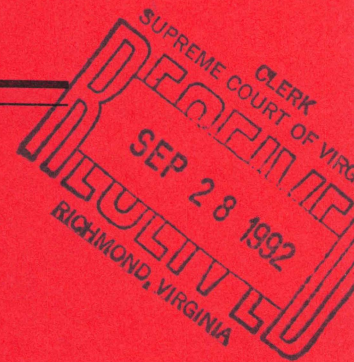


245VA291



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 920639

TECHDYN SYSTEMS CORPORATION,

Appellant,

v.

WHITTAKER CORPORATION,

Appellee.

**JOINT APPENDIX
VOLUME V**

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**TRIAL TESTIMONY OF
MARIE RAYMOND - RECALLED**

MARIE RAYMOND - DIRECT EXAMINATION

2550

1 Whereupon,

2 MARIE RAYMOND

3 having previously been duly sworn, was recalled as a witness
4 herein and was reexamined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. WORK:

7 Q Good afternoon, again, Ms. Raymond.

8 A Good afternoon.

9 Q Both Mr. Riddles and Mr. Boehlert referred this
10 afternoon to a document that they referred to as CDRLs,
11 stating that it had been established in this case that they
12 were part of the subcontract.

13 I am going to hand you these documents, and ask
14 you if you could tell me when is the first time you ever saw
15 these documents?

16 A The front part of the document, beginning with
17 page 217, through 9 of 17, I first saw in January of 1990.
18 The document, the rest of the document, beginning with page
19 10 of 17, which represents the prime contract schedule, I
20 saw as of the PDR in January of 1986.

21 Q And the first time you saw the document relating
22 to what Mr. Riddles referred to as the RCE, the two, 0002AB
23 CLIN is when?

24 A In January 1990.

25 Q Are those CDRLs?

MARIE RAYMOND - DIRECT EXAMINATION

2551

1 A No, they're --

2 Q Part of the --

3 A They are line items.

4 Q Are they part of the subcontract that you
5 administered from 1985 to the present?

6 A No, they are not.

7 Q Now, Ms. Raymond, when we finished with your
8 testimony of last week, you had discussed with the jury, the
9 list of what you call flow down clauses of the federal
10 acquisition regulation. Do you remember those?

11 A Yes, I do.

12 Q When you came to the ICCE program, and became
13 contract administrator for the ICCE program, had you any
14 prior familiarity with those clauses?

15 A Yes. They are very similar standard clauses of
16 Government contracts.

17 Q How long had you been engaged in the field of
18 contract administration in Government procurement?

19 A Ten years.

20 Q Prior to 1985?

21 A That's correct.

22 Q And had you, in that period of time, any
23 opportunity to become aware of how people operating in the
24 field of Government procurement interpreted those clauses?

25 A I had administered many Government contracts, as

MARIE RAYMOND - DIRECT EXAMINATION

2552

1 well as subcontract under Government prime contractors and
2 yes, I was aware.

3 Q To what extent is it common, in subcontracts, to
4 see standard federal acquisition clauses flow down to the
5 subcontract level?

6 A It's normal.

7 Q Was there anything unusual about the ICCE prime
8 contract as relates to the number of federal acquisition
9 regulation clauses that were flowed down into the
10 subcontract?

11 A No.

12 Q Now, in addition to working in the field for some
13 ten years prior to 1985, had you had occasion to do anything
14 else to learn how people in your field, in Government
15 procurement field, interpreted those clauses?

16 A Yes, I attended many seminars. I had many friends
17 that were part of the industry, and they, in fact, I would ,
18 you know, set up meetings and teach people in my department
19 interpretation of clauses and how we use them.

20 Q What is the NCMA?

21 A It's the national contract management association.
22 It's a professional association for contract administrators
23 and managers.

24 Q How long have you been a member of that
25 association?

MARIE RAYMOND - DIRECT EXAMINATION

2559

1 MR. WORK: Ms. Raymond, is the changes clause
2 before you, changes fixed price section 52.243-1 the changes
3 clause that you understood to be incorporated in the ICCE
4 subcontract?

5 THE WITNESS: Yes.

6 BY MR. WORK:

7 Q And at the time, that Whittaker entered into the
8 ICCE subcontract, did you, as the contract administrator,
9 have an understanding of what this clause meant?

10 A Yes.

11 Q What was the basis for that understanding, before
12 you get into what your understanding was?

13 A The many seminars and post graduate courses that I
14 had as well, as well as ten years of working with Government
15 contracts.

16 Q To what extent had you had occasion to work with
17 this changes clause, or predecessor changes clause, clauses,
18 in the federal acquisition regulation and before that in the
19 defense act regulation?

20 A They're in every contract that's over 25,000.

21 Q Now, what understanding did you have when you
22 entered into the ICCE subcontract, as relates to the types
23 of changes or type of change covered by this changes clause?

24 A Well, first of all, this is put into the contract
25 to allow changes, so that you don't have to put out a new

MARIE RAYMOND - DIRECT EXAMINATION

2560

1 contract every time you want something else. There are two
2 different types of changes. One is a directed change, and
3 the other is a --

4 MR. BOEHLERT: Your Honor, I object to his witness
5 discussing what types of changes there are. She certainly
6 can discuss what she understood to be in the contract, but
7 not explain Government procurement law.

8 JUDGE BROWN: Let me see the document, and let me
9 see counsel up here.

10 (Continued on next page.)

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MARIE RAYMOND - DIRECT EXAMINATION

2561

1 JUDGE BROWN: Take the jury out and leave the
2 witness here.

3 (Pause while jury is excused.)

4 JUDGE BROWN: Ms. Raymond, in your understanding
5 of this clause based on what you've told us about, what is
6 an equitable adjustment?

7 THE WITNESS: It's remuneration for extra work
8 that you have done for some reason.

9 JUDGE BROWN: And how is it determined?

10 THE WITNESS: It is a bilateral agreement between
11 parties.

12 JUDGE BROWN: Okay.

13 (Pause.)

14 JUDGE BROWN: Mr. Work, there are it appears to me
15 several alternatives here. Are you talking about just this
16 52.243.1 changes fixed price over 2 alternative 1 or is one
17 of those alternatives also included?

18 MR. WORK: No, just the standard fixed price.

19 JUDGE BROWN: Just down to that point.

20 MR. BOEHLERT: Alternative 5, Your Honor, is
21 reference to the subcontract.

22 JUDGE BROWN: Alternative 5 is referenced in the
23 contract?

24 MR. BOEHLERT: Yes, it is.

25 MR. WORK: Well, let's get it clear. I think

MARIE RAYMOND - DIRECT EXAMINATION/BENCH CONFERENCE

2562

1 that's a question we're going to have to ask Ms. Raymond.

2 JUDGE BROWN: Well, now, I want Ms. Raymond to
3 leave for a minute and I will try to explain to you all my
4 problem with this whole process.

5 (Pause while witness is excused.)

6 JUDGE BROWN: I now know for sure from a witness
7 what I suspected all along and what has bothered me and why
8 I have said we are not going to talk about equitable
9 adjustment. It's a bilateral agreement. It's not something
10 you can sue somebody for. You can't get an equitable
11 adjustment from a jury because we don't have a bilateral
12 agreement.

13 You can get damages from a jury and this clause
14 talks about equitable adjustment. And I can't get to there
15 from here. I can't ask this jury to do an equitable
16 adjustment.

17 MR. WORK: May I explain what our position is?

18 JUDGE BROWN: Yes.

19 MR. WORK: The importance of this clause, Your
20 Honor, is that it is the standard for discussing entitlement
21 for extra work. As Ms. Raymond is about to testify, this
22 clause has been interpreted over literally 30 years to
23 encompass both formal changes and informal changes, or
24 what's known as constructive changes, the kinds of things
25 you've heard about here and the kinds of things that TechDyn

MARIE RAYMOND - DIRECT EXAMINATION/BENCH CONFERENCE

2563

1 brought about in it's claim to the Government.

2 In a lot of ways, that concept is similar to or
3 analogous to a merit recovery, but it is not precisely
4 analogous and there is a lot of understanding in this
5 industry, as she will testify, concerning the circumstances
6 under which one may recover.

7 When she said that -- she responded to your
8 question about what an equitable adjustment is, that's
9 really the last step in the process. The first step in the
10 process is the occurrence of the change, be it through a
11 formal process or an evolutionary process. That creates an
12 entitlement and you see that it says that the contracting
13 officer, and in this case because this is a flow down
14 clause, the contracting officer becomes TechDyn, shall make
15 a change in the contract.

16 JUDGE BROWN: Either contract price, delivery
17 schedule or both.

18 MR. WORK: Right. Here we have a situation where
19 since 1987 Whittaker has sought to recover under that
20 particular part of the clause.

21 JUDGE BROWN: Okay.

22 MR. WORK: That particular part of the clause has
23 been breached in that TechDyn has not made an equitable
24 adjustment.

25 JUDGE BROWN: So what are you supposed to do now?

MARIE RAYMOND - DIRECT EXAMINATION/BENCH CONFERENCE

2564

1 MR. WORK: What you're supposed to do then is you
2 still have an entitlement and you can proceed under the --

3 JUDGE BROWN: It's a dispute under the disputes
4 clause.

5 MR. WORK: It's a dispute under the disputes
6 clause and --

7 JUDGE BROWN: But that's not what we're doing in
8 court here today.

9 MR. WORK: But we are, Your Honor. We are because
10 you have --

11 JUDGE BROWN: Show me the disputes clause.

12 MR. WORK: -- because you have thrown out the
13 disputes clause.

14 JUDGE BROWN: Well, I've thrown out the disputes
15 clause and I'm about to throw this one out, too, in terms of
16 what this jury is going to do. Let me see the disputes
17 clause because I don't think the jury is going to become
18 involved in the disputes clause, either.

19 MR. WORK: Well, the disputes clause enables you
20 to go to court if there is a dispute.

21 JUDGE BROWN: Okay. Well, let me see that. And
22 if that's what it says, then maybe we can go to court but
23 we're not going to get equitable adjustment in court.

24 MR. WORK: I'm not asking for equitable
25 adjustment, Your Honor. Let me just explain the process, if

MARIE RAYMOND - DIRECT EXAMINATION/BENCH CONFERENCE

2565

1 I may.

2 JUDGE BROWN: You're asking for money damages.

3 MR. WORK: I'm asking for money damages --

4 JUDGE BROWN: Well, we can all understand that and
5 we can deal with it. Why are we going into this?

6 MR. WORK: We're going into this because this
7 contemplates the circumstance. This clause as it's been
8 interpreted and is understood in the industry and as she
9 will explain --

10 JUDGE BROWN: Go ahead.

11 MR. WORK: Entitles one to recovery based on both
12 formal changes and constructive changes, a constructive
13 change being any action or inaction of the buyer that
14 affects the scope of the contractor's or subcontractor's
15 work.

16 The disputes clause --

17 JUDGE BROWN: Is that the disputes clause?

18 MR. WORK: There are two of them in this contract,
19 Your Honor.

20 JUDGE BROWN: Okay.

21 MR. WORK: The one that we have dealt with that
22 said this thing is to go to sort of an arbitral situation --

23 JUDGE BROWN: Right. Okay. Show me the one that
24 deals with what the Court does if you think that there's
25 something in there relevant to what the Court does.

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1 MR. WORK: All right. Let me see if I can find
2 that.

3 (Pause.)

4 MR. WORK: As you'll recall, Your Honor, this
5 particular disputes clause is hard to apply to this case and
6 as you'll recall --

7 JUDGE BROWN: Well, hold on one second and let me
8 see if I can break through one other thing.

9 Mr. Boehlert, let me ask you a question.

10 Assume for the moment that Mr. Work has proved
11 beyond pur adventure, so the jury is absolutely going to
12 believe it, that it was your client's responsibility to do
13 this logistic plan and they didn't do it and as a result,
14 their time in preparing this thing was extended until hell
15 won't have it, they still haven't finished the manual and
16 it's taken them 3000 more hours to do it. Can they collect
17 the 3000 hours from your client?

18 MR. BOEHLERT: Yes.

19 JUDGE BROWN: Then why are we messing with all of
20 this? This is just a straight contract case. If something
21 they didn't do --

22 MR. BOEHLERT: I'm sorry, Judge. I'm going to
23 take that back. If properly pled. Now, when it comes to
24 this case --

25 JUDGE BROWN: Now, never mind --

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1 MR. BOEHLERT: I'm going to look at the pleadings.

2 JUDGE BROWN: Okay. I'm not talking about
3 properly --

4 MR. BOEHLERT: If the pleadings were conformed to
5 the proof -- I mean, theoretically, yes. I'm not sure they
6 pled it right.

7 JUDGE BROWN: Well, tell me what you think they
8 did plead, then.

9 MR. BOEHLERT: I think they pled that the offenses
10 that TechDyn did was that they didn't certify the claim and
11 pass it up to the Air Force.

12 JUDGE BROWN: Well, okay. I don't think that's
13 what the pled. But all right. Let's assume --

14 MR. BOEHLERT: Assuming they pled what you said --

15 JUDGE BROWN: Okay.

16 MR. BOEHLERT: Then the answer is yes.

17 JUDGE BROWN: Or that for example because you
18 didn't provide the right modem and it was your -- it was
19 TechDyn's responsibility to prepare the modem and that
20 caused them all kinds of extra money, they can collect
21 against you if they prove that, can't they?

22 MR. BOEHLERT: That's my understanding.

23 JUDGE BROWN: Well, then I don't know why we're
24 going through all this other who struck John except you are
25 so wedded to Government contracts that you can't see that

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1 it's just an ordinary garden variety case.

2 MR. WORK: Do you know, Your Honor? Let me tell
3 you what's coming.

4 JUDGE BROWN: All right.

5 MR. WORK: They're going to take the position that
6 this clause on its face says that you can only recover based
7 on formal changes.

8 JUDGE BROWN: Well, they're not going to get to
9 first base on that.

10 MR. WORK: And that you've got to give certain
11 notification and things like that.

12 JUDGE BROWN: You're claiming all that?

13 MR. BOEHLERT: If they're claiming a change, this
14 clause says that if any such change causes an increase or
15 decrease in the cost over --

16 JUDGE BROWN: I don't care whether we're talking
17 about change or Susie. If you did something that caused
18 them to have to do extra work and it was not within the
19 contract, they can collect against you, can't they?

20 MR. BOEHLERT: Judge, I have to study their
21 pleadings. I don't want to be evasive. Properly pled --

22 JUDGE BROWN: Well, study their pleadings and let
23 me know at nine o'clock tomorrow morning because I don't
24 think all this stuff has anything to do with what this jury
25 needs to do.

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1 This is all stuff about when you go into the
2 negotiations with the Air Force and all that.

3 MR. WORK: Well, it's not that.

4 JUDGE BROWN: This is just a you caused us damage
5 and we want to collect.

6 MR. WORK: Let me take another example, okay?

7 JUDGE BROWN: It's simple.

8 MR. WORK: Let me take an example which is not
9 simple and I'm not sure that --

10 JUDGE BROWN: Well, let's let the jury go before
11 we do it.

12 Bring them in.

13 (Pause while jury is seated.)

14 JUDGE BROWN: We're going to duke it out a while
15 longer here but we're going to let you all go home but I
16 wanted to tell you -- I realize I have a set of cases I have
17 to handle in the morning beginning at 8:30 so we'll start at
18 9:30, if that's all right, tomorrow. Everybody be here at
19 9:30?

20 Okay -- 9:30. And remember: leave your materials
21 here, don't get into any conversation with anybody about
22 this, don't find any information anywhere else. Go home and
23 have a nice evening. See you at 9:30 in the morning. We're
24 still working.

25 (Pause while jury is excused.)

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1 JUDGE BROWN: Okay. You were about to say?

2 MR. WORK: Your Honor, the changes clause does
3 have some parallels in common law although they are not
4 precise parallels.

5 The situation that does not have any parallel in
6 common law relates to the two termination clauses and there
7 really is no parallel. They interrelate. One is the
8 default termination clause and the other is the termination
9 for convenience clause. And if the default termination is
10 not valid under its terms, then it can convert automatically
11 by its terms to a termination for convenience, which
12 entitles the contractor to all of its performance costs and
13 eradicates any responsibility for delays.

14 There are certain requirements that must be met,
15 certain standards that must be met, as that clause is
16 interpreted throughout this industry, which is a very close
17 knit industry. When you talk to any of these people that
18 come in -- Brancati or Raymond or even Hise know these
19 things as a matter of second nature.

20 As relates to the default termination clause for
21 the kind of default that was called out in the letter that
22 we read today which is called a failure to make progress
23 type default, that is not really a default at all. It is a
24 predicted default. It is a prediction that by the time the
25 delivery date comes around you're not going to be ready to

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1 deliver.

2 JUDGE BROWN: This has to do with the RCE, does it
3 not?

4 MR. WORK: That has to do with the RCE.

5 JUDGE BROWN: Well, I didn't understand that she
6 was talking now about the RCE at all.

7 MR. WORK: Oh, she will.

8 JUDGE BROWN: I know she will.

9 MR. WORK: She's going to give her understanding
10 of the various clauses that are pertinent to our claim. And
11 our claim with respect the purported default termination for
12 failure to make progress on the RCE is that it was not valid
13 under the terms as those terms are understood by her and
14 that it must as a matter of the contract term itself
15 automatically be converted into a termination for
16 convenience.

17 JUDGE BROWN: Well, I think you've changed the
18 ground rules on me here. What does this changes clause have
19 to do with it?

20 MR. WORK: I'm just saying there are four clauses
21 that she is going to testify about.

22 JUDGE BROWN: Well, let's talk about the one that
23 I have looked at so far.

24 MR. WORK: Okay. The changes clause on its
25 face -- and I think you've read it -- does not indicate that

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1 it is broad enough to cover constructive changes.

2 JUDGE BROWN: I don't care whether you call it
3 constructive or Susie. I've just agreed with Mr. Boehlert
4 that if they do something wrong or they breach the contract
5 in some way that causes you additional work, you get to
6 recover. If they ask you to do something that's not within
7 the contract scope, you get to recover.

8 MR. WORK: Well, let me just finish.

9 This clause, as you saw, states certain
10 conditions. I'm sure Mr. Boehlert is going to want to argue
11 to the jury that those conditions haven't been met.

12 JUDGE BROWN: Like what?

13 MR. WORK: The condition for notice and the
14 condition that any change be preceded by a formal
15 modification.

16 JUDGE BROWN: But I'm not going to fool with that.
17 I'm not going to listen to him on that. Because that all
18 has to do with this equitable adjustment stuff and we're not
19 talking equitable adjustment.

20 MR. WORK: No, it really doesn't, Your Honor.

21 JUDGE BROWN: Well, sure it does.

22 MR. WORK: No, the equitable adjustment is when
23 the parties themselves can agree.

24 JUDGE BROWN: Failure to agree puts you in the
25 disputes clause.

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1 MR. WORK: And, as you have indicated, the
2 disputes clause that the parties agreed to is out of this
3 case. And here we are in court and we're litigating and
4 we're litigating on the basis of entitlement under that
5 clause.

6 JUDGE BROWN: Mr. Boehlert, I'm not going to hear
7 you argue this stuff any more than him. What do you think
8 of that?

9 MR. BOEHLERT: There is a notice requirement to
10 get compensation.

11 JUDGE BROWN: Where is it?

12 MR. BOEHLERT: Okay. There's two issues in front
13 of you. One is --

14 JUDGE BROWN: Where's the notice requirement?

15 MR. BOEHLERT: Subparagraph C.

16 JUDGE BROWN: "Contractor must submit any
17 proposals for adjustment under the clause within 30 days"?

18 MR. BOEHLERT: Yes.

19 JUDGE BROWN: That's out. You don't have to do
20 that. If you breach the contract, he's going to recover in
21 this court. That's what that jury is going to do.

22 And if you all don't want that to happen, for
23 God's sake end this thing now like Mr. Work wanted to and go
24 to the Government or wherever you need to be. But in this
25 courtroom, this is a breach of contract case and that's all

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1 I'm going to do. And that's all that jury is going to do.

2 There is no possible way this jury, even after
3 sitting here ten days, is going to try a Government contract
4 case. We're just not going to do it.

5 MR. BOEHLERT: I understand what you're saying --

6 JUDGE BROWN: This is just a breach of contract
7 case. And if he breached it, if TechDyn breached it, if
8 Whittaker can prove damages, Whittaker can recover. And the
9 equitable adjustment and the disputes clause is not part of
10 anything that that jury is going to have to consider.

11 MR. BOEHLERT: Just so we get a couple of
12 things -- Mr. Work has never wanted to go to the Federal
13 courts because they haven't certified their claim, Your
14 Honor. That's kind of a misconception. I just wanted to
15 straighten that out.

16 JUDGE BROWN: I don't care Mr. Work wants to go
17 but both of you are here -- both of you have this jury and
18 what this jury is going to do is they're going to say here
19 is the contract, all right? We've heard a lot of this who
20 struck John.

21 This is what these people were supposed to do or
22 it wasn't clear what these people were supposed to do or
23 they agreed on it in Burlington or wherever in the heck it
24 was or not.

25 Did you fulfill your obligation? Yes or no.

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1 Were they damaged by any lack of fulfilling the
2 obligation? Yes or no.

3 How much is that worth? Yes or no.

4 Same thing for him -- breach of contract.

5 MR. BOEHLERT: I understand, Your Honor --

6 MR. WORK: Your Honor, but --

7 MR. BOEHLERT: I understand what you're saying --

8 MR. WORK: But it is not a breach of contract.

9 JUDGE BROWN: It is a breach of contract case.

10 MR. WORK: Let me tell you why it's not.

11 JUDGE BROWN: All right.

12 MR. WORK: A change is not a breach of contract.

13 A change under the changes clause is something the buyer has
14 a right to do. The concept of a program expanding like this
15 happens all the time. That's not a breach of contract.

16 JUDGE BROWN: Well, the jury can deal with that.

17 MR. WORK: Under this clause, there's an
18 entitlement to do that. There's entitlement to say either
19 by explicit contract modification or just by inaction,
20 there's entitlement to let a program evolve and become a
21 developmental program. That's not a breach of contract.

22 JUDGE BROWN: Okay.

23 MR. WORK: And it's not a breach of contract by
24 TechDyn. But there is a concomitant right to recover.

25 JUDGE BROWN: And that's one of the things you're

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1 suing for.

2 MR. WORK: But it's not a breach of contract. And
3 that imposes a much greater burden on us to say that they
4 have done something wrong.

5 JUDGE BROWN: No, if they've asked you do to
6 something that wasn't in the original contract, they should
7 pay for it.

8 MR. WORK: But that isn't a breach of contract.

9 JUDGE BROWN: But the jury doesn't understand
10 that.

11 MR. WORK: Your Honor, before the changes clause
12 ever came into existence and, indeed, for a while after the
13 changes clause initially came into existence, there was no
14 recognition of constructive changes. This goes back 30
15 years.

16 Over time, the concept of constructive changes was
17 grafted onto this changes clause and there was recognition
18 of a right on the part of the buyer, be it Government or
19 prime contractor, by action or inaction, to cause additional
20 work or additional costs. It's not a breach of contract.

21 JUDGE BROWN: Okay. Stop just a minute.

22 If you ask them to do something because the Air
23 Force asked you do to it that was beyond the scope of the
24 original contract, don't you have to pay for it?

25 MR. BOEHLERT: There are notice requirements.

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1 There are --

2 JUDGE BROWN: Not in this court.

3 MR. BOEHLERT: Okay. Well, there's another
4 changes clause up front. Remember? The one we looked at
5 the other day. I do suggest this and I'd like to think
6 about it tonight. I'd like to look at their pleadings to
7 see what they pled.

8 Perhaps it would be appropriate, Judge, because
9 these clauses are part of the contract, to let them go into
10 evidence. I mean, it's part of the contract. It would be
11 grossly improper for this witness to instruct the jury based
12 on her understanding --

13 JUDGE BROWN: I think we'll be here 14,000 more
14 years if we do that and I'm not going to do it.

15 MR. BOEHLERT: Then counsel could work with you on
16 the jury instructions.

17 JUDGE BROWN: I can tell the jury in very simple
18 terms: if these folks caused these folks to do additional
19 work that's not in the contract, these folks have to pay
20 these folks for it.

21 MR. BOEHLERT: See, that's going to be your
22 instruction and your decision.

23 JUDGE BROWN: But that's all I have to say.

24 MR. BOEHLERT: Well, I don't have a problem with
25 that. You're going to have to decide on the jury

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1 instructions.

2 JUDGE BROWN: Well, then that's all we have to
3 say.

4 MR. WORK: But I have a problem with calling it a
5 breach of contract.

6 JUDGE BROWN: I didn't say breach of contract. I
7 said two things: first, if they breached the contract and
8 that caused you damage, you get to recover. Second, if they
9 ask you to do additional work that is not within the
10 original contract, they've got to pay for it.

11 MR. WORK: Okay.

12 MR. BOEHLERT: Provided they meet the conditions,
13 though, in the contract.

14 JUDGE BROWN: What conditions?

15 MR. BOEHLERT: There is -- the conditions in that
16 article 2-1 that --

17 JUDGE BROWN: Show me.

18 MR. BOEHLERT: Okay.

19 (Continued on next page.)

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1 JUDGE BROWN: If Mr. Brancati is still here maybe
2 he ought to talk to Mr. Morrison so we don't get this thing
3 completely messed up, you know?

4 MR. BOEHLERT: If those two talk, we will have a
5 mess.

6 JUDGE BROWN: Oh, all right.

7 (Laughter.)

8 JUDGE BROWN: Okay. Article 1, Changes -- the
9 contractor's representative specified in article 1.6 may at
10 any time make changes in and for -- or direct the
11 admissions -- all changes beyond the general scope are
12 binding on the parties hereto and require modification of
13 this agreement.

14 MR. WORK: As I said, Your Honor, we're not
15 talking about changes beyond the general scope, which are
16 cardinal changes, a new contract. We're not talking about
17 those.

18 JUDGE BROWN: Well, where are the other kind of
19 changes in here?

20 MR. WORK: Well, it's just -- the only thing that
21 would apply, if it applied at all, and you have to then
22 figure out how does this relate to the flow down clause,
23 would be 2.1.A. But then you've got a question how does
24 that relate -- how did these parties intend that clause to
25 relate to the traditional flow down clause which is

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1 customarily used. So you have that interpretational
2 problem, too.

3 JUDGE BROWN: Well, here's the payment section.
4 Let's see. Subject to the provisions of the subcontract,
5 the contractor will pay to the subcontractor those charges
6 which are allowable and appropriate in this subcontract upon
7 submission to the contractor and invoiced.

8 MR. BOEHLERT: I don't think that's going to help
9 you. That's my opinion.

10 JUDGE BROWN: No, it isn't going to help me.

11 MR. BOEHLERT: But I think the contract is
12 important. I think what is not appropriate is for this
13 witness --

14 JUDGE BROWN: What did they do wrong in getting
15 paid for the extra work?

16 MR. BOEHLERT: They didn't do any extra work.

17 JUDGE BROWN: Well, that's the issue.

18 MR. BOEHLERT: That's the issue.

19 JUDGE BROWN: If they prove they did extra work,
20 they get paid.

21 MR. BOEHLERT: But you know, Judge, that if there
22 are conditioned precedents to get an allowance --

23 JUDGE BROWN: What I'm asking is what's the
24 conditioned precedent?

25 MR. BOEHLERT: Notice.

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1 JUDGE BROWN: Where is the notice provision?

2 MR. BOEHLERT: The notice provision is this
3 subparagraph 3 on this -- this is the way I interpret the
4 contract. Let me --

5 JUDGE BROWN: Subparagraph C?

6 MR. BOEHLERT: Yes. This is the way I interpret
7 it --

8 JUDGE BROWN: What written order? There never was
9 a written order. It says the contractor must submit any
10 proposal for adjustment, hereinafter referred to as the
11 proposal, under the clause within 30 days from date of
12 receipt of the written order.

13 Well, you go back up here and it says changes --
14 fixed price -- the contracting officer may at any time by
15 written order without notice to the sureties, if any, make
16 any changes.

17 MR. BOEHLERT: That clause is important because
18 that's right -- if they don't timely submit a proposal,
19 they've waived their right for an adjustment.

20 JUDGE BROWN: What written notice was there of
21 these? What written order was there for these changes
22 you're talking about?

23 MR. BOEHLERT: None.

24 JUDGE BROWN: So when did the time begin to run
25 for them to submit their proposal?

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1 (Pause.)

2 JUDGE BROWN: If I had wanted to, I could have
3 been a Government contracts lawyer but I didn't want to and
4 I don't want to now.

5 MR. WORK: But on the termination issue, you're
6 going to have to because --

7 JUDGE BROWN: That may be but that's a different
8 issue than this. You all are trying to make a Federal case
9 out of a simple breach of contract, extra work case. We do
10 extras all the time and they come in -- every time they come
11 in, they say the standard AIA contract says a written order
12 has to be for changes and nobody ever does an extra with a
13 written order -- in the history of the world, nobody's ever
14 done one. No contractor has ever done that.

15 Well, maybe they do in these things but we haven't
16 got one here.

17 MR. WORK: Well, they didn't in this case, in the
18 prime contract.

19 JUDGE BROWN: It isn't any different than the
20 standard AIA contract problem.

21 MR. BOEHLERT: I hear what you're saying, Judge.

22 This clause does talk to that because -- and
23 paragraph A talks about an order from the representative and
24 paragraph B is all changes beyond the general scope of this
25 subcontract --

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1 JUDGE BROWN: Well, as I understand it, how we got
2 to the changes here was because the Government starts
3 messing and what you got to get are these B-specifications
4 that become how the thing is going to be done. And nobody
5 ever rewrote the contract, nobody ever rewrote the
6 A-specifications, they just said well, that B-specification
7 won't do. So they kept on working them until it got to be a
8 long time contract, a development contract, which nobody
9 contemplated.

10 So these folks want to be paid for it. You say
11 yes, that was within the A-specifications; the
12 B-specifications didn't change the A-specifications, it
13 didn't stretch out. That isn't true and the jury can manage
14 that.

15 But all this other stuff the jury doesn't need and
16 isn't going to have to fool with.

17 MR. BOEHLERT: There are so many nuances, like
18 even this --

19 JUDGE BROWN: Oh, I know there are nuances.

20 MR. BOEHLERT: -- alternate 5 which is the changes
21 clause, they say it's not a research and development
22 contract but the very clause, the changes clause, it says if
23 the requirement is for research and development and it is
24 desired to include the clause, substitute these provisions.
25 So I --

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1 JUDGE BROWN: Well, the trouble is nobody thought
2 it was a research and development contract until we got
3 further into it and then all of a sudden it became one,
4 according to their evidence.

5 MR. BOEHLERT: Well, yes, but what the contract
6 says is itself is an admission that it is a research and
7 development contract because this provision, this FAR
8 provision says of all these provisions, use the research and
9 development alternate 5.

10 MR. WORK: Mr. Boehlert, if you'll just notice
11 there -- you have vaulted the standards changes clause and
12 the alternate 5 and the incorporation clause says as
13 appropriate.

14 MR. BOEHLERT: No. It's changes -- fixed price
15 for those claims --

16 MR. WORK: No --

17 JUDGE BROWN: No. No more. Here's the ruling.

18 I am going to -- you all can fashion and submit to
19 me a very simple instruction that simply will tell the jury:

20 Number one: if A breached the contract and B
21 suffered damages, thereby B can recover.

22 Number two: if A directed, caused, how ever you
23 want to put it, additional work to be done under the
24 contract and B thereby had additional work not contemplated
25 within the contract, B can recover for it.

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1 And the jury will determine it. And that's the
2 end of it.

