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NUCLEAR REGULATORY COMMISSION ISSUANCES

October 1993



U.S. NUCLEAR REGULATORY COMMISSION

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Vol 38, No. 4
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NUCLEAR REGULATORY COMMISSION ISSUANCES

October 1993

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
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Washington, DC 20555-0001
(301/492-8925)

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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Commission
Issuances

COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

In the Matter of

OI Docket No. 1-93-027R

FIVE STAR PRODUCTS, INC.
and CONSTRUCTION PRODUCTS
RESEARCH, INC.

October 21, 1993

The Commission denies Petitioners' motion to quash or modify a subpoena issued by the NRC Staff in the course of an investigation to determine if Petitioners have violated NRC regulations and to determine if safety-related problems exist at NRC-licensed facilities. The new enforcement date for the subpoena is November 1, 1993.

REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)

Section 50.7 of 10 C.F.R. was adopted both to implement section 211 of the Energy Reorganization Act and to incorporate into NRC regulations the Commission's authority under section 161 of the Atomic Energy Act.

NRC: ENFORCEMENT OF SUBPOENAS

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

The philosophy underlying the adoption of section 211 of the Energy Reorganization Act and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

A defect in materials provided by a "supplier" or "vendor" can prove just as dangerous to public health and safety as a defect in materials provided by a "contractor" that has a more complex or long-term relationship with the NRC licensee.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The risk to public health and safety — and the NRC's responsibility to protect that public health and safety — is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer's contract with the NRC licensee.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The risk to public health and safety, the NRC's responsibility to protect it, and the amount of protection afforded to "whistleblower" employees cannot be measured by the length of the contractual relationship between a licensee and a supplier of goods. This is especially true where the "supplier" offered goods and services that were certified to meet the NRC's requirements for installation in safety-related applications.

NRC LICENSEES: CONTRACTUAL RELATIONSHIPS

Filling a purchase order issued by an NRC licensee by a vendor or "supplier" constitutes a contract between those two parties.

REGULATIONS: INTERPRETATION AND APPLICABILITY

(10 C.F.R. § 50.7)

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION (CONTRACTORS)

The term "contractor" in section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7 of NRC regulations includes — at a minimum — employers such as "vendors" or "suppliers" that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B.

REGULATIONS: SAFETY STANDARDS

Cement and grout sold to NRC licensees under Part 50 Appendix B certification are "basic components" whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2).

REGULATIONS: SAFETY STANDARDS

A vendor or supplier who itself certifies that its products were manufactured and sold in accordance with Part 21 cannot reverse itself and allege that Part 21 does not cover the manufacture of these products.

REGULATIONS: SAFETY STANDARDS

A vendor or supplier who certifies its products were manufactured and sold in accordance with Part 21 is required to "permit duly authorized representatives of the [NRC] to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. § 21.41.

**ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION
(CONTRACTORS)**

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

An entity that maintains an on-going contractual relationship with a manufacturer to test that manufacturer's products, which are then sold to NRC licensees, is a "subcontractor" of the manufacturer within the meaning of section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

"Whistleblowers" are protected under section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7, regardless of the accuracy of their allegations.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

A supplier's subsequent act of ceasing to sell materials certified under 10 C.F.R. Part 50 Appendix B does not remove an employee's protection for engaging in protected activity that occurred prior to that supplier's ceasing to sell such materials.

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

For purposes of 10 C.F.R. § 50.7, the term "contractor" is not limited to those persons who perform work within the protected area.

**REGULATIONS: INTERPRETATION AND APPLICABILITY
(10 C.F.R. § 50.7)**

For purposes of 10 C.F.R. § 50.7, the NRC has jurisdiction over an employer with a long history of providing materials, including safety-related materials, to the nuclear industry and over acts by that employer that are directly related to its transactions with NRC licensees.

NUCLEAR REGULATORY COMMISSION: INVESTIGATIVE AUTHORITY

Congress intended, in passing the Energy Reorganization Act, that the NRC have the ability to conduct its own investigations under the Atomic Energy Act during the pendency of a Department of Labor proceeding.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The remedies provided by an arbitrator in a "whistleblower" case are similar to those provided by the Department of Labor in such a case — they assist the employee as an individual. Those remedies do not assist the NRC in performing the duties assigned it by Congress — protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC.

