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Those Listed Below: 703358 Boskey/lsa

Bennett Boskey, Acting General Counsel

LITIGATION PROCEDURE

Attached is a draft of a litigation procedure guide which we have sent to our field legal staffs for their comments. We should appreciate receiving any comments you may have by January 20th.

Attachment:
Draft litigation procedure guide

Distributed to:
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December 21, 1949

LITIGATION PROCEDURES GUIDE

I. Actions Against the Atomic Energy Commission

A. Whenever an action is brought against the Atomic Energy Commission as a named party defendant or against any one or more of the Commissioners for acts done as a Commissioner, as soon as the summons and complaint have been served, three copies of the summons and complaint will be immediately sent to the Office of the General Counsel in Washington, D. C.

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B. As soon as is practicable an investigation will be conducted by the Field Office having knowledge of the facts to ascertain the operative facts that have given rise to the cause of action. It shall be the responsibility of the Office of the Assistant General Counsel (or Counsel) to see that a thorough and expeditious investigation is made and a report of such investigation in triplicate is forwarded to the Office of the General Counsel, Washington, D. C. This investigation should be conducted in such fashion as to reveal all pertinent data necessary to enable the Department of Justice to prepare a defense to the action if there be one. This report of investigation should include the following information:

1. Copies of all papers served.
2. The date of service of process, the name and position of the person served.
3. The name of the Court, where located, and the time allowed for appearance or answer.
4. The name of the plaintiff, where he resides, who he is (whether present or former employee, employee of another contractor, third party, etc.).

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5. Basis for the action (negligence, assault, contract trespass, etc.).

6. Amount claimed as damages.

7. Relief prayed for if an equitable action.

8. Nature of the principal defense or any known irregularities that may be urged in abatement.

9. Whether any Federal statute is involved.

10. Existence of any applicable insurance, and if so, whether the claim is fully covered or partially covered (amount of insurance coverage in dollars and cents).

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11. Whether or not security considerations or restricted data is involved in the case.

12. The names and present addresses of all witnesses known to be involved.

13. Statement of the substance of all pertinent documents (better to have copies of all documents, if possible).

14. Any other information that would be of assistance in preparing the case for trial.

15. Any opinion of the Assistant General Counsel as to the proper disposition of the case.

C. Examples of such actions that may be brought against the Commission as determined by past experience are actions under the Federal Torts Claims Act, for injunctive relief such as the UE case, and actions under the Tucker Act.

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II. Actions Against Cost Type Contractors of the Atomic Energy Commission.

A. In cases where the Atomic Energy Commission has a financial interest in the outcome of any action brought against any of its contractors or subcontractors, it is necessary to take such steps as are necessary to protect the interest of the government. Whether or not the Atomic Energy Commission has an interest in the outcome of the action may be dependent upon a number of factors. First of all, if the contractual relationship is a cost type and the judgment would be a reimbursable item under the contract, the Atomic Energy Commission would obviously be financially interested in a judgment obtained against such contractor. Secondly, if the contract provides for payment for services at a specified rate per hour for various classes of employees and the judgment would be a reimbursable item under the terms of the contract, the Atomic Energy Commission would be financially interested in the outcome of the action. Finally, regardless of the nature of the contractual relationship if the judgment would constitute a reimbursable item under the contract, the Atomic Energy Commission is financially interested in the outcome of litigation. The financial interest of the Atomic Energy Commission may be traced, in some instances, through several tiers of contracts down to an action by a third person against a subcontractor. The existence of this financial interest may be ascertained by examining the provisions for reimbursable items in each of the various contracts involved.

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B. Actions not Covered by Insurance

1. In actions brought against contractors falling into the categories stated in II. A. (supra) where they are completely covered by insurance a single copy of the summons and complaint will be sent to the Office of the General Counsel, Washington, D. C.

2. In addition to the single copy of the summons and complaint, a report will be forwarded setting forth the following material:

a. Brief statement of the factual situation giving rise to the cause of action.

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b. Statement that the action is completely covered by insurance.

c. That the insurer has been notified and has agreed to assume the defense of the action.

d. Name of the insurer.

e. Name of the insurer's counsel.

f. Any other information that is considered to be appropriate. (Whether or not restricted data is involved.)

C. No Insurance or Insufficient Coverage

1. Where it is ascertained that there is no insurance or insufficient insurance to cover the claims alleged in the cause of action, examination should be made of the contract to determine whether or not a judgment obtained against the defendant would constitute a reimbursable item under the contract. In the event that it is ascertained that the judgment would or might constitute a reimbursable item under the contract, investigation should be

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made of all the operative facts and a report in triplicate should be forwarded to the Office of the General Counsel, Washington, D. C., in the same manner as stated in I. B. (supra).