3 MR. WORK: That's adequate for us.

4 JUDGE BROWN: On that.

5 MR. BOEHLERT: Well, Your Honor --

6 MR. WORK: Now we come to the default issue.

7 MR. BOEHLERT: Okay, Your Honor. I'll work with
8 you on that. I'm not sure that's so easy because that
9 certainly works to their advantage because TechDyn has --
10 they breached but there's no extra work. I mean, it's not
11 like something they ordered --

12 JUDGE BROWN: Then all you have to do is prove it.
13 That's all. The jury just has to determine -- look jury, we
14 breached the contract but didn't cause them any additional
15 work; it's really them that messed up. The jury can deal
16 with that kind of an issue and we can handle it. But this
17 stuff we'll reserve for the Air Force general who finally is
18 going to determine this thing anyway after all this is done.

19 Okay. What about the disputes clause?

20 MR. WORK: It's not the disputes clause, it's the
21 default termination clause and the termination clause.

22 And basically, as those clauses are interpreted,
23 there are certain conditions precedent to --

24 JUDGE BROWN: Let me see the default termination
25 clause.

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1 (Pause.)

2 JUDGE BROWN: Maybe Mr. Morrison's representative
3 could meet with Mr. what's his name's representative and
4 they not fight.

5 (Pause.)

6 MR. WORK: 249.8 is the default termination and
7 then that references this termination for convenience
8 clause.

9 (Pause.)

10 JUDGE BROWN: Well, I remember this. I've looked
11 at this before. They claim that the manner in which they
12 were entitled to the termination was failure to make
13 progress so as to endanger performance of the contract.

14 MR. WORK: Yes.

15 JUDGE BROWN: All right.

16 MR. WORK: And that requires notice and
17 opportunity to cure.

18 JUDGE BROWN: Okay.

19 MR. WORK: And if that's not sustained -- and
20 notice and opportunity to cure encompasses, as the clause is
21 interpreted in the industry, a schedule against which to
22 measure whether the contractor will or will not make the
23 delivery date because if there's no delivery date, there's
24 nothing to make.

25 JUDGE BROWN: Okay. Now, I've heard this before

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1 but I want to walk through it again.

2 Here's the make progress so as to endanger
3 performance of the contract -- where do I go next?

4 MR. WORK: And then you go to the notice and the
5 opportunity to cure.

6 JUDGE BROWN: And where is that? Just so I don't
7 have to read the whole thing.

8 (Pause.)

9 JUDGE BROWN: The Government's right to contract
10 under subdivisions 1(ii) may be exercised if the contractor
11 does not cure such failure within ten days after receipt of
12 the notice from the contracting officer specifying the
13 failure.

14 MR. WORK: Yes.

15 JUDGE BROWN: Okay. Well, I can put that -- so
16 far, I can put all that in an instruction. So far, I could
17 say to the jury the contractor is entitled to terminate --
18 some magic word -- if the subcontractor fails to make
19 progress so as to endanger performance of this contract, the
20 right to terminate under that subdivision may be exercised
21 if the contractor does not cure such failure within ten days
22 after receipt of the notice from the general contractor
23 specifying the failure. I can understand that.

24 MR. WORK: Now, there are three requirements
25 subsumed in there as that clause is interpreted:

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1 Number one, in a failure to make progress type
2 default there has to be a schedule because if there's no
3 delivery schedule, then there's no failure to make progress
4 against a schedule.

5 JUDGE BROWN: Well, I've already ruled on that and
6 I rule that it doesn't because it would be, again, rank
7 foolishness to say what happened here is these folks say,
8 their position is you delayed it beyond any possible
9 schedule. There was a schedule and your folks delayed it
10 beyond that.

11 MR. WORK: Let me tell you why --

12 JUDGE BROWN: Then you cannot possibly say that
13 they could go from now until the year 2050 --

14 MR. WORK: No, no. You don't understand. And
15 this is the point I'm making -- you go back to the changes
16 clause for this. The buyer at any time unilaterally can
17 impose a schedule so long as it's a reasonable schedule. So
18 he's never in that no-win situation. If a schedule is
19 passed, as it was passed here by over two years, TechDyn at
20 any time had the right under the changes clause to say here
21 is the schedule that is going to prevail in this contract.
22 I am imposing this unilaterally. And the requirement there
23 is that it's got to be a reasonable schedule but he may do
24 that. So he is never in the trap that you're talking about.
25 He's also never in the trap with regard to excess

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1 reprocurement costs that you were talking about where you
2 have a --

3 JUDGE BROWN: Well, I've looked at that law and I
4 may be wrong but that's my ruling. So where do I go from
5 there?

6 MR. WORK: Could I tell you two other aspects of
7 that?

8 JUDGE BROWN: Yes.

9 MR. WORK: First of all, the cure notice has to
10 indicate what it is the notice the contractor is supposed to
11 cure.

12 JUDGE BROWN: Well, it says right here --
13 specifying the failure.

14 MR. WORK: Right. And here --

15 JUDGE BROWN: Well, you can argue to the jury that
16 that didn't properly specify the failures.

17 MR. WORK: And the second thing is --

18 JUDGE BROWN: Third.

19 MR. WORK: -- that it's got to be a bona fide --
20 the third thing is that it's got to be a bona fide
21 opportunity to cure. And here we have a situation, as you
22 observed today, when at least there's an indication that the
23 decision was made before the cure notice ever went out.

24 JUDGE BROWN: Well, the jury can deal with that.
25 You can argue you that.

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1 MR. WORK: But what we want is an instruction that
2 the opportunity to cure has to be a bona fide opportunity to
3 cure.

4 JUDGE BROWN: I'm not going to tell them that
5 because I think that's too complicated. I'm just going to
6 repeat exactly what's here and I think that there is -- I
7 think this clause in this fashion can go to the jury. That
8 is, the right to terminate for a default termination is if
9 the subcontractor fails to make progress so as to endanger
10 the performance of the contract then there's a right to
11 terminate for default --

12 MR. WORK: Then let me tell you the two aspects of
13 this.

14 JUDGE BROWN: -- and provided that the right to
15 terminate may be exercised if the contractor does not cure
16 such failure within 10 days after receipt of a notice from
17 the general contractor specifying the failure. And you can
18 argue all that.

19 MR. WORK: Okay. There are two other aspects to
20 this. If the contractor does not meet that burden by the
21 terms of this clause, then there is an automatic conversion
22 of the default termination to a termination for convenience.

23 JUDGE BROWN: All right.

24 MR. WORK: And under a termination for
25 convenience, the contractor is entitled to recover his cost

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1 of performance plus his winding up costs and he cannot be
2 held responsible for the delay that they are alleging. He
3 is entitled to costs. It is a decision by the --

4 JUDGE BROWN: He cannot be held liable for what?

5 MR. WORK: For delay.

6 JUDGE BROWN: Delay in the RCE?

7 MR. WORK: In the performance of the RCE.

8 JUDGE BROWN: Okay.

9 MR. WORK: Either before or after.

10 JUDGE BROWN: Well, we can put that in an
11 instruction pretty simply, can't we, Mr. Boehlert?

12 MR. BOEHLERT: These are all instruction issues
13 and we'll address them all.

14 JUDGE BROWN: Is he telling me what the law is?
15 So far?

16 MR. BOEHLERT: If there's a wrongful default -- if
17 there's a termination for convenience?

18 JUDGE BROWN: Yes. If there's a default. For
19 example, if he convinces the jury that your notice did not
20 properly specify the failure and didn't really give him time
21 to cure, then the jury could say well, then it's a --

22 MR. BOEHLERT: My position on that, Judge, is that
23 the subcontract does say Virginia law will apply and
24 Virginia law is very clear on breach. And I think on that,
25 the remedies will go each way. It's a breach remedy.

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1 MR. WORK: There's no parallel.

2 JUDGE BROWN: I think that if the contract has a
3 specific provision with regard to how you default the
4 person, he's entitled to have the jury understand what that
5 is. So I would intend to put that in an instruction and
6 then tell them if you find from the evidence that the
7 contractor did not properly default terminate the
8 subcontractor, then the subcontractor is entitled to recover
9 whatever this other thing says.

10 MR. WORK: Okay. There's one final aspect.

11 JUDGE BROWN: Okay.

12 MR. WORK: And that is the aspect which I think I
13 misled you about the other day because from your comments I
14 don't think you understood it and that's the excess
15 procurement cost thing.

16 A contractor -- a buyer -- is entitled to excess
17 procurement costs only where what is reprocured --

18 JUDGE BROWN: Show me that clause.

19 MR. WORK: -- is substantially similar. That is
20 the kind of interpretational information that I propose to
21 have Ms. Raymond give. That is not stated in the clause but
22 like constructive changes in the changes clause, that has
23 been established interpretation in this industry for years
24 and years and years. And everybody knows it. And all these
25 people on both sides of the aisle know it.

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1 MR. BOEHLERT: Not everybody knows it and we don't
2 even know this witness does. She can't instruct this jury
3 on the law.

4 JUDGE BROWN: Well, she's not going to tell them
5 that. I'll tell you my ruling on that, which is based on
6 "Brown on Government Contracts", a new formula that's coming
7 out, and here it is:

8 If it is not the very particular item, that is, I
9 have to cause the person sitting at a terminal to be able to
10 switch to three different ground entry stations. That's the
11 requirement of the Air Force. I can do it with software, I
12 can do it with hardware. You messed up the software, let us
13 say for the moment. And therefore TechDyn had to get that
14 process done, that requirement of the contract done some
15 other way.

16 And if the way that they got it done performs the
17 same function an doesn't add something to the deal, in other
18 words, if it still is how I get those three entry stations
19 switched so I can look at it on my one terminal, then that
20 may be -- it can be argued to the jury that that's
21 substantially similar.

22 MR. WORK: Well, but --

23 JUDGE BROWN: Substantially similar doesn't mean
24 it's got to be done with hardware. Substantially similar
25 means it's got to be the same work.

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1 MR. WORK: It's kind of like the difference
2 between a hand lawn mower, though, and a power lawn mower,
3 Your Honor. One is done manually and with lesser
4 requirements, as Mr. McCune said --

5 JUDGE BROWN: Exactly. But it's still that one
6 lawn that I'm mowing.

7 MR. WORK: Well, but it's a lot easier to do it
8 and a lot different, a lot less hard to accomplish the task
9 of inventing a hand lawn mower or a sickle on the one
10 hand --

11 JUDGE BROWN: I'm going to let you argue that.
12 I'm going to put the term in it that the reprocurment has
13 to be substantially similar.

14 MR. WORK: Okay.

15 JUDGE BROWN: I'm just declaring as a matter of
16 law they are not precluded from claiming that what they did
17 was substantially similar because it was one hardware, one
18 software, one manual, one electronic.

19 I'm just ruling that the jury can determine that
20 but what will go to the jury is an instruction that will
21 tell them that the reprocurment or how ever -- I'm not sure
22 how it will be finally phrased in the jury instruction --
23 but let's use your words for a moment -- that the
24 reprocurment has to be substantially similar.

25 Then I'm going to put a period and then I'm going

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1 to let you say look, jury -- this isn't similar at all.

2 They went to an entirely different system that had nothing
3 to do with this system.

4 I'm going to let them say we were mowing the lawn,
5 we're mowing the same lawn. I'll let you say yes, but they
6 used a goat and we were going to use a power lawn mower.

7 MR. WORK: Now are you going to let me put on Ms.
8 Raymond to say how she understood these clauses when she
9 signed this contract?

10 (Laughter.)

11 JUDGE BROWN: No. Because what you're really
12 talking about is matters of law and I have boiled the law
13 down to simplistic, unimaginably awful terms that you don't
14 agree with and you can note your exception but we don't need
15 her then to tell us all about Government contract law
16 because the jury is going to get very simple instructions.

17 MR. WORK: I can appreciate the desire for
18 simplicity and just let me say two sentences so it will be
19 in the record.

20 This is a field, and I think you observed, Your
21 Honor, this is a field in which people like Ms. Raymond and
22 Mr. Brancati and I suspect Mr. Hise and Mr. Rosen are very,
23 very familiar with how these clauses work. It is a highly
24 specialized group of people. I mean, there's no fooling
25 them as to what the requirements are. They know. It's

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1 second nature to them. I don't know as well as Raymond
2 does, although I operate in this field to some extent.

3 And it seems to me that that is relevant in
4 determining the intent of the parties, as I said in that
5 motion, and as the 4th Circuit said.

6 JUDGE BROWN: Okay. I understand your argument.

7 MR. WORK: Thank you for the time, Your Honor.

8 JUDGE BROWN: And I rule against you.

9 Let's come back tomorrow and the case will be
10 maybe a little shorter. We'll see.

11 MR. WORK: It will be a little shorter.

12 JUDGE BROWN: All right.

13 I was kind of hoping that it would end -- well,
14 what I'm thinking is that -- I was kind of hoping it would
15 end tomorrow but maybe it won't. If it did, then what we
16 would do is probably not bring the jury in Monday. On
17 whatever day it ends, we probably won't bring the jury in
18 the next day because I can't tell exactly how long it will
19 take and I can tell from reading the instructions and
20 knowing my peculiarities that a lot of the instructions are
21 going to have to be redone.

22 MR. BOEHLERT: I'm going to start on this. You're
23 saying there's flexibility -- no matter what we've
24 submitted -- to work on --

25 JUDGE BROWN: Oh, sure.

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1 A In MOD 31, I believe that is the option for line
2 items 57 and 58 --

3 Q Those are the additional two remote radio sites?

4 A Yes. We had to have some DTSSs for that and we
5 were to take the RCE software and add the capability for
6 them to talk to four GESs. And, at that time, for those
7 items we had a delivery schedule of 14 months or so from
8 contract award.

9 Q And aside from that, was there any other effort to
10 put a schedule in the subcontract after the initial schedule
11 was passed?

12 A No.

13 Q Did you have a schedule, a contractual schedule,
14 for example, at the time you passed SQT or completed SQT in
15 December of 1987?

16 A No.

17 Q Did you have a contractual schedule at the time
18 that you shipped the 87-350 version of the software in early
19 1988?

20 A No.

21 Q Now, are you familiar with a document entitled the
22 ICCE program schedule?

23 A You mean the TechDyn document?

24 Q Yes.

25 A Yes.

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1 Q And what is the ICCE program schedule or what was
2 it in this program?

3 A It's a submission that's prepared by TechDyn to
4 advise the Government when certain events are going to
5 happen.

6 Q Is it contractual in nature in any sense as
7 relates to you as the subcontractor?

8 A No, no. It's informational.

9 Q Do you receive it on an informational basis?

10 A Yes, I do.

11 Q When is the last such ICCE program schedule you
12 received on an informational basis?

13 A Well, there were two. I received one on an
14 informational basis in early 1991 dated December '90 and I
15 attended a review in June and I received a schedule at that
16 time.

17 Q June just last month?

18 A Right.

19 (Pause.)

20 MR. WORK: Ms. Raymond, I'm going to hand you a
21 document that's entitled "TechDyn Program Management Review
22 (PMR) 18 June 1991". We have marked it as Defendant's
23 Exhibit 67. And I wonder if you could tell us whether that
24 document is the document you just described.

25 MR. BOEHLERT: Your Honor, I object to the

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1 introduction of this document for two reasons, primarily
2 because it was not marked as a Defendant's trial exhibit and
3 it certainly wasn't produced during discovery. But
4 primarily because it's their case in chief and it's not in
5 their pre-marked documents.

6 JUDGE BROWN: Have you ever seen it before?

7 MR. BOEHLERT: No, sir.

8 JUDGE BROWN: Let me see the document and let me
9 see counsel up here.

10 Why wasn't it marked?

11 MR. WORK: We didn't have it at the time that the
12 exhibits went in.

13 JUDGE BROWN: When did the exhibits go in?

14 MR. WORK: I believe June 5th.

15 MR. BOEHLERT: June 3rd.

16 MR. WORK: June 3. And this was received by Ms.
17 Raymond from TechDyn at a PMR and I think Mr. Boehlert
18 attended part of that PMR as a matter of fact or was there
19 at the time it was taking place.

20 JUDGE BROWN: What's the purpose of introducing
21 it?

22 MR. WORK: To discuss the schedule that you see
23 right there. This is a TechDyn -- you've heard this
24 referred to before as a document which reflects past
25 accomplishments and future projections.

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1 JUDGE BROWN: So when you got it why didn't you
2 give him and put it on the exhibit list?

3 MR. WORK: Frankly, I thought we had but
4 apparently we didn't.

5 JUDGE BROWN: What does it do to your case?

6 MR. BOEHLERT: I don't know. I don't know how
7 they intend to use it.

8 JUDGE BROWN: You hadn't seen it in connection
9 with the PMR?

10 MR. BOEHLERT: I was at the client's office that
11 day. I did not attend the PMR in any way and never have.

12 JUDGE BROWN: And you've never seen this before.

13 MR. BOEHLERT: No.

14 JUDGE BROWN: I sustain the objection.

15 MR. WORK: Okay. We can use another one. This
16 will take just one second to find, the other schedule
17 document, Your Honor.

18 (Pause.)

19 MR. WORK: Sorry for the delay, ladies and
20 gentlemen.

21 BY MR. WORK:

22 Q Ms. Raymond, I'm going to hand you a Plaintiff's
23 exhibit. It is a document labelled -- it's a document that
24 I think has been admitted into evidence, Your Honor -- a
25 document signed by Mr. Donald Ellis of TechDyn, a letter to

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1 the Government, subject submittal of ICCE program schedule
2 and technical order status report and then it attaches a
3 document of the same name.

4 Do you recognize this document?

5 JUDGE BROWN: What's the exhibit number?

6 MR. WORK: 1615. Has that not been admitted?

7 JUDGE BROWN: No.

8 BY MR. WORK:

9 Q Do you recognize that document, Ms. Raymond?

10 A Yes, I do.

11 Q And is that the December version, the version of
12 this advisory statement of TechDyn prior to the one that we
13 just looked at, the June one?

14 A Yes, it is.

15 MR. WORK: I offer that document into evidence,
16 Your Honor.

17 JUDGE BROWN: Any objection to it?

18 MR. BOEHLERT: Your Honor, I do object. I don't
19 think there's a foundation that Ms. Raymond knows this
20 document.

21 I think she recognizes the format perhaps but the
22 only indication she's seen this before is she's familiar
23 with the contents of it.

24 JUDGE BROWN: Let me see the document.

25 (Pause.)

2.

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1 JUDGE BROWN: I think there are multiple copies of
2 this document here.

3 MR. WORK: Your Honor, you'll recall that in my
4 cross-examination of Mr. Ellis I used this.

5 JUDGE BROWN: I don't think we need but one but
6 you can ask one more question if she saw it at the time or
7 whatever to lay a foundation.

8 BY MR. WORK:

9 Q Did you see this TechDyn submission at or about
10 the time that it went in to the Government, Ms. Raymond?

11 A Some time thereafter. I'm on the distribution for
12 this document.

13 Q Okay. And you're familiar with the document?

14 A Yes, I am.

15 JUDGE BROWN: I'll overrule the objection. 1615
16 is received.

17 (Pause.)

18 JUDGE BROWN: That's a Plaintiff's number. I
19 guess we shouldn't call it 1615. We'll give it a
20 Defendant's number. What's the next number?

21 I want to give that a Defendant's number. I am
22 told 102?

23 MR. WORK: 106.

24 JUDGE BROWN: We'll call it 106 -- 1615 Plaintiff
25 becomes 106 Defendant and is admitted.

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1 (The document referred to was
2 marked for identification as
3 Defendant's Exhibit 106 and was
4 received in evidence.)

5 BY MR. WORK:

6 Q Would you turn to the first page of the graph
7 paper?

8 A Okay.

9 Q We had a viewgraph of the other one.
10 Unfortunately, we don't have a viewgraph of this one which
11 is slightly different. What does this depict?

12 A The overall program schedule for the ICCE CENTAF
13 program.

14 MR. WORK: Your Honor, since we don't have a
15 viewgraph, may I just hold this up for the jury to see as
16 we're going through them?

17 JUDGE BROWN: Unless somebody objects.

18 MR. WORK: Can everybody see this?

19 BY MR. WORK:

20 Q And on the left-hand side of the page, under the
21 title "Program Milestones" what are those items listed
22 there, Ms. Raymond?

23 A Milestones for the ICCE program. The major ones.

24 Q And these are milestones that have been achieved?

25 A Yes. In many cases.

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1 Q And then we come over to the column entitled
2 "Prior" and there are some dates under that, month and year.
3 And what do those indicate?

4 A That those milestones have been met.

5 Q All right. Now, let's look down at line number
6 eight and would you read the language that appears under the
7 program milestone at line number eight?

8 A "Software qual test (SQT)/TAF cert."

9 Q And what are the dates that are shown there?

10 A 12/87.

11 Q Now, let's turn over, please, to page 5, the
12 handwritten numeral five. This is a TechDyn document, is
13 that correct?

14 A That is correct.

15 Q Let's look down at line number six -- excuse me --
16 line number one in the program milestones on page 5. What
17 does the program milestone read in line number one?

18 A "SQT complete."

19 Q And what are the dates shown there?

20 A 12/87.

21 Q And then you see line number three?

22 A Yes.

23 Q And what does that read, the program milestone?

24 A "TAF certification test."

25 Q And what are the dates on that?

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1 A 2/88.

2 Q And then line number six?

3 A "TAF completion (87-350 plus fixes).."

4 Q And what are the dates on that?

5 A 4/88.

6 Q And this was submitted by TechDyn to the
7 Government to the best of your knowledge and belief?

8 A • Yes.

9 Q And have those same numbers been reflected on
10 other schedules that you have seen?

11 A Yes, they have.

12 Q Is there any difference, for example, between the
13 numbers that we just reviewed on this schedule, on this
14 statement of milestones achieved dated 27 December 1990, and
15 the latest version of this TechDyn document that you saw in
16 June of 1990?

17 A None that I know of.

18 Q And is that a document to the best of your
19 knowledge and belief that TechDyn is required to submit as a
20 contract data requirements list item under TechDyn's prime
21 contract with the Government?

22 A Yes.

23 JUDGE BROWN: May I have it? I'll mark it in.
24 Defendant's 106.

25 (Pause.)

7:

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1 payments. What was your understanding, based on your
2 subcontract -- strike that. Was there a provision relating
3 to the obligation to make progress payments in you ICCE
4 subcontract, and where in the document would one find that?

5 A Yes, there is a provision there, in fact there is
6 even one in modification 3. That allows billing in
7 accordance with the progress payment regulation of the FAR.

8 Q What is your understanding , based on the ICCE
9 subcontract document, of the concept of progress payments.

10 A Progress payments are simply payments based on
11 percentage of your cost incurred, up to a certain percentage
12 of the individual contract price that you are authorized to
13 be paid as you work.

14 Q In the course of the program, did Whittaker bill
15 TechDyn submit invoices to TechDyn, under the clause you've
16 just described?

17 A Yes. On a monthly basis.

18 (Pause.)

19 BY MR. WORK:

20 Q I'm going to hand you a document that's been
21 marked as Defendant's Exhibit 48E. It appears to be a
22 letter from Mr. William Hise of TechDyn to you, dated 20
23 November 1986. Ad can you tell me if you identify that, can
24 identify that document, Ms. Raymond?

25 A Yes, I received this letter.

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1 Q And what is that letter. Excuse me, strike that.
2 Your Honor, we offer Defendant's Exhibit 48E.

3 JUDGE BROWN: Any objection to 48E?

4 MR. BOEHLERT: No.

5 JUDGE BROWN: Received.

6 (The document referred to, having
7 been previously marked for
8 identification as Defendant's
9 Exhibit 48E, was received in
10 evidence.)

11. BY MR. WORK:

12 Q Now, what is this letter, Ms. Raymond. I guess
13 the best way to characterize it is to read the sub-reference
14 that Mr. Hise has used.

15 A Subcontractor 125-001. Stoppage of progress
16 payments.

17 Do you want me to keep reading?

18 Q Yes, just one second. Would you read the first
19 two paragraphs of this letter, please.

20 A We have reviewed your referenced letter of 13
21 November 1986 and the conclusions stated therein that 4C is
22 without fault or negligence o the schedule of your
23 subcontract. This unilateral determination of no fault or
24 negligence by Command Control and Communications
25 Corporation is not acceptable to TechDyn Systems

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1 Corporation. WE are hereby stopping, effective today, the
2 processing of any future claims for progress payments for
3 work under subject subcontract. tHis action will remain in
4 effect until such time as 4C agrees to a revised schedule to
5 TechDyn and to an equitable cost consideration to TechDyn
6 for the delay incurred by 4C in the performance of the
7 subcontract.

8 Q How long was it after November 1986 that TechDyn
9 recommended progress payments to Whittaker under this
10 program?

11 A ABout a year and a half.

12 Q And what happened in the mean time in terms of the
13 progress that Whittaker made in this program?

14 A During that time, we delivered both of the CENTAF
15 systems, and we came up with certifiable software.

16 Q You passed SQT?

17 A That's correct.

18 Q Did you make other progress under the contract?

19 A We made other progress, yes. We delivered certain
20 manuals, the specifications were authenticated.

21 Q Ms. Raymond, I've now handed you a document we
22 have marked as Defendant's Exhibit 43E. It consists of
23 actually two documents. ONe a memorandum dated 22 December
24 1986, and that covers a letter from Mr. Hise to you dated 18
25 December 1986 . ARE you personally familiar with both of

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1 Q Ms. Raymond, I'm going to hand you a copy of the
2 letter from Whittaker to TechDyn dated August 5, 1988 and I
3 ask you -- I'm going to hand you a copy of a letter admitted
4 yesterday. It is Defendant's Exhibit 10E, a letter from
5 Whittaker to TechDyn dated August 22, 1988 and there is a
6 list on the second page that Mr. Brancati testified about as
7 to outstanding progress payment invoices.

8 Could you look at that and see if that refreshes
9 your recollection as to the amount of dollars outstanding
10 during a portion of this no payments made period?

11 A Yes. It refreshes me, I guess.

12 Q And what is the amount shown there?

13 A Well, the amount shown is 2 million. However,
14 only 1.8 million are a progress payment. The other two are
15 for completion of milestones in the amount of 118,474.
16 That's for delivery of the first CENTAF system and for
17 completion of delivery of the IOC system, the October '85
18 system for 113,924.

19 Q But as of August 22, 1988, the amount of
20 outstanding progress payments was how much as reflected
21 there?

22 A 1.8 million.

23 Q In terms of the current status of TechDyn's
24 payments under this contract, where does TechDyn currently
25 stand with regard to making progress payments?

7.

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1 A They haven't paid us in a long time.

2 Q Can you tell me approximately how long a time that
3 has been that they haven't paid you again?

4 A Since December of '88.

5 Q So if we had had the foresight to do it, you would
6 have colored a portion of this period red as well. Is that
7 correct?

8 A Right.

9 Q And by how much is TechDyn currently in arrears?

10 A 1.6 million, I think.

11 Q Are you claiming that amount in this lawsuit?

12 A Yes.

13 MR. BOEHLERT: I do object and move to strike at
14 this time, Your Honor, because reviewing the pleadings there
15 is no demand for that amount. It may be something we
16 address with the Court but it's not part of this lawsuit.

17 (Pause.)

18 JUDGE BROWN: Where will I find it in the
19 counterclaim, Mr. Work?

20 MR. WORK: You'll find it in count 4, Your Honor,
21 which I think fairly covers payments due under --

22 JUDGE BROWN: Well, come up a minute.

23 MR. BOEHLERT: Count 4, Your Honor, is four
24 specific invoices and there's no demand for a contract
25 balance.

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1 A The maintenance of the system up in Iceland, for
2 one thing.

3 Q Will you describe the background of that issue,
4 please?

5 A Yes. I believe I said during my last testimony
6 that during negotiations we had cut out our guy and had
7 trained the TechDyn technician.

8 Q "Our guy" being Whittaker's field service person?

9 A Being Whittaker's field service person who was to
10 go up there as well.

11 Q Now, will you take us back to the pre-contract
12 period to recall for the jury what your understanding with
13 regard to field service responsibility was going into the
14 MOD 3 subcontract?

15 A Going into the MOD 3, we had agreed that TechDyn
16 would do the service and that we would train their
17 technicians to maintain the PDFA system that was up there.

18 Q And then what occurred as the program started?

19 A The system didn't break down for about a year.
20 When it did break down --

21 Q This is the IOC system?

22 A The IOC system. The RADIL did not break down.
23 When it did break down, we were issued a purchase order and
24 one of our field service engineers, Mr. Jim Sullivan, went
25 to Iceland and repaired the system.

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1 Q A purchase order is a new contract, is that
2 correct?

3 A That's correct. And we were paid for that effort.

4 Q All right. And then what happened?

5 A Thereafter, some expensive equipment broke in it.
6 We were issued a purchase order. We did go up there. We
7 did deliver that hardware. We were not paid for it. And
8 their position became stronger and stronger until in early
9 1988, their letters began to say well, this is your total
10 responsibility and whenever that system is down, you are to
11 go fix it.

12 Q Prior to January 1988, had they taken the
13 position to your recollection that that wasn't their
14 responsibility?

15 A Yes, they had. They had in fact requested that --
16 they had sent us an RFP requesting the amount of money it
17 would cost to have one of our guys go up there for an
18 extended period of time. They had sent letters requesting a
19 minimum spares buy for that system and so forth. So I
20 believe that they understood what the responsibilities
21 between us were.

22 (Continued on next page.)
23
24
25

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1 Q Understood them as you understood them, is that
2 correct?

3 A That's correct.

4 Q And then what happened after January 1988?

5 A They no longer understood them.

6 Q And what position did they take after January
7 1988, as relates to the field service issue?

8 A That it was entirely our problem, our
9 responsibility. And we were remiss in not going to do it.

10 Q And were there any other such issues that arose
11 where you began to sense that after January of 1988, TechDyn
12 was taking a different position than it had previously taken
13 with respect to the parties' relative responsibilities under
14 the contract?

15 A In the RCE as well. TechDyn had worked with us
16 and , you know, replaced components in the switching and
17 remote control units. And after that, they simply said,
18 it's all yours, you fix it.

19 Q Prior to a period in mid-1988, had TechDyn ever
20 taken the position that the external interface equipment
21 that was used in remotely controlling the outlining radios
22 was anything but TechDyn's own responsibility? Did you get
23 that question, or shall I repeat it.

24 A I got the question, but I don't really recall
25 whether they did or didn't .

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1 Q Now, apart from the RCE the field service
2 issue, were there any other issues in which TechDyn's
3 position, as to the parties' respective responsibilities,
4 appeared to change after January 1988?

5 A None that I can think of.

6 Q Was there an issue regarding cabling and packaging
7 that occurred some time in that temporal time frame?

8 A No, it was earlier.

9 Q Will you describe what the cabling packaging
10 issue?

11 A We were ready on schedule to deliver the first
12 CENTAF system.

13 Q That was the RADIL for use by the central Air
14 Force?

15 A That is correct. And the Air Force had agreed
16 that we shouldn't deliver it, because the original intent
17 was to use those CENTAF RADILs to do a clean up part of the
18 contract, where you verify your manuals, and you
19 authenticate your manuals. The training on them.

20 And then CENTAF really wanted their system. There
21 was some problem in Libya, and asked us to deliver it. And
22 we said yes, we would. But that TechDyn had some
23 responsibility there for some cabling and some packaging of
24 the DTS. CENTAF did not want the radios at that time.

25 Q Why would TechDyn have responsibility for that

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1 cabling and packaging concerning the DTS? Is that part of
2 the DTS?

3 A Yes.

4 Q And what happened then, with regard to this
5 cabling and packaging issue?

6 A They asked us how much it would cost for us to do
7 it, and since they, since we weren't prepared to deliver
8 that stuff, we sent them a proposal. And they sent a letter
9 back saying because you were late on the entire program, it
10 is your responsibility to do this work and you are directed
11 to do it.

