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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 920639

TECHDYN SYSTEMS CORPORATION,

Appellant,

v.

WHITTAKER CORPORATION,

Appellee.

**JOINT APPENDIX
VOLUME III**

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**TRIAL TESTIMONY OF
WILLIAM C. HISE**

WILLIAM C. HISE - DIRECT EXAMINATION

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1 see.

2 Are we ready for the jury?

3 MR. BOEHLERT: Yes, sir.

4 JUDGE BROWN: Bring them in.

5 (Pause while jury is seated.)

6 JUDGE BROWN: Are we ready for the next witness?

7 MR. BOEHLERT: Yes, sir.

8 I'd like to call Mr. William Hise.

9 Whereupon,

10 WILLIAM C. HISE

11 having been duly sworn, was called as a witness herein and
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. BOEHLERT:

15 Q Good morning, sir.

16 A Good morning.

17 Q Would you please state your full name and home
18 address for the record?

19 A William Curtis Hise. My home address is 2454
20 North Wakefield Court, Arlington, Virginia.

21 Q Are you currently employed?

22 A Yes.

23 Q And where are you employed?

24 A With TechDyn Systems Corporation.

25 Q In what capacity are you employed at TechDyn?

WILLIAM C. HISE - DIRECT EXAMINATION

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1 A I am the Vice President and Director of Management
2 Support Operations and I am the Chief Financial Officer.

3 Q I'd like you to start for us, please, with your
4 graduation from high school and would you please tell us
5 your educational and work experience up to the time that you
6 joined TechDyn.

7 A My education background is after graduating from
8 high school I attended the University of Illinois and
9 received a Bachelor's degree in liberal arts and sciences.
10 I stayed on an additional year and received a Master's in
11 political science.

12 Q What year was that?

13 A That would be 1949. And I received a J.D. degree
14 from George Washington University Law School in 1954.

15 Q So that was a law degree.

16 A Yes.

17 Q What did you do next?

18 A Following graduation from the University of
19 Illinois, I started working and finished law school actually
20 part daytime and part evening. I was called to -- I was in
21 the reserve forces, the Air Force, and I was recalled in
22 1951 during the Korean War and served two years in Korea.

23 I might as well go ahead now maybe and give you my
24 military experience where it intertwines.

25 Q What I think is most helpful is just a

WILLIAM C. HISE - DIRECT EXAMINATION

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1 chronological development if we can do that and if you can
2 blend the education and work experience, that would be
3 helpful.

4 A After I returned from the Korean War, I took a job
5 with the General Electric company in procurement and I moved
6 from there in a number of capacities in industry. I served
7 with Litton Industries, the Bud Company, all in contract
8 administration type positions.

9 Q What did you do there?

10 A I was -- at Litton, I was a senior contract
11 administrator and I went -- from Litton, again I was
12 recalled during the Berlin Crisis and served approximately
13 14 months, I think it was, on active duty with the Air
14 Force. I returned, went back to Litton in the same basic
15 capacity.

16 Q What timeframe was this, Mr. Hise?

17 A That would have been 1961. I returned to Litton
18 for a short time then I moved to the Bud Company in the
19 Washington area. And then I --

20 Q What position did you hold with them?

21 A In all my work experience I've been in contract
22 administration type positions, either as a manager level or
23 as a senior contract person by that time. I was again
24 recalled during the -- as I say, the Berlin Crisis and I
25 returned. Then I went to Page Communications, where I

WILLIAM C. HISE - DIRECT EXAMINATION

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1 stayed for approximately ten years.

2 Q What did you do at Page Communications?

3 A I was manager of government contracts.

4 Q What type of business did Page Communications do?

5 A Page Communications was basically in
6 communications engineering systems design and installation
7 in the continental United States and also overseas.

8 Q And your role in that company was what?

9 A I was manager of government contracts.

10 Q What did that mean, Mr. Hise?

11 A That means that I had the responsibility for
12 preparing proposals to the Government. I had responsibility
13 for negotiating those proposals and then I had the
14 responsibility for either directly or supervising the
15 day-to-day administration of those contracts.

16 Q And approximately can you tell us over that ten-
17 year period how many contracts you would have been involved
18 with?

19 A Well, I would say approximately 10 or 15. Most of
20 my time at Page Communications was being responsible for a
21 major communications system that was being installed in
22 Southeast Asia and Viet Nam and Thailand during the Viet Nam
23 War.

24 Q What system was that?

25 A That was what was called the IWCS. It was the

WILLIAM C. HISE - DIRECT EXAMINATION

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1 integrated wideband communications system for support of the
2 U.S. Army forces -- well, support of all of the forces that
3 were fighting in Viet Nam at the time.

4 Q Okay. So --

5 A And while I was Page, I was recalled for the third
6 time with the Air Force and I served -- this was in 1968,
7 during the Pueblo crisis and I served as the executive
8 officer for the 833rd Air Division at Seymour Johnson in
9 North Carolina.

10 Q What were your duties in that capacity?

11 A Under the air division, there were four Tactical
12 Air Command fighter units that reported to the air division
13 and my role was as the executive officer of the air
14 division, primarily responsible for administrative functions
15 on a command-wide level.

16 Q And how long did that engagement last?

17 A Well, my engagement lasted a little over 12 months
18 and then I was released then from active duty.

19 Q Did you then go back to Page Communications?

20 A I then went back to Page Communications and stayed
21 there until 1975 when I left Page and sent to a company
22 called Aero-Maritime which was an international trading
23 company and I was there approximately two years.

24 Q What did you do with them?

25 A I was director of contracts, more in the

WILLIAM C. HISE - DIRECT EXAMINATION

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1 international areas compared to government contracts as we
2 know it.

3 Q Okay. What did you do after that?

4 A I went from there to a company called TELCOM,
5 which had been a spin-off from Page Communications and I was
6 there where I left to go with TechDyn in June of 1980.

7 Q How did you learn of TechDyn Systems?

8 A The way I learned about it was I received a call
9 one morning from the president of the company, Mr. Morrison,
10 asking me whether I'd be interested in coming aboard with
11 his company which he was at that time was in its very early
12 years. I think it had been formed in late 1978.

13 It had one or two contracts in existence and so I
14 joined the company approximately a year after it had been
15 operating.

16 Q In what capacity did you join the company?

17 A I joined the company as Director of Management
18 Support Operations.

19 Q Do you still hold that position?

20 A Yes.

21 Q As Director of Management Support Operations, what
22 is your responsibility?

23 A I have the responsibility for the contracts, the
24 finance, the personnel, the security and administrative
25 functions of the company which is operating in a number of

WILLIAM C. HISE - DIRECT EXAMINATION

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1 locations.

2 Q Let's go through those. You said you're
3 responsible for contracts. What is your participation in
4 the contract side of the company?

5 A At the present time, it's slightly different than
6 it was perhaps in the early days in the sense that in the
7 beginning when the company was much smaller than it is now I
8 was the contract negotiator, I was the direct hands-on
9 manager of the contracts that existed.

10 Today, we have a number of contracts so I perform
11 a supervisory role. In addition, again, being a very small
12 company, I get totally involved in the actions and decisions
13 on all of the contracts that we have.

14 Q Do you do that on a day-to-day basis?

15 A On a day-to-day basis.

16 (Continued on next page.)

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WILLIAM C. HISE - DIRECT EXAMINATION

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1 Q You said you are also involved in the financial
2 side of the company.

3 A I carry the title of chief financial officer.

4 BY MR. BOEHLERT:

5 Q What does that mean?

6 A Well, that means that I'm basically responsible
7 for the financial operation of the company, which includes
8 the accounting operation, the day to day accounting
9 operation, the payroll. Those types of things, plus the
10 issuance of financial statements and those kinds of things.

11 Q How is the company's financial organization set
12 up?

13 A I guess one way to explain it would be, it's
14 basically multi-tiered in the sense that there's the area,
15 the accounting department that deals with the direct
16 documents that end up in the various ledgers and eventually
17 into the financial statements. Those individuals are people
18 who record the payments. They record receipt of invoices.
19 They make sure payments are made as required. And also the
20 invoicing activities to the government.

21 Q Is there another level?

22 A Yes, then actually those documents which are the,
23 basically the primary source documents for the accounting
24 department are moved forward into a project ledger for each
25 of the contracts that we have. And those ledgers record all

WILLIAM C. HISE - DIRECT EXAMINATION

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1 of the costs associated that are directly related to that
2 particular contract.

3 Q Is there another group of people, or a level in
4 your organization that does that?

5 A Well, again, being a relatively small company,
6 individuals perform more than one function. The accounting
7 department is approximately six people. So, there could be
8 the same people performing more than one function, but it's
9 a different activity in the sense of what they would be
10 doing.

11 Q Do all those people report to you?

12 A Yes. Let me -- you want me to go ahead and
13 finish?

14 Q Yes, please. Explain how the financial
15 departments work.

16 A In addition to the so called project ledgers that
17 are established on each of the contracts, there is the
18 indirect costs ledgers that follow the same basic procedure.
19 We're paying rent, or we're paying utilities on a building
20 or whatever. Those normally would go into indirect ledgers
21 and the same general procedures of paying bills and
22 receiving invoices and all that happen in that case.

23 Q Who prepares those?

24 A Those are prepared by the accounting department
25 under my direct supervision.

WILLIAM C. HISE - DIRECT EXAMINATION

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1 Q Do you know whether those are reviewed by any
2 outside source?

3 A We are constantly reviewed, particular from the
4 accounting and finance aspect of the company by the defense
5 contractor audit agency, which reviews our proposals for
6 indirect rates for the coming year. They audit the year end
7 audits of our accounts. Then periodically they come in and
8 perform what they choose to call a survey of your accounting
9 operation to determine whether it is being run in a manner
10 that meets the government's standards. And we have just
11 recently, within the past eight months, had one of those
12 that has been for a continuing basis over the years.

13 Q Were the results of that conveyed to you?

14 A The results of that were conveyed to us, in a
15 letter and it indicated that our accounting system was
16 satisfactory.

17 Q Is there any other level in the financial
18 organization?

19 A Yes. In addition to the ledger for each contract,
20 the general ledger of direct costs, there is, as I
21 indicated, the indirect costs. And those, then, are mated
22 in a, what is a summary contract ledger document, which is
23 put out on a monthly basis, which gives the total cost for a
24 contract, which combines the direct charges and the indirect
25 charges that would be applied to that contract.

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1 And that would be the final level prior to the
2 preparation of the financial statement of the company, which
3 is done on a monthly basis, on an interim basis. And then
4 yearly it is audited by the outside accounting firm, in our
5 case, Arthur Anderson & Company.

6 Q And are you provided certified financial
7 statements on a yearly basis?

8 A We are provided certified accounting statements
9 from Arthur Anderson at the end of the year, yes.

10 Q You said you are also responsible for personnel,
11 is that correct?

12 A Yes.

13 Q And what is your responsibility there, sir?

14 A The manager of personnel reports directly to me.
15 I review the hiring, not only the practices and the policies
16 that relate to hiring of personnel, but again, in our case,
17 being a relatively small company, I review most of the hires
18 that are made within the company, to make sure that they
19 meet the requirements that we would want for that
20 individual.

21 Q You also mentioned security.

22 A Yes.

23 Q What is that?

24 A Being a defense contractor, we, and many of our
25 contracts do have classified portions performed on those

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1 contracts, we maintain a classified secure facility. Again,
2 the government, with its investigative service, comes in and
3 reviews our procedures and our hiring practices with regard
4 to people being brought in on board. We process the
5 clearances that they would need to do that work. We at
6 TechDyn have a top secret facility for use of classified
7 material, we have a secret storage facility.

8 Q The last function you mentioned was
9 administration. What are you referring to there?

10 A I guess one way of putting it would be everything
11 else. But it's basically the administrative functions that
12 the company would have from running a courier service as
13 needed, the secretarial staff, the receptionist, the
14 mailroom. Those types of things. So, it's administrative
15 requirements that a company like ours would have.

16 Q Would you say that things run smoothly?

17 A Yes.

18 Q Are you familiar with a prime contract that
19 TechDyn has with the Air Force, for the Icelandic Command
20 and Control Enhancement project?

21 A Yes, I am.

22 Q And are you familiar with a subcontract that
23 TechDyn had with Whittaker Corporation regarding that
24 contract?

25 A Yes, I am.

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1 Q And how did you become familiar with that
2 subcontract?

3 A Well, I became familiar with it in the sense that
4 I was involved in the negotiations of the prime contract at
5 which the 4C Corporation, which was the predecessor of the
6 corporation to Whittaker, was a directed subcontractor from
7 the Air Force to us on that procurement. We received from
8 the 4C Corporation at that time a proposal that was
9 incorporated into our submission to the Air Force. We
10 negotiated that contract, we in turn then issued a
11 subcontract to Whittaker for their performance of the so
12 called PDFA, the processing display functional area, of the
13 contract, which was the directed portion of that contract
14 that we were obligated, under our prime contract, to
15 subcontract to 4C.

16 Q Were you personally involved in that process?

17 A Yes.

18 Q Mr. Hise, I'm going to place in front of you a
19 document that has been previously received in evidence as
20 Plaintiff's Exhibit 22A3. Before we do that, Your Honor,
21 may I get a clarification from you? It is my understanding
22 that the contents of these binders, everything up here, has
23 been received in evidence. Is that correct?

24 JUDGE BROWN: The 22 series?

25 MR. BOEHLERT: Yes, sir.

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1 JUDGE BROWN: Yes. Twenty-two A, one, two and
2 three.

3 MR. BOEHLERT: I think there is a four and five as
4 well.

5 JUDGE BROWN: Is there?

6 MR. BOEHLERT: Yes. I place before you what has
7 been previously identified as the modification number 3 to
8 this contract. And refer you to the statement of work. And
9 I ask that you please refer to paragraph 3.6.3.1, caption
10 pre-operational support. Do you have that in front of you,
11 sir?

12 THE WITNESS: Three point six point one?

13 BY MR. BOEHLERT:

14 Q No, 3.6.3.1.

15 (Pause.)

16 A Yes, I do.

17 Q Okay, would you read that please?

18 A Three point six point three point one, pre-
19 operational support. The contractor shall be responsible
20 for providing complete logistic support through the OT&E of
21 the FOC system. This effort shall include, but not be
22 limited to supply support, maintenance support, technical
23 support, providing necessary support equipment, maintain,
24 paren (including collaboration of the support equipment)
25 close paren, preliminary technical orders and necessary

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1 maintenance.

2 Q Are you familiar with that paragraph of the
3 subcontract?

4 A Yes.

5 Q Mr. Hise, did there ever come a time during
6 contract performance that an issue arose between TechDyn and
7 Whittaker regarding pre-operational support?

8 A Yes.

9 Q Tell us what happened.

10 A There came a point in time when Whittaker
11 Corporation refused to furnish the pre-operational support
12 as required under the paragraph as it related to the PDFA
13 portion of the contract.

14 Q And what happened?

15 A At the time that Whittaker refused to provide that
16 support, we on one occasion, the only way that we could
17 obtain the equipment as it pertained to the RADIL, which was
18 the integral part of the PDFA, or the equipment portion of
19 it, we had to purchase from Whittaker, or at least issue
20 them a purchase order, for them to provide basically what
21 they were required to provide under the contract.

22 Q Do you recall what that was?

23 A If I recall, it related to a disc drive, or
24 something of that nature.

25 Q Was a demand made that Whittaker, pursuant to this

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1 Q So to determine the subcontract price for the
2 remote control element, what would one do?

3 A One would add those two together.

4 Q And do you know what that number is, sir?

5 A I can figure it up real quick.

6 Q Why don't we do that.

7 (Pause.)

8 A By totalling those two numbers, I get the figure
9 of \$405,012.

10 Q Do you know whether Whittaker completed the remote
11 control element on this project?

12 A They did not.

13 Q Do you know whether Whittaker has been paid any
14 money with respect to the remote control element?

15 A Yes, they have.

16 Q How much?

17 A My recollection is that they were paid \$385,000
18 plus -- it was approximately \$385,000.

19 Q And on what do you base that conclusion?

20 A I base that on the conclusion that that was the
21 figure that was included by Whittaker in submission of a
22 progress payment to TechDyn in which they indicated under
23 CLIN 2AB they had incurred \$385,000 plus for the RCE effort.

24 Q And was Whittaker paid those monies?

25 A They were paid those monies.

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1 (Pause.)

2 MR. BOEHLERT: Your Honor, I'd like to just check
3 with your clerk to confirm something and then I can move on
4 quickly.

5 Is Exhibit 117 in evidence? I think it is.

6 THE CLERK: Yes.

7 MR. BOEHLERT: Thank you very much.

8 BY MR. BOEHLERT:

9 Q Mr. Hise, did there come a time during subcontract
10 performance that the issue of test beds arose?

11 A Yes.

12 Q What happened?

13 A Originally as part of the negotiation between
14 TechDyn and 4C Corporation, the subcontractor, directed
15 subcontract Whittaker or 4C, agreed that they would furnish
16 as part of the joint negotiation a facility to TechDyn to
17 operate the test bed for the ICCE system.

18 Q Was there any agreement on whether or not
19 Whittaker would charge TechDyn for that?

20 A There was definitely an agreement that they would
21 not charge TechDyn for use of that facility.

22 Q And was space indeed provided by Whittaker for a
23 test bed?

24 A Space was indeed provided and there was no charge
25 made to TechDyn for a considerable period of time.

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1 MR. BOEHLERT: Mr. Hise, I want to place in front
2 of you a document that's been marked as Plaintiff's Exhibit
3 1560 for identification.

4 (Pause.)

5 JUDGE BROWN: The witness wants some water we're
6 at it.

7 (Pause.)

8 THE WITNESS: Thanks.

9 (Pause.)

10 MR. WORK: What was the number?

11 MR. BOEHLERT: 1560.

12 BY MR. BOEHLERT:

13 Q Mr. Hise, I place in front of you Plaintiff's
14 Exhibit 1560, which purports to be a one-page letter from
15 TechDyn to Whittaker dated 9 July 1985. Do you recognize
16 that document?

17 A Yes, I do.

18 Q Okay. And what is it?

19 A It was a letter that we sent to 4C on 9 July 1985
20 to the attention of Ms. Raymond.

21 MR. BOEHLERT: Your Honor, I move Plaintiff's
22 Exhibit 1560 into evidence.

23 JUDGE BROWN: Any objection to 1560?

24 MR. WORK: No objection.

25 JUDGE BROWN: It's received.

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1 (The document referred to, having
2 been previously marked for
3 identification as Plaintiff's
4 Exhibit 1560, was received in
5 evidence.)

6 THE WITNESS: The letter is subject subcontract
7 125-001; test bed facilities.

8 BY MR. BOEHLERT:

9 Q Would you please read paragraph 1?

10 A "In order to set up the test bed for the subject
11 subcontract, TechDyn has certain space and power
12 requirements. During a visit by our engineers to your
13 facilities, bay area 5 appeared to be best suited for our
14 needs. Our requirement for approximately 300 square feet,
15 power and cabling to the crypto room would be satisfied if
16 this area was reserved for use by TechDyn."

17 Q And was such a space reserved?

18 A Such space was reserved.

19 Q Did TechDyn set up a test bed?

20 A TechDyn did set up a test bed at the 4C facility.

21 Q Did there come a time that this situation changed?

22 A Yes.

23 Q What happened?

24 A There came a point in time when the 4C Corporation
25 which I think by that time had been acquired by Whittaker

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1 closed a part of its facilities in Torrance, California and
2 moved most of their operation or a substantial portion of
3 their operation to Carlsbad, California, down near not too
4 far from San Diego.

5 Q At the time of contracting, was that move
6 foreseen?

7 A That move was not foreseen at all.

8 Q What, if anything, did TechDyn do in response to
9 that move?

10 A TechDyn did in fact move its facility to the
11 Whittaker facility at Carlsbad and reestablished the test
12 bed in a facility that Whittaker had at Carlsbad.

13 Q Did TechDyn incur any costs associated with that?

14 A Yes, they did. They incurred the cost of
15 dismantling -- reestablishing the test bed, testing it out,
16 getting it operational and, in addition, the actual movement
17 of the equipment from Torrance to Carlsbad.

18 Q Did there come a time again that the issue of the
19 test bed arose?

20 A There came a point in time, again, when Whittaker
21 decided that they no longer were going to permit TechDyn to
22 have a test bed in its facility at Carlsbad or for that
23 matter any place else and we were told --

24 MR. WORK: Objection. No foundation.

25 MR. BOEHLERT: Your Honor, he's explaining what

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1 happened.

2 JUDGE BROWN: Well, I guess it's when he got to
3 the "we were told" part.

4 MR. WORK: That's right. Just that.

5 JUDGE BROWN: He'll have to establish who told who
6 what.

7 BY MR. BOEHLERT:

8 Q What happened, Mr. Hise, with respect to this
9 issue regarding the test bed?

10 MR. WORK: Objection. That's not a foundation
11 question.

12 JUDGE BROWN: Lay a foundation for his
13 participation in whatever he's going to testify to and then
14 we can get around it.

15 MR. BOEHLERT: Okay.

16 BY MR. BOEHLERT:

17 Q Mr. Hise, did you again personally participate in
18 any issue with Whittaker concerning the test bed?

19 A Yes.

20 Q What happened?

21 A In a meeting that was held in Carlsbad --

22 MR. WORK: Objection. No foundation.

23 BY MR. BOEHLERT:

24 Q Were you at the meeting?

25 A Yes. In a meeting in Carlsbad in which I was in

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1 attendance, we were told by the president of the Whittaker
2 division that we were to get out of their facility.

3 Q When did that meeting occur?

4 A If I recall, it was in the July '88 timeframe.
5 The exact date I don't recall.

6 MR. BOEHLERT: I have a document that I'd like to
7 place in front of you that I've marked as Plaintiff's
8 Exhibit 385 for identification.

9 (Pause.)

10 (Continued on next page.)

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1 MR. BOEHLERT: Please turn to tab 385.

2 THE WITNESS: What is the number?

3 BY MR. BOEHLERT:

4 Q Three eighty-five. Do you recognize that
5 document?

6 A Yes, I do.

7 Q It's a letter from the Whittaker Corporation in
8 July of 1988, dated 18 July, to be exact, to TechDyn, to my
9 attention. And the subject of the letter is test bed
10 facilities.

11 MR. BOEHLERT: I'd like to put Plaintiff's Exhibit
12 385 into evidence.

13 MR. WORK: No objection.

14 JUDGE BROWN: Plaintiff's Exhibit 385 is received.

15 (The document referred to, having
16 been previously marked for
17 identification as Plaintiff's
18 Exhibit 385, was received in
19 evidence.)

20 BY MR. BOEHLERT:

21 Q Would you please read the first paragraph?

22 A "An agreement which set up a test bed for the ICCE
23 IOC System, was reached between WES, then 4C Corporation and
24 TechDyn Systems as a result of referenced letter and the
25 stated ESD desire for an IOC test bed. This agreement was

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1 extended by mutual consent during negotiation of
2 modification 003, to subject sub-contract to encompass FOC
3 testing and training."

4 Q Do you agree with that last statement? This
5 agreement was extended by mutual consent during negotiation
6 of modification 003, to subject subcontract to encompass FOC
7 testing and training?

8 A I agree with it, and I would have been a party to
9 that negotiation, and I think I indicated earlier in my
10 testimony that that had taken place.

11 Q Okay. As of the date of this letter, 18 July
12 1988, had FOC testing and training been completed?

13 A It had not.

14 Q Would you read the next paragraph please?

15 A In as much as the original period of four months
16 has been extended to the present time, more than 22 months,
17 it is requested that TechDyn remove the CFA equipment from
18 the Whittaker facility and make arrangements for the FOC
19 system test and training at another facility.

20 Q What, if anything, did TechDyn do in response to
21 this letter?

22 A We did remove our equipment from the facility.
23 And we rented a facility at another contractor building in
24 the, namely the VEDA Corporation, in Simi Valley.

25 Q I ask you to look at the document marked as

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1 Plaintiff's Exhibit 394 for identification.

2 (Pause.)

3 A Yes.

4 Q It is dated 5 August 1988, from Whittaker to
5 TechDyn.

6 A Yes.

7 Q Do you recognize this document?

8 A Yes.

9 Q What is it?

10 A It's a letter form the Whittaker Corporation dated
11 5 August 1988, to TechDyn Systems Corporation, to my
12 attention. And the subject is subcontract 125001, CFA
13 equipment.

14 MR. BOEHLERT: Your Honor, I move Plaintiff's
15 Exhibit 394 into evidence.

16 JUDGE BROWN: Any objection to Plaintiff's Exhibit
17 394?

18 MR. WORK: No objection, Your Honor.

19 JUDGE BROWN: Plaintiff's Exhibit 394 is received.

20 (The document referred to, having
21 been previously marked for
22 identification as Plaintiff's
23 Exhibit 394, was received in
24 evidence.)

25 BY MR. BOEHLERT:

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1 Q Please read the second paragraph there.

2 A The second paragraph reads, "By reference B, WES
3 requested that TechDyn remove the CFA equipment from WES
4 facilities. As of 1 July 1988, the WES facility at 6190
5 Yarrow Drive in Carlsbad, California, was vacated. If
6 TechDyn does not remove its equipment immediately, it will
7 be liable for the \$20,000 per month rent for the Yarrow
8 Street building."

9 Q Prior to this time, had TechDyn been either
10 requested to pay rent, or had it paid any rent for that test
11 bed?

12 A We had not paid any rent, and we had not been
13 requested to pay any rent until I -- to the best of my
14 recollection, until we received this letter.

15 Q And did TechDyn respond to this letter?

16 A We responded by getting out as soon as we could.

17 Q Are there any costs associated with that move?

18 A The costs of tearing down the testbed facility at
19 Carlsbad, and the re-establishing of an operational test bed
20 at the facility that we had rented in Simi Valley, was a
21 cost that we bore as a result of this eviction from the
22 Whittaker facility. And the actual cost of transporting the
23 equipment from Carlsbad to Simi Valley area, which was, the
24 Los Angeles area.

25 Q Do you know whether the subcontract contained a

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1 completion date?

2 A Yes.

3 Q What was that date?

4 A The original completion date was, if I recall, was
5 31 December 1986.

6 Q Was that for the ICCE, the Iceland portion of the
7 subcontract?

8 A That was for the so-called ICCE portion of the
9 subcontract, and there was a Central Air Force, CENTAF
10 portion, which had a completion date of the end of February,
11 1987.

12 Q Mr. Hise, I know that the jury has heard about
13 CENTAF over and over again. I don't think we talked much
14 about it. Can you explain to them what the CENTAF portion
15 of this project was?

16 A The CENTAF Air Force, portion of the contract was
17 a transportable system, as compared to a more fixed system.
18 It was a system that was part of the Central Air Force,
19 which as most of us know, participated in Desert Storm, and
20 some of the other operations. And, so it was a -- the
21 Central Air Force was a mobile tactical unit of the Air
22 Force operating under the tactical air command.

23 Q Mr. Hise, do you know if there was any software
24 development requirement associated with the CENTAF portion
25 of the contract?

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1 A Yes, the software that was being developed was to
2 be utilized in both the ICCE, so-called ICCE system, and
3 the, eventually in the CENTAF.

4 Q But was the software being developed under the
5 CENTAF portion or under the ICCE portion?

6 A It was not being developed the CENTAF portion, it
7 was being developed under the ICCE portion of the contract.

8 Q Do you know what that completion date for the
9 CENTAF portion was?

10 A It was the, I believe, the 28 of February, 1987.

11 Q Was that completion date met by Whittaker?

12 A No, it was not.

13 Q As we sit here today, is the subcontract complete?

14 A The subcontract is not complete.

15 Q Why not?

16 A Well, there is still some very basic areas of the
17 subcontract performance, required performance, that has not
18 been met. One very critical area is that the software for
19 the test, or the support facility at Tyndall Air Force Base,
20 has not been accepted by the Air Force.

21 Q And whose responsibility is it to prepare that?

22 A That was totally the responsibility of Whittaker.

23 Q Mr. Hise, I want to show you a document that has
24 been marked as Plaintiff's Exhibit 1017 for identification.

25 JUDGE BROWN: Is he through with 385 and 394?

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1 MR. BOEHLERT: Yes, he is.

2 JUDGE BROWN: All right, move of those, please.

3 (Pause.)

4 BY MR. BOEHLERT:

5 Q Mr. Hise, I place Plaintiff's Exhibit 1017 in
6 front of you. It is a 5 November 1986 letter from TechDyn
7 to Whittaker. It purports to bear your signature. Do you
8 recognize that document?

9 A Yes, I do.

10 Q What is it?

11 A It's a letter that I prepared on 5 November 1986,
12 to the 4C Corporation, attention of Ms. Raymond. Which was
13 basically a show cause notice, indicating that they had
14 failed to make satisfactory progress under the contract.
15 And this was dated November 1986.

16 MR. BOEHLERT: Your Honor, I move Plaintiff's
17 Exhibit 1017 into evidence.

18 MR. WORK: No objection.

19 JUDGE BROWN: Plaintiff's Exhibit 1017 is
20 received.

21 (The document referred to, having
22 been previously marked for
23 identification as Plaintiff's
24 Exhibit 1017, was received in
25 evidence.)

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1 BY MR. BOEHLERT:

2 Q Mr. Hise, would you please read the first
3 paragraph for us? If I might, before you do that, the date
4 of this letter is --

5 A Five November 1986.

6 Q And the, at this time, the schedule date for
7 overall, or the subcontract date for overall completion was
8 what?

9 A The --

10 Q On the ICCE portion.

11 A On the ICCE portion was 31 December 1986.

12 Q Okay, thank you. Would you please read the first
13 paragraph?

14 A "Since Command Control and Communications
15 Corporation has failed to make satisfactory progress under
16 subcontract number 125-S001, within the time required by the
17 terms, TechDyn Systems Corporation is considering
18 terminating the subcontract under the conditions of default
19 of this subcontract. Pending a final decision in this
20 matter, it will be necessary to determine whether your
21 failure to perform arose from causes beyond your control,
22 and without fault or negligence on your part. Accordingly,
23 you are given the opportunity to present, in writing, any
24 facts baring on the question to the undersigned, within ten
25 days after receipt of this notice. Your failure to present

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1 any excuses within this time, may be considered as an
2 admission that none exist.

3 Your attention is invited to the respective right
4 of the subcontractor and TechDyn Systems Corporation and
5 the liabilities that may be invoked if a decision is made to
6 terminate for default."

7 Q Did TechDyn default terminate Whittaker at this
8 time?

9 A They did not default terminate Whittaker at that
10 time.

11 Q Why not?

12 A The main reason that we did not default terminate
13 Whittaker was the fact that in consultation with the
14 contracting officer at both the SBA and at the Air Force, we
15 were told that if we defaulted --

16 MR. WORK: Objection. We were told --

17 JUDGE BROWN: Sustain the objection.

18 MR. BOEHLERT: I am not offering it for the proof
19 of what he was told, but what TechDyn did.

20 JUDGE BROWN: Well, then ask him what TechDyn did.

21 MR. BOEHLERT: What did TechDyn do and why?

22 THE WITNESS: Well, we did not terminate Whittaker
23 and the why is that had we terminated Whittaker, we would
24 have been in default of our prime contract, which
25 specifically had directed us to use Whittaker in the

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1 performance of the PDFA potion of the contract.

2 BY MR. BOEHLERT:

3 Q Could you read the second paragraph of this
4 letter, please?

5 A "Any assistance given to you on this contract, or
6 any acceptance by TechDyn Systems Corporation, of delinquent
7 goods or services, will be solely for the purpose of
8 mitigating damages and it is not the intention of TechDyn
9 Systems Corporation to condone any delinquency, or waive any
10 rights that TechDyn Systems Corporation has under the
11 contract."

12 Q What did you mean by that?

13 A We basically were putting Whittaker on notice that
14 regardless of whether we terminated for default, or didn't,
15 that we were not waiving any of our rights for
16 nonperformance.

17 Q Has Whittaker's performance on the subcontract had
18 any impact on TechDyn?

19 A Yes.

20 Q What way?

21 A Well, it has increased the cost of our performance
22 under this project.

23 Q Have you been able to assess those costs?

24 MR. WORK: Objection. Strike that, Your Honor.

25 MR. BOEHLERT: Have you been able to assess --

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1 THE WITNESS: Yes, I have.

2 BY MR. BOEHLERT:

3 Q How did you do that?

4 A We had gone through the financial records of the
5 company, virtually every document that relates to this
6 contract. We've looked at the schedules and the periods of
7 delay that were being incurred. And have come up with our
8 assessment of the damage impact, against the Corporation.

9 MR. WORK: Your Honor, I would like to approach
10 the bench, please.

11 JUDGE BROWN: All right.

12 (Bench conference.)

13 JUDGE BROWN: Are we done with --

14 MR. BOEHLERT: Yes, sir.

15 JUDGE BROWN: What is that?

16 MR. BOEHLERT: That is 1017.

17 JUDGE BROWN: Okay, we are done with that.

18 MR. BOEHLERT: Yes.

19 (Pause.)

20 BY MR. BOEHLERT:

21 Q Mr. Hise, you said that you, that TechDyn has
22 computed its costs associated with --

23 MR. WORK: Objection, he does not have to repeat
24 what he said.

25 JUDGE BROWN: Just ask the next question.

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1 MR. BOEHLERT: How did TechDyn compute those
2 costs?

3 THE WITNESS: As I was beginning to state, we
4 reviewed all the costs documents that relate to the ICCE
5 program. We --

6 BY MR. BOEHLERT:

7 Q Who was involved in that process?

8 A I was involved. My accounting staff was involved.
9 And we utilized the assistance of Scott Gray, who is with a
10 company called Barrington. He is a cost specialist.

11 Q What did you do to accumulate those costs?

12 A We took, as I said, all the documents that relate
13 to the ICCE program, we took those and then did analysis of
14 those costs that we felt were attributable to the delay that
15 had been caused to TechDyn by the subcontractor on this job.

16 Q What materials were reviewed, Mr. Hise? t

17 A Specifically, we reviewed all of the time sheets.
18 We reviewed all of the labor distribution reports that
19 result from the week, or the bi-weekly time sheets. We
20 reviewed all of the travel vouchers. We reviewed all of the
21 direct expenditure documents, invoices, the subcontract
22 payments, the material costs. We virtually looked at
23 hundreds and hundreds of documents, and the accounting files
24 that relate to this contract.

25 MR. WORK: Objection, and move to strike, Your

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1 Honor. All of, many of those documents, as Your Honor
2 knows, were requested but not produced on discovery, such as
3 time sheets, travel vouchers, and many of the other
4 documents that he mentioned. I think there should be no
5 testimony on that.

6 MR. BOEHLERT: As you know --

7 JUDGE BROWN: It has been previously ruled upon,
8 and you are preserving your point. I overrule it, as
9 previously done.

10 MR. BOEHLERT: For purposes of the record, Your
11 Honor, I would like it to be clear that after a lengthy
12 discussion, that motion was denied.

13 JUDGE BROWN: Well, there is no point in making a
14 point. The record is clear what has happened here.

15 MR. BOEHLERT: What else was reviewed, Mr. Hise?

16 THE WITNESS: We reviewed the, all of the, what I
17 would call the basic detailed accounting documents that I
18 had referred to earlier that we kept in the course of our
19 accounting operations that relate to this contract. We
20 reviewed the ledgers from the inception of this contract as
21 relate to the ICCE program --

22 BY MR. BOEHLERT:

23 Q What do you mean ledgers?

24 A As I indicated earlier, there is prepared each
25 month, a ledger as pertaining to this contract and

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1 incorporated in that is, are all the costs that have been
2 collected during that month, and shows then also a
3 cumulative cost status of that project.

4 Q Would that be referred to as a general ledger of
5 the company?

6 A It would be referred to as a general ledger, yes.

7 Q Okay. Any other documents reviewed?

8 A We reviewed the indirect costs that have been
9 incurred over the period of the performance of this
10 contract. In assessing our damages, we looked at the
11 business that -- the proposals that were being submitted
12 during that time. We looked at --

13 Q Why did you do that?

14 A We looked at that because there was a direct
15 impact on the business that we were able to obtain as a
16 result of our key people not being available to pursue the
17 marketing effort.

18 MR. WORK: Objection, and move to strike the
19 reference to those business proposals. They were asked for
20 and not produced in discovery.

21 JUDGE BROWN: Overruled.

22 (Continued on next page.)

23

24

25

WILLIAM C. HISE - DIRECT EXAMINATION

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1 BY MR. BOEHLERT:

2 Q What else did you review, Mr. Hise?

3 A We reviewed the schedule, the performance
4 schedules that were prepared over time. We looked at the
5 price -- cost status report which was prepared on a
6 repetitive basis on this contract.

7 Q For what purpose?

8 A The purpose of that was -- that was a report that
9 was required by the prime contract which was a management
10 tool. It established for TechDyn a budget on this contract
11 from day one and it was used as a budget and a projection of
12 the costs that would be incurred as we went along. TechDyn
13 had other budget documents but this was one that had been
14 directed by the Government under the contract so we used it
15 as the primary tool for managing the contract.

16 Q Any other documents reviewed?

17 A We reviewed virtually every document that relates
18 to this contract. It was a very exhaustive time -- task of
19 going back and looking and determining what had happened as
20 relates to the non-performance of the directed
21 subcontractor.

22 Q Were you able to reach any conclusions regarding
23 TechDyn's damages as a result of that review?

24 A Yes, we were.

25 Q And were those conclusions reduced to writing?

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1 A Yes, they have been.

2 JUDGE BROWN: Before we get to that, so that I
3 don't interrupt it, let's take our morning recess now.
4 We'll take 15 minutes and then we'll get to that later.

5 (Brief recess.)

6 BAILIFF: Remain seated and come to order.

7 JUDGE BROWN: Okay. Bring them in.

8 (Pause while jury is seated.)

9 JUDGE BROWN: Okay. We're ready to go -- oh,
10 we're not ready to go. We're almost ready to go.

11 (Pause.)

12 BY MR. BOEHLERT:

13 Q Were the conclusions you reached regarding damages
14 reduced to writing?

15 A Yes, they have been.

16 Q Mr. Hise, I place in front of you a document -- a
17 group of documents that have been previously marked as
18 Plaintiff's Exhibits 950 through 987 and also Exhibit 912.
19 And I ask you to look at those documents and tell me if you
20 can identify them.

21 (Pause.)

22 A Yes, I can.

23 Q Did you participate in the preparation of these
24 documents?

25 A Yes, I did.

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1 Q What was your participation?

2 A My participation was working directly with the
3 accounting staff in preparing the documents that are here
4 and with -- again, as I indicated -- with the assistance of
5 the cost specialists from Barrington Associates.

6 Q Who directed the preparation of these documents?

7 A I directed the preparation of these documents.

8 Q And were you involved in that process?

9 A Yes, I was. Very much so.

10 Q And do these documents constitute summaries of
11 other information?

12 A In most -- yes. I would say the answer to that is
13 yes.

14 Q And the information that's being summarized -- are
15 those records that are regularly maintained by TechDyn in
16 the ordinary course of business?

17 A Yes.

18 Q And, again, are those the documents that you
19 previously mentioned when you were describing what were
20 reviewed?

21 A They are those same documents.

22 Q Are those voluminous documents?

23 A They are very voluminous.

24 Q In fact, would they fill more than a bookcase or
25 more than a file cabinet?

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1 A As an example, when we were waiting for the
2 counsel for Whittaker to come and review these documents, we
3 laid out the expense reports alone in one room, a vacant
4 room that we had, and that room was probably 10 by 30 and
5 they were in stacks -- they covered the entire floor. The
6 time sheets were of equal volume. The invoices that were
7 paid over the period of performance on this contract would
8 be file cabinets full. So there were just a lot of records.

9 Q And what was the purpose of these documents that
10 sit in front of you now, Plaintiff's Exhibit 950 through
11 987?

12 A The purpose was to take the pertinent documents
13 from those voluminous records that I indicated and condense
14 them down to the ones that were selected or used in coming
15 up with our damage analysis.

16 Q And do these documents truly and accurately
17 reflect the information contained in those source documents?

18 A They truly reflect the information in those
19 documents. To the extent that they're listed here on the
20 documents in this notebook, they are accurate to the last
21 degree.

22 MR. BOEHLERT: Your Honor, I move Plaintiff's
23 Exhibits 950 through 987 into evidence.

24 JUDGE BROWN: Any objection to 950 to 987?

25 MR. WORK: Objection to all of them, Your Honor.

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1287

1 They're either records that weren't produced in the course
2 of discovery or summaries of those records.

3 Your Honor has ruled on that but I am reserving my
4 position on it.

5 JUDGE BROWN: Okay. Then they are received -- 950
6 through 987?

7 MR. BOEHLERT: Yes, sir.

8 (The documents referred to, having
9 been previously marked for
10 identification as Plaintiff's
11 Exhibits 950 through 987, were
12 received in evidence.)

13 BY MR. BOEHLERT:

14 Q And I'd also like you to look at the very last
15 document there and it's 912 as well. Do you recognize that
16 document?

17 A Yes, I do.

18 Q And was that document prepared at your direction?

19 A Yes, it was.

20 MR. BOEHLERT: I also move Plaintiff's Exhibit 912
21 into evidence.

22 JUDGE BROWN: Any objection to 912?

23 MR. WORK: Same objection, Your Honor.

24 JUDGE BROWN: Same ruling. It's admitted over
25 objection.

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1 (The document referred to, having
2 been previously marked for
3 identification as Plaintiff's
4 Exhibit 912, was received in
5 evidence.)

6 MR. BOEHLERT: Your Honor, at this time I'd like
7 to now publish this evidence to the jury if I may, please.

8 JUDGE BROWN: All right. Show Mr. Work what you
9 have so he knows what you're --

10 MR. BOEHLERT: I have provided him a copy of it,
11 sir.

12 JUDGE BROWN: Well, if he's satisfied that that's
13 what's in that book, I guess --

14 MR. BOEHLERT: Okay.

15 MR. WORK: What are you going to show them?

16 MR. BOEHLERT: I'm going to show them an identical
17 copy of what I've provided you already -- Exhibits 950
18 through 987 and Exhibit 912. You're certainly welcome to
19 inspect the books.

20 MR. WORK: Well, I'll take your word for it if
21 that's what you say it is.

22 MR. BOEHLERT: That's what it is.

23 (Pause.)

24 MR. BOEHLERT: Mr. Hise and ladies and gentlemen,
25 what I'm going to be doing is these documents are numbered

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1 down in the bottom right-hand corner. Not every page has a
2 page number but the exhibits are independently numbered so
3 if I'm talking about 950 or 951, and I'll probably be
4 referring to them pretty much like pages in a book -- would
5 you turn to page 951 or Exhibit 951. And if you would
6 follow along with me, I'd appreciate it.

7 If you have any questions or you get lost in this
8 process, please let me know or the judge know. The purpose
9 of those is to help you not to hinder you looking through
10 paper.

11 BY MR. BOEHLERT:

12 Q Mr. Hise, looking at Plaintiff's Exhibit 950, it
13 says summary of damages. Do you recognize this document?

14 A Yes, I do.

15 Q And what is it?

16 A It is a summary of the four categories that we
17 have collected the damages against -- used in collecting the
18 damages as a result from Whittaker non-performance.

19 Q The first category of damages there -- PDFA
20 damages -- claim amount -- \$3,240,611.

21 A Yes.

22 Q What does that refer to? What are PDFA damages?

23 A These are the damages that result from the
24 non-performance of the processing display functional area of
25 the subcontract with Whittaker.

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1 Q And are those damages further defined?

2 A Yes, they are.

3 Q Would you turn to -- please turn to page 951 or
4 Exhibit 951.

5 A Yes.

6 Q The next page. At the very top, it says summary
7 of Whittaker caused PDFA damages. Do you recognize this
8 document?

9 A Yes, I do.

10 Q Now, on the left-hand side, it says description
11 and below it there are four entries: delay, excess
12 overhead, relocation of test beds, replacement of keyboard
13 and printer. Do you recognize those items?

14 A Yes, I do. Those are the four subcategories of
15 the damages that relate to the processing display functional
16 area.

17 Q Let's take them one by one if we might, please,
18 and I'd like you to explain to us how you computed the
19 amount being demanded.

20 Let's take delay first. What does delay mean?

21 A Delay means the extension of the program, the
22 delay in meeting the required contract delivery dates and
23 it's the damages in this case that result from that extended
24 delay.

25 Q And have you been able to quantify that delay?

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1291

1 A Yes.

2 Q And would you turn to page 952, please?

3 A Yes.

4 Q On this document, it says delay damages per day
5 and there's \$2,068 and delay days attributable to Whittaker
6 and there's 1243. What does the 1243 represent?

7 A Okay. The 1243 are the days that we feel that
8 Whittaker is totally responsible for as a result of their
9 non-performance.

10 Q How did you arrive at the number 1243 days?

11 A Okay. You take the start date of the contract and
12 go to the end. There are a certain number of days. What we
13 did is take the performance period of the basic contract,
14 including CENTAF, which would have been through February of
15 1987, and we further subtracted from the total number of
16 days during the period from the inception of the contract to
17 the end of the contract -- or, not to the end of the
18 contract but through the date that these were prepared,
19 which was in May of 1991 -- and we further took out of there
20 9.75 months.

21 Q Why did you do that?

22 A In MOD 36 to our contract, as a result of the
23 request for equitable adjustment that we had made to the Air
24 Force, they indicated to us or led us to believe that there
25 was -- they were recognizing that Whittaker had caused 9.75

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1 months of delay to this contract. And in order not to
2 duplicate --

3 MR. WORK: Objection, Your Honor. There's no
4 foundation for what the Air Force did. Unless he wants to
5 pull out a document and show us that, that's just absolutely
6 improper evidence.

