

Case No. VWZ-0006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: META, Inc.

Date of Filing: May 21, 1996

Case Number: VWZ-0006

This Decision considers a Motion to Dismiss filed by Maria Elena Torano Associates, Inc. (META) on May 21, 1996. In its Motion, META seeks the dismissal on jurisdictional grounds of the underlying complaint and hearing request filed by its former employee C. Lawrence Cornett under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. <1>On July 31, 1996, I conducted a hearing to receive evidence regarding the jurisdictional issues raised by META's Motion to Dismiss.

META argues that DOE does not have jurisdiction to hear Mr. Cornett's complaint since Part 708 applies only to employees of DOE contractors who perform work at DOE-owned or DOE-leased facilities.<2> META asserts that, with the exception of a limited number of visits to perform work ancillary to the primary purposes of the PEIS contracts, it did not perform work at DOE sites.

It is undisputed that Part 708 protections are limited to employees of contractors and subcontractors that perform work at contractor-operated DOE sites. See 10 C.F.R. §§ 708.1-708.4. The issue before me is whether META performed work at DOE sites within the meaning of Part 708. Section 708.4 defines "work performed on site" as:

work performed within the boundaries of a DOE-owned or -leased facility. However, work will not be considered to be performed "on-site" when pursuant to the contract it is the only work performed within the boundaries of a DOE-owned or -leased facility, and it is ancillary to the primary purpose of the contract (*e.g.*, on-site delivery of goods produced off-site).

10 C.F.R. § 708.4. Consequently, if all of the work META performed at DOE sites was ancillary to the primary purposes of the PEIS contracts, then META would not be subject to 10 C.F.R. Part 708 and its Motion should be granted. Given the somewhat unclear regulatory language above, it is apparent that there is no "bright line" test that can be employed in making a determination as to whether performed work is ancillary to the primary purposes of a contract. The determination as to whether work is ancillary is a subjective judgement which relies on facts of each individual case. After considering all of the testimony and exhibits presented by both parties during this proceeding, I find that META has performed work at DOE sites within the meaning of Part 708.

META has failed to persuade me that all of the work performed at DOE sites by META employees was ancillary to the primary purposes of its PEIS contracts with DOE.<3> After examining the three contracts META and DOE entered into regarding the PEIS, it is apparent that the primary purposes of the PEIS contracts were for META to revise draft materials for the PEIS, perform needed data analyses for the Draft PEIS and ultimately to prepare under DOE direction the Final PEIS. None of the witnesses or exhibits presented by either META or Mr. Cornett indicates that META employees performed data analysis at a DOE site or prepared written materials in connection with the PEIS at a DOE site. However,

there is substantial evidence before me to indicate that there was important work performed by META employees at DOE sites and that it was directly related to the primary purposes of the PEIS contracts.<4>

Testimony before me establishes that site visits made by META employees accomplished important mission-related purposes. They resulted in the obtaining of data generated at DOE nuclear sites and facilitated the gathering of necessary data by establishing relationships with employees at those sites. Dr. Phil Sczerzenie, the META impacts team leader, testified that the primary purposes of the site visits were to set up lines of communication for data from individuals at various DOE sites and to discover what types of data were available. Transcript of July 31, 1996 Hearing (Tr.) at 113, 115-16, 124. Further, Dr. Sczerzenie testified that META personnel obtained information needed in PEIS analysis during their visits to DOE sites. Tr. at 113, 115-17, 148. Dr. Sczerzenie's testimony is corroborated by the testimony of Dr. Thomas Hale, an economist on the META impacts team, who testified that one of the purposes of the site visits was to establish personal relationships with individuals at DOE sites in order to facilitate the transfer of needed data for analysis, to discover what data was available and to bring back data from the sites. Tr. at 166, 168. Further, Dr. Jane Rose, a member of the META impacts team, testified that she gathered data at the DOE sites. Deposition of Dr. Jane Rose (Rose Deposition) at 15. This testimony is supported by several of the META employee trip reports which have been submitted into the record. See Exhibits 13, 19 and 21. In my opinion, these activities involving data gathering and the facilitation of data gathering cannot be considered ancillary to the primary purposes of the PEIS contracts since they were directly related the primary purposes of those contracts. I accept META's contention that most of the data that it obtained from the sites was not collected on site by META personnel. However, as indicated by the testimony referred to above, data collection was greatly facilitated by site visits by META personnel. I also agree that data that was collected on site by META employees could have been transmitted by mail or electronic media. However, this does not change the fact that important data collection activities occurred at DOE sites. Section 708.4 does not require that work performed at DOE sites be of a nature that it must always be physically performed at a DOE site.