RULES OF PRACTICE: DISCOVERY RULINGS

The Commission will not rule on claims of privilege in discovery disputes in the abstract.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion by both Five Star Products ("Five Star") and Construction Products Research ("CPR") (collectively "Petitioners") to quash or modify a subpoena issued by the NRC Staff. The NRC Staff has responded in opposition to the Motion to Quash and Petitioners have submitted a motion for leave to file a reply with a tendered reply. We have also considered a letter from Petitioners dated September 28, 1993. After due consideration, we grant the motion for leave to file the reply, but deny the motion to quash and/or modify. We enforce the subpoena as issued. Because we held the subpoena in abeyance pending our resolution of this question, *see* Order in this Docket, August 27, 1993, we hereby establish a new response date for the subpoena of Monday, November 1, 1993, at the time and place stated in the original subpoena.

I. FACTUAL BACKGROUND

A. Petitioners' Industry-Related Activities

Five Star Products and CPR are closely related companies; they are both owned by Babcock & King, Inc., they share the same premises in Fairfield, Connecticut, and they share common officers. For example, Mr. William Babcock is the president of Babcock & King, Inc., the president of Five Star, and the vice-president of CPR. His father, Mr. H. Nash Babcock, is the president of CPR and vice-president of Five Star.

Five Star manufactures and sells grout and concrete products to the nuclear industry and has done so for about 20 years. Prior to the events that precipitated this incident, Five Star submitted these materials to CPR for testing. Following those tests, CPR issued Certificates of Conformance, certifying that the materials manufactured by Five Star meet the requirements of 10 C.F.R. Part 50, Appendix B. Under federal statute, section 206 of the Energy Reorganization Act, 42 U.S.C. § 5846, and implementing NRC regulations, 10 C.F.R. Part 21, this certification signified to nuclear power plant licensees that Five Star manufactured these materials subject to special quality requirements tailored to nuclear power plant safety applications, and subjected Five Star and CPR to safety reporting obligations to the NRC so that safety problems would be discovered and evaluated. Certified materials can be installed in "safety-related" systems without further testing by the NRC licensee that purchases them.

Based upon these certifications, several NRC licensees have purchased and installed Five Star's products in safety-related applications at various nuclear power plants in the United States over a period of years. *See* NRC Staff Response at 3 n.4. The Staff has also submitted an exhibit documenting the purchase by an NRC licensee of material manufactured by Five Star and certified by CPR as meeting the requirements of 10 C.F.R. Part 50, Appendix B, i.e., as safety-grade material. *See* NRC Staff Response at 13 n.19 and Exhibit 5.

B. The August 1992 Safety Inspection

On August 19, 1992, an NRC Staff inspection team began an unannounced inspection of Five Star. The inspection team viewed certificates of compliance signed by Five Star officials certifying that certain orders from NRC licensees for concrete and grout were filled in compliance with 10 C.F.R. Part 50, Appendix B, and subject to 10 C.F.R. Part 21. However, the inspection team also uncovered audits of Five Star's quality assurance ("QA") program performed by nuclear power plant licensees who were customers of Five Star's products. While some of the audits approved Five Star's QA program, other audits stated that the program was not qualified under NRC regulations because Five Star would

not allow the licensees access to the testing laboratory and, therefore, the qualifications of the QA program could not be verified.

The NRC inspection team requested access to the Five Star/CPR laboratory; however, access was denied on August 18th by CPR president H. Nash Babcock. Subsequently, Mr. Babcock again denied the NRC inspectors access to the laboratory on August 19th, and refused the inspectors' request for access to the laboratory technicians' notebooks. In addition, Mr. Babcock refused to allow the NRC inspectors to copy any of the records they had reviewed in the course of their inspection with the exception of the current QA manual. Finally, Mr. Babcock asked the inspectors to leave the Five Star/CPR premises before they had the opportunity to review all the documents that had originally been made available to them.

Subsequently, on August 25, 1992, Five Star informed its current customers that it was suspending its QA program immediately and that in the future it would only supply commercial-grade products, i.e., products that were not certified for safety-related uses. In response, the NRC Staff issued an Information Notice ("IN") that informed all NRC Part 50 licensees that (1) the NRC Staff had been denied access to Five Star's test laboratory and test data, and, (2) accordingly, the NRC had been unable to verify the quality of certain Five Star products used in safety-related applications. See IN-92-66 (Sept. 1, 1992).¹

C. The Holub Investigation

On January 22, 1993, CPR terminated the employment of Mr. Edward P. Holub, CPR's Director of Research. The NRC Staff has now confirmed that Mr. Holub did indeed bring safety concerns to the NRC Staff. These concerns related to the quality of the cement and grout that was (1) ordered pursuant to 10 C.F.R. Part 50, Appendix B, criteria by nuclear facilities licensed pursuant to 10 C.F.R. Part 50, and (2) tested by CPR and certified by CPR and Five Star to satisfy the requirements of 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. See generally NRC Staff Response at 6 n.11, and 7.