12 Q Did you do it?

13 A Yes.

14 Q How much did it cost you to do it?

15 A Oh, around \$20,000.

16 Q And your understanding of the responsibility to do
17 that work, was what?

18 A What?

19 Q Who had responsibility to do that work under the
20 MOD 3 subcontract?

21 A TechDyn.

22 MR. BOEHLERT: Object, Your Honor. Move to
23 strike. Asks for legal conclusion.

24 JUDGE BROWN: I overrule the objection.

25 (Pause.)

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1 MR. WORK: Now, let's move to the logistics area,
2 Ms. Raymond. We've heard about the system O&M manual.
3 Under the MOD 3 subcontract as you understood it, well,
4 let's withdraw that and let's start from basics again.

5 I think you have described to the jury previously
6 the arrangement that had been made and the discussion that
7 the, just before August 30, 1985, and the meetings in
8 Burlington Hotel. Will you --

9 MR. BOEHLERT: Object, Your Honor, to the form of
10 the question. If Counsel could stop testifying and just ask
11 questions.

12 JUDGE BROWN: I think that it would be both
13 proper and save you a lot of time, Mr. Work, if you won't
14 give any beginning paragraphs, just ask the question.

15 MR. WORK: Very well, Your Honor. Ms. Raymond,
16 will you just refer to the jury, what arrangement was made
17 between the parties, just before the finalization of the
18 MOD-3 prime contract discussions in Burlington,
19 Massachusetts?

20 MR. BOEHLERT: Object, again on parol evidence.

21 JUDGE BROWN: I'll overrule that objection.

22 THE WITNESS: We agreed that we would each get a
23 subcontractor. It would be the same subcontractor. That
24 subcontractor would put out the manuals for us. TechDyn
25 would be responsible for putting the whole manual, kind of,

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1 together and taking it through. We would give PDFA input.

2 BY MR. WORK:

3 Q And the whole manual being what?

4 A In the case of the system manual, it, in the case
5 of the O&M, it was meant to be a single manual. For the
6 system.

7 Q And with both parties contributing?

8 A Right.

9 Q All right, now, what happened with regard to the
10 logistics arrangement after work started on MOD 3, if you
11 could just take us through that briefly.

12 A We sent out fees to various competing logistic
13 houses, and Whittaker chose Ocean TEchnology Incorporated.
14 OTI, and we had been under subcontract on the second of
15 October. TechDyn was unable to come to an agreement with
16 that group, and you know, it eventually went to someone
17 else, much later.

18 Meanwhile, OTI was working and delivering all
19 kinds of stuff, all kinds of manuals that were required to
20 be delivered. TechDyn didn't pass them on, because of
21 course, they didn't have their part to put together with it.
22 And after we complained to them a number of times and the
23 Air Force became aware, they did pass them on.

24 And from then on, we had two sets of manuals that
25 we had to do. A CFA manual and a PDFA manual. And the only

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1 thing that the Air Force said, was okay, that's fine, they
2 would take care of that. However, they did want a system
3 level O&M manual. And many meetings after --

4 Q Meaning?

5 A The Air Force, the customer. In many meetings
6 asked, when these manuals would come together. And TechDyn
7 gave us separate purchase order to do a system level manual,
8 using the CFA input.

9 Q Referring to the logistics support analysis plan,
10 what was to happen with regard to that plan once work
11 started on MOD 3.

12 MR. BOEHLERT: Objection. Lack of foundation.

13 JUDGE BROWN: I'm not sure I understand your
14 objection. Be more specific.

15 MR. BOEHLERT: Well, I don't think counsel has
16 established this witness is familiar with the support
17 analysis plan. Whether she was involved, whether she had
18 any knowledge of what was supposed to happen.

19 JUDGE BROWN: I overrule the objection.

20 MR. WORK: What happened with regard to the
21 logistic support analysis plan?

22 THE WITNESS: It was a subcontract to OTI, and
23 they did in fact deliver a logistics support analysis plan,
24 you know, the input portion of it. But it never went
25 forward to the customer, to TechDyn's customer, the Air

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1 Force, because you know, TechDyn didn't have their part
2 ready.

3 At that time, some time, i don't remember when you
4 know, months, we received a letter asking how much we could
5 get back for the deletion of this effort. And we replied
6 that we couldn't get back any since we had already prepared
7 the document.

8 BY MR. WORK:

9 Q Was a logistics support analysis plan ever
10 prepared for this program?

11 A No, not system.

12 Q And that was because of what?

13 A Because the Government deleted the requirement.

14 Q And the Government deleted the requirement based
15 on the correspondence you saw, for what reason?

16 A It had gotten beyond the time that it would be
17 used.

18 Q Now, moving forward in time, you indicated the Air
19 Force wanted a system manual. What happened with regard to
20 that system ?

21 A TechDyn awarded a purchase order to us to do the
22 system.

23 Q And that was a separate contract?

24 A Yes.

25 Q When did that occur?

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1 A I believe it occurred in late 87, fall of 87.

2 Q I'm going to show you a document I've marked as
3 Defendant's Exhibit 3N, it's a letter from Mr. Hise of
4 TechDyn to the Air Force, dated May 19, 1986. Are you
5 familiar with that document?

6 A Yes, I've seen it.

7 MR. WORK: We offer this document, Your Honor.

8 JUDGE BROWN: Any objection?

9 MR. BOEHLERT: No.

10 JUDGE BROWN: What number is it again?

11 MR. WORK: 3N.

12 JUDGE BROWN: Received.

13 (The document referred to, having
14 been previously marked for
15 identification as Defendant's
16 Exhibit 3N, was received in
17 evidence.)

18 (Pause.)

19 MR. WORK: Ms. Raymond, would you read the first
20 paragraph from this May 19, 1986, letter from Mr. Hise to
21 the contracting officer at ESD, please?

22 THE WITNESS: As directed in paragraph six in the
23 referenced letter, this is to advise you that the
24 Government's position on the technical manual, provisioning
25 requirements of the subject contract, is not considered by

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1 TechDyn Systems to be within the scope of the existing
2 contract requirements.

3 TechDyn is currently putting together the details
4 of its position and will submit this to you when completed.

5 BY MR. WORK:

6 Q Now, as the program wore on, Ms. Raymond, did
7 Techdyn have a position on the issue of whether the amount
8 of work the Air Force was requesting of TechDyn and then
9 hence TechDyn of Whittaker, was within or without the scope
10 of the arrangement that had been reached between the
11 parties at the time of contract?

12 A Yes, we did.

13 Q What position did Whittaker take?

14 A We agreed with TechDyn. Things that they now
15 wanted were not in scope, and they were not as agreed to.

16 Q Okay, now, will you take us down the road further
17 with regard to the completion of the system manual. Have
18 you encountered any problems with regard to the system
19 manual, and will you describe what they are?

20 A We, it was a long time before we got information
21 on the CFA O&M manual, and we wrote some letters expressing
22 our concern. We did receive information to put together
23 the CFA and the PDFA portions. WE went to a review in 1990,
24 where we --

25 MR. BOEHLERT: I object to this at this time, Your

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1 Honor, because counsel apparently has contended that that is
2 outside the scope of this lawsuit, it's a different
3 contract. And if that is the case, then this witness's
4 testimony can't be relevant to the matter before this court.

5 MR. WORK: Well, I'm interested in that, because
6 TechDyn has asserted the opposite position.

7 JUDGE BROWN: If it's agreed that it is not part of
8 the lawsuit, then we will stop now.

9 MR. WORK: It would require striking a good deal
10 of Mr. Ellis's testimony.

11 JUDGE BROWN: Well, we may want to do that. Is
12 that right, Mr. Boehlert?

13 MR. BOEHLERT: No, Your Honor. That's --

14 JUDGE BROWN: I overrule the objection, then. You
15 may respond to your situation, to your allegations as well
16 as take their own position.

17 THE WITNESS: Where was I?

18 JUDGE BROWN: I have no idea.

19 MR. WORK: You were spinning a very interesting
20 story about the completion of the system manual.

21 THE WITNESS: Yes, at a meeting, the Air Force
22 went over to get comments. And at that meeting, they told
23 us that --

24 MR. BOEHLERT: Object, Your Honor, hearsay.

25 JUDGE BROWN: Don't tell us what the Air Force

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1 said.

2 MR. WORK: I was, can I say I was told?

3 JUDGE BROWN: No.

4 THE WITNESS: We didn't have a full story. We
5 didn't have ECP31 or two, I don't know which.

6 MR. BOEHLERT: Object, Your Honor. Based on
7 hearsay.

8 JUDGE BROWN: I overrule the objection. She is
9 saying what she had and didn't have.

10 THE WITNESS: Which regarded the RCE modification.
11 We did get that and we followed further along --

12 MR. WORK: Now, let's just stop there so we
13 understand what engineering change proposal 31 and 32 on the
14 --

15 THE WITNESS: I don't know which it is because
16 it's on the TechDyn --

17 BY MR. WORK:

18 Q All right, but is it TechDyn engineering change
19 proposal to the Air Force, TechDyn at that time had not
20 shared with you, is that correct?

21 A That's true. It's on the new RCE.

22 Q All right.

23 A We have now gone through validation and
24 verification and we are waiting for prepublication review.
25 The Air Force has advised both TechDyn and us that we can't

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1 go to prepublication review until we have all of the proper
2 reproducible drawings in the system manual.

3 We did request the CFA drawings from TechDyn, the
4 kind of art work that is reproducible. And we were advised
5 that no, we couldn't have it. That we should actually take,
6 you know, the copies from the CFA manual and redraw that.

7 Q Did TechDyn ever explain to you why it wouldn't
8 give you the CFA drawings that you needed to complete the
9 system manual?

10 A Well, they said that they never said that they
11 would give them to us.

12 Q And how would you get them, simply them redrawing
13 all that work?

14 A I don't know. I had never considered that, Mr.
15 Work.

16 Q Would TechDyn's position that you had to recreate
17 these CFA drawings have any impact on, not only your
18 completion of the program, but TechDyn's completion of the
19 program?

20 A Would it?

21 Q Yes.

22 A Yes.

23 Q Let's mention briefly a small issue concerning the
24 DTS. Are you familiar with the requirements concerning
25 modification of the software to accommodate the modified DTS

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1 that was supplied by the Government through another program,
2 the Peace Shield program?

3 A Yes, I am.

4 Q Will you describe what that situation is?

5 A The modification changed a number of frames, and
6 therefore was thought to have effected the timing of
7 software. Now, we were required to do an analysis. It did
8 indeed effect the timing.

9 Q An analysis of, your software, is that correct?

10 A Of our software in regards to the timing of the
11 DTS, the frames.

12 Q And that analysis was required to take place after
13 you had received the outlined DTS in the late 1987 period?

14 A It was, yes, it was. It was required as a result
15 of an action item at a meeting.

16 Q And did Whittaker in fact undertake analysis to
17 determine what changes would have to made in the software
18 that was to be tested at SQT?

19 A Yes.

20 Q How much did that cost?

21 A That was 30,000 or so. I don't remember exactly,
22 Mr. Work.

23 Q Now, are you familiar with the issue concerning
24 the Alaska and Hawaii work?

25 A Yes.

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1 Q And what role did you have with regard to that
2 matter?

3 A I was involved in both proposals.

4 Q I'm not going to pull out the exhibits, but if you
5 can do this from memory. At one time, was there an option
6 in the MOD 3 subcontract, which gave TechDyn the option, an
7 option with respect to subcontract work with Whittaker as
8 relates to Alaska and Hawaii?

9 A Yes, there was.

10 Q And did that option, at some point, expire, and if
11 so, by what means?

12 A It expired by its expiration, I believe in April
13 of 87.

14 Q Was it April 30, 1987?

15 A That's right.

16 Q And what was the modification that reflected the
17 expiration, the modification of the subcontract, that
18 reflected the expiration of the subcontract modification, of
19 the subcontract option on April 30?

20 A Probably modification 8.

21 Q MOD 8 of the subcontract

22 A That's right.

23 Q Now, have you familiarized yourself with the prime
24 contract, as relates to this PACAF option under which the
25 Air Force had a right vis a vis, an option right vis a vis

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1 TechDyn, with regard to PACAF work?

2 A Yes, I reviewed that.

3 Q And do you recall when, if ever, that option
4 expired, and if so, by what means?

5 A It expired on 30 April 87 as well.

6 Q Now, madam, are you aware that sometime after --
7 strike that please. To your knowledge, did the option in
8 the subcontract ever get extended by a contractual document?

9 A No.

10 Q And so, it was expired as of April 30?

11 A That's correct.

12 Q Have you seen any document, contractual document,
13 which extended the Air Force's option under the prime
14 contract beyond April 30, 1987?

15 A No.

16 (Continued on next page.)

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1 Q Have you see a document entitled a request for
2 proposal to TechDyn issued following the expiration of the
3 option in the prime contract?

4 A Yes, I have.

5 Q What is a request for proposal based on your
6 understanding of such documents, given your experience in
7 this field?

8 MR. BOEHLERT: Object, Your Honor, to the general
9 nature of the question.

10 JUDGE BROWN: I'll overrule the objection.

11 THE WITNESS: It's a request by some agency for a
12 proposal and price on something that they need.

13 BY MR. WORK:

14 Q Based on your understanding of such documents --
15 are you familiar with such documents?

16 A Yes. I review them all the time.

17 Q Based on your understanding of such documents, do
18 they create any contractual rights or obligations?

19 A No, they do not.

20 Q And subsequent to -- well, what is your
21 recollection of the Air Force's issuance of a request for
22 proposal to TechDyn following the expiration of the option
23 for the PACAF work in the prime contract and the
24 subcontract?

25 A They issued a proposal in late 1987. It was meant

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1 to go within the framework of the ICCE subcontract.

2 Q Excuse me -- I'm talking about the prime
3 contract. Did the Air Force ever issue a request for
4 proposal to TechDyn following the expiration of the option
5 in the prime contract?

6 A Yes.

7 Q And when was that?

8 A That was in May of '87.

9 Q May of '87.

10 A Yes.

11 Q What happened after that?

12 A They issued a request for proposal to Whittaker.

13 Q All right. "They" being?

14 A They being TechDyn.

15 Q Now, are you aware that TechDyn ever submitted a
16 proposal to the Government in response to the May 1987 RFP?

17 A Yes, they did.

18 Q When did they do that?

19 A On November 25, I believe, of 1987.

20 (Pause.)

21 Q I hand you a document we have marked as
22 Defendant's Exhibit 49N, Ms. Raymond. There are several
23 Department of the Air Force certificates on the top but I'll
24 turn to a page entitled "Justification Review Document" with
25 a number of signatures on it and underlying that a document

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1 entitled "Justification for Other than Full and Open
2 Competition".

3 And I'll just hand you that and ask you if you are
4 familiar with that document.

5 A Yes, I read it.

6 Q What is it?

7 A It's a sole source justification which the Air
8 Force needs to create and sign in order to go sole source
9 for a particular vendor. And by sole source, I mean they
10 don't compete it. They don't get proposals from several
11 companies.

12 MR. WORK: I offer Defendant's Exhibit 49N.

13 MR. BOEHLERT: No objection, Your Honor.

14 JUDGE BROWN: It's received.

15 (The document referred to, having
16 been previously marked for
17 identification as Defendant's
18 Exhibit 49N, was received in
19 evidence.)

20 BY MR. WORK:

21 Q Can you indicate from that document, Ms. Raymond,
22 when this sole source justification memorandum was issued?
23 Or when it was signed?

24 A Okay. It was signed and approved beginning 16
25 November '87 and the last signature is dated 19 November

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1 '87.

2 Q Was that before or after TechDyn submitted its
3 proposal to the Air Force in response to the Air Force's May
4 29, 1987 RFP?

5 A It was before.

6 Q So the Air Force issued this sole source
7 justification before TechDyn submitted its proposal.

8 A That is correct.

9 MR. WORK: Your Honor, to save time, if I may just
10 read a portion of this?

11 JUDGE BROWN: Go ahead.

12 MR. WORK: I'm reading from the "Justification for
13 Other than Full and Open Competition". It's issued by the
14 Electronics System Division of the United States Air Force.

15 "Description of the action. Approval is hereby
16 requested to negotiate a new firm fixed price contract on a
17 sole source basis with Whittaker Command and Control
18 Systems, formerly known as Command Control and
19 Communications Corporation (4C) of Torrance, California.
20 WCCS is a wholly owned subsidiary of Whittaker Corporation
21 of Los Angeles, California. This action is being undertaken
22 to reduce procurement costs to the Government on the basis
23 of component breakout from existing Government contract" and
24 then there's a Government contract number, "with Small
25 Business Administration and TechDyn Systems Corporation.

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1 Through the existing contract with SBA and TechDyn, the Air
2 Force has taken delivery of three RADIL units produced by
3 WCCS. Therefore, the technical and schedule risks are rated
4 low with this procurement."

5 (Pause.)

6 JUDGE BROWN: May we have that up here?

7 MR. WORK: Oh, yes. Sorry.

8 BY MR. WORK:

9 Q And it was approximately seven or eight days after
10 the Air Force reached that decision that TechDyn submitted
11 its proposal for the first time. Is that correct?

12 A Right.

13 Q Now, did Whittaker subsequently, subsequent to
14 TechDyn's proposal, ever receive a request for proposal from
15 the Air Force?

16 A Yes, we did.

17 Q And when was that?

18 A I believe it was in January of 1988.

19 Q And did Whittaker respond to that?

20 A Yes.

21 Q One step that we neglected to mention. With
22 regard to TechDyn's proposal, at some point in time, did
23 TechDyn submit a request for proposal to Whittaker for a
24 proposal to be incorporated into TechDyn's proposal?

25 A I said that, Mr. Work.

7.
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1 Q All right. Now, have you undertaken any
2 comparison of Whittaker's proposal to TechDyn which was as
3 we know incorporated in TechDyn's November 25, 1987 proposal
4 to the Air Force and Whittaker's proposal to the Air Force
5 in response to the Air Force's January 1988 request for
6 proposal to Whittaker?

7 A Yes, I've undertaken an analysis.

8 Q Would you turn, please, to tab 41 of the book in
9 front of you? What is that?

10 A It's a comparison of Whittaker ACC/PACAF proposals
11 to TechDyn and to the U.S. Air Force.

12 Q Did you prepare this analysis?

13 A Yes, I did.

14 Q And what did you utilize in preparing it?

15 A Both proposals, the final proposal to TechDyn
16 Systems and the proposal to the Air Force.

17 Q Is this chart true and accurate to the best of
18 your knowledge and belief, Ms. Raymond?

19 A Yes.

20 MR. WORK: Your Honor, may I publish this to the
21 jury so Ms. Raymond may explain it to them?

22 JUDGE BROWN: Any objection?

23 (Pause.)

24 MR. BOEHLERT: No objection, Your Honor.

25 JUDGE BROWN: You may do so.

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1 (Pause.)

2 BY MR. WORK:

3 Q Ms. Raymond, I'll point and if you can simply
4 explain to the jury what you have depicted on this chart,
5 starting with the titles.

6 A That title? It's the Whittaker proposal and then
7 one title is the TechDyn proposal submitted on November 13,
8 1987.

9 Q This is the proposal -- the November 13 date is
10 the date on which you submitted a proposal to TechDyn, is
11 that correct?

12 A A revision, yes.

13 Q A revision of a proposal to TechDyn.

14 A Yes.

15 Q So this Whittaker proposal to TechDyn of November
16 13, 1987 and Whittaker proposal to the Air Force of January
17 25, 1988 -- is that right?

18 A Right.

19 Q All right. Now, would you just explain what the
20 proposed price is you have indicate here?

21 A To TechDyn, 2.7 million; to the Air Force 2.8
22 million. Of those 2.8, I think 100,000 or so was an extra
23 option. So for comparative purposes, we should actually say
24 2.7 and almost 2.8.

25 Q So your proposal to the Air Force was actually

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1 higher than your proposal to TechDyn?

2 A Yes, it was.

3 Q And then what do we have below that under the
4 title proposed hours?

5 A The hours proposed for each effort for TechDyn
6 were 23,351 and for the Air Force 21,000. What I did then
7 is I looked -- I looked at each proposal. Each proposal had
8 a different statement of work with it.

9 In the TechDyn instance, it was meant to fit
10 within a contract that required a great number of management
11 deliveries each month. It also required lots of
12 documentation.

13 It was for a six-month delivery schedule rather
14 than a four-month delivery schedule and there were different
15 tasks in it.

16 Q May I interrupt for just a second so we can go
17 back to basics?

18 When you say there was a different statement of
19 work for each proposal, are you saying that TechDyn gave you
20 a request for proposal with a statement of work in it?

21 A Yes.

22 Q And then the Air Force gave you a different
23 request for proposal with a different statement of work in
24 it. Is that correct?

25 A Yes. That's correct.

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1 Q And what are you doing in these boxes? Are you
2 trying to equate them?

3 A I'm trying to equate them. So I'm taking out the
4 hours --

5 Q Apples to apples comparison.

6 A Right. I'm taking out the hours for unlike tasks.

7 MR. BOEHLERT: Object, Your Honor, to any further
8 testimony on this chart.

9 During discovery, it was Whittaker's position that
10 they produced all their Alaska PACAF documents and could not
11 locate the statement of work related to the proposal they
12 bid on. Now there's testimony to a statement of work that
13 was never furnished.

14 JUDGE BROWN: Let's take a 15-minute recess and
15 we'll work on this while we're doing it and you can step
16 down.

17 Do you have the statement of work, Mr. Work?

18 (Pause.)

19 MR. WORK: We're going to have to wait for Ms.
20 Raymond to come back to identify what this mass of papers
21 is.

22 JUDGE BROWN: Okay. I'll come back in 15 minutes
23 to look at it. Meanwhile, show it to Mr. Boehlert if you
24 find it. He's entitled to see it.

25 (Brief recess.)

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1 JUDGE BROWN: Okay, we're ready.

2 MR. WORK: Ms. Raymond, what documents did you
3 consult in preparing these comparative analyses?

4 THE WITNESS: The proposal submitted to TechDyn
5 Systems on 13 November 1987.

6 BY MR. WORK:

7 Q That's shown here on the top?

8 A That's correct. And the proposal submitted to the
9 Air Force on 25 January 1988.

10 Q Will you go back down to the proposed hour
11 sessions and tell us how you tried to make this an apples to
12 apples comparison?

13 A I counted out the hours that were proposed to each
14 entity, and I took the basis of estimate sheets for each
15 proposal and compared the two. In those cases where there
16 wasn't one for the other, I made that a less hour because
17 that wasn't then required for performing tasks.

18 Q YOu deleted those unlike asks out.

19 A That is correct.

20 Q And then under the category, alike tasks?

21 A I compared those and added them up.

22 Q So, for hours for like tasks in your proposal to
23 TechDyn you had 16,037 hours and in your proposal to the Air
24 Force you had 16,134 hours, is that correct?

25 A That is correct.

MARIE RAYMOND - DIRECT EXAMINATION

2683

1 MR. BOEHLERT: Your Honor, may I also add to the
2 objection, relevance. It is the same issue --

3 JUDGE BROWN: Let's not put that in evidence. The
4 big chart. Don't you have a little chart. It's hard enough
5 for the clerk's office to keep all these books without
6 asking to keep a chart.

7 MR. BOEHLERT: Your Honor, this exhibit is no
8 different than the other two that were just, that the
9 objection was sustained to. There is no relevance for this
10 case. It doesn't show damages.

11 JUDGE BROWN: Well. I think it is in opposition
12 to the other exhibit, to your damages, at least. I overrule
13 the objection to this.

14 BY MR. WORK:

15 Q Ms. Raymond, at any time during the course of the
16 ICCE program, has Whittaker submitted a claim, or claims to
17 TechDyn based on the added work that the jury has heard
18 about in this case?

19 A Yes.

20 Q On what basis have, on what contractual basis,
21 what contractual article, have those claims been based?

22 A It's been on the changes clause.

23 (Pause.)

24 Q Ms. Raymond, I hand you a document that we have
25 marked as Defendant's Exhibit 42D. It appears to be a

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1 letter from Mr. Fournery of TechDyn, contract administrator
2 of TechDyn, to you, dated April 1987. Specific date in
3 April is either illegible or was never there. Do you
4 recognize that document?

5 A Yes, I do.

6 Q And that has a machine stamp on it, do you
7 recognize that stamp?

8 A Yes, that's my stamp.

9 Q What date is that stamp?

10 A April 30, 1987. On page two you will see a date
11 of the letter, of 30 April 1987, as well.

12 Q Thank you.

13 MR. WORK: Your Honor, I offer Defendant's Exhibit
14 42D.

15 JUDGE BROWN: Any objection to 42D?

16 MR. BOEHLERT: I object to the portion of it that
17 is hearsay, the second part, the Air Force letter.

18 (Pause.)

19 JUDGE BROWN: I overrule the objection. It was
20 attached and meant to be sent by TechDyn to Whittaker as
21 part of the letter itself.

22 (The document referred to, having
23 been previously marked for
24 identification as Defendant's
25 Exhibit 42D, was received in

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1 evidence.)

2 MR. WORK: Ms. Raymond, what is this letter?

3 THE WITNESS: It's a letter from TechDyn System's
4 that asks us to submit a claim.

5 BY MR. WORK:

6 Q To TechDyn?

7 A To TechDyn, yes.

8 Q And did Whittaker in fact respond to this letter
9 by submitting a claim to TechDyn?

10 A Yes, we did.

11 Q When was that?

12 A That was on the 29th of May, 1987.

13 Q And did Whittaker submit subsequent claims to
14 TechDyn on the same changes clause basis?

15 A Yes.

16 Q And what years and months did Whittaker submit
17 those claims?

18 A Well, we had to revise it a number of times, so,
19 in 1988, 89, 90.

20 Q Has Whittaker ever received any compensation under
21 those claims?

22 A No.

23 Q Thank you. If you could just give that to Judge
24 Brown, please.

25 (Continued on next page.)

MARIE RAYMOND - DIRECT EXAMINATION

2686

1 MR. WORK: Let's focus on the claim submitted in
2 '89 and '90. Were you part of the group in 1989 that
3 gathered to prepare a claim based on added work on this
4 program?

5 MR. BOEHLERT: Your Honor, I object to the leading
6 questions.

7 MR. WORK: This is just an introduction.

8 JUDGE BROWN: I overrule the objection to that
9 question.

10 THE WITNESS: Yes, I had previously written an
11 entitlements section early in 1989 and we priced that.

12 BY MR. WORK:

13 Q Whom did the group consist of that formed to
14 engage in these activities?

15 A It was Mr. Jack Cannady, who is presently my
16 supervisor.

17 Q What's his position at Whittaker at the present
18 time?

19 A He's the Vice President of Business Management.

20 Q And who else was part of this group?

21 A Claudia Justis, who worked on the software. Mr.
22 Joe Emerald, who worked on field engineering. Mr. Craig
23 Smith. Ms. Nannette Johanson. Ms. Bonnie Ellis. Arnold
24 Durtsche. Do you want me to go through everybody?

25 Q Is this a sample of the names?

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1 A Yes.

2 Q All right. You don't have to go through everyone.

3 And what was your role?

4 A I led the cost effort.

5 Q All right. Working with Messrs. Cannady and the
6 others that you mentioned.

7 A Yes.

8 Q At some point in time in connection with this
9 operation, did the group receive estimates of hours from
10 people who had worked in particular areas?

11 A The people that I mentioned who were the people
12 that had been involved in the project provided estimates of
13 hours and those of us, myself included, put those in the
14 computer to come up with the pricing.

15 Q All right. And we have another witness to
16 describe this process, so we'll go forward.

17 (Continued on next page.)

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MARIE RAYMOND - DIRECT EXAMINATION

2688

1 Q Ms. Raymond, when did TechDyn file its lawsuit
2 against Whittaker in this case?

3 A November 1989, I think it was the 16th or 17th.

4 MR. WORK: Your Honor, may I confer with you just
5 a minute, I don't want to waste the jury's time.

6 JUDGE BROWN: Wait just a moment, so Mr. Boehlert
7 can hear what you are saying.

8 (Bench Conference -- off record.)

9 MR. WORK: I have no further questions of Ms.
10 Raymond at this time.

11 JUDGE BROWN: Cross-examine?

12 (Pause.)

13 CROSS-EXAMINATION

14 BY MR. BOEHLERT:

15 Q Good morning, Ms. Raymond.

16 A Good morning.

17 Q The first thing you talked about on direct was
18 schedule, is that correct?

19 A That's correct.

20 Q And the obligation of 4C, if any, under the
21 subcontract to repair schedules of the ICCE project. Do you
22 recall testimony about that?

23 A To prepare schedules for the project? We were to
24 give input into the schedule, yes.

25 Q Did 4C do that?

MARIE RAYMOND - CROSS EXAMINATION

2704

1 requirements of this contract concerning support software.

2 A No, that's not true. That happened to be a
3 contractual issue.

4 Q Okay. So Whittaker was furnishing support
5 software. Is that correct? During this period. It was
6 being rejected by the Air Force and TechDyn --

7 A No. Whittaker has proprietary source software.
8 When you deliver a program like -- you know, if you buy
9 WordPerfect, they give you all of the support software that
10 you need with it but they don't give you the source code.
11 They give you what's called object code. The program works
12 fine, you really don't need the source code. This is stuff
13 that is proprietary and we license it out for lots of money.
14 And there was a tremendous pressure to give away this stuff
15 and eventually we did agree to deliver some of it.

16 Q Have you been making those decisions?

17 A No. Mr. Brancati has been making those. Along
18 with Mr. Cannady and with Mr. Sole, who is one of the vice
19 presidents of engineering.

20 Q Now, recall that date of the operational software,
21 August 1990. Were you involved in that decision on whether
22 or not the operational software was done?

23 MR. WORK: Object to the preface to the question.

24 JUDGE BROWN: Don't preface the question. Just
25 ask your question.

6.
MARIE RAYMOND - CROSS EXAMINATION

2705

1 MR. BOEHLERT: Okay.

2 BY MR. BOEHLERT:

3 Q Were you involved in the issue of the
4 acceptability of the operational software for the PDFA?

5 A The acceptability of the operational software for
6 the PDFA had been settled in December 1987.

7 Q We're going to get to that chart because I do want
8 to find out your position on that. Let's talk about
9 logistics, if we could, please.

10 A Okay.

11 Q You said that originally there was a requirement
12 for a logistics support analysis plan. Is that correct?

13 A That's correct.

14 Q And did Whittaker have money in its subcontract
15 for that plan?

16 A Yes.

17 Q And did Whittaker embark on an effort to get a
18 plan from OTI?

19 A Yes.

20 Q And did OTI prepare a plan and submit it to
21 Whittaker?

22 A Yes.

23 Q Was Whittaker paid for that?

24 A I assume so. I don't know.

25 Q Okay. You said earlier after the plan was

MARIE RAYMOND - CROSS EXAMINATION

2706

1 cancelled that there was a request that Whittaker give some
2 money back. That's what I understood you to say on direct.
3 Is that correct?

4 A That's correct.

5 Q And isn't it true that Whittaker wrote back and
6 said because we've incurred the cost, we're not going to
7 give any money back.

8 A That's correct.

9 Q And isn't it a fact that no money was given back.

10 A That's correct.

11 Q I want to talk about those DTSSs and this issue of
12 whether or not they were timely provided. Who had the
13 contract to buy those DTSSs?

14 A Whittaker did.

15 Q So if there was any delay, it was a delay from --
16 who was the supplier, Magnavox?

17 A Magnavox.

18 Q So if Magnavox delayed them, it was delaying in
19 furnishing them to Whittaker. Is that correct?

20 A That's correct.

21 Q I would like to go to that scheduling chart that
22 you mentioned earlier. Do you have that chart in front of
23 you, Ms. Raymond?

