant also addressed this question in his List of Issues dated November 22, 1999 on page 3.

The record reflects Exhibits that clearly demonstrate to the Board the premise for the assertion of the demand for payment. The first Exhibit to do this is Rule 4 file, Exh. B-7 which is a modification issued on September 23, 1998 after the audit was conducted on Contract NRC-04-91-073. Paragraph 3 states "The difference between the total funds obligated on contract ($176,694.39) and the total contract CPFF amount ($164,082) is $10,612.39 and represents an overpayment by NRC to the Contractor." For these amounts reflected in the audit, there was no evidence presented at the hearing that contradicted or disputed the findings of the audit. Consequently, Respondent's position is that since the audit is correct in this respect, the demand for payment must be upheld.

The second exhibit that demonstrates the premise for the assertion of the demand for payment is contained in the Rule 4 file, Exhibit C-27 dated February 20, 1996 and indicates that $176,112.04 inclusive of the retained fee of $1,417.65 has been paid to date. The figures established in Exhibit C-27 are reflected in the first demand letter (Rule 4 file, Exh. C-37) which clearly indicates that due to the audit and our contract payment records, it has been determined that an overpayment of $10,412.39 has been made under this contract. A summary of the audit findings and contract payment is contained in the letter. However, the demand letter incorrectly identified the dollar amount being owed to the Respondent as $10,412.39. This was due to a typographical error in the fixed fee amount. The correct number is $10,612.39 and was indicated as such in the second demand letter that superseded the prior version and was issued on September 25, 1998 (Rule 4 file, Exh. 45).

The appeal before the Board on Contract NRC-04-91-073 was initiated as a result of revisions to the audit by DCAA that was conducted on this contract. The Appellant questioned the revisions to the direct costs and whether the correct FAR provision had been applied in determining the regulatory ceiling on bid and proposal costs. The issue involving the direct costs was dismissed by the Board and the Board's order found that the version of the FAR that was in effect at the time of contract execution is the version to be applied . This was the version that the DCAA had used in their revised rate agreement. Therefore, the revised audit is correct.

The record shows that Respondent clearly indicated that one of the issues to be decided before the Board was the issue of the overpayment of $10,612.39. See Transcript at pg. 20, lines 6-7, pg. 25, lines 14-15, pg. 30, line 1, 20-22 and pg. 338, lines 16-22. Also, Appellant acknowledges that their was a counterclaim on pg. 167, lines 11-17. Moreover, the Appellant admitted that he had been paid more than $164,082 and that the figure that he kept quoting to the Board deducted the approximate $10,000 that was owed to the Respondent. See Transcript at pg. 359, lines 17-23. In addition, the Board questioned the rationale behind the demand letter on pages 362 , 364 and 366 of the Transcript.

Prior to adjourning, Respondent's counsel stated that " We believe -- the only reason we would call Mr. Poole to the stand is to indicate that there was an overpayment of $10,612.39. Those are in demand letters that are in the exhibit file, they've already been discussed previously, during Dr. Pal's testimony. That would be the only reason that we would place him on the stand. If you feel that has already been met, then we will not proceed forward, we will end right now. " See Transcript at pg. 475, lines 13-22. In response, the Board indicated "I don't think there's any dispute about that, is there Dr. Pal?" To which Dr. Pal responds, "No,

Your Honor" and the Board concludes by stating "I see no need for it." See Transcript at pg. 475-476.

The issues presented to the Board by the Appellant questioned the validity of the DCAA audit in two different areas. The first area which involved direct costs was withdrawn by the Appellant at trial. See Transcript, page 401, lines 22-25 & page 402, lines 1-6. The second issue involving which application of the FAR is binding has been decided by the Board in favor of the Respondent. See Board's decision, pages 3 & 4. Therefore, there are no outstanding issues regarding the revised rate agreement issued by the DCAA found in the Rule 4 file at Exh. 36. Moreover, the record is clear that the exhibits presented by the Respondent in the Rule 4 file at B-7, C-27, C-37 and C-45 are in fact correct and there is no dispute that the Appellant owes the Respondent the amount of $10, 612.39. Accordingly, Respondent asks the Board to rule that Appellant owes Respondent $10,612.39.

Respectfully submitted,

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DEPARTMENT OF ENERGY
BOARD OF CONTRACT APPEALS

Appeal of Pal Consultants, Inc. Under Nuclear Regulatory Commission Contract Nos. NRC-03-89-033 & NRC-04-91-073	**EBCA Nos. C-98-12282 & C-12283**

CERTIFICATE OF SERVICE

I hereby certify that a copy of "Respondent's Motion for Request for Ruling on Counter-Claim" was sent via U.S. mail to the following parties this 17th day of May, 2000:

Pal Consultants, Inc.
Attn: Dr. Nick Pal
14380 Story Road
San Jose, CA 95127-3818

Betty A. Hudson
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Board of Contract Appeals
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Washington, D.C. 20585

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