On January 28, 1993, Mr. Holub filed a complaint with the Wage and Hour Division, U.S. Department of Labor ("DOL"), alleging that CPR had terminated his employment in retaliation for his providing safety concerns to the NRC on or about June 22, 1992. On April 1, 1993, the DOL Wage and Hour Division, New Haven, Connecticut, issued an Area Director's Finding, signed by the Assistant

¹ On September 1, 1992, the NRC Staff, with the assistance of the United States Marshals, seized documents relating to Five Star's and CPR's activities under the authority of a criminal search warrant issued by the United States District Court, District of Connecticut. The NRC Staff has since returned copies and/or originals of those documents to Five Star and/or CPR as appropriate.

Area Director, which found that (1) Mr. Holub was engaged in protected activity within the scope and meaning of section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851; and that (2) discrimination as defined and prohibited by that statute was a factor in the actions that comprised his complaint. Five Star and CPR have appealed that decision and have requested a hearing before a DOL Administrative Law Judge.

As a result of the DOL Area Director's Finding, the NRC Staff, in accordance with normal procedure, issued a "chilling effect" letter to CPR on April 30, 1993. The NRC Staff requested CPR (1) to provide the reasons for Mr. Holub's termination, including any supporting documentation, and (2) to describe the actions, if any, taken or planned, to ensure that Mr. Holub's termination would not have a "chilling effect" in discouraging other employees from raising perceived safety concerns regarding Five Star products sold as meeting the requirements of 10 C.F.R. Part 50, Appendix B.

On May 6, 1993, CPR replied to the NRC Staff's letter. In its response, CPR refused to provide either the basis for Mr. Holub's termination or a description of any activities taken to prevent a "chilling effect" on its other employees. CPR based its refusal to provide the requested information on its assertion that the NRC lacked jurisdiction over CPR. On June 6, 1993, the NRC issued another "chilling effect" letter to CPR and on August 5, 1993, CPR responded, again refusing to provide the information requested by the NRC, based upon an assertion that the NRC lacked jurisdiction over CPR.

On June 21, 1993, the NRC's Office of Investigations ("OI") initiated investigation No. 1-93-027R into the circumstances of Mr. Holub's termination. On August 17, 1993, the Director of OI issued a subpoena to William N. Babcock, or the Custodian of Records for Five Star and CPR, seeking production of any documents "relating . . . to the termination of employment" of Mr. Holub "and the deliberations, discussions and communications that resulted in the decision to terminate Mr. Holub." The subpoena defined "document" to include

any handwritten, typed, recorded, reproduced communication, memoranda (whether issued or not), draft memoranda, notes, records, letters, messages, bulletin board postings, working papers, reports, summaries, opinions of consultants, notices, instructions, minutes of meetings, and inter & intra office communications."

Subpoena at 1. Furthermore, the subpoena sought "any and all company policies, procedures, or requirements regarding involuntary terminations" in addition to the position descriptions of three other named employees. *Id.* Finally, the subpoena sought Mr. Holub's official personnel file, "including any disciplinary warnings or actions; as well as attendance records and compensation, salary, bonus and/or payroll records . . ." *Id.*

On August 26, 1993, Petitioners filed their motion to quash or modify the subpoena. Petitioners argued that (1) the NRC Staff lacked jurisdiction over them and, alternatively, (2) that the subpoena sought privileged material. On August 27, 1993, we issued an order directing the NRC Staff to respond to the Motion to Quash by September 9, 1993. The NRC Staff has now responded and the matter is before us for resolution.

III. ANALYSIS

A. Applicable Statutes and Regulations

In section 161c of the Atomic Energy Act ("AEA") of 1954, as amended, Congress explicitly provided that the NRC

is authorized . . . to make such studies and investigations, obtain such information . . . as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes, the Commission is authorized . . . by subpoena to require any person to appear and testify or appear and produce documents, or both at any designated place.

42 U.S.C. § 2201(c) (emphasis added). Section 11s of the AEA, in turn, defines "person" as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, . . . and (2) any legal successor, representative, agent or agency of the foregoing." 42 U.S.C. § 2014(s).

In section 211 of the Energy Reorganization Act ("ERA"), as amended, Congress has provided that

[n]o employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . (A) commenced, caused to be commenced, or is about to commence or cause to be commenced . . . a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended; . . . or (F) assisted or participated . . . in any manner in such a proceeding . . . or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a)(1). An "employer," under the ERA, includes "a contractor or subcontractor of a licensee . . ." 42 U.S.C. § 5851(a)(2)(C).