24 A Yes.

25 Q Did you prepare this chart?

MARIE RAYMOND - CROSS EXAMINATION

2707

1 A I helped. Yes.

2 Q Who did you help?

3 A Various people in the Crowell & Moring office.

4 Q Who were they?

5 A I think it was Ms. Devorah Mayman, Mr. Johnson and
6 I don't remember the other person's name.

7 Q So you worked with their lawyers to put this
8 together.

9 A Lawyers and others, yes.

10 Q Did you work with their lawyers on every one of
11 these charts?

12 A No. No, I don't think I did.

13 Q Do you recall any that you didn't work with the
14 lawyers?

15 MR. WORK: You haven't established which ones she
16 worked on.

17 MR. BOEHLERT: The ones we've discussed today.

18 BY MR. BOEHLERT:

19 Q What about this allocation of program funding that
20 we looked at, chart 12?

21 A I did that by myself.

22 Q Well, we'll get to that one. Okay. So this chart
23 here -- did you find the dates or did they find the dates
24 for you?

25 A No, I found them from that program schedule where

MARIE RAYMOND - CROSS EXAMINATION

2708

1 it says prior and I just picked them from there.

2 Q That's right. So you relied completely on that
3 program schedule. Is that correct?

4 A That's correct. I wanted to portray TechDyn's
5 idea of when things were finished.

6 Q Okay. So you admit this is your interpretation of
7 a TechDyn schedule.

8 A I guess so.

9 Q And which schedule was it that you took these
10 numbers from?

11 A The December schedule.

12 Q December of what year?

13 A 1990.

14 Q And was that the chart or the schedule that Mr.
15 Work just furnished you?

16 A Yes.

17 Q That was 1615 that became Defendant's Exhibit 106.

18 A I also did some updating off another one.

19 (Pause.)

20 MR. BOEHLERT: I'm going to ask that we put that
21 chart in front of you, if we could, please.

22 THE WITNESS: Okay.

23 (Pause.)

24 BY MR. BOEHLERT:

25 Q I place before you Defendant's Exhibit 106, if I

MARIE RAYMOND - CROSS EXAMINATION

2709

1 could, please.

2 A Okay.

3 Q And that's the document you used to prepare this
4 chart. Is that correct?

5 A In addition to -- yes. In addition to the
6 updating that I said I did based on the program review.

7 Q Okay. Did you have any participation in the
8 preparation of this TechDyn 27 December 1990 schedule?

9 A Only as far as input was concerned.

10 Q Did you personally give input?

11 A Yes. I wrote a letter, I think.

12 Q Who did you write it to?

13 A Probably Mr. Rosen. Was it Rosen or was he gone
14 by that time?

15 Q I don't know. I just ask you if you recall.

16 A It was probably Mr. Rosen. I did write a letter
17 about that schedule.

18 Q What did your letter say?

19 A I don't remember.

20 Q You gave some input. Did you participate at all
21 in actually preparing this document?

22 A No, I did not. You mean hands on?

23 Q Yes.

24 A No.

25 (Pause.)

MARIE RAYMOND - CROSS EXAMINATION

2710

1 Q So we know where you got the information. Okay.
2 What was it that you say signifies the end of Whittaker's
3 testing?

4 A It was the acceptance of the report, the SQT
5 report.

6 Q Acceptance of the SQT report.

7 A Yes. As noted on that schedule.

8 Q How was that document accepted, if you recall?

9 A I don't recall.

10 Q Do you recall the Air Force accepting that
11 document?

12 A I recall the Air Force saying there was nothing
13 wrong with the report. However, wouldn't we please explain
14 exactly how each and every STR was fixed.

15 Q And how long did it take Whittaker to do that?

16 A We have never done it.

17 Q Never done it. Okay. So the Air Force since May
18 1988 has been asking Whittaker to correct open STRs coming
19 out of the system qualification test.

20 A No, no. You misunderstood me. In the report, in
21 the format of the report, they wanted to know exactly how we
22 fixed them and that was already in there. We've had ongoing
23 discussions on that. The Air Force has now said that's
24 fine, we don't need to know exactly how you fixed them.
25 What you have written on the bottom of your STRs is

MARIE RAYMOND - CROSS EXAMINATION

2711

1 sufficient.

2 Q Right. And how long has that process taken?

3 A Mr. Boehlert, it wasn't part of the job and it's
4 not called out in the MIL standards so it isn't required.

5 Q I understand your position on that, Ms. Raymond,
6 but how long did that process take before the Air Force
7 accepted the SQT report as being final?

8 MR. WORK: Objection to form of the question.
9 It's vague, Your Honor. "That process" has not been
10 defined.

11 JUDGE BROWN: I'll overrule the objection.

12 THE WITNESS: I don't really know.

13 BY MR. BOEHLERT:

14 Q Okay. I do have a document here that might
15 refresh your memory. Let me ask you first -- was it May of
16 this year, 1991, when the Air Force accepted that SQT
17 report?

18 A It may have been later.

19 Q It may have been later.

20 A It may have been later. It may have been last
21 month. I just don't remember, Mr. Boehlert. They accepted
22 the SQT and the report, they just wanted more format
23 changes.

24 Q Okay. So that May '88 number that you have up
25 here for the completion of testing -- you took that off a

MARIE RAYMOND - CROSS EXAMINATION

2712

1 TechDyn document, that's right?

2 A Of course. Yes. That's what I said.

3 Q Okay. But you didn't pay any attention at all to
4 what the Air Force was saying concerning the acceptability
5 of that SQT report, did you?

6 A I had no contract with the Air Force.

7 Q I understand your testimony. Software delivery --
8 I'd like to look at that. Now, where did you get that
9 number?

10 A From Mitre's schedule.

11 Q We've had that all through the trial. By Mitre's
12 schedule you mean TechDyn's schedule, I trust.

13 A Right. Yes. TechDyn's.

14 (Pause.)

15 Q And how did you arrive at the date April '88?

16 A From TechDyn's schedule.

17 Q Tell me specifically how, though. You've got that
18 schedule in front of you. I'd like to know how you came
19 upon telling this jury that Whittaker finished its software
20 delivery in April of 1988.

21 (Pause.)

22 A It will take me a while to go through it.

23 MR. BOEHLERT: Take your time because that's an
24 important date.

25 (Pause.)

MARIE RAYMOND - CROSS EXAMINATION

2713

1 THE WITNESS: TAF completion -- 87-350 plus fixes.

2 BY MR. BOEHLERT:

3 Q Okay. And what page are you looking at?

4 A On page 5.

5 Q Do you know whether there were any outstanding
6 trouble reports from the TAF certification test after that
7 date?

8 A I don't know. We were not supposed to be fixing
9 TAF STRs.

10 MR. WORK: Your Honor, I object to this line of
11 questioning. Mr. Boehlert is not trying to impeach Ms.
12 Raymond, he's trying to impeach his company's own document.

13 JUDGE BROWN: I'll overrule the objection.

14 MR. BOEHLERT: I'm not trying to impeach the
15 document, I'm trying to find out -- this is a chart that
16 purports to state --

17 JUDGE BROWN: I overruled the objection.

18 MR. BOEHLERT: Okay. I'm sorry.

19 JUDGE BROWN: We don't need argument if I overrule
20 the objection.

21 MR. BOEHLERT: Thank you, Your Honor. I'm sorry.

22 BY MR. BOEHLERT:

23 Q Do you know whether any outstanding trouble
24 reports existed after the TAF certification testing?

25 A Yes. There were some.

MARIE RAYMOND - CROSS EXAMINATION

2714

1 Q Do you know whether Whittaker agreed that certain
2 of those were within the scope of the subcontract?

3 A Yes. That they were within -- not the scope of
4 the subcontract but within the scope of the ICCE software
5 program so we did fix those.

6 Q You fixed those. When did the final one get
7 fixed?

8 A I don't know exactly but we sent a tape back and
9 forth to TechDyn a number of times to get them to accept it.

10 Q When did all that occur?

11 A In early 1990.

12 Q And that was software version 90-054. Is that
13 correct?

14 A Right. Correct.

15 Q So would that be the 54th day of 1990?

16 A Of 1990.

17 Q And then it took some time for that tape to be
18 accepted. Is that correct? Do you know whether it was ever
19 accepted?

20 A I don't know. I mean, they're using it at Tyndall
21 and they've called and said they love it but I don't know
22 that it's been accepted. The people at Tyndall Air Force
23 Base.

24 (Continued on next page.)

25

MARIE RAYMOND - CROSS EXAMINATION

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1 A For a portion of it, yes. Some of it was
2 optional -- you know how that happens.

3 Q So Whittaker got more work after that?

4 A The proposal included some options.

5 Q TechDyn wasn't invited to participate in those
6 negotiations, was it?

7 A Why would they?

8 Q I want to come back to this claim process and I
9 want to understand what you did, Ms. Raymond, with respect
10 to accumulating these claim costs. Did you ever reach any
11 conclusions concerning the damages that TechDyn allegedly
12 caused Whittaker?

13 MR. WORK: May I hear the question again, please?

14 BY MR. BOEHLERT:

15 Q During direct, you mentioned that there was a
16 claim effort that you participated in at the direction of
17 Mr. Cannady. Is that correct?

18 A No.

19 Q What did Mr. Cannady ask you to do?

20 A Mr. Cannady did not ask me to do anything. He was
21 not then with the company.

22 Q Okay. What did you do with respect to the claim
23 effort? You mentioned a bunch of people's names -- Claudia
24 Justis, Joe Amerault, Craig Smith, Natalie Johnson, Bonnie
25 Ellis, Arnold Durtsche, others -- what was your involvement

MARIE RAYMOND - CROSS EXAMINATION

2737

1 with them again?

2 A I was working on a claim with them.

3 Q What kind of claim?

4 A A claim for additional work. It was an update of
5 the claim that we had previously submitted to TechDyn that
6 in a meeting with TechDyn and the Air Force the Air Force
7 required additional detail and that was the object of this
8 exercise.

9 Q Why did the Air Force ask for additional detail?

10 MR. WORK: Objection, Your Honor.

11 JUDGE BROWN: I sustain the objection of why the
12 Air Force asked.

13 BY MR. BOEHLERT:

14 Q Did you reach any conclusions, personally reach
15 any conclusions, as a result of that effort?

16 A In what way?

17 Q Explain to me what were you doing? You were
18 updating a claim?

19 A Yes. I was updating a claim.

20 Q What does that mean?

21 A That means I was looking at the extra work that
22 had been done to see if more extra work had been done and if
23 we were entitled to any kind of recovery from TechDyn.

24 Q How did you determine if more work was done?

25 A I looked at all the documentation required by the

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1 contract, all the letters, all the notes. I talked to
2 everyone who had worked on it, so on and so forth.

3 Q Did you reach conclusions from that process?

4 A I reached a lot of conclusions but I don't know
5 how to answer you.

6 Q You mentioned the date when TechDyn filed its
7 lawsuit against Whittaker. Is that correct?

8 A Yes.

9 Q Some time in November of 1989.

10 A Yes.

11 Q Do you know whether Whittaker had sued TechDyn
12 prior to that point?

13 MR. WORK: Objection, Your Honor. May we approach
14 the bench, please?

15 JUDGE BROWN: Yes.

16 MR. WORK: This issue came out of the case with
17 the disputes issue. The reason that they sued TechDyn was
18 that TechDyn would not pursue the disputes clause that was
19 in the contract and you've said that's out so this should be
20 stricken.

21 MR. BOEHLERT: They asked for damages, sir.

22 JUDGE BROWN: Sir?

23 MR. BOEHLERT: They asked for damages.

24 JUDGE BROWN: So what?

25 MR. BOEHLERT: I'm just asking for -- the point

MARIE RAYMOND - REDIRECT EXAMINATION

2739

1 was made when TechDyn sued Whittaker, I'm just asking
2 whether Whittaker had sued first.

3 JUDGE BROWN: Why does it matter? It doesn't.
4 I sustain the objection.

5 (Pause.)

6 MR. BOEHLERT: That's all the questions I have at
7 this time. Thank you.

8 JUDGE BROWN: Any further questions, Mr. Work?

9 MR. WORK: I have a few more.

10 REDIRECT EXAMINATION

11 BY MR. WORK:

12 Q Ms. Raymond, Mr. Boehlert asked you about what
13 TechDyn -- strike that and let's do a little housekeeping so
14 you have enough elbow room to proceed.

15 JUDGE BROWN: And then strike it anyway and just
16 ask a question.

17 (Pause.)

18 THE WITNESS: I think this has become an exhibit,
19 Your Honor. I don't know if you want that.

20 MR. WORK: Is this an exhibit, too?

21 THE WITNESS: No, that one wasn't but that one
22 was.

23 (Pause.)

24 BY MR. WORK:

25 Q Mr. Boehlert was asking you about the contribution

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MARIE RAYMOND - REDIRECT EXAMINATION

2740

1 that TechDyn was proposing to make in the PACAF work in the
2 proposal that had been submitted. You mentioned that the
3 Air Force had deleted the requirement for any CFA equipment.
4 Will you explain that, please?

5 A The Air Force had decided that it could purchase
6 its own radios --

7 MR. BOEHLERT: Object to her testifying that the
8 Air Force decided.

9 JUDGE BROWN: I sustain the objection to her
10 saying what the Air Force decided.

11 BY MR. BOEHLERT:

12 Q You're familiar with the TechDyn proposal, aren't
13 you?

14 A Yes, I am.

15 Q And was TechDyn proposing to provide anything
16 other than what you referred to as management services?

17 A No, it was just PDFA and management services by
18 TechDyn.

19 Q And I have here Defendant's Exhibit 912 which is
20 TechDyn's claim for damages in connection with this Alaska
21 and Pacific work. What is the bottom line of that claim,
22 please? Just read the components of the claim and then the
23 bottom line.

24 A Lost profits, 329,429. General and
25 administrative expenses, 230,540. Overhead, 49,033. For a

MARIE RAYMOND - REDIRECT EXAMINATION

2741

1 total of 609,002.

2 Q Did TechDyn ever explain to you what it was going
3 to do in connection with the Alaska and Pacific work for
4 \$609,002?

5 A No.

6 Q Did Whittaker need to be managed in providing
7 another RADIL?

8 A I don't believe so.

9 Q Now, just a couple of cleanup things. Mr.
10 Boehlert repeatedly used the term "work stoppage" in
11 connection with a period in the summer of 1988. Did
12 Whittaker stop work in terms of not having anybody working
13 on this program during that period of time?

14 A No, there were people working. There was even --
15 there were joint meetings between TechDyn and WES and there
16 was a hardware acceptance test in August. There were
17 meetings where manuals were reviewed and so forth. There
18 were people working.

19 Q Approximately how many people did Whittaker have
20 working during that period that Mr. Boehlert refers to as a
21 work stoppage period?

22 A Five, six, seven -- something like that.

23 Q Based on personal knowledge, how many people did
24 TechDyn have working during that period, other than, say,
25 installers of equipment in Iceland?

MARIE RAYMOND - REDIRECT EXAMINATION

2742

1 A Five or six.

2 Q With regard to the logistics support analysis
3 plan, you indicated that you provided materials for such a
4 plan. Is that correct?

5 A That's correct.

6 Q Did a plan, an ultimate plan for this program ever
7 materialize?

8 A No.

9 Q Why not?

10 A Well, TechDyn hadn't done their part of it or put
11 the plan together so our submission just -- it didn't go
12 anywhere.

13 Q To whom did we make our submission?

14 A To TechDyn. And they needed to complete it, you
15 know, with their portion in it so that they could submit it
16 to their customer for comment.

17 Q And did that ever happen?

18 A No.

19 (Continued on next page.)

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MARIE RAYMOND - REDIRECT EXAMINATION

2743

1 Q Now, with respect to the DTS, Mr. Boehlert,
2 suggested in his cross that Whittaker had some
3 responsibility for the late delivery date. Who was
4 responsible for --

5 MR. BOEHLERT: Your Honor, object to all these
6 prefaces to --

7 JUDGE BROWN: I sustain the objection. I really
8 want you to stop the prefaces, and just ask your question.

9 MR. WORK: Yes, Your Honor. Who was responsible
10 for the late delivery of DTS?

11 THE WITNESS: Ultimately the Air Force. They had
12 furnished the design and they were delayed in their design
13 to Magnavox.

14 BY MR. WORK:

15 Q The Air Force hadn't furnished the design to whom?

16 A To Magnavox, the manufacturer of the DTS.

17 Q And in what program was this DTS being designed,
18 this modified DTS?

19 A A program called Peace Shield between the Air
20 Force and Boeing Company.

21 Q Did Whittaker have any ability to get that DTS
22 before the Air Force made it available to them?

23 A No.

24 Q Finally, with respect to the IOC payments, Ms.
25 Raymond, on the IOC payments, how much was billed and how

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1 much has been paid?

2 A I'm not --well, I can't really tell you how much
3 on all of it, because there was a level of effort and then
4 there was also a task for a, for the system, for Iceland.
5 And that was the only task that was progress billing task.
6 And for that, it was 385,000 plus, was billed and only about
7 70 percent of that was paid.

8 Q I see.

9 (Pause.)

10 BY MR. WORK:

11 Q Actually, I don't think I need to show that to
12 you.

13 A Okay.

14 MR. WORK: Your Honor, this document, which was
15 referred to yesterday with Mr. Brancati, has now been
16 authenticated by the Air Force and I have shown TechDyn's
17 counsel the authentication.

18 JUDGE BROWN: 20UU, it appears. Any objection to
19 20UU?

20 MR. RIDDLES: None, Your Honor.

21 JUDGE BROWN: It's received.

22 (The document referred to, having
23 been previously marked for
24 identification as Defendant's
25 Exhibit 20UU, was received in

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1 evidence.)

2 MR. WORK: I will read a portion of this letter.
3 This is a letter of August 26, 1988, concerning the remote
4 control element. It's a letter from the Air Force to
5 TechDyn.

6 MR. BOEHLERT: For the record, at least, I am
7 going to objection to counsel just standing there reading a
8 letter.

9 There's a witness on the stand, and he's reading
10 to the jury. It's unusual.

11 JUDGE BROWN: It's unusual, and it's being done
12 in this trial because of the volume material.

13 MR. WORK: There are referenced in this document,
14 three matters --

15 JUDGE BROWN: Well, don't comment on it, just read
16 what you --

17 MR. WORK: I'm not commenting. Just the
18 reference. A ICCE, RCE technical interchange meeting at
19 Whittaker Electronic System in July 1988, the meeting at
20 WES between Mr. Brancati, WES, Captain Jacobsen, ESD, and
21 Colonel Johnson, ESD, July 21, 1988. C, telecon between Don
22 TechDyn and Captain Moeller WES and Captain Jacobsen ESD 23
23 August 1988. And I'll read the portion that relates to
24 those references.

25 During referenced b telecon, the Government

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1 reiterated a proposal made previously at reference a and b.
2 A, it will be acceptable for the RCE to require up to 15
3 minutes to complete the readiness test. However, failed
4 certain switch overs shall be accomplished less than two
5 minutes and shall be completed before resuming the system
6 readiness test. B, and engineering change proposal, ECP
7 submittal, should not be necessary. The above constitutes
8 design implementation which does not require changes to
9 current allocated base line.

10 Three, performance of the above task is to be
11 considered within the present scope of the subject
12 subcontract.

13 Ms. Raymond, are you familiar with this letter?

14 THE WITNESS: Yes, I am.

15 BY MR. WORK:

16 Q What happened to this solution?

17 A Soon after we received that letter, TechDyn
18 removed their equipment, but at the same time they took all
19 the RCE equipment and all the RCE software. And that
20 solution just, nothing happened with it.

21 Q And was that equipment the CFA equipment, or the
22 RCE equipment, ever made available to complete the
23 initiative in this letter?

24 A No.

25 MR. WORK: I have no further questions.

**TRIAL TESTIMONY OF
JACK R. CANNADY**

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1 DIRECT EXAMINATION

2 BY MR. WORK:

3 Q Will you state your full name, please?

4 A Jack Charles Cannady.

5 Q What is your current position?

6 A I am the vice president of business management of
7 Whittaker Electronics Systems.

8 Q I wonder if you would just briefly review your
9 post high school back ground for us, up to the current time.

10 A Well, upon leaving high school, I joined the Navy
11 and I was in demolition units three and five, as well as
12 beach master units. And after I got out of the Navy, after
13 four years, I joined the Convaire Organization of General
14 Dynamics in San Diego. And during that period of time, I
15 went to night school for approximately five years.

16 Q In what areas did you study --

17 A In San Diego City College, and San Diego State
18 College.

19 Q What areas did you study?

20 A Accounting, finance and contract law.

21 Q How long were you at General Dynamics?

22 A For 18 years.

23 Q At what level did you start?

24 A I started as a material control clerk in the
25 maintenance area?

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1 Q What position did you hold at the end?

2 A The senior controller of the electrodynamic group.

3 Q What does that mean?

4 A It is a group of electronic companies, as well as
5 missile companies. It's the Atlantis and Centaur missiles,
6 and I was the controller of that group responsible for
7 financing, estimating and management systems.

8 Q And what kind of work did you do in that position?

9 A Primarily budgets estimating, cost accounting,
10 finance and preparation of claims.

11 Q And from where did you go after your department
12 from General Dynamics?

13 A After 18 years there I went to System Development
14 Corporation, in which at that time was the largest software
15 corporation in the U.S. That was in Santa Monica,
16 California.

17 Q And what position did you hold there?

18 A I was the vice president of business management.

19 Q And what did you do in that?

20 A I was responsible for the financial controls, the
21 estimating, budgets and management systems of all of the
22 Government projects there.

23 Q Were you also involved in some claims work there?

24 A Yes, I was. I worked with claims both on the
25 medicare and Medicaid projects as well as sophisticated

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1 computer projects there.

2 Q And where did you go after leaving the position
3 there?

4 A Well, after I was with STC, I then advanced to the
5 position of chief financial officer of the corporation, and
6 we sold that company to the Burroughs Corporation, so after
7 10 years I went to AMEX Systems, which was an 8A
8 disadvantaged business, and I became the chief financial
9 officer of that company.

10 Q And in that capacity, what kind of work did you
11 do?

12 A I was responsible for all of the administrative
13 areas, as well as finance, scheduling, the management
14 systems, claims preparation, contract administration and
15 contract negotiations.

16 Q At AMEX, did you become acquainted with Mr. thomas
17 Brancati?

18 A yes, I did. In fact, I was one of the people that
19 recruited Tom Brancati to come to AMEX from the TeleDyn
20 corporation where he was executive vice president.

21 Q Did there come a time when Mr. Brancati left AMEX
22 and you left with him to go to Whittaker?

23 A We, Mr. Brancati became the president of AMEX
24 after developing the electronics division there, and
25 building it up, he became the president. We then sold that

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1 company to the Allied Signal Corporation and Mr. Brancati
2 left to head up the Whittaker Electronics System. I left
3 sometime after that to join him there as his financial
4 officer.

5 Q Did there come a time when you joined Ms. Raymond
6 and others at Whittaker in developing a claim based on added
7 work in the ICCE program?

8 A Yes, it was. It was in December of 88 that I met
9 Ms. Raymond, and Mr. Johnson, and went up to evaluate a
10 claim that had been prepared and give an opinion as to what
11 was necessary in order to enhance that claim and update it.

12 Q All right. And will you describe what you did in
13 that connection and what roles and areas of people in this
14 group played?

15 A Well, I --

16 MR. RIDDLES: I'm sorry, I couldn't hear Mr. Work,
17 I thought he was testifying again. Did he ask a question?

18 JUDGE BROWN: Yes.

19 MR. RIDDLES: Could you repeat it?

20 MR. WORK: Oh, sure. You were speaking of your
21 work with the group that was examining a claim based on
22 changes in the ICCE program --

23 MR. RIDDLES: That I heard. The question was what
24 I didn't hear.

25 MR. WORK: All right, that was the previous

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1 question, and now this question is , will you describe what
2 you and the other people in the group did?

3 THE WITNESS: Yes. I was responsible for
4 evaluating the work that was outside of the scope of the
5 exiting contract. Along with the team.

6 BY MR. WORK:

7 Q This is the ICCE subcontract?

8 A this is the ICCE subcontract that was with the
9 TechDyn corporation. And in evaluating that , we looked at
10 the original proposal that had been made to the TechDyn
11 Corporation, and we further looked at the work that was
12 being done and we depended a great deal on Marie Raymond for
13 an interpretation of what occurred during the negotiations
14 subsequent to the submittal of the proposal.

15 Using that as a baseline as to what was required,
16 we then --

17 Q Well, let me just get a description of the roles
18 of the various people.

19 A Yes.

20 Q Was Mr. Christensen involved?

21 A Mr. Christensen was the program manager for
22 Whittaker Electronics System, and he was in effect our
23 expert in our equipment and our software program and how
24 they had interdependence and how they played together in
25 order to do our potion of the system.

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1 Q You mentioned also that Mr. Johnson was involved.
2 What role --

3 A Mr. Johnson was involved. Mr. Johnson brought to
4 it, the overall scope of the e entire system, where we did
5 only a portion of the system, Mr. Johnson was aware of the
6 total system. BAsed on his knowledge of that particular
7 program, and his knowledge of those particular equipments,
8 and software, and was able to give our -- He was able to
9 give our estimate and our proposal a credibility --

10 MR. RIDDLES: I am going to object to whether Mr.
11 Johnson was able to give it a credibility and move that that
12 be stricken. That is outside the purview of this witness'
13 knowledge and is a question for the jury.

14 JUDGE BROWN: I sustain the objection to
15 characterizing him giving credibility and ask that the jury
16 disregard that. However, what he actually did in connection
17 with it can be considered.

18 MR. WORK: Now, we have described what this group
19 did with regard to the work -- withdrawn that. I think we
20 ought to define clearly your role in this group at this
21 time.

22 THE WITNESS: My role was to look at the estimate
23 as it had originally been proposed. At the contract as it
24 had been performed. Determined what the best way was to
25 depict those tasks beyond and above the scope of the

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1 existing contract. And prepare them into such a manner in
2 the claim, as to be able to justify them, substantiate them,
3 and negotiate.

4 BY MR. WORK:

5 Q To what extent did the role you played in this, in
6 this effort, related to previous claim efforts that you
7 described in your positions at GEneral Dynamics and the
8 other companies --

9 MR. RIDDLES: I object to that, Your Honor,
10 irrelevant.

11 JUDGE BROWN: I overrule the objection.

12 MR. WORK: Was there any relationship at all
13 between the work you were playing in this role and the work
14 you had played in similar efforts at your prior employers?

15 THE WITNESS: It was identical.

16 BY MR. WORK:

17 Q And specifically, what did you do in the role you
18 were playing with this group?

19 A After looking at the original estimate, and
20 understanding the basis for the estimate, and the rationale
21 for the estimate, and looking at the contract and those
22 tasks that were being performed in the contract, that were
23 not related to the original estimate, I gave instructions
24 to a group of experts that we brought together, at least
25 experts in my opinion, in software, in testing, in field

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1 engineering, and asked them to right a statement of work
2 that would describe the additional tasks that were being
3 done, that was outside the scope of the original contract.

4 And further, asked them to develop the estimate in
5 man hours and in the type of people that it would take to
6 perform that work, and to justify that in such a way as that
7 it could be assessed and validated that this was a
8 reasonable estimate in order to do the job of those tasks
9 that were above the estimate that was originally proposed.

10 (Continued on next page.)

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1 Q You mentioned experts, are these people in the
2 company that have worked on the program?

3 A Yes, they --

4 MR. RIDDLES: Your Honor, I will object.

5 MR. WORK: Withdrawn. We will withdraw the term
6 experts. I am just trying to find out who these people
7 were.

8 JUDGE BROWN: The term experts was the witness'
9 terms.

10 MR. WORK: Right. Who were these people?

11 THE WITNESS: Claudia Justis, for example, who
12 was the chief engineer at that time of this project, in all
13 software engineering, and also the overview of software
14 testing. People like, a fellow named Joe Amaro that did
15 field engineering. A fellow named Ken Turry, who was our
16 expert in the system of the remote control element. People
17 of that nature.

18 BY MR. WORK:

19 Q Who worked on the logistics area, on this effort?

20 A The logistics area was a group of people that had
21 worked in it. But it was primarily a individual who had
22 extensive experience in both the Marine Corps as well as
23 from an educational background, in integrational logistics
24 support, and his name is Steven Jones.

25 Q All right, now, with this group of people, what

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1 direction did you give them?

2 A I gave them the direction to come up and to
3 justify why it was outside the scope, which we referred to
4 as entitlement. Why were we entitled to a change? Why was
5 the change outside the scope, how did they determine that?
6 Then I asked them to write a statement of work for the work
7 that had to be done, that was outside the scope and develop
8 a schedule for it.

9 Q When you say outside the scope, you are saying
10 added work?

11 A Added work, outside of the scope of the contract,
12 yes. Added work that had not been envisioned at the tie of
13 the original subcontract.

14 Q And the original subcontract is the MOD 3 FOC
15 contract?

16 A It's the MOD3 forward, not the front end. We only
17 addressed the MOD-3 forward, which we referred to as the
18 basic contract, not the front end portion.

19 Q What product did you ask these people to produce
20 for you?

21 A I asked them to produce a -- it was a claim. And
22 it was to be a certified claim, and in each section, such as
23 in software engineering, they would write down what the
24 entitlement was, what the task was, hat the schedule was
25 that they were performing, what period of time it was to

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1 occur in and what hours it would take and the
2 classification, or the level of person that i required to
3 take, to do the job.

4 Q What, I want to pick up on your reference, it. Do
5 you equate the it, with the specific task you are talking
6 about?

7 A That is correct. Individual tasks.

8 Q Now, please explain that. Individual tasks to do
9 what?

10 A The individual task to expand the software, tho
11 expand the testing to increase the task of documentation, to
12 increased the task of logistics support, to see where the
13 increase, perhaps the evaluation made of the hardware and
14 the determination of the hardware.

15 Q Okay, now, we've got the task identified. And
16 what instructions did you give them once the task was
17 identified?

18 A Once the task was identified, was to come through
19 and develop when, what type of hours it would take to
20 develop and to do that task. And the type of people that it
21 would take, whether it was a senior engineer, or a junior
22 engineer, or a logistics expert, or a testing engineer.
23 What type of people it would take to develop, to use those
24 hours to do that task.

25 Q Now, why was it necessary to estimate these things

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1 rather than simply going to the records?

2 A Because the records had not been set up in such a
3 way as to pick up each one of these tasks. These tasks had
4 evolved as the program had evolved, and as the scope of the
5 program had grown, the actual had been incurred, but they
6 had not been specifically identified to these tasks, these
7 out of scope tasks.

8 Q When you say identified, by setting up a separate
9 --

10 A By setting up separate cost centers, or separate
11 work orders, which is the same as separate cost centers.

12 Q Based on your experience, is that usual or unusual
13 that an evolving program, you don't set up separate task
14 centers.

15 A You never set up separate task centers in an
16 evolving program. You usually do it within the scope of
17 the contract. When it starts going outside the scope of the
18 contract, it is known as ,the term used is a constructive
19 change.

20 MR. RIDDLES: I would object to that, Your Honor
21 and that it be stricken, whether that term is a constructive
22 change --

23 JUDGE BROWN: I overrule that objection.

24 MR. WORK: What is a constructive change --

25 JUDGE BROWN: Very little is going to be a legal

JACK R. CANNADY - DIRECT EXAMINATION

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1 conclusion in this trial.

2 MR. WORK: I don't want you to, Mr. Cannady, to
3 think anything of the law, but just based on your
4 experience, what is, what does the term constructive change
5 mean?