7 JUDGE BROWN: I sustain the objection to stating
8 that the Air Force believed that Whittaker caused delay and
9 ask the jury to disregard that. However, he may state why
10 he took out the 9.75 months without reference to what
11 somebody else said the cause was.

12 BY MR. BOEHLERT:

13 Q And why was that taken out?

14 A That was taken out because in the modification
15 that was issued by the Air Force, as a result of the
16 negotiations of that modification, it was our belief that
17 there was included in those dollars the costs associated
18 with 9.75 months of delay.

19 Q Are any of those dollars being demanded in this
20 lawsuit at all?

21 A Absolutely not. There are no costs that were
22 obtained from that modification included in the current
23 assessment of our damages.

24 Q The top number on this page 952, delay damages per
25 day, \$2068 --

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1293

1 A Yes.

2 Q Did you participate in the computation of that
3 number?

4 A I did.

5 Q And does Exhibit 953 explain how that number was
6 arrived at?

7 MR. WORK: Objection, Your Honor. That's leading.

8

9 BY MR. BOEHLERT:

10 Q What does Exhibit 953 show?

11 A Okay. Exhibit 953 is the manner in which we
12 arrived at the \$2068 per day of damages. And that was done
13 by taking the -- by identifying, I should say, the time
14 related costs, those costs that were being incurred on this
15 program for categories like the project manager, the systems
16 engineer, the logistics person -- people who because of the
17 delay had to stay on the program during the time that this
18 delay was being incurred. Those costs were identified
19 during the entire period of the performance on this
20 contract. From that total, we deducted certain costs that
21 we felt had been added or covered by other modifications, et
22 cetera, namely, those costs that were in the original
23 contract obviously should not be in any delay claim. Those
24 were taken out. Those amounted to \$1,352,617.

25 Q What's the next entry?

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1 A The next entry is those that I had referred to
2 earlier as being the time-related costs associated with the
3 settlement of MOD 36 for the Air Force, \$733,079. There
4 were certain time related costs in other contract
5 modifications. Those totalled \$579,923. There were certain
6 time related costs that we have included in the remote
7 control element reprourement dollars so we have taken those
8 out of the delay portion of this damage assessment.

9 Q Why were they taken out of this portion?

10 A Because to leave them in there would actually be a
11 duplication. And by taking them out, there is no
12 duplication.

13 (Continued on next page.)

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1295

1 Q The next line says time related costs attributable
2 to Whittaker delay.

3 A Right. And so when you take those four categories
4 out of the total dollars that we had worked us as being
5 associated with the time related costs, and it was labor and
6 certain travel costs, et cetera -- when you do that, you end
7 up with \$2,315,153 attributable to Whittaker's delay. You
8 divide that by the number of days that I testified to
9 earlier that we feel are attributable to Whittaker which is
10 \$1243. You come down with a delay cost per day through
11 profit of \$2068 per day.

12 Q It says profit at 11 percent. How was that number
13 arrived at?

14 A The profit on this job was negotiated initially at
15 11 percent and 11 percent has been the percent of profit
16 that has been -- I think almost without exception for all of
17 the MODs that have been negotiated.

18 Q The final line on this page, 953, states delay
19 damages per day \$2068 per day.

20 A Yes.

21 Q What does that mean?

22 A That means for each day of delay that Whittaker
23 caused us, we were ending up with \$2068 additional costs
24 that was not covered in our contract.

25 Q Mr. Hise, I'd like you to please turn back to

WILLIAM C. HISE - DIRECT EXAMINATION

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1 exhibit page number 951. And you've explained that number
2 in the delay column \$2,570,524. Just to the right of that,
3 there's a column captioned interest \$349,224. What is that
4 referencing?

5 A That is the amount that we feel would be the
6 appropriate interest on that money as a result of not having
7 it. And that's been computed at 10 percent per year not
8 compounded but just a straight 10 percent which is below the
9 average that we over time have paid in borrowing money to
10 run this contract.

11 Q Turning to exhibit page number 979, please, what
12 does that page show?

13 A That is the manner in which we computed the total
14 of \$349,224 of interest.

15 Q Mr. Hise, I'm going to refer you back again to
16 page 951. And, again, this is the summary of Whittaker
17 caused PDFA damages.

18 A Yes.

19 Q And I'm going to come down to the next line item,
20 please, which says excess overhead -- \$262,409. What does
21 that mean, excess overhead?

22 A When we entered into this contract, we entered
23 into it on the basis of an indirect overhead rate based on a
24 certain level of performance, of direct labor within the
25 company.

1 Q What does that mean, a certain indirect overhead
2 rate? Let's explain that to the jury if we could, please.

3 A The indirect costs of a company are those costs
4 that are established in a pool and I think I testified
5 earlier that there is a separate ledger within the company
6 that we keep those costs and those costs are not
7 specifically identifiable to a particular contract but they
8 are costs that support all of the contract and they are
9 allocated based on the direct labor that's being incurred on
10 each of the individual contracts. So to the extent that
11 those costs --

12 Q May I refer your attention, please, Mr. Hise, to
13 page 970?

14 A Yes.

15 Q Do you recognize that document?

16 A Yes.

17 Q What is it?

18 A This is a compilation of the indirect costs for
19 the years 1986 through 1990.

20 Q So if we look at the column on the left-hand side,
21 it says account -- there's a number and then description
22 below that. Are those the costs that you were just
23 describing?

24 A Those are exactly the costs that I was describing.
25 They are those costs that it would not be practical to try

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1 to allocate as you are incurring those costs to a particular
2 contract. You put them in a pool and then they're allocated
3 based on the direct labor that's performed on that contract.

4 Q Okay. If we can go back to your explanation,
5 please. You were on page 951 and you were explaining to us
6 how you arrived at the number \$262,409 for excess overhead.

7 A Yes.

8 Q How did you do that?

9 A Well, okay. Certain indirect costs remained
10 fixed. In there is rent, there are utilities -- there are
11 those kinds of things in the indirect pool which stay pretty
12 much the same even though your base of business or your
13 contracts that you normally would be performing on gets
14 reduced. And during this period because of the problems of
15 this subcontract with Whittaker, we were not able to
16 maintain the volume of the labor base that we had projected
17 at the time we negotiated the contract.

18 Q At the time the contract was negotiated, what were
19 TechDyn's overhead rates?

20 A Our overhead rate at the time that we negotiated
21 this was approximately 108 percent.

22 Q And did that change?

23 A That changed and the rate over the period of this
24 performance was roughly 130 percent.

25 Q And is it compensation for that difference that's

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1299

1 being demanded there?

2 A That is correct.

3 Q The next item, going back to page 951, please,
4 summary of Whittaker caused PDFA damages, is relocation of
5 test beds.

6 A Those are the costs that we've determined were
7 directly associated with the matter of the two relocations
8 of the test bed. One, if you recall I indicated it was from
9 Torrance, California down to Carlsbad and then there came a
10 point in time when we were told to get out of the Carlsbad
11 facility and we moved to a rented facility that we obtained
12 from another contractor in Simi Valley. So those costs
13 associated with dismantling the test bed, reestablishing the
14 test bed, moving the equipment are the costs that we have
15 put against that item of damage.

16 Q And you've assessed that damage at \$48,742.

17 A Correct.

18 Q Would you please turn to Exhibit 973? What does
19 Exhibit 973 show?

20 A Exhibit 973 breaks down the \$48,742. It breaks it
21 down into direct labor, the overhead, the travel, the
22 subcontract, the consultants -- those items of cost that
23 were directly associated with those relocations.

24 Q And are those costs further explained in Exhibits
25 975 and 976?

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1300

1 A Yes. What we did in order to be as accurate as we
2 could was to go back -- this was something that happened
3 previously so we could go back to the cost records, the
4 labor records and travel -- particularly the travel and the
5 labor records and identify specifically the individuals that
6 worked in that test bed that would have been involved in the
7 relocation and that's the way we arrived at the costs
8 associated with that relocation.

9 Q Mr. Hise, I'm still looking at page 973 and I see
10 an entry there for general and administrative, \$345,000.
11 What is that referring to?

12 A General and administrative expense is a level or
13 category of expense which is somewhat corporate wide or it's
14 costs that cannot be associated directly with a particular
15 functional operation of the company such as a facility that
16 you're running a contract out of but is corporate wide.

17 Q Are these costs different than the other indirect
18 costs you mentioned?

19 A It's a separate collection of the costs. Many of
20 the same types of costs would apply but to different people.
21 If you've got a cost for health insurance, then that would
22 apply to the individuals that are in that particular cost
23 center and in the case of TechDyn, we have certain personnel
24 like Mr. Morrison and myself that are in this G&A category
25 because the functions that we do within the company are

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1301

1 company wide in many cases.

2 Q When you refer to G&A you're referring to what?

3 A General and administrative expense.

4 Q Would you turn, please, to page 972 or Exhibit
5 972? Do you recognize this document?

6 A Yes.

7 Q What is it?

8 A This is a summation of the general and
9 administrative expense for fiscal years 1986 through 1990 as
10 are recorded on the records of the company, the financial
11 records of the company.

12 Q And under the description on this, on the
13 left-hand side of the page, does that describe the
14 categories of costs that are placed in the general and
15 administrative account?

16 A Yes, it does.

17 Q I'd like to take you back, please, to Exhibit 951.
18 The last item there is replacement of keyboard and printer,
19 \$1687. Why did you select that?

20 A Well, as I testified to earlier, there was an
21 occasion where we had to buy a keyboard and a printer to
22 repair the PDFA equipment that was in Iceland. When
23 Whittaker had refused to provide that to us under what we
24 considered was a requirement under their subcontract, we
25 purchased it from another vendor and that's the cost

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1302

1 associated with that purchase.

2 Q Would you please turn to Exhibit 977? Do you
3 recognize this document?

4 A Yes.

5 Q What is it?

6 A That is the cost of the Whisper Writer printer and
7 the keyboard, which totaled \$1381. There was the
8 application of the general and administrative cost against
9 that purchase and a profit of \$167 for a total of \$1687.

10 Q And if you'd look at Exhibit 978.

11 A The two pages of Exhibit 978 are the actual
12 purchase orders that were issued to the vendors who provided
13 the two items of equipment.

14 Q Going back to page 951, Exhibit 951, please --

15 A Yes.

16 Q I see in the interest column there there are the
17 numbers \$7856 and \$169, respectively, next to the relocation
18 of test beds and replacement of keyboard and printer.

19 A Yes.

20 Q And what do those represent?

21 A Those represent, again, the interest cost that we
22 associated with not having that money available.

23 Q Still looking at this page, if I read the second
24 column over, it says claim amount before interest
25 \$2,883,362. What's that referring to?

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1303

1 A That refers to the PDFA damages prior to the
2 application of any interest charge against it.

3 Q And if interest is applied to it, what is the
4 number?

5 A Then the number becomes \$3,240,611.

6 Q Mr. Hise, I'd like to take you back, please, to
7 Exhibit 950.

8 A Yes.

9 Q The next entry on this page is \$569,031.

10 A Yes.

11 Q What is that referring to?

12 A Those are the damages that we have determined were
13 caused to TechDyn as a result of Whittaker's non-performance
14 of the remote control element requirement of their
15 subcontract.

16 Q Would you turn to exhibit page 982, please?

17 MR. BOEHLERT: Would you like a copy of this,
18 Judge? I'm sorry.

19 JUDGE BROWN: Not really.

20 MR. BOEHLERT: Okay. I'm sorry. I think everyone
21 else got one.

22 JUDGE BROWN: The important people have a copy.

23 (Pause.)

24 BY MR. BOEHLERT:

25 Q Exhibit 982, Mr. Hise? What does this show?

WILLIAM C. HISE - DIRECT EXAMINATION

1304

1 A That shows the elements of cost that we used in
2 arriving at the total damage amount of \$569,031.

3 Q I'd like to just go down this column if I might,
4 please, and ask you direct labor on site -- what does that
5 mean?

6 A Okay. That means the labor of the personnel at
7 TechDyn that were directly associated with the failure of
8 the subcontractor to perform on this particular item of the
9 subcontract and it includes the pre-termination costs that
10 were incurred in arriving the decision to terminate and the
11 actual reprourement costs that TechDyn incurred in going
12 out to a different vendor.

13 Q What is shown on page 983, Exhibit 983?

14 A 983 is a specific estimate of what those hours
15 were for performing the function that I've just indicated.

16 Q And I see direct labor, consultants?

17 A Consultants is a category of labor in the sense
18 that we, as many other companies, bring a consultant onboard
19 for short periods of time to do various functions. It's
20 basically a labor category that's used in performing our
21 work.

22 Q The next entry is on-site overhead, \$88,533. What
23 is that referring to?

24 A What page is that on?

25 Q I'm on Exhibit 982.

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1305

1 A Well, that is the application of the overhead that
2 was incurred during the time in which these costs were
3 being -- the direct labor costs were being incurred.

4 Q The next item is travel, \$5,498.

5 A That was the travel that was required by the
6 individuals that we would have identified here. We have
7 identified them by category but there would have been names
8 there.

9 Q Would you please turn to Exhibit 984?

10 A Well, yes -- 984 -- let me see if I have that.
11 Okay.

12 Q Does that show the travel costs?

13 A Yes, it does. And by name. These costs were
14 pulled directly from the expense reports of these
15 individuals which are part of the accounting records of the
16 company.

17 Q And going back to page 982, please? The next item
18 is consultants.

19 A The consultants were those individuals that we
20 were hiring as consultants at the company at that period in
21 time.

22 Q And otherwise described on 983?

23 A Those are explained on Exhibit 983 to the extent
24 of category of consultant, yes.

25 Q The next item, \$183,703 under subcontracts.

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1306

1 A Yes.

2 Q What is that referring to?

3 A As a result of the requirement to go to another
4 vendor to obtain an operational remote control element,
5 there were certain drawing, manual and provisioning
6 requirements that had to be changed from the way they had
7 been planned and the way they had been done up to that
8 point.

9 Q Who was that subcontractor?

10 A That subcontractor was the VEDA Corporation.

11 Q And does Exhibit 985 support that number?

12 A 985 is a letter to VEDA indicating that there was
13 \$140 plus relating to the manual changes and there was
14 roughly \$40,000 for the additional provisioning that had to
15 be accomplished.

16 Q You said \$140. Did you mean --

17 A \$140,000.

18 Q Okay. Is that number here? I think it's hard to
19 read.

20 A Well, I wavered a little bit in my -- it's not
21 very clear. It's \$140,000 plus but I cannot -- but the
22 total from a clearer copy of this document is \$183,703.

23 Q The next item going back to page 982 is materials,
24 \$66,394.

25 A Yes.

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1 Q Where did that number come from?

2 A Those numbers came from the documents that
3 reflected the purchase of the additional material and
4 equipment that was needed to fabricate and to make
5 operational an RCE unit from the Grimm Corporation.

6 Q Is that information described on Exhibit 986?

7 A Yes, it is.

8 Q The next item, other direct costs?

9 A Yes.

10 Q And what is being claimed there?

11 A That's \$2000 that was estimated as additional
12 costs that would be needed -- that were needed or used in
13 the performance of this reprocurment.

14 Q We see a subtotal of \$432,999 then general and
15 administrative, \$33,038.

16 A Yes. For a subtotal of \$466,037 and if you add
17 profit to that effort and interest at the 10 percent that I
18 indicated, it makes for a total of \$569,031.

19 (Continued on the next page.)

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1 Q Mr. Hise, would you please turn to exhibit page
2 950 again?

3 A Yes.

4 Q And that entry there, Alaska and PACAF damages,
5 \$609,002.

6 A Yes.

7 Q How was that arrived at?

8 A Those damages are the dollars that we were denied
9 as a result of the award of the Alaska PACAF to TechDyn and
10 it being awarded to the Whittaker Corporation. And that
11 includes an amount for the profit that would have been on
12 that effort, the overhead that was included in that proposal
13 and the general administrative costs that was included in
14 that proposal.

15 Q If you turn to the very last exhibit in this book,
16 912, would you tell us what that shows?

17 A Well, that shows exactly what I was saying, that
18 the lost profits would have been \$329,429, or was 329,429.
19 And generally administrative expense would have been
20 included in that proposal, and was lost as a result of not
21 getting it. It was \$230,540, and the overhead that was
22 included in that proposal that was lost as a result of not
23 getting it, was \$49,033, for the total of \$609,002.

24 Q Do you know whether TechDyn has also claimed any
25 punitive damages related to that Alaska PACAF work?

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1 A Yes.

2 Q How much?

3 A I don't know the exact figure on the punitive
4 damages. I think it's called out --

5 Q Does \$2 million refresh your recollection?

6 MR. WORK: Objection, Your Honor.

7 JUDGE BROWN: Sustain the objection. The jury
8 will disregard the question.

9 BY MR. WORK:

10 Q The next item, if we go back to exhibit page 950,
11 Mr. Hise, is lost profits. And there is a demand there for
12 \$2,314,338.

13 A Yes.

14 Q Have you participated in the computation of that
15 number?

16 A I have participated with Mr. Chris Ripper of the
17 Barrington Associates, who has arrived at that figure as
18 being the assessment of lost profits.

19 Q And what has your participation been in that
20 process?

21 A I have identified the revenue that we had incurred
22 over the period of the time of this contract and I have also
23 identified certain revenue as it relates tot he ICCE
24 contract.

25 MR. WORK: Your Honor, that number just leaped up

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1 from \$1,365,675 and their latest interrogatory supplement. I
2 object to the increase.

3 MR. BOEHLERT: It didn't leap. It is set forth as
4 that number in the trial exhibits that were marked and
5 submitted to this court.

6 JUDGE BROWN: I overrule the objection.

7 BY MR. BOEHLERT:

8 Q Mr. Hise, I place in front of you a document that
9 has previously been marked as Plaintiff's Exhibit 901 for
10 identification. And I ask if you can identify that document
11 please?

12 A Yes, I can.

13 Q What is it?

14 A This is a chart, graphic chart, line chart,
15 showing the revenue of the company starting in 1979, going
16 through 1990, with an estimate of what the revenue would be
17 in 1991. And that estimate is based on actual through the
18 month of May, financial period through the month of May.

19 Q As chief financial officer for TechDyn, are you
20 familiar with the annual revenues of TechDyn?

21 A Yes.

22 Q And from what documents are you familiar with
23 that?

24 A These, the documents that I am familiar with are
25 the annual certified statements as performed by the

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1 accounting firm that reviews TechDyn's financial records and
2 for the last ten years, has been ARthur Anderson & company.

3 Q And have you participated n those audits?

4 A Very much so.

5 MR. BOEHLERT: Your Honor, I move Plaintiff's
6 Exhibit 901 into evidence.

7 JUDGE BROWN: Any objection to 901?

8 MR. WORK: I would like to know who prepared it.

9 JUDGE BROWN: I have not seen either one, I don't
10 know what it is.

11 MR. BOEHLERT: Who prepared this document, Mr.
12 Hise?

13 THE WITNESS: This, the actual document was
14 prepared jointly with me furnishing the data, and perhaps
15 the lines being drawn by Mr. Chris Ripper of the Barrington
16 Company.

17 MR. BOEHLERT: Your Honor, I move that document
18 into evidence.

19 JUDGE BROWN: Any objection to 901?

20 MR. WORK: I object on relevance grounds, Your
21 Honor.

22 JUDGE BROWN: Let me see it again.

23 (Pause.)

24 MR. BOEHLERT: Your Honor, as a claim for lost
25 profits, the annual revenues of the company over time is a

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1 relevant consideration in this case.

2 MR. WORK: Not given the theory that they have
3 articulated, Your Honor, it's not.

4 JUDGE BROWN: What do you mean given the theory
5 they have articulated?

6 MR. WORK: They've articulated the theory in
7 writing and from Mr. Morrison, that there were five
8 individuals. We talked about them yesterday, and we talked
9 about them with Mr. Morrison, who had not been able to go
10 out and get new business, work on new business. Mr.
11 Morrison confined it to the last --

12 JUDGE BROWN: Take the jury out a minute, this
13 will take a little bit of time, I can see.

14 (Jury excused.)

15 JUDGE BROWN: Okay.

16 MR. WORK: And that as a result, they lost
17 revenues. So, what they are doing, Your Honor, is not
18 projecting the company. But they are projecting the earning
19 power of these five individuals, Mr. Morrison said had never
20 given them a dime's worth of business for this company.
21 What the company had done is totally irrelevant to that
22 theory.

23 We have tried to pin down the theory. I think we
24 have pinned down the theory. It is in their expert's
25 written materials, and Mr. Morrison stated what the theory

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1 is the other day. Is the revenues of the company, are
2 irrelevant, totally irrelevant under that theory. It is
3 simply a question of how much money these individuals, who
4 had never gotten a dime for this company, could have brought
5 in, in marketing activities.

6 MR. BOEHLERT: Your Honor, the theory of the lost
7 profits has not been identified to individuals at all. What
8 it has been is the impact on the company. The company had a
9 growth pattern. Then what happens with the ICCE program,
10 and the delays, there is a diversion of the technical
11 ability of the categories of people there, technicians,
12 engineers, project managers, company presidents, in order to
13 participate in proposal efforts --

14 JUDGE BROWN: So that the whole change in the
15 profitability of the company, you are laying at the feet of
16 Whittaker?

17 MR. BOEHLERT: Yes, Your Honor.

18 JUDGE BROWN: What evidence supports that? That
19 is, do you think the evidence so far presented supports
20 that. Or is there something that you are going to present
21 later that supports that theory?

22 MR. BOEHLERT: This is relevant evidence, this is
23 part of it. This is the revenues of the company.

24 JUDGE BROWN: Well, of course -- I understand
25 that. But do you think that you have so far presented the

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1 evidence that you are going to need to present on what will
2 be called the liability aspect of it. That is, of course,
3 if you have presented sufficient evidence to lay at the feet
4 of Whittaker all of the change in profitability of the
5 company, then of course, it would be relevant. So, what I
6 am asking you is, are we at the point where you have
7 presented all you are going to present, except now telling
8 me what the figures are?

9 MR. BOEHLERT: That is correct, Your Honor, prima
10 facie case is in.

11 JUDGE BROWN: You think you have made a case that
12 the change in the profitability of the company, not a
13 particular lost contract, but the change in the general
14 overall picture of the profitability of the company, can be
15 laid to the delay that you think you have proven on the part
16 of Whittaker?

17 MR. BOEHLERT: Delay and, yes, diversion of
18 responsibility.

19 JUDGE BROWN: Delay and diversion of
20 responsibility.

21 MR. BOEHLERT: Yes.

22 JUDGE BROWN: Okay, do you want to say anything
23 about that?

24 MR. BOEHLERT: I am sorry, I don't understand what
25 you mean.

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1 JUDGE BROWN: Do you want to tell me what you
2 think proves that all of the change in the profitability of
3 the company, is due to diversion and delay, diversion of
4 resources and delay, yes, the delay really isn't so much
5 related. It's more diversion of resources. That was due to
6 Whittaker's nonperformance, or failure to perform, or --

7 MR. BOEHLERT: What the testimony has shown is
8 that this company, from its inception, had a marketing plan.
9 It has been testified that it is a small company that uses
10 qualified people to do its work. And that there is an
11 established method of marketing that involves request for
12 proposal routing sheets, what have you, that go through the
13 company.

14 In order to obtain new projects, it is essential
15 that first of all, people be available to prepare those
16 proposal, which Mr. Roundtree testified to yesterday and Mr.
17 Morrison testified to. Often they were not. AND
18 opportunities had to be foregone. On other occasions, which
19 were specifically identified, Mr. Roundtree, I believe Mr.
20 Morrison has testified, that on those occasions, the
21 proposals were deemed to be technically insufficient.

22 Mr. Roundtree said the reason they were
23 technically insufficient was that the competition people
24 that TechDyn had were not available to participate. Now,
25 the suggestion was made, well, why didn't you go out and

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1 hire a consultant. And the answer was, we don't do business
2 that way.

3 Your Honor, the very direct impact that these
4 competent people that otherwise would have participated in a
5 proposal and would have had the technical ability to do the
6 work, and be proposed as an engagement team, were unable to
7 do it, because as Mr. Roundtree said, they were on the ICCE
8 program. And but for the delays, they certainly would not
9 have been on the ICCE program. They would have been freed
10 up to do the work.

11 JUDGE BROWN: I want to be absolutely certain that
12 I understand your position. Is your position that you can
13 recover as damages in this case, a loss of profitability, or
14 a change in the profitability picture of the company,
15 because, in general, and some specifics that you have
16 presented so far, individuals were diverted from their usual
17 pattern of activity. As opposed to telling me that you lost
18 the Canadian telephone business because people weren't able
19 to do it.

20 MR. BOEHLERT: Okay, what we are doing is, we are
21 showing a growth pattern, and an ability of the company to
22 do work, and do it profitability, up through the period that
23 the stagnation of the ICCE program occurs, at which time it
24 either levels off or declines.

25 JUDGE BROWN: And have I heard everything that you

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1 want to say about that?

2 MR. RIDDLES: Your Honor, I believe also that
3 Exhibit 506 is in evidence, which indicates jobs that were
4 actually bid and denied.

5 JUDGE BROWN: Yes.

6 MR. RIDDLES: And also there is the testimony of
7 Mr. Roundtree, that there were jobs that they did not bid,
8 but they would have bid, because of the lack of personnel to
9 help them in preparation proposals and in the evaluation
10 proposals and the submission of those proposals.

11 With those predicate facts, it creates a
12 reasonable inference, I think, that the ICCE program was an
13 impact on the profitability of the company. The growth
14 rates, Your Honor, for the five years preceding the ICCE
15 program are 39 percent. I think the actual figure is 38.6
16 percent, per year. And then after the ICCE program is
17 entered into, they begin to decline. So --

18 JUDGE BROWN: As in Exhibit 901?

19 MR. BOEHLERT: Yes.

20 MR. RIDDLES: Yes, sir. There will be adjustments
21 to that exhibit to further clarify that. Mr. Ripper can
22 clarify that. And I think to the degree that Mr. Hise can,
23 as well. So, but the combination of those effects seems to
24 me to create a question of fact for the jury, that they can
25 determine, in determining whether or not there has been lost

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1 profits. And then, on the entitlement side of it. And then
2 through Mr. Hise and through Mr. Ripper, the quantum can be
3 established otherwise.

4 JUDGE BROWN: I sustain the objection to the
5 exhibit 901, and further rule that to the extent that jobs
6 for specific contracts are identified as having been loss
7 due to the delay and the concomitant diversion of resources
8 of TechDyn personnel, that may be an appropriate measure of
9 damages. It is not an appropriate measure of damages and is
10 now stricken that the company generally did not follow its
11 pattern of profitability. That is too speculative and not
12 founded in the evidence that I have heard. And what I have
13 heard is, is that I have heard all of the evidence that is
14 grounded, and that all I need to hear now is how it
15 happened. That is, what the profitability picture was
16 before the change. And I rule that is not a proper measure
17 of damages and will not be considered.

18 So, we can bring the jury back in and continue.
19 And your exception is noted.

20 (Pause while jury is seated.)

21 MR. BOEHLERT: Mr. Hise, I place in front of you a
22 document marked as Plaintiff's Exhibit 574 for
23 identification.

24 JUDGE BROWN: Are we through with the book that
25 has 950 and 987, for the moment?

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1 MR. BOEHLERT: Yes, we are, sir.

2 JUDGE BROWN: All right. If I could have that,
3 mark that in, and also 912.

4 MR. BOEHLERT: That's right in the back of that.

5 JUDGE BROWN: Okay, oh, I see.

6 MR. BOEHLERT: Do you have 574, Mr. Hise, by
7 chance?

8 THE WITNESS: I don't know what it is. I
9 apologize.

10 MR. BOEHLERT: It would be a tab. I don't know
11 whether you have it.

12 (Pause.)

13 MR. BOEHLERT: Oh, here it is.

14 (Pause.)

15 BY MR. BOEHLERT:

16 Q Sir, I place in front of you a document marked as
17 Plaintiff's Exhibit 574, do you recognize that document?

18 A Yes, I do.

19 Q What is it?

20 A This is a, this is the summary, ICCE summary
21 ledger report that is prepared on a monthly basis, as I
22 indicated earlier in my testimony, there were ledgers kept
23 for the direct costs, and a ledger kept for the indirect
24 costs. And they were kept together in a project, or
25 contract summary document. This is the summary document for

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1 the ICCE program, for the period ending May 19, 1991.

2 MR. BOEHLERT: Your Honor, I would enter
3 Plaintiff's Exhibit 574 into evidence.

4 MR. WORK: Objection on the same discovery ground,
5 Your Honor.

6 JUDGE BROWN: That objection is overrule.
7 Plaintiff's Exhibit 574 is received.

8 (The document referred to, having
9 been previously marked for
10 identification as Plaintiff's
11 Exhibit 574, was received in
12 evidence.)

13 (Pause.)

14 MR. BOEHLERT: I believe that is all the
15 questions. If I could have maybe a half of a minute, just
16 to look at my notes.

17 JUDGE BROWN: Yes.

18 MR. WORK: Your Honor, while he is doing that, may
19 I just leave the room, for just one minute?

20 JUDGE BROWN: Yes.

21 (Pause.)

22 MR. BOEHLERT: Is that my minute, Judge, or does
23 he get charged? We can split it.

24 JUDGE BROWN: We have a lawyer here, so --

25 MR. BOEHLERT: I have no further questions, Your

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1 JUDGE BROWN: Take five minutes.

2 (Brief recess.)

3 BAILIFF: Remain seated and come to order.

4 JUDGE BROWN: Okay. Bring them in.

5 (Pause while jury is seated.)

6 JUDGE BROWN: We're ready to go.

7 BY MR. WORK:

8 Q Mr. Hise, is it true that TechDyn is now seeking
9 recovery of costs incurred by TechDyn for which the Air
10 Force has already previously increased the amount of
11 TechDyn's prime contract with the Air Force?

12 A That is not correct and I've so testified this
13 morning.

14 Q Do you recall being deposed by my colleague Mr.
15 Swennon in October of 1990?

16 A I do.

17 Q I'd like to have you refer to your deposition,
18 sir.

19 A No, I don't have it.

20 MR. WORK: I'll give you a copy of it.

21 (Pause.)

22 MR. WORK: And I would like to put the passage
23 that I'm referring to on the overhead viewgraph, if I may,
24 Your Honor.

25 MR. BOEHLERT: I object to that, Your Honor. It's

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1 A Excuse me, if you will. What page was that?

2 Q Page 110.

3 A I'm sorry.

4 Q Question: "Is it in fact true that if you succeed
5 in the court case in Fairfax County for certain costs
6 incurred by TechDyn, TechDyn would be paid twice?"

7 Answer: "We would be paid twice but for separate
8 causes of action: one against the Air Force and one against
9 Whittaker."

10 Question: "Right. But for the same costs
11 incurred by TechDyn. Is that correct?"

12 Answer:

13 MR. BOEHLERT: Your Honor, this is not proper
14 impeachment. Counsel is simply reading a deposition without
15 the opportunity for the witness to explain answers.

16 JUDGE BROWN: Well, you may give the witness the
17 opportunity to explain his answers. He has asked exactly
18 the same question and is asking the witness if that was his
19 testimony at the deposition. Or he should ask the witness.
20 That's the one piece he left out -- ask the witness whether
21 that in fact was his testimony at the time of the
22 deposition. Then other counsel may ask him to explain it.

23 MR. WORK: Since he interrupted me, I'd like to
24 start that particular passage again, if I may, so we have a
25 consistent record here.

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1 BY MR. WORK:

2 Q Question: "Is it in fact true that if you succeed
3 in the court case in Fairfax County for certain costs
4 incurred by TechDyn, TechDyn would be paid twice?"

5 Answer: "We would be paid twice, but for separate
6 causes of action: one against the Air Force and one against
7 Whittaker."

8 Question: "Right. But for the same costs
9 incurred by TechDyn. Is that correct?"

10 Answer: "For the same costs that have been
11 incurred by TechDyn. Yes."

12 Was that your testimony at the deposition, sir?

13 A That was the testimony at the deposition in --

14 Q Thank you. Mr. Hise, is it the position of
15 TechDyn that Whittaker is to pay all of TechDyn's costs
16 after the originally contemplated completion date for the
17 ICCE program, that is, 18 months after award?

18 A The answer to that is no.

19 Q Would you turn, please, to page 78 of your
20 deposition? And this is at lines 7 through 15 of your
21 deposition.

22 Question: "I have asked a specific question and
23 that is is it the position of TechDyn that Whittaker is to
24 pay all of TechDyn's costs after the originally contemplated
25 completion date for the ICCE program, that is, 18 months

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1 after award?"

2 Answer: "It is our feeling that the costs that
3 were incurred on this project beyond the original completion
4 date were caused by the delay of the directed
5 subcontractor."

6 Was that your testimony at your deposition, sir?

7 A That was the testimony at the deposition last
8 October.

9 Q Thank you. Mr. Hise, do you have a book of our
10 charts up there? Our visual aids? I think you do?

11 A Is that what that is?

12 MR. WORK: Yes. You can put your deposition away
13 for the time being. acted

14 Ladies and gentlemen, we're at tab 17 in your
15 chart book.

16 BY MR. WORK:

17 Q Now, sir, in your testimony this morning, you
18 stated to the jury that TechDyn is alleging against
19 Whittaker responsibility for 1243 days of delay. I wonder
20 if you could stand up to the chart here which indicates a
21 timeline and indicate to the jury when those days occurred,
22 please.

23 MR. BOEHLERT: I object to the use of that chart,
24 Your Honor. It has information on it that is not in
25 evidence.

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1 MR. WORK: All he needs to do is use the timeline.

2 JUDGE BROWN: Well, I sustain the objection to
3 using the chart for the timeline. He can just tell us the
4 days. Take the chart down.

5 MR. WORK: Okay.

6 BY MR. WORK:

7 Q How many days in 1985, sir?

8 A The way we computed the 1243 days as I indicated
9 in my testimony earlier was to take the total number of days
10 from the inception of the contract through May of 1991 and
11 subtract out of that the period of performance of the
12 original contract period, which was through February of '87
13 and to further subtract out of that the 9.75 months which
14 was included in the MOD 36 settlement with the Air Force.
15 So what is left in the timeframe that you have here from '85
16 to '91 is the 1243 days.

17 MR. WORK: Move to strike as non-responsive.

18 My question was which portion of those days
19 occurred in 1985.

20 JUDGE BROWN: I'll overrule the motion to strike
21 but you can ask him again and see if he can answer it.

22 BY MR. WORK:

23 Q Which portion of those 1243 days occurred in 1985?

24 A There was delay being incurred on this project, as
25 I testified to earlier this morning, long before the initial

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1 contract period ended. So what I'm telling you is there are
2 days of delay going back very early in this program
3 extending out to the present time. The way we computed the
4 number of days is as I've just stated and twice this
5 morning.

6 Q I understand that. How many days in 1985, sir, of
7 the total of 1243 days?

8 A I cannot tell you exactly the number of days in
9 1985 but I can assure there were delay days in 1985 and I
10 testified to that this morning, when we issued a show cause
11 letter to Whittaker.

12 MR. WORK: Your Honor, I object and move to strike
13 that last comment as totally non-responsive to my question.

14 JUDGE BROWN: Well, I overrule your motion to
15 strike. He was answering the question his way and you're
16 asking the question your way and maybe you all are meeting
17 and maybe you're not.

18 MR. WORK: Well, I guess I have a little time so
19 I'll be patient and try to get an answer.

20 BY MR. WORK:

21 Q You said you cannot tell me exactly how many of
22 the 1243 days you are seeing to assess against Whittaker
23 occurred in 1985. Give me your best estimate and then tell
24 me what it's based on.

25 A I can't make an estimate because that's not the

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1 way we determined the damage assessment so I'm not going to
2 make an estimate for you that you can shoot holes in and
3 that's what you're trying to do.

4 Q How many days in 1986, sir?

5 JUDGE BROWN: I think you can move on to something
6 else because he said that's not how he computed it. You
7 have your argument, he has his testimony and you'll have to
8 move on.

9 MR. WORK: May I ask one summary question in that
10 regard, sir?

11 JUDGE BROWN: Try it.

12 MR. WORK: I'll give it a try.

13 BY MR. WORK:

14 Q In any of the years -- 1985, 1986, 1987, 1988,
15 1989, 1990 and 1991 -- can you give me a number of days in
16 any of those years that you're seeking to assess against
17 Whittaker?

18 A I will give you the same answer. I cannot do that
19 because that's not the way we determined the number of days
20 of delay.

21 Q Well, I'm having trouble with your
22 characterization -- or is it Mr. Crider's
23 characterization -- of time related --

24 A Well, Mr. Crider isn't sitting here so anything
25 I've said is what I'm saying.

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1 Q Excuse me, sir. Let please ask the question and
2 then you can answer. You've used the term time related
3 delays or time related damages.

4 A Yes.

5 Q Whose term is that?

6 A Well, when I've used it, it was my term.

7 Q Who originated that term for use in this case?

8 A I don't know.

9 Q It wasn't you, was it, sir?

10 A Well, I don't know whether it was or not. I said
11 I don't know so why ask me whether it was me when I just
12 answered the question? I don't know who may have originated
13 that. It's certainly appropriate.

14 Q Well, that's what I'm trying to get at, Mr. Hise.
15 You call these time related delays but as I understand your
16 testimony, you can't tell me in what period of time these
17 delays occurred that you're seeking to assess against
18 Whittaker. Is that correct?

19 A No, that is not correct. I testified very clearly
20 that the time in which these delays were being incurred was
21 from -- almost from the day of inception on this contract up
22 to the period that we have used which is the 17th of May
23 1991.

24 Q Were all the days expended by, say, July of 1988?
25 Were all the 1243 days that you're seeking to assess

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1 against Whittaker over by that time, Mr. Hise?

2 A You're asking the same question in a different way
3 and I'm going to give you the same answer. I can't tell you
4 what number of days in any given month or any given year.
5 That's not the way we assessed it.

6 Q Well, what does the time in the label time related
7 delays have reference to, sir?

8 A The time related are the periods in which this
9 contract was extended and the time related category caused
10 it, if that's what you're asking, are the ones that I
11 testified to this morning. The people who had to stay on
12 this contract through completion. They're still on it.

13 Q Well, you answered the question the way I expected
14 you to. You said the periods in which these delays occurred
15 and I'm trying to focus you, sir, on specifically in what
16 years the delays you're seeking to assess against Whittaker
17 occurred. Can you answer that?

18 A And I think almost three times in the last 15
19 minutes -- and I'm telling you that I cannot tell you on any
20 given day, any given hour when a delay occurred. We do know
21 that the contract was for 18 months, including CENTAF. We
22 know that it is now almost four and a half years later and
23 it's still not performed. So what we have attempted to do
24 is we know that the responsibility for the delay in our
25 assessment is Whittaker. We've tried to back out of those

WILLIAM C. HISE - CROSS EXAMINATION

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1 days and those dollars the costs that were related to
2 another activity.

3 Q And you can't help the jury any more than you just
4 have in identifying what specific period you're saying
5 Whittaker delayed this contract, is that right?

6 A You asked it four or five more times, I'm going to
7 give you the same answer. I'm telling you that's not the
8 way we did it.

9 Q It is true, is it not, sir, that the Air Force
10 extended the original contract schedule of which you speak
11 fully five times during the course of the period that you
12 referenced. Is that correct?

13 A The contract has been extended on a number of
14 occasions. I don't know the exact number and I'm not going
15 to take your testimony as to whether it's five or not.

16 Q Well, what is your best recollection, sir?

17 A I don't have a recollection on it. We can go to
18 all the MODs and determine what it is. I'll testify to the
19 fact that it was extended on a number of occasions for a
20 number of reasons and they were not necessarily related to
21 the performance by Whittaker. Contracts are extended every
22 day for many reasons.

23 Q Are you finished with that answer? I don't want
24 to interrupt you.

25 A No, I'm finished with that answer.

WILLIAM C. HISE - CROSS EXAMINATION

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1 MR. WORK: Mr. Boehlert has handed me the prime
2 contract, which is Plaintiff's Exhibit 4, and reference made
3 to a modification, or I should say P000-58, or modification
4 58 to the ICCE prime contract. With that in front of us,
5 sir, can you tell the jury how much the MODs after MOD-3
6 increased the contract revenue to TechDyn?

7 THE WITNESS: Well, from this document, I can tell
8 you what the prime contract funding value is.

9 BY MR. WORK:

10 Q Will you do that, sir, please?

11 A The current contract funding is \$18,138,749.87

12 Q Okay, thank you very much.

13 (Pause.)

14 Q Now, sir, we were talking about what you called
15 PDFA damages. And I'd like to move to what you called RCE
16 damages. During what specific time period were the direct
17 labor costs that you showed us incurred, with respect to
18 those RCE costs?

19 A Well, again, without going back to the documents
20 that I was using to testify, and I think those would show --

21 Q Okay, let's go back to those documents, sir.

22 JUDGE BROWN: Are you referring to the set of
23 exhibits, 950 to 980?

24 MR. WORK: Yes. Where would I find that?

25 JUDGE BROWN: They are here.

WILLIAM C. HISE - CROSS EXAMINATION

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1 MR. WORK: Thank you. Now, sir, would you tell me
2 in what specific time period the charges relating to the
3 RCE, the direct labor charges relating to the RCE, were
4 incurred? And please point us to the page that you are
5 referring to.

6 (Pause.)

7 THE WITNESS: It would appear to me, from the
8 documents that I testified to earlier, that the travel
9 costs, for instance --

10 BY MR. WORK:

11 Q No, just direct labor costs, sir.

12 A Well, direct labor costs, as I indicated, were
13 incurred over a period of time leading up to the problems
14 with the RCE.

15 Q Could you tell me sir, please, what document we
16 can refer to, to determine specifically what happened, what
17 you say are RCE direct labor costs. Or just show us page
18 numbers.

19 A I don't think I can show you a page number, that
20 would pin down the exact date. I think I testified this
21 morning that the labor that associated with the
22 reprocurement, the TechDyn labor is an estimate. Obviously
23 the labor was performed during the period in which the
24 problems began to develop with the RCE, up through the
25 period of reprocurement, and the actual final delivery of it

WILLIAM C. HISE - CROSS EXAMINATION

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1 by the vendor.

2 Q Will you show me where, in what document of this
3 collection, that your counsel gave to the jury, that is
4 obvious, please?

5 A Well, I think I've just testified that there is no
6 document that says it is obvious.

7 Q Okay, it is not obvious from these documents.

8 A Well, if you are directing it specific to labor --

9 Q That was my question.

10 A To that extent, it's not.

11 (Pause.)

12 MR. WORK:

13 Q Now, sir, you referred to a subcontractor by the
14 name of VEDA. Is that correct?

15 A Yes.

16 Q And you subcontracted with VEDA to do certain work
17 on this program, relating to the logistics responsibilities
18 under the program. Is that right?

19 A We are under subcontract to VEDA to do certain
20 work that perhaps could be called the logistics area, yes.

21 Q In fact, you hired VEDA to do your logistics work
22 on this contract, did you not?

23 A Again, the answer to that is yes and no. They, as
24 I just testified, they are under subcontract to us to do a
25 certain amount of, well, work that could be characterized as

WILLIAM C. HISE - CROSS EXAMINATION

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1 logistics.

2 Q Okay, when did you enter into the subcontract with
3 VEDA?

4 A I do not know the exact date.

5 Q Well, give me the best recollection. Give me your
6 ball park estimate.

7 A It -- If you want my best recollection without
8 having the document in front of me that would tell me when
9 the subcontract itself, I would say it was early 86.

10 Q Prior to that time, you had nobody working on the
11 required logistics operation support plan, did you sir?

12 A Well, again, you are asking me a question I do not
13 know the answer to. We had logistics people during that
14 time. They were working, whether they were working on the
15 logistics support plan, I can't answer that. I don't know.

16 Q In fact, you don't know much about the performance
17 aspect of this program, do you, sir?

18 A That's not true at all. I know very much about
19 this program. And, --

20 Q Let me ask the question a different way. You
21 don't know much about the technical performance of this
22 contract. In other words, the technical side. The actual
23 technical performance.

24 A I have been in this business a long time, as I
25 testified to this morning. And while I'm not, I do not hold

WILLIAM C. HISE - CROSS EXAMINATION

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1 an engineering degree, and I'm not a technical person per
2 se, I would dare say that I probably know more about the
3 technical aspects of this program than most people in my
4 position would know about a job, because --

5 Q All right, I'll accept that sir. Is it not true,
6 sir, that VEDA has a claim outstanding against TechDyn
7 because TechDyn has not paid VEDA for the work that VEDA has
8 done on this contract?

9 A That is absolutely not true.

10 Q Okay, I'll accept that. Let's talk about PACAF.
11 You talked about that this morning. Is it true, sir, that
12 on February 16, 1988, you filed a protest with the United
13 States General Accounting Office, expressly alleging that
14 the Air Force had permitted the so-called PACAF options to
15 expire?

16 A We filed a protest with the GAO --

17 Q Yes or no, please, and then you can explain all
18 you want. I think that's a --

19 A I think the answer the way you frame the question
20 has to be no. Because there were other reasons, in addition
21 to that.

22 (Pause.)