The Commission has adopted regulations implementing section 161 of the AEA and section 211 of the ERA for each area of licensing activities.² The regu-

² Section 50.7 was adopted not only "to implement section [211], 'Employee Protection' of the [ERA]," but also "to incorporate into the regulations the Commission's authority under section 161 of the [AEA] to investigate an alleged unlawful discrimination against an employee and to take appropriate action . . ." 47 Fed. Reg. 30,452

(Continued)

lation implementing employee protection for activities under Part 50 is found at 10 C.F.R. § 50.7, which prohibits "[d]iscrimination by a Commission licensee, . . . or a contractor or subcontractor of a Commission licensee . . ." 10 C.F.R. § 50.7(a). "[P]rotected activities include but are not limited to: (i) [p]roviding the Commission information about possible violations of requirements imposed under either [the Atomic Energy Act or Energy Reorganization Act]." 10 C.F.R. § 50.7(a)(1).

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989).

B. Application

1. *Petitioners Are a "Contractor" and a "Subcontractor" Within the Meaning of the Statute and the Regulation*

Petitioners are subject to the Commission's jurisdiction under section 161 of the AEA and section 211 of the ERA.³ Stripped of its rhetoric, Petitioners' argument that they are not subject to the NRC's jurisdiction under section 211 boils down to a simple assertion that each of the two entities, Five Star and CPR, is not a "contractor" or "subcontractor" within the meaning of section 211 of the ERA and 10 C.F.R. § 50.7(a). Instead, Petitioners argue that they are "suppliers" of goods and services, not "contractors."

We infer that Petitioners' argument is that the term "contractor" requires an extended relationship between the NRC licensee and the contracting party, not the individual contract that results from the filling of a purchase order. However, Petitioners cite no law whatsoever for that proposition or the proposition that a "supplier" of materials has no contract with the purchaser. Furthermore, Petitioners cite no definition of the term "contractor" in either section 211 and its legislative history or in 10 C.F.R. § 50.7 and its statement of considerations for their position. Instead, Petitioners' only citation to *any* authority in support of their argument is to the definition of a contractor for purposes of the NRC's Fitness for Duty requirements in 10 C.F.R. Part 26.

The NRC Staff argues that because Five Star entered into "contracts" with NRC licensees to provide concrete and grout that was certified to meet NRC

² July 14, 1982). Thus, this section of our regulations is adopted under *both* section 211 of the ERA and section 161 of the AEA.

³ Clearly, Petitioners are "persons" as defined in section 111 of the AEA and we do not read their pleadings to argue to the contrary.

requirements for installation in safety-related applications, Five Star is a "contractor" within the meaning of section 211 and 10 C.F.R. § 50.7. Furthermore, the Staff argues that because CPR "contracted" its services to Five Star for the purpose of enhancing Five Star's contracts with NRC licensees, CPR is a "subcontractor" within the meaning of section 211 and 10 C.F.R. § 50.7.

Neither the legislative history of section 211 (then section 210) of the ERA nor the Statement of Considerations of 10 C.F.R. § 50.7 provide any discussion or the definition of the term "contractor." Congress added section 211 to the ERA as part of the NRC's Authorization for Fiscal Year 1979, Pub. L. No. 95-601. This provision originated in the United States Senate as section 7 of S.2584, the Senate version of the NRC's authorization legislation. The Senate Committee Report only briefly discusses the provision without discussing the term "contractor." See S. Rep. No. 95-848 (May 15, 1978) at 29-30. Because the House version of the authorization legislation did not contain a similar provision, the Senate version was adopted as section 10 of the final legislation. See H.R. Conf. Rep. No. 95-1796 (Oct. 14, 1978) at 16-17. Likewise, the Statement of Considerations accompanying the adoption of 10 C.F.R. § 50.7 contains no discussion of the term "contractor." See 47 Fed. Reg. 30,452.

After considering this matter, we do not think that Congress could have intended to exclude employees at entities such as Five Star and CPR from the protection of section 211. The philosophy underlying the adoption of section 211 and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information. Any attempt to "chill" this access to the NRC by harassing, intimidating, or firing employees who report conditions that could adversely affect the public health and safety violates section 211.

Quite simply, a defect in materials provided by a "supplier" or "vendor" can prove just as dangerous to public health and safety as a defect in materials provided by a "contractor" that has a more complex or long-term relationship with the NRC licensee. The risk to public health and safety — and the NRC's responsibility to protect that public health and safety — is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue. Likewise, the protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer's contract with the NRC licensee.