6 MR. RIDDLES: Objection, Your Honor. May we
7 approach the bench?

8 JUDGE BROWN: Yes.

9 MR. RIDDLES: The identical testimony that we
10 started to object to the other day, extrapolating of Ms.
11 Raymond --

12 MR. WORK: I will not.

13 MR. RIDDLES: Just a minute, let me finish, Mr.
14 Work. Don't get excited, the interruptions are --

15 MR. WORK: I'm just trying to save you time.

16 MR. RIDDLES: It is exactly the same testimony
17 that we are asking the jury, what is a constructive change.
18 And he is now giving his opinion -- and I --

19 JUDGE BROWN: What is the purpose of the
20 testimony?

21 MR. WORK: Just to define the term he used. I'm
22 not going to ask for more than that.

23 JUDGE BROWN: Well, we don't need to define it,
24 because it's not important. Let's get on.

25 MR. WORK: All right.

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1 MR. WORK: I interrupted you and the progression
2 that I was trying to elicit. You described the instructions
3 that these people identify specific tasks. You had given
4 your instructions with regard to what they were to do with
5 those tasks, and will you pick us up at that point as to the
6 additional instructions you gave these people, like Claudia
7 Justis, etc.

8 THE WITNESS: Yes. Once they defined their task,
9 and developed the schedule for it, they prepared task
10 description and they prepared justifications for why that
11 task was out of scope. They then brought it back to the
12 team, if you would, the basic team. WE reviewed that,
13 discussed that with them, tried to assure ourselves, and did
14 assure ourselves that it was out of scope, and it was a
15 proper task to estimate.

16 They then went back and prepared the estimate in
17 man hours, or in hours.

18 BY MR. WORK:

19 Q How did you instruct them to do that?

20 A I told them to go back and assume that the task
21 was as if it was a change, that was a new change that had to
22 be developed based on the scope of work and the schedule and
23 that they were to estimate a fair and reasonable price for
24 that. And one that could be justified.

25 Q All right.

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1 MR. RIDDLES: Your Honor, on the same basis that I
2 objected to -- on the Court's ruling as of yesterday.

3 JUDGE BROWN: I don't understand your objection.

4 MR. RIDDLES: Sorry, may I approach?

5 JUDGE BROWN: Yes.

6 MR. RIDDLES: He is describing an equitable
7 adjustment at this point, Your Honor.

8 MR. WORK: No, he's not.

9 JUDGE BROWN: It doesn't sound like it.

10 MR. RIDDLES: Sounds like to me if there is
11 additional work that has to be done under a contract -- you
12 know, he arrived at what was additional and what was not
13 additional.

14 MR. WORK: I guess we had picked you up at, they
15 had come back and you reviewed, and then you sent them back
16 to do what?

17 THE WITNESS: They went back to do the estimate.

18 BY MR. WORK:

19 Q And the estimate took what form?

20 A What was, for example, I guess that's the best
21 way.

22 Q The question was an estimate of what?

23 A An estimate of the additional work to be done,
24 that is described in the statement of work.

25 Q I see. And how did you instruct them to quantify

JACK R. CANNADY - DIRECT EXAMINATION

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1 that amount of additional work?

2 A I asked them to develop the number of hours that
3 were necessary, by classification, classification being the
4 engineering classification, such as senior software
5 engineer, hardware engineer, classifications like that.

6 Q ARE those classifications that existed within the
7 company at the time?

8 A Yes, they are.

9 Q Okay.

10 A And I also asked them if there was any material,
11 or subcontract, or other costs, such as travel, that was
12 related to that particular task, that they were defining to
13 also put in those costs?

14 Q Did you give them any instructions with respect to
15 just raw delay?

16 A No, I did not. BEcause I related primarily to
17 each one of the individual tasks, and took it on a task by
18 task basis, and related that primarily to specifics of each
19 element of the task that had to be done, rather than trying
20 to get a delayed task, or trying to asses something that was
21 somewhat of an intangible.

22 Q All right. And then what further instructions did
23 you give them, other than estimating the hours and
24 categorizing those estimates?

25 A Well, once they were finished with that, they

JACK R. CANNADY - DIRECT EXAMINATION

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1 brought back the estimates and we had developed a computer
2 program --

3 Q Who is we?

4 A The team and I, and the program control people,
5 which was the finance people of that particular operation.
6 And this computer program would then take the salary that
7 these various classifications were paid, and they would then
8 take that and convert that into an hourly rate. So that it
9 can be applied to the hours that had been estimated by each
10 one of the estimators.

11 and then we applied our indirect costs, or our
12 overheads, our indirect costs to it. And then once --

13 Q What's the it there?

14 A To the each one of the tasks and -- it's actually
15 to the hours. You take the hours, you apply the direct
16 costs to the direct salary costs and then apply the indirect
17 costs to that. And then you apply a imputed profit to
18 that.

19 Q Then what did you do?

20 A We then consolidated all of this by individual
21 task. We broke it into categories and put it into the
22 claim.

23 Q What extent did the group comprised of you, Ms.
24 Raymond, Mr. Christensen and Mr. Johnson, review the input
25 as it was coming in?

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1 A We reviewed the input, we reviewed all of the
2 input, all of us, reviewed all of the input. We reviewed it
3 basically in two stages. WE reviewed the input that would
4 come in as to the task, or the scope ,to assure that it was
5 truly an out of scope task that was not envisioned at the
6 time of the subcontract.

7 We then would go through and the estimates would
8 come in and make an assessment based on our experience, so
9 that was reasonable estimate to do the job for, and whether
10 we were using the proper level and category of people to do
11 the job. And if it had other costs, such as travel costs,
12 whether those were reasonable and justifiable and wether
13 the rationale that had been provided by the estimator, as to
14 why that estimate was credible, was what we felt a
15 reasonable basis that we could certify to later in the
16 claim.

17 Q Now, just put us again in terms of time. When was
18 this effort, let me put it this way. Over what period of
19 time, and when did this effort occur that you've just been
20 describing ?

21 A My evaluation occurred in the last week of
22 December 1988, that was my personal evaluation. The team
23 was formed in the first week of 89, and we delivered the
24 claim on February 6. Now, that does not mean that that was
25 a five or six week effort. Because this was an around the

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1 clock type of an operation. And seven days a week that we
2 were working in order to get this claim into verify it and
3 validate it in such a way, in that period of time.

4 Q Now, for what period of time in the FOC program
5 did this retrospective analysis cover?

6 A I don't understand the question.

7 Q Over what period of time did you examine to
8 determine whether there were added tasks? You said this was
9 the FOC MOD-3 effort --

10 A Yes.

11 Q Which we, as we know, started in August of --

12 MR. RIDDLES: Objection, leading the witness, Your
13 Honor.

14 MR. WORK: Strike --

15 JUDGE BROWN: Sustain.

16 MR. WORK: Do you understand my question now?
17 What period did you --

18 THE WITNESS: We went back -- if you are saying
19 what period did the claim cover?

20 BY MR. WORK:

21 Q That's right, I'm not very good at asking that
22 question.

23 A The claim covered the entire period from the time
24 MOD-3 was executed or given to the company as authorization
25 through the conclusion of the program.

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1 Q To that point in time?

2 A We did estimate it. We took what it was, and we
3 projected it through the program, yes. To that point in
4 time.

5 Q Mr. Cannady, I am going to hand you a set of
6 documents, that we have marked as Defendant's Exhibit 50A
7 for identification. Will you tell us what that is?

8 A The first document is a small document and it is
9 called an executive summary.

10 Q Could we just have an overview of what the whole
11 set is?

12 A Yes, this is the claim.

13 Q This is the product of this effort.

14 A This is the product of this group, that we
15 delivered on the 6th of February to TechDyn, that we
16 forwarded to them on the 6th of February.

17 Q Now, at any time subsequent to the effort that you
18 have just described, was there updating?

19 A Yes. There was updated in January of 1990, where
20 we went back, re-assessed what task had occurred since then,
21 any changes to the task since then, and sent in a formal
22 update to the claim.

23 Q HAS there been any updating since that time?

24 A No, there has not.

25 (Continued on next page.)

JACK R. CANNADY - DIRECT EXAMINATION

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1 Q I am handing you another document that we have
2 marked as Defendant's Exhibit 50E for identification. I'll
3 put that over here and I'll ask if you can tell us what that
4 is.

5 A The second document that you gave me is dated 19
6 January 1990 and it is the update to the claim. It is the
7 January '90 update to this claim.

8 Q Okay. Now, for illustrative purposes, Mr.
9 Cannady, could you just select one task out of the various
10 tasks that are described in the claim to give the jury a
11 feel for what a task is?

12 MR. RIDDLES: I'm going to object to that, Your
13 Honor. If he's going to be looking at that claim, it's not
14 in evidence.

15 MR. WORK: I'm not asking him to look at it. Just
16 sit there and describe a task for illustrative purposes.

17 THE WITNESS: All right. Let's take a task, for
18 example, where the software testing is increased. Let's say
19 that there is additional software that has to be done, it's
20 not just the testing. I misspoke there.

21 BY MR. WORK:

22 Q If you could identify the task in a descriptive
23 way.

24 A The task would be that you had to develop some
25 additional lines of code in order to meet the requirements

JACK R. CANNADY - DIRECT EXAMINATION

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1 of the redirection to the contract and you had to take these
2 lines of software code, put them into the system, integrate
3 them into the other portions of the system, test them
4 incrementally as you were developing them and then test them
5 in total within the system. You had to also revise the
6 documentation to include those revisions and you had to also
7 revise your test plans or your test planning in order to
8 include that change to the software program.

9 Q Is that an illustrative task?

10 A That's an illustrative task that's within the
11 software portion here. There are several of those within
12 the software portion.

13 Q I see. Now, what materials pertaining to a
14 specific task are contained in that document?

15 A The materials of a large portion of the document
16 or in effect the bibliography are various letters and
17 directions which came through and established why it was out
18 of scope and it was the description or the direction to do
19 tasks that were not envisioned in the initial contract.

20 The next document other than the executive summary
21 which is this document was a description of what, why these
22 documents entitled the company to additional monies for this
23 since it was an increase in the scope of task.

24 And the third document here, which is the cost
25 volume, included the justification, the rationale and the

3.
JACK R. CANNADY - DIRECT EXAMINATION

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1 number of hours, then it was converted to the computer runs
2 which are also in this document here which dollarize the
3 number of hours that it took to do the job.

4 Q Now, let's just take our sample task within the
5 software development area. What materials are in that cost
6 volume with respect to that and who prepared the basic
7 materials prior to getting to the computer run?

8 MR. RIDDLES: I object to it, Your Honor. It's
9 not in evidence. He's asking him what materials are in
10 there.

11 MR. WORK: Well, let me withdraw the question and
12 try to ask it more clearly.

13 BY MR. WORK:

14 Q Taking our sample task, you indicated that there
15 would be for that task and the other tasks justification
16 materials in the cost volume and for any given task without
17 having to name the name, who prepared those? Was it your
18 control group or was it one of the people that --

19 A No, it was the experts in each area prepared it.
20 My term experts. It was the people responsible for doing
21 the work, essentially, in each area who prepared it. And
22 then they brought it back to my control group for us to give
23 it a test of reason and to give it a second look as far as
24 what their rationale was.

25 In each one of the sections here, you have the

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1 rationale for how they prepared it, how they came up with
2 the estimate, why they selected the number of hours and why
3 they selected the classifications.

4 Q In addition to the materials that were prepared by
5 one of your what you call experts, then what additional
6 materials are there relating to each task in that cost
7 volume?

8 A You also have the tabulated runs which have taken
9 each one of the hours by month and put down what month it
10 was done in and it has taken it and multiplied it out by the
11 number -- the hours by the rate, by the total amount of your
12 overheads down to the total amount for each one of those
13 individual tasks.

14 Q Is the physical computer run in the document?

15 A Yes, it is.

16 Q And what additional materials, if any, are in that
17 document relating to your given tasks?

18 A You have your statement of work, you have your
19 entitlement, you have your detailed statement of work, you
20 have your schedule that it was performed to, you have the
21 number of hours and people, if applicable, by name who did
22 it or by classification if it was done by a number of people
23 in the same classification. And you have the rationale as
24 how the estimate was prepared. You have the tabulated run
25 which has the number of hours, it has the rate, it has the

JACK R. CANNADY - DIRECT EXAMINATION

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1 indirect cost rates and it comes out with the total dollars
2 including the other costs such as travel that would be
3 related to that task.

4 Q I see. And there are two other volumes there.
5 Will you describe them, please?

6 A This volume is the factual discussion and
7 entitlement. This is the document that is prepared to say
8 this is why it is out of scope. This is why it's an
9 additional task. This is why we say it wasn't in the
10 original subcontract that was negotiated.

11 And this is a document of all the -- this is the
12 bibliography.

13 Q I think you mentioned that one. Was there a
14 slim --

15 A This one is the executive summary, which is an
16 overall executive summary encompassing the scope of the
17 task, the scope of the entire claim and it is just what it's
18 called -- it's an executive summary that someone could sit
19 down, read quickly and understand why we were submitting a
20 claim.

21 Q All right. What was the date on which you
22 submitted this claim to TechDyn?

23 A February 6, 1989.

24 Q And what was the date that you submitted the
25 update to TechDyn?

JACK R. CANNADY - DIRECT EXAMINATION

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1 A January 19, 1990.

2 Q Has Whittaker received any compensation from
3 TechDyn on the basis of those claims?

4 A No.

5 (Pause.)

6 Q Mr. Cannady, I've handed you a document which at
7 the moment is not marked as anything. What is it and --
8 well, let me ask you this -- do you know anything about this
9 document?

10 A I furnished the numbers that are in this document.

11 Q All right. Are these numbers true and accurate to
12 the best of your knowledge and belief?

13 A Yes, they are.

14 MR. RIDDLES: Object to that testimony, Your
15 Honor, and move to strike for lack of foundation. When he
16 says he furnished the numbers, there's no testimony that
17 he's based the numbers on firsthand observation.

18 JUDGE BROWN: I'll overrule the objection.

19 (Pause.)

20 MR. WORK: Your Honor, I would like to publish
21 this to the jury at this time if there's no objection.

22 MR. RIDDLES: There's an objection, Your Honor.

23 JUDGE BROWN: Okay. What is it?

24 MR. RIDDLES: The objection is, Your Honor, that
25 there's no foundation for the numbers that are in this

2.

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1 document being accurate.

2 JUDGE BROWN: Come up.

3 I recall Ms. Justis and Mr. Jones saying they did
4 some things and gave him some figures and at least to the
5 extent that they did, I think he can testify to it. But I
6 haven't heard a source of these numbers as being those
7 persons who testified. It's been rather general.

8 So if you can establish that these numbers come
9 from people who have already testified that they prepared
10 these things then I think his objection --

11 MR. RIDDLES: Your Honor, may I make another
12 objection on that?

13 In addition to that, Your Honor, what they've done
14 is they are asking for opinion evidence from someone else
15 based on estimates. This witness has no firsthand
16 knowledge. He has received all of this.

17 JUDGE BROWN: Well, the people from whom he
18 received it have testified, is what I'm telling you, at
19 least to some extent.

20 MR. WORK: Your Honor, let me explain why I intend
21 to use this this way.

22 As you'll recall -- I mean, this is very much like
23 Hise getting up here and saying we did this and we did that
24 and we did the other thing in terms of pulling together all
25 this stuff.

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1 JUDGE BROWN: Well, that isn't going to get you in
2 here.

3 MR. WORK: Well, let me just tell you. He has, as
4 he described this effort -- do you want to listen to this
5 now?

6 JUDGE BROWN: No, not necessarily.

7 MR. WORK: He had personal knowledge of these in
8 the sense that he quality controlled all the groups
9 throughout the whole process. You don't go out and -- one
10 person doesn't do this by themselves and there were
11 obviously more people than Justis and Jones involved in
12 this. And with a time limit trial, you can't bring all
13 those people in.

14 We have an individual here, and we also one in Ms.
15 Raymond, who quality controlled all these numbers, all the
16 underlying material of those claims. And that's the way
17 claims are presented. You see this every day. You don't
18 have every person who has been involved in the effort down
19 to the secretaries come in.

20 JUDGE BROWN: I have the person who supervises the
21 person who was involved in the effort and who knows
22 something about the technical aspect of it. How you
23 determine whether a task is or isn't within the scope of the
24 contract and how you developed the hours is a subject on
25 which they're entitled to cross-examine.

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1 They had Mr. Jones here. They had Ms. Justis
2 here.

3 MR. WORK: And they had Ms. Raymond.

4 JUDGE BROWN: Well, whoever they had, if these
5 figures came from people who have testified, then I want to
6 hear that and that will be a foundation and we'll see if
7 there's a further objection.

8 MR. WORK: Could we put Ms. Raymond back on
9 because she was involved in this and she is in a position
10 to --

11 MR. RIDDLES: Your Honor, there's really no
12 testimony from Ms. Raymond as to a single dollar or to a
13 single hour.

14 JUDGE BROWN: So you say you think they should?

15 MR. RIDDLES: Yes. I object to her -- what I'm
16 saying --

17 JUDGE BROWN: I thought you were laying the
18 foundation when Jones was there. I made a note --

19 MR. WORK: I laid an illustrative foundation.
20 Yes.

21 MR. RIDDLES: But he didn't testify what those
22 hours are. He gave no number of hours that he testified to.
23 All we have here are numbers and there's no link in between
24 them, Your Honor. Nothing to cross-examine on.

25 JUDGE BROWN: Well, you're going to lose your

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1 argument as to those persons who testified that they
2 performed a task and gave him the work. And if you have
3 other people who can testify and you can put them on now,
4 then we'll hear them.

5 MR. WORK: All right. Ms. Raymond.

6 JUDGE BROWN: Okay.

7 (Pause.)

8 MR. WORK: We are going to recall Ms. Raymond at
9 this time.

10 JUDGE BROWN: If you'll step down and out of the
11 room a minute. We need to lay a further foundation for your
12 testimony.

13 (Witness excused.)

14 Whereupon,

15 MARIE RAYMOND

16 having been previously duly sworn, was recalled as a witness
17 herein and was examined and testified further as follows:

18 DIRECT EXAMINATION

19 BY MR. WORK:

20 Q Good afternoon, again.

21 A Hello, again.

22 Q Ms. Raymond, you sat here and heard the process
23 described by Mr. Cannady. What personal role did you play
24 in this process?

25 A I was part of the control team. I did a great

**TRIAL TESTIMONY OF
MARIE RAYMOND - RECALLED**

MARIE RAYMOND - DIRECT EXAMINATION

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1 argument as to those persons who testified that they
2 performed a task and gave him the work. And if you have
3 other people who can testify and you can put them on now,
4 then we'll hear them.

5 MR. WORK: All right. Ms. Raymond.

6 JUDGE BROWN: Okay.

7 (Pause.)

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9 this time.

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11 room a minute. We need to lay a further foundation for your
12 testimony.

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17 herein and was examined and testified further as follows:

18 DIRECT EXAMINATION

19 BY MR. WORK:

20 Q Good afternoon, again.

21 A Hello, again.

22 Q Ms. Raymond, you sat here and heard the process
23 described by Mr. Cannady. What personal role did you play
24 in this process?

25 A I was part of the control team. I did a great

MARIE RAYMOND - DIRECT EXAMINATION

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1 deal of advising on the contract. I also went through all
2 of the cost runs over and over again to make sure that the
3 tasks we were talking about were properly reflected.

4 Q Okay. I think it might be helpful if you just
5 started from the beginning of the process. Mr. Cannady has
6 given instructions -- were you present to hear Mr. Cannady's
7 instructions to all these people?

8 A Yes.

9 MR. RIDDLES: Object to all that, Your Honor.
10 Just ask a question.

11 BY MR. WORK:

12 Q All right. Now, what did you do personally to
13 check the identification of the tasks that were identified?

14 A You mean insofar as the numbers were concerned or
15 the tasks themselves?

16 Q Let's just start back at the beginning of the
17 process. In terms of the identification of the task, what
18 did you do personally to verify that this indeed was an
19 appropriate task?

20 A I had previously sat up the entitlement. I had
21 previously advised the people of various things that had
22 been done out of scope and I continued to do so.

23 Q All right. And did you personally verify every
24 task?

25 A Yes. I personally verified every task.

MARIE RAYMOND - DIRECT EXAMINATION

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1 Q All right. Now, beyond the verification of the
2 tasks, what did you do to examine and verify the workup that
3 was done, the descriptive material that was done that is
4 contained in the largest of those three documents to
5 determine --

6 A These references?

7 Q Yes.

8 A I took those from the contractual files to support
9 the entitlement.

10 Q And you personally selected the documents here?

11 A Yes, I did.

12 MR. RIDDLES: You referred to one document -- I'm
13 not clear as to what document you're referring to.

14 MR. WORK: This is volume 2, part 2. And it's
15 marked as Defendant's Exhibit 50C for identification.

16 BY MR. WORK:

17 Q What role did you have in collecting those
18 materials?

19 A I did it. I collected them.

20 Q And are those materials that relate to particular
21 tasks?

22 A Yes.

23 Q All right. And sitting here today, are those true
24 and correct to the best of your knowledge and belief?

25 A Yes, they are.

MARIE RAYMOND - DIRECT EXAMINATION

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1 Q All right. And what was the next step in the
2 process? You've identified the tasks, you've collected the
3 materials. Mr. Cannady's experts have prepared what --
4 written narratives?

5 A Yes. For the cost volume, they prepared written
6 narratives -- it was a statement of work. This is the task
7 that I did at a reasonable level, a small level. Then they
8 said in order to do this task, I did this step, this step,
9 this step. This step took me 20 minutes, this one took me
10 10 minutes, this one took seven hours.

11 After that, they took that particular write up and
12 they put it onto -- like graph paper. Then they put when
13 those particular hours in a particular span of a year or so
14 went.

15 After that, I reviewed those hours.

16 Q And what did you do in reviewing those hours?

17 A I reviewed them twice. The first time, I just did
18 a very general review. After they went into the computer
19 and I got a printout, that was easier to read because it
20 wasn't everybody else's handwriting. Then I actually took
21 the actual financial records of the company for all of those
22 periods and I reviewed every single task.

23 Q As contract administrator on this ICCE MOD 3
24 subcontract, to what extent were you in a position to verify
25 them on the basis of your own experience?

MARIE RAYMOND - DIRECT EXAMINATION

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1 A I had been involved up until that period in all
2 the everyday things, the meetings and the activities that
3 went on.

4 (Continued on next page.)

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MARIE RAYMOND - DIRECT EXAMINATION

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1 Q And what did you do in terms of verifying the work
2 that was done?

3 A Beyond going over the printouts and verifying --

4 Q You went over the hours before they went into the
5 computer?

6 A Yes. And then I went over the hours and dollars
7 after they came out of the computer. And if something was
8 in the wrong month or the wrong year, then I went over that
9 as well.

10 Q I see. And what did you do beyond that?

11 A I put the volumes together.

12 Q Are you the author of these volumes?

13 A Yes.

14 Q You personally wrote these things?

15 A I wrote the entitlement, the executive summary
16 and I took the data that was on discs that the engineers and
17 other people had prepared and if they handwrote them, then a
18 secretary typed them and then I would take and edit them.

19 Q And who besides yourself went through the steps
20 that you have identified, in verifying the numbers coming
21 out of what you termed these experts?

22 A There was Mr. Christensen -- you have to realize I
23 wasn't there toward the end of that period that I'm talking
24 about. I wasn't there for the everyday business that was
25 going on.

MARIE RAYMOND - DIRECT EXAMINATION

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1 Q Was Mr. Christensen?

2 A Mr. Christensen was, yes.

3 Q And in your presence, did he go through the same
4 process you went through?

5 A He went through the same process.

6 Q And who else did it?

7 A And Mr. Johnson went through the same process.

8 Q And what had been his involvement in this program?

9 A He had been the program manager on the TechDyn
10 side and he had sort of a system overview which was helpful.

11 Q And did Mr. Johnson perform his verification in
12 your presence?

13 A Yes. We were all in the same room.

14 Q And what did Mr. Cannady do with respect to these
15 materials?

16 A He did the same thing.

17 Q And the product of this effort were documents that
18 you personally prepared?

19 A Yes.

20 Q The executive summary -- did you prepare that?

21 A Yes, I wrote it.

22 Q The factual discussion and entitlement -- did you
23 prepare that?

24 A Yes, I did.

25 Q The cost volume -- did you prepare that?

MARIE RAYMOND - DIRECT EXAMINATION

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1 A Yes.

2 Q And the references volume -- did you prepare that?

3 A Yes. And that one I did all by myself.

4 Q Now, with respect to the January 19, 1990 update,
5 what role did you have in that document?

6 A I assisted in the preparation of that.

7 Q And who else was prepared?

8 A Mr. Cannady. Mr. Christensen. Our pricing
9 department.

10 MR. WORK: Your Honor, I submit that that is an
11 adequate -- well, just a second.

12 BY MR. WORK:

13 Q Do you have in front of you a copy of this sheet
14 of paper? Are you familiar with this document?

15 A Yes.

16 Q And what is it?

17 A It's a summary of Whittaker's counterclaims.

18 Q And where do these numbers come from?

19 A From our accounting system and from this claim as
20 updated.

21 Q And do these numbers reflect updating to the time
22 of this trial?

23 A Updating and rounding, yes.

24 Q All right. And rounding? By rounding you mean
25 what?

MARIE RAYMOND - DIRECT EXAMINATION

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1 A I mean for instance in cabling and packaging, it
2 was a little bit over 20,000 and there's 20,000 written
3 there.

4 MR. WORK: Your Honor, I submit that that is an
5 adequate foundation.

6 JUDGE BROWN: Well, I don't want you to submit
7 anything right now except the witness for cross-examination.

8 MR. WORK: Okay. May I give one sentence of
9 explanation?

10 The reason for bringing on Mr. Cannady to talk
11 about these particular numbers is that he is in charge of
12 the accounting system.

13 JUDGE BROWN: I understand.

14 Any cross-examination of her?

15 MR. RIDDLES: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. RIDDLES:

18 Q Ms. Raymond, did I understand you to say that you
19 did not actually prepare any of the estimates that are in
20 the documents that are before you now?

21 A I did say that. However, I did prepare an
22 estimate of the claim preparation.

23 Q But you did not prepare the estimate that later
24 became embodied for the other activities, other than the
25 claim preparation, in those documents in front of you. Am I

MARIE RAYMOND - CROSS EXAMINATION

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1 correct?

2 A Yes.

3 Q You have no personal knowledge of the actual hours
4 and the methodology that was used to do those estimates, do
5 you, ma'am?

6 A I have a knowledge of the methodology.

7 Q But you have no knowledge, then, of the actual
8 selection of the numbers and how the person who selected
9 them chose those numbers. Am I correct?

10 A No, I do not.

11 Q The document that is before you that you
12 identified as a summary of Whittaker's counterclaims --

13 A Yes.

14 Q You did not prepare this document, did you, ma'am?

15 A No, I did not.

16 Q And, in fact -- like, for example, there are some
17 numbers on the bottom of it -- do you see where the blacked
18 out portion is and some additional numbers are there?

19 A Yes.

20 Q You didn't prepare any of those numbers, did you,
21 ma'am?

22 A No. That's accounting.

23 Q And the number at the top where it says software
24 and there's a number there?

25 A Yes.

MARIE RAYMOND - CROSS EXAMINATION

2788

1 Q You did not prepare that number either did you?

2 A I added two numbers together to get there.

3 Q So is it your testimony that you did prepare this
4 number?

5 A I don't know how you're asking that. If you're
6 asking me did I estimate this number, no, I didn't. If
7 you're asking did I add some things in order to come up
8 with numbers, yes, I did.

9 Q So all of the estimation -- as I understand, all
10 of estimation that you did was based on numbers supplied by
11 individuals other than yourself. Is that correct?

12 A Yes, except in one case.

13 Q And that would be in the claim area that you
14 mentioned.

15 A Right.

16 Q And so I would be correct, then, that as to all of
17 the numbers that are here -- by the way, where is the claim?

18 A It's not on this piece of paper. You had asked me
19 previously about this document and it has a claim per person
20 section in it.

21 Q So I am correct in that you have no personal
22 knowledge in the preparation of any of the numbers on this
23 sheet of paper. Am I correct, ma'am?

24 A It's difficult to answer that, Mr. Riddles. For
25 instance, I know what progress payments were submitted. I

MARIE RAYMOND - CROSS EXAMINATION

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1 did not prepare the invoices but I have copies of the
2 invoices.

3 Q Okay. Count 1. You see where you have that
4 identified -- where that is identified on this document?

5 A Yes.

6 Q You did not prepare and have personal knowledge of
7 any of those items. Am I correct?

8 A If you say estimating, that's correct.

9 Q Okay. And count 2, there are no numbers there so
10 you testified that you do have personal knowledge of count
11 4?

12 A Yes, those are the invoices we were talking about.

13 Q Unpaid MOD 3 progress payments. You see that
14 number?

15 A Yes.

16 Q I'd ask you not to disclose it at this point. Did
17 you prepare that number for this chart?

18 A I took it from an invoice that went to TechDyn.

19 Q And then the unpaid front end progress payments?
20 Do you see that category?

21 A That's the same category you just asked me about.

22 Q All right. Okay. Then you have the other numbers
23 that are below there, ma'am?

24 A Yes.

25 Q Did you prepare those numbers?

MARIE RAYMOND - CROSS EXAMINATION

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1 A The handwritten numbers?

2 Q Yes.

3 A No.

4 Q And you have no personal knowledge of how those
5 numbers were derived or from where they came from. Am I
6 correct about that, ma'am?

7 A Yes.

8 MR. RIDDLES: Your Honor, I renew my objection
9 that it is without personal knowledge.

10 And let me ask a few more questions, if I may.

11 JUDGE BROWN: All right.

12 BY MR. BOEHLERT:

13 Q Ms. Raymond, may I look at this claim for just a
14 minute?

15 A Yes.

16 (Pause.)

17 Q Which is the portion that has the computer runs
18 that you talked about? Did you prepare this?

19 A Yes.

20 (Pause.)

21 Q I'm going to show you page 1.2-18 of this
22 document. And, again, without disclosing that, do you see
23 the category that's referenced there as 106?

24 A Yes. Technical.

25 Q That's a technical person?

MARIE RAYMOND - CROSS EXAMINATION

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1 A Yes, it is.

2 Q Did you prepare that?

3 A Yes, I did.

4 Q And are there hours estimated for that technical
5 person?

6 A Yes, there are.

7 Q And what time period is being estimated for the
8 technical person that's there?

9 A It's January through August of 1987.

10 Q And then is there a dollar calculation for the
11 number of hours there?

12 A Yes, there is.

13 Q Okay. Did you check that actual category as
14 against the actual cost records maintained by Whittaker?

15 A Yes. That was my main purpose.

16 Q I see. And what is the category of activity
17 that's being referenced here in this page number?

18 A Correlation, which is a software task.

19 Q I see. Let me just show you some other documents,
20 if I may.

21 (Pause.)

22 MR. WORK: May I see what you're showing her?

23 MR. RIDDLES: Yes.

24 (Pause.)

25 JUDGE BROWN: We'll take 15 minutes.

MARIE RAYMOND - CROSS EXAMINATION

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1 (Brief recess.)

2 BAILIFF: Remain seated and come to order.

3 MR. WORK: Your Honor, before the jury comes in,
4 I'd like to address something with you, if I may have your
5 leave.

6 I think we have a fundamental even hand in this
7 issue here in this respect. This is the summary of the cost
8 information that TechDyn has submitted and, as you know, I
9 have always complained that we had never even seen the
10 underlying records. Never.

11 The documents that are in here are summaries of
12 summaries. The underlying material was prepared by their
13 experts. They're hearsay documents.

14 JUDGE BROWN: And what exhibit is that?

15 MR. WORK: This is what they call TechDyn's
16 damages.

17 JUDGE BROWN: But is it an admitted exhibit?

18 MR. WORK: It's not admitted exhibit -- well, I
19 don't think so -- is it?

20 MR. BOEHLERT: Yes. Those are all in evidence.

21 JUDGE BROWN: Okay.

22 MR. WORK: All right. We have objected to this
23 from the beginning.

24 JUDGE BROWN: Okay.

25 MR. WORK: There is no non-hearsay document in

MARIE RAYMOND - CROSS EXAMINATION

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1 here. It is all hearsay. These are hearsay on hearsay.