23 BY MR. WORK:

24 Q I am going to hand you a document, sir, that has
25 been marked as Defendant's Exhibit 49F. We refer to this

WILLIAM C. HISE - CROSS EXAMINATION

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1 for identification. We referred to this same document with
2 Mr. Morrison. It consists of two documents. The response
3 from GAO and a letter from you dated February 19, 1988. I
4 am going to ask you to refer please to a page, the second
5 page in your letter, under the paragraph number two, and see
6 if that refreshes your recollection that you personally
7 filed a protest with the United States General Accounting
8 Office, alleging that the Air Force had allowed the PACAF
9 options to expire.

10 A That was one of the contentions that we included,
11 or that I included in the letter filed --

12 Q Thank you. Now, sir, sitting here today, you are
13 aware that before TechDyn submitted a proposal in response
14 to the Air Force's May 29, 1987 RFP, request for proposal,
15 that before you submitted a proposal in response to that
16 RFP, the Air Force had already decided not to contract with
17 TechDyn for the PACAF work. Is that correct?

18 A Sitting here now, is that what you are saying?

19 Q That's correct.

20 A We obtained through the Freedom of Information
21 route, certain information that led us to believe that there
22 was a dialogue going on between Whittaker --

23 MR. WORK: I object, Your Honor, that is not at
24 all responsive.

25 JUDGE BROWN: Just answer the question, and if

WILLIAM C. HISE - CROSS EXAMINATION

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1 your counsel wants you to explain it, he will ask. Or say
2 that you can't answer it.

3 THE WITNESS: Could I ask you to re-ask the
4 question?

5 BY MR. WORK:

6 Q Yes. Sitting here today, you are aware, are you
7 not, that the Air Force promulgated what is called a sole
8 source determination memorandum, prior to the time that
9 TechDyn submitted its proposal in response to the May 29
10 RFP?

11 A Sitting here today, yes. It is my recollection
12 that that is correct.

13 MR. WORK: Thank you. Your Honor, I have one more
14 question that pertains to some of his testimony. But I am
15 going to have to look it up in the deposition. Would this
16 be a convenient time to --

17 JUDGE BROWN: We can break for lunch until 1:25.
18 Remember the instruction. Do not talk to anyone about it.
19 We will return at 25 minutes after one.

20 (Whereupon, at 12:25 p.m., the hearing was
21 recessed, to reconvene this same day, Wednesday, July 10,
22 1991, at 1:25 p.m.)

23

24

WILLIAM C. HISE - CROSS EXAMINATION

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1 A I guess, why don't you add it up and I'll --

2 Q Seven years, right?

3 A I guess it would add to that.

4 Q You were awarded this contract -- the prime
5 contract you were awarded, in September it was effective on
6 August 30, so we will give you the benefit of the doubt and
7 give you 30 August -- August 30, 1985. We add seven years
8 to that, what number do we get, what date do we get?

9 A I guess if you added seven years to that, you
10 would get, 8/30/92.

11 Q Eight, 30 - 92. You and I get the same answer.

12 (Pause.)

13 Q Now, sir, just so we can understand better, what
14 it is we are talking about, here. As I understand it, the
15 costs that you multiplied the 1243 days by were not costs,
16 actual costs associated with any particular day, is that
17 right?

18 A That's, that's -- well, it was associated with a
19 particular day. I mean, every cost was incurred on a
20 particular day. So, I don't know, I don't know whether I
21 can answer that.

22 Q Well, what -- Where did you get the figure, the
23 dollar figure, by which you used to multiply, in multiplying
24 1243 to get your PDFA damage?

25 A I think I testified this morning, that we went

WILLIAM C. HISE - CROSS EXAMINATION

1353

1 back from the period 8-30-85, I believe it was 17 May 1991,
2 and we took the time related costs and computed a figure of
3 some \$5 million plus.

4 Q What you did, sir, was it not, was to take not
5 1992, because of course the contract is almost over, but you
6 took from 8-30-85 on out to May 1991, and you averaged your
7 cost for that period. Is that right?

8 A My testimony was that --

9 Q Can you say yes or no, and then you can explain
10 all you want.

11 A Would you state the question again?

12 Q Sure. In determining a cost figure to use, in
13 multiplying 1243 days to get some time related cost that you
14 are talking about, you didn't take costs associated with any
15 particular day, did you?

16 A I think I've answered just now that every cost was
17 incurred on some day, but there was no particular day that
18 we were trying to pin down, okay?

19 Q And because you weren't trying to identify your
20 time related cost to any particular day, you simply
21 calculated an average cost for the period August 30, 1985,
22 average per day costs from the period August of 1985 on out
23 to May of 1991, didn't you, sir?

24 A Well, I think you are stating, that statement is
25 fairly close to being accurate.

WILLIAM C. HISE - CROSS EXAMINATION

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1 Q Okay, thank you. Now, sir, and in fact, your
2 costs varied substantially during the period from August 30,
3 1985 to May 1991, didn't they?

4 A The answer to that would be yes, they varied.

5 Q Now, sir, let's just take out, and I would ask the
6 jury to do the same thing. Was this published to the jury
7 574?

8 MR. BOEHLERT: It was not.

9 MR. WORK: Well, perhaps we can do it without
10 publishing it to the jury. In the first six months of the
11 program, or five months of the program, from August 85 to
12 the end of the year. Do you have this before you, sir?

13 THE WITNESS: No, I don't.

14 MR. WORK: Where would I find this, sir?

15 MR. BOEHLERT: Up there in Tab 574.

16 MR. WORK: Could you help me, please? Take out
17 574, please. We are looking at the first page, the summary
18 sheet.

19 (Pause.)

20 THE WITNESS: Wait.

21 MR. WORK: Do you see that, 574?

22 THE WITNESS: Okay.

23 BY MR. WORK:

24 Q Now, I'd like to go down to the bottom for the
25 total, prior to G&A. Prior to general and overhead. And

WILLIAM C. HISE - CROSS EXAMINATION

1355

1 for that first five month period on the program, you spent
2 total \$79,740, is that correct?

3 A That would have been in the period of our fiscal
4 year 85, which would have been from the inception of the
5 contract, through probably 30 June of --

6 Q So, these are fiscal years?

7 A Yes, well, it has FY there. That's fiscal year.

8 Q All right. Let's take the first full fiscal year.
9 In the first full fiscal year, which was your fiscal year
10 1986, which extended from June 1985 to June 1986, your total
11 cost before general and administrative costs, were \$4.6
12 million, is that correct?

13 A Before G&A, yes.

14 Q G&A added about another \$200,000, is that right?

15 A It looks like \$250,000.

16 Q Okay. Now, let's look just by way of example in
17 assessing your average cost theory, to the last fiscal year
18 of this contract, fiscal year 1991, which extended from June
19 1990 to June 1991. To the present time. Is that correct?
20 Correct?

21 A For the last, for fiscal year 91?

22 Q Yes. In the total cost, in that year, before G&A,
23 was \$1.1 million, is that correct?

24 A I have to tell you, that's correct, but I have to
25 indicate our fiscal year did not end in May, so that is not

WILLIAM C. HISE - CROSS EXAMINATION

1356

1 a complete fiscal year. Our fiscal year ends on 30 June.

2 Q Okay, 30 June. Up until just the day before the
3 start of the trial. And in that fiscal year, you spent \$1.1
4 million, is that correct?

5 A It would reflect that we spent 1.1, again, closer
6 to 1.2 million, up through the period of May 1991, yes.

7 Q And G&A added another couple of 100,000, or
8 another \$50,000 to that, correct?

9 A Correct.

10 Q So, that, the last year, the last fiscal year, the
11 last full fiscal year, the 12 month fiscal year, you spent
12 only one quarter of what you spent in the first full fiscal
13 year on this program. Is that right?

14 A Well, let's put it, certainly what the cost
15 reflect and --

16 Q Okay, thank you. Just one more question. You are
17 not projecting that this contract is not going to end until
18 1992, are you sir?

19 A We are not now projecting that it will end as late
20 as 92. I hope it doesn't --

21 Q So, you are estimating costs and asking the jury
22 to assess against Whittaker costs, beyond your anticipated
23 close of the contract, aren't you?

24 A No. You know, I think you have to live with your
25 figures, and I'll live with mine. You've come up with the

WILLIAM C. HISE - REDIRECT EXAMINATION

1358

1 Q What is the correct answer?

2 A We have a claim from Whittaker, not because we
3 haven't paid them anything that they are under contract for
4 --

5 Q You said from Whittaker.

6 A I'm sorry, from VEDA. Not because we haven't paid
7 them anything that they are due under the contract, but they
8 have filed a claim with TechDyn based on certain delays
9 which appears to, in the early analysis of that claim,
10 appear to be based on delays that were incurred by
11 Whittaker.

12 Q Mr. Hise, your deposition was referred to several
13 times on cross examination. Do you recall when that
14 deposition was taken?

15 A My deposition was taken on October 17, 18 and 19
16 of 1990.

17 Q And do you recall the status of TechDyn's damage
18 analysis at that time?

19 A Yes, I do.

20 Q Would you describe for us what was that damage
21 analysis at the time of your deposition

22 A At the time of my deposition, we were going
23 through an analysis of the cost associated with this project
24 in order to make a determination, as best we could, to what
25 the damages were as a result of the impact of the delays,

WILLIAM C. HISE - REDIRECT EXAMINATION

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1 etc., by Whittaker. And at that point in time, I think we
2 had collected virtually all of the costs associated with the
3 ICCE program and were able at that point in time, to point
4 out that there was a contract value and the total cost had
5 increased beyond that by a certain figure.

6 Q Did that number, at that time, include monies that
7 were paid to TechDyn by the Air Force?

8 A At that time, we included, would have included,
9 any monies that would have been paid to TechDyn by the Air
10 Force.

11 Q Since your deposition, has any work been done on
12 TechDyn's damage analysis?

13 A That, as I indicated, was a very preliminary stage
14 and our attempting to determine the theory on which we were
15 going to present our damage claim to the Court, and since
16 then, there has been substantial change in our position. We
17 did not want to come into this Court, during this trial, and
18 give the impression whatsoever, that we were claiming
19 anything that we had recovered from the Air Force, and that,
20 I think I made that very clear today, we have not done.

21 Q Has an effort been made to exclude those costs?

22 A Those costs are absolutely excluded.

23 (Pause.)

24 BY MR. BOEHLERT:

25 Q Mr. Hise, does TechDyn incur costs related to a

**TRIAL TESTIMONY OF
MAX STEVEN ROSEN**

MAX STEVEN ROSEN - DIRECT EXAMINATION

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1 MR. BOEHLERT: Mr. Rosen is going to testify, Your
2 Honor. He just went down the hall, and is going to be back
3 in a moment.

4 (Pause.)

5 Whereupon,

6 MAX STEVEN ROSEN
7 having been duly sworn, was called as a witness herein and
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. RIDDLES:

11 Q Would you please state your full name and place of
12 employment for the record?

13 A My name is Max Steven Rosen, currently employed by
14 A.R.C. Professional Services Group, 5390 Cherokee Avenue,
15 Alexandria, Virginia.

16 Q Mr. Rosen, are you familiar with the TechDyn
17 Corporation?

18 A Yes, I am.

19 Q How are you familiar with the TechDyn Corporation?

20 A I worked with TechDyn from November 1987 through
21 December 1990.

22 Q What position were you employed in with the
23 TechDyn Corporation?

24 A Initially I was a senior contract administrator.
25 And then I became manager of contracts.

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MAX STEVEN ROSEN - DIRECT EXAMINATION

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1 Q In your capacity as senior contracts administrator
2 and manager of contracts, did you become familiar with the
3 term RFP?

4 A Yes.

5 Q What is an RFP?

6 A An RFP is a request for proposal.

7 Q How did you become familiar with this, sir?

8 A I both prepared request for proposals that TechDyn
9 submitted, and I maintained the records, I jointly
10 maintained the records.

11 Q With whom did you jointly maintain the records?

12 A I jointly maintained the records with our other
13 contract administrator, Mr. Hise, who was my supervisor.

14 Q And did you maintain records of RFPs that had been
15 submitted by the TechDyn Corporation?

16 A Yes, I did.

17 MR. WORK: Objection, Your Honor, and move to
18 strike. Not produced on discovery. We only got five of the
19 exhibits.

20 JUDGE BROWN: I don't know where we are going,
21 yet, but I overrule the objection to his testimony so far.
22 You can raise the objection again when we get something that
23 is a little more specific and then we can see.

24 MR. RIDDLES: In maintaining those records, did
25 you ever have occasion to examine the RFPs that were in the

MAX STEVEN ROSEN - DIRECT EXAMINATION

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1 files of the TechDyn Corporation?

2 THE WITNESS: Yes, I did.

3 MR. WORK: Your Honor, I am going to object to any
4 testimony about anything that has not been produced in
5 discovery, or produced as exhibits.

6 JUDGE BROWN: Well --

7 MR. WORK: He can't testify about something we
8 asked for and haven't received.

9 JUDGE BROWN: Is he going to testify to something
10 that isn't in the exhibits?

11 MR. RIDDLES: No, sir, he is not. And I want --
12 All of these documents have been produced to them, as he
13 well --

14 JUDGE BROWN: Well, I can't tell yet whether he is
15 going to or not. He says he's not.

16 MR. WORK: Well, then I withdraw the objection.

17 JUDGE BROWN: Hold your objection until we get to
18 something that specifically is offered that you have not
19 seen before in the submission of exhibits, or something of
20 that sort.

21 BY MR. RIDDLES:

22 Q I am going to ask that you be shown now a series
23 of exhibits. First, Plaintiff's Exhibit 501. And a copy of
24 this has previously been provided to Mr. Work.

25 (Pause.)

MAX STEVEN ROSEN - DIRECT EXAMINATION

1365

1 Q Do you have before you 501?

2 A Yes, sir.

3 Q Do you recognize what this exhibit is?

4 A Yes, it is a proposal that we submitted to, that
5 TechDyn submitted to CCOM at Fort Monmouth, New Jersey.

6 Q What was -- How do you recognize this proposal?

7 A This was a proposal that I assisted in the
8 preparation of.

9 MR. RIDDLES: Your Honor, at this time I move
10 Plaintiff's Exhibit 501 into evidence.

11 JUDGE BROWN: Any objection to Plaintiff's Exhibit
12 501?

13 MR. WORK: No objection to this specific one, Your
14 Honor.

15 JUDGE BROWN: Plaintiff's Exhibit 501 is admitted.
16 (The document referred to, having
17 been previously marked for
18 identification as Plaintiff's
19 Exhibit 501, was received in
20 evidence.)

21 BY MR. RIDDLES:

22 Q Now, I would like for you to turn over, please to
23 Exhibit Number 502.

24 (Pause.)

25 A Okay.

MAX STEVEN ROSEN - DIRECT EXAMINATION

1366

1 Q And would you look at the first page of Exhibit
2 502, do you have that before you?

3 A Yes, sir.

4 Q Is that a letter from Mr. Hise?

5 A Yes, it is.

6 Q Do you recognize this, sir?

7 A I recognize this as the letter signed by Mr. Hise
8 submitting the proposal.

9 Q And, what is the date of the letter?

10 A Twenty-seven January 1987.

11 Q Is this a -- Have you -- Let me ask you this, was
12 this proposal maintained in the proposal files at TechDyn?

13 A Yes.

14 MR. RIDDLES: Your Honor, at this time I move
15 Plaintiff's Exhibit 502 into evidence.

16 JUDGE BROWN: Any objection to 502?

17 MR. WORK: No objection, Your Honor.

18 JUDGE BROWN: Plaintiff's Exhibit 502 is received.

19 (The document referred to, having
20 been previously marked for
21 identification as Plaintiff's
22 Exhibit 502, was received in
23 evidence.)

24 BY MR. RIDDLES:

25 Q I ask you to look, please, at Exhibit 503.

MAX STEVEN ROSEN - DIRECT EXAMINATION

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1 (Pause.)

2 A Okay.

3 Q Do you recognize Plaintiff's Exhibit 503?

4 A Yes.

5 Q What is it please sir?

6 A This is a proposal that was proposal number -- it
7 was a proposal for the 490 Autovon sites in Europe.

8 Q What's the proposal number, did you find that?

9 (Pause.)

10 A Eight zero six.

11 Q Do you recognize this proposal?

12 A Yes, I do.

13 Q How do you recognize it?

14 A I recognize it from our files at TechDyn.

15 MR. RIDDLES: Your Honor, at this time I would
16 move into evidence, Plaintiff's Exhibit 503.

17 JUDGE BROWN: Any objection to 503?

18 MR. WORK: No objection, Your Honor.

19 JUDGE BROWN: Plaintiff's Exhibit 503 is received.

20 (The document referred to, having
21 been previously marked for
22 identification as Plaintiff's
23 Exhibit 503, was received in
24 evidence.)

25 BY MR. RIDDLES:

MAX STEVEN ROSEN - DIRECT EXAMINATION

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1 Q I ask you to look, please, at Plaintiff's Exhibit
2 504.

3 (Pause.)

4 Q Do you recognize Plaintiff's Exhibit 504?

5 A Yes. It is proposal number 908.

6 Q And what was that proposal involving, sir?

7 A This was the technical and administrative support
8 for various battle simulation centers in Europe.

9 Q How do you recognize it, sir?

10 A This proposal, I worked on.

11 MR. RIDDLES: Your Honor, I move Plaintiff's
12 Exhibit 504 into evidence.

13 JUDGE BROWN: Any objection to 504?

14 MR. WORK: No objection, Your Honor.

15 JUDGE BROWN: The exhibit is received.

16 (The document referred to, having
17 been previously marked for
18 identification as Plaintiff's
19 Exhibit 504, was received in
20 evidence.)

21 BY MR. RIDDLES:

22 Q Now, I show you two volumes. Exhibit 505.

23 (Pause.)

24 Q Do you recognize that exhibit?

25 A Yes, it is proposal number 904, which was for the

MAX STEVEN ROSEN - DIRECT EXAMINATION

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1 486L System, the O&M job in Turkey and Greece.

2 Q How do you recognize it, sir?

3 A I, again, assisted in the preparation of this
4 proposal and maintained them.

5 MR. RIDDLES: Your Honor, at this time I move
6 Plaintiff's Exhibit 505 into evidence.

7 JUDGE BROWN: Any objection to 505?

8 MR. WORK: No objection, Your Honor.

9 JUDGE BROWN: Received.

10 (The document referred to, having
11 been previously marked for
12 identification as Plaintiff's
13 Exhibit 505, was received in
14 evidence.)

15 MR. RIDDLES: I have no further questions, thank
16 you, Mr. Rosen.

17 JUDGE BROWN: Any questions, Mr. Work.

18 MR. WORK: Briefly. I intend to call Mr. Rosen,
19 but if I may, I would just like to ask a couple of cross
20 examination questions.

21 (Pause.)

22 CROSS EXAMINATION

23 BY MR. WORK:

24 Q Mr. Rosen, you are aware that the five proposals
25 you just identified are the same five proposals that Mr.

**TRIAL TESTIMONY OF
EDWARD H. RIPPER**

EDWARD H. RIPPER - DIRECT EXAMINATION

1371

1 THE WITNESS: I appreciate that.

2 JUDGE BROWN: Okay, next.

3 MR. RIDDLES: We call Mr. Chris Ripper, Your
4 Honor.

5 (Pause.)

6 MR. RIDDLES: Your Honor, if I can just have one
7 minute to get my book.

8 MR. WORK: Your Honor, you asked for a copy of the
9 summaries of the expert testimony.

10 JUDGE BROWN: No, I said just bring them, and have
11 them available in case the expert wonders from the --

12 MR. WORK: Okay. I have them available if you
13 need.

14 JUDGE BROWN: Hopefully, I won't need them.

15 (Pause.)

16 Whereupon,

17 EDWARD H. RIPPER

18 having been duly sworn, was called as a witness herein and
19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. RIDDLES:

22 Q Good afternoon, Mr. Ripper.

23 A Good afternoon.

24 Q Would you please state your name and your place of
25 employment for the record.

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1 A Edward H. Ripper. My place of employment is the
2 Barrington Consulting Group.

3 Q Mr. Ripper, I would like for you to begin with the
4 jury and tell us a little bit about your personal
5 background. Where did you grow up, sir?

6 A I was born in Arlington, Virginia, and grew up in
7 ARlington.

8 Q And where did you attend high school?

9 A Also in Arlington, Virginia.

10 Q After you graduated from high school, did you
11 pursue a college education, sir?

12 A I did. At East Carolina University.

13 Q And what was your major, please at East Carolina
14 University?

15 A I majored in accounting.

16 Q Did you get a degree there?

17 A Yes. I got a bachelor of science in business
18 administration.

19 Q And when was that?

20 A In 1974.

21 Q Upon receipt of your degree in accounting from
22 East Carolina, what did you do then?

23 A I went to work for Arthur Anderson & Company, one
24 of the large international public accounting and consulting
25 firms.

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1 Q What were your duties at the Arthur Anderson
2 company?

3 A I started as a staff accountant, and was later
4 then promoted to a senior accountant, and finally to a
5 manager.

6 Q What does a manger do at Arthur Anderson?

7 A My duties at Arthur Anderson were broke out on two
8 separate lines. First, I was in charge of the audit
9 examinations and the financial statements of companies in
10 the area that I specialized in terms of the auditing of
11 financial statements, was in terms of government
12 contractors.

13 And then my other role was in their consulting
14 work relating to government contract matters and in
15 consulting in the financial aspects of disputes.

16 Q For how many government contractors did you
17 perform audits?

18 A I'd say, I mean, in the seven years I was with
19 Arthur Anderson, I probably performed probably something on
20 the order of 100 to 150 audits.

21 Q Now, when you left -- how long were you at Arthur
22 Anderson?

23 A Seven years.

24 Q And when did you leave there, sir?

25 A In fall of 1980.

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1 Q Where did you go then?

2 A I helped form a company by the name of Peterson &
3 Company.

4 Q Where was that company, sir?

5 A My office was in Washington, D.C, but the company
6 had offices at that time in one other city, in Chicago.

7 Q What was your role, with the Washington office?

8 A I was one of the founding partners of the firm,
9 and of the Washington office, and then later became the
10 managing partner of the Washington, D.C. office.

11 Q What was the size of the Washington office, or
12 excuse me, of Peterson & Company, when you founded it, or
13 helped found it?

14 A We had 25 people, initially.

15 Q And when you -- Did that grow -- did that number
16 grow?

17 A Yes, it did. It grew annually to the point where
18 in 1987, we had about 600 people in the professional staff.

19 Q Did there come a time when you left Peterson
20 company?

21 A Yes, I did, in the fall of 1990.

22 Q And what did you do then.

23 A I helped form my present firm, the Barrington
24 consulting group.

25 Q Tell the jury, please, what your role is at the

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1 Barrington Consulting Group.

2 A I am in charge of the Washington, D.C. office, and
3 so, in that capacity, I have certain administrative
4 responsibilities. But, the vast majority of my time is
5 spent on client consulting matters.

6 Q And what do you do for clients when you consult
7 for them?

8 A The bulk of my time is spent in contract matters
9 and in loss profit matters. The analysis, determination,
10 and quantification of damages including lost profits.

11 Q What, when you say lost profits, what kind of
12 clients do you perform that service for?

13 A Over the years, there has been a wide variety of
14 clients. I have done large lost profits case for the
15 Raytheon Company, a large government contractor. I did
16 another lost profits case involving a contractor that was
17 building a federal, working on a federal highway project.
18 Another lost profits case involved a contractor that was
19 building a middle school for Howard County Maryland. Those
20 are some of the ones.

21 Q Some of the ones. Now, in any of those cases,
22 which you helped to determine lost profits, have you ever
23 been qualified as an expert witness in litigation or
24 arbitration?

25 A Yes. In those three cases that I mentioned. And

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1 then there were two others as well.

2 Q What are lost profits?

3 A Generally speaking, lost profits are the profits
4 that are denied a company as a result of wrongful action by
5 another company.

6 And generally speaking, lost profits are the
7 result of identifying lost revenues and then subtracting
8 from the lost revenues, or another name for that is sales,
9 subtracting from the lost revenues, or lost sales, or lost
10 costs that would have been incurred to generate those sales,
11 or revenues. And the result of that equation, lost
12 revenues, less relevant costs, equal lost profits.

13 MR. WORK: Your Honor, I understand that Mr.
14 Ripper is going to be offered as an expert. And he is now
15 testifying beyond just his credentials. And I think that he
16 should be qualified.

17 And I should have a chance to conduct some voir
18 dire before he starts --

19 JUDGE BROWN: Are you going to offer him?

20 MR. RIDDLES: I am right now, Your Honor. I do
21 indeed proffer Mr. Ripper as an expert in the field of lost
22 profits identification.

23 JUDGE BROWN: Okay, do you have questions you want
24 to ask him about his expertise?

25 MR. WORK: I sure do.

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1 JUDGE BROWN: All right.

2 VOIR DIRE EXAMINATION

3 BY MR. WORK:

4 Q Good afternoon, Mr. Ripper.

5 A Good afternoon. How are you?

6 Q Good. Let's try to understand this field of
7 expertise that you are talking about. Your counsel said as
8 an expert in lost profits. Is that your field, today?

9 A At least as I understand, that is how I am
10 proffered in this case, Mr. Work. I believe I have some
11 expertise beyond that. But as far as this case is
12 concerned.

13 Q Okay. I understand you do. Do you have any
14 experience, specifically, in taking a group of three or
15 four, or five people, individuals, and analyzing whether
16 that particular group of people, could have brought business
17 into a given company had something not occurred, or had
18 something occurred?

19 A I think putting aside the exact number, I would
20 certainly say that many of the lost profit cases with which
21 I have been involved, we have had to study a nucleus of key
22 people. In some case, perhaps maybe it was more than four
23 and five, and in some cases it could have been less than
24 four and five. But I would say that the study of the
25 resources of the company, and its people, is an important

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1 part of the study of lost profits.

2 Q My question was confined simply to examining a
3 small group of people, a handful of people, without
4 examining resources beyond those people, to determine
5 whether it was likely or unlikely, speculative or certain,
6 that they could have brought additional business into the
7 company. Have you ever had any experience specifically like
8 that?

9 (Pause.)

10 A It is hard to answer that question because, I
11 think it would be a mistake to only narrowly look at the
12 lost profits issue as a it relates to a small number of
13 people.

14 Q Mr. Ripper, let me just ask you this, have you
15 ever done that specific task, regardless of whether it would
16 be a mistake to do that? Have you ever done that specific
17 task in isolation from other analyses?

18 A No.

19 (Continued on next page.)

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1 MR. WORK: I have no further questions.

2 I think that because that is the theory this
3 gentleman is not qualified but I understood your statement
4 with regard to Mr. Crider so I suspect you will let him
5 testify.

6 JUDGE BROWN: I accept him as an expert in the
7 field and the weight of his testimony will be judged by the
8 jury in light of all the other testimony.

9 DIRECT EXAMINATION (Resumed)

10 BY MR. RIDDLES:

11 Q Mr. Ripper, are you familiar with the TechDyn
12 Corporation?

13 A Yes, I am.

14 Q And are you familiar with the ICCE project?

15 A Yes, I am.

16 Q How are you familiar with those?

17 A I was asked to provide consulting services with
18 respect to TechDyn and specifically as it related to the
19 ICCE project.

20 Q What consultant services specifically were you
21 asked to do?

22 A I was asked to study the TechDyn Corporation and
23 particularly the historical results of the company. I was
24 asked to study the ICCE project and I was asked to study
25 whether the problems surrounding the ICCE project impacted

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1 the company's revenues and therefore its profits.

2 Q How did you go about your work, sir?

3 A There were probably three primary ways. First
4 would be reviewing the financial statements and the other
5 accounting and cost related documents that the company
6 maintains. I reviewed their marketing information in terms
7 of bids and proposals and their procedures and the forms and
8 that sort of things that the company used in marketing its
9 work.

10 MR. WORK: Excuse me, Mr. Ripper. I have to
11 interrupt for purposes of the record.

12 I object to any testimony about the company's
13 marketing records because apart from those five proposals,
14 we have seen no proposals and no RFP sheets. So we have no
15 basis for assessing his testimony on that.

16 MR. RIDDLES: Your Honor, it sounds like a
17 reiteration of the same objection and he's testifying to the
18 materials that he reviewed in going about his process.

19 JUDGE BROWN: Well, I guess my concern, plus Mr.
20 Work's objection, is that he may be going into the area that
21 I ruled was not going be --

22 MR. RIDDLES: I do not believe that he is. I
23 think he's talking about the methodology and the universe of
24 materials that he reviewed.

25 JUDGE BROWN: Okay. I'll overrule the objection,

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1 then.

2 MR. RIDDLES: Go ahead, Mr. Ripper.

3 THE WITNESS: I kind of lost track of our
4 question. And while I've lost track of it, could I have a
5 glass of water?

6 MR. RIDDLES: Sure.

7 (Pause.)

8 BY MR. RIDDLES:

9 Q I think what you were asked was how did you go
10 about your task and you were describing some of the universe
11 of the procedures that you did to investigate.

12 A That's right. Now I remember. I had talked about
13 the accounting data and the financial statements. I talked
14 about the marketing information on the company and really
15 lastly in terms of it, a big group of activities was
16 interview the key senior management people at the company.

17 Q After studying those -- well, let me ask you -- I
18 think I'm looking for 506A, if I could.

19 (Pause.)

20 Q I'm going to show you what's been previously
21 marked as Plaintiff's Exhibit 506A. Do you recognize that,
22 sir?

23 A Yes, I do.

24 Q What is that, please, sir?

25 A This is a series of RFP routing sheets related to

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1 RFPs that TechDyn responded to by issuing a formal proposal
2 in response to those RFPs but for which they were rejected
3 or their proposals were not accepted --

4 MR. WORK: Objection, Your Honor. That testimony
5 was excluded yesterday. It should be excluded today.

6 JUDGE BROWN: I sustain the objection to him
7 commenting on what happened to them without a foundation.

8 MR. RIDDLES: I didn't realize he was -- I don't
9 think he was here yesterday so that's why --

10 JUDGE BROWN: Yes.

11 MR. RIDDLES: I'll ask --

12 MR. WORK: May I move to strike that answer?

13 JUDGE BROWN: Yes.

14 MR. RIDDLES: Just that portion of his answer.

15 JUDGE BROWN: Strike the portion of his answer
16 with regard to what happened to the proposals when they left
17 TechDyn.

18 BY MR. RIDDLES:

19 Q And how are you familiar with this exhibit, sir?

20 A Should I restrict my answer to just really the
21 document here in front of me, Mr. Riddles?

22 Q For right now.

23 A All right. I am familiar with these documents as
24 being documents that were in TechDyn's files and documents
25 that I analyzed in connection with my review of this area of

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1 the company.

2 MR. RIDDLES: I am going to ask that you be shown
3 Exhibit 501 through 505.

4 (Pause.)

5 BY MR. RIDDLES:

6 Q Would you take a look, please, at Exhibit 501?

7 And what is it, please, sir? Do you recognize it?

8 A Yes, I do. It's proposal number 001.

9 Q And have you seen this document before?

10 A Yes, I have.

11 Q Okay. Would you look at 502 at this time, sir?

12 A I have that.

13 Q Do you recognize it?

14 A Yes, I do.

15 Q And what is this, sir?

16 A This is proposal number 715 of the TechDyn
17 Corporation.

18 Q And did you examine these two proposals in the
19 course of your analysis of the ICCE project and the TechDyn
20 Corporation?

21 A Yes, I did.

22 Q Would you look, please, at 503?

23 A I have that.

24 Q And what is it, please, sir?

25 A Proposal number 806 of the TechDyn Systems

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1 Corporation.

2 Q Did you look at it in determining the analysis
3 that you were asked to do?

4 A I did.

5 Q And then I would ask you to look at 504 and 505.

6 A Is that 504 here?

7 Q Yes. And do you recognize that?

8 A Yes. That's proposal number 908 of the TechDyn
9 Systems Corporation.

10 Q Is that one of the documents that you examined?

11 A Yes, it is.

12 Q And 505, sir.

13 (Pause.)

14 A I have that here in front of me.

15 Q And what is that, please, sir?

16 A Proposal number 904 of the TechDyn Systems
17 Corporation.

18 Q Did you examine that in your analysis of TechDyn
19 and the ICCE project?

20 A Yes, I did.

21 Q Now, sir, after looking at those and examining
22 those documents, were you able to come to an opinion as to
23 whether or not there were lost profits to the TechDyn
24 Corporation as a result of the ICCE project.

25 A Yes, I was.

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1 Q And what is your opinion, sir?

2 A That there were indeed lost profits to the TechDyn
3 Systems Corporation arising out of problems on the ICCE
4 project, particularly as it relates to the five RFPs and --

5 MR. WORK: I move to strike, Your Honor. That
6 assumes a fact not in evidence and it's improper based on
7 your ruling of yesterday that you reiterated today and I
8 think it's prejudicial for Mr. Riddles to continue to
9 question him on a subject that's not in evidence.

10 JUDGE BROWN: Let me see counsel up here a second.

11 (Pause.)

12 JUDGE BROWN: Well, I'll tell you what -- take the
13 jury out a minute and would you go out side for a minute?

14 THE WITNESS: Sure.

15 (Pause while jury and witness are excused.)

16 JUDGE BROWN: You purport to be basing what he's
17 saying on what other witnesses have testified to?

18 MR. RIDDLES: Not entirely, I think. I think in
19 part he is. One, he is going to be -- what he purports to
20 be basing this on -- I'll just proffer that he has examined
21 the RFP proposals, he has examined -- he knows, I think, of
22 Mr. Roundtree's testimony concerning the exhibit titled 6A
23 that we have produced which Mr. Roundtree testified that we
24 submitted proposals on those jobs and were not working on
25 them.

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1 And I think also that he has reviewed the Air
2 Force documents -- now, these are not in evidence -- on
3 which these jobs were rejected for various reasons and I
4 think that that comes within the scope of the rule allowing
5 an expert to testify on things that are not in evidence but
6 as long as they are within the category of documents that
7 are reasonably relied upon by an expert in the field.

8 JUDGE BROWN: Well -- okay. Let me ask you one
9 other thing. Have I heard -- of course, he's not going to
10 tell us what those Air Force documents say because he can't
11 do that.

12 MR. RIDDLES: No, sir. He's not going to do that.

13 JUDGE BROWN: All right. So have I heard all the
14 evidence on the point of the impact of the lack of the
15 TechDyn people on these proposals and have I heard all I'm
16 going to hear about why TechDyn isn't working on those
17 proposals? Have I heard all I'm going to hear about those
18 two subjects? So that now what I'm hearing is only his
19 evidence as to calculation of damages based on things that
20 he's seen, including the Air Force documents?

21 MR. RIDDLES: I think I understand your question.
22 I believe that the answer is yes with one exception. There
23 is one other document in which -- and I'm not sure whether
24 it's in evidence or not. If I could have one minute, I
25 could answer that question.

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1 JUDGE BROWN: Yes.

2 MR. RIDDLES: Let me just have a minute and I'll
3 see if I can find that.

4 JUDGE BROWN: Okay.

5 (Pause.)

6 MR. RIDDLES: This document has not yet been
7 admitted into evidence. This is Plaintiff's Exhibit 77. It
8 has been authenticated. It's an authenticated Air Force
9 document. And what it contends, Your Honor, I could show
10 you -- it says --

11 MR. WORK: Could I just take a look at it?

12 MR. RIDDLES: Yes. Sure.

13 (Pause.)

14 MR. RIDDLES: It says the performance of both
15 TechDyn and 4C was a strong evaluation factor in future
16 procurement actions at ESD such as the command center
17 authorization -- shoddy performance in the ICCE hurts us
18 all. This is one of the documents that Mr. Ripper has
19 reviewed.

20 We have not admitted it into evidence at this time
21 but it's an authenticated document that he has reviewed.
22 It's not our intention to put it in evidence, Your Honor.

23 JUDGE BROWN: Well, I want to know whether I have
24 heard now all of the evidence that is going to be presented
25 laying the factual predicate why TechDyn is not working --

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1 in our euphemism -- not working on the five proposals.

2 MR. RIDDLES: Yes, sir. You have.

3 JUDGE BROWN: Okay. Let's take your objection.

4 MR. WORK: Well, there are several parts to it.

5 Number one would be if there are Air Force
6 documents that he has reviewed reflecting that this position
7 of those -- we have never been shown them, as far as I know.
8 We got one document yesterday which I was referring to with
9 Mr. Roundtree and you didn't permit me to do that on Mr.
10 Riddles' objection but if he's going to testify on the basis
11 of stuff that we haven't seen and isn't in evidence and
12 can't be in evidence, then his testimony should not be
13 permitted on that ground.

14 There's a much more fundamental ground, Your
15 Honor, and it's going to be the subject of a motion to
16 strike if a motion is necessary and that is --

17 JUDGE BROWN: Well, let's hear the fundamental
18 ground now since we've heard all the evidence laying the
19 factual predicates.

20 MR. WORK: All right. But I would like to have an
21 opportunity formally to present it because I do have a piece
22 of paper --

23 JUDGE BROWN: Well, you can present it right now.

24 MR. WORK: The basic issue in the claim for lost
25 profits for unrelated future business in Virginia is as a

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1 matter of law such a claim cannot be uncertain, speculative,
2 contingent or otherwise. It cannot be any of those things
3 and further it must be reasonably certain.

4 What we're talking about here, and I can show you
5 the summary of his testimony, and I'd like to show it to
6 you, is that it is -- in fact, let me get it.

7 (Pause.)

8 JUDGE BROWN: Did you break the blooming door?

9 (Pause.)

10 JUDGE BROWN: Never a dull minute in this
11 courtroom. They just broke the door. The door handle fell
12 off the other side.

13 MR. WORK: This relates to the five programs --

14 JUDGE BROWN: Well, wait until Mr. Riddles gets
15 back.

16 MR. WORK: All right.

17 JUDGE BROWN: Okay.

18 MR. WORK: This relates to the five programs that
19 are the only programs in evidence. The summary of Mr.
20 Ripper's testimony is as follows: "In Mr. Ripper's opinion,
21 the effect of the foregoing was that many new business
22 opportunities that were identified and bid were lost. Among
23 these lost opportunities were the following" and then it
24 mentions the three German programs and the two New Jersey
25 programs. And then it goes on to say "TechDyn lost the

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1 foregoing proposals because TechDyn's technical personnel
2 were committed to the ICCE project and could not spend
3 adequate time and attention necessary to prepare those
4 proposals."

5 JUDGE BROWN: What is the factual predicate for
6 that opinion?

7 MR. WORK: There isn't any in evidence at this
8 point.

9 MR. RIDDLES: I'm sorry -- what was the point of
10 that?

11 MR. WORK: That they were unable to spend time.

12 JUDGE BROWN: Read the sentence again.

13 MR. WORK: Yes. "TechDyn lost the foregoing
14 proposals because TechDyn's technical personnel were
15 committed to the ICCE project and could not spend adequate
16 time and attention necessary to prepare these proposals."

17 JUDGE BROWN: Stop. Is that part of his opinion?

18 MR. RIDDLES: Yes, sir.

19 JUDGE BROWN: Okay.

20 MR. WORK: And that's not in evidence. I mean,
21 Mr. Roundtree said it but I objected that there was no
22 foundation for it and there was no foundation ever laid for
23 that.

24 Then they go on to say, "The TechDyn personnel
25 that were not available to work on the proposals and/or were

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1 not available to be proposed as members of the engagement
2 team included the following: Don Ellis, Rufus Thornton,
3 Alfred Johnson, Everett Jones, Edward Bell, Glen Helwig and
4 Ralph Rose." No other people have been identified and I
5 have asked Mr. Thornton, Mr. Morrison and Mr. Roundtree to
6 give me a complete list and we do have evidence that none of
7 these guys ever got any business for this company. Mr.
8 Morrison said that. And Mr. Morrison in fact took off the
9 marketing from the table and confined it to simply working
10 on this proposal.

11 The one RFP sheet that we've seen pertaining to a
12 job that was bid out of the Washington office had Ellis'
13 name on it as being part of the proposal team. If anything
14 is speculative, it is this and his only testimony, as far as
15 I'm concerned could be that if these people had worked on
16 this project -- I mean, he can't even say whether they were
17 available to work on it. There's no evidence that they were
18 not available.

19 MR. RIDDLES: I believe Mr. Roundtree testified --

20 MR. WORK: I objected and there was no foundation
21 ever laid for that. If you look at their time charges, they
22 had plenty of time.

23 So this is about the most speculative claim I can
24 imagine. Three programs in Germany that weren't even bid
25 out of this office, two in New Jersey, only one of which was

1 bid out of this office and that was bid by a guy from New
2 Jersey, would have been gotten but for the unavailability of
3 these five guys who never got any business for this company?
4 And that's why I asked him the question in examining his
5 qualifications have you ever done this before? He's never
6 done this before. No one's ever done this before because
7 that's not a proper claim. Pure speculation.

8 MR. RIDDLES: May I --

9 JUDGE BROWN: Yes, but I want to be sure that you
10 understand Mr. Work's argument so I'm going to amplify it a
11 little bit so I am sure you understand it.

12 MR. RIDDLES: All right. Okay.

13 JUDGE BROWN: There is no evidence why TechDyn is
14 not working on these. There is no evidence that TechDyn
15 would have gotten them if some other particular person had
16 been on them.

17 You have selected five proposals without any
18 reason why those particular five were suggested on which
19 TechDyn is not doing work. We haven't heard a word about
20 all the ones on which TechDyn is doing work, although I know
21 from peripheral evidence that TechDyn does have some other
22 work.

23 And there is no factual predicate laid from which
24 the jury could determine or this witness could testify
25 except I guess something that's out there that you haven't

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1 brought in but anyway there is nothing from which the jury
2 could determine that TechDyn would have gotten these
3 proposals if anybody had been able to work on it because we
4 don't know why they didn't get it and we don't know what
5 effect it would have had if everybody's name that's on that
6 list had been on the proposal as being ready to work.

7 MR. WORK: We don't even know if they were ever
8 awarded for that matter, to anyone.

9 JUDGE BROWN: And that's the lack that I see in
10 what Mr. Work says and that's what I want you to address.

11 (Continued on the next page.
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1 MR. RIDDLES: First of all, I recall Mr. Morrison
2 saying on his direct examination and again on his cross
3 examination, that when you have personnel, I remember Mr.
4 Work asking, when you have personnel that you cannot assign
5 to a project, because they are tied up, he said that he
6 could not assign his qualified people from this project,
7 from the ICCE project, to the other project, because he had
8 to have new hires. And that is, it is very difficult to
9 obtain new hires in the context of this. He said he could
10 not propose, which is my recollection, Mr. Ellis, or the
11 other engineers because of their involvement in the ICCE
12 program.

13 JUDGE BROWN: Who did he propose in these
14 proposals?

15 MR. RIDDLES: They are on the proposal routing
16 sheet. There is only one --

17 JUDGE BROWN: No, no. On the proposals, 506, 501,
18 502, 503, 504, 505, who is proposed to do the work?

19 MR. RIDDLES: Could I -- I'd have to look at.

20 JUDGE BROWN: Well, look at it.

21 MR. WORK: I could tell you right off the top of
22 my head.

23 JUDGE BROWN: He can find it. Find it and tell
24 me. Does it say new hires?

25 MR. RIDDLES: It does not say new hires. I don't

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1 know. Yes, sir.

2 JUDGE BROWN: Let's look and see.

3 MR. WORK: One of them says consultants as needed.

4 (Pause.)

5 MR. RIDDLES: Let me just get it.

6 JUDGE BROWN: Is it on the routing sheets that it
7 appears?

8 MR. RIDDLES: Yes, but I am just trying to find a
9 cross reference.

10 JUDGE BROWN: The proposal is the thing that went
11 to the company.

12 MR. RIDDLES: I understand that. I am just trying
13 to find on this sheet, so I can look it up.

14 JUDGE BROWN: I just want to make sure we are not
15 talking about an internal document, but that we are talking
16 about the --

17 MR. RIDDLES: Now this one, I have to try to
18 figure out. I have a cross reference. Which ones -- let's
19 see. Just on minute.

20 (Pause.)

21 MR. RIDDLES: Your Honor, could I consult with Mr.
22 Morrison, get his help in finding these things?

23 JUDGE BROWN: Yes.

24 MR. RIDDLES: Thank you.

25 JUDGE BROWN: All I want to know is who was

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1 proposed to do the work in those proposals.

2 MR. RIDDLES: I know.

3 (Pause.)

4 JUDGE BROWN: Five zero one, two, three, four and
5 five, I think it is.

6 MR. RIDDLES: All right, sir.

7 (Pause.)

8 MR. WORK: Would you like me to hand this --

9 JUDGE BROWN: No. Don't hand anything up that
10 might change my mind, if I am aiming in your direction, you
11 don't want to talk me out of it, do you?

12 MR. WORK: No, I want to give you confidence.

13 JUDGE BROWN: Well, don't hand me anything then.

14 (Laughter.)

15 JUDGE BROWN: When a lawyer prepares a piece of
16 paper, he feels like he is lost if he doesn't get to use it.

17 MR. WORK: Well, Ms. Powsen came all the way out
18 here to Fairfax County to give it to me. She probably
19 stayed up all night last night writing it.

20 (Pause.)

21 MR. RIDDLES: Your Honor, I am looking at the
22 people that are proposed for Exhibit 505.

23 JUDGE BROWN: Okay.

24 MR. RIDDLES: And that is in two volumes. That is
25 the job in Greece and Turkey.

1 JUDGE BROWN: Are there people's names there?

2 MR. RIDDLES: Yes, there are and their resumes.
3 What these indicate, Your Honor, is that there are indeed
4 new hires. It also indicates that none of the people -- I
5 hesitate to say none of them, because I haven't looked all
6 the way through --

7 JUDGE BROWN: The names are not in there? The new
8 hires names are not in there?

9 MR. RIDDLES: Yes, sir, they are.

10 JUDGE BROWN: The names are there?

11 MR. RIDDLES: The names, their qualifications and
12 their resumes. They have to --

13 JUDGE BROWN: There is no where that a blank
14 appears, then? A person not named as a name with a resume,
15 whether he is a new hire or otherwise, that is what I am
16 interested in. That is what you were saying.