We believe that this is especially true where — as here — the "supplier" offered goods and services that were certified to meet the NRC's requirements for installation in safety-related applications. Five Star offered a product for a price; and part of the product offered for purchase was the value of the certificate

under Part 50, Appendix B, allowing installation in safety-related applications. Because the cement and grout purchased from Five Star carried this certificate, NRC licensees were likely to use such materials in safety-related applications without further testing or investigation.

If an employee of a firm that manufactures such material has information regarding a defect in the material or in the method of testing that material, we believe that Congress clearly intended that such an employee be protected if he or she provides that information to the NRC. Any other interpretation would be contrary to the spirit of section 211 and would create a serious gap in the protection that Congress clearly intended to create for employees in the nuclear industry and related occupations.

Moreover, we cannot accept Petitioners' distinction between a "contractor" and a "vendor" — or "supplier," to use Petitioners' words. As the Staff notes, Five Star provided materials to NRC licensees by means of a contract. True, these contracts did not require an extended relationship between Five Star and the licensee and were not performed at the location of the NRC licensee's facility. But they were still contracts in every legal sense of the word; accordingly, Five Star was a "contractor" in every legal sense of the word.⁴

Accordingly, we construe the term "contractor" in section 211 of the ERA and 10 C.F.R. § 50.7 of our regulations to include — at a minimum — employers such as "vendors" or "suppliers" that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B. Five Star is such an employer and therefore, is a "contractor" for purposes of 10 C.F.R. § 50.7 and section 211

⁴ In a letter to the NRC Staff, dated July 23, 1993, containing an affidavit by William N. Babcock, Petitioners asserted that the filing of a purchase order did not constitute the establishment of a contractual relationship between Five Star and the NRC licensee that purchased the materials. See Motion to Quash at Exhibit E, Affidavit at 3. However, it is a well-settled point of contract law that in certain situations, performance by an offeree in compliance with an offer constitutes an acceptance of that offer and creates a contract. See, e.g., Calamari and Perillo, *Contracts* § 31 (1970); Farnsworth, *Contracts* §§ 3.14, 3.24 (1982); Restatement (Second) of the Law of Contracts § 50 (1979). See also *Hinjar v. United States*, 174 Cl. Cl. 209, 355 F.2d 606 (1966); *Radium Mines, Inc. v. United States*, 139 Cl. Cl. 144, 153 F. Supp. 403 (1957). This concept has been adopted by article 2 of the Uniform Commercial Code. See U.C.C. § 2-206(1)(b). As one court has recently noted, a purchase order is generally presumed to be an offer inviting acceptance by the seller. *Harper Trucks, Inc. v. Allied Welding Supply*, 2 U.C.C. 835 (D. Kan. 1986).

In his Affidavit, Mr. Babcock admits that Five Star has supplied materials to NRC licensees in response to "blanket purchase orders for products." See Motion to Quash at Exhibit E, Affidavit at 3. The purchase orders described by Mr. Babcock constituted "offers" to buy conforming materials. Five Star apparently replied by supplying the conforming materials, see, e.g., NRC Staff Response at Exhibit 5E, which constituted an "acceptance" of the offer by performance, creating a unilateral contract. Of course, if the licensee exchanged additional correspondence with Five Star, a more traditional bilateral contract may have been established. Thus, we find that Five Star entered into contractual relationships with NRC licensees when it consummated transactions in which it supplied materials to fill purchase orders issued by those NRC licensees.

The final step in the process would be for the NRC licensee to send Five Star the payment for the materials, the "consideration" for the performance of the contract. We have no doubt that if Five Star had supplied the conforming materials to the NRC licensee but the licensee refused to pay the price quoted in the purchase order, Five Star would have sued the licensee for breach of contract under the theory described above.

of the ERA. Therefore, the Staff has authority to investigate the circumstances of Mr. Holub's termination under section 211 of the ERA, section 161 of the AEA, and 10 C.F.R. § 50.7.⁵

Having determined that Five Star is a "contractor" within the meaning of section 211 and 10 C.F.R. § 50.7, we can easily find that CPR is a "subcontractor" — even by Petitioners' own definition. Clearly, CPR maintained an ongoing contractual relationship with Five Star to provide testing services regarding the cement and grout sold to the NRC licensees. Based upon those tests, Five Star certified that the materials meet the NRC's requirements found in 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. Absent CPR's testing services, Five Star could not have issued the certificates that were an integral part of the sale of its materials to NRC licensees. Therefore, CPR is a "subcontractor" to Five Star within the meaning of section 211 of the ERA and 10 C.F.R. § 50.7 adopted under both section 211 and section 161 of the AEA.