2 JUDGE BROWN: Well, what is -- I don't know what
3 you're objecting to because I don't know what's happened
4 that isn't --

5 MR. WORK: Okay. Let me tell you. I'll try to be
6 succinct.

7 TechDyn hired some experts to look at their
8 accounting records. What they did was to prepare these
9 computer runs. These are not original accounting documents.
10 We have never seen the original accounting documents.

11 They prepared these and they prepared other
12 direct labor things and then they prepared consultants'
13 costs and they prepared travel stuff and other time related
14 stuff.

15 Then they prepared summary sheets on top of those
16 summary sheets which are double hearsay.

17 Then Mr. Hise, who was not involved in the process
18 any more than Ms. Raymond -- certainly less than Ms. Raymond
19 was because these were prepared by the experts --

20 JUDGE BROWN: Well, Ms. Raymond is testifying.
21 What's the problem?

22 MR. WORK: Well, the problem is that you have
23 said, as I understood you, that you would let in those
24 things that were done by the individuals that actually did
25 the work.

MARIE RAYMOND - CROSS EXAMINATION

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1 JUDGE BROWN: I said at a minimum and then you
2 said that you could put Ms. Raymond on to prove some more.
3 So let's finish with Ms. Raymond before you --

4 MR. WORK: Okay. But understand I have a
5 continuing objection to this document which is hearsay on
6 hearsay.

7 JUDGE BROWN: All right. Okay.

8 Are we ready for the jury?

9 MR. RIDDLES: Yes, Your Honor.

10 JUDGE BROWN: Bring them in.

11 (Pause while jury is seated.)

12 JUDGE BROWN: I think we're in the
13 cross-examination of Ms. Raymond.

14 MR. BOEHLERT: Yes, sir.

15 (Pause.)

16 JUDGE BROWN: Okay. We're ready.

17 BY MR. BOEHLERT:

18 Q Ms. Raymond, I'd like for you to keep that page
19 open that we previously identified, where you identified
20 category 106.

21 A Okay.

22 Q And I want to show you now -- first I'll show you
23 what's been marked as Whittaker Exhibit 51E. Do you
24 recognize this, ma'am?

25 (Pause.)

MARIE RAYMOND - CROSS EXAMINATION

2795

1 A Yes.

2 Q What is it, please?

3 A It's a job status detail.

4 Q Now, I'd like to show you, if I may, where the
5 tabs are here. Do you recognize that?

6 A Yes, I do.

7 Q What is that, please?

8 A Job status summary.

9 Q And then there's another tab -- and I'll tell you
10 I put those in there. Do you recognize that?

11 A It's another job status summary.

12 Q Are these the actual cost records of the Whittaker
13 Corporation?

14 A A portion of them, yes.

15 Q Okay. Now, with respect to -- I'm going to show
16 you also a couple of others and I apologize for the big
17 stack of exhibits. I know there are a lot of them. Here is
18 51H and there are two tabbed exhibits in it. This is
19 Defendant's 51H and are those also -- if you will turn to
20 them -- job status summaries for the Whittaker Corporation?

21 A Yes.

22 Q Are those also part of the actual cost records of
23 the Whittaker Corporation?

24 A Yes.

25 Q And 51G and 51I -- I'll purport to you are the

MARIE RAYMOND - CROSS EXAMINATION

2796

1 same, if you'd like to take a look at them.

2 A That's fine.

3 Q Okay. Never trust a lawyer, but all right. Okay.

4 Now, let me ask you to turn back to the claim, to the page
5 that we had open before.

6 A Okay.

7 Q Now, look please at the 106 category.

8 A I see it.

9 MR. WORK: Your Honor, if we're going to testify
10 about the document, it should come in as evidence.

11 JUDGE BROWN: I'll overrule the objection. We are
12 testing the methodology used, is my understanding.

13 BY MR. BOEHLERT:

14 Q Do you have costs for that 106 for the month of
15 January?

16 A I beg your pardon? January of what?

17 Q 1987 on the page that you had referred to.

18 A Yes, I do.

19 Q Do you have hours?

20 A Yes, I do.

21 Q What are the hours that you have?

22 A Three hundred hours.

23 Q Okay. So January '87, you have 300 hours. What
24 do you have for February?

25 A I have 300 all the way across through August.

MARIE RAYMOND - CROSS EXAMINATION

2797

1 Q February through August?

2 A Yes.

3 Q January -- February -- March -- April -- May -- I
4 won't complete it -- what's the total number of hours?

5 A Twenty-four hundred.

6 Q Then you have 2400 hours. Do you have a dollar
7 figure for that?

8 A 55,762.

9 Q That's 55 --

10 A 762.

11 Q \$55,762. Would you look, please, at the first of
12 the books I gave you --

13 A Which one's the first?

14 Q Let me find it. Just a second and I can tell you.

15 A Is it the one you opened here?

16 Q I'm not sure. Look at 51E.

17 A How do I know it's 51E?

18 Q Well, I think it will be marked. Let me just see.
19 There's G and there's I -- let's see --

20 A This may be E then.

21 Q H and that must be E. All right. Okay. Good.

22 Would you look at 51E and I want to direct your attention to
23 that page that we marked before. There are two of them, I
24 think, and if you'll find one of them that's marked at the
25 bottom with a Bates stamp B301396.

MARIE RAYMOND - CROSS EXAMINATION

2798

1 A 396?

2 Q 301396, I think.

3 A I don't --

4 Q Well, let me see if I can find it for you.

5 A This is 326.

6 Q Let's look at tab 8.

7 A Oh, okay. All right.

8 Q Do you find that now?

9 A Yes.

10 Q And that is the -- does that show the cost for

11 category 106? The number of hours?

12 A No, it doesn't.

13 Q What does it show, ma'am? It shows a zero, does

14 it not?

15 A It doesn't show a zero. It shows only dollars.

16 Q And what are the dollars that you reflect for

17 category 106 in the month of January of 1987?

18 A \$155,278.

19 Q May I approach?

20 A Certainly.

21 Q You see where it says technical 106?

22 A Right.

23 Q And then it says actual month hours. Do you see

24 that?

25 A Oh, okay.

MARIE RAYMOND - CROSS EXAMINATION

2799

1 Q So it does show the hours, right?

2 A Oh, okay.

3 Q What are the hours there, ma'am?

4 A They are -- for 106, they're zero.

5 Q Okay. Now, would you look at the next yellow
6 sticker in that book? Do you find that, ma'am?

7 A Yes.

8 Q And does that show the same category for February?

9 A Yes.

10 Q What are the number of hours for 106?

11 A That's zero also. However, you have to realize
12 that it was over a year not month by month.

13 Q Okay. So that's a zero also.

14 A Right.

15 Q Let's look at the next one, please, ma'am. That's
16 going to be in book 51H.

17 (Continued on next page.)

18

19

20

21

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MARIE RAYMOND - CROSS EXAMINATION

2800

- 1 Q 301690, did you see that tab?
- 2 A Yes.
- 3 Q And do you have a month, same thing there, for
- 4 March?
- 5 A Yes.
- 6 Q What are the numbers there?
- 7 A There are no hours there, either.
- 8 Q Zero, also?
- 9 A Right.
- 10 Q Let's look at the next tab in that book, please.
- 11 A None there.
- 12 Q Would you look at the next book please? Is there
- 13 another tab in that book?
- 14 A Perhaps you would like me to explain how this is
- 15 really done, it's not done month by month, it's not done --
- 16 Q I don't want you to explain it, and there is no
- 17 question pending. I just want you to go through the actual
- 18 cost data. Let's look at 51G, please. You will find some
- 19 tabs in there, and I think they should be pages 200380.
- 20 A Yes.
- 21 Q What's the, do you have that for May, is that
- 22 correct?
- 23 A I can't read it, it's too light.
- 24 Q Do you -- let me just look. That one didn't copy
- 25 too well. Let's look --

MARIE RAYMOND - CROSS EXAMINATION

2801

1 A Well, there are no hours on here.

2 Q Let's look at the next one, which is 200446. Can
3 you tell what month this references?

4 A June.

5 Q June. Okay, so we will skip May. Go to June.

6 How many hours on that one, please, ma'am?

7 A For 106, none .

8 Q Is there another tab in that book?

9 A There, let me just look and I will tell you that
10 they are all zero.

11 Q Okay.

12 A There is nothing on this page.

13 Q Okay. Will you look in the next book, please,
14 ma'am, which is 51-I. And I hope there are stickers in
15 that one, too.

16 A It's also zero there.

17 Q Okay, and then the next -- and that's on both of
18 them, isn't it, ma'am?

19 A Right.

20 Q What months are those?

21 A July and August.

22 Q July and August. Okay, I'll take these back for
23 you.

24 (Pause.)

25 JUDGE BROWN: Let me see counsel up here a

MARIE RAYMOND - CROSS EXAMINATION

2802

1 minute. One of the jurors (***) this to the bailiff, and
2 she passed it out to me, or whatever you wish to do.

3 MR. RIDDLES: Those books are --

4 JUDGE BROWN: No, don't tell me, I'm just telling
5 --

6 MR. RIDDLES: Well, let me ask a follow up
7 question. Ms. Raymond, just to make sure I understood you,
8 those books, those are, you recognize those as Whittaker
9 exhibits, correct?

10 THE WITNESS: I recognize what they are. I don't
11 know whether they are Whittaker exhibits or not.

12 BY MR. RIDDLES:

13 Q And those are the, and what were the categories
14 that you were looking at there?

15 A I was looking at 106.

16 Q Right. And what was the document that you were
17 looking at, to compare that?

18 A It was a summary report.

19 Q Of the actual cost incurred by Whittaker in that
20 category during that time period?

21 A Right. And technical 1, 2, 3, 4 and 5. We looked
22 at one.

23 Q Right. I had you look at 106, right?

24 A Right.

25 MR. RIDDLES: Thank you.

MARIE RAYMOND - REDIRECT

2803

1 REDIRECT EXAMINATION

2 BY MR. WORK:

3 Q Now, just to get the whole picture, what
4 additional volumes would you need to look at, Ms. Raymond?

5 A Probably those same ones. Those particular things
6 represent lines per code. And its two hours per line of
7 code, or something like that. Then we put them all into the
8 technical category, because that was the amount of money
9 those people were making. So, I would have to look at the
10 hours for technical 2, 3, 4 and 5 as well.

11 Q Okay. Now, just to clarify what is on this
12 summary sheet, do you still have a summary sheet of what is
13 on that?

14 A Yes.

15 Q Under the title count one, compensation, under
16 changes clause for added work performed, and TechDyn
17 breaches, the first item, software, were you here when Ms.
18 Justis testified?

19 A Yes, I was.

20 Q And is that number based on the work he did in
21 that area, the analytical work that you personally reviewed?

22 A Yes.

23 Q And was that number ever updated, and if so, by
24 whom?

25 A It was updated in January of 1990, but our

MARIE RAYMOND - REDIRECT

2804

1 accounting department, Jack Cannady.

2 Q And was it updated further, at all?

3 A It was further updated in June of 1990. Again, by
4 tasks that we had performed --

5 Q And who identified those particular tasks?

6 A I did.

7 Q And the testing area, was that also an area that
8 Ms. Justis had responsibility for?

9 A Yes.

10 Q And you personally reviewed that?

11 A Yes.

12 MR. RIDDLES: Object to leading the witness, Your
13 Honor.

14 JUDGE BROWN: Sustained.

15 MR. WORK: All right. Did you have any role in
16 the review of Ms. Justis' testing numbers?

17 THE WITNESS: Yes, I did.

18 BY MR. WORK:

19 Q And did you have any role in updating those
20 numbers?

21 A Yes, I did.

22 MR. RIDDLES: Objection, again, leading.

23 MR. WORK: What, if any role, did you have in
24 updating those numbers?

25 THE WITNESS: I looked at the present accounting

MARIE RAYMOND - REDIRECT

2805

1 records. I set up tasks for out of scope effort, and I took
2 those tasks, out of scope effort, and simply took the costs
3 on the books.

4 BY MR. WORK:

5 Q And the next item is logistics, who had
6 responsibility for that?

7 A Mr. Jones.

8 Q And what if any role did you have in reviewing Mr.
9 Jones' work?

10 A The same role I had with all the rest of them.

11 Q And is that number updated?

12 A Yes, it is.

13 Q And who was responsible for updating the number?

14 A I was.

15 Q And the next item is remote control, who had
16 responsibility for that?

17 A Mr. Turry.

18 Q And did you have any role in reviewing those
19 number?

20 A Yes, I did.

21 Q The next item is updated terminal sets. Who had
22 responsibility for those items?

23 A Mr. Arnold Durtsche, along with Claudia Justis.

24 Q Did you have any role in doing those numbers?

25 A Yes.

MARIE RAYMOND - REDIRECT

2806

1 Q Are those numbers updated?

2 A No.

3 Q And the next item is cabling and packaging. Did
4 you have any role in those numbers?

5 A Yes.

6 Q What role was that?

7 A That was, what was done in a claim by Craig Smith,
8 and I reviewed all the purchase orders, and --

9 Q The next items is administrative. And what does
10 that mean?

11 A That means the preparation of the claim and the
12 process of trying to get it resolved.

13 Q And who was responsible for those numbers?

14 A Mr. Cannady.

15 Q Okay, and the next is interest. Who had
16 responsibility for those numbers?

17 A Mr. Cannady.

18 Q Now, down at the bottom, unpaid progress payments
19 and earned retainage. I understood -- what do those numbers
20 represent -- to what extent, if any, are these numbers
21 reflected here reflected in the invoices that you personally
22 have knowledge.

23 A There are two invoices. One is for the --

24 Q You don't have to say the numbers. But you have
25 personal knowledge of those numbers?

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MARIE RAYMOND - REDIRECT

2807

1 A Yes, I do.

2 Q And have you reviewed them and verified the
3 accuracy of these?

4 A I directed that they be sent, and I have them in
5 my records.

6 Q And there is an interest number. Who has
7 responsibility for that?

8 A Mr. Cannady.

9 Q And then there is a total, who had responsibility
10 for that?

11 A Mr. Cannady.

12 JUDGE BROWN: Any other questions of Ms. Raymond?

13 MR. RIDDLES: Just one question.

14 RECROSS-EXAMINATION

15 BY MR. RIDDLES:

16 Q Ms. Raymond, you did not do personally do the
17 updates, am I correct?

18 A I added numbers together, and then I went to the
19 accounting records and I said, this is cost this much, and
20 this is -- for the --

21 Q Am I correct, though, numbers were given to you
22 by someone else? And you simply added the numbers to what
23 was existing before.

24 A Yes. They're the direct numbers out of our
25 system.

MARIE RAYMOND - RECROSS

2808

1 Q And you personally have no knowledge of the way, I
2 mean, of the actual data from which those numbers were
3 derived, am I correct ?

4 A No, you're not correct. I had to, in the role, or
5 my semi-role of looking at this project as more than, just,
6 as a contract persons would, I actually reviewed time cards
7 and so forth. And I review cost data every week to make
8 sure that people are charging correctly. So, I would say I
9 have some --

10 Q But you don't know how -- how the calculations
11 that went into that number, am I correct?

12 A But they're actual dollars, and there's no
13 calculation required. Fifty hours on the time card go in
14 and they're multiplied by the man's salary.

15 Q You did not total the hours on the time card?

16 A Yes, I did.

17 Q On the time cards?

18 A Yes.

19 Q You're the one that totalled all the hours?

20 A Yes. I see the time cards, I get copies of them.

21 Q And you totalled them?

22 A Yes, I totalled them against the books?

23 Q Where are those totals?

24 A I have certain ones in my office.

25 Q There are none here in the court room today?

MARIE RAYMOND - RECROSS

2809

1 A No.

2 MR. WORK: Object, Your Honor. In the same way
3 that none of the records underline this cost item here, and
4 have --

5 JUDGE BROWN: The foundation that has been laid,
6 will be for the jury to determine with regard to both sets
7 of numbers. Any thing further of her?

8 MR. RIDDLES: No.

9 JUDGE BROWN: You may step down.

10 (Witness excused.)

11 MR. WORK: I would like to recall Mr. Cannady.

12 (Pause.)

13 MR. WORK: Your Honor, I have put a sticker on
14 this document, and I am going to lay a foundation to offer
15 this document, this Defendant's Exhibit 108.

16 JUDGE BROWN: I don't know what this document
17 means.

18 Whereupon,

19 JACK CANNADY

20 having been duly sworn, was recalled as a witness herein and
21 was examined and testified further as follows:

22 DIRECT EXAMINATION (Resumed)

23 MR. WORK:

24 Q Good afternoon, again, Mr. Cannady.

25 A Good afternoon.

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1667

**TRIAL TESTIMONY OF
JACK R. CANNADY - RECALLED**

JACK R. CANNADY - DIRECT EXAMINATION

2809

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3 that none of the records underline this cost item here, and
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17 means.

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19 JACK CANNADY

20 having been duly sworn, was recalled as a witness herein and
21 was examined and testified further as follows:

22 DIRECT EXAMINATION (Resumed)

23 MR. WORK:

24 Q Good afternoon, again, Mr. Cannady.

25 A Good afternoon.

2:
JACK R. CANNADY - DIRECT EXAMINATION

2810

1 Q There's a document in front of you that bares the
2 sticker, Exhibit 108 for identification. I would like under
3 Count 1 for you to deal with two particular numbers.

4 A Yes.

5 Q There's a number for administrative. Who was
6 responsible for developing that number?

7 A I was, primarily with the team. But I was the
8 primary architect. And this here is the cost that was
9 estimated -- a portion of it is recorded in the books, and a
10 portion is estimated for what is the value for the fact
11 finding and the subsequent negotiation of the claim.

12 Q Okay.

13 A It's an estimate of what it took to put the claim
14 together, what it will take to investigate it, understand
15 it, assess it, justify it and negotiate it.

16 Q Now, there's an interest figure there. Who put
17 that figure here together?

18 A I put that figure in. That figure was put in as a
19 fairly simplistic calculation. It said that we submitted
20 the claim on the 6 of February. And what we did then is
21 calculated it from that date to June 25, of 1991, from the
22 end of that month, of February, to 1991, at 12 percent
23 interest, which is what our financing arrangement is for
24 outstanding monies.

25 Q Okay, and there is an interest figure down at the

JACK R. CANNADY - DIRECT EXAMINATION

2811

1 bottom.

2 A This was put in rather hurriedly, as you can see.
3 I calculated this today. IT's a simplistic figure on the
4 two unpaid amounts.

5 Q The tow unpaid invoices?

6 A Well, it's actually three unpaid invoices. The
7 219 is a combination of two invoices and the 1?13?927 is a
8 single invoice. What I did here was calculate 12 percent of
9 that value.

10 Q All right.

11 MR. WORK: Your Honor, I offer Defendant's
12 Exhibit 108.

13 JUDGE BROWN: Objection to 108?

14 MR. BOEHLERT: I renew my objection on the --

15 JUDGE BROWN: I overrule the objection.

16 Foundation for all these figures will be for the jury to
17 determine.

18 MR. WORK: Mr. Cannady, there are two basic
19 categories here. First is compensation under changes clause
20 for added work performed on breaches. Would you simply read
21 the item and the number, please?

22 THE WITNESS: The first item here is software,
23 which is \$1,408,720. The next item is testing, which is
24 \$224,314. The next is logistic of 730,036. The next one
25 is the remote control element, for 426,531. And then the

JACK R. CANNADY - DIRECT EXAMINATION

2812

1 data terminal sets for 36,158. Cabling and packaging,
2 20,000. The administrative that we talked about, which is
3 500,000. And then the interest figure which was calculated
4 as I indicated, which was 895,964, which totals \$4,234,113.

5 BY MR. WORK:

6 Q And then under the last category, unpaid progress
7 payments, and those are invoice progress payments.

8 A Those are progress payments outstanding.

9 Q And earned retainage, that we have actually taken
10 out, Your Honor, the earned retainage, at this point, that
11 has not been invoiced. So, will you read the invoice
12 numbers and interest figure, please.

13 A Yes. The unpaid MOD-3 progress payments, the two
14 invoices outstanding, total 219,839, and the unpaid front
15 end progress payments is 113,927. The imputed interest is
16 40,052, for a total of 373,118.

17 Q Mr. Cannady, what is the current contract value,
18 and by that I mean the contract price, of Whittaker's MOD-3
19 subcontract?

20 A ABout 6.6 million.

21 Q What is the current amount paid by TechDyn under
22 that MOD-3 subcontract?

23 A Approximately 5 million.

24 Q What amount of money has Whittaker spent in
25 performing the MOD-3 subcontract in addition to added work

JACK R. CANNADY - DIRECT EXAMINATION

2813

1 on that subcontract.

2 A About 10.7.

3 MR. RIDDLES: Your Honor, I object to this
4 testimony on the grounds of relevance.

5 JUDGE BROWN: Response?

6 MR. WORK: I have no further questions on that.

7 JUDGE BROWN: Well I sustain the objection and ask
8 that it be stricken.

9 MR. WORK: Well, I'm sorry, I wasn't. Was there a
10 motion to strike on the basis?

11 JUDGE BROWN: Yes.

12 MR. RIDDLES: I objected an therefore moved to
13 strike, Your Honor.

14 MR. WORK: Your Honor, the jury has heard from
15 TechDyn about the amount of money was to be paid by the Air
16 Force under this contract. It has heard from TechDyn about
17 the total amount of money it has spent, and it has heard
18 from TechDyn about the amount of money that has been paid.
19 I simply asked for the same figures for Whittaker. To the
20 extent that it's not relevant, then it is not relevant for
21 TechDyn.

22 JUDGE BROWN: Well, maybe not. But I must take
23 objections as they come. And I hear this one in the context
24 of your claim, I don't think it's relevant, and I sustain
25 the objection.

JACK R. CANNADY - DIRECT EXAMINATION

2814

1 MR. WORK: Well, you'll recall that I did object
2 to TechDyn's number, and I did object --

3 JUDGE BROWN: I don't recall. But if I've been
4 inconsistent, I sure apologize, and I guarantee you it will
5 happen again.

6 MR. WORK: I have no further questions.

7 JUDGE BROWN: Any cross examination of the
8 witness?

9 MR. RIDDLES: Yes.

10 (Continued on next page.)

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JACK R. CANNADY - CROSS EXAMINATION

2815

1 CROSS-EXAMINATION

2 BY MR. RIDDLES:

3 Q For example, the software number -- we have
4 \$1,408,720 in there.

5 A That's correct.

6 Q Sir, does that include -- do you know whether that
7 includes engineering costs for a category 106 engineer?

8 A Does it include category costs for a 106 engineer?

9 Q Yes, sir.

10 A Yes, it would.

11 Q It does?

12 A It would be the category -- when you say 106, I
13 would have to familiarize myself with the 106 but if that's
14 one of our classifications in software that we used in
15 making the claim, the basis of that number started with the
16 costs that were put into the claim.

17 Q Would I be correct, then, that you don't have any
18 personal knowledge of what a 106 engineer is and whether
19 that's in the claim right now?

20 A I do not. That is correct.

21 Q Do you have any idea -- I don't mean to say any
22 idea but would it be fair to say that you do not know what
23 is in that software category in terms of the various labor
24 breakdowns?

25 A I would know it by the classification titles

JACK R. CANNADY - CROSS EXAMINATION

2816

1 rather than the number of the classification. If you ask me
2 is there a senior software engineer in there, I can tell you
3 yes, there is. If you ask me about a number, I don't
4 memorize the numbers. I do understand the classifications
5 and the classifications that were used.

6 Q All right, sir. Let me ask you this: How many
7 hours in that software category of \$1,408,720 are for a
8 technical person? And I don't know how else to refer it.

9 A For a technical person, I could not answer off the
10 top of my head but I could take the claim which is no longer
11 here -- I could take that claim and go through each task
12 and tell you exactly how many hours were estimated in each
13 task. But there's hundreds.

14 Q But when you were doing that, sir, would I be
15 correct that you would be looking at estimates that someone
16 else prepared?

17 A I would be looking at estimates that someone else
18 prepared that I evaluated at the time based on very discrete
19 small tasks at that time or very small estimates for each
20 one of those tasks and the questioned that person as to how
21 they developed that estimate for that task.

22 Q But you do not know at this time as you sit here
23 today what those tasks were. Am I correct, sir?

24 A That is correct. I would have to refer to the
25 claim.

JACK R. CANNADY - CROSS EXAMINATION

2817

1 Q All right. Testing is another area -- \$224,314
2 you're claiming for there. Do you have any personal
3 knowledge of the number of hours and the categories that
4 went into the testing area.

5 A Again, I would have to refer to the claim, to the
6 specific task, remind myself of what the task was, what the
7 additional scope was and remind myself of what the rationale
8 was for that estimate. Then based on my experience, I could
9 make a determination. But coming out and memorizing, I
10 cannot do it.

11 Q I can understand that. It's difficult to memorize
12 all those figures that are in all those claims. Let me just
13 ask you this, though. You said that you would be refreshing
14 yourself. You would be refreshing yourself as to something
15 that someone else told you though, am I correct?

16 A That is correct. I would be refreshing myself on
17 an estimate that someone else prepared and that I evaluated
18 based on my experience in the software field of evaluating
19 estimates, costs to complete, budgets for the last 35
20 years. That's correct.

21 Q But you would have had no personal knowledge of
22 whether or not that individual whose hours had been
23 estimated had actually performed those hours.

24 A No, I would not have known if that individual had
25 performed those hours. I would merely make an assessment

2.

JACK R. CANNADY - CROSS EXAMINATION

2818

1 whether those hours were necessary to do that job.

2 Q And in doing that assessment, you would not know
3 any particular individual's name that might have done that.

4 Am I correct, sir?

5 A Only if I had personal knowledge, which I did in a
6 couple of areas which I went out and looked at to
7 familiarize myself with it but in general, no.

8 Q All right. Let me talk to you about Mr. Jones. I
9 think you mentioned him in the logistics --

10 A Steve Jones?

11 Q Yes.

12 A Yes.

13 Q What did he look at, do you know, to base his
14 estimate on the initial effort for his area?

15 A Yes, he went back and went into the original
16 estimate that had been prepared, which was a logistics plan
17 which was subsequently negotiated out of the contract. He
18 looked at the logistics plan and the documentation that was
19 required. He then went and looked at the various contract
20 line items and what we call CDRLs which is just a definition
21 of a particular document, and what it would take to do that
22 document, whether it was one-sided or two-sided, what type
23 of research would have to be done in order to put it in, the
24 spares requirement, there would have to be the documentation
25 of the spares and the delivery of the number of units of

7:
JACK R. CANNADY - CROSS EXAMINATION

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1 that document that would have to be given to the various
2 commands.

3 Q Let me ask you this: Did he look at the contract
4 line item numbers, for example?

5 A He looked more at the CDRLs than the contract line
6 items.

7 Q Did he look at the attachments that are referenced
8 in the subcontract for the contract line item numbers?

9 A Yes, he did.

10 Q I see. And he told you that he did that?

11 A I was with him. He was sitting in a room about
12 four feet away from me when I was doing the evaluation of
13 the estimate in Carlsbad.

14 Q So then you know as a fact that he did.

15 A Yes, I do.

16 Q I see. How did he determine his final figure? Do
17 you know, sir?

18 A He went through and took a look at what the
19 requirements were of the document. Let's take a document --
20 there's two or three things that fall into logistics. One
21 of them is field engineering, one of them is the furnishing
22 or determining what spares are necessary for the system,
23 another one is where those spares come from and how they
24 interface and what spares are needed for a 30-day period or
25 a year's period, different items there. And then a very

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1 large portion is the documentation that is required of every
2 system so that you can operate it and repair it. And he
3 would go through and take the actual requirement of the CDRL
4 or what was required by the contract and he would make an
5 assessment of what the changes in the software would change
6 in the number of pages, the number of illustrations, the
7 number of items that would change within each one of those
8 and it was an estimate based on his judgment.

9 Q Is Mr. Jones -- he's a redheaded young man from
10 the Marine Corps?

11 A Yes, he is. The Marine Corps. He also has a
12 Master's degree in integrated logistics support.

13 Q Okay. I just wanted to make sure.

14 A Yes, sir.

15 Q Now, the 12 percent interest that you mentioned.
16 Who's charging you 12 percent interest?

17 A Our corporation, the Whittaker Corporation. We're
18 one of the divisions and it's part of our P&L statement, our
19 profit and loss statement. We have an imputed interest of
20 12 percent or 1 percent a month on all outstanding
21 receivables that are unpaid.

22 Q Would it be fair to say that they could charge you
23 a lesser or a higher amount if they wanted to, sir?

24 A They could, being the corporation. They could
25 charge what they feel is appropriate. Yes.

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1 Q What's the rate of interest at a bank if you went
2 to borrow that money? Do you know?

3 A It depends on what your credit rating is.

4 Q What's the credit rating of the Whittaker
5 Corporation?

6 A Double A.

7 Q What would be -- you would then be, I assume, able
8 to borrow at the prime rate of interest.

9 A I would say that what you usually do -- very few
10 people can borrow at prime except bank to bank. I'd say
11 that you're probably at prime plus two or prime plus one and
12 a half.

13 Q What is that currently, sir?

14 A I don't know.

15 Q Do you have any idea?

16 A No, I don't.

17 Q Would it be less than 10 percent?

18 A I would have to go back and pick up the Wall
19 Street Journal and look at what it is today.

20 Q I see. Do you have the Whittaker claim? Is that
21 what that is up there?

22 A No, this is the bibliography, this is the update
23 and I --

24 Q Over to your left.

25 A Oh, over here. Yes. Yes.

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1 Q Are you familiar with this, sir?

2 A Yes, I am.

3 Q I want to direct your attention to this category
4 right here where it says 106 technical. Do you see that,
5 sir?

6 A Yes.

7 Q Is this part of the -- and you see these hours for
8 300 hours here in January of 1987?

9 A Right.

10 Q And are you familiar with this document, sir?

11 A I am familiar with this document.

12 Q And then you see the rate, the dollars that are
13 being charged?

14 A Yes, it's \$22.53.

15 Q And then you see a total here of \$55,762?

16 A That's correct.

17 Q Is this a part of your claim in the software
18 area, sir?

19 A Yes, it is.

20 Q And that's part of this \$1,408,720?

21 A Yes, it is.

22 Q And it's also part of the \$4,244,113 that you're
23 asking for. Am I correct, sir?

24 A That's correct.

25 MR. RIDDLES: No further questions.

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1 MR. WORK: Your Honor, I'd like to -- on the basis
2 on the foundation that's been laid and the questions by both
3 sides offer the 1989 Whittaker claim and the 1990 update.

4 JUDGE BROWN: Any objection?

5 MR. RIDDLES: Yes, Your Honor.

6 JUDGE BROWN: May I see the document you want
7 admitted by number?

8 (Pause.)

9 JUDGE BROWN: Okay. It's Exhibits 50E, 50B, 50A,
10 50D and 50C that you're offering.

11 MR. WORK: Yes, Your Honor.

12 JUDGE BROWN: Okay. The objection?

13 MR. RIDDLES: Yes, Your Honor. Object to it on
14 the basis of relevance and also for the Court's prior
15 ruling, consistent with the Court's prior ruling.

16 May we approach?

17 JUDGE BROWN: Oh, dear, yes. You'd better come up
18 and tell me what my prior ruling was.

19 MR. RIDDLES: I believe the Court ruled that the
20 claim could not come into evidence, Your Honor, as part of
21 the motion in limine and that's what this document is.

22 JUDGE BROWN: Okay. If you want to respond?

23 MR. WORK: Yes. The objection was on the basis of
24 hearsay, the same basis that I objected to their materials
25 when they brought them up in trial here.

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1 MR. BOEHLERT: There's a opinion argumentation as
2 well as legal theory.