17 MR. RIDDLES: No. I don't think that there is a
18 blank. But can I show the Court what there is here.
19 Because it creates a reasonable inference for the jury to
20 support testimony.

21 JUDGE BROWN: Yes, I want to see that.

22 MR. RIDDLES: This, for example, these that list,
23 I think -- for Greece. And the Court can look through.
24 There are several of these. And the Court will see that
25 there are a number of them are non-employed at this time

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1 with the TechDyn Corporation. They are new hires.

2 MR. WORK: That is just contradicting what --

3 JUDGE BROWN: Are you saying that Ronald Feathers.

4 I am not sure what I am supposed to be looking at. I am

5 looking at someone named Ronald Feathers.

6 MR. RIDDLES: Could I see, and I will identify the

7 specific ones that I say are, that the evidence indicates

8 that they are new hires.

9 JUDGE BROWN: Okay.

10 (Pause.)

11 MR. RIDDLES: I am not certain about Mr. Feathers,

12 but I will clear that up in a minute. Here is Mr. Bowsica,

13 his proposed position is a site manager. He is in Turkey,

14 and not a member of TechDyn Corporation.

15 JUDGE BROWN: And where does that say that?

16 MR. RIDDLES: It says it right here, where it --

17 JUDGE BROWN: Where he is present.

18 MR. RIDDLES: Data communications technician on a

19 system in Turkey. And at that time, TechDyn, as I

20 understand, had no projects in Turkey. And he is in

21 essence, not a -- What they do have, when there is a TechDyn

22 person, now, and I think there is one here that I think is

23 TechDyn man, who is proposed --

24 JUDGE BROWN: No, I just wanted to get the

25 picture. In other words, there is not, there are no blanks.

1 There are identified, people who are not yet TechDyn
2 employees, is that your point?

3 MR. RIDDLES: That is the point.

4 JUDGE BROWN: All right, well go ahead with your
5 argument.

6 MR. RIDDLES: And so, I think that it will appear
7 throughout these that there are these new hires that they
8 are going to get, and I would proffer that.

9 The second point is, when these people are
10 proposed, they propose them on the proposal, they could not
11 work in-house to develop this proposal in a system that is
12 sufficient to put together a technically sufficient
13 proposal.

14 The third aspect of this, is that when you have to
15 propose new hires, the company loses cost effectiveness.
16 And it seems obvious to me, Your Honor, that if you are
17 going to have to propose somebody you have to identify a man
18 in Ankara, Turkey, who has never worked for TechDyn before,
19 and these are the clarifying questions that Mr. Rountree
20 testified to. These are the kinds of questions that can be
21 asked.

22 And so you have that factor, it increases your
23 costs as well, when you have to go and hire new people in
24 Turkey, rather than use the ongoing people that you have.
25 You have to go out and search for these people, you have to

1 find them, and then you have to propose them. In some
2 cases, you have to relocate them.

3 So, those are factors that present a reasonable
4 inference.

5 JUDGE BROWN: A reasonable inference of what?

6 MR. RIDDLES: A reasonable inference that when you
7 don't have your best qualified project people to put on a
8 project, that it is going to cost you more time, more money
9 and will weaken the overall effort of the proposal effort.

10 And there has been testimony to it, by not only
11 Mr. Morrison, but by Mr. Rountree. And the third point is,
12 that when you have a project like this, there is also a
13 reasonable inference that when you have a project like this,
14 the government may be a little less likely to pick you up,
15 when you have a project whereas here cause to go bad by the
16 Whittaker Corporation. That adversely impacts upon TechDyn
17 as well.

18 Those are inferences that, and then what we have
19 done is we have identified specific jobs with specific
20 people where our best qualified people are not able to go
21 and take on that job. And all we are talking about in the
22 area of lost profits now is to have Mr. Ripper identify the
23 profits that may have been, or would have been earned on
24 these jobs. These specific jobs.

25 JUDGE BROWN: Okay. Have I heard your argument?

1 MR. RIDDLES: Yes.

2 JUDGE BROWN: I sustain the objection, and further
3 rule that there is no sufficient basis to allow the jury to
4 consider the five proposals, or damages based on the five
5 proposals that have been introduced into evidence. Five
6 proposals were selected. We don't know how or why, that
7 Whittaker is not working on.

8 There is no evidence why Whittaker is not working
9 on those. And to allow the jury to make the leap from the
10 fact that we had a weakened proposal, we had to use new
11 hires, we didn't use our best people. The comments that you
12 make are very telling, I hate to play back a lawyer's
13 statements to you, but these are the kinds of things you
14 said, among other things that you said, but these are the
15 kinds of things that support the position I am arguing, I am
16 ruling on:

17 You said it makes it a little less likely to get
18 these government contracts. Well, a little less likely
19 doesn't cut it as far as evidence is concerned. You started
20 to say, he is going to testify the profits that may have
21 been earned. And I think that is more the truth, than
22 profits that would have been earned.

23 MR. RIDDLES: I believe I changed that, Your
24 Honor.

25 JUDGE BROWN: You did. You laid a predicate, I

1 believe, for the possibility that you then could have shown
2 if it is a fact, that the government, looking at that
3 proposal, did not grant it to TechDyn because certain people
4 weren't on it. Because the best people weren't on it,
5 because it was weak. Because it involved new hires, or
6 whatever combination of it. And I waited in vain for that
7 testimony to come. But to allow the jury to make that leap
8 for the Government, I think would be pure speculation, and
9 in Mr. Work's language, and improper, in my language, and
10 not a proper measure of damage. And I rule that it may not
11 be done, and that there be no further testimony on that
12 particular aspect of the case.

13 Are we ready to proceed, noting your exception?

14 MR. RIDDLES: Yes. Let me find out where Boehlert
15 is. Well, you have ruled that he can't testify on that.
16 You ruled that he can't testify on that, and you ruled that
17 he can't testify on the presentive basis, and I want to know
18 what I have left at that point.

19 JUDGE BROWN: Do you want to take a short recess?

20 MR. RIDDLES: Yes.

21 JUDGE BROWN: We will take a five minute recess.

22 MR. WORK: Your Honor, may Ms. Raymond be excused.
23 She is the company representative.

24 JUDGE BROWN: I take it we are not going to need
25 her testimony today, is that right? You don't plan to call

**TRIAL TESTIMONY OF
SCOTT DOUGLAS GRAY**

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 for the next witness, who is?

2 BAILIFF: Mr. Scott Gray.

3 JUDGE BROWN: Mr. Scott Gray.

4 Whereupon,

5 SCOTT DOUGLAS GRAY

6 having been duly sworn, was called as a witness herein and

7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. BOEHLERT:

10 Q Good afternoon.

11 A Good afternoon.

12 Q Sir, will you please give us your full name and
13 address for the record?

14 A Yes, my name is Scott Douglas Gray, and I live at
15 1409 N. Lancaster Street in Arlington, Virginia.

16 Q Are you currently employed?

17 A Yes. I am employed by the Barrington Consulting
18 Group.

19 JUDGE BROWN: Excuse me, do we need these?

20 MR. BOEHLERT: We don't.

21 JUDGE BROWN: Okay, just get them out of his way
22 and get them out of my way.

23 BY MR. BOEHLERT:

24 Q Mr. Gray, starting with your graduation from high
25 school, please describe your educational experience.

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 A Yes, sir. I attended Colgate University and
2 received a bachelors of arts degrees in economics. And
3 following that, I received my masters in business
4 administration with a concentration in finance from
5 Georgetown.

6 Q And when was that?

7 A I graduated in 1983 from Georgetown.

8 Q Since that time, have you had any other education
9 or classes?

10 A Seminars, periodic seminars in claims pricing and
11 damage analysis, but on continuing education courses.

12 Q What did your studies at Georgetown to obtain your
13 masters in business administration consist of?

14 A Well, a concentration in finance, financial
15 analysis and accounting.

16 Q And since that time have you attended seminars?

17 A Yes, I have.

18 Q What have you attended?

19 A Seminars on the pricing of claims, construction
20 claims, and claims in Government contracts, delay,
21 disruption contracts. Issues of that type.

22 Q Okay. After your graduation from Georgetown,
23 would you describe your work experience, please?

24 A Yes, initially I was involved with the Grace
25 Commission, which was a commission put together to study the

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 methods of cost control in the Federal Government, also
2 known as the Product Waste and Abuse Study. Following that
3 I was employed by Peterson Consulting.

4 Q When you were at the Grace Commission, what in
5 particular did you do?

6 A It was primarily related to procurement issues.
7 It was research consultant type position.

8 Q And then Peterson Consulting, what is that?

9 A That's a firm that really analyzes damages and
10 issues related to business disputes in litigation.

11 Q When did you join Peterson?

12 A I joined Peterson late in 19, or about the middle
13 of 1983.

14 Q What did you do while you were employed there?

15 A Well, I entered Peterson at the staff level, and
16 rose up through the ranks to the vice president level. And
17 my responsibilities changed over time.

18 Q Well, let's start at the beginning and go up
19 through, just generally, what your responsibilities were.

20 A Okay, at the earlier levels, it was primarily
21 engagement related, which I'll say were working on
22 consulting engagements at Peterson Consulting. And those
23 were primarily engagements for the analysis of costs and
24 damages on contracts cases.

25 Q Okay, over time, did your duties change?

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 A Well, as you rise up, you take on more management
2 responsibility duties. So, by the time I was a vice
3 president, my duties broke out really into an administrative
4 side, which relates to recruiting and staffing and training,
5 as well as continuing to work on consulting engagements.

6 Q You talked about engagements related to contract
7 cost and damages. Would you describe some of those
8 engagements, please?

9 A Yes. Generically, the are either being retained
10 by the contractor, or a subcontractor. In some instances,
11 by an owner, to analyze increase costs or cost overruns, or
12 damages. One case was an analysis of increased costs to
13 design and install a software system for an automated power
14 plant for the U.S. Navy.

15 Q What was your participation in that project?

16 A That was primarily doing the analysis of the
17 increased costs. Determining what methodology should be used
18 to quantify damages, and then actually performing the
19 calculations.

20 Q Did you have other similar engagements while at
21 Peterson?

22 A Yes, at Peterson, I probably worked on 30 to 40
23 engagements that would be similar to that.

24 Q And that was doing what?

25 A Really analyzing increase in costs incurred by

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 contractors or subcontracts as a result of specific actions.

2 Q And how long did your engagement with Peterson
3 last?

4 A I was with Peterson up through the fall of 1990,
5 as it was a little over seven years.

6 Q And then what happened.

7 A I left Peterson to help found the Barrington
8 Consulting group, where I am currently employed.

9 (Continued on next page.)

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SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 Q What are your responsibilities with the Barrington
2 Consulting Group?

3 A Well, actually, they are very similar to what they
4 were at Petersen. They break out into two general areas.
5 There's the administrative area of training and recruiting,
6 et cetera, basically managing the business and managing our
7 office.

8 On the technical side or on the engagement side,
9 it continues to be similar to the analysis of damages and
10 costs on contract cases.

11 Q And are you currently involved in matters other
12 than this project?

13 A Yes, I am.

14 Q And on approximately how many other contracts?

15 A Oh, currently, about four or five other open
16 engagements in various stages, some just beginning, some
17 that have been dormant for a while. I've probably worked on
18 eight to ten since I've been with the Barrington Consulting
19 Group.

20 Q Would you describe some of those for us and what
21 you're doing right now with respect to those other
22 engagements?

23 A Yes. One of them I'm currently working on relates
24 to assisting a government contractor in identifying
25 increased costs related to delays and disruptions that they

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 had incurred on a project to design and install test
2 equipment and diagnostic equipment for the U.S. Air Force.
3 A similar project just trying to identify increased costs on
4 a U.S. Army project for an integrated command and control
5 information system.

6 Q And who is the client in that case? You work for
7 the contractor?

8 A That's right. The government contractor.

9 MR. BOEHLERT: Your Honor, at this time I proffer
10 Mr. Gray as an expert in the field of contract costs and
11 damages.

12 JUDGE BROWN: Do you want to ask him any questions
13 on his expertise?

14 MR. WORK: Yes, I do, Your Honor.

15 VOIR DIRE EXAMINATION

16 BY MR. WORK:

17 Q Good afternoon. I understand you graduated from
18 Georgetown in 1983?

19 A That is correct.

20 Q And then you worked briefly for the Grace
21 Commission?

22 A Yes. Actually, I began working for the Grace
23 Commission while I was going to school at Georgetown, during
24 the summer and then continued to work there during my second
25 year at Georgetown.

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1 Q All right. So you worked there for some six
2 months or so at the most.

3 A That's approximately correct.

4 Q And then your entire career has been, beyond that
5 point, has been in what we call litigation support,
6 developing claims to assert against people. Is that right?

7 A Yes, that is correct.

8 Q And your colleagues in this particular effort from
9 the beginning have been Messrs. Ripper and Crider. Is that
10 right?

11 A Yes, that's correct.

12 Q And you were proffered as an expert in cost
13 analysis but you've never been involved in any company where
14 you have actually analyzed the costs of that company from
15 the inside. Is that correct?

16 A Being employed by a company?

17 Q That's right.

18 A Well, I do various types of analyses for our own
19 company, for Barrington currently and at Petersen, various
20 types of analyses that we do to understand our cost
21 structure for management purposes.

22 Q Barrington has been in existence about six months?

23 A That's correct.

24 MR. WORK: Okay.

25 Again, Your Honor, I don't think Mr. Gray's

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 background, as impressive as it is, qualifies him to analyze
2 costs in this program. He's not been in any industry that
3 is remotely similar to this and he has never worked from the
4 inside of a company to understand how a company incurs costs
5 and the reasons why.

6 Again, I suspect your ruling will be that Virginia
7 law is lenient on the subject and I will defer to that but I
8 feel he's not qualified to offer any insight to this jury
9 and certainly no disparagement of his fine credentials.

10 JUDGE BROWN: I'll overrule the objection and
11 receive him as an expert and the weight to be given to his
12 testimony will be judged by that and other factors that the
13 jury will and has heard.

14 DIRECT EXAMINATION (Resumed)

15 BY MR. BOEHLERT:

16 Q Mr. Gray, are you familiar with the ICCE project,
17 the Iceland Command and Control Enhancement Project?

18 A Yes, I am.

19 Q And how did you become familiar with that project?

20 A Well, we were engaged, Barrington Consulting
21 Group, including myself, were engaged by TechDyn to assist
22 them in the analysis of costs and damages on that project or
23 related to that project.

24 Q And what was the scope of your work?

25 A Well, the scope of my work as opposed to my

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 colleagues, Mr. Crider and Mr. Ripper, the scope of my work
2 was really focused on analyzing increased costs flowing from
3 specific actions that are being alleged against Whittaker.

4 Q And specifically, what did you do pursuant to your
5 engagement?

6 A Well, initially, we went in and met with the
7 TechDyn people and reviewed the project documentation to get
8 an understanding of what those actions or what the issues
9 were and --

10 MR. WORK: Excuse me. Your Honor, I understand
11 how your rulings have gone on this subject but I reiterate
12 our objection that the summary of Mr. Gray's testimony lists
13 documents that he has reviewed as the basis of his testimony
14 that have not been given to us.

15 JUDGE BROWN: Your objection is preserved and
16 overruled for the previously stated reasons.

17 BY MR. BOEHLERT:

18 Q Your first engagement or your first action was to
19 do what, Mr. Gray?

20 A It was to understand exactly what the issues were
21 or what was being complained of.

22 Q And how did you go about doing that?

23 A Well, it was meeting with TechDyn people and
24 reviewing project documents.

25 Q Who did you meet with?

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 A I met with Mr. Morrison, Mr. Hise, Mr. Ellis, Mr.
2 Thornton, Mr. Bell. Several others involved in the project
3 to varying degrees -- Mr. Max Rosen.

4 Q Have you met with them on more than one occasion?

5 A Yes, on several occasions.

6 Q And from those meetings, did you gain an
7 understanding of what the problems on the ICCE project were?

8 A Well, from those meetings and also a review of
9 documents and the legal filings in the case.

10 Q And what's your understanding?

11 MR. WORK: Objection, Your Honor. There's no
12 qualification of Mr. Gray as one who does anything other
13 than calculate costs.

14 JUDGE BROWN: I sustain the objection to him
15 giving his understanding. That would be just repeating
16 hearsay that he's gotten from other people and from the
17 review of the documents.

18 BY MR. BOEHLERT:

19 Q Upon completing that phase, what did you do next?

20 A Well, the next step was to understand TechDyn's
21 accounting system and their system of accumulating costs.

22 Q What did you do to do that?

23 A Well, again, I met with people in the accounting
24 department as well as Mr. Hise to review the types of
25 records that they maintain on a consistent basis and

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 reviewed those records to get familiar with the way they're
2 set up and the way the costs are accumulated.

3 Q What documents did you review?

4 A Well, as a generic category, I'll say just about
5 all the accounting and cost documents but the ones we
6 primarily relied on included summaries of the ICCE contract
7 costs, the general ledger for the ICCE project as well as
8 indirect departments. All the detailed cost information
9 such as invoices, purchase orders, time sheets, things of
10 that nature.

11 We reviewed the budgets from project schedule
12 status reports. Proposal modifications that were submitted,
13 submissions to the DCAA for indirect rates. All the
14 documents that go into the accounting system in the
15 recording of costs.

16 Q Okay. Based upon the review of those documents,
17 what did you next do?

18 A Well, once we were familiar with them, we set out
19 to understand cost increases or cost overruns on the job and
20 then to try to understand what caused the cost to overrun
21 and try to specifically identify the increased costs that
22 came about from delays on the project and specific breaches
23 on the project.

24 Q Were you able to do that?

25 A Yes, we were.

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 Q What did you do next?

2 A Well, the next step is really to identify the
3 methodology that you're going to employ to price each
4 discrete claim item and I worked with Mr. Hise as well as
5 with my colleagues to identify the most appropriate
6 methodology to use and then basically followed it through --
7 went to the cost records and --

8 Q Did you arrive at a methodology?

9 A Yes.

10 Q What was it?

11 A Well, we've got five discrete claim areas and the
12 methodology --

13 MR. WORK: Objection, Your Honor. May we approach
14 the bench, please?

15 JUDGE BROWN: Yes.

16 MR. WORK: Again, I'm looking at the description
17 and the substance of his testimony and although it says he
18 will testify to his methodology, he does not satisfy the
19 Virginia rule in explaining what his opinions are with
20 regard to methodology and what the basis for those opinions
21 is.

22 That's the entire description of the substance of
23 his -- the summary of his opinion.

24 JUDGE BROWN: Okay.

25 MR. BOEHLERT: Your Honor, he is entitled to

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 cross-examination and I overrule the objection. He may
2 testify.

3 So we need to get all this stuff back. We need to
4 get the jury back and we need to get the witness back.
5 Maybe one of you would get the witness.

6 (Pause while jury and witness are seated.)

7 DIRECT EXAMINATION (Resumed)

8 BY MR. BOEHLERT:

9 Q Mr. Gray, what methodology did you use to compute
10 TechDyn's costs?

11 A We really relied on three basic principles. The
12 first is reliance on the actual costs or the historical
13 costs incurred by the company and recorded during the normal
14 course of business in the regular business records and using
15 those to identify the damage amount.

16 The second basic principle is to do discrete claim
17 calculations or to do separate claim calculations for each
18 area of damages.

19 And the third is to include in our claims only
20 those costs that are attributable to the actions that are
21 being alleged against Whittaker.

22 Q In your experience, Mr. Gray, is that a generally
23 accepted method of computing damages?

24 A Yes. Those are the principles and guidelines that
25 are accepted and are generally used in calculating a claim.

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1 Q What about delay claims?

2 A Well, for a delay claim, what we've done is
3 analyzed the time related costs on the job and identified
4 those which were increased or really incurred due to the
5 PDFA delays attributable to Whittaker.

6 Q How did you do that?

7 A Again, the first step is the identification of
8 time related costs.

9 Q How did you do that?

10 A That -- it's a narrative process. It begins with
11 an understanding of why costs on the project are being
12 incurred. There are many costs on a project that are not
13 time related costs, that relate only to performing a
14 specific activity.

15 Q What type of costs are those?

16 A Well, we often refer to them as activity related
17 costs and that would be a cost that relates to specifically
18 performing a discrete item and work, such as purchasing a
19 piece of hardware that is going to be installed. That is
20 not affected by delay. You purchased that hardware and the
21 cost stays the same regardless of whether the contract is
22 pushed back or not.

23 Q So what, if anything, did you do in this process
24 with those type of costs?

25 A Well, again, here we're trying to identify the

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 delay costs attributable to Whittaker. So any costs that
2 aren't affected by delays, we excluded from our analysis and
3 didn't include them.

4 Q What costs were included?

5 A Just what we referred to as time related costs.

6 Q What did you identify as time related costs in
7 this case?

8 A Well, in this case, there's a very significant
9 component of time related labor and that relates to the
10 project personnel that are on the project for substantially
11 the whole period and each month, each day, each week, the
12 project gets pushed out, those people need to remain on the
13 project and the costs for those people increase.

14 Q So did you use all project personnel?

15 A No. No. Just --

16 Q What project personnel did you use?

17 A Just the core group of people that were required
18 to maintain the contract, if you will. The core group of
19 people that were required to stay on this contract for the
20 essential duration of the contract.

21 Q Were there other time related costs that you
22 identified?

23 A Yes. There is the on-site overhead or the
24 indirect overhead that relates to that labor that we
25 identified.

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 Q Were you able to compute that?

2 A Yes, we did. Using the rates that have been
3 reviewed and approved by the DCAA.

4 Q Okay. Are there other elements of cost that you
5 reviewed and included in this time related pool?

6 A Yes. There is the travel expenses that were
7 incurred in relation to those time related people as they
8 went about their duties over the course of the project.

9 Q Why did you include travel?

10 A Well, the work that these people are doing over
11 the course of the contract includes visiting subcontractors
12 to monitor performance, various visits to different Air
13 Force installations to meet with the client. Visits to
14 Iceland to oversee work that's going on there. So there's
15 travel over the course of the project and it's done and as
16 the project extends out that travel increases and those
17 costs, additional costs, are incurred.

18 Q Were there other costs that you identified for
19 this time related pool?

20 A Yes. There are consultants and some temporary
21 labor which are basically people that TechDyn employed on a
22 contract basis to work for them over the course of this
23 project.

24 Q Why did TechDyn include those people in the
25 calculation?

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 A Well, again, these are people that were essential
2 or required for the performance of the contract and were on
3 for the entire duration of the contract.

4 Q What process was used to select the individuals
5 that would have been named for purposes of these damages?

6 A One piece of that process were discussions with
7 the project personnel to understand what they were doing,
8 what their function on the project was and why they remained
9 on, why they were essential to the performance of the
10 contract.

11 MR. WORK: Objection, Your Honor. Move to strike.
12 The issue of whether people are essential on this project is
13 a factual issue beyond the competence of this witness.

14 JUDGE BROWN: I'll overrule the objection.

15 (Continued on next page.)

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1 BY MR. BOEHLERT:

2 Q And did you personally have these conversations?

3 A Yes, I did.

4 Q And with whom did you speak?

5 A I spoke with Mr. Morrison. As well as Mr. Ellis
6 and Mr. Thornton. Mr. Everett Jones. And Mr. Rosen.

7 Q Did you ever have occasion to speak with Mr. Hise?

8

9 A Yes, I spoke to Mr. Hise on many occasions.

10 Q Are you familiar with the term total cost claim?

11 A Yes, I am.

12 Q What is a total cost claim?

13 A Well, that's a methodology. A simple claim
14 methodology in which a contractor would calculate his
15 damages by taking total cost incurred on the project,
16 subtracting out the bid cost or the budgeted costs, to
17 determine an overrun and adding to that profit and interest
18 in mark ups to come up with a claim amount.

19 Q Did TechDyn use a total cost approach to compute
20 its damages?

21 A No, not on this project.

22 Q How did the TechDyn approach differ from a total
23 cost claim?

24 A First of all, it differed by identifying discreet
25 areas or discreet claim items. Identifying a delay claim,

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1 identifying increase costs related to overhead. Increased
2 costs related to the test beds. Added costs for the RCE. By
3 identifying discreet claims and pricing them out, rather
4 than taking an aggregate approach and saying here is what we
5 lost doing everything, we identified specific items and just
6 found the increased cost for that.

7 That's one method. But I tell you the primary way
8 is just, you know, we did employ the top down approach,
9 which says, here is cost, minus bid, is the actual. We
10 built up to what the increased costs were, rather than just
11 subtracting down and claiming an entire overrun.

12 Q And was it by the method you just described that
13 you did this bottom up building of these damages?

14 A Yes. It is more the identification going in and
15 identifying increased costs, rather than just identifying an
16 overrun.

17 Q Have you used that methodology on other occasions,
18 Mr. Gray?

19 A Which methodology?

20 Q The methodology of the ground up approach to
21 damages?

22 A Oh, yes.

23 Q And that is the approach that TechDyn used in this
24 case?

25 A Yes.

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1 Q Is that consistent with generally accepted claim
2 principles?

3 A Yes --

4 MR. WORK: Objection, no foundation.

5 JUDGE BROWN: I don't know what is meant by
6 generally accepted claim methods. I sustain the objection.

7 MR. BOEHLERT: Are the standards in the industry,
8 Mr. Gray, for pricing delay claims?

9 JUDGE BROWN: What industry?

10 MR. BOEHLERT: The cost field, the cost accounting
11 field for Government contract field.

12 THE WITNESS: There are methods that are generally
13 employed --

14 MR. WORK: You still haven't answered my
15 objection. That is not a foundation.

16 JUDGE BROWN: Well, it sounds like he is laying a
17 foundation. He can say --

18 MR. WORK: The question was, are there standards
19 in the Government contract field? Of course there are
20 standards in the Government contract field. That's a very
21 broad field, indeed.

22 JUDGE BROWN: Well --

23 MR. BOEHLERT: We are talking about delay claims.

24 JUDGE BROWN: Say that again.

25 MR. WORK: We are talking about the claims

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1 methodology field, which is the field that this man was
2 offered as an expert.

3 JUDGE BROWN: Well, I guess I got him off it,
4 because I didn't understand what claims meant. What claims
5 methodology meant. Ask the question, I am lost.

6 MR. BOEHLERT: Okay, I will.

7 (Pause.)

8 BY MR. BOEHLERT:

9 Q Are there various methodologies to compute
10 damages, delay related damages?

11 A Yes.

12 Q And are you familiar with those methodologies?

13 A Yes.

14 Q And what are some of them?

15 A Well, the method that is commonly used and is
16 generally used in the industry, is to determine a daily rate
17 of delay damages. And to apply that to the number of days
18 of delay that are being attributed to the defendant to
19 calculate the delay.

20 Q Is that what was done in this case?

21 A Yes, it is.

22 Q You mentioned a remote control element. What, if
23 anything, did you do to assess the remote control aspect of
24 this project?

25 A We went into the cost records, and identified the

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1 specific instances of costs that arose, or were incurred
2 because of TechDyn's need to go and compete the RCE work.

3 (Pause.)

4 Q In your analysis, Mr. Gray, were you asked to
5 prepare a graft to depict the time related costs that were
6 accumulated by you and Mr. Hise in your analysis and then to
7 demonstrate which portion of those costs are being claimed
8 against Whittaker?

9 A Yes.

10 Q I present to you what has been marked as
11 Plaintiff's Exhibit 988 for identification and ask if you
12 can identify that document?

13 A Yes, I can.

14 Q What is it?

15 A This is a document I prepared --

16 MR. WORK: Could you please wait a moment? Thank
17 you.

18 THE WITNESS: This is a document that I prepared
19 to help graphically or pictorially present the methodology
20 or the delay claim that we calculated.

21 BY MR. BOEHLERT:

22 Q I am going to present to you what's previously
23 been marked as Plaintiff's Exhibit 953.

24 (Pause.)

25 Q I ask you whether the document you have in front

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1 of you, Plaintiff's Exhibit 988, graphically depicts the
2 information on Plaintiff's Exhibit 953?

3 A Yes, it does.

4 MR. BOEHLERT: Your Honor, I move Plaintiff's
5 Exhibit 988 into evidence.

6 JUDGE BROWN: Any objection to 988?

7 MR. WORK: Yes. It is not an exhibit. It's a
8 visual aid. It's not evidence, it's a visual aid.

9 MR. BOEHLERT: It is based on evidence, Your
10 Honor. It's a graphic depiction of what is in evidence,
11 what has been received in evidence.

12 JUDGE BROWN: I don't think that's an objection,
13 unless there is something I am missing. I mean, he prepared
14 it. It is based on another exhibit. I don't understand the
15 objection, I guess.

16 MR. WORK: The understanding, the objection, Your
17 Honor, is that this is a visual aid, the same type that has
18 been used through the course of this hearing. It is simply
19 prepared to explain, conceptualize something. It is not
20 evidence. It is not real evidence. It is simply a
21 document.

22 JUDGE BROWN: I don't think a visual aid always
23 can't come into evidence. And I don't hear any other
24 objection to this one, so it is received. What number is
25 it?

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1 MR. BOEHLERT: Nine - 88.

2 JUDGE BROWN: Plaintiff's Exhibit 988 is received.

3 (The document referred to, having
4 been previously marked for
5 identification as Plaintiff's
6 Exhibit 988, was received in
7 evidence.)

8 MR. BOEHLERT: Mr. Gray, I am going to put that on
9 the overhead projector here, and ask that you please step
10 down and I am also going to ask that the jury resume their -
11 - do you still have those exhibit books? The 900 series?
12 If you please would refer to page 953.

13 (Pause.)

14 MR. BOEHLERT: Mr. Gray, what is the purpose of
15 Plaintiff's Exhibit 953, calculation of delay damages per
16 day.

17 THE WITNESS: Well, the purpose of 953 is to show
18 the calculation of the daily delay damages that were
19 incurred by TechDyn on the ICCE program.

20 BY MR. BOEHLERT:

21 Q Now, with respect to that, would you please
22 explain this chart, and please explain with respect to all
23 of these time related costs, which you assembled for TechDyn
24 on this project, which portion of that is being claimed
25 against Whittaker in this law suit?

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1 A As I said, the first step that we did was to
2 review the project and identify the time related costs of
3 the project. And that is essentially what this whole box
4 represents, \$5,153,000 from exhibit 953.

5 But you are not done when you get there. What you
6 are trying to get at are the added costs that came, that are
7 due to the delays attributable to Whittaker. So, when we
8 got in that and analyzed the time related costs, this \$5
9 million of time related costs, 1,352,000 related to
10 performance of the original contract, the 18 months that
11 were in the original contract between the Air Force and
12 TechDyn.

13 That is not attributable to Whittaker. That has
14 nothing to do with any delays that are cause.

15 Q Why isn't that being demanded against Whittaker?

16 A Well, because they were not caused by Whittaker.

17 Q TechDyn would have been there any way?

18 A That's correct. Those costs would have been
19 incurred regardless of --

20 Q Now, I'd like to take you to the next category
21 there. Caption, time related costs for modification number
22 36, \$733,079. What does that refer to?

23 A Those are the time related costs that were
24 incurred during the time period that was compensated by the
25 Air Force, the 9.75 month period, compensated by the Air

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 Force in MOD 36. So, again, those are costs that at this
2 point, are not being attributed to Whittaker because they
3 were reimbursed by the Air Force.

4 Q And TechDyn paid for that, so it is not being
5 claimed again?

6 A That's correct.

7 Q Now, in this bottom, on the bottom here. Time
8 related costs included in other MODs and claims. What are
9 MODs.

10 A Well those are modifications tot he contract
11 between TechDyn and the Air Force.

12 Q And there is a number there, \$753,910. Is that
13 being claimed against Whittaker?

14 A No, it is not.

15 Q Why not?

16 A Well, during the period following the 18 month
17 original contract period and the 9.75 month period
18 recognized by the Air Force, there were some selected
19 modifications to the contract that needed to be performed by
20 TechDyn. So, TechDyn would have, out in this period, some
21 low level of people, time related people, out there working.
22 Time related people, such as the project manager, part of
23 his time, Don Ellis, etc.

24 Q Were you able to determine what that level left
25 would have been for purposes of contract modifications?

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1 A Yes.

2 Q What did you do with those costs?

3 A Well, we had not included them in the claim
4 calculation against Whittaker.

5 Q Why?

6 A Because once again, they weren't caused by
7 Whittaker.

8 Q Okay, is there an aspect of these time related
9 costs that you assembled that are being claimed against
10 Whittaker?

11 A Yes.

12 Q And what box is that?

13 A Well, that's this box right here.

14 Q How did you compute that, Mr. Gray?

15 A Those are the costs incurred during this extended
16 period that don't relate to modifications from the Air Force
17 or to other claims that TechDyn has against Whittaker.
18 There is another issue in this box, right here, which is,
19 one of TechDyn's claims against Whittaker for procurement of
20 the RCE. And some of those re-procurement costs were
21 incurred during this extended period. And it is not
22 appropriate to include them on this delay claim where they
23 would be being claimed twice. So, also included them in
24 here and removed them.

25 Q Those are being claimed somewhere else, is that

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1 right?

2 A THat's correct.

3 Q As part of the remote control element point.

4 A Yes.

5 Q Thank you. Would you please resume the stand?

6 (Pause.)

7 Q Now, I see up in the box there, additional time
8 related costs attributable to Whittaker, \$2,315,153.

9 A Yes.

10 Q Now, turning to Plaintiff's Exhibit 953, if you
11 have that in front of you.

12 A Yes, sir, I do.

13 Q And coming down the page about half way, do you
14 see that same number, \$2,315,153?

15 A Yes, I do.

16 Q You just explain to us how you arrived at that
17 number, correct?

18 A Correct. Those are the time related costs that
19 are attributable to Whittaker.

20 Q Now, the next entry is divided by the number of
21 days in the delay period, 1,243 days.

22 A Yes.

23 Q How was that number arrived at?

24 A The entire contract period, for which these costs
25 related, for which this \$5,153,000 of the time related costs

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1 relate, run from August 31 of 1985 up through May 19 of this
2 year, May 19, 1991. And that is 2,088 days, calendar days,
3 during that period.

4 Q All right.

5 A Now, again, part of that was originally
6 anticipated, and part of it was compensated by the Air
7 Force. So, we removed 18 months worth of days, 548 days
8 from the 2,088 and also 9.75 months worth of days, which is
9 297, to arrive at this number of days in this delay period.

10 Q To get at this number of delay days, what is the
11 ending date that you used, Mr. Gray?

12 A May 19 of 1991.

13 Q Of 1991. We have heard testimony that delays have
14 gone beyond May 19, 1991. In this calculation, is there any
15 compensation being demanded for that?

16 A No. Because when this was done, the most recent
17 cost data available was May 19. And so we needed to rely on
18 the costs that we had in hand at the time.

19 Q So, you had actual costs at that time to prepare
20 that number?

21 A That's right --

22 MR. WORK: Objection, Your Honor, we didn't have
23 actual costs. And again, we have a problem with relying on
24 some things that we didn't receive in discovery.

25 JUDGE BROWN: I overrule the objection.

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1 MR. BOEHLERT: As you have already ruled several
2 times, Judge, they did get access to every document TechDyn
3 has.

4 MR. WORK: He didn't --

5 JUDGE BROWN: Everybody has their position. And
6 the jury isn't considering what I am ruling on the
7 objections.

8 (Continued on next page.)

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1 BY MR. BOEHLERT:

2 Q The next entry is delay cost per day, \$1863. Do
3 you see that?

4 A Yes.

5 Q Okay. And is that the result of the division of
6 the two prior numbers?

7 A Yes. That's taking the same \$315,153 and dividing
8 it by the number of days and coming up with the average
9 delay cost per day.

10 Q Do you know why the profit rate of 11 percent was
11 used?

12 A Yes. That was the negotiated rate that was used
13 by TechDyn on this contract and also supported by historic
14 profitability of the company.

15 Q So you arrive at delay damages per day \$2068 per
16 day.

17 A That's correct.

18 Q What does that mean?

19 A That means that every extra day that TechDyn had
20 to stay out on the project they were damaged by that amount.

21 Q And turning now to Exhibit 952? Do you have that
22 document in front of you?

23 A Yes, I do.

24 Q And what does this document reflect?

25 A Well, this reflects the calculation of the delay

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1 damages attributed to Whittaker by taking that \$2068 per day
2 and multiplying it times the number of days of delay that
3 are being attributed to Whittaker.

4 Q To arrive at what total?

5 A \$2,570,524.

6 Q Would you turn to Exhibit 951, please?

7 A Yes.

8 (Pause.)

9 Q This is captioned "Summary of Whittaker Caused
10 PDFA Damages" and the first entry on this page is delay.
11 And I see in the first column there, claim amount before
12 interest, the same number you just read, \$2,570,524?

13 A Yes. That number is carried forward from schedule
14 952.

15 Q Now, there's interest added to that. Why, Mr.
16 Gray?

17 A As with all these CLIN sections, TechDyn has
18 incurred these costs, has been unreimbursed for them and
19 this is basically the cost of being out of pocket for that
20 money.

21 Q So the claim amount, including interest, for that
22 aspect is \$2,919,748. Is that right?

23 A Including interest. That's correct.

24 Q Another aspect of this claim that I'd like you to
25 explain to us if you would, please, is this concept of

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 excess overhead that's being demanded. TechDyn is asking
2 for \$262,409 of excess overhead. Why is TechDyn asking for
3 that?

4 A Well, those are additional overhead costs that
5 were incurred or paid for by the ICCE contract because of
6 PDFA problems.

7 MR. WORK: Objection, Your Honor. No foundation
8 for that from this witness.

9 BY MR. BOEHLERT:

10 Q From your study, were you able to determine
11 whether --

12 JUDGE BROWN: I'll reserve the ruling until I hear
13 what the foundation is.

14 BY MR. BOEHLERT:

15 Q From your study, were you able to determine
16 whether TechDyn incurred excess overhead costs?

17 A Yes, I did.

18 Q And how did you perform that study?

19 A Well, the anticipated overhead rate for TechDyn
20 for this period was 107 percent.

21 MR. WORK: Your Honor, again, he's testifying
22 about facts that aren't in evidence.

23 JUDGE BROWN: I think he's testifying to a fact
24 that is in evidence. I heard -- I think it was Mr. Hise --
25 testify to this, didn't I?

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1 MR. BOEHLERT: He did, sir.

2 JUDGE BROWN: All right. So I think it's already
3 been testified to and I overrule the objection.

4 BY MR. BOEHLERT:

5 Q Then what happened?

6 A Well, the actual rate was approximately 130
7 percent and so --

8 Q What effect does that have on TechDyn?

9 A Well, the effect it has is the ICCE contract pays
10 for a lot more of TechDyn's overhead than it would have.

11 Q And what's the reason for that happening?

12 A Basically a reduction in the amount of work, the
13 volume of work performed by TechDyn.

14 Q The next two items are relocation of test beds and
15 replacement of keyboard and printer.

16 MR. WORK: Your Honor -- excuse me. That fact
17 certainly isn't in evidence, the reduction of work performed
18 by TechDyn. I think he's talking about an unabsorbed
19 overhead claim but there is no factual foundation for a
20 reduction of work performed by TechDyn.

21 MR. BOEHLERT: I've asked him how he computed the
22 claim, Your Honor.

23 JUDGE BROWN: Well, lay a further foundation.

24 MR. BOEHLERT: Well, I'm moving on to the next --

25 JUDGE BROWN: Well, I sustain the objection.

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1 Strike the last answer.

2 BY MR. BOEHLERT:

3 Q The next two elements are relocation of test beds
4 and replacement of keyboard and printer. Mr. Hise testified
5 to those. Did you also participate in the computation of
6 those damages?

7 A Yes.

8 Q And that amounts claimed -- if you review those,
9 are those the results of those computations as well?

10 A Yes, they are.

11 Q So the claim amount including interest for PDFA
12 damages, Whittaker caused PDFA damages, is how much, Mr.
13 Gray?

14 A \$3,240,611.

15 (Pause.)

16 Q Did you also participate in the calculation of the
17 remote control element damages?

18 A Yes, I did.

19 Q Would you please turn to Exhibit 982?

20 (Pause.)

21 MR. WORK: Your Honor, at this point, I would like
22 to object to this line of testimony because he's simply
23 repeating what Mr. Hise said. He's not adding anything to
24 it. This is not opinion. He's calling out these numbers
25 for the second time.

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1 JUDGE BROWN: I thought he was going to say
2 something additional to what Mr. Hise said, from what you
3 told me up here. Is he just repeating what Mr. Hise said
4 and putting his affirmature on it?

5 MR. BOEHLERT: Well, Your Honor, I am asking him
6 some questions about the labor on this, if he knows what
7 timeframes the labor came from.

8 JUDGE BROWN: All right. Go ahead. I'll overrule
9 the objection. Don't just have him repeat what Mr. Hise
10 said.

11 BY MR. BOEHLERT:

12 Q Would you turn to page 982, if you would, please?
13 And the first category there is direct labor on-site,
14 \$67,198. Are you familiar with that number?

15 A Yes, I am.

16 Q And did you derive that number?

17 A Yes.

18 Q How was it done?

19 MR. WORK: Objection, Your Honor. Mr. Hise said
20 that he didn't know for what period of time this related and
21 they're trying to bring it in through this witness now.

22 JUDGE BROWN: Well, let's see if they can. I
23 overrule the objection.

24 MR. WORK: Well, it's fact. It's not in evidence.

25 JUDGE BROWN: Well, he can tell us how he derived

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 it and we'll see whether it is or not. I don't know whether
2 it is or not at this point.

3 BY MR. BOEHLERT:

4 Q How was that derived?

5 A Well, that labor number is actually the total of
6 two separate numbers from two different periods. They are
7 summarized on Exhibit 983.

8 Q And what numbers are being summarized for what
9 periods?

10 A Well, again, there are two pieces to it. The
11 first page of 983 is the procurement cost related to the
12 remote control element. That's after Whittaker was
13 terminated and TechDyn stepped in and finished the work.
14 And that labor amount right there is \$48,821. So that work
15 really begins in March -- February and March of 1989 and
16 runs out into the spring of 1990 when that RCE work was
17 completed. That's the first piece of it. The second piece
18 of it is on the second page of Exhibit 983, which we've
19 called pre-termination remote control element effort and
20 that relates to prior to the termination of Whittaker, the
21 work that TechDyn did in relation to trying to get the work
22 completed.

23 MR. WORK: I object on the same ground previously
24 stated, Your Honor. This is new evidence coming in through
25 an expert not --

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1 JUDGE BROWN: I don't understand how he is knowing
2 these things unless -- I thought he was going to read from a
3 document but it doesn't sound like he is. What's the
4 foundation for knowing that? And it sounds like fact and so
5 he shouldn't be testifying to it because it isn't in
6 evidence otherwise but maybe it's there and I'm just not
7 seeing it.

8 BY MR. BOEHLERT:

9 Q Well, it's pre-termination remote element
10 efforts -- do you know when the termination was?

11 MR. WORK: Objection.

12 JUDGE BROWN: Well, I sustained the objection to
13 asking him about --

14 MR. BOEHLERT: This document is in evidence, Your
15 Honor.

16 JUDGE BROWN: I know the document's in evidence
17 but unless it's on the document, he can't testify to what
18 dates were used to derive it.

19 MR. BOEHLERT: We do have a notice also of the
20 date of the termination.

21 JUDGE BROWN: Well, stick to it then and ask him
22 some opinion questions.

23 (Pause.)

24 JUDGE BROWN: What opinion did you want to bring
25 out through him with regard to this?

SCOTT DOUGLAS GRAY - DIRECT EXAMINATION

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1 BY MR. BOEHLERT:

2 Q Mr. Gray, in your opinion, the demands that
3 TechDyn has set forth against Whittaker -- are they an
4 accurate method of computing damages?

5 A Yes.

6 (Pause.)

7 Q And are you also familiar with the Alaska PACAF
8 claim that TechDyn has submitted?

9 A Yes, I am.

10 Q Now, I ask you to turn to Exhibit 912. It's at
11 the very back of the book.

12 (Pause.)

13 Q And the amount being demanded there is \$609,002.

14 A Yes.

15 Q Are you familiar with how that was derived?

16 A I'm familiar with it.

17 Q And, in your opinion, is that a fair and accurate
18 assessment of damages against Whittaker?

19 A Yes, I believe so.

20 Q Would you step down to the chart, if you would,
21 please, Mr. Gray, and put down there for us the total amount
22 of damages that in your opinion have been fairly assessed
23 against Whittaker on this project.

24 MR. WORK: Your Honor, this is just repetitive.
25 The damages --

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 litigation or negotiate due largely to two factors in the
2 legal environment. "

3 Do you agree with those comments, sir?

4 A Yes, I do.

5 Q Now, sir, just let me try to understand --

6 (Pause.)

7 MR. WORK: I have just developed a time line, Your
8 Honor, may I show it to the witness?

9 JUDGE BROWN: Yes.

10 BY MR. WORK:

11 Q Now, sir, we have a time line from August of 85 to
12 the present time. And I asked Mr. Hise this morning, during
13 what period the, during what periods the 1243 days occurred.
14 Could you answer that question for us, sir?