Petitioners raise three additional arguments that they are not subject to the NRC's jurisdiction. All are easily rejected. First, Petitioners argue that they are not subject to our jurisdiction because they now sell only "commercial-grade" grout and cement to the nuclear industry. Motion to Quash at 7. However, Mr. Holub alleges — and Petitioners do not deny — that at the time he provided information to the NRC, Five Star was selling materials to NRC licensees with CPR's certificates that the materials complied with the requirements of 10 C.F.R. Part 50, Appendix B.⁶ In other words, at the time in question, Five Star was selling "safety-grade" materials, not "commercial-grade" materials.

We cannot and will not allow Five Star's subsequent act of ceasing to sell safety-grade materials to remove Mr. Holub's protection for engaging in protected activity. Otherwise, a contractor could protect itself from a charge of discrimination simply by terminating the contract when it was caught in the act

⁵In their letter of September 28, 1993, Petitioners allege that the Staff did not have jurisdiction to conduct its August 1992 inspection. However, the NRC Staff clearly had jurisdiction to inspect Five Star's operations under 10 C.F.R. Part 21, which implements sections 161 and 234 of the AEA and section 206 of the ERA. Briefly, Part 21 requires that any firm that manufactures a "basic component" of a facility or activity licensed by the NRC, must report any known defects or noncompliances in that component that could create a substantial safety hazard, to the NRC as soon as those are discovered. Contrary to Petitioners' allegation, see Motion to Quash at Exhibit E, at 2, the cement and grout manufactured by Five Star and sold to NRC licensees under Part 50 Appendix B certification, are "basic components" whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2). Moreover, Five Star itself certified that its products were manufactured and sold in accordance with Part 21. Therefore, Five Star cannot now reverse itself and allege that Part 21 does not cover the manufacture of these products. Accordingly, Five Star was required to "permit duly authorized representatives of the [NRC], to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. § 21.41.

⁶Mr. Holub alleges that he provided information to the NRC Staff on or about June 22, 1992, before Five Star abandoned its QA program. NRC Staff Response at 7. Petitioners do not argue to the contrary.

We note that Petitioners have characterized Mr. Holub's allegation as "baseless." Motion to Quash at 2. However, Mr. Holub is protected under section 211 and 10 C.F.R. § 50.7 regardless of the accuracy of his allegation.

of discrimination. Again, we cannot find that Congress intended such a result in enacting section 211.

Second, Petitioners argue that they are not "contractors" because they did not perform work "inside the protected area boundary. . . ." Motion to Quash at 7, *citing* 10 C.F.R. Part 26. However, that argument is clearly specious. Section 26.3 defines a class of persons who are subject to random drug testing by urinalysis, not the class of persons who are subject to the employee-protection provisions. We defined "contractor" narrowly in Part 26 for the specific purpose of limiting the intrusive testing for illegal drugs and only for that purpose.

More importantly, we believe that Congress could not have intended to limit the NRC's ability to protect employees from discrimination to those employees who performed jobs in the protected area, and, as before, we read no such limitation in either the ERA or its legislative history. For example, such an interpretation would mean that the NRC could not protect workers who prefabricated portions of the reactor outside a protected area. Therefore, we conclude that the fact that the Petitioners did not actually install the materials in the licensees' plants does not remove them from the coverage of either the ERA or the Commission's regulations.

Third, Petitioners rely upon *Adams v. Dole*, 927 F.2d 771 (4th Cir. 1991) *cert. denied*, 112 S. Ct. 122 (1991), for the proposition that their employees are not protected under section 211. Petitioners argue that the NRC can assert jurisdiction over them only if the NRC has jurisdiction over "any" employer and that the Fourth Circuit rejected that approach in *Adams v. Dole*. Motion to Quash at 6. We have reviewed that case and we believe that Petitioners have misread it.

In *Adams v. Dole*, the Fourth Circuit held that an employee of a DOE contractor was not protected under section 211 — a decision that Congress legislatively reversed in enacting the 1992 amendments to section 211. In reaching its decision, the Fourth Circuit concluded that only employees of NRC licensees and their contractors and subcontractors were protected — not employees of DOE licensees and their contractors and subcontractors. 927 F.2d at 777. In the process, the Fourth Circuit rejected an argument raised by the Petitioners that the DOL had jurisdiction over "any" employer, regardless of the employer's relationship to an NRC licensee.⁷

In this case, we do not assert jurisdiction over just "any" employer. Instead, we are today asserting jurisdiction over an employer with a long history of providing materials — including safety-related materials — to the nuclear industry and, more specifically, over acts by that employer that are directly

⁷ At no point during its decision did the Fourth Circuit discuss the type of relationship that constituted a "contractor" for purposes of section 211.

related to its transactions with NRC licensees. Thus, we find Petitioners' citation to *Adams v. Dole* to be inapposite.