3 JUDGE BROWN: What went into evidence in theirs
4 so that I'll try to be a little bit consistent -- what's
5 similar to this in their case?

6 MR. WORK: This was the -- there were these
7 summary on summary sheets.

8 JUDGE BROWN: All right.

9 MR. WORK: And these are summary on summary
10 sheets.

11 JUDGE BROWN: This was --

12 MR. WORK: Hise authored this. These are
13 documents that were prepared, as I understand it, by their
14 experts taken from records that we have never seen.

15 MR. RIDDLES: That's not the testimony.

16 MR. WORK: That's what Mr. Hise said. Well,
17 whoever did these computer runs. Hise said he did it in
18 conjunction with the experts and these were attachments to
19 the experts' summary of opinions. These are hearsay
20 documents.

21 These are all hearsay documents. Everything in
22 here is either hearsay or double hearsay. There is no
23 original documentation here.

24 MR. BOEHLERT: Do you want me to get you an order
25 on this, Your Honor, since you did already rule on this in

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1 the motion in limine?

2 JUDGE BROWN: Well, I sometimes change my mind.

3 You just never can tell.

4 (Pause.)

5 MR. RIDDLES: Your Honor, there was no objection

6 that I recall to this --

7 JUDGE BROWN: I sustain the objection. This is --

8 the 50 series is narrative. This is figures. And the

9 comparable figures that I have allowed in is this and I

10 don't see any comparable figure items. If you have them,

11 I'll look at them.

12 MR. WORK: We can just put in the cost volume.

13 Here are the -- this is the cost volume. These are the

14 computer runs that Mr. Cannady and Ms. Raymond talked about.

15 JUDGE BROWN: Is there narrative in here?

16 MR. WORK: There is narrative that supports the --

17 JUDGE BROWN: Well, why don't you prepare one that

18 you think isn't narrative and I'll look at it tomorrow.

19 MR. WORK: Okay.

20 JUDGE BROWN: Okay. Are we -- can he be excused?

21 MR. WORK: He may be excused.

22 JUDGE BROWN: You're excused and free to go.

23 Thank you.

24 (Witness excused.)

25 MR. WORK: Mr. Joseph Nocera.

**TRIAL TESTIMONY OF
JOSEPH A. NOCERA**

3.
JOSEPH A. NOCERA - VOIR DIRE EXAMINATION

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1 A Methodology of the claim preparation was a part of
2 the evaluation. It would not be the only part. We were
3 primarily responsible for the claim evaluation.

4 Q And you looked at the actual costs and then
5 supporting data as well, is that correct, sir?

6 A That's correct.

7 Q Have you ever had experience at the DCAA in
8 evaluating simply the methodology of the claim, and that
9 only, sir?

10 A The DCAA would normally evaluate a claim in its
11 entirety, at the request of its contracting officer.
12 Normally, we would not allow contracting officer to ask such
13 limited questions.

14 Q Am I correct?

15 A I think the answer to your question is probably
16 not.

17 Q Am I correct that your testimony here today, what
18 you have been asked to do, is simply evaluate the
19 methodology of the claim employed here, sir?

20 A I think that is correct, yes.

21 MR. RIDDLES: Your Honor, I would object to him
22 being proffered on that basis.

23 JUDGE BROWN: I overrule the objection, and find
24 that he is qualified to testify as an expert witness in the
25 field, and his qualifications will be judged by the jury.

JOSEPH A. NOCERA - DIRECT EXAMINATION

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1 DIRECT EXAMINATION

2 BY MR. WORK:

3 Q Mr. Nocera, are you familiar with the claims that
4 Whittaker has made against TechDyn in this law suit?

5 A Yes. I am . I have read the claims and I've read
6 all the other documents relating to it. The contracts, the
7 subcontract, the claims themselves, and I've also read the
8 TechDyn claim and reviewed those, and other documents that
9 relate --

10 Q Would it be fair to say that you are familiar with
11 not only Whittaker's claims in this law suit against
12 TechDyn, but TechDyn's claims in this law suit against
13 Whittaker?

14 A Yes, that's correct.

15 Q I think you gave a partial list of things you
16 reviewed. Will you just give us a complete list of things
17 that you reviewed, to acquaint yourself with the parties'
18 claims.

19 A I reviewed the documents that were related to the
20 computations of the claim amounts, and the assessment of the
21 technical evaluations. I read the Whittaker claim, I read
22 the three volumes, the technical part of the claim. I
23 primarily focussed on the quantum volume. That is the
24 volume where they priced it out.

25 And in the TechDyn claims, I reviewed the

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1 documents that they had submitted in support of their
2 financial pricing out of the claims. I read other
3 documents that were related to both claims. Correspondence,
4 contract administration correspondence, and the like.

5 I used, in making the evaluation, a pamphlet that
6 I referred to. I used the Federal Acquisition Regulations
7 as a reference guide. I used the Defense Contract audit
8 manual as a means to evaluate whether or not I had followed
9 the steps appropriate in an audit.

10 And, I probably some other things, too. A lot of
11 documents.

12 Q Based on your experience, are there different
13 methodologies employed in developing claims and Government
14 procurement situations, based either on added work or added
15 costs?

16 A Yes. I think the general consensus would be that
17 if you know there is a change coming to your contract, and
18 it is pre-announced, or you recognize it as being a change
19 that would add work to it, the best method would be to
20 establish a series of accounts, which you would use to
21 accumulate the cost to perform that specific additional
22 work. That would be probably the best way that you could
23 account for a later claim.

24 However, that seldom happens in the real world.
25 Primarily because claims are evolutionary. Most contractors

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1 believe in the beginning that they are going to be minor, or
2 that they are not too important, so they continue to
3 accumulate their costs in the regular accounts. The costs
4 become commingled, and later on it is difficult to identify.

5

6 In those circumstances, the next best thing that
7 you can do is to make an analysis of the work that you were
8 supposed to do under the contract, and the work then, that
9 you actually did. And you determine what the differences
10 are in the work that was required to be done. And then you
11 try to isolate the event that caused that work to be
12 performed. And then you show a cause and effect
13 relationship. And then you price out the effect.

14 And that's usually done by reviewing the cost that
15 were incurred, if those were available, and trying to
16 determine. Usually it takes some estimating. Trying to
17 determine how many hours, or what efforts it would be
18 required to perform those additional tasks. And then you
19 price those out on the basis of actual rates, and hourly
20 rates for people who worked on the jobs, and you imply your
21 indirect expense rates.

22 Q Are there any other methodologies that are used to
23 develop a claims based on added cost or added work in
24 evolving programs?

25 A Yes. There is another method that is used. And

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1 it is called the total cost claim. And it has certain
2 assumptions built in to it. And those assumptions make it
3 very difficult for this kind of a claim to be evaluated and
4 be accepted.

5 MR. RIDDLES: Your Honor, I object, and I want to
6 approach the bench.

7 MR. WORK: While we approached, did I leave that
8 correspondence with you?

9 MR. RIDDLES: Not that I know of.

10 MR. WORK: The one I handed to you.

11 MR. RIDDLES: Your Honor, I have here this
12 witness' statement and it doesn't say anything about total
13 cost as being part of his testimony.

14 JUDGE BROWN: Let me see that.

15 (Pause.)

16 JUDGE BROWN: I'm having trouble finding where he
17 comments about Whittaker's claim at all.

18 MR. WORK: At the time that we prepared this
19 document, Your Honor, and this was an attachment to the
20 December 10 case synopsis, we had virtually nothing on
21 TechDyn to be able to assess it. And he is simply saying,
22 he has the, he is going to be referring to the time related
23 cost claim --

24 JUDGE BROWN: Where do I find that in this text?

25 MR. WORK: On page four. And now that we have the

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1 information, that they have provided in their exhibits, and
2 the various graphs and things like that, he is in a position
3 to assess what that claim is.

4 JUDGE BROWN: Well, he may not do so if it was not
5 revealed in the answer to interrogatory expanded by you. In
6 the statement he made. I don't see anything there where he
7 comments at all.

8 MR. WORK: Well, may he comment about time related
9 cost claim?

10 JUDGE BROWN: I don't see where he does there --
11 give an opinion except for more documents are needed. What
12 is --

13 MR. WORK: Because we didn't have them at the
14 time, Your Honor.

15 JUDGE BROWN: Well, I understand that. And he may
16 not testify on anything that is not revealed.

17 MR. RIDDLES: Your Honor, I would also move that
18 his testimony be stricken, about total costs.

19 JUDGE BROWN: He hasn't really said anything.

20 MR. WORK: Your Honor, my problem with this has
21 been -- remember when I raised this with Grey?

22 JUDGE BROWN: Yes.

23 MR. WORK: There was a little snippet, three
24 sentences, he said I am going to talk about methodology, and
25 I am going to say, it's reasonable. There was no statement

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1 of opinion for the basis of why he thought so. He just
2 said, I'm going to say it is reasonable. On the basis of
3 that, you let him testify. This guy has about seven pages
4 of material describing what he knew at the time, because he
5 hadn't received the trial exhibits that he was going to rely
6 on.

7 JUDGE BROWN: I sustain the objection to him
8 testifying to something that was not revealed in the answer.

9 MR. WORK: Let's focus on Whittaker's claim
10 against TechDyn in this law suit. How would you
11 characterize the claim methodology in that claim, sir?

12 THE WITNESS: Well, I reviewed the claim document.
13 In my opinion, it's a reasonable claim that the methodology
14 that was used to prepare the claim was reasonable under the
15 circumstance.

16 They did an evaluation of the work that was to be
17 done under the original contract. As best they could
18 determine that. And then they did an evaluation of the work
19 that was actually performed. And they isolated the causes
20 and effects of the additional work that had to be performed
21 over and above the contract amount. And then they priced out
22 those items, those discreet cost effects.

23 And there are roughly 12 of those in the claim.
24 Nine to 12, depending on how you put them together. And I
25 reviewed those. And the methodologies that were used to

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1 arrive at the pricing amount.

2 BY MR. WORK:

3 Q What is the importance of identifying particular
4 tasks and the cause and effect relationship as pertains to
5 those tasks?

6 A The cause and effect relationship is a requirement
7 to be able to say who you are going to make a claim against.
8 The person, or the object that caused you to incur that
9 cost, was responsible, really for paying for it. So, that is
10 who you are going to make the claim against. You have to
11 know what the cause was and who made that cause. And then
12 the effect is, of course, the quantity, the amount that you
13 are asking for.

14 It's important price that discreetly because there
15 are other costs that you might have incurred that have
16 nothing to do with that particular activity, that was
17 incurred, the additional work. There are certain costs that
18 are incurred over and above the contractual amounts which are
19 your own responsibilities, such as inefficiencies, increases
20 in rates that were not beyond the control of the original
21 estimate. Failure to budget to the estimate and so forth,
22 or controlled to the budget.

23 So, those costs would be your own. You want to
24 make sure that those are eliminated.

25 Q In your opinion, sir, would it have been

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1 appropriate for Whittaker to have looked at the contract,
2 the subcontract price and the cost incurred on the program,
3 and claim the difference from TechDyn?

4 MR. RIDDLES: Objection, Your Honor. It's beyond
5 the scope of this witness' testimony. He's here -- what
6 he's stated is what he is going to testify to -- so that
7 goes beyond. I also object to the leading question.

8 JUDGE BROWN: I sustain the objection to the
9 leading nature of the question. I don't know whether you
10 want to ask it another way and then we will have to come up
11 and review the other -- or whether you would like to let it
12 go.

13 MR. WORK: All right. Mr. Nocera, do you have any
14 opinion on whether or not, any other type of methodology, of
15 claim methodology, would be, would it be appropriate in
16 these circumstances of this program?

17 THE WITNESS: Yes.

18 MR. WORK: Other than the one Whittaker --

19 MR. RIDDLES: Your Honor, I object to that being
20 irrelevant to the issue at hand. If he could talk about the
21 method that is appropriate for this one, and that was used
22 by Whittaker, that is what he has been proffered for as an
23 expert. Not to talk about something else.

24 JUDGE BROWN: Well, I guess I have to look at what
25 he says there. He's about to tell us some other method that

JOSEPH A. NOCERA - DIRECT EXAMINATION

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1 would have been appropriate, and I don't know whether that's
2 in the --

3 MR. WORK: He has, Your Honor, I would be happy to
4 show you.

5 JUDGE BROWN: He says there is another method that
6 would have been appropriate and he is going to tell about
7 it.

8 MR. WORK: There's a lengthy analysis of Whittaker
9 methodology.

10 (Continued on next page.)

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1 BY MR. WORK:

2 Q Let's focus on TechDyn's claim.

3 MR. RIDDLES: TechDyn's?

4 MR. WORK: Yes. TechDyn's claim.

5 MR. RIDDLES: Your Honor, I'll object to that.

6 That's beyond the scope of his proffered testimony.

7 JUDGE BROWN: I can't know that yet. I don't know
8 what he's going to ask. If it's revealed, he can ask it.

9 BY MR. WORK:

10 Q Mr. Nocera, as relates to TechDyn's claim for time
11 related costs, are you familiar with that claim?

12 A Yes, I am.

13 Q What would you as --

14 MR. RIDDLES: Your Honor, I renew my objection and
15 the basis of my objection is this: I can find no proffer
16 where he has been identified as an expert in the field on
17 identifying TechDyn's claim.

18 JUDGE BROWN: I'll overrule the objection. I hear
19 what he's going to ask. I don't know whether you do but I'm
20 pretty sure you'll find it written right there when he asks
21 it.

22 MR. WORK: Page 4 through 7, Mr. Riddles.

23 BY MR. WORK:

24 Q As relates to TechDyn's claim for time related
25 costs, what would you as an auditor, what materials would

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1 you as an auditor need to evaluate that claim and determine
2 whether it has any valid basis?

3 A In order to evaluate the claim as it is presented
4 for the time related expenses, we would need to know -- we
5 would have to have detailed time sheets for the individuals
6 who are charging into that total cost of the time related
7 expenses.

8 And we would need to know what they were doing and
9 why they were performing that and where the rest of their
10 time is going. We'd need to have their time sheets and if
11 it were possible, if you were there on-site, you would want
12 to discuss with the individuals, perhaps, interview them or
13 look at other documents that would indicate what their
14 responsibilities on the contract were and how their costs
15 were being distributed.

16 Then you'd want to know about the additional costs
17 that were being added, like the overhead costs which are the
18 costs of indirect labor like secretaries and supplies and
19 fringe benefits, which are not directly charged to a
20 contract. You would want to know why they were required to
21 have consultants on-site and what those consultants were
22 doing.

23 So you'd want to know what travel they did and why
24 they made certain trips and what they were doing. You need
25 to know what they were doing in effect and why.

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1 Q What documents, specific documents, would you need
2 to assess the things you've just mentioned?

3 A Well, you'd need -- basically, you'd need the job
4 cost summaries for the jobs as how ever they recorded their
5 costs. You'd need to know what costs were being charged to
6 which jobs on the contract, whether they were being
7 accumulated by line item or whether they were being
8 accumulated by a work breakdown structure. You need to know
9 all of that so that you can tell what costs were being
10 expended on what parts of the contract.

11 So you'd need time sheets and expense reports and
12 the job cost summaries and overhead submissions and all of
13 those kinds of things.

14 Q What about items for consultants? What would you
15 need to evaluate whether claims for consultants' time would
16 have any validity?

17 A Well, normally what you'd need for a consultant is
18 you would have to know what it is they were asked to do.
19 You'd need their agreement with the company for what kind of
20 work they were going to perform. You'd need their invoices
21 for how much they charged and when they performed the work.
22 And you'd need to look at their work product so that you'd
23 know that they actually did something that contributed to
24 the task. It would be a report or -- it could be a number
25 of things but whatever the work product was, if that could

JOSEPH A. NOCERA - DIRECT EXAMINATION

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1 be evaluated.

2 MR. WORK: We're going to put up on the overhead a
3 document that Plaintiff has marked as Plaintiff's Exhibit
4 953 and it's in what TechDyn's published to the jury in a
5 volume entitled TechDyn's damages.

6 JUDGE BROWN: I don't think he can see.

7 MR. WORK: Yes. I'll just give this to you.

8 (Pause.)

9 BY MR. WORK:

10 Q Can you describe what's shown on this document?

11 A Yes. The 953 exhibit is a summarization of the
12 calculation of the delay damages per day as it's titled and
13 essentially the first line is the total cost incurred and
14 then the amounts that are taken out appear to be the
15 contracted for amounts. Those are amounts that were
16 compensated otherwise by the original contract or by
17 modifications to that contract and the net amount, the
18 \$2,315,000, is all of the rest of the cost.

19 On the basis of this presentation, I would say
20 that they were blaming Whittaker for the incurrence of all
21 that cost and this in my opinion is --

22 MR. RIDDLES: Objection, Your Honor. This is
23 beyond the scope of his --

24 JUDGE BROWN: I sustain the objection.

25 MR. WORK: All right.

JOSEPH A. NOCERA - DIRECT EXAMINATION

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1 BY MR. WORK:

2 Q Now, Mr. Nocera, to evaluate that claim, let's
3 break it down into it's basics. What elements exist in that
4 claim that you would want to inquire about to determine the
5 validity of this claim? What cost elements?

6 A Well, the cost elements are kind of presented on
7 the next page, 954, and they are made up of labor so we
8 would want to see all the time sheets for the people who
9 worked on the job and we would want to know what the periods
10 of time they were charging to this activity were, what they
11 were doing. Their time sheet would reveal the charges that
12 they made to different jobs that they were working on during
13 the period of time.

14 Q Are the time sheets contained in that book?

15 A No, the time sheets are not in here.

16 Q What is there in that book that reflects the time
17 of individuals --

18 MR. RIDDLES: I renew my objection. Beyond the
19 scope of the proffered testimony.

20 JUDGE BROWN: I'll sustain the objection.

21 MR. WORK: All right.

22 BY MR. WORK:

23 Q As relates to these direct labor costs, would
24 simply a summary of the time --

25 MR. RIDDLES: Objection.

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1 MR. WORK: May I ask the question, please?

2 JUDGE BROWN: I haven't heard the question.

3 MR. RIDDLES: All right. I'll let him finish and
4 then I'll object.

5 MR. WORK: Thank you.

6 BY MR. WORK:

7 Q Would it be enough to evaluate this claim simply
8 to have a list of hours of people spent on this program
9 without any description of what those people were doing in
10 incurring those hours?

11 MR. RIDDLES: Objection.

12 JUDGE BROWN: Overruled.

13 THE WITNESS: No. It would not be sufficient to
14 evaluate the charge there because you have to know whether
15 or not they were even working on a relevant job. They could
16 have been -- I don't know how many contracts TechDyn has.
17 That would be another thing we'd have to know, is whether or
18 not these people are charging to other contracts and whether
19 or not they were really working on the contract that we're
20 talking about.

21 BY MR. WORK:

22 Q If they were working on the contract, would it be
23 enough simply to know that they were working on the contract
24 or would you have to have further detail?

25 MR. RIDDLES: I renew my objection, Your Honor.

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1 JUDGE BROWN: Overruled.

2 THE WITNESS: No, that would not be sufficient
3 either because there are several -- the contract is broken
4 out in several line items and some of those line items would
5 have work that is not related to this claim and if they were
6 charging to those line items, we would want to know how much
7 time they actually charged there and how they distributed
8 their time. The time sheet would reveal that.

9 BY MR. WORK:

10 Q There are also items on this list for contract
11 management. Would it be enough in evaluating whether that
12 contract management was the valid basis for the claim simply
13 to have a list of hours without any description of what
14 management -- of what was being managed?

15 A No. Yes, you'd have to have some description of
16 the work that's being performed, what is contract
17 management, what his responsibilities and what other
18 aspects of the contract is he managing besides what we're
19 talking about here. You have to know whether there's a
20 reasonable basis for distributing his time to the other
21 lines of the contract.

22 Q As relates to travel, would it be enough in your
23 opinion simply to have a list of trips made by people
24 working for TechDyn in connection with this program without
25 any indication of what purpose those trips were designed to

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1 serve?

2 A No, that wouldn't be sufficient either because the
3 purpose of trying to evaluate the costs that are incurred
4 and being accumulated against the claim or against the
5 contract is to know what it was they were doing. So if they
6 made a trip, you would want to know the purpose of the trip,
7 who was there, who they contacted, how long they were gone,
8 what city they went to and all of the things that would
9 normally appear on his expense report and his trip report.
10 You'd want to see his trip report. The trip report is the
11 report of what happened at the meeting that he went to or
12 whatever he did the trip for. So you'd want to evaluate
13 both of those to see the relevance of the costs being
14 charged to a particular activity under a contract.

15 Q Now, as relates to consultants, would it be enough
16 in your opinion in evaluating whether or not a claim for
17 consultants' time was valid simply to have a list of
18 consultants' charges without any identification of what
19 those consultants were doing?

20 A No. Again, you'd need to know what the consultant
21 was hired for, what his area of expertise is, what area he
22 was working in, what he agreed to do and what his product,
23 output, and how he contributed to the program and why he was
24 needed at all.

25 Q Now, with respect to the category of other direct

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1 costs, what documents would you need to identify whether a
2 claim for other direct costs had any valid basis?

3 A Other direct costs usually is a calculation --

4 MR. RIDDLES: Your Honor, I hate to be a nuisance.
5 I'm just going to renew my objection. There's not any basis
6 for this in the proffered testimony of this witness.

7 JUDGE BROWN: Well, bring it up and I'll look.

8 (Pause.)

9 MR. RIDDLES: If I've missed it, I'm sorry. I
10 can't find it.

11 MR. WORK: Right there on the top of page 5, first
12 sentence.

13 JUDGE BROWN: Item F. Overrule the objection.

14 BY MR. WORK:

15 Q Let me repeat the question, Mr. Nocera. In
16 evaluating a claim for other direct costs, what documents
17 would you have to have to determine the validity or
18 invalidity of such a claim?

19 A For other direct costs which is normally of
20 grouping of costs that are being charged direct to a
21 project, they can be a variety of things. First of all, you
22 have to know what they are specifically so you have to know
23 whether or not -- what kinds of documents would support
24 them. For instance, if there's a purchase of some kind of
25 material or equipment or rental of equipment, you have to

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1 know what it is that was -- what you're being charged for
2 and then the kind of document that would support that,
3 whether it would be an invoice or a contract or whatever it
4 might be. It could be a time sheet or you could --
5 sometimes you find consulting expenses or travel expenses
6 grouped as other direct costs so you have to know what the
7 costs are and then you determine what kinds of data you need
8 to support the costs that are being charged there. So it
9 could be a variety of documents.

10 Q I see on this list on 954 as well an item for
11 on-site overhead. What documents would you need to
12 ascertain the validity of a claim for on-site overhead?

13 A On-site overhead -- overhead is a grouping of
14 expenses of costs that are not normally charged direct to a
15 contract. They include such things as indirect labor for
16 secretaries, for supervisors. If you're in a manufacturing
17 place, the material movers. It can be any variety of
18 things. Normally, fringe benefits for those kinds of people
19 are included in that pool. You have supplies and rent and
20 depreciation of equipment. Those kinds of expenses are all
21 pooled together and then they are allocated to all the
22 business on the basis of a rate. And so you would need to
23 know what those individual expense accounts contain, why
24 they are legitimate expenses. You'd have to know the basis
25 for the allocation and, if they're a Government contractor,

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1 as TechDyn is, they will normally have made a submission to
2 the Government for approval of those rates and I would like
3 to see -- I would particularly like to see any DCAA
4 evaluations of those rates if those were available.

5 Q Based on your own experience with DCAA, does DCAA
6 establish or approve rates for a company in TechDyn's
7 position?

8 A They would review their submission, annual
9 submission for approval of rates and they would make a
10 recommendation either to a contracting officer or, if
11 they're on what is called audit determined rates for rates
12 of the past year, they would make a determination and see if
13 the client, TechDyn in this case, would agree to those
14 rates. And those would be the rates that they would use.

15 Q Now, I see an entry on 954 for general and
16 administrative as well. What would you need to have to
17 evaluate a claim for general and administrative expenses in
18 the context of TechDyn's claims?

19 A General and administrative expenses are similar
20 to those which are included in overhead but they are
21 generally a broader kind of expense. Like they usually
22 include the salary and the operation of the president's
23 office, the executive vice presidents of the corporation,
24 the expenses of the personnel department, things of that
25 nature but they are a grouping of expenses and they are

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1 courtroom here, have you, and what the jury might have heard
2 about those costs. Am I correct, sir?

3 A No, I do not.

4 Q Okay. Are you familiar with this book by Coopers
5 & Lybrand?

6 A I don't know.

7 JUDGE BROWN: Show it to Mr. Work first.

8 (Pause.)

9 MR. WORK: The book is not relevant, Your Honor.
10 It says "Construction Litigation Representing the
11 Contractor".

12 If we're going to bring in this kind of thing,
13 then the document that I proffered as an exhibit should come
14 in, too. I object to it.

15 JUDGE BROWN: Well, it's not the same basis and I
16 don't know what he's going to do with the book but it's
17 shown to you for informational purposes. He hasn't offered
18 it as an exhibit at this point.

19 MR. WORK: Well, I object to any questioning based
20 on it, on just an even handed basis that I intended to do
21 the same thing.

22 JUDGE BROWN: I don't think what you intended to
23 do -- fine. But what you intended to do is not the same
24 thing and I overrule your objection. That objection at this
25 point.

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**EXCERPTS OF TRIAL PROCEEDINGS OF
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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: I have received in writing a number
6 of motions to strike and other motions so I'm going to rule
7 on a number of those motions now because I've read them and
8 your points are preserved.

9 Obviously if I'm ruling on it, I'm ruling against
10 your motion because I would allow the other side to speak if
11 I was going to rule in favor of your motion. A couple of
12 the motions I'll hear oral argument on.

13 There was a motion by Whittaker to be allowed to
14 put in the cost figures. I did say at the hearing that I
15 would look at it the next day. Today effectively is the
16 next day when I said I would look at it and I have looked at
17 it.

18 And I find it wouldn't make any sense to the jury
19 without testimony and I find further that the witnesses
20 adequately described how the cost estimate was developed in
21 order to allow that point to go to the jury, that those cost
22 figures would be confusing to the jury and not add anything
23 and further have some hearsay in them and so I deny the
24 introduction of the cost figures.

25 I further deny TechDyn's motion not to allow

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1 damage evidence to go to the jury because it's based on
2 hearsay or not proper experts or that kind of thing. The
3 people who testified were not independent experts. They
4 were the people who developed figures in the process of
5 managing Whittaker's business and their development of cost
6 figures was not materially different than TechDyn's
7 development of cost figures and I think both of them should
8 go to the jury so I deny those motions.

9 TechDyn made a motion to strike Whittaker's
10 quantum merit theory. I'll take that up at the jury
11 instructions. I deny it as a motion to strike now. We can
12 revisit it when we do jury instructions.

13 TechDyn made a motion to strike Whittaker's
14 evidence because Whittaker didn't give notice. I said I
15 wasn't going to hear that. What I mean by not going to hear
16 it is I'm not going to rule it as a matter of law. It may
17 be in the contract and it may be something that can be
18 argued to the jury. I deny it as a motion to strike.

19 Whittaker renewed all of Whittaker's motions to
20 strike. I don't think this is the appropriate time to do
21 that because I think you make a motion to strike at the
22 conclusion of the party's evidence against whom the motion
23 is made and then at the conclusion of all of the evidence
24 and rebuttal evidence is still to be introduced, but if I'm
25 wrong about that and this is the right time to do it, I deny

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1 the motions for the same reasons that I gave before.

2 TechDyn made a motion to strike which I find a
3 certain irony in TechDyn's motion to strike relying on the
4 Hale case for failure to apportion but I deny it for the
5 same reason that I'm going to deny and have denied and will
6 continue to deny Whittaker's motion on the same basis as to
7 TechDyn's evidence.

8 And what I'm ruling there is simply that it's a
9 jury question. The same thing with regard to the argument
10 that the damages by Whittaker are speculative. They're jury
11 questions.

12 I think that addresses all of the motions except
13 two: TechDyn's motion to strike the administrative costs
14 and TechDyn's motion to strike the progress payments. And
15 those two I'll hear argument on.

16 (Pause.)

17 MR. BOEHLERT: Your Honor, I'd like to address
18 those in order, if I might, please.

19 The law of Virginia is clear that absent a
20 contract provision which expressly allows the recovery of
21 attorneys' fees or litigation costs or claim preparation
22 fees --

23 JUDGE BROWN: Actually, excuse me. Let me
24 interrupt you just a minute. I've read your submission so
25 why don't you let them respond and you can respond to what

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1 they say.

2 MR. BOEHLERT: Okay, Judge.

3 MR. WORK: We have prepared a written response to
4 that, too, and our computer broke down here in an electrical
5 storm and we couldn't get it back up but I'll simply
6 summarize what's in this, Your Honor.

7 JUDGE BROWN: Okay.

8 MR. WORK: On the question of the administrative
9 costs, I guess maybe the place to pick up is --

10 JUDGE BROWN: I think I've -- well, no. I haven't
11 seen this, have I?

12 MR. WORK: Right. You have not seen this.

13 JUDGE BROWN: I've seen some composition but not
14 this.

15 MR. WORK: Right.

16 JUDGE BROWN: All right.

17 MR. WORK: This clause that we're talking about
18 upon which this claim is based requires -- it's the changes
19 clause and it requires -- it states that the buyer, here
20 TechDyn, shall make an equitable adjustment. It states it
21 in those terms, that the buyer shall make an equitable
22 adjustment in the event of changes.

23 There is evidence, Your Honor, that TechDyn
24 invited a claim from Whittaker in April of 1987. Whittaker
25 filed a claim in May of 1987, as Ms. Raymond testified. It

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1 filed another claim in 1988, approximately May of 1988. It
2 filed the large claim that you have seen in January of 1989.
3 It filed a supplemental claim in January of 1990. So over
4 the period of four years since TechDyn invited a claim,
5 there has been a great deal of work involved in the
6 preparation of that claim. And yet, as Ms. Raymond
7 testified, no action on that claim by TechDyn.

8 TechDyn has never paid anything, despite the
9 language of the contract that says shall make an equitable
10 adjustment. And the theory underlying that administrative
11 claim which does not include any attorneys' fees, it
12 includes simply company time in developing those claims, and
13 Mr. Cannady so testified, we feel those are appropriate
14 breach of contract damages.

15 This system is supposed to work smoothly. This
16 system did work smoothly in the case of TechDyn's claim,
17 their initial claim, that got resolved by the Government.
18 But after four years and literally tens of thousands of
19 hours of involvement by the group that Mr. Cannady and Ms.
20 Raymond described to develop these claims and submit them,
21 Whittaker has gotten nothing. It's spent an enormous amount
22 of time.

23 Mr. Cannady describe the seven-day a week,
24 six-week effort virtually around the clock for some people
25 to develop that 1989 claim. And yet no payment on it. And

1 we feel that TechDyn's failure to comply with its explicit
2 contractual obligation to make an equitable adjustment once
3 there have been changes identified is appropriate breach of
4 contract damages and I think there is certainly enough
5 evidence on that subject to go to the jury.

6 We are not claiming attorneys' fees which would be
7 on top of the figure stated and there is no evidence that
8 that figure does include attorneys' fees. It does not.

9 Now, with regard to progress payments, as I recall
10 the motion, and unfortunately I don't have it here, the
11 motion is that there's been no proof that invoices were
12 submitted for the reduced amount claimed. And let me just
13 go back in time for a moment.

14 You'll recall that Ms. Raymond testified that
15 there was a period of approximately two years from November
16 of '86 until November of 1988 when no payments were made and
17 then a payment and then another period starting in about
18 December of '88 through the present time when no payments
19 were made.

20 Whittaker had requested in the summary sheet that
21 Your Honor saw two weeks ago, Whittaker requested all the
22 monies that were due and yet as you'll recall the provision
23 of the counterclaim that you read said amounts and invoices
24 accrued. And the figure that is now in the claim is lower
25 by 1.6 million than the total amount that Whittaker

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1 considers to be an amount accrued and due under the original
2 contract.