15 A Which, could you qualify the 1243 days?

16 Q Mr. Hise identified 1243 days as the number of
17 days that TechDyn was seeking to assess against Whittaker.

18 A The 1243 days of delay, or actual days of delay,
19 would occur throughout the entire period of the contract.

20 Q Well, that surprises me, Mr. Gray, because I wrote
21 something down that you said, and I think I wrote it down
22 verbatim. You said the costs I am talking about, occurred
23 during this extended period. Now, just what period are you
24 talking about when you said this extended period?

25 A The extended period is the period coming after the

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 original contract period of 18 months, and after 9.75 months
2 of MOD 36.

3 Q So that, just point out to the jury where that
4 would take us on our time chart.

5 A December of 87.

6 Q It would take us to December of 87? And you are
7 saying that everything that occurred after there in way of
8 time related costs is Whittaker's responsibility, aren't
9 you?

10 A No, that is not what I am saying.

11 Q Then what are you saying? Well, let me ask a
12 question. You said that the delay periods for which TechDyn
13 had been paid extended out to December of 87 - -

14 A For which TechDyn had been paid?

15 Q Well, as I see on your chart, could you turn on
16 this a minute? As I see on your chart, all time related
17 costs -- how did they do this here. All time related costs
18 that haven't been compensated by the Government already, are
19 in this block. And I ask you when the Government's time
20 related costs occurred, and you are saying, as I understand
21 it, up to December of 1987. Am I correct?

22 A Yes, that is correct.

23 Q So, all time related costs after December 1987,
24 you are saying, are Whittaker's. Is that right?

25 A No, you are making a leap there, that's not

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 consistent.

2 Q I guess the jury will have to decide whether that
3 is consistent or not. As I recall Mr. Crider's testimony,
4 and I assume you know what Mr. Crider was going to testify.
5 Not so much his testimony, but I assume you know. He said
6 there were four boxes in which he put delays. One was
7 software design. You know that software design was
8 completed before December 1987, don't you, sir?

9 A I'm not aware of that particular fact.

10 Q You don't know whether or not it was.

11 A That's correct.

12 Q And he also said that the next box was software
13 development, but you know that Whittaker's software, passed
14 software qualifications tests in December 1987, didn't you?

15 A Again, I didn't do the delay analysis, so I am not
16 sure of the dates.

17 Q And the third box that Mr. Crider talked about was
18 software, delays in software testing, but you know that the
19 only delay in software test called out in the contract was
20 software qualification test which occurred in December 1987,
21 don't you?

22 A Again, I am not specifically aware of that fact.

23 Q And the fourth box that he put out for us, was
24 delays in the installation of the system, and when did that
25 occur, sir?

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 A Delays in the installation?

2 Q Right.

3 A Again, I am not up to date on all the dates.

4 Q When did Whittaker deliver its hardware to this
5 program, sir?

6 A Again, sir, I've not analyzed that.

7 Q I see. Now let's just look at your components of
8 time related costs. Start out with direct labor. And all
9 direct labor you charge to this job during the delay period
10 that TechDyn charged to this job during the delay period
11 after what you say is the Air Force delay period. You have
12 included and tried to assess against Whittaker, right?

13 A No, that is not true.

14 Q What direct labor that occurred after the Air
15 Force extensions was charged to some other job, but related
16 to this job?

17 MR. BOEHLERT: Objection.

18 THE WITNESS: It was charged to another job --

19 MR. WORK: Well, that's not a good question, you
20 are right. What direct labor on the ICCE program -- strike
21 that, too. Apart from what you say the Air Force has
22 accepted responsibility for and has compensated TechDyn for,
23 what direct labor is there that was charged to this job by
24 TechDyn that you are now trying to charge to Whittaker?

25 THE WITNESS: Well, there are many different

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 types. There are installation labor, for the installers and
2 technicians that were doing the work. There's --

3 BY MR. WORK:

4 Q That is compensated by the original program, isn't
5 it sir?

6 A That's correct, but it, much of it happened, I
7 thought your question was, what happened during this period.

8 Q No, I didn't -- That was compensated during this -
9 - That was paid for under the original contract, wasn't it?

10 A Yes.

11 Q So, that falls in that box. And you talked about
12 -- Well, let's go on. What other direct labor is there that
13 the Air Force hasn't already paid for that you are seeking
14 to charge against Whittaker?

15 A There are some amounts of installation and labor
16 that have not been paid for by the Air Force.

17 Q No, but the Air Force hasn't finished paying
18 TechDyn has it?

19 A No.

20 Q Okay. Now, what other direct labor, apart from
21 installation of -- what kind of CFA equipment that you're
22 talking about?

23 A For which time? I haven't mentioned any type of
24 equipment.

25 Q Well, you install something.

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 A The installation, the TechDyn installers of the
2 CFA equipment, yes.

3 Q Okay. And that was contemplated by the original
4 contract. So, what other direct labor that the Air Force
5 hasn't already compensated TechDyn for, or promised
6 compensation --

7 A Well, again not all --

8 Q Can I finish please? What other direct labor that
9 the Air Force hadn't already paid for, promised to pay
10 TechDyn for, is excluded from your pool, as you call it, of
11 direct labor that you are seeking to charge against
12 Whittaker?

13 A Again, I mentioned earlier activity related costs
14 such as installation, drawings, certain secretarial support,
15 certain engineering support, that is just not in our time
16 related pool.

17 Q But that's in these two pools, isn't it?

18 A Not entirely, no.

19 Q Okay, show me where in these materials you, I can
20 find this?

21 A For which, I haven't mentioned any type of
22 equipment?

23 Q Okay, show me where in these materials that you
24 have given to me that I can find it, that you've charged
25 costs to, other than Whittaker, that aren't either already

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 compensated or promised to be compensated. Show me where in
2 these materials.

3 A Well, they wouldn't be in these materials, because
4 they are not being claimed against Whittaker.

5 Q We haven't seen them, the jury hasn't seen them.
6 What other documents exist that show charging direct labor
7 to TechDyn's own inefficiencies?

8 A There are labor distribution reports, there are

9 MR. BOEHLERT: Objection, Your Honor, there is no
10 foundation that there has been any TechDyn inefficiencies.
11 There is nothing in evidence on that point.

12 MR. WORK: All right, let's just go down a list of
13 that. Perhaps that might help.

14 MR. BOEHLERT: I have an objection, Your Honor.

15 JUDGE BROWN: I'm withholding until he lays a
16 foundation.

17 MR. WORK: Okay, let's just go back to your
18 perfect bid theory, prior to 85. You are aware, aren't you,
19 sir, that TechDyn took, reduced its bid, original bid in
20 this program from \$33.8 million to 10.4 million. You are
21 aware of that --

22 MR. BOEHLERT: I objection, Your Honor. He is now
23 talking about this witness's perfect bid theory. I don't
24 think this witness has testified to that. I also don't know
25 what the \$38 million number -- I don't know whether this is

SCOTT DOUGLAS GRAY - CROSS EXAMINATION

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1 MR. BOEHLERT: Your Honor, the witness is entitled
2 to answer the question.

3 JUDGE BROWN: I think he did.

4 MR. WORK: Now, sir, you're aware, in this
5 program, this is not a hypothetical, that there was a 17
6 month delay in the Government furnishing a modified data
7 terminal sale, aren't you?

8 THE WITNESS: Again, my area of analysis was not
9 the delay analysis or the dates in which work was performed.

10 BY MR. WORK:

11 Q Well, did any of you, or your colleagues, try to
12 analyze the effect on the program, not only in that period,
13 but later, as a ripple effect, of the Government's delay in
14 furnishing the data terminal?

15 A I believe Crider's opinion was that the delay was
16 entirely attributable to --

17 Q I didn't ask what his opinion was. I asked
18 whether anybody had analyzed it.

19 A I believe it was an issue of analysis, yes. And
20 that it was determined that it was not, or did not
21 contribute to the delay.

22 Q Well, you understood how this program worked. If
23 there was an extension of the design period, and as TechDyn
24 said in its claim of the development aspect of the program
25 expanded, you understand that that would have a ripple

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1 P R O C E E D I N G S

2 BAILIFF: Everyone please rise. The Circuit Court
3 of Fairfax County is now in session, the Honorable J. Howe
4 Brown presiding. Please be seated and come to order.

5 JUDGE BROWN: Okay. Mr. Work, you have a motion
6 and let me say that we're going to start at ten with the
7 jury so if each of you would limit yourself to no more than
8 25 minutes, we can get through and get our jury back.

9 MR. WORK: Your Honor, we have our first witness
10 in the courtroom, Mike McCune, and if you'd like him to step
11 out, that would be fine.

12 JUDGE BROWN: Yes.

13 (Pause.)

14 MR. BOEHLERT: Your Honor, before Mr. Work starts,
15 it's Plaintiff's position in that these motions are not
16 timely in that Defendant has already introduced evidence
17 into this case and begun its case. And the law in Virginia
18 on motions to strike is that before the defendant's case
19 they may move to strike the evidence.

20 JUDGE BROWN: Let me see the law that says they
21 can't do it later.

22 MR. BOEHLERT: Okay. Forensby Marbrith.

23 JUDGE BROWN: Okay. And where specifically does
24 it say that?

25 MR. BOEHLERT: A motion to strike at the

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1 conclusion of plaintiff's evidence in chief before any
2 evidence on behalf of defendant has been introduced should
3 not be sustained unless it is plain that the Court would be
4 compelled to set aside a verdict for the plaintiff
5 considered as a demerita evidence.

6 JUDGE BROWN: Right.

7 MR. BOEHLERT: Defendant has started its case.

8 JUDGE BROWN: All right. Well, my ruling on that
9 has been -- and you can have this back -- and will be today
10 because I haven't seen a case yet to the contrary and that
11 one isn't either -- if the evidence that the Defendant in
12 any way impacts on the question before the Court, then the
13 Court may not consider that evidence and will not and the
14 motion to strike can't be granted. So if you feel when he
15 goes through his motion that any of the evidence that he
16 introduced on any of the motions to be considered by the
17 Court, then we would not grant the motion. In the absence
18 of that evidence, then I will hear you at that time.

19 MR. BOEHLERT: Just so the Court is aware of what
20 the Defendant has done, he has introduced all of the
21 Plaintiff's claims against the Air Force in this case and
22 then all of Defendant's claims against TechDyn and against
23 the Air Force.

24 JUDGE BROWN: All right.

25 MR. BOEHLERT: So it is the Plaintiff's

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1 position --

2 JUDGE BROWN: You can certainly make that part of
3 your argument and I'll consider that in argument. I don't
4 automatically refuse to hear the motion to strike but I'll
5 certainly consider that when your turn comes to your side of
6 it.

7 MR. WORK: Your Honor, as a preliminary matter you
8 asked for a revised set of the jury instructions with the
9 titles taken off.

10 JUDGE BROWN: Okay. Well, let me ask you to hold
11 on to them -- well, I guess I can hold on to them as well as
12 you. I just meant I wanted them when it came time to do
13 them.

14 MR. WORK: And those are the page references in
15 the transcript I'll be referring to.

16 JUDGE BROWN: Okay.

17 MR. WORK: Just by way of introduction, Your
18 Honor, this is a motion to strike and a motion for summary
19 judgment and I understand from my colleague Mr. Carey that
20 is the appropriate characterization in Virginia.

21 What I'd like to do is to work my through the
22 claims of TechDyn. I'm going to start with counts 3 and 4.
23 You'll recall those counts pertain to the PACAF option, the
24 AAC/PACAF option work so called. Count 3 alleges tortious
25 interference with an option right in the prime contract and

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1 count 4 alleges breach of an option provision in the
2 subcontract.

3 You will recall that there has been a fair amount
4 of history with regard to the alleged breach of an option
5 right in the subcontract and on prior occasions we have
6 endeavored to point out to the Court that no extant clause
7 has ever been identified and, indeed, throughout this
8 proceeding and TechDyn's presentation of its case, I waited
9 to hear any reference to an extant subcontract right
10 pertaining to the PACAF option work.

11 The chronology is basically this: that under MOD
12 8 of the subcontract which is part of Plaintiff's Exhibit
13 22A et seq, the subcontract option for the ACC/PACAF work
14 expired by the terms of MOD 8 on April 30, 1987. There has
15 been no evidence introduced indicating any contractual
16 extension of the MOD 8 option relating to the PACAF work
17 and, as Your Honor recalls, the alleged breach of contract
18 pertained to actions that took place well after April 30,
19 1987.

20 Now, with respect to the option allegedly existing
21 in the prime contract, you will recall that there was
22 testimony that there was a modification to the prime
23 contract that extended the option again to April 30, 1987.
24 Thereafter, on May 29, 1987, the Air Force issued a request
25 for proposal, an RFP, and Mr. Morrison testified about that

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1 RFP. Mr. Morrison said, however, and other witnesses did as
2 well, including Mr. Roundtree, that an RFP does not create a
3 contract. It does not create a contract right.

4 It simply invited a proposal, nothing more. So
5 our position with regard to the alleged extant options is
6 that the options expired by their terms both in the prime
7 contract and the subcontract on April 30, 1987. There has
8 been no evidence introduced of any contractual extension of
9 those options. And you will recall yesterday in my
10 cross-examination of Mr. Hise I asked him did you file a
11 protest with the United States General Accounting Office
12 alleging that the Air Force had acted wrongfully in allowing
13 the options to expire? He said yes. That was the substance
14 of the protest, or at least that was one facet of the
15 protest, he said. So we have no evidence in this record of
16 any contractual extensions of those options.

17 Now, I want to go back to an argument that we
18 had -- a hearing that we had before the Court on March 21,
19 when I said in argument that it appears that TechDyn has
20 shifted its theory from reliance on an option to reliance on
21 some kind of vague business expectancy unrelated to anything
22 in the contract. TechDyn responded to that on April 5 of
23 this year in a supplemental opposition to the motion for
24 summary judgment on page 12 saying it has always been
25 TechDyn's position that an option existed as of the time of

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1 the alleged tortious interference and that that option
2 existed up until January of 1988. Yet TechDyn has
3 introduced no evidence that there was any contractual
4 option.

5 I mention this only to indicate that TechDyn
6 should not be allowed now to slip into the business
7 expectancy. It took the position that there was an option
8 and yet it has failed to prove that there was an option.

9 There are two other very important grounds for
10 striking and granting summary judgment with respect to
11 counts 3 and 4 and they apply equally to both and they are
12 basically related to the failure of TechDyn to prove any
13 causation.

14 As you will recall, the chronology went as
15 follows: the options expired on April 30, 1987, the RFP for
16 the prime contract came on May 29, 1987. It was not until
17 November 25, 1987 that TechDyn submitted its proposal and we
18 have evidence yesterday with Mr. Hise that sitting there in
19 the witness stand yesterday he was aware that the Air Force
20 had decided in a sole source justification memorandum on
21 November 16, approximately nine days before TechDyn
22 submitted its proposal, that the Air Force had decided not
23 to work with TechDyn on the PACAF or the ACC/PACAF work. So
24 any alleged differential in the prices proposed by Whittaker
25 to TechDyn on the one hand and the price proposed by

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1 Whittaker to the Air Force subsequently could not have
2 affected the Air Force's decision. There simply is a
3 failure of proof on the basic causation.

4 And, finally and probably most important, and I
5 think you'll remember the memorable moment in this court
6 when Mr. Morrison was about to say Whittaker bid higher to
7 TechDyn than it bid to the Air Force and there was a big
8 scramble back here and they realized they had to add two
9 numbers together and realized Whittaker's proposal, its
10 bottom line proposal to the Air Force, was actually higher
11 than it was to TechDyn, whereas the stated, repeatedly
12 stated, theory of count 3 and count 4 was that Whittaker had
13 bid lower to the Air Force than it had bid to TechDyn.

14 Mr. Morrison, who had not read the RFP to which
15 Whittaker was responding to the Air Force, tried to scramble
16 by saying there's a differential in fiscal years but the
17 fact remains that the allegation is that the price, the
18 price -- it didn't say prices or components of prices -- it
19 said the price -- this is in the complaint, the motion for
20 judgment, that the price bid by Whittaker to the Air Force
21 was lower than the price bid to TechDyn. We know now that
22 that is not true. That's baseless. There again, we have a
23 failure of causation.

24 So, in sum, with respect to counts 3 and 4, there
25 is no evidence that there was any contractual right in the

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1 subcontract extant at the time of the alleged tortious
2 interference, no evidence that there was any extant
3 contractual option in the prime contract at the time of the
4 alleged interference, and no causation proof that any
5 interference or breach affected the Air Force's decision
6 which took place before TechDyn ever submitted its proposal
7 and well before, months before, Whittaker submitted its
8 proposal to the Air Force. Whittaker submitted its proposal
9 to the Air Force, as I recall, on January 25, 1988.

10 Complete failure of causation.

11 And, finally, the heart of the allegation, that
12 Whittaker bid lower to the Air Force than it bid to TechDyn,
13 has been proven to be false. Proven by Mr. Morrison's own
14 testimony to be false.

15 So on that basis, we move to strike the evidence
16 relating to counts 3 and 4 and move for summary judgment on
17 those counts.

18 Now, I'd like to deal with the allegation in count
19 1 that Whittaker somehow prevented TechDyn from getting new
20 and other business opportunities and future profit
21 opportunities unrelated to ICCE.

22 There I think the evidence is very clear that
23 the -- and this is from Mr. Morrison's own lips -- the
24 theory of the claim, as articulated both by Mr. Morrison and
25 in Mr. Ripper's summary of testimony that was presented

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1 before him, the theory of recovery is that an identified
2 number of people, five people out of a company of 175, 165
3 to 170 people somehow couldn't work on proposals and
4 couldn't work if work was ever brought in and therefore
5 TechDyn lost some -- I think the number yesterday was \$2.1
6 million in profits, suggesting that somehow these five
7 people were going to bring in an additional -- if it's about
8 11 percent profit, about \$20 million in business. But as
9 Mr. Morrison said, these people had never brought in a
10 dime's worth of business. And, in fact, they were hired
11 specifically for this program in every case except Mr.
12 Johnson's case, who was gone by this time. And there is no
13 evidence that they ever were proposed for business.

14 The five RFPs and proposals that we have been
15 talking about consisted of three that were proposed in
16 Germany by the German office, which was a much larger
17 office, consisting of about 100 people --

18 JUDGE BROWN: You don't think we took care of that
19 yesterday?

20 MR. WORK: I think we took care of that. And I
21 move to strike and move for summary judgment with respect to
22 that portion of count 1.

23 JUDGE BROWN: All right.

24 MR. WORK: Now, Your Honor, with respect to --

25 MR. RIDDLES: Your Honor, I hate to interrupt Mr.

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1 Work but I'm concerned about one issue and that is we have
2 not rest with our case as yet.

3 JUDGE BROWN: When are you going to rest it?

4 MR. RIDDLES: We had planned to rest it soon this
5 morning but we had a proffer that we wanted to make
6 concerning our objection to the criminal issue that we have.
7 We want to preserve that objection.

8 JUDGE BROWN: Well, you certainly may preserve
9 that. You may do it one of two ways. When I'm not here and
10 the jury's not here, you may hire the Court Reporter and put
11 it on the record or you may do it in writing. The purpose
12 for preserving that, of course, is for appeal.

13 MR. RIDDLES: Yes.

14 JUDGE BROWN: And you have not rested your case in
15 the sense of not being able to present that proffer but you
16 have rested your case as I understand it for any other
17 purpose and I sent the clerk in here early so you could
18 check the exhibits to be sure that all of the --

19 MR. RIDDLES: We did check the exhibits. I just
20 wanted to make sure that we had preserved that and that the
21 Court understood.

22 JUDGE BROWN: Absolutely. I want you to be able
23 to do that and, as I say, you can do it one of those two
24 ways. But there's no point in my hearing that.

25 MR. RIDDLES: You've already ruled on it.

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1 JUDGE BROWN: Yes. And the evidence was complete
2 on what I call the issue of liability. It's how you get to
3 the damages that was to be presented as we went through.
4 And I agree that you need to do that and perhaps should have
5 said at the beginning I want you do it. The most convenient
6 way might be to do it in writing or you can certainly hire
7 the Court Reporter to do it when I'm not here because I
8 don't want to take up trial time with it but you need to do
9 it to preserve the point for appeal so that you've got --
10 you've got all your evidence on the one point but you need
11 to have your proffer of what the damage evidence would have
12 been for appeal purposes. And definitely you have the right
13 to do that.

14 MR. RIDDLES: And that would be within the next
15 several days, I take it, or through the end of this trial at
16 least.

17 JUDGE BROWN: Sure.

18 MR. RIDDLES: Okay. Thank you, Your Honor.

19 JUDGE BROWN: Or today if you can find time with
20 the reporter during lunch or after five.

21 MR. RIDDLES: If I can, I'll try to do that, Your
22 Honor.

23 JUDGE BROWN: That's fine. I agree you need to do
24 that.

25 MR. RIDDLES: Thank you, sir.

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1 JUDGE BROWN: Let me just -- so we don't waste a
2 lot of time, don't you agree that that part of the damages
3 in count 1 was taken care of yesterday, albeit over your
4 objection?

5 MR. RIDDLES: The lost profits portion?

6 JUDGE BROWN: Yes. The lost profits for future
7 work that they didn't get by virtue of being diverted,
8 having to work on the ICCE program.

9 MR. RIDDLES: Yes, sir. I think you took care of
10 it yesterday over our objection. We will preserve that.

11 JUDGE BROWN: Okay. Then let me just say that
12 over your objection at this point formally, taking the
13 evidence in the light most favorable to the Plaintiff I find
14 there is not sufficient evidence to allow the jury to
15 consider that item, as I said yesterday, and I grant the
16 motion and that portion of the claim is stricken. I think I
17 did it yesterday. If not, it's done today so we don't have
18 to waste time arguing that.

19 And then your proffer absolutely may be presented
20 in the record.

21 MR. RIDDLES: If I could address just one more
22 issue. However, we also, subject to the contention of Mr.
23 Boehlert that was made this morning concerning the case, we
24 feel it's improper to do that, for that to be stricken after
25 the Defendant had presented evidence in our case.

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1 JUDGE BROWN: Did you feel that the Court
2 considered any evidence that the Defendant presented in
3 making that motion?

4 MR. RIDDLES: I do think that it has impact on it.
5 I don't know what's in the purview of the Court's mind but
6 it was definitely within the purview of the Court.

7 JUDGE BROWN: Well, if you can tell me what
8 evidence it was -- I can tell you that it is my position
9 that I did not, that I considered only the evidence
10 presented by the Plaintiff in making that ruling and not on
11 the evidence of the Defendant. If you can tell me what
12 evidence you think the Defendant presented that might have
13 or you think did impact on the Court's decision, then I will
14 hear you.

15 MR. RIDDLES: Well, I'll let Mr. Work finish and
16 we'll think about that for a moment and maybe we can have a
17 chance to respond.

18 JUDGE BROWN: All right. You don't need to argue
19 further that point of count 1 unless they bring something
20 up.

21 MR. WORK: Your Honor, we come now to the basic
22 claim, namely the delay claim. And I have identified for
23 you what I consider to be the basic cases on point in
24 Virginia. There's Hale v. Fawcett, in 1976 and then there
25 are three additional Virginia Supreme Court cases to the

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1 same effect.

2 And the rule of Hale v. Fawcett is that the burden
3 is on the plaintiff to present evidence which would allow
4 within a reasonable degree of certainty the jury to identify
5 what specific portion of the damages TechDyn alleged it
6 suffered are attributable to Whittaker and Hale v. Fawcett
7 came up in precisely the same circumstances that we're
8 raising this motion, namely on a motion to strike. And
9 there's a fairly long quotation on page 2 of our motion with
10 respect to this facet of count 1 and I think you can see
11 both from that case and from the Medcon case in 1986 and the
12 Parr v. Citizens Bank case in 1985 and the Cooper v. Whiting
13 Oil case in 1984, that this rule has been consistently
14 followed, that when damages are alleged and there's a prima
15 facie case made that there are other causes -- a cause or
16 multiple causes -- that were unrelated to the acts of the
17 defendant, that in that even the plaintiff must present
18 evidence which would allow a jury within a reasonable range
19 of certainty to identify what portion of those damages are
20 attributable to the defendant.

21 Now, let me just try to review the evidence on
22 that subject very briefly.

23 Mr. Morrison identified that in reference to MOD
24 36 of the prime contract which Plaintiff put in evidence as
25 part of Exhibit 4 that the release clause in that provision

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1 excluded provisioning, which Mr. Morrison identified in
2 testimony as being a big item that continued throughout the
3 program and the reason it was excluded from the release in
4 MOD 36 is that they couldn't calculate the cost at that time
5 because it was an ongoing cost. Mr. Morrison, as you will
6 recall, identified that as a big item, millions of dollars.

7
8 Secondly, Mr. Morrison identified with respect to
9 the same release clause that the cost of preparation of the
10 claims and the negotiation of the claims. And you'll recall
11 Mr. Morrison saying there was meeting after meeting after
12 meeting over a period of years to get this claim resolved.
13 And those costs went into the costs of this program and the
14 Government has not resolved that yet and that's still an
15 open item so that is a big body of damages that Mr. Morrison
16 himself identified and thus created a prima facie case of
17 other causes.

18 You will recall that Mr. Morrison testified that
19 throughout the program the Air Force, and I quote, "jerked
20 TechDyn around". It was the Air Force that jerked TechDyn
21 around, caused it to go to a meeting out in Sacramento.
22 What's in Sacramento? An Air Force logistics station. And
23 meetings here and meetings there throughout the program. A
24 big item, according to Mr. Morrison, yet unidentified and
25 not calculated in connection with the damages that are

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1 sought to be assessed against Whittaker.

2 Mr. Ellis identified a number of things which
3 increased the cost of TechDyn on this program which were not
4 covered by the claim in MOD 36 which are ongoing. The
5 increase in the requirements for what he called level 3
6 drawings which are production level drawings, the removal of
7 the test bed for Desert Storm which prevented them from
8 testing their new RCE with the CFA and caused a substantial
9 delay of some months. Mr. Ellis testified to that.

10 Mr. Ellis testified that they're still having
11 problems with their O&M manual on the CFA side, still trying
12 to satisfy the Air Force's demands with respect to that
13 element of work.

14 These are all elements that create separate prima
15 facie cases of other causes. And then you'll recall Mr.
16 Crider who had read the depositions and was very forthright
17 in acknowledging that Mr. Thornton, the project engineer on
18 this case, had testified under oath that a big problem in
19 his opinion with respect to the RCE was the lack of a
20 contractual definition as to who was to do what which gave
21 rise to delays and gray hairs on his part, as he said.

22 Mr. Crider also recognized that Mr. Thornton had
23 acknowledge a number of other factors which had caused
24 additional costs that have not been compensated by the Air
25 Force, including nit picking with respect to logistics

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1 documents; including additional testing that hadn't been
2 contemplated. And we saw a letter or he testified to a
3 letter in September of -- excuse me -- I don't have the date
4 of it -- reflecting TechDyn's statement that the Air Force
5 was expanding the testing requirements both with respect to
6 Whittaker and TechDyn. Costs reflecting TechDyn's --
7 factors within TechDyn's responsibility.

8 And finally, we've had evidence from several
9 people that the initial people assigned to this program at
10 TechDyn, a Mr. Chisholm, who was the original program
11 manager, was fired after a number of months for
12 incompetence, creating inefficiencies.

13 We've had testimony that the logistics operation
14 at TechDyn which was supposed to get up and running at the
15 beginning of the program didn't get up and running and there
16 was a failure to do any work on this basic logistics plan
17 that we talked about that has caused a lack of a baseline
18 and what Mr. Thornton was testifying about his deposition
19 that Mr. Crider recalled, namely, that there's a lot of nit
20 picking because we've got no baseline.

21 So -- you know, I could go on with this, Your
22 Honor, but countless times in Plaintiff's own case there has
23 been a recognition of other causes. And yet we saw Mr.
24 Gray's chart yesterday and we saw that they were claiming in
25 the category of time related costs, which are all costs

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1 really unrelated -- except material, which were already
2 compensated under the original program -- that they are
3 seeking all costs, direct labor, consultants' time, travel,
4 other direct costs, and all excess overhead on this program
5 that haven't been already compensated by the Air Force. No
6 consideration at all of these other causes.

7 That creates the situation, Your Honor, that we
8 have talked about in prior motions, namely, that they have
9 not given the jury a reasonable basis for identifying -- and
10 I think the words in Hale v. Fawcett are "with reasonable
11 certainty" -- the portion of this great mass of additional
12 damages, time related damages and excess overhead, that are
13 attributable specifically to Whittaker. That is their
14 burden. They haven't met that burden. And therefore count
15 1 in its entirety ought to be dismissed.

16 And, finally, that brings me to count 3 and the
17 purported default termination of Whittaker. Under that
18 claim, TechDyn seeks what is known as excess procurement
19 costs. The default termination, and you'll remember the
20 default termination letter, Your Honor, the default
21 termination letter stated pursuant to FAR -- I think it's
22 522498 -- we hereby default terminate you. That clause was
23 a flow down clause from the prime contract into the
24 subcontract and it was incorporated by reference in the
25 subcontract and that is the clause under which TechDyn

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1 default terminated Whittaker. This isn't a firing, a common
2 law firing as Mr. Boehlert has said on occasion. It is an
3 action taken under a specific clause that has a specific
4 basis in law. And that basis in law is this: that the
5 buyer who purports to default terminate a seller, a
6 contractor, has the burden of proving the following -- and
7 let me step back from that for just a moment.

8 The default termination letter says specifically
9 we hereby default you for failing to make progress. And
10 there are two types of default termination set forth in the
11 standard default clause which was incorporated in this
12 contract. One is an actual failure to make delivery,
13 another is a failure to make progress. And in that default
14 letter which they have in evidence, it states that the basis
15 for this default is not an actual default but rather a
16 failure to make progress. That is not a default but it is a
17 predictive default. It means we don't think by the time the
18 delivery date comes you'll be ready to make delivery.
19 That's the way it has been consistently interpreted.

20 And to make such a default valid, the buyer has
21 the burden of proving the following things:

22 Number one, it has the burden of proving that it
23 gave notice and a bona fide opportunity to cure.

24 Number two, it has the obligation of proving that
25 there was a contractual schedule in effect against which to

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1 measure the seller's progress, because without a schedule,
2 the seller has no basis for saying you're not going to meet
3 the delivery date if there's no delivery date. And the
4 contractor has no opportunity to say I can meet the delivery
5 date. There is a solid, consistent basis in law requiring a
6 schedule, a contractually effective schedule.

7 And finally, in order to recover excess
8 reprocurement costs, the law is clear. The party initiating
9 the default has the burden of proving that the replacement
10 item is substantially similar to the item being replaced in
11 three respects. Number one, it must be substantially
12 identical in physical constitution. Number two, it must be
13 substantially similar in mechanical constitution. And,
14 number three, it must be substantially similar in function.

15 And all of these things, the party initiating the
16 default has the burden of showing. And I'd like to start
17 with the last one first, if I may, namely the obligation to
18 show substantial similarity.

19 There is a great deal of testimony in this record,
20 Your Honor, that the replacement item was a mechanical item.
21 It was a mechanical switching item, a manual switching item,
22 where instead of automatically switching from one channel
23 and one ground station to another, you had to flick the
24 switch. It is not in any way mechanically similar and they
25 haven't proven that. They haven't presented any evidence on

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1 that.

2 It is not physically similar because you'll recall
3 Mr. Thornton's testimony that hardware replaced the
4 developmental software in this program.

5 And, finally, there is clear evidence that it is
6 not functionally similar in the respect that it doesn't do
7 the same thing. There is no automatic switching in this new
8 RCE.

9 So on all counts, there has been a failure of
10 proof and, under those circumstances, the law is very clear
11 and it goes back many years that unless there is substantial
12 similarity in the three categories I mentioned and unless
13 the Plaintiff, the party initiating the default, can prove
14 that, then it is not entitled to excess procurement costs
15 regardless of whether the default was valid.

16 Now, let's turn to the question of what the party
17 initiating the default has to prove to prove the validity of
18 the default termination.

19 It must prove that it gave notice and a bona fide
20 opportunity to cure and in that respect, I'd like to refer
21 specifically to the language of Mr. Morrison in his
22 testimony and this is at page 349 and it's toward the back
23 of your stack, I believe, Your Honor. I think it's one of
24 the last pages in the stack of transcript references. It's
25 page 349.

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1 JUDGE BROWN: Go ahead and talk.

2 MR. WORK: Mr. Morrison, and I quote, "There came
3 a time, then, when this became patently clear to us and, in
4 consultation with the Air Force and Mitre and all these
5 other guys, we decided that we had to acquire this
6 capability through some other means. It was then that we
7 finally terminated for default, for cause, the Whittaker
8 Corporation on the RCE effort."

9 Not only has TechDyn failed to prove that it gave
10 a bona fide opportunity to cure, Mr. Morrison has shown the
11 opposite.

12 There is a case, Your Honor, that we cite in our
13 motion on this point called the Sorretto case which
14 indicates that if a decision is made to default prior to
15 giving a notice and opportunity to cure, that there is no
16 bona fide opportunity to cure. The decision has already
17 been made. And that is so apt in the situation where the
18 default termination is a predictive termination, it's not an
19 actual default but a predictive default.

20 And the law is very clear, again, going back many
21 years, that in that case, a failure to make progress type
22 default, the contractor has to have an opportunity, a real
23 opportunity to show he can make it.

24 But here the decision was already made and that
25 was the situation in the Sorretto case, the precise

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1 situation that we have here out of Mr. Morrison's own lips.
2 Not only have they failed to sustain their burden, but
3 they've proved the opposite on direct examination.

4 And, finally, sir, with regard to the schedule
5 issue and you'll recall that we've had some discussions of
6 this in the past. I listened very closely to the evidence
7 of what schedule existed and you'll recall that Mr. Ellis
8 said that there was this so-called ICCE program schedule.

9 What was it? It was a CDRL submission.

10 Did it establish a contractual schedule between
11 TechDyn and the Air Force? No. It was just a unilateral
12 submission.

13 Was it based on an actual schedule? No, these
14 were just projections that changed over time.

15 There was nothing contractual at the prime
16 contract level and there is no proof at all, no evidence at
17 all, that any schedule was established at the subcontract
18 level. Mr. Ellis' testimony doesn't go to the subcontract
19 level, it goes to the prime contract level. But that --
20 even assuming that that CDRL submission created a
21 contractual schedule, which it didn't, there's no evidence
22 that TechDyn ever flowed that down to Whittaker.

23 There was a schedule in this situation way back at
24 the beginning and that was passed in 1986 and the default
25 termination took place in early 1989. In that situation,

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1 the law is clear that if you let a schedule go by and you
2 urge a contractor to continue, as they did and you've heard
3 evidence to that effect, that there's a clear waiver and
4 that there's no schedule in existence. No contractually
5 effective schedule. And we've cited a number of cases which
6 establish that requirement and it's logical because, again,
7 the contractor has to be given an opportunity to show that
8 it can make the delivery date. But if there's no delivery
9 date, how's it going to do that?

10 Thank you very much.

11 JUDGE BROWN: I am aware of the fact that he took
12 a little longer than 25 minutes. I'm going to cause him to
13 lose some of his points which will shorten your presentation
14 and you won't as long to go so I think you'll be able to do
15 it within the time.

16 I overrule the motion to strike with regard first
17 to count 3. I'm going to apply plain old common sense to
18 this case and if that's contrary to government contract law,
19 some judge smarter than me will straighten it out but it
20 defies common sense that under the circumstances of this
21 case we ought to grant a motion to strike count 3.

22 Whether default termination was or was not proper
23 and whether there was a schedule and all of the other
24 matters relating to that will be matters that the jury will
25 determine based upon the contract and any applicable

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1 incorporated regulations.

2 I have looked at your instructions and I'm not
3 going to instruct the jury that way. If there are
4 regulations that are part of the contract that impact on the
5 question whether there was default termination properly done
6 or other matters, those regulations should be introduced in
7 your case, we will give them to the jury and the jury will
8 decide whether the evidence meets it.

9 If it is as clear as you say, it will be a simple
10 matter to correct it later but the jury is going to do it
11 first. It is my intent to give the jury the contract,
12 including any regulations that apply and let them decide the
13 issue of whether the evidence meets the burden.

14 The same with regard to whether the work is
15 substantially similar. And here, common sense just takes
16 over and runs away with any peculiar government contract law
17 and I'll tell you what I have in mind.

18 Mr. Work's argument would allow a contractor to
19 breach a contract by failing to produce or deliver some
20 discrete piece of equipment which, let us say in my
21 hypothetical case, is known only to that particular
22 contractor. Nobody else has that technology, nobody else
23 has the ability to make that thing. And it is necessary to
24 do a function, switching let's say. And so because the
25 contractor breaches the contract by refusing to produce that

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1 discrete piece of equipment, the prime contractor is
2 required to develop a new and different other method of
3 handling the same function. And the reason, the sole reason
4 why the technology had to change was because of the breach
5 of the subcontractor.

6 If government contract law says that the claim
7 fails on that, so be it folks, but that is not common sense
8 and it's not going to happen in this courtroom today. It
9 may happen in this courtroom some time later when you
10 educate me and I'm a lot smarter but it's not going to
11 happen today.

12 Of course, if the technology changes because the
13 Air Force changed the contract and said we don't want you to
14 do switching that way, we want you to do switching by
15 manual, that's a different issue but that's not the evidence
16 that I've heard viewed in the light most favorable to the
17 Plaintiff. The evidence I've heard viewed in the light most
18 favorable to Plaintiff is TechDyn breached the contract,
19 TechDyn didn't produce the software, TechDyn stopped doing
20 the work and they had to go find some different way to do it
21 because they frankly didn't have the ability to do the
22 software that Whittaker could have done so they had to find
23 a mechanical way to do it. It wasn't because mechanical
24 ways are better, it wasn't because of any other reason, as I
25 heard the evidence, than that Whittaker breached the

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1 contract. And for that reason, I'm going to let the jury
2 consider it and of course you can present evidence otherwise
3 and we'll see how it comes out with the jury.

4 I also overrule the motion to strike with regard
5 to the delay damages. In this case, I find that the
6 evidence is sufficient to allow the jury to consider whether
7 the apportionment has been proved by one side and the other
8 side. This is what I said to you up here in a bench
9 conference, Mr. Work, the other day. I think you are
10 confusing your effort to show that this delay was due to
11 other causes from their evidence which taken in the light
12 most favorable to them, even though you made some points on
13 cross-examination, viewed in the light most favorable to the
14 Plaintiff, they have presented sufficient evidence for the
15 jury to consider whether they have made that reasonable
16 apportionment or not or whether they have shown what the
17 cause of the damage is, being Whittaker, to recover.

18 I'll hear you on the counts 3 and 4 argument then
19 and if you've come up with anything where you think I have
20 considered evidence that the Defendant introduced in ruling
21 on count 1, the damages for future loss of business on other
22 work that TechDyn you say lost, I'll hear that, too.

23 (Continued on next page.)

24

25

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1 MR. BOEHLERT: Thank you, Judge. Let's address
2 count three first. Which is TechDyn's claim that Whittaker
3 tortiously interfered with TechDyn's business.

4 The law in Virginia is clear on what it takes to
5 prove tortious interference. In the case of Chavez v.
6 Johnson, 335 S.E. 2d 97 1985, the Supreme Court said, the
7 elements required for a prima facie showing of the tort are
8 (1), the existence of a valid contractual relationship, or
9 business expectancy, (2), knowledge of the relationship or
10 expectancy on the part of the interferer, (3), intentional
11 interference inducing or causing a breach or termination of
12 the relationship or expectancy, and (4), resultant damage to
13 the party whose relationship or expectancy has been
14 disrupted.

15 Let's not confuse ourselves at this point whether
16 an option existed or not. Let's take a look at what the law
17 is with respect to proving tortious interference, which is
18 what has been alleged here.

19 Point one, was there a valid contractual
20 relationship or business expectancy. The evidence is clear.
21 Absolutely. TechDyn had a prime contract with the United
22 States Air Force which originally contained an option to do
23 this work. Whether or not that option for purposes of this
24 motion was extended, is irrelevant, Your Honor. But the
25 evidence was clear that it was.

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1 Plaintiff's Exhibit 105 was the request for
2 proposals from the Air Force, which clearly stated that the
3 option for the Alaska PACAF work was extended to January 31,
4 1988. All of the tortious events which are complained of in
5 this case took place prior to that.

6 So, one, did the prime contract exist with respect
7 to the Alaska PACAF option between TechDyn and the Air
8 Force? Absolutely.

9 Did the option exist? Yes. The evidence is
10 clear. It said in the Air Force document to TechDyn that
11 the option was being extended.

12 What did the evidence show with respect to
13 Whittaker's activity? That they submitted a quote to
14 TechDyn stating that they were quoting this work for the
15 Alaska PACAF option. That's what it says right on the face
16 of the document they submitted.

17 So, for the argument to be made that there was no
18 option in existence is certainly contrary to the evidence.
19 But the test is not whether the option existed, but whether
20 there was a valid contractual relationship. And the answer
21 is yes. TechDyn expected to get that work from the Air
22 Force and the Air Force was actively soliciting that work,
23 irrespective of the form in which they were soliciting it:
24 option, request for proposal or otherwise. It was pursuant
25 to that prime contract.

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1 Let's assume there was no contract at all in
2 existence between TechDyn and the Air Force. And let's
3 assume that there was no option, let's assume it expired.
4 Was there a business expectancy? Absolutely. TechDyn not
5 only had that under contract, but had every reason to
6 believe that they, as the prime contractor delivering this
7 identical system up in Iceland, was the choice candidate to
8 get this identical work in the Pacific theatre and in
9 Alaska. Did they have an expectancy to get that work? Sure
10 they did.

11 As Mr. Work mentioned many times, as early as
12 1985, they had quoted that work to the Air Force, and then
13 it was taken out of the original procurement and put into an
14 option. So, there was certainly a valid business expectancy
15 that existed at the time of the tortious interference.

16 Number two, was there knowledge of the
17 relationship or expectancy on the part of the interferer?
18 That's Whittaker. Absolutely. The evidence is clear that
19 not only did they know about it, they were submitting prices
20 to TechDyn and to the Air Force in detailed proposals. Huge
21 volumes that absolutely indicated that they knew every
22 aspect of both TechDyn's relationship to the Air Force and
23 the obligations that the Air Force was placing on TechDyn to
24 use Whittaker to quote that work.

25 Was there knowledge? Yes.

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1 Three, intentional interference inducing or
2 causing a breach or termination of the relationship or
3 expectancy. Your Honor, I am very much like you when it
4 comes to these things. It's common sense that dictates, was
5 there intentional interference? Submitting a price to
6 TechDyn knowing that TechDyn has to rely on that price in
7 order to get this work from the Air Force, and then without
8 advising TechDyn that they are going to submit inconsistent
9 and lower prices to the Air Force behind TechDyn's back, is
10 intentional interference with that business expectancy.

11 JUDGE BROWN: How do I know they submitted a lower
12 price to the Government for the same work?

13 MR. BOEHLERT: Although it went a little slowly at
14 times, Mr. Riddles stood here and with reference to the
15 prices and the TechDyn proposal to the Air Force, I'm sorry,
16 Whittaker's proposal to TechDyn, which was submitted to the
17 Air Force and then we took the Whittaker proposal directly
18 to the Air Force, and I believe there were 13 separate
19 instances in which the same work, which was the price that
20 the Whittaker Corporation quoted the Air Force was lower
21 than the price that was quoted to TechDyn, which TechDyn had
22 to use.

23 What's important is, Mr. Work makes his point that
24 our case, TechDyn's case, is based on the fact that overall,
25 the quote from Whittaker to the Air Force was lower. He

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1 perceived a scramble. There was no scramble at counsel's
2 table. The difference between the prices, as the witness
3 has stated, was that there was another whole year of effort
4 being quoted to the Air Force. However, what Plaintiff's
5 motion for judgment says, "Simultaneously providing TechDyn
6 and the Air Force inconsistent price and scheduling
7 information for the Alaska PACAF option work, Whittaker
8 breached its contract."

9 It is the inconsistent pricing. It doesn't have
10 to be overall higher or lower, but we showed through the
11 witnesses and the Whittaker documents that on at least 10
12 occasions, and I think it was 13 occasions, the prices being
13 submitted to the Air Force were indeed lower.

14 JUDGE BROWN: Well, was that the reason the Air
15 Force granted the contract to Whittaker? What I've heard --
16 let me just tell you why I've asked the question.

17 I've heard in the evidence from, I don't remember
18 who, but I've heard from I think two witnesses, in talking
19 about the testimony with regard to trying to show future
20 damages on the five contracts in particular, that the Air
21 Force considered three things. And I don't know that I
22 remember what the three are, but I remember costs,
23 technology and something else, it may have been personnel.
24 But there were three items that the Air Force considers.

25 And I've heard specifically from a witness, they

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1 are not always granted on cost. They grant on other
2 factors, and that was one of the major points that was
3 trying to be made, that was made, by witnesses for TechDyn
4 in saying they were damaged by not having the five or six or
5 so people who worked on the ICCE program to do the proposal.
6 Because the Air Force doesn't just consider costs.

7 JUDGE BROWN: So, how do I know why the Air Force
8 granted this contract, and don't I have to, to Whittaker
9 instead of TechDyn.

10 MR. BOEHLERT: The answer is no you don't, Your
11 Honor, and it's very clear why that is not an element of the
12 burden of proof to tortious interference.