2. When it is ascertained that the judgment would constitute a reimbursable item under the contract, upon receipt of the report, the Office of the General Counsel will immediately notify the Department of Justice of the pending action, and will forward with such notification 2 copies of the report that has been received from the field. The notification to the Department of Justice will set forth the title of the action, where filed, in DOE ARCHIVES allowed for response, sufficient facts to show the financial interest of the government, the nature of the cause of action, the name and address of the individual that may be contacted by the local U. S. Attorney for assistance, and the request that the Department of Justice take such steps as it considers necessary to protect the interests of the government.

3. When it is ascertained that the judgment would not be a reimbursable item under the contract, a complete report should be made of the operative facts, a copy of the summons and complaint, and the decision of the Assistant General Counsel that such a judgment would not constitute a reimbursable item under the contract should be forwarded to the Office of the General Counsel, Washington, D. C. The file will then be examined in the Office of the General Counsel, and when it is ascertained that the judgment would not be a reimbursable item under the contract, the Assistant General Counsel will be so notified, the contractor shall be notified by the

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Assistant General Counsel of the conclusion that such a judgment would not be a reimbursable item under the contract and that the contractor must enter upon the defense of the action upon its own initiative.

4. As a matter of practice, the Department of Justice may decline to undertake the defense of a case. Instances when Justice has declined to defend have been cases involving the plaintiff's rights under the Veterans' Preference Act, Collective Bargaining Agreements, etc. In the event that the Department of Justice declines to defend an action and so notifies the Office of the General Counsel, notice will be given immediately to the field attorney for the purpose of authorizing the contractor to employ private counsel for the defense of the action.

III. Fair Labor Standards Cases

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Actions brought against contractors, who are working in any relationship to the Atomic Energy Commission that would give rise to a financial interest of the Commission in a judgment against a contractor, based upon violations of the Fair Labor Standards Act, shall be treated in like manner as actions which result in judgments which are reimbursable and which the Department of Justice has declined to defend. The Department of Justice has for many years stated that the defense of such contractors in actions involving the Fair Labor Standards Act ordinarily will not be handled by the Department of Justice but will be defended by private counsel selected by the contractor.

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IV. Appearances Before Administrative Agencies

A. In some instances it may be necessary for the Atomic Energy Commission to intervene in proceedings before certain Federal Administrative Agencies. In such cases, before action is taken, the matter should be discussed fully with the Office of the General Counsel. It is not necessary to request the Department of Justice to handle such matters, although in some instances the Office of the General Counsel may wish to consult with the Justice Department. Intervention usually arises in cases where the contractor is directly involved in the proceeding. Actual representation of the contractor will usually be handled by his own private counsel.

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B. Where petition is made directly to a Federal Administrative Agency for relief, representation in the proceeding is handled by Counsel of the Atomic Energy Commission. In all such cases, before action is taken by the Assistant General Counsel, the Office of the General Counsel should first be consulted.

C. When the Agency involved is an Agency of a State, the matter should be first submitted to the Office of the General Counsel before action is taken.

V. Claims in Favor of the United States

Claims in favor of the United States will be processed in accordance with the provisions of GM Bulletin No. 110, issued October 25, 1948.

VI. Miscellaneous

1. Representation Agreements. In all cases where it is appropriate that the Department of Justice should take over the defense of the action, representation agreements in triplicate should be obtained

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from the contractor. This agreement should be in writing and signed by some official of the contractor who has authority to make such an agreement. The agreement will authorize the United States Attorney to represent the contractor in the litigation, but reserves to the government its defenses, if any, to claims of reimbursement under the contract. A sample of such an agreement is set forth in Appendix A.

2. Settlements: In all actions that have been filed the matter of settlement remains the primary responsibility of the contractor and the Atomic Energy Commission. In pursuance of this responsibility, the counsel representing the contractor, the Assistant General Counsel, and the United States Attorney should all confer concerning the propriety of the settlement. The United States Attorney acts only in an advisory capacity in such circumstances. In all important cases involving matters of policy or the outlay of substantial sums of money, the Assistant General Counsel should consult with the Office of the General Counsel before taking any final action. In any event the settlement should be reported to the Office of the General Counsel as soon as practicable after it has been consummated. In those actions defended by an insurance company, the matter of settlement is the prime responsibility of the insurance carrier. Whether or not the carrier may choose to obtain the advice and counsel of either the contractor or the Atomic Energy Commission or both is a matter for the insurance carrier.