Finally, Petitioners characterize this dispute as simply "an employment matter." Motion to Quash at 9 (emphasis deleted). However, this dispute presents more than just a concern over the circumstances of Mr. Holub's termination. For approximately 20 years, Petitioners have sold products to various NRC licensees and those licensees have, in turn, presumably installed in safety-related systems, based upon certifications from Petitioners that these products met the requirements of 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. The NRC Staff is naturally concerned that Petitioners may have discharged Mr. Holub in violation of his rights under the ERA and the Commission's regulations because he provided safety concerns to the NRC, and, as we noted above, the staff has jurisdiction to investigate that issue.

However, another fundamental question exists: if Petitioners discriminated against Mr. Holub for reporting safety concerns, did they discriminate against others for the same actions over the past 20 years and did such discrimination create an atmosphere in which unsafe products were sold to NRC licensees for installation in safety-related areas of nuclear power plants? In order to determine whether an investigation is needed into *that* question, the NRC Staff must first make a threshold determination of whether Petitioners discriminated against Mr. Holub.

In a case almost directly on point, the Appeal Board found that the NRC Staff needed similar information related to the termination of a contractor's employee in order to determine whether to order an augmented inspection at the employer's office. See *Union Electric Co. (Callaway Plant, Units 1 and 2)*, ALAB-527, 9 NRC 126 (1979) ("*Callaway*").

We find the *Callaway* Board's reasoning persuasive. The Staff's purpose in instituting this investigation is not to provide Mr. Holub with a remedy for the loss of his employment. Instead, the NRC Staff must determine whether to initiate an investigation into (1) whether Petitioners have taken similar actions against other workers or whether Mr. Holub's termination may have had a "chilling effect" on his co-workers and (2) in either case, are there any safety implications resulting from the employer's actions.

As the Staff points out, Petitioners' products have been

used as support for safety-related dynamic machinery installed in safety-related systems. Grout and structural concrete are also used as support for the nuclear reactor vessel, which is part of the reactor coolant pressure boundary, and structural concrete is also used in nuclear vessel containment walls, shielding, and in the walls and floor of diesel generator rooms."

Staff Response at 3 n.3.⁸ Clearly, a failure by Petitioners' products in one of these safety-related systems could create a threat to the public health and safety. Such a failure could occur if Petitioners' employment practices have created a situation in which substandard material has been sold as safety-grade material. Investigating this type of potential threat to public health and safety is a purpose clearly authorized by Congress in section 161 of the AEA, independent of any authorization provided for this investigation by section 211.⁹

2. *The Pendency of a DOL Proceeding Does Not Prevent the NRC from Acting to Protect Public Health and Safety*

Petitioners argue that because Mr. Holub has initiated a proceeding before the DOL, the NRC should not pursue its own investigation into this matter as a matter of "discretion." Motion to Quash at 8-10. Specifically, Petitioners argue that Mr. Holub's sole remedy under both the ERA and NRC regulations is provided by the DOL and that the NRC's investigation would be "improvident." Motion to Quash at 9. However, this argument is clearly rebutted by both the legislative history of the ERA and our prior case law.

First, it is clear that Congress intended that the NRC have the ability to conduct its own investigations during the pendency of a DOL proceeding. As the Senate floor manager of the ERA noted, "the pendency of a proceeding before the [DOL] need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954." 124 Cong. Rec. 29,771 (1978) (remarks of Senator Hart). Reflecting this view, the Memorandum of Understanding ("MOU") between the NRC and the DOL clearly provides that the NRC can take action independent of the status of the DOL's proceedings. See Memorandum of Understanding Between the NRC and the Department of Labor, 47 Fed. Reg. 54,585 (Dec. 3, 1982).

As we noted above, NRC licensees have purchased cement and grout from Petitioners for approximately 20 years. These licensees have installed these

⁸ For example, Five Star's promotional literature states that its grout is intended for use under applied loads to support a component, structure, or piece of equipment or machinery. The grout provides the necessary structural support between the bottom of the supporting device and the top surface of its foundation, and transfers the applied support or equipment loadings (static and/or dynamic) uniformly to the foundation for which stress levels have been analyzed. Thus, shrinkage or expansion from the material's specification can cause unanalyzed stress distributions that may impact equipment operability. In addition, Five Star states that applications for its Special Grout 160 include radiation shielding, penetration closures, and nuclear reactor foundations. Finally, Five Star states that its Structural Concrete is used primarily in the repair of structural concrete. Applications include the repair of concrete columns, floors, walls, foundations, and setting of structural anchors. These products can also be used in other safety-related applications as determined by the licensee.