13 JUDGE BROWN: Okay.

14 MR. BOEHLERT: Is that it would be rare, if ever
15 that a Plaintiff could come into Court, show wrongful
16 conduct by the Defendant, get them to admit the wrongful
17 conduct, and then bring in, and I don't mean to be
18 disparaging to the Air Force, but it is essentially a co-
19 conspirator, and have them take the stand and say, yes, it
20 was the lower, inconsistent pricing that I was receiving at
21 the same time, which caused me to give that work.

22 JUDGE BROWN: Well, don't you at least have to
23 show that the lower, inconsistent pricing was probably at
24 least a factor that was considered? And how do we know
25 that?

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1 MR. BOEHLERT: Well, Your Honor, we know that
2 certainly by the inference that can be drawn that TechDyn
3 was the selected contractor for this. This was in TechDyn's
4 contract and the Air Force was actively soliciting this work
5 from TechDyn.

6 In any business relationship, it takes substantial
7 cost and effort for a company like TechDyn to put together
8 proposals. The Air Force was studying those proposals,
9 actively soliciting them. There is no reason other than
10 they got a better price for a better deal from Whittaker
11 outside of TechDyn.

12 JUDGE BROWN: So, you think all you have to show
13 is they went after it, and they got it. Not that they did
14 it in some improper way?

15 MR. BOEHLERT: That is not correct, Your Honor. I
16 think that -- Okay, that's right. That there is the
17 intentional interference. Now the Dugan case talks about
18 what happens in at-will contract arrangements. And it says
19 that in those circumstances, if there is an at-will
20 relationship, you need to show improper means.

21 It is the client's contention that this is not at-
22 will relationship. It is a direct subcontract where TechDyn
23 requested a proposal and under the change clause, Whittaker
24 had an obligation to give that. So, it is not an at-will
25 relationship. But even if it was, if it's at-will, then you

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1 have to show both intentional interference and improper
2 means.

3 And what Dugan said, it says, "Methods of
4 interference considered improper are those means that are
5 illegally or independently tortious, such as violations of
6 statutes, regulations or recognized common law rules.
7 Improper methods may include violence, threats or
8 intimidation, bribery, unfounded litigation, fraud,
9 misrepresentation, or deceit, defamation, duress, undue
10 influence, misuse of inside or confidential information, or
11 breach of a fiduciary relationship."

12 There is absolutely no question in this case that
13 Whittaker misused inside information. This was information
14 that was provided to them by virtue of this contract
15 relationship, that, Your Honor, as well as fiduciary
16 relationship, as a directed subcontractor, consistent with
17 the FAR regulations that we have cited to the Court, there
18 is an obligation in FAR provision 52.215-24. It's an
19 obligation for the subcontractor to, and this is what it
20 says, "The contractor shall require the subcontractor to
21 certify and substantially perform in section 15.804-4 of the
22 Federal Acquisition Regulation, that to the best of its
23 knowledge and belief, the data submitted under paragraph A
24 above were accurate, complete and current as of the date of
25 agreement, on the negotiated price of the subcontract, or

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1 subcontract modification."

2 Your Honor, the law is clear. That is part of the
3 subcontract. This subcontractor had an obligation to give
4 their best, fairest, most accurate prices to TechDyn. And
5 they didn't. They simultaneously were acting in a manner to
6 give inconsistent and lower prices, and substantially lower
7 in many instances at the same time.

8 So, what we have shown is a valid contractual
9 relationship between TechDyn and the Air Force. But even if
10 it didn't exist, certainly that expectancy to get that
11 identical work they were doing.

12 Secondly, knowledge. No question, Whittaker had
13 the knowledge. Intentional interference, no question there
14 was intentional interference. Whittaker got the work. It
15 couldn't have been unintentional. This proposal was put
16 together with great effort by Whittaker as well.

17 Whether or not improper means is necessary, Your
18 Honor, is for your conclusion. But I contend that because
19 it is not an at-will relationship, you don't need to show
20 improper means. But assuming that you did, the Dugan case
21 very clearly articulates what that would be. Misuse of
22 inside information, breach of fiduciary relationship, any
23 improper means, which common sense dictates this is, would
24 satisfy that test.

25 The fourth element is resultant damage to the

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1 party whose relationship or expectancy has been disrupted.
2 The damage has been amply demonstrated, both by expert and
3 fact testimony.

4 That is a prima facie case, Your Honor, for
5 tortious interference. Every one of those elements has been
6 met. Substantial evidence has been presented before this
7 Court. The issue of whether or not the option expired is
8 genuinely a red herring.

9 As part of our case, anticipating this argument,
10 we have shown beyond a doubt, or certainly put facts in
11 evidence that the option existed. But even if it didn't
12 that had nothing to do with the count on tortious
13 interference. And therefore, Your Honor, we ask that that
14 motion be overruled, and that that aspect of the case go to
15 the jury.

16 The second aspect is somewhat closely related, but
17 there is a contractual obligation. In the party
18 subcontract, and let's start first off, with what is
19 inherent in any contractual relationship, that is the
20 obligation that is an important and legally binding
21 obligation to deal in good faith, and not to do anything to
22 hinder, obstruct or interfere with the obligations or rights
23 of the other party.

24 And this case, Your Honor, that is part of this
25 subcontract. And Whittaker breached it. Subcontractor

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1 cannot be quoting prices knowing that not only the price
2 contractor will rely on them, but has to rely on them, and
3 turn right around and submit inconsistent and lower prices
4 and then add another year for increased effort, for
5 increased profit for the defendant, take the work, and argue
6 that they had not breached that obligation of good faith.
7 That alone can go to the jury.

8 But that is not the only aspect of the contractual
9 action which we have sited, both in the motion for judgment
10 and evidence shown.

11 What's been amply demonstrated, Judge, is that at
12 the time the proposal itself was submitted, and Mr. Morrison
13 read from i', Whittaker proposal, this proposal is submitted
14 in response to the RFP, contract modification, etc., in item
15 one, and that was the proposal. This is being submitted
16 pursuant to the contract changes clause and reflects our
17 best estimate and actual cost as of this date. It's not
18 true. That is a breach of contract.

19 I've also cited to you the FAR provisions, I won't
20 go over them again, but it is article 2-33, which makes
21 certain FAR clauses, the Federal Acquisition Regulation
22 clauses, applicable to this subcontract, and federal
23 acquisition regulation 52.215-24, is governing. That is the
24 obligation of Whittaker to give its accurate and fair, and
25 best, pricing as of the time that that option is submitted,

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1 as of the time that price is submitted.

2 Your Honor, the evidence is clear, Whittaker did
3 not honor those contractual obligations. Either the implied
4 obligations inherent in every contract, which certainly are
5 existent in this contract, and heightened, where you have a
6 directed subcontractor relationship, but even if the implied
7 obligations didn't exist, the express contractual
8 obligations do exist. Those were breached, Your Honor. The
9 evidence has been ample on that. And for that reason, that
10 count as well should go to the jury.

11 I would be happy to answer any questions you have,
12 Judge.

13 JUDGE BROWN: Have I heard everything you want to
14 say about the --

15 MR. BOEHLERT: Well, on the lost profits, yes,
16 Your Honor, I mean, what Whittaker did is they submitted
17 into evidence all of TechDyn's claims against the Air Force.
18 And as you know, or you may or may not have reviewed, what
19 those claims show is that 99 percent of those claims
20 seriously criticize Whittaker and the very negative impact
21 that Whittaker's activities have had on TechDyn.

22 There is ample evidence by virtue of those claims
23 in evidence that it has damaged TechDyn, both the direct
24 damage alleged and it has caused, and certainly an inference
25 can be drawn, and direct information can be drawn from those

WHITTAKER'S MOTIONS TO STRIKE

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1 claims, which show a very real and negative impact on
2 TechDyn's ability to do this contract, and on its business.

3 So, Your Honor, I do contend that there is
4 substantial and voluminous evidence in the record presented
5 by the defendant which shows that TechDyn has been seriously
6 impacted as a company, by virtue of those materials which
7 they submitted into evidence.

8 And relying on the case of Barnes v. Mavery, 42 SE
9 2d 304, the law in Virginia is that a motion to strike at
10 the conclusion of the Plaintiff's evidence in chief, before
11 any evidence on behalf of the defendant has been introduced,
12 should not be sustained unless it is clear that the Court
13 would be compelled to set aside a verdict for the Plaintiff,
14 considered as a demerita evidence.

15 This Court can't do that. There has been
16 substantial evidence both by the Plaintiff as to the lost
17 business and the Defendant has introduced evidence as to the
18 serious impact these activities have had on this company as
19 well.

20 So, for that reason, Your Honor, I ask that you do
21 please reconsider your previous preliminary ruling on that
22 count, and that that count as well be allowed to go to the
23 jury.

24 JUDGE BROWN: For the reason stated yesterday, I
25 am confident that that case, that your case, does not

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1 present sufficient evidence for the jury to consider it.

2 And I would have to overturn any jury verdict.

3 It is now a little bit after ten. I am not sure
4 enough about the other counts, the counts three and four, to
5 grant a motion to strike. And when we're not sure, we don't
6 grant it. Because we can never be wrong if we don't grant
7 it. But we can be wrong if we grant it. And so I overrule
8 the motion to strike.

9 We will go forward to the next stage of the trial.
10 You can raise it again at the conclusion of all the
11 evidence.

12 Is the jury here? Are we ready for the jury?

13 MR. RIDDLES: One issue, Your Honor. I was handed
14 this morning by Mr. Work a video tape entitled Crowell &
15 Moring RADIC, that they intend to --

16 JUDGE BROWN: Crowell & Moring what?

17 MR. RIDDLES: RADIC. And he wants to use this in
18 his trial. We have not been provided this before today.

19 MR. WORK: I am not going to use it today, as I
20 told you. I am just going to give it to you, and if you
21 have an objection to it, you can state that objection.

22 MR. RIDDLES: I am stating it. I object to
23 introducing a video tape as evidence in this case that we
24 have not received before.

25 JUDGE BROWN: Well, I don't know what it is, but

**TRIAL TESTIMONY OF
MICHAEL PERRY McCUNE**

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 MR. WORK: Your Honor, the first witness is Mr.
2 Michael McCune.

3 Your Honor, we are going to use some visual aids
4 with Mr. McCune, and I will certainly lay a foundation for
5 them before we show them to the jury. But, may I approach
6 him and give him a copy of the visual aids?

7 JUDGE BROWN: Yes.
8 Whereupon,

9 MICHAEL PERRY MCCUNE
10 having been duly sworn, was called as a witness herein and
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. WORK:

14 Q Will you state your full name, please?

15 A Michael Perry McCune.

16 Q What is your position?

17 A I am the, currently the director of C3 advanced
18 development at Whittaker Electronic Systems.

19 Q Thank you. What is your education, sir?

20 A I have a bachelor of science degree in
21 mathematics. I've had advanced courses, graduate course in
22 mathematics and system engineering. I graduated in 1967
23 from Oregon State University. The graduate course in
24 mathematics were Oregon State, and the system engineering
25 courses were at West Coast University in Los Angeles.

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1 Q Mr. McCune, we are still in the pre-proposal phase
2 of the ICCE program which you identified as being in the
3 1984 period and you mentioned your understanding of the
4 requirements as you were trying to develop a proposal. One
5 of the things you mentioned was the expectation of some
6 changes in the existing RADIL software. Could you describe
7 what changes you were addressing at the time and the
8 relative magnitude of those changes?

9 A Well, there were a number of small technical
10 points that they wanted changed having to do with how some
11 of the messages were processed and how some of the data was
12 to be displayed and some of the operator capabilities.

13 Q What magnitude of changes were you addressing at
14 the time?

15 A It was generally estimated by us to be around 5
16 percent.

17 MR. RIDDLES: I renew my objection on the prior
18 grounds, Your Honor.

19 JUDGE BROWN: Well, I don't think that he is
20 attempting and won't allow him to vary the terms of the
21 contract. The preparation that he made in preparing for the
22 expectation of what that work would encompass is relevant to
23 the issues but he's not going to be allowed to vary the
24 terms of the contract by these pre-contract
25 preparations.

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1 as being a plug in interface. Why did you depict them in
2 that fashion, sir?

3 A Because this breakdown of the system which was
4 employed literally had plug in interfaces. And these
5 interfaces -- there were basically two of them, one for the
6 LATERAL-TELL data link and one for the TADIL-A data link,
7 they were covered by relevant MIL SPECS or MIL standards.
8 Now, these are military standards or military specifications
9 that are issued by the U.S. Government to allow the
10 standardization of equipment within the military services.
11 For instance, there is a MIL standard 188 interface for the
12 ROCC data link, the LATERAL-TELL and there is a MIL standard
13 1397 interface for TADIL-A.

14 Q Now, in the development of these two functional
15 areas, what was your anticipation in this pre-proposal
16 period of the relationship between the two areas in the
17 development phase?

18 A Well, this was a very good breakdown because the
19 two areas were virtually independent of one another. In
20 order to operate as a complete system, you had to have both
21 functional areas working correctly. But during the
22 development, you can develop the PDFA virtually independent
23 of the CFA and you can develop the CFA virtually independent
24 of the PDFA. In order to do that, the normal approach to
25 this is that you will use test equipments or you'll use test

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1 jigs and special setups to enable you to test a partially
2 developed CFA in the absence of a PDFA and vice versa. And
3 this was a very common thing that we did.

4 So in the normal progression of an overall system,
5 the PDFA and the CFA would come together in a process that's
6 called integration but the whole system would not
7 necessarily come together until it was finally installed and
8 you were testing the entire system as installed in Iceland.

9 Q I see. And would you tell us very briefly, sir,
10 what the PDFA area consisted of and what the CFA area
11 consisted of?

12 A Yes. The PDFA, the name is very descriptive of
13 the function -- processing and display. In the bottom of
14 the RADIL console is all the electronics that does the
15 message processing and the display generation for the RADIL
16 and the top consists of two television sets, essentially,
17 cathode ray tubes, and a keyboard and a track ball that the
18 operator could use to interface with the system. And so
19 that was the computer heart, if you will, of this whole
20 message processing and translation capability.

21 The CFA had all of the communications functions.
22 It had crypto equipment, which is communications security
23 equipment that scrambles the data so that enemies cannot
24 intercept and take advantage of this data. It had data and
25 voice terminals for handling the data communications and the

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1 voice communications. There were switches and remote
2 control elements and there were radios and antennas.

3 And the normal flow of data, data sent from the
4 RADIL would typically go through the crypto into the
5 terminal, through the switches and out to the radio. This
6 is a simplification but in general terms.

7 Data that went the other way would be received by
8 the radio and flow back through the system over to the
9 RADIL. This also is a generalization because, as I said in
10 the earlier chart, some of this equipment was at remote
11 sites, some of it was centrally located. But in terms of
12 its basic function and a top level diagram, it's an
13 acceptable depiction.

14 Q All right. Now, separately with respect to each
15 of the two areas, to what extent in this pre-proposal phase
16 as you were addressing it, did the equipment that you
17 expected to be responsive to the requirement in Iceland
18 already exist?

19 A The RADIL system had already been developed and it
20 had been deployed in the United States for performing the
21 same kind of function that was to be performed in Iceland I
22 guess --

23 Q Are you talking about the leased system at the
24 four ROCC --

25 A That's correct. And so that equipment was the

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1 basis of the RADIL that was to be used in Iceland.

2 Q How about the software aspect of the PDFA? To
3 what extent did that exist?

4 A There was an existing set of software that was
5 already in use in the United States and that was the basis
6 for the capabilities that were to be put into the RADIL.

7 Q For what period of time in this pre-proposal era
8 in 1984 had the PDFA equipment, both the computer and the
9 software, been in existence?

10 A Working as an entity, for two to three years.

11 (Continued on next page.)

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1 a moment so we can better understand how this program
2 worked. We were talking about the requirements definition
3 and design stage. And will you describe that as you
4 understood it, at the outset of the FOC portion when this
5 program started, August of 1985?

6 A Okay, the major point to be made about the
7 requirements definition and design stage, is that this
8 contract was a modification of existing software and
9 hardware. And so that the requirements that we were
10 addressing were the requirements for the modifications. We
11 were not addressing the requirements for the entire system,
12 because after all, the original system had already been in.

13 The Air Force hands and operated by the Air Force,
14 and in fact, the software had been modified by the Air Force
15 and was in their sole responsibility at the onset of the
16 ICCE contract. So that the software that the Air Force had
17 modified was provided back as the starting software for the
18 addition of some more changes.

19 And these changes were what we were analyzing in
20 the requirements definition and those were the changes we
21 were designing. And then we were going to implement the
22 test.

23 Q And going into this program, once the FOC portion
24 started, did you have any different perception of the
25 magnitude of changes at the outset than you did in the

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1 proposal?

2 A No, they were the same.

3 Q Will you tell the jury what the terms preliminary
4 design review and critical design review mean, and what role
5 you understood they were to play in this program?

6 A Okay. Preliminary design review is when you show
7 your understanding of the requirements and present a
8 preliminary design.

9 The critical design review is where you refine
10 that design into the final design and you are then ready to
11 begin the implementation of the design.

12 Q And then do we move to the next element of the
13 program, which is called, or what you have called design
14 implementation and in-plant testing?

15 A That would be correct.

16 Q And what was your understanding of what was to
17 happen in that element of the ICCE program?

18 A Once you have the detailed design, you would
19 implement that design and then you would test what you have
20 built. But since we had a modification program, the
21 implementation would be making the changes that had been
22 requested. And the testing would focus on what had been
23 added that was new, plus there would be what is called
24 regression testing to verify that the old features worked.

25 However, because the old features had already been

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1 developed and were in fact owned by the Air Force, it was
2 not necessary to exhaustively test those old features.
3 After all, they already had it and it was there.

4 Q Now, just briefly describe what you mean by the
5 terms test plans, test procedures and test conduct.

6 A Okay, test plans refer to the documents that were
7 written to describe how you expect to do the testing. It
8 was not a, we are going to put the system under test, we are
9 going to simulate it with a test device, we are going to
10 make these observations.

11 This is the support equipment we are going to use,
12 the test should take this long. We will use this many
13 people. In other words, it's a typical plan that says how
14 we expect to do it.

15 That document is submitted to our customer, who
16 would review and approve it, and that approved test plan
17 becomes the basis for writing the detailed test procedures.
18 This is the plan, this is the implementation of the plan,
19 and it gives the --

20 (Continued on next page.)

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1 Q These are the test procedures?

2 A Test procedures, yes. The test procedures are
3 step-by-step instructions of what you do, what you look for
4 and it contains a place to mark your observations as did it
5 occur as expected or not. So it is both a set of procedures
6 on how to run the test and it is a log or a record of the
7 execution of the test.

8 BY MR. WORK:

9 Q All right. Now, moving to the next element of the
10 ICCE program, logistics documentation and training, what was
11 your understanding of that element of the ICCE program,
12 going into the FOC phase of the program?

13 A We had a role to play in this but a relatively
14 small one. We were to provide provisioning information to
15 TechDyn and TechDyn was to develop the full provisioning
16 lists for the whole system. So we were to document the PDFA
17 portions, supply to that TechDyn and they would take care of
18 the rest of it.

19 We had some manuals to prepare relating to the
20 details of the software but many of the manuals in the
21 overall system were to be done by TechDyn. And the same is
22 true for the training plans and conduct. Basically, we were
23 in a subservient role in the preparation of much of the
24 documentation.

25 There is one area where we had significant

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1 documentation to prepare and that was in the support
2 documentation of the PDFA, meaning the hardware and
3 software. It had to be fully documented. Since we were
4 building that hardware and software, we were responsible for
5 documenting it. But the rest of the system was TechDyn's.

6 Q All right. Now, moving finally to the last
7 element, you've called that shipment installation and
8 on-site testing. What was your understanding of that
9 element of the ICCE program going into the FOC aspect of the
10 program and what role did you understand Whittaker's to be
11 in that phase?

12 A Well, we certainly had a portion of the packaging
13 and shipping because we had to deliver what we developed to
14 TechDyn because they were our prime contractor.

15 In addition, we had to build what's called the
16 product specs for the PDFA and for what we built on the RCE.
17 Basically, a product spec is -- we use the term "as built".
18 It says what did we actually build?

19 Q Is that the C-specification which you referred to
20 as product definition documents?

21 A That's correct. I should point out that the
22 normal progression -- there was a draft of the
23 C-specifications that is prepared way back here at the
24 critical design review that says here's the outline of what
25 that final design is going to look like but the last pieces

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1 of information that must go into a C-spec cannot be produced
2 until after you have delivered -- almost delivered the
3 system. And so to deliver a final product spec is possible
4 only when you get clear out here at the end of the program.
5 You must have the final software. You must have the final
6 hardware.

7 Q Incidentally, we did not indicate where on this
8 progression of elements the B-specifications fell. In what
9 phase and what element of the program would they be?

10 A Okay. During the requirements definition and
11 design element, when you're preparing for the preliminary
12 design review, you're working with an A-spec and producing a
13 draft B-spec. When you're doing the critical design review,
14 you're working with a B-spec and producing draft C-specs.
15 When you have finally built the whole system, you then
16 produce the final C-specs, the product specs here on the
17 chart.

18 Q I see. Now, sir, would you tell us as relates to
19 the ICCE program as you understood it going into the FOC
20 portion of the program, what the interrelationship of these
21 various program elements was?

22 A As I said earlier, generally the time flow is from
23 left to right. So you would first do contract award, then
24 requirements definition and so on through the list.

25 There is frequently some overlap between these and

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1 that is often done in the interests of shortening the
2 schedule or where there is independence of elements you can
3 begin one without waiting for formal completion of a prior
4 step.

5 There is also an interrelationship in that each of
6 the ones to the right is highly dependent upon the elements
7 to the left.

8 Q In what sense?

9 A Well, that's why they're normally performed in
10 serial order. You must have an approved critical design,
11 you must have an approved design before you can really
12 implement that complete design. And until you've
13 implemented the design, you can't really test it. Until you
14 have a tested product, it would be premature to try to
15 prepare a complete set of manuals because those manuals
16 would be subject to change. Until you have a set of
17 manuals, you can't really go out and perform the
18 installation nor can you ship the product until you've
19 actually built it and completed the documentation. There's
20 some overlap that's possible between some of these elements
21 but generally whatever you do at the left needs to be
22 completed or pretty much locked into concrete before you can
23 seriously begin the elements to the right.

24 Q I see. Now, sir, as director of engineering for
25 Whittaker, did you have personal knowledge of what the

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1 Whittaker ICCE team consisted of?

2 A I'd like to correct that. At this point, I was
3 not the director of engineering. I was still advanced
4 corporate technology.

5 Q I see. In that position --

6 A I was the chief engineer. In other words, the
7 chief technical person in the company. But I did not run
8 the engineering department. I was running the IRAD
9 department.

10 Q Did you have personal knowledge of who in the
11 engineering department worked on these various elements?

12 A Yes, I knew many of them personally.

13 Q All right. And let's start with the requirements
14 and definition and design period. Who at Whittaker worked
15 on that phase of the program, sir?

16 A The chief person was Claudia Justis, who was the
17 chief system engineer for the project and also director of
18 engineering through much of the project.

19 Q Had she been brought into the company after the
20 ICCE program or was she a 4C person?

21 A She was a 4C person.

22 Q And for how long did she work on this program?

23 A Through the entire technical development, until
24 1990, I believe.

25 Q I see. And who else worked at Whittaker on the

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1 requirements definition and design program?

2 A There were a number of other people. One that
3 comes to mind was Al Amaro who both implemented software and
4 I believe led a group at various times. He still works for
5 Whittaker. He left for about a year, 1988 or so, and came
6 back.

7 Q Was he an old 4C person?

8 A Yes, he had worked with us for quite some time.

9 Q Who else?

10 A On the hardware side, there's a man named Craig
11 Smith. He went back into the 1970s with 4C and he was an
12 employee up through 1991. And he worked and was
13 available -- he worked on the project all the way through.

14 Q Any others in the software or hardware areas?

15 A Yes. Arnold Durtsche, Rick Thomas -- they were
16 software programmers. They had worked at 4C before this
17 contract and worked all through the -- all the technical
18 deliveries. Arnold Durtsche is still with us. Rick Thomas
19 I believe just changed jobs a few months ago.

20 Q And the people you've named, I understand from
21 your testimony, worked on subsequent phases as well?

22 A Yes, they did. In the test area, Mr. Bob Fowler,
23 nicknamed the RADIL Ranger because he knows it intimately,
24 he worked on test procedures, test conduct. He's still with
25 Whittaker.

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1 Q Why did you call him the RADIL Ranger?

2 A Because he had worked on the RADIL when he was in
3 the Air Force and when he left the Air Force he came to work
4 for us.

5 Q Okay. And I gather from your prior testimony the
6 people you named in this requirements definition and design
7 element also worked on this element?

8 A Yes. They carried over although there were more
9 people working in that area in the test -- and in the design
10 implementation, normally you have a few people -- one other
11 characteristic I guess I should say at this point -- at the
12 left you start with a small number of people and, as you
13 progress over time through these various elements, you bring
14 in more and more people. So there's a small number of
15 people during the design stage or through the PDR. There's
16 more people brought on to do the critical design review and
17 even more to do the implementation and test. So over time
18 as you go through these elements, you would expect to see
19 more people and more organizations come onboard.

20 It's also true that each of these different areas
21 represents a different technical specialty and a different
22 set of skills. You would have a contract person -- Marie
23 Raymond, who has been on the program the entire time.

24 Q You're putting her in --

25 A At the very start, at the contract award. You

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1 would have system engineers that would start at the
2 requirements definition and would support the program all
3 the way through. You would have software people coming on
4 prior to the critical design review going through the
5 implementation and test. You would have test people coming
6 on after the design was approved, working the test and going
7 all the way through. Some of the test people also helped in
8 the training area and so that cross training was very
9 effective. Logistics would come onboard after you had
10 something that was built and they would then start
11 documenting things.

12 Some of the C-specs, the product spec documents
13 would be done by the people that developed the software. So
14 the same people would show up in multiple phases but
15 generally there was a build up over time so that as you
16 reached the end of the program you have the largest number
17 of people onboard to the program. That's very common.

18 Q Now, sir, I'd like to actually talk about how the
19 program unfolded based on your personal knowledge and
20 involvement and if you do not have personal knowledge and if
21 I ask you something, please tell us.

22 The requirements definition and design period --
23 what was the anticipated duration of that period as you got
24 into the FOC period?

25 A That total period was to be six months. The

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1 fly.

2 Q Did you anticipate this going into the FOC portion
3 of the contract?

4 A Absolutely not. This was a very unusual
5 circumstance.

6 Q So can you tell us based on personal knowledge as
7 you've described it what happened during the requirements
8 definition and design period and how it differed from what
9 you anticipated going into the FOC portion?

10 A In simple terms, when the contract was awarded,
11 there was an A-spec and we expected that that contained a
12 complete statement of the Air Force requirements that were
13 going to be placed on the PDFA.

14 In fact, what happened was that the Air Force
15 spent about a year after contract award refining those
16 requirements which meant that all of the work that went into
17 the PDR and all of the work that went into the CDR basically
18 were overcome by events and the PDR was held but then after
19 the PDR, the CDR was pushed out in time an extended period
20 of time while the Air Force was basically rewriting the
21 A-spec.

22 Q In what context were they rewriting the A-spec?

23 A Well, they didn't do it by rewriting the A-spec.
24 They left that alone. What they did was modify the B-specs.
25 the A-specs was a contractual document and apparently they

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1 didn't want to play with a contract document so what they
2 did was when we prepared B-specs, they basically said no,
3 wait -- this doesn't do everything we want. We need this,
4 we need this.

5 Q Were you present while this was happening?

6 A I was not a constant participant in these meetings
7 but I did attend a number of these redline sessions when
8 they came up with specific technical questions.

9 Q And who attended these meetings that you're
10 talking about this phase?

11 A There would be a representative from TechDyn.
12 There would be program and technical representatives and
13 contractual representatives from Whittaker and there would
14 be usually just a tremendous number of people from the Air
15 Force.

16 Q And what agencies or commands of the Air Force?

17 A It would be expected -- I would have expected to
18 see representatives from Electronic Systems Division, since
19 they were administering the contract, and they have a
20 company called Mitre Corporation that provides them
21 technical advisors. It was very frequent or very common to
22 see Mitre and ESD together when you're working on an ESD
23 contract. However, ESD also either allowed to happen or
24 brought in, I don't know which, representatives from a
25 number of user commands. That would be commands like the

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1 Tactical Air Force from Langley Air Force Base, the users at
2 Tyndall Air Force Base representing the ROCC community and
3 the ROCC support activities, AWACS people from Tinker Air
4 Force Base, which is the AWACS support wing, people from the
5 Air Force Logistics Command, people from Alaska, people from
6 Hawaii, people from Iceland -- I mean just a tremendous
7 number of people that normally would never show up in a
8 contract because, again, this performance specification, the
9 A-spec, is supposed to contain all of the user requirements
10 and that document is to be prepared before the contract is
11 let.

12 Well, what actually happened was after the
13 contract was let and we had this A-spec, the Air Force
14 brought in their users and the users started saying I want
15 something different and, in fact, it was almost ludicrous
16 because many times the Air Force would argue during these
17 meetings and in front of our people --

18 MR. RIDDLES: I object to this testimony about Air
19 Force officials on the grounds of hearsay.

20 JUDGE BROWN: I'll overrule the objection. It's
21 not introduced for the truth, it's introduced for what
22 happened.

23 BY MR. WORK:

24 Q Would you continue?

25 MR. RIDDLES: Well, I would like to have a

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1 A That's correct. There was a hardware critical
2 design review, I think, in December of '86 that was passed.
3 And even in that first design review, the Air Force had many
4 objections and said no, we're not going to accept this
5 design but in May basically this same design review was
6 presented, the same charts, the same design approach and
7 that one was accepted. There were some improvements in the
8 C-specifications made during that time from January to May.

9 Q So you're saying that critical design review got
10 pushed back from the original schedule by over a year? Is
11 that correct?

12 A That's correct.

13 (Continued on next page.)

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MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 Q Now, sir, would you to tab 13 in your book,
2 please? You've been discussing the Air Force participants
3 in the meetings that you attended during this requirements
4 definition and design period. Are you familiar with the
5 chart that's in front of you, sir?

6 A Yes, I am.

7 Q Does this chart reflect the various Air Force
8 procurement and user communities that you observed present
9 at these meetings?

10 A Yes, it does.

11 Q Is the chart accurate? And the chart also
12 indicates the presence of some Air Force procurement
13 advisors and you've mentioned one of them, Mitre -- who were
14 the others?

15 A I believe the others were companies -- H&H
16 Aerospace certainly was. They were companies that ESD had
17 contracted with to provide additional support.

18 Q And at the bottom of the second half of the page
19 on the horizontal bias, under the title U.S. Air Force User
20 Commands, would you just describe briefly what they were and
21 what role they played in these design definition meetings?

22 A Yes. Do you want me to say more?

23 Q Yes, please.

24 A Okay. TAC -- on the left, the Tactical Air
25 Command was the original user of the RADIL and they were the

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1 ones that operated the RADIL inside the continental United
2 States.

3 CENTAF was the Central Air Force -- is the Central
4 Air Force. Their area of responsibility -- they're part of
5 the rapid deployment force and their focus was Saudi Arabia
6 and a part of the ICCE contract was to provide a couple of
7 RADIL systems for the use of CENTAF in Saudi Arabia.

8 The 932nd in Iceland was to be the operators of
9 the RADIL installed in Iceland.

10 SMALC is the Sacramento Air Logistics Center.
11 They're the chief office for logistics of the Air Force and
12 their interest was really restricted just to logistics
13 matters.

14 The RSSF was the ROCC software support facility
15 located at Tyndall Air Force Base. They're the people who
16 had previously modified the RADIL software that became the
17 starting software furnished by the Government at the onset
18 of the ICCE program.

19 PACAF is the Pacific Air Force. They're another
20 Air Force organization. Their headquarters was in Hawaii
21 and there was an option in the contract for PACAF to get a
22 RADIL under the ICCE contract.

23 And similarly the Alaskan Air Command was another
24 user organization. There was an option in the contract to
25 provide a RADIL to the Alaskan Air Command.

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1 Q Are you in a position to attest to the accuracy of
2 this chart as depicting participants in these design
3 definition meetings that you've been describing?

4 A I think there are some names here that I probably
5 did not have explicit contact with but in terms of
6 organizations and many of the names, yes, I'm familiar with
7 them.

8 MR. WORK: May I publish this at this time, Your
9 Honor?

10 MR. RIDDLES: Your Honor, there's no foundation
11 that he has all of the information that's established on the
12 chart and I object to it on that basis.

13 JUDGE BROWN: I sustain the objection.

14 MR. WORK: All right. We'll bring it in later.

15 BY MR. WORK:

16 Q Now, sir, you said that the critical design review
17 or the ultimate critical design review for the PDFa software
18 occurred in May of 1987, following this series of meetings.
19 What happened next in this program based on your personal
20 knowledge?

21 A After the completion of the critical design
22 review, we entered into the implementation stage.

23 Q Could I stop you for just a moment?

24 A Certainly.

25 Q As a result of this extended period of

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1 requirements definition and design, were there -- did there
2 evolve changes in the existing software that you brought
3 into this program?

4 A Yes.

5 Q And can you describe for us, sir, what those were
6 in general terms?

7 A In most general terms, there were added
8 requirements placed on the software. Requirements that had
9 not been defined in the A-spec and were defined during the
10 conduct of the contract. Specifically, the user commands
11 had several points that they -- several technical features
12 that they wanted in the software and there are I think three
13 or four that come to mind. They wanted a feature called
14 correlation, they wanted a feature called digital handover.
15 They wanted a feature having to do with the block 20/25
16 software of the AWACS and they wanted an R squared shift or
17 a reporting responsibility feature.

18 Q All right. Will you turn, please, to tab 18 in
19 your book, please? This is a chart entitled changes in
20 ICCE software requirements. Did you have a role in the
21 development of this chart, sir?

22 A Yes, I did.

23 Q And will you tell us what is depicted here?

24 A Well, this basically summarizes the major points
25 of change that occurred and compares what happened or the

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1 those things are or whether you're just talking about
2 something that was done orally.

3 MR. WORK: Fine. Let me try to amplify that.

4 BY MR. WORK:

5 Q Did you understand the Court's question?

6 A Yes.

7 Q Will you address that question?

8 A Yes.

9 JUDGE BROWN: Well, I don't think I asked a
10 question.

11 MR. WORK: Well, let me try to ask a question.

12 BY MR. WORK:

13 Q You've used the term changes in the software. You
14 talked on the one hand about the extension of this period.
15 Did you regard that as a change?

16 A Certainly.

17 Q And was that something that was formally announced
18 before it happened or was it something that just evolved?

19 A It's something that evolved.

20 MR. RIDDLES: For a point of clarification -- I
21 think that what he's talking about are changes of his
22 pre-contract expectation. That's my understanding of it.

23 JUDGE BROWN: No, he's talking about the change in
24 the time that it took to get to the point of critical design
25 review, if I understand it.

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1 MR. WORK: That's right.

2 MR. RIDDLES: Okay.

3 JUDGE BROWN: That was the first thing that he
4 addressed just now.

5 BY MR. WORK:

6 Q Now, you mentioned in your testimony, sir, that
7 there was a long period of involvement of the various user
8 commands with a lot of them having involvement. Did you
9 consider that to be a change in this program with regard to
10 software?

11 A Just bringing the user commands with the
12 subsequent slowing of the performance of meetings was a
13 change. The inputs of those people and the effect they had
14 on the technical progress of the program was a change
15 because they demanded that things be put into the
16 B-specifications that had no traceability back to the
17 A-specifications. In other words, new requirements were
18 being inserted into the planned implementation of the
19 system. We had no opportunity to account for those
20 requirements in our planning for the program, in our bid for
21 the program in the schedule for the program. Consequently,
22 they were creating new work as we were performing on the
23 contract.

24 Q And I gather from your prior testimony that all of
25 these meetings that you attended there was a representative

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1 of your prime contractor, TechDyn, present. Is that right?

2 A Yes.

3 Q Now, sir, in terms of -- you said that the Air
4 Force had been operating this RADIL software for CONUS,
5 continental United States, sites for several years before
6 the start of the ICCE project and then it gave it back to
7 you. At the time of the start of the program, before the
8 start of the program, had they given you any information
9 concerning testing of that system?

10 A No, they had not.

11 Q At some other time during the course of the
12 execution of the FOC program, did they disclose any testing
13 results?

14 A Yes, they ultimately did. They indicated that
15 they had done what's called a TAF certification test on the
16 original RADIL software and that there had been a number of
17 system trouble reports written as a result of that test.

18 Q Had you any knowledge of those test results prior
19 to the start of this program, sir?

20 A No.

21 Q Who does this TAF certification testing?

22 A That is done by an organization at Langley Air
23 Force Base. That is their job in life, to perform these
24 tests. I don't remember the exact nomenclature, but they're
25 called a test wing or a test group or something. And they

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1 are the ones that are tasked to do this. That's what they
2 do. They have specialized test equipment to perform this
3 testing and they're responsible for it. Whenever this group
4 does the testing by the way, it's performed --

5 MR. RIDDLES: Objection. The witness is
6 volunteering answers to questions that haven't been asked.

7 JUDGE BROWN: I'll sustain the objection and ask
8 you to ask the next question.

9 BY MR. WORK:

10 Q Let's go on to the next question. Does the term
11 JCS PUB 10 mean anything to you?

12 A Yes, it does.

13 Q What does it mean to you?

14 A That refers to the publication of the Joint Chiefs
15 of Staff. It's publication number 10 and it was one of the
16 contractual documents, a reference document, that defines
17 the message structure and protocol of the TADIL-A data link
18 used to communicate with the AWACS aircraft.

19 Q And at any time during the course of the
20 requirements definition and design phase, did you receive a
21 different version of that JCS PUB 10?

22 A Yes, we did. During the conduct of the program,
23 the Air Force indicated that they wanted a later version of
24 PUB 10 to be used on the contract, a later one than had been
25 referenced at the time that the contract was -- or a later

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1 one than the version that had been incorporated in the
2 contract by reference.

3 Q And what impact did that have on work that
4 Whittaker was doing under subcontract to TechDyn?

5 A There were differences between the two versions
6 and the Air Force wanted us to implement a TADIL-A data link
7 that was compliant with the later version whereas the
8 software that existed had been built to the earlier version.
9 This meant that there was a change -- there was added work
10 to be done to first of all, analyze the impact of the
11 document and second of all to implement the changes dictated
12 by the new document.

13 Q I see. You mentioned a few moments ago the term
14 block 20/25 capabilities. Can you explain what that term
15 means, please?

16 A Yes, sir. The AWACS aircraft and many other
17 weapons systems are updated -- their software is updated in
18 what's called a block approach. And so when you give a
19 block number, it refers to a particular set of capabilities
20 that have been implemented into a system. Block 20/25
21 changes that were referred to indicated that the Air Force
22 wanted the TADIL-A to be identical to that that was
23 implemented on the AWACS aircraft in specific areas of
24 implementation so that not only we have to use a new version
25 of PUB 10 as a reference, we had to use some AWACS documents

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1 to indicate how they further deviated from that latest
2 version of PUB 10. So there was a new PUB 10 plus some
3 additional change documents summarized as the AWACS block
4 20/25 capabilities and that represented the full scope of
5 the TADIL-A data link that the Air Force wanted us to
6 implement.

7 Q Did that affect -- block 20/25 change affect the
8 duration or the scope of Whittaker's work under its
9 subcontract with TechDyn in the requirements definition
10 design phase?

11 A Yes, it did. Again, to go back to the basics, in
12 the A-specification would be a reference to the referenced
13 documents such as PUB 10 that would tell us what message
14 standards we were to implement in providing the TADIL-A data
15 link. After we had begun the contract and the
16 A-specification was set and were into the time stage from
17 the preliminary design review to the critical design review,
18 we were in the process of modifying the B-spec and now the
19 Air Force is introducing the new documents which we had
20 never seen, had never been referenced and had never been
21 supplied to us. And even after they told us they wanted to
22 implement to the new PUB 10 and to the block 20/25, it was
23 some time after that before they even provided the documents
24 to us so that we could review them. The net result is we
25 may have understood what the Air Force was saying they

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1 wanted but we didn't even have the reference documents to be
2 able to analyze the impact of what they were asking for
3 until very much into the contract, approximately -- I'd say
4 between six months, nine months into the contract -- maybe a
5 year.

6 JUDGE BROWN: Let me see counsel up here a minute.

7 (Bench conference.)

8 (Continued on next page.)

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1 JUDGE BROWN: Now wait a minute. Let's go back
2 and try to -- You didn't fix the door yesterday. Now let's
3 not break the wall. The door is fixed, by the way. Did you
4 do that? This building has been falling apart since we
5 built it. See us after the trial.

6 (Pause while jury is seated.)

7 MR. WORK: You mentioned that when you were
8 discussing changes, that the concept of a digital handover.
9 Will you tell the jury what that means, sir?

10 THE WITNESS: Yes. Digital handover refers to a
11 process whereby the controller of an aircraft, such as an
12 interceptor, and the controller is a person who is operating
13 in a facility, and is directly, has voice communication with
14 the pilot of the controlled aircraft. The controller wants
15 to transfer his control of that aircraft to another person,
16 usually another system.

17 For example, the ROCC has the capability to
18 control an aircraft. And the AWACS has a capability to
19 control and aircraft. And due to the, it can arise that as
20 the tactical situation evolves, an aircraft that has been
21 controlled by the ROC, should become controlled by the
22 AWACS, or vice versa. And so that process of transferring
23 control is called handover.

24 And a digital handover is a mechanism whereby you
25 use messages on TADIL-A and on the LATERAL-TELL to cause to

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1 initiate this transfer, and to cause the transfer to go to
2 completion. So, it's digital as opposed to voice.

3 BY MR. WORK:

4 Q Now, as it relates to digital handover, what
5 happens, as relates to digital handover during the
6 requirements definition and design period on the ICCE
7 program?

8 A It was one of the items on which there was a great
9 deal of user discussion. And a lot of time spent evolving
10 what the digital handover requirement was, and how it could
11 possibly be implemented. And there was a lot of change and
12 evolution in the refinement of how digital handover should
13 be implemented, but the end result was, the requirement for
14 digital handover was written into the B spec.

15 MR. RIDDLES: I'm sorry, I object that you were --
16 go ahead.

17 THE WITNESS: The B spec had the digital handover
18 capability written in as something that was to be
19 implemented. And then during the implementation phase, the
20 digital handover was implemented and tested and documented -
21 -

22 MR. WORK: Now, --

23 THE WITNESS: So, it became part of the system.

24 BY MR. WORK:

25 Q Did digital handover capability of PDF/A software

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1 existed prior to this program?

2 A I don't know. It was not really identified prior
3 to the onset of the program that we were going to make
4 modification to the digital handover area.

5 Q Okay. Now, sir, you also mentioned something
6 called R squared capability. What does that mean?

7 A It's a technical term --

8 Q What does it mean. What does the R squared stand
9 for?

10 A It stands for reporting responsibility. And on
11 the TIDAL-A data link, there can be many people whose radar
12 observe a particular, say, aircraft. The reporting
13 responsibility is a protocol for transmitting messages such
14 that the person who sees the aircraft the best, is the one
15 who reports it, and everybody else will listen to it.

16 Because an aircraft can fly through radar
17 coverage, the person who sees it best can change over time .
18 And so there can be a shift in the responsibility of
19 reporting on that aircraft. And so the catch phrase is R
20 squared. That means, who sees it best, and is reporting it.

21 Q Now, on the ICCE program, during the requirements
22 design definition and design period, what happened with
23 regard to R squared capability?

24 A There was an R squared ability in the original
25 RADIL software. But some members of the user community were

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1 not satisfied with it. And consequently there was a revise
2 implementation that was written in the B specs.

3 Q During that period?

4 A During that period.

5 Q And what impact did that have on Whittaker's scope
6 and duration of work under its subcontract with TechDyn?

7 A Well, first of all, it took longer to perform,
8 just to achieve a final B spec, a final set of
9 implementation requirements. And then it took longer to
10 implement and test the document. So, having the change in
11 the, during the requirements definition and design, caused
12 all of the phases to the right to be moved out until the
13 requirements were finalized. And then the amount of work
14 performed in writing procedures and test conduct, and
15 writing the manuals and product specs, was all effected. It
16 was made larger.

17 If there was more work done up here, then there
18 was more work to be done in these later stages documenting
19 and testing that which was produced.

20 Q Finally, in your earlier testimony, sir, you made
21 reference to the term, correlation capability. What does
22 that term mean?

23 A That is also a term that refers to a capability to
24 be implemented on the data links. It is a, it's a common
25 problem with radar systems for a variety of reasons, that

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1 one radar can see a track, and object in the sky. And the
2 second radar can see it. And when the two systems
3 communicate with one another, they report two different
4 tracks. There is only one object in the sky. There can be
5 two different tracks.

6 It happens, for instance, if the navigation system
7 on board an AWACS system is slightly off. So, that he is
8 not quite sure where he is, or he's got some uncertainty.
9 And that uncertainty is just enough to make it appear that
10 there is two different tracks when there is only one.

11 So, the correlation problem says, I want to take
12 these two tracks and make them one track, in fact. Because
13 it is determined that the two are one track, and its just an
14 error in reporting. So, they wanted to implement a process
15 of digital correlation, or implement messages that would
16 allow them to correlate tracks using data links.

17 Q I see. Did that happen during the requirements
18 definition and design phase?

19 A Yes, it did.

20 Q What impact on the B specifications did the design
21 requirement have?

22 A New requirements were written into the B
23 specifications to implement this correlation capability.

24 Q And what impact did that have on Whittaker and the
25 scope and duration of work under its subcontract with

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1 TechDyn?