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3. Extension of Time for Filing Responsive Pleading: In all cases where actions are brought either against the Commission or its contractors and it appears that the time for filing a responsive pleading will have elapsed before the foregoing suggested procedure can be complied with, it is the responsibility of the Office of the Assistant General Counsel to take such steps as are necessary, under the local practice, to see that no default is entered against the defendant in the pending action. Care should be taken to see that the remedial action taken does not commit the defendant to any particular defense nor should action be taken that may admit the jurisdiction of the particular tribunal if that question may be considered proper to be raised at a subsequent time.

4. Fees: It should be the practice of the Assistant General Counsel to seek the advice of the local United States Attorney in the appropriate district concerning the amount of the fee that is to be paid to private counsel who have been retained by a contractor in those cases involving reimbursable items and in which the Department of Justice has declined to represent the contractor. The United States Attorney has been instructed by the Department of Justice to give such advice on a confidential basis.

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5. Retention of Private Counsel by Contractors: The retention of private counsel by contractors is only proper to defend actions arising out of the performance of work under the terms of the contract, and which would constitute reimbursable items under the contract, where specifically authorized by appropriate Atomic Energy Commission personnel. Such authorizations shall be fully given in

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these classes of cases in which the Department of Justice has declined to undertake the defense, or the assistance of private counsel is deemed advisable under the circumstances.

6. Cases Involving Restricted Data and Radiation Hazards: In these cases where it is anticipated that restricted data may be disclosed in the presentation of the case of either the plaintiff or the defendant, contact should be made with representatives of the local Security Office, Insurance Section, and Public and Technical Information Section by the Assistant General Counsel to ascertain what steps, if any, may be taken to adequately dispose of the pending action. If information now classed as restricted data may properly be declassified, immediate steps should be taken to accomplish the declassification so as to make the information available. In all cases where a disclosure of restricted data may be anticipated as being necessary during the course of a trial, special effort should be made to settle the case consistent with the merits of the case.

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7. Cases Involving Commission Policy: Where actions are filed against the Commission or its contractors that may involve over-all policies of the Atomic Energy Commission as for example in the fields of labor relations, taxation, insurance, security or progress of the work, the Assistant General Counsel shall exercise close supervision over the handling of such litigation, regardless of whether the litigation be handled by counsel of the insurance carrier or private counsel. Particularly in such cases, the Assistant General Counsel should keep in close touch with the Office of the General Counsel, Washington, D. C. In the event of a significant conflict between the views of Counsel retained to represent the contractor

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and the Assistant General Counsel as to the conduct of litigation, the Assistant General Counsel shall consult with the Office of the General Counsel, Washington, D. C.

8. Relationship Between Assistant General Counsel and Contractor's Counsel: The Assistant General Counsel's Office should maintain as cordial and cooperative relationship with counsel representing the contractor as is possible under the circumstances. However, this does not mean that the Assistant General Counsel should perform the work that should be performed by the contractor's counsel. If at any time, it appears that contractor's counsel is not giving proper attention to pending litigation in which the Atomic Energy Commission is interested, the Assistant General Counsel should be quick to call that fact to the attention of necessary authorities for remedial action.

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VII. Monthly Report

Each Assistant General Counsel or field attorney assigned to a given area should submit a monthly report showing the status of the litigation in his particular area. It is only necessary to record any changes from the previous report that may exist at the time the new report is submitted.

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APPENDIX A

AGREEMENT FOR REPRESENTATION

The undersigned (hereinafter referred to as "contractor") agrees that the defense of the action entitled _____ Case No. _____ in the _____ Court may be conducted exclusively by counsel designated by the Attorney General of the United States and that counsel so designated shall have complete and exclusive control and direction of such defense. No part of the fee or salary of such counsel so designated shall be paid by the contractor.

It is further agreed that neither this agreement nor the designation of such counsel, nor his representation of the contractor, nor any action taken by him in the defense of such action shall constitute an admission or concession that the United States is liable to the contractor for the amount of any recovery in said action against him, or for the costs or expenses of defending said action, but shall be without prejudice to any defense which the United States might otherwise have to any such claim against it.

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Neither this agreement nor any action taken pursuant thereto by any officer or agent of the United States may, for the purpose of establishing any such claim against the United States, be shown in evidence in any proceeding. By making this agreement, the contractor in no way waives any such claim as he may have against the United States.

_____
Contractor

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Dated _____194_

Be it known that on this ____ day of _____ 194_ before me came _____ for the contractor mentioned in, and who executed, the foregoing agreement, and he acknowledged that _____ he _____executed the same as h_____ act and deed.

IN WITNESS WHEREOF I have hereunto affixed my hand and seal this _____ day of _____ 194_.

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_____
Notary Public

My Commission expires:

_____

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