Further, I find that META employee tours of DOE sites significantly assisted those on the trip and other META employees with whom they shared information in preparing the PEIS. Granted, the information META employees obtained from site tours does not appear to be "data" of the type that META was contracted to obtain or analyze under the PEIS contracts. <5> See Tr. at 117, 120, 126-27 (Dr. Sczerzenie). META personnel did not go to DOE sites to make physical measurements or conduct specific validation of the data they obtained. Nevertheless, the testimony of Drs. Hale and Rose shows that on the site tours they obtained information that they utilized in the analyses they performed for the PEIS.<6> Specifically, Dr. Hale testified that through site tours he was better able to understand the nature and scale of potential environmental hazards and that this assisted him in his analysis for the PEIS. Tr. at 170-71, 178. Dr. Rose testified that she was able to obtain information and make observations that were essential for her to properly perform her PEIS work. Rose Deposition at 7-8, 12-15, 22-23, 28-29. In addition, the testimony of Mr. Cornett and the trip report exhibits he has submitted support the conclusion that information and observations from the DOE site tours were communicated to META personnel at the firm's Gaithersburg facility, Tr. at 214-15, 224; Exhibits 13, 19, who used it in the analyses that they performed for the PEIS. Tr. at 218-20. This information sensitized those employees to site conditions that could require particular data analysis or provided some general verification of conditions at the site. As a result of the use

of this type of information in the PEIS analysis, I believe that the site tours were too important to be deemed ancillary to the primary purposes of the PEIS contracts.

I recognize that a very small percentage of the time spent by META employees on the PEIS project involved travel to DOE sites, and that only a small percentage of the firm's employees actually travelled to those sites. See Affidavit from Albert N. Tardiff at ¶ 6. I also recognize that not all of the time spent on the trips was spent on site. See Tr. at 72-74, 131, 270. Nevertheless, as indicated above, there were activities engaged in by META personnel on site that were not ancillary to the primary purposes of the PEIS contracts, but were intimately related to such primary purposes as revising draft materials for the

draft PEIS and performing needed data analysis. In view of the importance of the work performed at DOE sites, and the fact that the sites visited were some of the major nuclear facilities involved in the PEIS, the relatively little amount of time spent there, while a relevant factor, is not dispositive of the jurisdictional issue in this case.

Since the meaning of the expression "ancillary to the primary purpose of the contract" is not crystal clear, in reaching a determination on the jurisdictional issue raised by META, I have also taken into consideration the purpose of Part 708. The Part 708 preamble states that "a fundamental purpose of this rule is to encourage individuals to feel free to disclose to the DOE information relative to health and safety problems at DOE-owned or -leased facilities...." 57 Fed. Reg. 7533 at 7535 (March 3, 1992). The PEIS that META employees worked on was directly related to the issues of waste management and environmental restoration at DOE's government-owned, contractor-operated sites and Mr. Cornett has alleged that there were deficiencies in the PEIS analysis of human health risks. While META has correctly pointed out that its work is less directly involved with on-site work than that of the management and operating contractors and subcontractors involved in prior cases under Part 708, META's on-site contact was much more significant than that of the deliverer of goods referenced in the example in the Section 708.4 definition of "work performed on site." <7> Thus, META is one type of contractor or subcontractor that DOE intended to cover by the Part 708 regulations.

Because I find that META employees performed work at DOE sites that cannot be considered ancillary to the primary purpose of the PEIS contracts, I conclude that META is a contractor that performed work on site as defined in Section 708.4, and thus is subject to the Part 708 regulations.<8> Consequently, I shall deny META's Motion to Dismiss.

It Is Therefore Ordered That:

- (1) The Motion to Dismiss filed by META, Inc. on May 21, 1996 is denied.
- (2) This is an Interlocutory Order of the Department of Energy.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: August 22, 1996

<1>Beginning in 1991, DOE entered into the first of three contracts with META to obtain its services to help DOE produce a draft Programmatic Environmental Impact Statement (PEIS). Mr. Cornett's Part 708 complaint arises from his employment with META on the PEIS and alleges that because of disclosures he made regarding health and safety risks he experienced various forms of reprisal culminating with his termination from employment with META. For a procedural history of this matter, see C. Lawrence Cornett, 25 DOE ¶ 87,504 (1996) (Order to Show Cause) (Cornett).

<2>In this Decision, I will refer to DOE-owned or DOE-leased facilities as "DOE sites."

<3>As in my Order to Show Cause, references to META employees include employees of META's subcontractor, Louis A. Berger Associates (Berger). From the record before me Berger employees performed essentially the same types of work as META employees on the PEIS contracts. See Cornett, 25 DOE at 89,023 n.5.

<4>I reject, however, Cornett's argument that because META certified that its employees' DOE site visits were necessary, the work performed at the sites should be automatically deemed integral to the purposes of the PEIS contracts. Nevertheless, the fact that META chose to send its personnel to DOE sites provides

some evidence that it considered the visits important.

<5>The parties disagree on the definition of the word "data." Dr. Hale's testimony sums up this dispute: "Data sort of has lots of different meanings. In talking to people . . . about high level waste and understanding, for instance, what vitrification is, and what processes are necessary. That's data, in my mind. . . . In other peoples minds it's rows and columns of numbers." Tr. at 178.

<6>During cross examination at her deposition, Dr. Rose took issue with the word "tour," referring instead to her activities on site as "field work." Rose Deposition at 51-52.

<7>There are many such contractors that deliver supplies and equipment for offices, building maintenance, cafeterias and vending machines. For this reason, I do not accept META's argument that finding Part 708 jurisdiction in this case would extend Part 708 jurisdiction to almost all DOE contractors and make the ancillary work exception meaningless.

<8>While META has correctly pointed out that Cornett did not work at any DOE site, the definition of "employee" in Section 708.4 clearly states that the determination of whether a person has standing as an employee shall be made without regard to the on- or off-site locale of the employee's work performance. 10 C.F.R. § 708.4 (definition of "employee").