⁹ While the NRC Staff has informed us that it has "determined that Five Star's products d[o] not constitute a safety concern[.]" NRC Staff Response at 6, we read that statement to indicate that the Staff has no safety concerns arising out of Mr. Holub's particular allegation. We do not read that response as meaning that the Staff has reviewed and validated *all* sales by Five Star to the nuclear industry over its 20-year history.

materials in safety-related systems, relying on the certification that the purchased materials met the NRC's requirements for safety-grade materials. The Staff has a legitimate concern that Petitioners' employment practices may have allowed substandard materials to have been sold as safety-grade materials. It is clear that Congress did not intend that the agency await the conclusion of a lengthy DOL hearing process before investigating such a safety-related issue.

Second, the *Callaway* decision speaks directly to this issue. In that case the Appeal Board held that the Staff had jurisdiction to investigate and take action against contractors who retaliate against their employees who bring safety concerns to the NRC, even if that employee has either contractual or statutory remedies for his discharge. *See generally Callaway*, 9 NRC at 132-39. As the *Callaway* Board pointed out, the remedies provided by the arbitrator in that case — like the DOL in this case — will only assist the employee as an individual. Those remedies will not assist the NRC in performing the duties assigned it by Congress; protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC. *E.g., Callaway*, 9 NRC at 138-39. Accordingly, the NRC Staff need not await the conclusion of Mr. Holub's DOL proceedings before conducting its investigation.¹⁰

3. Petitioners Have Failed to Demonstrate That the Subpoena Should Be Modified

In their Motion to Quash, Petitioners urge that if we find that we have jurisdiction over them in this matter, that we should in any event modify the subpoena. Motion to Quash at 11. First, Petitioners ask that the Staff be directed to tell them what documents it already has so they can identify the documents they need to produce. The Staff has now done exactly as requested by Petitioners: it has informed the Petitioners that it (the Staff) has no documents that are requested in the subpoena. *See* NRC Staff Response at 18.

Second, Petitioners ask that the Commission modify the subpoena to eliminate the requirement to produce any documents covered by the attorney-client privilege or the work-product privilege. Motion to Quash at 11-12. We will not take that step at this time. The normal practice in discovery is for the party opposing discovery to identify the documents for which a privilege is claimed (as the Staff notes, Response at 18-19, by date, author, addressee, and reason for claiming the privilege) and submit that list to the Court — or in this case, to the Commission — for an adjudication of those claims if the parties cannot

¹⁰ Petitioners argue that the NRC recently opposed efforts to require simultaneous investigations by both the DOL and the NRC. That statement is true, the Commission opposes any effort to *require* simultaneous investigations. However, the Commission has always maintained that it has the *discretion* to conduct a simultaneous investigation in an "appropriate" case. The NRC Staff has determined that this case is an "appropriate" case.

reach an agreement among themselves. We will not rule on such claims in the abstract.¹¹

4. *The Involvement of the United States Attorney*

Finally, Petitioners claim that the United States Attorney for the District of Connecticut appears to be involved in this case on behalf of the NRC in some manner and imply that such involvement should be grounds to quash the subpoena. We disagree. The Staff has not referred this case to the U.S. Attorney and says that it knows of no such involvement. NRC Staff Response at 20. If the Petitioners wish to understand the involvement — if any — of the Office of the U.S. Attorney for the District of Connecticut, they may communicate directly with that Office. This allegation is not grounds to quash the subpoena.

IV. SUMMARY

As we have shown above, the subpoena before us has been issued in the course of an investigation to determine if Petitioners have violated the Commission's regulations issued pursuant to section 161 of the AEA and section 211 of the ERA and to determine if any possible safety-related problems exist at NRC licensed facilities. The information sought is clearly relevant to that investigation, clearly described, and Petitioners have not alleged any failure to follow statutory procedures in issuing the subpoena. Thus, we find no reason to quash the subpoena. *United States v. Powell, supra; United States v. Comley, supra*. Accordingly, we deny the motion to quash or modify the subpoena and establish a new enforcement date for the subpoena of November 1, 1993.

It is so ORDERED.¹²

For the Commission¹²

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this day of 21st October 1993.

¹¹ In their tendered reply, Petitioners appear to have abandoned this argument. Reply at 4 n.4.

¹² Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.