2 A Just the same as I said before. More work was
3 done, in all of the phases, starting with requirements
4 definition and the schedule, the possibility of completing
5 all of these phases, was shifted to the right. Because
6 until that requirement was defined, it was not possible to
7 even properly begin these other phases. So, the more time
8 they spent defining their requirements, the more delay there
9 was on the program.

10 Q Would you turn, please now to Tab 18 in your book.
11 We've been discussing the various matters on that chart. Is
12 this chart an accurate depiction of what happened during the
13 requirements definition and design phase of ICCE program as
14 it relates tot he PDFFA software?

15 A YEs, it is.

16 MR. WORK: May I publish this chart to the jury,
17 Your Honor.

18 MR. RIDDLES: I object to it, Your Honor.

19 JUDGE BROWN: I haven't seen it.

20 MR. WORK: Well, it's chart 18.

21 JUDGE BROWN: Okay, what is the objection?

22 MR. RIDDLES: Your Honor, again, it is a spin on
23 the ball, it's not testimony to aid, it's not a chart that
24 aids in this testimony. And it doesn't have any factual
25 information on it. What it is, is an argument in the nature

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1 of what I would take to be a closing argument and
2 presentation to the jury.

3 JUDGE BROWN: Okay, do you want to say anything
4 else?

5 MR. RIDDLES: No.

6 JUDGE BROWN: I thought you were through, I was
7 asking Mr. Work if he wanted to say anything else.

8 MR. WORK: It is a visual order.

9 JUDGE BROWN: Wait a minute, are you through, Mr.
10 Riddles?

11 MR. RIDDLES: Yes.

12 JUDGE BROWN: Okay.

13 MR. WORK: It is a visual aid that will help the
14 jurors understanding of this matter. It has been fully
15 qualified and there is a complete foundation for everything
16 on this document.

17 JUDGE BROWN: I find it is argument. And you may
18 be able to use it in argument. But it doesn't do any good
19 to repeat to the jury, because they've heard his testimony.

20 MR. WORK: Then Your Honor, we have a little bit
21 of a tension between not letting him use the thing to give
22 the jury a visual context before he describes it, on the one
23 hand, and then having described it, he can't use it to give
24 that visual perception. That's what I understand a visual
25 aid is supposed to do.

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1 JUDGE BROWN: Well, what a visual aid is supposed
2 to do is, first, it is supposed to aid the jury in
3 understanding the testimony. He has already given the
4 testimony. And second, it is supposed simply to be a light
5 depiction of the airplanes, and that kind of thing. That
6 obviously assisted the jury. And I find this will not, and
7 I sustain the objection.

8 MR. WORK: Very well, Your Honor. Now, sir.
9 Let's just talk. We've been talking about impacts in terms
10 of duration, and you've testified about that. Is there any
11 means available to you, that you have used, to quantify the
12 amount of additional software that evolved in the course of
13 the requirements definition and design phase?

14 THE WITNESS: Yes, there is.

15 BY MR. WORK:

16 Q How do you quantify that? Is there some means you
17 can use?

18 A There are several means, and in fact, this is an
19 area called software matrix. And it is a subject of a lot
20 of learned academic articles. How do you quantify software?
21 And how do you use these to predict performance or to
22 predict costs and things?

23 The most common method for quantifying software is
24 to look at the lines of code. How much material is written,
25 how much software is there?

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1 MR. RIDDLES: I object to his testifying to this.
2 He has not been proffered as an expert in software
3 development. And essentially, what he is trying to do is
4 have a software expert without having him proffer him as
5 such.

6 MR. WORK: I would like to address that. Because
7 if Mr. Riddles would allow me to lay the foundation, Mr.
8 Riddles will discover that this man is not offered to give
9 an opinion, he has done something to measure, to quantify
10 the amount of additional software.

11 JUDGE BROWN: Now, I've lost the question. What
12 was the question again?

13 MR. WORK: The question is, is there a way that
14 you, Mr. McCune, you, and indeed, let me modify that
15 question, have you endeavored to quantify the amount of
16 additional software that emerged from the requirements
17 definition and design phase on the PDFA software?

18 THE WITNESS: Yes.

19 MR. WORK: What method did you use to quantify the
20 amount of additional software?

21 THE WITNESS: I, and the people that support me in
22 our engineering department, wrote programs that would read
23 the source files of the software at the onset of the
24 program, at the time of the contract award, the software
25 that the Air Force provided, and the software that we have

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1 delivered here at the end of the program, counted the lines
2 of code, and print that out and say here is the totals. And
3 that line of code count is a direct measurement of how much
4 work went into preparing or producing, or modifying, that
5 software.

6 BY MR. WORK:

7 Q Now, is there a chart that you prepared, and you
8 may turn to Tab 19, that reflects the results of measurement
9 that you have accomplished?

10 A Yes, chart 19 is the results.

11 Q Now, sir, just so I understand your position, may
12 I publish this to the jury as being reflective of work he
13 has done before he testifies about it so he doesn't get it
14 on -- JUDGE BROWN: Any objection?

15 MR. RIDDLES: Can I see it?

16 MR. WORK: Yes, it is tab 19.

17 JUDGE BROWN: He is offering you one here, too,
18 Mr. Riddles, if you can't find your tab 19.

19 (Pause.)

20 MR. RIDDLES: Your Honor, I object to it again.

21 It has entries in here for what purports to be lines of code
22 in the original software, original Whittaker estimate
23 proposed software. And then some other additional
24 information. And again, it's, what he is essentially trying
25 to do is put in expert testimony and say how many lines of

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1 code were in the original software. There has been no
2 testimony that he was qualified to do that.

3 JUDGE BROWN: I overrule the objection. I find
4 that he is qualified to do it and has said that he did it.
5 And I believe it will assist the jury and I overrule the
6 objection.

7 MR. WORK: May I publish it now?

8 JUDGE BROWN: Yes.

9 MR. WORK: Thank you.

10 (Pause.)

11 JUDGE BROWN: And where should they put this?

12 MR. WORK: This should be at Tab 19.

13 JUDGE BROWN: Nineteen.

14 BY MR. WORK:

15 Q Mr. McCune, this is a chart entitled software
16 expansion. Will you tell the jury what is depicted on that
17 chart, please?

18 A Yes. Using a computer program, we analyzed the
19 code, the software that was provided by the Air Force at the
20 start of the ICCE program --

21 Q That was back in August of 1985?

22 A It was provided back then. WE analyzed it several
23 times, not only in this particular run, but during the
24 conduct of the proposal, we were required to provide timing,
25 I mean the conduct of the contract, we were required to

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1 provide timing and sizing estimates. And this was part of
2 our approach towards sizing software.

3 MR. RIDDLES: Your Honor, let me just object
4 again. He is saying we did that. What I'd like to know is
5 what this witness did.

6 JUDGE BROWN: I will overrule the objection. He
7 explains in his qualification who the we is, him and the
8 engineers who supported him, he said. I overrule your
9 objection.

10 MR. WORK: Just so the jury will understand, you
11 are using the term line of code. Will you define that,
12 please?

13 THE WITNESS: Yes. A line of code is a one unit
14 of information that goes into the original form of software,
15 called the source code. There can be several different
16 definitions applied to what a line of code is. One of the
17 simplest one is to say how many lines ar there? If you were
18 to look at them in a pre-listing, you would just count how
19 many lines.

20 But, in a software sense, it is a little more
21 meaningful to look at what is called statements. Because
22 several lines of code could be combined into one single
23 software statement. So, the way we are looking at here is
24 how many statements were there?

25 And that, the reason this is significant is, when

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1 you are programming, you are actually writing these lines of
2 code. The more code there is, the more statements there
3 are, the more work you have expended to put these into the
4 source code, the more work you have to do to test what you
5 have put in there, and the more work you have to do to
6 document it.

7 Q Is it, in your work at Whittaker, can you
8 translate a line of code in terms of the amount of effort
9 that is required to create that line of code?

10 A Yes. There is actually, not just at Whittaker,
11 there is industry standards. One published after an
12 exhaustive study by the Navy. But we use a general rule of
13 thumb, when trying to make a quick estimate, and that is
14 that it could cost on average about \$100 to produce one line
15 of code. And that's from start of the program to the end of
16 the program.

17 Q I see. The number you have for the first column
18 is a 132,862 lines of code in original software. What do
19 you mean by that?

20 A That means that in that line of code, there is
21 executable code instructions to the computer, if you will,
22 and there are comments describing the code, or describing
23 the environment in which a set of code will operate.

24 And so we call that source statements and comment
25 statements. And within this 132,000 there are about 90,000

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1 source statements that are directions to the computer, and
2 the remaining 42,000 is comment.

3 Q What's the second vertical column you have there,
4 sir?

5 A This column is based on the line of code estimates
6 that went into our proposal that said how much work we
7 though we were going to do above and beyond this initial
8 software. And we estimate jobs, we try to determine how
9 many lines of code we are going to implement, because the
10 number of lines of code directly leads to the cost and the
11 schedule that it is going to take to make that
12 implementation.

13 And so, our proposal to TechDyn was based on a
14 software size compared to this one, that was about 139,500.
15 Therefore, there was a growth of just under 7,000 total
16 lines of code.

17 Q What's the third column you have on that chart,
18 sir?

19 A This is the delivered software, version 90.054,
20 which was the last delivered set of software, run through
21 the same analysis program, and this is the total lines of
22 code that existed in that software. And this has about
23 120,000, 119,000 lines of executable software and the
24 remainder is all comments.

25 Q And the 412,000 statements is actually a counted

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1 figure, is that correct?

2 A That's correct.

3 Q Okay, just one work of explanation. The jury has
4 heard a lot of comments about what these various
5 characterizations of software versions are. What are those
6 characterizations, or applications?

7 A Each version is assigned a version number. Which
8 is nothing more than a shorthand for the date on which that
9 version was defined, or delivered. Version 90.054, would be
10 1990, and the julienne date meaning 54, meaning the 54th dat
11 of the year 1990. So this would be approximately two months
12 into 1990.

13 Q Thank you very much. Now sir, I would like to
14 come back to our elements chart and move to the next phase,
15 which you have called design implementation and in-plant
16 testing. What I'd like you to say, address first, is what
17 happened to the timing of that phase, as a result of what
18 you have already been discussing in the requirements
19 definition and design phase.

20 A The timing was delayed. The start of the
21 implementation phase normally occurs after the completion of
22 a CDR. And as the CDR occurred, was finally approved in May
23 1988, and the requirements, I mean the design implementation
24 phase could then be deemed to have started at that time,
25 May, sorry, May of 87.

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1 Q May of 87. All right. In terms of, again,
2 speaking in general, what happened to the scope and duration
3 of the design implementation and in-plant testing solely as
4 a result of what the events that you have talked about in
5 the requirements definition and design phase?

6 A The amount of work that had to be expended in
7 writing test procedures, and conducting the testing, grew
8 directly as a result of the added requirements that were put
9 into the B spec.

10 Q Okay. Now, sir, did you have personal involvement
11 in this program during the design implementation and in-
12 plant testing phase?

13 A Yes, I did.

14 Q And what was that?

15 A I was called a number of times to look at problems
16 that occurred in the implementation and I was called upon to
17 -- I was the author of the operating system that was used in
18 a portion of the system, and is still used today. And so, I
19 was called in as the expert on the operation system when
20 they were trying to determine where some problems existed.

21 Q Based on your reading of the technical document
22 section of this program, ICCE prime contract, ICCE
23 subcontract, what was, or what did you understand to be, the
24 test for software qualification in this program?

25 A There was a test, it was called a software

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1 qualification test. And that test is a contractor test. In
2 fact, that is when we write these test procedures, we are
3 writing the procedure for the contract of the SQT, the
4 software qualification test. And when the software passes
5 that qualification test, it has met its requirements. These
6 test procedures that are written, their job is to test all
7 of the design requirements in the B specs.

8 And so here we have the requirements that the
9 software is to meet. We write procedures about how we are
10 going to prove that it meets that. Then we run the test to
11 show that the software meets the requirements. And at
12 completion of the test, of the conduct of the SQT, the
13 software is complete and accepted.

14 MR. WORK: Now, Your Honor, I would like to make
15 reference to a chart 20 as a visual aid for the jury and
16 before he describes it in such detail that any further
17 testimony would be repetitious, I would ask your permission
18 to publish that to the jury, as a means of facilitating its
19 understanding --

20 JUDGE BROWN: Is there an objection to 20?

21 MR. RIDDLES: Yes, sir. Same objection.

22 JUDGE BROWN: Twenty is simply testimony, and I do
23 not find that it would lead the jury in understanding the
24 testimony, but simply be a repetition of it. I sustain the
25 objection.

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1 MR. WORK: All right sir. In terms of your
2 expectation of what would have to be accomplished in the
3 design implementation and in-plant testing phase of this
4 program, what did you expect, based on your reading of the
5 technical contract documents?

6 THE WITNESS: There was to be a single test,
7 duration of approximately two months. And that test was to
8 meet three different test goals. It was to be a software
9 qualification test, TAC certification test and a detail
10 certification test.

11 BY MR. WORK:

12 Q Now, let's take each one of those. You described
13 the software qualification test as a contractor test.

14 A Correct.

15 Q And what does that mean?

16 A That means that the contractor writes the test
17 procedures. The contractor conducts the test. The test is
18 observed by the customer, and verified by the quality
19 assurance personnel of the customer and the contractor and
20 at the completion of that test, the contractor has proven
21 that the product that he created, the software that he
22 created had met its requirements.

23 That means the software development is complete.

24 Q Now, sir, you referred to TAF testing as user
25 testing. What do you mean by that?

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1 A The TAF certification test, stands for tactical
2 Air Force certification. Its purpose is, even though the
3 contractor has built a system according to its requirements,
4 the user --

5 Q Contractual requirements?

6 A Contractual requirements. The user, the Air Force
7 user in the field wants to be assured that if he uses this
8 system, that it will not cause problems and it will not be
9 mistakes of the nature that could be dangerous or deadly.
10 For example, the user wants to be assured that if he sees on
11 the screen a symbol for a hostile aircraft, that truly is a
12 hostile aircraft and not a friend. Because he may shoot
13 that aircraft down. And he doesn't want to shoot down a
14 friend. He wants to be sure that it's a hostile.

15 So the purpose of TAF certification is to provide
16 aid to the user community in the Air Force, a certification
17 that the system is safe and proper for their use in the
18 field.

19 (Continued on next page.)

20

21

22

23

1 BY MR. WORK:

2 Q The jury has heard a couple of terms, one term
3 being TAF certifiable and the other term being TAF
4 certification. In this program, based on your reading of
5 the technical documents, was there a difference between
6 those two concepts?

7 A Yes.

8 Q What was the difference?

9 A The software that we produced was to be TAF
10 certifiable. And at the Air Force's option, they were to
11 perform TAF certification on their schedule and whenever
12 they chose to do it.

13 Q In this program, based on your understanding of
14 the technical documents, what was the measure for
15 determining TAF certifiability?

16 A Completion of the software qualification test.

17 Q That being the contractor test.

18 A That's correct.

19 Q Or, in this case, the subcontractor test.

20 A That's correct. When the software was tested and
21 complete, it was certifiable.

22 Q And you also mentioned, I believe, a third term,
23 which I think you referred to as JTAO testing. What's that
24 in the context of this program?

25 A Another long series of acronyms. It stands for

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1 Joint Tactical Air Operations. And it refers to -- it's a
2 test very similar to the Tactical Air Force Test except it
3 is applied at the Joint Service level, meaning Army, Air
4 Force, Marine Corps and Navy. They want to know the same
5 kinds of -- they have the same concerns that the Tactical
6 Air Force has.

7 In addition, the Joint Chiefs of Staff has
8 directed in a program called JNTACS that the -- I'm sorry --
9 I can't remember that acronym -- but the JNTACS program was
10 a joint directive that the command and control systems of
11 all of the services will be interoperable, meaning that they
12 can operate with one another and the proof of that
13 interoperability is the JTAO test.

14 So it's like the top level of the TAF. The TAF is
15 the Air Force trying to satisfy that it's safe for Air Force
16 use and it's appropriate for Air Force use. The JTAO test
17 says let's do a similar kind of test at the Joint Service
18 level.

19 Q And was that to be a contractor test or a user
20 test, as you understood it, in the ICCE program?

21 A It is a user test.

22 Q All right. Now, sir, now that we've broken down
23 the terms software qualification and TAF certification and
24 JTAO certification, you mentioned some concepts going into
25 the program of concurrent testing in these three areas.

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1 What did you understand by that?

2 A The contract called for one test to be run over
3 two months and that test would be SQT, TAF CERT and JTAO
4 test all in one. It could be all one test or it could be
5 separate tests but it would all be run in the same two-month
6 period. And at the end of that period, software testing
7 would be over. There would be no more software testing.

8 Q So your contemplation going into the design
9 implementation and in-plant testing phase was that there
10 would be a two-month period of testing.

11 A That's correct.

12 Q What happened in that phase of the ICCE program?

13 A The first thing that happened is that the
14 concurrent test concept was broken and we were left with
15 just a software qualification test, with the TAF testing and
16 the JTAO testing to occur at some point in the future.

17 Q When did the software qualification test occur?

18 A It was actually held in November and December of
19 1987.

20 Q And you talked about the achievement of that
21 milestone. When was software qualification testing
22 completed and TAF certifiability established?

23 A I would say that that occurred in May of 1988 when
24 the test report on the software qualification test was
25 accepted by the Air Force.

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1 Q I see. Now, sir, did testing continue beyond the
2 acceptance of the SQT test report?

3 A Yes, it did.

4 Q Would you describe what happened in that regard?

5 A There was a conduct of a TAF certification test on
6 the software that was produced, the final version of
7 software that came out after the SQT.

8 Q And that version -- just so we can follow -- was
9 what? What was that version designated?

10 A It was called 87-350.

11 Q And what happened to that particular version of
12 the software?

13 A Two things happened. That version of software was
14 tested in a TAF certification. It as also issued to the
15 operating RADILs that were then in operation in the
16 continental United States, Iceland, Saudi Arabia, and I
17 believe Alaska and Hawaii.

18 Q And do you have personal knowledge of how that
19 particular software has operated and for what period of time
20 it has operated?

21 MR. RIDDLES: Objection.

22 MR. WORK: I'm just laying a foundation.

23 JUDGE BROWN: Well, I don't know what the
24 objection is yet.

25 MR. RIDDLES: Your Honor, may I approach?

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1 Q And what was done with respect to those STRs after
2 SQT?

3 A They were fixed.

4 Q Okay. And during what period of time were they
5 fixed, sir?

6 A Between the completion of the SQT in December of
7 1987 until the acceptance of the SQT test report in May of
8 1988.

9 Q All right. Now, you spoke of the user test, the
10 TAF test. Were there STRs that came out of that test?

11 A Yes, there were.

12 Q Was that an unusual event or a usual event?

13 A That was a very normal event.

14 Q And what was your understanding of your obligation
15 with respect to those STRs?

16 A At what point in the program?

17 Q Well, at that point in the program.

18 A At that point in the program, we were going to fix
19 the STRs.

20 Q And when was that?

21 A That was after the conduct of the TAF, so that
22 would be late '89, early 1990, I believe.

23 Q Now, going into the program, going into the FOC,
24 was it your expectation that the ensuing elements of the
25 program would be a function of when you fixed those TAF STRs

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1 or did you have some other understanding and, if so, what
2 was it?

3 A My understanding was there was going to be one
4 test, which would be a combined TAF CERT, JTAO and SQT. And
5 at the end of that test, I would anticipate there would be
6 STRs and those STRs would be fixed and that would be the end
7 of it and then there would be a software baseline that could
8 be used as the basis for preparation or finalization of all
9 the manuals that depended upon the software capabilities.

10 Q And I believe you testified that your expectation
11 based on the factual, technical documents that that testing
12 period would take place over two months.

13 A That's correct.

14 Q Now, what happened actually in the program in the
15 period 1988 and beyond with respect to TAF STRs?

16 A There was a TAF test that was run by the Air
17 Force. STRs from that test were presented to Whittaker and
18 we fixed those STRs. And that resulted in a new version of
19 software being issued, version 90-054.

20 Q Did the fixing of TAF STRs -- well, let me put it
21 this way. In your contemplation going into the program, was
22 the fixing of STRs arising from TAF to have any impact on
23 the subsequent elements of the program?

24 A Well, since there was just one test and TAF was
25 part of that test, the answer would be yes. That if we

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1 fixed problems from that one test, then the problems would
2 be fixed and we'd be able to press forward with these
3 documents, with the remaining phases of the program. When
4 the tests were split apart, TAF -- we did not consider TAF
5 to be part of our responsibilities and that our
6 responsibilities ended at the SQT. And so once the SQT,
7 software qualification test, trouble reports were fixed our
8 responsibilities were ended. That software was complete.

9 Q And did that mean that you could then proceed to
10 the ensuing steps in the program?

11 A That's correct.

12 Q Do I understand your testimony that that didn't
13 happen?

14 A That did not happen.

15 Q What did happen?

16 A We were told that TAF was going to become part of
17 the effort, that we were to perform that effort of
18 supporting TAF and, more particularly, fixing STRs that came
19 out of the TAF certification test. We as a contractor did
20 not participate directly in the TAF testing because that was
21 an Air Force test run by Air Force people so we did not have
22 the opportunity to see what they were doing but only after
23 they had tested it they gave us the STRs and said here were
24 the problems. At that point, we were able to interact with
25 the results of the TAF testing.

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1 Q All right. There's been some testimony in this
2 case, sir, concerning the availability of the test bed to
3 complete this process that you were told to do. What was
4 the significance to you of the availability of a test bed to
5 finish the process that you were asked to do of fixing and
6 verifying the STRs?

7 A You must have a test bed to complete the final
8 verification of the STRs.

9 Q Can't you simulate a test bed?

10 A You can but only to a certain point of confidence.
11 I could not ever recommend to our management that we would
12 deliver something based on unrealistic test beds or
13 unrealistic simulations. Simulation will get you so far.
14 Ultimately, the only way you can prove that something works
15 is to run it on the real hardware and the reason for this is
16 that this is a complicated software and hardware system. It
17 had multiple computers. There would be interaction
18 constantly between the computers and from each computer to
19 the peripheral devices that it controlled. The timing of
20 this interaction was crucial to the proper operation of the
21 software. So if you used different hardware, if you used a
22 different test bed, if you will, you could get different
23 results depending upon this crucial timing. Therefore, we
24 could get very far in testing by using simulation or using
25 substitutes for the test bed but you could not sign it off

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1 and say that's going to work when it goes to the field, I
2 fully expect that it's been repaired, until you had a real
3 test bed.

4 Q All right. Now, let's talk about another element
5 of the system you haven't mentioned so far and that is
6 something called the DTS. What does DTS mean?

7 A It stands for data terminal set.

8 Q And in which functional area did the DTS belong in
9 this program?

10 A It was in the communications functional area here
11 in the data and voice terminals on this drawing of the PDFA
12 and CFA complements.

13 Q Now, did the DTS at any time come into the testing
14 picture on this program?

15 A Yes, it did.

16 Q And will you explain how, sir?

17 A Yes. Because the DTS is the device that controls
18 the operation of the TADIL-A data link, in order to do
19 TADIL-A testing, you must have a data terminal set. At the
20 start of the program --

21 Q May I ask you why?

22 A Yes, because it has some unique operating
23 characteristics. The interface from the PDFA to the CFA for
24 the data terminal set is a unique interface. It's a MIL
25 standard 1397 type A interface. And the data terminal set

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1 is connected -- the actual operating string is PDFFA connects
2 to a crypto device which connects to a data terminal set but
3 the crypto device is basically transparent. Whatever it
4 gets, it puts out although it performs its function on the
5 data. Whenever there's an input, there's an output. The
6 data terminal set is the dominant player in this
7 relationship. It will initiate a signal to the computer
8 telling the computer what's about to happen and then it will
9 either send data to the computer or the computer will give
10 data to it. So the data terminal set controls the operation
11 and the software inside the computer just sits there waiting
12 until the data terminal set says please do this or prepare
13 to do this -- now do this -- and then the transaction will
14 occur. Without a data terminal set, there would never be
15 this stimulus. So in order to test the PDFFA in the real
16 world, you must have a data terminal set.

17 Q Now, what happened with regard to the data
18 terminal set in this ICCE program, sir?

19 A At the onset of the program, the data terminal set
20 was -- the standard data terminal set was to be modified in
21 order to support the split site operation or the remote
22 radio capability.

23 Q Was it to be modified within the ICCE program or
24 within some other program?

25 A It was not part of the PDFFA but my understanding

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1 is that it was to be modified outside. The ultimate
2 decision was it was to be modified outside of the ICCE
3 contract.

4 Q Okay. And was there any delay in the availability
5 of the DTS to conduct testing on the PDFA software?

6 A Yes, I believe it was delayed approximately a
7 year.

8 Q All right. Now, sir, I wonder if you would turn,
9 please, to tab 21 in your book. The jury does not have this
10 yet. This is a chart entitled "Effects of Testing Changes
11 September 1985 to April 1988". Are you familiar with this
12 chart, sir?

13 A Yes.

14 Q Did you participate in the preparation of this
15 chart?

16 A Yes, I did.

17 Q What is depicted here?

18 MR. RIDDLES: I object to this chart, again, Your
19 Honor. It's got more of this argument from Mr. Work on it.

20 JUDGE BROWN: I'll overrule the objection at this
21 point. I'll hear a foundation.

22 MR. WORK: All right. Let's lay a foundation.

23 BY MR. WORK:

24 Q What is depicted on this chart, sir?

25 A It shows the original contract test schedule and

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1 the effect on the testing schedule from the two different
2 sources. One is from the late delivery and the ultimate
3 performance modifications on the data terminal set and
4 another change resulting from the changes in software.

5 Q Okay. Is this chart true and accurate to the best
6 of your knowledge and belief based on your personal
7 involvement in the ICCE program?

8 A Yes, it is.

9 MR. WORK: May I publish this to the jury, Your
10 Honor?

11 MR. RIDDLES: I renew my objection. It has
12 argument on it. It's not an aid to the jury. It's an
13 argument. Look, for example, Your Honor, if you have a copy
14 of it, at argument number 3.

15 (Pause.)

16 MR. RIDDLES: And look at number 2. These are
17 arguments to be made, not facts in evidence that a witness
18 can testify to that actually aids the jury's understanding.

19 MR. WORK: Under Mr. Riddle's definition --

20 JUDGE BROWN: I don't find that this is argument.
21 I find that it is fact and it would aid the jury in
22 understanding his testimony and therefore he may publish it
23 to the jury.

24 MR. WORK: Thank you very much.

25 (Pause.)

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1 MR. WORK: This would go, ladies and gentlemen, at
2 tab 21.

3 (Pause.)

4 BY MR. WORK:

5 Q Mr. McCune, will you describe to the jury what you
6 have depicted on this chart, please, starting with number 1?

7 A Yes. Number 1 depicts the original contract
8 schedule and it shows that there would be a test period
9 during which the SQT, TAF and JTAO testing would all occur
10 simultaneously or concurrently in a two-month period.

11 There was a planned hardware/software integration
12 in there. It notes that this testing was done in-plant and
13 that there was subsequent testing of some hardware elements.
14 The ICCE hardware, the CENTAF 1 and CENTAF II hardware.

15 Q As this program evolved, was that what happened?

16 A No, that is not what happened at all.

17 Q Let's go down to number 2, which I gather relates
18 to the DTS. What does that show, sir?

19 A The data terminal set, which was to be provided
20 with a split site capability, was to be delivered here in
21 June of 1986. In fact, such a data terminal set was not
22 available until June of 1987. This means that -- and when
23 it was delivered, this data terminal set had different
24 performance characteristics than that which had been
25 promised here earlier in the program.

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1 Q What was the effect of that?

2 A Well, two things. First, the late delivery meant
3 we could not test with the device but more importantly,
4 because the performance characteristics had changed, we had
5 to make additional software changes to accommodate those
6 performance characteristics. That meant that until this
7 data terminal set was delivered, it was not possible to
8 finalize the software nor to begin a software qualification
9 test. This data terminal set, as it was ultimately
10 delivered, was a pacing item in the ability to complete the
11 software qualification test.

12 Q Now, in that same horizontal box there you have
13 SQT. Is that placed temporarily as it occurred or is that
14 some other depiction?

15 A No, that is where it actually occurred. This chart
16 shows where SQT actually occurred but what it depicts is
17 that with the delivery of the data terminal set here, there
18 was a time period required in which we would integrate with
19 that data terminal set and then after that delay in response
20 to the delivery of this equipment, then we could begin an
21 SQT. In fact, this box is shown at the place where the SQT
22 actually did occur.

23 Q All right. Now, in line 3, what do you depict
24 there, sir?

25 A Here we depict that there was a long period, on

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1 the order of a year, during which the Air Force was further
2 refining its requirements as put into the B-specifications.

3 Q The software requirements?

4 A The software requirements. Once this was
5 finalized, there was a period of three or four months when
6 the first CDR was held, which was rejected for Air Force --
7 primarily for Air Force internal reasons.

8 Q That's January of 1987?

9 A That's correct. And, in May of 1987, the CDR was
10 actually finally approved. That meant that the software
11 design was approved. So there is a slip of this CDR from
12 six months in the original program out to this point.

13 Q Back in when -- March of '86?

14 A That's approximately correct. After this CDR was
15 held, the modified data terminal set was delivered. And
16 then we had to make some software changes because of the
17 difference in that data terminal set. But up until this
18 point, even if the data terminal set had been delivered on
19 time, it was not possible to proceed with the implementation
20 until this CDR was approved and it was not possible to have
21 the CDR approval until the requirements had been finalized.

22 Once the requirements had been finalized, it then
23 took a period of time to complete the CDR and that period of
24 time was expanded because the software requirements had
25 grown. There was more material to be put into the system,

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1 more new design and, in addition, the Air Force was
2 insisting on levels of design material that were
3 inappropriate in a modification program. They were asking
4 that all of the material be documented as if this was a
5 complete development program.

6 Q Now, what do you have out here in the last box?

7 A Okay. After we conducted the SQT dry run starting
8 in September and the formal SQT starting in November and
9 completing in December of 1987, there were a number of
10 trouble reports that came out of the SQT. These were
11 corrected. An SQT report was written and submitted to
12 TechDyn and that report was not approved until all of
13 these -- the disposition of these STRs was finalized and
14 these STRs were -- I believe all of them -- I believe all of
15 them were fixed in here and when this SQT report was
16 finalized or it was approved, that amount to us of
17 acceptance of the software that had been produced in the
18 program.

19 Q And that version of the software was the 87-350
20 version that you've mentioned went out to the RADIL sites.

21 A That's correct.

22 (Continued on next page.)

23

24

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1 Q All right, let's now move to the next area on your
2 chart. Logistic documentation and training. What impact on
3 that area did the expansion of the two prior areas have?

4 A There were two impacts. First, because it took
5 longer to complete the requirements definition and the
6 implementation, the onset of this space was delayed. So
7 there was a straight linear delay due to the fact that of
8 the expanded time spent on the requirements definition and
9 in the implementation.

10 However, once this was begun, there was also an
11 expansion of the work performed in several of these areas,
12 in manual preparation, in training conduct and in training
13 plans.

14 All of these areas were impacted by the expanded
15 software requirements.

16 Q How did that occur?

17 A Well, for example, if you add a software
18 requirement that says we have to do say correlation, there
19 has to be a new switch action, a new set of buttons that the
20 operator can push, a new set of data that the operator can
21 observe, in performing this correlation function.

22 When you have a new set of buttons, the operator's
23 manual has to change to show what those changes are. And
24 the training course has to change to show the operator how
25 to use that button and what actions to observe when it goes

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1 correctly and what actions to observe if there is a problem
2 in the correlation that they are going to set up.

3 So, basically, any change up at the beginning,
4 even if it is a small change in requirements, in terms of
5 the amount of words you put into a B5 specification,
6 potentially can result in very large changes down stream.
7 It all depends on the individual change in requirements.

8 Q Let's finally move to the last area. Ship and
9 installation and on-site testing. What impact would the
10 expansion and extension of the prior areas have on this
11 final area?

12 A Well, the main impact is here on the product
13 specs. Because the C specs, or the product specs, cannot be
14 completed until after the software is completed and
15 accepted.

16 Q Why is that?

17 A Well, one of the elements that is in a C spec is
18 the final software listings. In other words, when you are
19 all done with the software you run off a computer listing
20 and say, here is the programs, and you insert those listings
21 into the C specs.

22 Therefore, until you have completed the software,
23 you cannot run the final listings, put them in the C specs
24 until you have delivered the final C specs.

25 Q Can you give us just some sense of the volume of C

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 specs that emerge from this extended program?

2 A Yes. If you recall the chart that showed that
3 there were about 412,000 total lines of code, if you were to
4 print such a listing with 50 lines per page, you might get
5 some 8,000 pages. One box of computer paper, which is
6 about, well, 14 inches high, contains 3,000 sheets of paper.
7 So, we would be looking at roughly three boxes, or a stack
8 several feet high, just of computer listing.

9 In addition, since the C specifications contain
10 information on every single module that is in the system,
11 the computer would be literally hundreds of individual
12 documents saying module x contains this information, does
13 this, and there's the listing for module x. There would be
14 an additional stack, probably a foot high.

15 Q One thing that I don't think we've explained, what
16 is the function of the product specification, in the ICCE
17 program?

18 A The product spec is the as bid document. The
19 purpose, one of the purposes of the ICCE contract was to
20 enable the Air Force to report the RADIL system, both
21 hardware and software.

22 In order to do that software support, they wanted
23 documents in the format and the style and the hierarchy that
24 they were familiar with. And that is the A spec, B spec, C
25 spec.

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 arise?

2 A After the RCE software was developed, and it, we
3 were approaching a point where there was going to be an
4 integration between the RCE software, the computer that it
5 ran on and representative equipments from the rest of the
6 CFA, such as switching elements and terminals, and radio.
7 Basically, create, we were at a point where we had to create
8 a test bed containing a full up, or a representative subset
9 of the CFA so that we could test the full operation of the
10 RCE software.

11 Q Why did you need all of that CFA equipment to
12 test?

13 A Well, you don't need it all, but you need enough
14 of it there so that you can exercise every one of the
15 control functions and observe that the function works
16 correctly. And you have to do both positive and negative
17 testing. Meaning, show that I can do the control, and then
18 if a failure is induced, show them that you can recognize
19 the failure and react quickly to the presence of this
20 potential equipment failure.

21 Q Based on your personal knowledge, at any time
22 during this process, did Whittaker write any specifications
23 with regard to the RCE?

24 A Yes, we did.

25 Q What were the nature of those specifications?

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 A I believe there were two specifications written.
2 And that would have been back here during the requirements
3 definition and design stage. I believe there was a B1
4 specification and a B5. The B1 specification was basically
5 a defensive move, because it was, in order to describe how
6 hardware, or how software is going to run in a B5, you need
7 an adequate description of what the hardware environment is.

8 There was no such document provided by TechDyn
9 with the hardware that they had. I mean, there were manuals
10 that described the commercial equipment, but nothing that
11 defined within the rigorous hierarchy of specifications that
12 said here is what the hardware environment is in which you
13 are going to run the software.

14 So, we wrote such a document so that we could
15 refer to that document. In other words, we basically were
16 laying a foundation, a hardware foundation, for what our
17 software was going to do.

18 Q As we progress into the 1987-88 period, were there
19 other issues regarding the RCE that you personally got
20 involved with?

21 A Yes.

22 Q What were they and when did they occur?

23 A When we were integrating the CFA and RCE control
24 software, in order to test the RCE, one of the features, we
25 had a great deal of trouble making the feature work to our

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 question is is it hardware, is it software?

2 Q Well, let me ask you this: why did you have a
3 suspicion that it was a hardware problem?

4 A Because I could find no errors in the software and
5 he could find no errors in the software. I could find no
6 errors in his approach to identifying these and I could find
7 persuasive evidence in the test cases that he ran that the
8 hardware was the problem.

9 Q And what particular facet of the hardware was the
10 problem?

11 A It was a modem, which is a device for doing
12 computer communications from one computer to another over a
13 telephone line.

14 Q Now, as the spec was written, was that modem
15 actually part of the RCE or was it just part of the general
16 CFA?

17 A It part of the CFA.

18 Q Okay. And just tell us more about this modem and
19 what you believe based on the work you personally did to be
20 the problem.

21 A What we determined was that when the modem
22 performed a function called retraining which is the process
23 of a modem at each end of the phone line recognizing -- each
24 one has to recognize that the other modem exists and the two
25 of them go through a handshaking process to establish how

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 they're going to communicate and then both decide that yes,
2 we're communicating properly and now the computer can
3 actually go ahead and send some data. This retraining
4 process was taking either a very long time or did not happen
5 properly.

6 Q And what did you conclude from that, sir?

7 A We concluded that the modem was not of proper
8 design to support the way it was being used. In other
9 words, the modem could not retrain quickly enough so that we
10 could meet the timing requirement that we were trying to
11 meet.

12 Q And what did you do at that point of time?

13 A We recommended that the modem be changed.

14 Q All right. And was it changed?

15 A Yes.

16 Q And what happened then?

17 A The new modem had a problem also.

18 Q And was there further investigation at that point?

19 A Yes.

20 Q And what conclusion did you draw based on that
21 further investigation?

22 A We finally concluded that unless an appropriate
23 modem was put in place, we could go no further in modifying
24 the software. In other words, the software could not
25 overcome the deficiencies in the modem hardware.

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 Q To your personal knowledge, were these conclusions
2 of this period of effort that you engaged in with Mr.
3 Campbell communicated to TechDyn?

4 A Yes.

5 Q All right. And now, sir, what happened at that
6 point?

7 A At this point, because I was in the technical
8 side, my involvement started to wind down.

9 Q If you don't have personal knowledge beyond that,
10 that's fine.

11 A Okay.

12 Q If you do have personal knowledge, please relate
13 it to the --

14 A Well, there was a period of time during which I
15 did not participate in the RCE any further, which would be
16 about the next eight months, from spring of 1988 until
17 January of 1989.

18 Q All right. Now, sir, did there come a time when
19 you became aware that TechDyn had gone to a new type of
20 control system?

21 A Yes.

22 Q And when did you become aware of that?

23 A It was after January of 1989 when TechDyn gave us
24 first a cure notice and then a default notice, saying that
25 your effort on the RCE is to be stopped.

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

1672

1 Q Now, sir, let me go back for a moment to the
2 period of time in the spring and early summer of 1988 when
3 you were trying to troubleshoot the RCE to determine the
4 nature of the problem. Was TechDyn doing anything to solve
5 the problem, to your personal knowledge?

6 A From the people that were on-site, I don't believe
7 those people had the capability to solve the problem. I'm
8 not sure they understood the problem.

9 Q Did you ever observe anybody from TechDyn doing
10 anything to solve the problem, other than the replacement of
11 the modem?

12 A No.

13 Q All right. Now we're into 1989 and beyond. Have
14 you ever had occasion to review a document that I believe is
15 in evidence produced by TechDyn called ECP, engineering
16 change proposal, 32?

17 A Yes.

18 Q What is ECP 32?

19 A It --

20 MR. RIDDLES: Your Honor, I renew my objection.
21 This witness is not an expert and to the extent that he's
22 going to attempt to provide expert testimony, I object to
23 it.

24 JUDGE BROWN: When he gets to an expert question,
25 I suggest you renew your objection. I can tell what he's

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

1673

1 going to do at this point.

2 BY MR. WORK:

3 Q What was ECP 32, sir?

4 A It was a change to the ICCE system, to its
5 technical requirements, that represented an alternate design
6 for an RCE.

7 Q All right. And were you familiar with the prior
8 design for the RCE, the old RCE?

9 A Yes.

10 Q And I gather that you became acquainted with the
11 design for the new RCE by looking at ECP 32. Is that
12 correct?

13 A That's correct.

14 Q Did you ever have occasion to compare the two to
15 examine their physical and functional similarities and
16 dissimilarities as well as their mechanical similarities and
17 dissimilarities?

18 A Yes, I did.

19 Q I don't want you to offer an opinion if you can't
20 answer this question without offering an opinion, I just
21 want you to state fact as to what the differences were as
22 they were reflected in the two documents.

23 A The major difference that I understood from the
24 document was that some of the implementation that was in the
25 Whittaker RCE had been deleted in the replacement RCE.

MICHAEL PERRY McCUNE - DIRECT EXAMINATION

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1 Q The old RCE?

2 A The old RCE had more features and more capability
3 than the new RCE.

4 Q And what were the features that had been deleted
5 in the new RCE as reflected in ECP 32?

6 A The automatic line testing and automatic line
7 switching or graceful degradation features.

8 Q And what had those features -- what, if anything,
9 had those features been replaced by?

10 A There was a manual line switching capability.

11 Q What does that mean?

12 A That means that they were going to do some
13 patching. A man would have to walk up to a panel and pull
14 some plugs and shove in some other plugs in order to do the
15 switching.

16 Q And are those switches actually part of the RCE or
17 are they just part of the general CFA?

18 A In terms of the B-1 spec for the Whittaker RCE
19 development, that equipment was part of the CFA. It was
20 external to the RCE equipment as we saw it.

21 Q So in the new RCE as opposed to the old, some of
22 the peripheral external equipment in the CFA was changed.
23 Is that correct?

24 A That's correct.

25 Q What other differences were there, sir?

MICHAEL PERRY McCUNE - CROSS EXAMINATION

1705

1 report supplement contains a partial listing of the status
2 of a number of system trouble reports (STRs) but provides no
3 evidence of closure, descriptions or analysis of STRs
4 generated since the end of formal SQT, 17 December '87. The
5 supplement also provides no analysis of data recording and
6 reduction from the SQT. The attachment provides details of
7 the review with specific problems noted."

8 Q Now, look, sir, please -- is 1073 in that exhibit?

9 A Yes.

10 Q Would you look at that, please?

11 (Pause.)

12 Q Do you recognize that document, sir? Well, I see
13 there's a letter -- let me help you out here. It's a letter
14 to Ms. Raymond from the TechDyn Corporation, isn't it?

15 A Yes.

16 Q And this one is also forwarding information to the
17 Whittaker Corporation, am I correct, sir?

18 A That's what it says.

19 Q And it's forwarding for correction system trouble
20 reports. Do you see that reference?

21 A That's what it says.

22 Q And again for action in accordance with the Air
23 Force letter. Do you see that reference as well, sir?

24 A Yes.

25 Q Look over at the Air Force letter, please.

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MICHAEL PERRY McCUNE - CROSS EXAMINATION

1725

1 Q Do you still have Plaintiff's Exhibit 1073 in
2 front of you?

3 A No, I do not.

4 (Pause.)

5 Q This was the Air Force letter to Mr. Hise of
6 TechDyn dated 6 September 1989 making reference, for
7 example, to FVT. I'd like you to turn to the list of STRs
8 that Mr. Riddles referred to that was attached to that
9 letter. How many of those STRs relate to the 87-350 version
10 or prior versions of the -- well, let's break that down.
11 How many of those STRs relate to the 87-350 version of the
12 software?

13 A Well, it's not clear by looking at this directly
14 because all we have is a -- on the STR number, there is a
15 year and then a sequence number that was created. So
16 without examining the details of the STR, I couldn't
17 comment. But since there's numbers that range from 069
18 through 87994, I would anticipate that the higher numbers
19 came near the end of the year and that the smaller numbers
20 occurred earlier.

21 MR. RIDDLES: I object to the lack of foundation
22 of that. He says that he would anticipate that and there's
23 no testimony that he understood that.

24 JUDGE BROWN: Lay a foundation for his knowledge.

25 MR. WORK: Yes.

MICHAEL PERRY McCUNE - CROSS EXAMINATION

1726

1 BY MR. WORK:

2 Q Again, what do these numerical designators mean,
3 sir?

4 A They are date followed by the occurrence number of
5 the STR. A year followed by the occurrence number. So you
6 could have 87128 created in January of '87 and 87141 created
7 in December. It's not probable that that happened but it's
8 possible. There's nothing else that could be inferred from
9 the sequence of numbers other than it was created in 1987.

10 Q Okay. And I see -- I guess I counted 12 of these
11 with designators prior to 87-350. Am I correct?

12 A Yes but there's no significance to that.

13 Q With the exception of -- well, I see a D beside
14 most of these 87 numbers. What does a D mean?

15 A It means it was a documentation change that was
16 required. That's the lowest priority of STR.

17 Q What is a documentation change?

18 A It means in working with the system and reviewing
19 the documents that existed they found a technical error in
20 the document, something was described incorrectly. It could
21 have been a test procedure, it could have been a software
22 document, it could have been a manual. It's not clear just
23 from the number what it was.

24 Q Does the documentation type of STR have any
25 relationship to the actual software tape that was in use

MICHAEL PERRY McCUNE - CROSS EXAMINATION

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1 when this document was prepared?

2 A None. In fact, MIL standard 1679 specifically
3 requires that -- which is the basis of the priority system
4 that we use -- specifically says that documentation errors
5 will be allocated the lowest priority. It's an extremely
6 low priority, it can be fixed when you get around to it
7 because any documentation error can be corrected on an
8 interim basis by simply noting in the document what the
9 correct statement should be. And then you have plenty of
10 time to issue a formal correction to the documentation.

11 Q And I see that most of the rest on this list of 87
12 items have a plus sign before it. What does that mean?

13 A That means that the Air Force expects that there
14 would be verification of that software correction by running
15 a formal verification test or FVT.

16 Q And I gather that, as you understood the document,
17 a formal verification test was not required?

18 MR. RIDDLES: Objection, Your Honor. What he
19 gathers -- and he's leading the witness --

20 JUDGE BROWN: I sustain the objection to that.
21 Ask a different question.

22 BY MR. WORK:

23 Q As of 1989, did you have any understanding, sir,
24 as to whether formal verification test was required by the
25 original ICCE MOD 3 contract, the prime contract between

**TRIAL TESTIMONY OF
MARIE RAYMOND**

MARIE RAYMOND - DIRECT EXAMINATION

1728

1 TechDyn and the Air Force?

2 A I understand there was no mention of FVT in the
3 original contract.

4 MR. WORK: I have no further questions, Your
5 Honor.

6 JUDGE BROWN: Anything further, Mr. Riddles?

7 MR. RIDDLES: No, sir.

8 JUDGE BROWN: May this witness be excused? Mr.
9 Work?

10 MR. WORK: Yes. Yes, he may be excused.

11 JUDGE BROWN: You are excused and free to go or
12 stay as you wish. Thank you.

13 (Witness excused.)

14 JUDGE BROWN: Next?

15 MR. WORK: We call Ms. Raymond.

16 JUDGE BROWN: Come forward and be sworn.

17 Whereupon,

18 MARIE RAYMOND

19 having been duly sworn, was called as a witness herein and
20 was examined and testified as follows:

21 MR. WORK: Your Honor, as you will recall, there
22 is a understanding among the Court and the parties that Ms.
23 Raymond's testimony will be bifurcated and that this
24 testimony will pertain only to the formation of the
25 contract, the pre-contract period and the formation of the

MARIE RAYMOND - DIRECT EXAMINATION

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1 subcontract and then she will appear later in our case.

2 DIRECT EXAMINATION

3 BY MR. WORK:

4 Q State your full name, please.

5 A Marie Raymond.

6 Q What's your position?

7 A I'm Director of Contracts for Whittaker
8 Electronics Systems.

9 Q Will you describe very briefly your education,
10 please?

11 A I graduated from college in 1966. Thereafter, I
12 did extensive post-graduate work.

13 Q And did you have any employment immediately after
14 your education?

15 A No, I didn't. I was married and had some
16 children.

17 Q How many children do you have?

18 A Three.

19 Q When did you go back to work?

20 A In 1975, full-time.

21 Q With whom did you find your employment?

22 A 4C Corporation.

23 Q Have you been with 4C and its successor,
24 Whittaker, ever since?

25 A Yes.

MARIE RAYMOND - DIRECT EXAMINATION

1730

1 Q What positions have you held at Whittaker?

2 A Contract administrator, senior contract
3 administrator, contract manager, manager of contracts and
4 director of contracts.

5 Q And will you give us a very brief one-sentence
6 overview -- what has been your involvement in the ICCE
7 program?

8 A It has been my life.

9 Q Ms. Raymond, let's focus first on the pre-contract
10 period and I'll define pre-contract to mean the period
11 before TechDyn received its prime contract for the FOC work
12 in August of 1985.

13 A Okay.

14 Q What, if any, role did you personally have in the
15 ICCE program prior to August 30, 1985?

16 A Prior to that time, we had an effort called a
17 front end effort and that had a modification to it which was
18 for the RADIL system that went up to Iceland. In that
19 particular effort, I worked on the proposal. I negotiated,
20 I reviewed the subcontract and then I managed that
21 particular effort and I also worked on the proposal for the
22 upcoming FOC.

23 Q When did those front end activities take place?

24 A From March -- late March of 1985 to August.

25 Q And whom did you interact with during that period?

MARIE RAYMOND - DIRECT EXAMINATION

1731

1 A Could you clarify your question, please?

2 Q Certainly. With whom did you have contact during
3 that period?

4 A With TechDyn Systems, you mean?

5 Q Right.

6 A With Mr. Hise and Mr. Johnson.

7 Q Was Mr. Morrison involved in any work that you had
8 involvement with with regard to the front end effort?

9 A No.

10 Q Did you have contact in the front end work you did
11 with anyone other than Mr. Johnson or Mr. Hise, be it at
12 TechDyn or be it at the ultimate customer, TechDyn's
13 customer, the Air Force?

14 A I spoke at some point with Mr. Yennowine, but that
15 was closer toward the proposal effort.

16 Q Toward the proposal effort for what?

17 A For the FOC.

18 Q Okay. Now, you mentioned the name Mr. Yennowine.
19 Who was Mr. Yennowine?

20 A Mr. Yennowine became the contract administrator,
21 the subcontract administrator, at the time of the FOC
22 modification.

23 Q How much contact did you have with Mr. Yennowine
24 over the years?

25 A Thereafter daily contact.

MARIE RAYMOND - DIRECT EXAMINATION

1732

1 Q Will you describe Mr. Yennowine to the jury,
2 please?

3 A He was a very nice young man who had just
4 graduated from college and was a rugby player.

5 Q A what?

6 A A rugby player.

7 Q Did Mr. Yennowine ever describe to you his
8 experience in the contract administration area?

9 A Yes, he did.

10 Q What did he tell you?

11 A He said he didn't know how to do it because he
12 hadn't done it before.

13 Q Okay. Did Mr. Yennowine tell you who appointed h
14 im to the position of contract administrator for TechDyn on
15 this ICCE program?

16 A No, he didn't.

17 Q All right. Now, you've mentioned the proposal and
18 negotiations for the MOD 3 FOC work.

19 A Yes.

20 Q Did you have any personal involvement in those
21 activities?

22 A Yes. I actually went to TechDyn Systems at the
23 time of the cost proposal and brought a pricer with me and
24 did work on the 4C portion or the Whittaker portion of the
25 cost proposal. I went through factfinding and changes to

7.

MARIE RAYMOND - DIRECT EXAMINATION

1753

1 JUDGE BROWN: This is a little different, so I
2 think you'll have to approach it that way.

3 (Pause.)

4 BY MR. WORK:

5 Q Ms. Raymond, I'll give you two books, they're both
6 Plaintiff's exhibits, one is Plaintiff's Exhibit 4. This
7 volume of Exhibit 4 will contain P0003 which I understand is
8 the modification that created the FOC work. Is that right?

9 A Yes. That is right.

10 Q And I also hand you what has been marked as
11 Plaintiff's Exhibit 22A -- and I've again got the wrong
12 volume of that -- 22A3. And I would ask you to find the
13 statement of work in both of those and tell me whether it is
14 the same statement of work or a different statement of work.
15 And, if it is the same, what is it?

16 (Pause.)

17 A I have them.

18 Q All right. Let's first -- with regard to
19 Plaintiff's Exhibit 4, the TechDyn prime contract with the
20 Air Force -- you found the statement of work?

21 A Yes, I did.

22 Q And is there some kind of designator on that that
23 would enable you to identify it?

24 A Yes, there are two.

25 Q And what are they?

MARIE RAYMOND - DIRECT EXAMINATION

1754

1 A There's an identifier at the top that says SOW ECI
2 1229 20 August 1985.

3 Q And what's the title of the document?

4 A Statement of work for the Iceland Command and
5 Control Enhancement System.

6 Q All right. And --

7 A Wait -- there's more. There's a legend at the
8 bottom that says F19628-85-C0079 P0003, Attachment 20.

9 Q And what does that P0003 indicate to you, if it
10 has any meaning at all?

11 A That's modification 3 to the contract number I
12 just read.

13 Q Between whom was that contract?

14 A It is between ESD and TechDyn Systems Corporation.

15 Q Now, let's go to the book that has been described
16 to the jury as containing the subcontract and will you find
17 the statement of work in there, please?

18 A I've found it.

19 Q And what is the designator on that?

20 A It's exactly the same.

21 Q The same one.

22 A Yes.

23 Q Have you had an opportunity to examine these two
24 documents?

25 A Yes, I have.

7-1
MARIE RAYMOND - DIRECT EXAMINATION

1755

1 Q Is there any difference at all between these two
2 documents?

3 A No, there's not.

4 Q Can you state categorically that they are the same
5 documents based on your inspection of them?

6 A Based on previous inspection -- do you want me to
7 go page by page?

8 Q I don't think it's necessary. Let's turn beyond
9 the lists and so forth at the beginning to the first page
10 with substantive comments on it. It's under the title
11 "Section 3, Requirements".

12 A Of which document?

13 Q Both.

14 A Okay.

15 Q Let's take the prime contract first and then we'll
16 talk about the subcontract.

17 A Okay.

18 Q The language of section 3 states "The contractor
19 shall deliver a system which meets the requirements
20 specified in ESD SSECI 120 and shall comply with the
21 following" and then it goes on to state "The contractor
22 shall provide, design, develop, modify, procure,
23 manufacture, integrate, test and install a certifiable a
24 Tactical Air Forces (TAF) Joint Tactical Operations (JTAO)
25 system which will be interoperable on a tactical digital

MARIE RAYMOND - DIRECT EXAMINATION

1756

1 information link A (TADIL-A) with U.S. forces." And do you
2 see the word "contractor" there?

3 A Yes, I do.

4 Q And, based on your experience with these
5 documents, who was the prime contractor in the prime
6 contract statement of work?

7 A The prime contractor.

8 Q And who was the contractor in the subcontract
9 statement of work?

10 A The prime contractor.

11 Q All right. Now, ma'am, is there any reference in
12 this document which you have identified as being the same in
13 both versions, to Whittaker or to the subcontractor, either
14 of those terms?

15 A I don't believe so.

16 Q Is there any breakdown in the statement of work
17 which appears in both the prime contract and the subcontract
18 book as we have it today, a breakdown of the statement of
19 work designating what work TechDyn is to perform and what
20 work Whittaker is to perform?

21 A No.

22 Q Is there any other contractual document between
23 these parties relative to the ICCE program which breaks down
24 the work as between Whittaker and TechDyn?

25 A I would think that the only thing would be line

MARIE RAYMOND - DIRECT EXAMINATION

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1 P R O C E E D I N G S

2 BAILIFF: Everyone please rise. The Circuit Court
3 of Fairfax County is now in session, the Honorable J. Howe
4 Brown presiding. Please be seated and come to order.

5 JUDGE BROWN: Are we ready for the jury?

6 MR. WORK: One preliminary matter, Your Honor, if
7 I may.

8 We are filing today a motion for reconsideration
9 with regard to the interpretation of the default termination
10 clause and, at your convenience, I would like an opportunity
11 to address that.

12 JUDGE BROWN: Well, my convenience would be some
13 time when the jury isn't here.

14 Okay. Bring them in.

15 (Pause while jury is seated.)

16 Whereupon,

17 MARIE RAYMOND

18 having been previously duly sworn, was recalled as a witness
19 herein and was examined and testified further as follows:

20 DIRECT EXAMINATION

21 BY MR. WORK:

22 Q Ms. Raymond, we had skipped around a bit on
23 Thursday when we left off with your testimony and, as you
24 will recall, we had been talking about the pre-contract
25 period and a meeting in late August before the finalization

MARIE RAYMOND - DIRECT EXAMINATION

1793

1 of the ICCE prime contract. And I'd like to come back to
2 that.

3 A Okay. Can you hear me?

4 MR. WORK: Yes. Can everybody hear Ms. Raymond
5 today?

6 (Pause.)

7 BY MR. WORK:

8 Q First of all, just to recall what that meeting
9 was, will you relate to us in very brief form what the
10 purpose of the evening meeting in late August of 1985 was?

11 A The purpose of that was to bring down the proposed
12 price on both Whittaker's and TechDyn's part based on a
13 conversation that Mr. Hise and I had with the Air Force
14 contracting officer.

15 Q Who was that?

16 A That was Mr. John McDonald. Who advised us that
17 they only had \$10 million.

18 Q And what transpired at that meeting, that evening
19 meeting, in late August? Incidentally, where was the
20 meeting?

21 A The meeting was held in a hotel room in
22 Burlington, Massachusetts.

23 Q And who participated in the meeting?

24 A It was both negotiating teams and our team had Mr.
25 Tobiason, Mr. Sutherland, Mr. Sills and myself. The TechDyn

MARIE RAYMOND - DIRECT EXAMINATION

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1 team had Mr. Hise, Mr. Johnson, Mr. Shepard. I believe Mr.
2 Chisholm was there.

3 Q All right. What transpired at that meeting?

4 A We made a number --

5 MR. BOEHLERT: I renew my objection, Your Honor,
6 on parol evidence.

7 JUDGE BROWN: Overruled.

8 You can go ahead.

9 THE WITNESS: We made a number of agreements on
10 how to bring our price down. Ours was 6.2 and we came down
11 to 5.2.

12 BY MR. WORK:

13 Q 6.2 million?

14 A 6.2 million.

15 Q That was on the subcontract portion?

16 A That was on the subcontract portion. That's
17 correct. And what we did was the Air Force had already
18 agreed that there were certain spares and certain software
19 that we could take out. What we further did then was we
20 agreed to work together as a team --

21 Q You and TechDyn?

22 A TechDyn and Whittaker. So far as testing was
23 concerned, where we'd be a single test team rather than
24 having two separate test teams where TechDyn would be the
25 test leader, so to speak, and we would support as required.

MARIE RAYMOND - DIRECT EXAMINATION

1807

1 Q They never passed that down?

2 A No, they did not.

3 Q Once that MOD 36 schedule came into existence, did
4 you have a schedule on this program?

5 A No, it was too late.

6 Q Now, let's look further on Mr. Yennowine's
7 November 27, 1985 letter. In the fourth paragraph, Mr.
8 Yennowine states, "Attached please find the statement of
9 work, the specifications and the corresponding exhibits and
10 attachments for the work covered by these CLINs." Was there
11 anything attached, actually attached, to this letter?

12 A No.

13 Q What was there in the Federal Express envelope?

14 A A number of attachments to the prime contract and
15 they were so marked and I had some contract data
16 requirements lists. I had a specification. I didn't at
17 that time have a statement of work but I asked for that and
18 got it later.

19 Q Well, let's just stop on the statement of work.
20 This says, "Attached please find the statement of work."

21 A That refers to the prime contract statement of
22 work.

23 Q How do you know that?

24 A Because I read it.

25 Q Read what?

MARIE RAYMOND - DIRECT EXAMINATION

1808

1 A I read the prime contract statement of work, the
2 front cover page says -- it has the prime contract number,
3 P0003 and attachment something or other.

4 Q I think you've take a step beyond us. I gather
5 from your testimony, Ms. Raymond, that in this particular
6 envelope, there was no statement of work of any kind.

7 A No, there wasn't.

8 Q All right. Was there a specification, the
9 specification?

10 A Yes, there was a specification.

11 Q Was it a complete specification?

12 A No, it was a two-sided document and I only had one
13 side. But I called Mr. Yennowine and he fixed that quickly.

14 Q All right. Now, was this specification a special
15 specification for Whittaker's work or was it something else?
16 And, if so, what was it?

17 A It was the overall project specification. It was
18 the prime contract specification.

19 Q The specification the United States Government had
20 issued to TechDyn.

21 A That's correct.

22 Q All right. Was there ever a separate
23 specification for the subcontract?

24 A No, there was not.

25 Q What else was in the envelope that you found?

MARIE RAYMOND - DIRECT EXAMINATION

1809

1 A Various other attachments to the prime contract
2 regarding data deliverables.

3 Q Were there any documents other than this two-page
4 letter specifically related to the subcontract or what
5 Whittaker was to do under the subcontract?

6 A No, there were not.

7 (Continued on next page.)

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MARIE RAYMOND - DIRECT EXAMINATION

1810

1 Q What did you understand Mr. Yennowine by the term
2 "attached please find"?

3 A I thought that he meant it to be an informational
4 document. I didn't think he meant it to be part of the
5 subcontract. Because I had that covered in an all work to
6 be covered in an all work to be done under the subcontract,
7 to deliver complete systems.

8 Q And then it says in the next paragraph, if the
9 above terms are satisfactory, please sign and return two
10 copies of this modification. And then it says further, if
11 you have any questions concerning this modification, please
12 contact the undersigned.

13 Was this two paged letter and the loose
14 attachments contained in the federal express package what
15 you had asked Mr. Yennowine to provide at the November PMR
16 which proceeded this letter?

17 A It obviously wasn't what I was expecting. I
18 expected a regular subcontract.

19 Q What would a regular subcontract consist of? What
20 did you have in mind when you made the request to Mr.
21 Yennowine?

22 A That only the data that was pertinent, or at least
23 something that gave me a guideline for the pertinent work
24 under the subcontract.

25 Q What do you mean by that?

MARIE RAYMOND - DIRECT EXAMINATION

1811

1 A I wanted my own statement of work that said, you
2 know, you provide this system and that system --

3 Q Whittaker will provide?

4 A Right, Whittaker will provide. I wanted our own
5 specification, although that's not quite as important. And
6 our own contract data requirements lists.

7 Q All right. And did in fact you take Mr. Yennowine
8 up on his invitation to contact him if you had any
9 questions?

10 A Yes. I did.

11 Q When did you do that?

12 A Upon receipt of this package.

13 Q How did you communicate with Mr. Yennowine?

14 A I said David, is this all?

15 Q What did he say?

16 A Yes, what do you mean?

17 Q Just relate the conversation to the jury, please.

18 A I then explained to him, you know, that I wanted,
19 I needed something that was really pertinent to us. And he
20 said he would work on it.

21 Q Now, when was that conversation?

22 A In late November or early December.

23 Q What happened then?

24 A Nothing.

25 Q Did you make any further efforts to contact Mr.

MARIE RAYMOND - DIRECT EXAMINATION

1812

1 Yennowine?

2 A Yes. I talked to him several times about his. At
3 one point, he said that he had, he was working with Mr. Hise
4 on it.

5 Q Did anything come of those conversations?

6 A No. I didn't receive any more documentation.

7 Q What happened then?

8 A TechDyn didn't pay us, because we hadn't signed
9 the subcontract.

10 Q When had you started work on the FOC work?

11 A On the first of September, or so, in 1985.

12 Q Had, by the time of this November letter, had you
13 received any payment from TechDyn for that work?

14 A No.

15 Q Did you thereafter receive any payment for that
16 work until you signed this document?

17 A No, I didn't.

18 Q Did you ever receive any formal communications
19 from TechDyn stating that they wouldn't pay you until you
20 received, until you signed this document?

21 A Yes. I received a telex in January of 1986, that
22 so advised.

23 Q So advised what?

24 A That no payment would be made to Whittaker until
25 the subcontract was signed.

MARIE RAYMOND - DIRECT EXAMINATION

1813

1 Q What happened then?

2 A I became very concerned and talked to various
3 people at Whittaker. And worried about signing the
4 contract. Eventually, management felt that this was an
5 urgent need for the Air Force, etc. And that I shouldn't be
6 concerned as I was, and to go ahead and sign it.

7 Q Did you do that?

8 A Yes, I did.

9 Q And when did you sign this document?

10 A On or about the 14 of January, I think that my
11 gnashing of the teeth lasted a few days beyond.

12 Q What do you mean by that?

13 A I had my secretary prepare it for signature. But
14 then I went around and I talked to the people. And finally
15 did sign it.

16 Q Now, by the time that you signed this, Ms.
17 Raymond, had you received the documents that you had
18 requested from Mr. Yennowine, namely a subcontract statement
19 of work defining what Whittaker was to do on this program?

20 A No.

21 Q Did you ever receive such a document?

22 A No.

23 Q At any time during the program did you request
24 such a document?

25 A Yes.

MARIE RAYMOND - DIRECT EXAMINATION

1814

1 Q What did you receive that you didn't receive a
2 subcontract statement of work? Did you ever receive the
3 prime contract statement of work?

4 A Yes, I did. I got the prime contract statement of
5 work at the PDR, the preliminary design review in early
6 January of 1986.

7 Q From whom did you receive that prime contract
8 statement of work?

9 A From Mr. Johnson.

10 Q And Mr. Johnson, at that time, was serving in what
11 role?

12 A I believe he had just taken over the project as
13 the program manager.

14 Q For?

15 A TechDyn Systems.

16 Q And will you tell the jury about the circumstances
17 under which you received that prime contract statement of
18 work?

19 A There were some questions during the PDR and our
20 program manager, Mr. Tobiason, had some argument about that.
21 Mr. Johnson came to see me and he said, you know, what do
22 you think, what's going on here? So, I showed him what I
23 had. And what I had put into my file was the February
24 statement of work.

25 Q February when?

MARIE RAYMOND - DIRECT EXAMINATION

1815

1 A 1985, that had come with the RFP. So, he said --

2 Q And that preceded the discussions we've been
3 having this morning?

4 A Right.

5 Q That was simply a document you had retained in
6 your file from earlier times.

7 A Right.

8 Q And that was a prime contract statement of work or
9 a subcontract statement of work?

10 A Prime.

11 Q Okay.

12 A And so, he said, you don't have the right
13 statement of work. And so he allowed me to make a copy of
14 his statement of work.

15 Q And what was that?

16 A That was a prime contract statement of work dated
17 20 August 1985.

18 Q All right.

19 (Pause.)

20 BY MR. WORK:

21 Q I am going to hand you, Ms. Raymond, what has been
22 marked as TechDyn Exhibit 22-A-3, and I turn to tab 3 where
23 you see the November 27 letter which we have, 1985 letter,
24 which we've been discussing. Is there in that file the
25 statement of work, the August 20 statement of work for the

MARIE RAYMOND - DIRECT EXAMINATION

1816

1 prime contract, which you have just been referring to?

2 A Yes. Yes.

3 Q And how was that statement of work identified?

4 A It's called statement of work for the Iceland
5 Command and Control Enhancement system, SOWECI 1229, dated
6 20 August, 1985. And it has handwritten on it F19628-85-C-
7 0079, P0003, attachment 20 or 26.

8 MR. WORK: Your Honor, I have some excerpts from
9 that document, the 20 August 1985 prime contract statement
10 of work. May I publish that to the jury?

11 JUDGE BROWN: Show it to Mr. Boehlert.

12 MR. WORK: I have.

13 MR. BOEHLERT: I assume they are from that
14 document. I don't have any problem.

15 (Pause.)

16 MR. BOEHLERT: I would like the record to reflect
17 that on page 9, there is certain writing. And I don't know
18 if this is a true and accurate copy of what is in evidence
19 as the subcontract.

20 JUDGE BROWN: That is to be established before the
21 jury --

22 THE WITNESS: There is some writing here, too.
23 May I take a look at it? Because --

24 MR. WORK: Ms. Raymond, have you compared the
25 excerpt I have given you with the original?

MARIE RAYMOND - DIRECT EXAMINATION

1817

1 THE WITNESS: Yes.

2 MR. WORK: And is it the same?

3 THE WITNESS: Yes, it is.

4 JUDGE BROWN: You may look at it, Mr. Boehlert, if
5 you want.

6 MR. BOEHLERT: If it becomes an issue, Your Honor,
7 may I do it at that time?

8 JUDGE BROWN: Yes.

9 MR. WORK: Ms. Raymond, the first page of this
10 excerpt, what is that?

11 THE WITNESS: I don't have the excerpt.

12 BY MR. WORK:

13 Q Well, you ought to have the excerpt.

14 A That's the title page to the statement of work,
15 for the Iceland Command and Control Enhancement system.

16 Q And is this the document that is found in that
17 Plaintiff's Exhibit which is purportedly the subcontract?

18 A Yes.

19 Q Now, let's turn over to the page, the second page
20 in this excerpt, which is page one.

21 A Right.

22 Q Entitle spoke. And section 1.1 reads, this
23 statement of work describes the required tasks to be
24 performed by the contractor, and the management programs and
25 controls that the Government requires during the contract.

MARIE RAYMOND - DIRECT EXAMINATION

1818

1 Who is the contractor in that sentence?

2 A TechDyn Systems.

3 Q And what is the contract?

4 A The Iceland Command and Control System.

5 Q Is that the prime contract or the subcontract?

6 A That is the prime contract.

7 Q TechDyn's prime contract with the Air Force?

8 A Yes.

9 Q Now, will you turn over to the third page in this
10 excerpt, which is page nine. And this starts with a section
11 entitled 3.0 requirements. And in 3.1.1 it reads, the
12 contractor shall provide, paren (design, development,
13 modify, procure, manufacture, integrate, test and install),
14 end paren, a certifiable tactical Air Force's (TAF), joint
15 tactical air operations (JTAO) system, which will be
16 interoperable on a tactical digital information link A,
17 (TADIL-A), with U.S. Air Forces.

18 Who is the contractor in that sentence?

19 A TechDyn.

20 Q Does the term contractor vary at all in this
21 statement of work?

22 A No, it does not.

23 Q Now what did you understand the term a certifiable
24 TAF JTAO system to mean?

25 A A system that is ready for Government

MARIE RAYMOND - DIRECT EXAMINATION

1819

1 certification testing.

2 Q Now, can you turn over to -- no, we can stay on
3 this page. In 3.1.2, the statement is made, the ICCE system
4 will be composed of the following functional areas. And
5 then there is a description in subparagraph A of the
6 processing and display functional area. And in B, the
7 communications functional area.

8 Was there any description of these, of what we
9 have been referring to as the PDFA and the CFA, other than
10 in these two paragraphs, in this prime contract statement of
11 work?

12 A No.

13 Q Was there any break down of any kind of the work,
14 in minor detail than in these two paragraphs?

15 A There, the entire statement of work continues to
16 clarify and describe the work.

17 Q All right. Does the statement of work ever break
18 down who was to do what, other than simply saying the
19 contractor shall provide this system?

20 A No. It only says the contractor.

21 Q Now, will you turn over to page 10? In the middle
22 of the incomplete paragraph at the top of the page, it says,
23 in the sentence starting with the radio equipment, will you
24 read that sentence, please?

25 A The radio equipment shall also consist of remote

MARIE RAYMOND - DIRECT EXAMINATION

1820

1 control equipment for remotely controlled radio operation,
2 including tuning through Iceland posts and
3 telecommunications (IPT), North Atlantic relay station
4 (NARS) and Kathlowic Naval Communication Services (KNCS)
5 facilities.

6 Q What is being referred to there as you understood
7 this document?

8 A The remote control element of the system.

9 Q Was there any further explanation of the remote
10 control element, or who was to do what on the remote control
11 element in this statement of work?

12 A No, there was not.

13 MR. WORK: I have one additional excerpt from the
14 August 20, 1985, statement of work. And one excerpt from a
15 modification to that statement of work relating to testing.
16 I have given copies to Mr. Boehlert and I request permission
17 to publish these to the jury.

18 MR. BOEHLERT: I don't have a problem with the
19 first page, provided it comes from what is in evidence. The
20 second page, I don't know where it comes from and I do
21 object to it.

22 MR. WORK: I represent, well can you tell us what
23 the second -- you can't because you don't have it. I'll
24 hand you two pages, one is can you identify the first of
25 those two pages, which is document dated 20 August 1985?

MARIE RAYMOND - DIRECT EXAMINATION

1821

1 THE WITNESS: Yes, it's a page from the statement
2 of work for the prime contract.

3 BY MR. WORK:

4 Q Now, I will hand you a page which is dated in
5 1987, and can you tell us what that is, please?

6 A This is a page from a modification to the
7 contract, which modified the prime statement of work.

8 Q And that is, out of what modification to the prime
9 contract?

10 A Modification 12.

11 Q Otherwise known as P00012?

12 A That's correct.

13 Q And can you verify that these are what they appear
14 to be?

15 A Yes.

16 MR. WORK: Any objections?

17 MR. BOEHLERT: I don't know what you intend to do
18 with it. I do object if you intend to use it further. It's
19 a fragment of a document not in evidence.

20 MR. WORK: It is in evidence, Your Honor. It's in
21 --

22 JUDGE BROWN: Well, let's find it and show it, and
23 let her --

24 MR. WORK: All right.

25 (Pause.)

MARIE RAYMOND - DIRECT EXAMINATION

1822

1 MR. WORK: Ms. Raymond, i am going to hand you
2 what has been marked as Plaintiff's Exhibit 4, the prime
3 contract. And ask you, please, to turn to P00012, page 22,
4 and tell us if your excerpt is in fact a page from P00012.

5 THE WITNESS: Yes it is.

6 JUDGE BROWN: Any further objections to it?

7 MR. BOEHLERT: Well, he's referring to one
8 document, out of the subcontract, and one document out of
9 the prime contract. It may be authentic. I don't know that
10 he is talking about the same contract, Your Honor. I
11 continue to object on that base.

12 MR. WORK: What is the first document, the first
13 document that is marked 20 August 1985?

14 THE WITNESS: The prime contract statement of
15 work.

16 MR. WORK: Thank you.

17 JUDGE BROWN: I overrule the objection. I don't
18 think it's any different from showing a piece on the
19 overhead. You may show it to the jury.

20 MR. BOEHLERT: Your Honor, I have to object and
21 move to strike, because I think --

22 MR. RIDDLES: Well, I think he is reading from the
23 subcontract, and --

24 JUDGE BROWN: I think it is clear to the jury that
25 the statement of work and the subcontract is the same as the

MARIE RAYMOND - DIRECT EXAMINATION

1823

1 statement of work and the prime contract. And that is the
2 point they are making. And you have your point, which you
3 can make in argument and evidence late. But you can show it
4 to the jury.

5 MR. WORK: Just so there can be no further
6 question, Ms. Raymond, is there any difference between the
7 document that is entitled the statement of work in the prime
8 contract, and the document that is entitled statement of
9 work in the subcontract?

10 THE WITNESS: None that I know of.

11 MR. WORK: Now, may I publish these two excerpts?

12 JUDGE BROWN: Show them to the jury.

13 MR. WORK: Let's start with the document from the
14 August 20, 1985, statement of work. And my question is what
15 standard for acceptability of the PDFA software if called
16 out in the prime contract statement of work?

17 THE WITNESS: A software qualification test.

18 BY MR. WORK:

19 Q And was that provision relating to a software
20 qualification test ever modified?

21 A Yes, in P00012 it was.

22 Q In what particular paragraph of P00012?

23 A It further clarified --

24 Q Just what section, first, so the jury can find it
25 first.

MARIE RAYMOND - DIRECT EXAMINATION

1824

1 A Two point three point one eight, point one point
2 two.

3 Q And would you read the portion of that which you
4 believe clarifies the standard for software PDFA software
5 acceptability?

6 A The test of the PDFA software will be referred to
7 as software qualification test (SQT). SQT shall verify that
8 the PDFA software will meet all requirements as system
9 specification in the SOW.

10 Q Okay. Now, ma'am, I would like you to put those
11 documents aside for a moment, please. And I hand you volume
12 one of Plaintiff's Exhibit 22. What do you find there?

13 A I find a subcontract document between TechDyn and
14 Command Control Communications Corporation.

15 Q And what is it?

16 A It's a, the subcontract for the front end effort.

17 Q AND just so the jury recalls what the front end
18 effort was, when did that start, and what was the front end
19 effort?

20 A It began April or March of 1985, and it was an
21 attempt by the Government to get started on this contract
22 so, we had some tests to do and one of them was to work on
23 the proposal.

24 Q The proposal for what?

25 A For the FOC system, that we are talking about.

MARIE RAYMOND - DIRECT EXAMINATION

1827

1 MR. WORK: I'm going to give Mr. Boehlert excerpts
2 from that clause or those terms and conditions in the front
3 end contract. And I've given Ms. Raymond the same excerpts.

4 BY MR. WORK:

5 Q What do you have there, ma'am?

6 A I have pages from the subcontract.

7 Q And we see a page 16 and then the next page jumps
8 to page 50 and goes to page 55. First of all, what is the
9 page 16?

10 A It's part of the subcontract and it has various
11 articles in it.

12 Q All right. And then what is the portion that is
13 marked page 50 through 55?

14 A It is an attachment which is said here to contain
15 FAR clauses that are set forth in the prime contract.

16 Q And by FAR clauses, we mean what again?

17 A Federal Acquisition Regulation.

18 MR. WORK: May I publish these excerpts to the
19 jury, Your Honor?

20 JUDGE BROWN: Any objection?

21 MR. BOEHLERT: No, sir.

22 JUDGE BROWN: You may.

23 (Pause.)

24 BY MR. WORK:

25 Q Would you focus, Ms. Raymond, on page 16 and the

MARIE RAYMOND - DIRECT EXAMINATION

1828

1 article in the front end subcontract, article 2.33, FAR
2 clauses, and follow along with me as I read it?

3 "Attachment 1 contains FAR clauses that are set
4 forth in the prime contract and are applicable to this
5 subcontract as appropriate. These clauses have the same
6 force and effect as those set forth in full text."

7 Now, what did you understand that provision of the
8 front end subcontract to mean?

9 A That these FAR clauses were to flow down into the
10 subcontract and that in those places where it says the
11 Government, it is to be TechDyn Systems and in those places
12 where it says the contracting officer, it is to be a member
13 of TechDyn Systems.

14 Q Is this an unusual situation based on your
15 experience in contract administration?

16 A No, this is very normal.

17 Q Now, let's look at the list of flow down FAR
18 clauses. For example, reference number 60, 52.243-1,
19 changes, fixed price. What does that have reference to
20 ma'am?

21 A That's a regulation in the Federal Acquisition
22 Regulations that deals with fixed price contracts.

23 Q And did you have any understanding as to whether
24 or not that changes clause applied to Whittaker's work in
25 the ICCE program?

MARIE RAYMOND - DIRECT EXAMINATION

1829

1 A Of course it did.

2 Q And then will you look at reference number 52,
3 progress payments, 52.232-16. What did that have reference
4 to?

5 A That referred to the authority to collect progress
6 payments.

7 Q All right. Now, let's look over on page 53,
8 reference 72, termination for convenience of the Government,
9 52.249-2. What did that have reference to?

10 A That refers to the possibility of being able to
11 terminate that particular contract if, for instance, the
12 requirement goes away so that the Government or their prime
13 contractor can just say well, we don't need this any more so
14 we'll stop work on this.

15 Q And then look at, please, reference 74, 52.249-8,
16 default (fixed price supply and service). What is that
17 reference to?

18 A It applies to a termination clause that is used in
19 cases where default in delivering the equipment or work
20 happens.

21 Q Now, did you have any understanding as to whether
22 or not all of these clauses that I've just referred to
23 applied to Whittaker's work on the ICCE program?

24 A Yes, they did.

25 Q And at the time that you entered into these

MARIE RAYMOND - DIRECT EXAMINATION

1830

1 contractual arrangements with TechDyn, what was your
2 expectation as to how these what you called flow down
3 clauses were to be interpreted?

4 A In accordance with the common interpretation of
5 the Federal Acquisition Regulation.

6 Q Are you familiar with that common interpretation
7 based on your work in the contract administration area?

8 A Yes.

9 Q Okay. You can put that aside now, Ms. Raymond.
10 Let me ask you about one other document as relates to the
11 MOD 3 FOC effort, that is the proposal which the jury has
12 head was submitted to the Government by TechDyn in May of
13 1985 and a prior proposal of Whittaker to TechDyn for
14 subcontract portions. Did you have any understanding at the
15 time you entered into the MOD 3 subcontract as to whether
16 either of those proposals had any bearing on the ultimate
17 contractual relationship between the parties with respect to
18 MOD 3 FOC?

19 A Are you talking about the prime proposal and the
20 subcontractor proposal when you say either?

21 Q That's correct.

22 A They were -- the contract was based on that.
23 However, the proposals themselves weren't incorporated into
24 the contract.

25 Q To your knowledge, did TechDyn ever take any

MARIE RAYMOND - DIRECT EXAMINATION

1831

1 position on whether or not those proposals were part of the
2 contractual relationship between TechDyn and Whittaker?

3 A Yes. When I attempted to rely on the proposals as
4 having -- when they wanted us to do some extra work, I got
5 at least one if not more letters saying that the proposal
6 was not incorporated into the contract and therefore it did
7 not apply.

8 Q Now, ma'am, we've been talking about the absence
9 of any statement of work defining what Whittaker was to do
10 in this program. And I'd like to come to the question of
11 whether there is any contractual document or documents which
12 any way shed light on the question of what portion of the
13 work the two parties were to do.

14 MR. BOEHLERT: Object, Your Honor. That's asking
15 for a legal conclusion.

16 MR. WORK: I'm just asking for a --

17 JUDGE BROWN: I hope not because that's part of
18 what the jury's going to have to decide so I overrule the
19 objection.

20 THE WITNESS: The closest thing is the document
21 that shows the line items. It shows that in a certain line
22 item we were supposed to do a certain amount of work.

23 BY MR. WORK:

24 Q And how does it reflect how much work you're
25 supposed to do under a given line item?

MARIE RAYMOND - DIRECT EXAMINATION

1841

1 MR. BOEHLERT: Because of some inaccuracies, I
2 continue to object.

3 JUDGE BROWN: What inaccuracies are you referring
4 to?

5 MR. BOEHLERT: At least on one of these, it
6 purports to show dollar amount of joint CLINs, through page
7 four. Apparently that is not a joint CLIN. I understand
8 the purpose of summaries, and I think the parties should use
9 them. But to me, the summary ought to be that, a summary,
10 not a something that is indecipherable, by saying go look at
11 exhibit 4 and look at 22.

12 JUDGE BROWN: Well, I find that is not materially
13 different then go look at all our labor allocation costs, or
14 go look at all of our consultant costs. And I think she has
15 explained it enough, sufficiently, so that you can cross
16 examine, and the jury can make a judgment. And I overrule
17 the objection that it will assist in her testimony, and I
18 will allow it to be shown to the jury. And you may show it
19 to the jury when you are ready.

20 (Pause while jury is seated.)

21 MR. WORK: When referring to Chart 12, one of
22 Whittaker's visual aids, in just two sentences or less, will
23 you summarize to the jury, what this chart represents?

24 THE WITNESS: This chart represents the allocation
25 of the ICCE program funding. There is a column called

MARIE RAYMOND - CROSS EXAMINATION

1861

1 Q If we could turn back, please -- maybe I can get
2 that book out of your way. Would you turn back, please, to
3 modification number 3, and I want to look at that November
4 27, 1985 letter you signed.

5 A Okay.

6 (Pause.)

7 Q And I want to take your attention back to the
8 paragraph that says "Attached please find the statement of
9 work" we covered that "the specifications and corresponding
10 exhibits and attachments for the work covered by these
11 CLINs." What else was in that package of materials you
12 received? What other exhibits did you get?

13 A There were a number of CDRLs.

14 Q Do you recall which ones?

15 A No. I really don't. I mean, they were attachment
16 something to something and then there was a gap and
17 something to something and there was a gap. There were
18 addendum statements of work in there for CENTAF, I believe
19 and ACC/PACAF.

20 Q And you made the conclusion, didn't you, from
21 reviewing those documents, that they were for informational
22 purposes only.

23 A Right.

24 Q That paragraph says, "If the above terms are
25 satisfactory, please sign and return two copies of this

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1 modification." You did sign this document, didn't you?

2 A Yes.

3 Q But before you signed it, you mentioned that you
4 talked to your boss about it, didn't you?

5 A I talked to various people about it. I talked to
6 my boss and to people in program management and so forth.

7 Q Well, let's go through the list of who you talked
8 to about this document and why. What did you say? Was Mr.
9 Hatchett your boss?

10 A No.

11 Q Okay. Did you talk to Mr. -- well, let's go
12 through. Tell us who you did talk to, please, about this
13 document.

14 A I spoke with Mr. Tobiason and with Mr. Sills and
15 with Mr. Rasband, I guess. And I spoke with Mr. Hatchett.

16 Q What did you say to Mr. Tobiason about the
17 document that you received? Modification 3?

18 A I don't remember exactly. I just voiced my
19 concern.

20 Q What was your concern?

21 A My concern was that we didn't have our own
22 specific statement of work that would tell us precisely what
23 to do and when we were finished.

24 Q What did Mr. Tobiason say?

25 A I don't recall.

MARIE RAYMOND - CROSS EXAMINATION

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1 Q But he didn't tell you not to sign the contract.

2 A No, he didn't tell me not to sign it.

3 Q And who was Mr. Tobiason?

4 A He was the program manager.

5 Q And he had also been heavily involved in that
6 technical proposal, hadn't he?

7 A I don't believe that -- he was heavily involved in
8 the cost proposal. I don't believe that he wrote any part
9 of the technical proposal but I don't know.

10 Q I understood you to say, though, he was involved
11 in the negotiations in Boston with the Air Force.

12 A Yes, he was.

13 Q To arrive at a price.

14 A That's correct.

15 Q And Mr. Sills -- what did you say to him?

16 A Similar things.

17 Q Who was Mr. Sills?

18 A He was Mr. Tobiason's supervisor.

19 Q What did Mr. Sills say to you?

20 A Essentially the same thing. He said you need to
21 work it out -- work it out.

22 Q And Whittaker was doing work. Is that correct?

23 A That's correct.

24 Q He didn't express any alarm to you about your
25 concern, did he?

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1 A Mr. Sills?

2 Q Yes.

3 A I think he did express alarm. But he did tell me
4 I needed to work it out. That was my job.

5 Q Okay. Mr. Rasband -- who was he?

6 A He was my supervisor but I think just before that,
7 right around that time, he left so I'm not really sure.

8 Q So he was on the contract side. Is that correct?

9 A Finance.

10 Q Finance side. So you talked to a couple of
11 technical people and then a financial individual and what
12 did Mr. Rasband say to you? Work it out?

13 A Work it out.

14 Q Who was Mr. Hatchett?

15 A He was president of the company.

16 Q What did you say to him?

17 A I said I have concern. We don't have our own
18 statement of work.

19 Q Did he reply to you?

20 A Yes. We had a discussion about it.

21 Q What did that discussion consist of?

22 A I don't remember the exact words. All he said was
23 yes, I understand that that's a problem and let me think
24 about it.

25 Q Did you have occasion to write to Mr. Hatchett

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1 about your concerns?

2 A Yes.

3 MR. BOEHLERT: I'd like to place before you a
4 document that I've marked as Plaintiff's Exhibit 32 for
5 identification.

6 (Pause.)

7 MR. BOEHLERT: It purports to be a one-page
8 memorandum in your handwriting.

9 BY MR. BOEHLERT:

10 Q Do you recognize this document?

11 A Yes, I do.

12 Q Did you prepare it?

13 A Yes, I did.

14 MR. BOEHLERT: Your Honor, I move Plaintiff's
15 Exhibit 32 into evidence.

16 MR. WORK: No objection.

17 JUDGE BROWN: It's received.

18 (The document referred to, having
19 been previously marked for
20 identification as Plaintiff's
21 Exhibit 32, was received in
22 evidence.)

23 BY MR. BOEHLERT:

24 Q Tell us the circumstances surrounding your
25 preparation of this document, Ms. Raymond.

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1 A We had received a telex from TechDyn saying that
2 we were not going to get paid until we signed the
3 subcontract.

4 Q TechDyn was saying we need a signed document.

5 A TechDyn was saying we need a signed document and I
6 was saying I need a statement of work because this worries
7 me. That was my job, Mr. Boehlert, and --

8 Q Is it unusual for you, Ms. Raymond, to have a --

9 MR. WORK: Objection. Interruption of the --

10 MR. BOEHLERT: Oh, I apologize. I thought you
11 were finished.

12 THE WITNESS: No, go ahead.

13 BY MR. BOEHLERT:

14 Q Is it unusual for you in your contract experience,
15 to have a prime contractor require a signed subcontract
16 before making payments?

17 A No, that's not unusual.

18 Q Okay. But at this time, you had concerns -- and
19 are they set forth in this memorandum?

20 A Yes.

21 Q Let's go through it.

22 "Subject telex requests signature on MOD 3 of the
23 TechDyn contract. I recommend we hold out until we have our
24 own SOW --" is that statement of work?

25 A Yes, it is.

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1 Q "And perhaps specifications and CDRL list."
2 CDRL -- are those the contract data requirement lists?

3 A Yes, they are.

4 Q "Taking responsibility for their SOW et cetera can
5 only cause big problems later in the contract. I would like
6 to discuss this with you prior to signing. Even if they
7 withhold payments for a while, our own statement of work
8 will save money later." Is that what you wrote?

9 A Yes.

10 Q And what were the big problems that you envisioned
11 on 16 January 1986?

12 A That our work was not defined.

13 Q So what? What problems would that cause?

14 A It would cause the problems that were caused and
15 that's why we're sitting here.

16 Q Could it cause a problem that you don't know -- if
17 you don't know the scope of your work, you don't know when
18 you're done?

19 A You don't know when you're done, you don't know
20 what to deliver.

21 Q I see a note at the bottom. It says, "Note for
22 file. Mr. Hatchett directed signature." Did you prepare
23 that?

24 A Yes.

25 Q And does that confirm what the president of the

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1 company told you?

2 A Yes.

3 Q You wrote that note to cover yourself, didn't you?

4 A Of course.

5 Q You've had problems on this job, haven't you, Ms.
6 Raymond?

7 A Yes. You mean the ICCE?

8 Q The ICCE project.

9 A Yes.

10 Q And I believe you're telling this jury that those
11 problems arise because you don't understand the scope of the
12 work. Is that correct?

13 A No, I don't believe I'm saying that.

14 Q Okay. Well, let's look back at this document that
15 you did sign. And I'd like you to explain for us, if you
16 could, please, and I'm sure there's a good explanation, but
17 the date for your signature on modification number 3, the 27
18 November 1985 letter is 14 January 1986. Your memorandum to
19 cover yourself is 16 January 1986. How do you explain that
20 discrepancy?

21 A I had my secretary prepare this letter for
22 signature prior to signing it. That often happens.

23 Q So you wanted to be especially sure you talked to
24 the president of the company before you signed modification
25 3.