3 We have reduced it by that amount in response to
4 Your Honor's request and I specifically asked Mr. Cannady --
5 and I can cite you his testimony -- I specifically asked Mr.
6 Cannady whether the two amounts remaining represented
7 invoiced amounts that haven't been paid and he said they
8 have. They do so represent progress payments that have been
9 invoiced and not paid.

10 It does not include the 1.6 million that we feel
11 we're entitled to and frankly I'm at a loss to understand
12 why that amount should not be included in this claim as well
13 because that amount is due and owing based on work
14 performed.

15 But as relates to the two relatively small
16 amounts, there is clear testimony that that amount has been
17 invoiced and is due and owing. Part of it was invoiced for
18 the IOC contract which hasn't been paid since October of
19 1985 and part of it was for the FOC contract which hasn't
20 been paid since 1988.

21 So I think those are matters that are
22 appropriately factual issues that should go to the jury.

23 JUDGE BROWN: I'm going to rule on the
24 administrative costs in preparing the claim.

25 I'm not going to let this jury consider the

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1 question of whether the breach of contract because equitable
2 adjustment wasn't pursued entitles Whittaker to damages.
3 Equitable adjustment as I think I've learned in the course
4 of this is pretty much what it says: that is, the party to
5 whom equitable adjustment is requested can do a number of
6 things. They could extend the time, they could give money
7 or they could give both and presumably they could give any
8 kind of money they wanted to give. They probably could give
9 money for administrative costs in preparing the claim.
10 Maybe -- I don't know.

11 But this jury can't do equitable adjustment and
12 there's an argument that we would get into that would be
13 another trial as to what TechDyn does when TechDyn doesn't
14 feel like Whittaker's claim is legitimate. That's the
15 problem here.

16 There's no evidence that TechDyn just for some
17 mean minded reason didn't pursue this. They didn't pursue
18 it because they didn't think the position that Whittaker was
19 taking was legitimate. So we come to this court to find out
20 whether Whittaker has a legitimate claim against TechDyn and
21 that's the claim that we're trying.

22 And Whittaker would have had to have developed at
23 a least a portion of this claim for the Air Force in any
24 event and I don't think under Virginia law you can recover
25 for the process of developing your claim.

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1 Therefore, I grant the motion to strike the time
2 and effort spent on the preparation of the claim itself.

3 I'll hear the argument on the other point from
4 your point of view.

5 MR. WORK: Your Honor, may I just address one
6 premise that you stated in your ruling on that?

7 JUDGE BROWN: Yes.

8 MR. WORK: There is evidence that TechDyn
9 considered the claim valid. There is no evidence that it
10 did not consider the claim valid. The evidence that it did
11 consider the claim valid is in Defendant's Exhibit 53, a
12 letter of Mr. Hise dated April 25, 1988 in which Mr. Hise
13 stated, "We feel that the subcontractor has clearly
14 identified areas wherein the Air Force was responsible for
15 delays in contract performance and/or areas in fact the Air
16 Force has increased the scope of the work of the contract."

17 JUDGE BROWN: Well, that just confirms my view
18 that we're not going to let the jury decide whether that was
19 a breach of contract item or not. And, even if it was, I
20 wouldn't allow the claim for preparation of the claim as an
21 item of damage.

22 Okay. Your motion.

23 MR. BOEHLERT: Your Honor, in the Defendant's
24 counterclaim, there is no allegation that there are past due
25 progress payments.

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1 There was also no testimony -- well, first, there
2 was no documentary evidence at trial of any invoices being
3 submitted after that progress payment request number 16 that
4 Ms. Raymond testified to concerning the recovery of progress
5 payments or even a request for progress payments.

6 It was established during the cross-examination of
7 Ms. Raymond with examination of the progress payment clause
8 in mind that there's an 80 percent contract limitation
9 payment when you take a loss adjustment factor into account
10 and Ms. Raymond testified that that level had been hit by
11 Whittaker and that was the reason that no more invoices had
12 been submitted and, for that reason -- in fact, I flat out
13 asked her has Whittaker submitted any invoices to TechDyn
14 for progress payments since then? That's the December '88
15 payment. And she said I don't believe so.

16 I don't believe so, either, Your Honor. There
17 haven't been any in evidence, there hasn't been anything to
18 show that there's any request for progress payments. And
19 even if there was, the testimony is clear that as of this
20 date Whittaker has been paid in full under the progress
21 payment clause of the contract.

22 So there's two reasons that Whittaker has no basis
23 whatsoever to go to this jury to ask for progress payments.

24 JUDGE BROWN: I think that whether there is money
25 owed under the clause is an issue for the jury. The reason

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1 that the future items, that the work that hadn't been billed
2 wasn't allowed is because it wasn't part of the pleadings.

3 And the work isn't complete yet, so the jury may
4 find that there isn't anything due but the jury will
5 consider that as well.

6 Okay. I think that --

7 MR. BOEHLERT: Your Honor, there's one thing and
8 it's really minor but on Defendant's Exhibit 108, there is a
9 summary of the damages and down below the total --

10 JUDGE BROWN: Okay.

11 MR. BOEHLERT: There's the language "TechDyn's
12 breach of the disputes clause and bad faith litigation,
13 undetermined litigation costs" -- Your Honor, you've ruled
14 that the disputes issue is not part of this. There's been
15 no evidence of any bad faith litigation and there's been --

16 JUDGE BROWN: I'm not finding where you're --

17 MR. BOEHLERT: I'm sorry.

18 JUDGE BROWN: Oh, I see.

19 MR. BOEHLERT: Do you see that language there?

20 (Pause.)

21 JUDGE BROWN: That should be taken out of that
22 exhibit. And so in light of the Court's ruling should
23 administrative \$500,000.

24 You can either strike it out of this one or submit
25 a revised one.

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1 MR. WORK: We'll submit a revised one, Your Honor.

2 JUDGE BROWN: Okay -- 108, then, will be revised
3 before it goes to the jury.

4 MR. WORK: May I just address the bad faith
5 litigation issue for a moment?

6 I certainly think that the ACC/PACAF claim
7 represents bad faith litigation, both on --

8 JUDGE BROWN: Well, let's look at the
9 counterclaim. Where is that claim? Where do I need to look
10 to find that claim?

11 MR. WORK: Which claim, Your Honor?

12 JUDGE BROWN: The claim for money damages for bad
13 faith litigation.

14 MR. WORK: Well, I don't think it's stated in
15 there, Your Honor. It is -- there are -- it's not stated
16 explicitly but it was stated explicitly in the December 10
17 synopsis which incidentally was then incorporated in
18 Whittaker's supplemental interrogatories of January 15, 1991
19 and in those materials it is clearly stated.

20 JUDGE BROWN: When we come to the issue of what
21 the case is going to be tried on, what instructions are
22 going to the jury, we're not talking about discovery, we're
23 talking about pleadings and that's not properly a part of
24 the pleadings in the case, so I sustain the objection to
25 that and that should be stricken.

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1 MR. BOEHLERT: Consistent with your ruling on jury
2 instructions, Your Honor, I might also add that the
3 references to the counts, count 1, count 2, count 3, count 4
4 be stricken. I don't know that --

5 JUDGE BROWN: No, I think that should be left in.
6 The finding instruction -- the jury is going to be asked to
7 make a separate finding instruction with regard to each
8 count and so they need to know what the counts are and I
9 don't think it's improper for the damage summary to say this
10 is what we're claiming with regard to count 1.

11 They could have done in it in separate pieces of
12 paper -- instead of that, they put it on one piece of paper.
13 But the jury has to make a separate finding with regard to
14 each count of both the counterclaim and the main claim. So
15 I think that should remain.

16 MR. WORK: Your Honor, one additional issue.

17 You're quite right about the timing of Whittaker's
18 renewed motions to strike. We have filed those but did not
19 intend to take them up until the close of TechDyn's rebuttal
20 case. Let me just get a clarification. May we raise those
21 issues at that time?

22 JUDGE BROWN: Yes.

23 MR. WORK: Thank you.

24 JUDGE BROWN: Which is not to say that you won't
25 get a summary denial of them but you may raise them to

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1 preserve the point. And the fact that it goes to the jury
2 doesn't end the case, of course.

3 You can always come back and try again after
4 the -- if the jury gives anybody any money, come back and
5 see me. All right?

6 We'll recess until ten.

7 MR. BOEHLERT: Your Honor, for purposes of the
8 record only, I would like to lodge an objection to the
9 Court's denial of Plaintiff's motions to the extent you've
10 ruled on those.

11 JUDGE BROWN: Both parties should note their
12 exception.

13 MR. BOEHLERT: And, Your Honor, Plaintiff doesn't
14 intend to put on a rebuttal case. I think we've done enough
15 with the evidence and we're ready to discuss with you jury
16 instructions.

17 JUDGE BROWN: Gee, I wish I'd known that.

18 MR. WORK: Well, we intend to put on a rebuttal
19 case, Your Honor.

20 JUDGE BROWN: Rebuttal of what?

21 MR. WORK: Rebuttal of their defenses against
22 their claim. On cross-examination, they raised a number of
23 issues that have to be addressed by witnesses that had
24 already come and gone.

25 We have a claim just as they have a claim and

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1 you wanted to. You won't do that, I hope. But you can meet
2 on Friday if you want to.

3 Since you will be in there deliberating, you
4 wouldn't be impacting on the Court. Okay?

5 All right. Sorry it's raining, but go home or go
6 to work. and do something different today. We will get it
7 ready for you tomorrow.

8 (Pause while jury leaves.)

9 JUDGE BROWN: Okay, anybody wants to renew their
10 motions, now is the time to do it.

11 MR. WORK: I would like to, Your Honor.

12 Your Honor, I am going to address counts three and
13 four relating to the Alaska PACAF matters. And you will
14 recall that count three is based on tortious interference
15 with an alleged existing option. And count four is based on
16 an alleged breach of an option in the subcontract.

17 There are a lot of issues pertaining to these two
18 counts. But, the threshold issue, is causality. The
19 question is, did Whittaker do anything to cause the
20 Government, the Air Force to decide not award the Alaska
21 PACAF work to Whittaker, excuse me, to TechDyn. And on that
22 subject, there has been on evidence, except negative
23 evidence. And the negative evidence is established solely
24 as matter of chronology. There simply can be no argument
25 about this.

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1 Setting aside the question of whether there was an
2 option or whether there wasn't an option, or whether there
3 was a business expectancy, or whether there wasn't, the
4 chronology is this:

5 The Air Force decided on November 16, 1987, in its
6 sole source justification, in which a memorandum is in
7 evidence, that it would not deal with TechDyn and would deal
8 exclusively with Whittaker. And its stated reason for doing
9 that was that the Air Force has decided not to buy
10 communication equipment that TechDyn had been supplying for
11 ICCE, but rather simply but the RADIL and the RADIL software
12 that had always been supplied by Whittaker, and to which
13 TechDyn could add nothing.

14 That decision was made and documented on November
15 16, 1987. There is no evidence in the record that Whittaker
16 did anything at all proper or improper to influence that
17 decision. The allegations in counts three and four are that
18 Whittaker submitted inconsistent and lower pricing to the
19 Air Force, lower bottom line prices, than it did to TechDyn.
20 And when TechDyn submitted its proposal, and subsequently
21 Whittaker submitted its proposal to the Air Force. All that
22 took place after, the Air Force's decision not to deal with
23 TechDyn. There is a complete failure to address, much less
24 prove, fundamental threshold issues of causality.

25 There is no evidence or innuendo in this record,

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1 that Whittaker did anything to effect that November 16
2 decision. The only allegation of wrong doing is allegedly
3 different proposals. But TechDyn didn't submit its proposal
4 to the Government until November 25, more than a week after
5 the Government had already decided not to deal with TechDyn.
6 And Whittaker didn't submit its proposal to the Air Force
7 until late January 1988.

8 On that ground alone, without consideration of any
9 thing else, that issue, the issues in counts three and four,
10 should not go to the jury. Causality is a fundamental
11 element of the tortious interference claim and the breach of
12 contract claim. I don't think there is any factual dispute
13 at all concerning the pure issue of chronology.

14 Now, beyond that. Was there a contract writing
15 that was breached in count four as alleged? Was there an
16 option that was somehow interfered with in count three? On
17 the issue of count four, I've been raising this issue, Your
18 Honor, since last January. They never alleged, what the
19 alleged contract right was and they didn't prove it.

20 The only proof is MOD-8 of the subcontract, which
21 extended the subcontract option until April 30, 1987. It
22 was never extended. There is no evidence what ever that
23 there was any extension of that contract right.

24 TechDyn has mentioned that there was an RFP, which
25 even Mr. Morrison said did not create any contractual

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1 rights, which purportedly extended the prime contract option
2 further out. But there is no evidence that the subcontract
3 option, which by its terms expired under MOD-8 of the
4 subcontract on April 30, 1987, was ever extended.

5 So, on that second ground, count four ought to go
6 out. Now, what about the option that is alleged? The
7 evidence is absolutely clear that under P00014 of the prime
8 contract, the option which was not TechDyn's option, but
9 rather the Air Force's option, also expired on April 30,
10 1987.

11 There is no evidence that any contractual right
12 was created after that period in time. No evidence at all.
13 Mr. Morrison acknowledge that the RFP didn't create a
14 contractual right. Mr. Johnson, who was the program manager
15 at the time, testified that the option in the prime contract
16 was not extended by this RFP. Ms. Raymond testified to the
17 same effect. There simply is no evidence that that prime
18 contract ever got extended.

19 Thirdly, I am moving away from the causality
20 thing, but I don't think it should be necessary, because I
21 think that is a stopper in itself. But let me just take out
22 this thing to the end.

23 Thirdly, an element of the tortious interference
24 claim is improper conduct. An improper act. As a matter of
25 law in Virginia, submitting the lower price is not an

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1 improper act. That's as a matter of law. And that issue
2 should not go to the jury. Same on a breach of contract.
3 On that issue, too, there has been no improper action as a
4 matter of law.

5 And finally, Your Honor, the very basic, the very
6 factually premise for this whole thing, namely that
7 Whittaker submitted a lower price to the Air Force than it
8 submitted to TechDyn is simply false. You'll
9 remember the long period of time when they were trying to
10 add up these numbers, and realized in trial, in trial, that
11 Whittaker's bid to the Air Force was actually higher than
12 the bid to TechDyn.

13 This has been a false claim from the beginning.
14 TechDyn has avoided the issue, is trying to get this issue
15 to the jury so it can say what bad folks these people at
16 Whittaker are. But the claim is a false claim. They haven't
17 gotten beyond the basic threshold of causality. Which is
18 proven, as a matter of simply causality and nothing else.

19 And on that ground, Your Honor, counts three and
20 four ought to be disposed of. I would solicit Your Honor's
21 views on whether it would be productive at this time to
22 argue our renewed motion with respect to count one.

23 JUDGE BROWN: It would not. Response to counts
24 three and four?

25 MR. BOEHLERT: Yes, Your Honor.

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1 JUDGE BROWN: In the sense that it would not, and
2 I'll just go on to say that I deny the motion for reasons
3 previously given.

4 MR. WORK: May I indicate for the record that I
5 take exception?

6 JUDGE BROWN: Yes. I think that is really set out
7 in writing as well as in the previous motion that was made.

8 MR. BOEHLERT: Your Honor, I have two filings here
9 that I have prepared in response to their earlier motions
10 for reconsideration, which I have handed counsel.

11 Let's address the issues that certainly aren't new
12 to this Court. I contend, Your Honor, that well before you
13 got involved with this case, Whittaker Corporation attempted
14 with three separate judges to eliminate the Alaska PACAF
15 option count from TechDyn's motion for judgement. Judge
16 Plummer denied it, Judge Middleton denied it, you denied
17 that motion on at least one, probably two, occasions. You
18 have twice denied motions to strike the evidence regarding
19 that issue. But it is coming back to you now.

20 And let's just address the issues one more time.
21 Because I am confident, Judge, that when we do, that motion
22 is going to be denied again. Let's look at the issue of
23 causation. And that now appears to be the issue that Mr.
24 Work contends is the reason that TechDyn cannot get this
25 case to the jury. And the sole basis for that contention is

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1 Mr. Work's reliance on what was introduced into evidence as
2 Defendant's Exhibit 49N. And he calls it a sole source
3 justification.

4 Judge, I ask you, in your time, to look at that
5 document.

6 JUDGE BROWN: Now, would be a good time.

7 MR. BOEHLERT: Okay. I don't know where
8 defendant's exhibits are.

9 JUDGE BROWN: Let me ask you a threshold question,
10 Mr. Boehlert. How has TechDyn been damaged?

11 MR. BOEHLERT: It's been deprived of the work and
12 the revenues that it would have received from doing that
13 work.

14 JUDGE BROWN: By virtue of what? What caused that
15 deprivation?

16 MR. BOEHLERT: The deprivation was Whittaker
17 submitting inflated price and erroneous scheduling
18 information to TechDyn, knowing TechDyn would rely on that.

19 JUDGE BROWN: What evidence is there that that was
20 a factor in the Air Force decision? A factor at all? A
21 factor?

22 MR. BOEHLERT: Your Honor, there is circumstantial
23 evident, certainly appropriate as the Chavez case says, for
24 purposes of establishing approximate cause and why it was a
25 factor. And if I could -- and I am going to answer your

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1 question. If I could just read you a portion from the
2 Chavez case. And what happened in the Chavez case is
3 actually the defendant brought in eight council members who
4 participated in a decision and that decision went against
5 the plaintiff in that case, Chavez. And those council
6 members, public officials, unanimously contended and
7 testified that they did nothing wrong and that the issue in
8 that case was not at all the basis, the reason that the work
9 was denied.

10 And because of that, the trial court struck the
11 count. It went to the Supreme Court, and the Supreme Court
12 said no. Even though the evidence may have been unanimous
13 testimony of eight council members that it had no bearing,
14 the jury was allowed to rely on the circumstantial evidence
15 of the case to arrive at the conclusion that tortious
16 interference took place.

17 And reading from Chavez, what the Court said,
18 regarding proximate cause, the Court relied on the unanimous
19 statements of the eight council members who testified that
20 they were not motivated by Johnson's letter, decided to
21 discharge Chavez. The jury, however, was not required to
22 accept the councilmen's testimony. It was entitled to rely
23 on the circumstantial evidence surrounding Johnson's
24 relationships with certain councilmen, that the timing of
25 his letter and particularly, Chavez's testimony that the

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1 seconded of the motion to terminate his contract, after
2 receiving Johnson's letter, explained his vote in a public
3 meeting as based on Chavez's excessive fees and not
4 sufficient experience, which had been pointed out to him.

5 We have very similar circumstances, in fact, far
6 more compelling circumstances in this case. The Air Force
7 had an option to select TechDyn. That was part of TechDyn's
8 prime contract. And the Air Force directed TechDyn to
9 obtain prices from Whittaker. Based on that, Whittaker
10 provided prices on November 12. Knowing that TechDyn would
11 rely on them. TechDyn did rely on those prices, submitted
12 the bid, but that prior to the time that the Air Force took
13 action on that, Whittaker submitted its own, lower and
14 inconsistent prices to the Air Force.

15 Your Honor, reading that document, I draw your
16 attention to paragraph two of that document --

17 JUDGE BROWN: But wait a minute, how was
18 Whittaker's price lower?

19 MR. BOEHLERT: Whittaker's price was lower. What
20 was testified to, was that Whittaker quoted for a material
21 portion of their bid, a portion of work for fiscal year
22 1990. And that the work that Whittaker had quoted to
23 TechDyn, doing an apples to apples comparison, was for
24 fiscal years 88 and 1989. When you look apples to apples,
25 it is absolutely clear that the Whittaker bid to the Air

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1 Force was lower than the bid that they submitted to TechDyn.
2 And there was no scramble at counsel table, at all. It was
3 studied, it's clear from the face of Plaintiff's Exhibit 114
4 and 188, that the bid that Whittaker submitted was lower.

5 Ms. Raymond sat here on the stand, and said after
6 she studied it, she was aware of one incident of where
7 Whittaker's prices were lower to the Air Force than they
8 were to TechDyn. Mr. Morrison sat on the stand and went
9 from document to document and showed ten other instances
10 where the prices were indeed lower.

11 So, Your Honor, there is ample evidence. It is
12 not at all true that the prices were higher to the Air
13 Force. Plus, the testimony has shown and the documentary
14 evidence has shown that the contract that Whittaker made was
15 \$1.75 million. Much, much lower than the bid that Whittaker
16 gave to TechDyn. So, the evidence is clear that it was a
17 lower price.

18 What that document that you have in front of you,
19 counsel has argued for more than a year that that was a
20 decision by the Air Force to award the work to TechDyn. It
21 is not. -- To Whittaker. It's not.

22 If you read paragraph two, description of action.
23 That's a description of what this document is. It says,
24 approval is requested to negotiate a new firm fixed price
25 contract on a sole source basis with Whittaker Command and

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1 Control Systems. And it goes on. This is a request by the
2 Air Force, at the time, to pursue a sole source basis award
3 to Whittaker. It is not a decision to go to Whittaker. In
4 fact, it is on February 16, 1988, which is Plaintiff's
5 Exhibit 120 in evidence, that the Air Force wrote to TechDyn
6 saying the Government will procure the Alaska PACAF RADIL
7 directly from WCCS.

8 Your Honor, it's February 16, 1988, that the Air
9 Force makes its decision and advises TechDyn. It is not
10 November 16, 1987. It simply is not what that document is.

11 So, counsel has misinterpreted, or misunderstood,
12 or misrepresented a document. It is not a decision by the
13 Air Force to go to Whittaker at that time. Meanwhile,
14 what's happening, is Whittaker is submitting contract prices
15 to TechDyn. Those prices are being relied on. They are
16 being forwarded up. The Air Force is considering TechDyn's
17 proposal, until February 16, 1988. That is clear from the
18 evidence in the record. Otherwise, they would have
19 rejected. They didn't reject it until February.

20 Meanwhile, Whittaker, as Ms. Raymond testified,
21 didn't advise TechDyn, but did submit lower prices to the
22 Air Force and walked away with the work.

23 Your Honor, it's a classic example of tortious
24 interference. The Chavez case says that proximate causation
25 can be established by the circumstantial evidence

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1 surrounding the relationship of the parties, the timing of
2 their actions, certainly, the timing and the relationship,
3 the fiduciary relationship of these parties, is compelling,
4 far more compelling than it was in Chavez. And in that case,
5 the Supreme Court held that it should have gone to the jury.

6 Your Honor, causation is not a problem in this
7 case. Plaintiff has established every element of causation
8 that it needs to, in order to get this case going forward.

9 (Continued on next page.)

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1 MR. BOEHLERT: The second issue that was raised is
2 is the option in existence or did it expire April 30, 1987?

3 Again, this part of the Defendant's case baffles
4 me. It always has. Plaintiff's Exhibit 105, which is the
5 Air Force request for proposals to TechDyn for this work
6 says, and I quote, "The option exercise date for CLINs 0006
7 through 0009 should be no later than 31 January 88." It's
8 an extension of the Alaska/PACAF option.

9 TechDyn then in Plaintiff's Exhibit 106 forwards
10 that very proposal on to Whittaker for purposes of preparing
11 a bid. Whittaker then, in Plaintiff's Exhibit 114, puts
12 together a bid for that work, submits it to TechDyn saying,
13 "Whittaker Command and Control Systems is pleased to submit
14 proposal D87-077R3 for the Alaska and PACAF options."

15 They can't convincingly argue -- I don't even
16 know how they continue to present that argument that no
17 option existed at the time these prices were submitted. The
18 evidence is so clear that that's what happened.

19 The next issue concerns this issue of improper
20 conduct and I know we addressed that prior, Your Honor, and
21 at that time I remember I just grabbed the Dugan case and I
22 had looked at it as to what might be considered to be
23 improper conduct and I read you portions of it. But if you
24 read that Dugan case you find out what improper conduct is
25 and it's a very nominal standard. The courts of Virginia

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1 will not tolerate sharp practices or unfair business
2 dealings.

3 Reading from Dugan, or quoting from Dugan, which
4 is 360 S.E. 2nd 832, the Virginia Supreme Court stated,
5 "When a contract is terminable at will, a plaintiff, in
6 order to present a prima facie case of tortious
7 interference, must allege and prove not only intentional
8 interference that caused the termination of the at will
9 contract but also the defendant employed improper methods."

10 The court then stated, "Methods of interference
11 considered improper are those means that are illegal or
12 independently tortious such as misrepresentation or deceit,
13 misuse of inside or confidential information, or breach of a
14 fiduciary relationship." That's where I stopped the last
15 time that you denied their motion.

16 But the court said further in that case, "Methods
17 also maybe improper because they violate an established
18 standard of a trade or a profession or involve unethical
19 conduct."

20 The court continued in its discussion by saying,
21 "Sharp dealing, overreaching or unfair competition may also
22 constitute improper methods."

23 And citing the Kinko case, then the Dugan court
24 said, "The trial court correctly refused to direct verdict
25 for defendant where substantial evidence showed that

1 defendant competitor employed sharp and overreaching actions
2 to interfere with plaintiff's business expectancy."

3 Again, citing another case, the court says,
4 "Recognizing that sharp dealing, overreaching or other
5 competitive conduct below the behavior of fair men similarly
6 situated constitutes improper methods of interfering with
7 existing business relationship."

8 Your Honor, I contend that every one of those
9 items from misrepresentation to unfair dealing or sharp
10 practices exists in this case and the evidence has been
11 clear from both sides. So there's no issue of whether or
12 not the conduct here amounts to improper conduct under the
13 law of Virginia.

14 Your Honor, I've touched on it -- the last point
15 they hit was this lower price. It absolutely was a lower
16 price and what Plaintiff's motion for judgment alleges is
17 inconsistent price and scheduling information, which
18 certainly it was by the Defendant's own testimony. Ms.
19 Raymond said on at least one occasion that happened.

20 There's an issue of fact there, Judge, and this
21 has to go to the jury.

22 Although, counsel, I think you addressed count 4
23 on the issue of whether or not a contract provision exists,
24 we addressed that previously, Your Honor, and I cited to you
25 both the affirmative representation in the Whittaker

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1 proposal that that was their -- "reflects our best estimate
2 and actual costs" is what the representation was in the
3 proposal. Furthermore, FAR paragraph 52.215-24,
4 subcontractor cost and pricing data, specifically addresses
5 this and the obligation of the subcontractor to give its
6 best and most fair prices. Whittaker didn't do that.

7 Furthermore, a very important part of every
8 contract is the obligation to deal in good faith and there
9 is an implied contract obligation in this contract like
10 every other one not to do anything that would materially
11 harm the prime contractor's relationship.

12 In this case, that happened. So there's a breach
13 of both the express contract provisions and the implied
14 contract provisions of fair dealing in this case.

15 So for those reasons, Your Honor --

16 JUDGE BROWN: What case do you find that Virginia
17 recognizes a cause of action based on an implied duty of
18 good faith outside the context of the Uniform Commercial
19 Code?

20 MR. BOEHLERT: I would cite to Your Honor the case
21 of A&E Supply Company v. Nationwide Mutual Fire Insurance
22 Company. It's a 4th Circuit case, 798 F.2nd.

23 JUDGE BROWN: I'm talking about Virginia.

24 MR. BOEHLERT: Okay. I've got to look at this
25 case. I've got down here Augustini v. Consolvo, 153 S.E.

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1 676, 678. It's a 1930 case so it certainly pre-dates the
2 Uniform Commercial Code, but what that case says is that --
3 and it goes to the purpose, that the essential purpose of a
4 contract is defeated when one prevents the other from
5 performing. And if that happens, then that constitutes a
6 breach, Your Honor. So I would cite to you, the Augustini
7 case.

8 I further cite to you, Your Honor, the case of
9 Easley v. First National Bank of Lynchburg, Supreme Court of
10 Virginia, 172 Virginia 94, a 1939 case. And I'm reading
11 from the last page of the decision. It says, "I think that
12 it would be a breach of good faith and fair dealing under
13 the circumstances to permit the bank to retain this stock
14 for any other purpose than that for which it originally
15 acquired it."

16 Your Honor, it's well established in Virginia that
17 there is an obligation of good faith and fair dealing in any
18 commercial relationship but especially when the parties have
19 contracted together and especially in this relationship
20 where one of those is a directed subcontractor who knows
21 that the prime contractor is relying on that party's prices
22 in order to get more work.

23 So, Your Honor, it's well established that that
24 exists in Virginia.

25 For those reasons, Your Honor, all of Plaintiff's

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1 motions, especially these motions to count 3 and 4, must be
2 denied.

3 JUDGE BROWN: Outside the context of the Uniform
4 Commercial Code, I do not believe Virginia accepts a
5 separate cause of action based on breach of good faith in a
6 contract. Whether the contract has been breached or not may
7 relate to how the parties treat each other, but there is no
8 separate cause of action for breach of implied good faith.

9 So that particular point won't go to the jury if
10 there are jury instructions on that but let me hear your
11 response to the other argument.

12 MR. WORK: Your Honor, do you still have the sole
13 source justification there?

14 JUDGE BROWN: I do. Yes.

15 MR. WORK: Mr. Boehlert said that this was just a
16 request for approval, not an approval. Could you turn to
17 the signature page, which is the first page, please?

18 JUDGE BROWN: Is the last page?

19 MR. WORK: No, the first page. It's the one that
20 says "Justification Review Document"?

21 JUDGE BROWN: Yes.

22 MR. WORK: You can see that this was prepared by
23 Captain Clinton Marshall, who was the program manager. And
24 then it was signed by Stephen Smith, by Captain Marshall
25 again, by the legal, by the program manager, Colonel

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1 Paschall, by Mr. Hart who was SADBAS -- I don't know what
2 that is -- and then by the Deputy Director for Contracting
3 and then the Principal Competition Advocate and then you'll
4 notice at the bottom "approved". This document, this sole
5 source justification memorandum, was approved. It is a
6 decisional document and it reflects the reason why the
7 decision was taken.

8 If you look over at paragraph F on the second page
9 of the actual justification memorandum, you'll see described
10 there the rationale for the decision, which was that in
11 1986, the Air Force, the Headquarters United States Air
12 Force in Washington decided it wasn't going to buy the
13 communications equipment and therefore there wasn't any
14 reason to deal through a middleman to obtain the PDFA
15 equipment, the RADIL and the RADIL software. And that is
16 the stated reason for this decision, and it is a decision
17 because the request for sole source authority was approved
18 on the face of the document.

19 Now, in the face of that, it is inconceivable to
20 me that this claim could go to the jury. Nothing had
21 happened with regard to these allegedly inconsistent bids
22 before this decision was taken.

23 TechDyn submitted its proposal on November 25,
24 1987, more than a week after this decision was taken and
25 approved. And this states the reason.

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1 Now, we come back to the ultimate standard that
2 TechDyn has to establish in order to get to the jury on this
3 point. They're seeking lost profits on an unrelated
4 program, on a program for another country that had been
5 taken out of the ICCE contract way back in 1985. That is
6 the claim for lost profits can't be speculative, it can't be
7 uncertain and it must be reasonably certain.

8 In the face of this decisional document, how can
9 they possibly maintain that they have met that standard?
10 And, in fact, it's inconceivable that they could be arguing
11 that the matter simply wasn't closed at this point. TechDyn
12 wasn't notified until later but this is a decisional
13 document.

14 Incidentally, there is -- on the issue of whether
15 the claim is speculative and uncertain and all those other
16 words, you may recall Mr. Johnson's statement that even
17 before the expiration -- his testimony that even before the
18 expiration of the options on April 30th, he was told and
19 there is a memorandum, a TechDyn internal memorandum
20 reflecting Mr. Fourney was told that the Air Force didn't
21 expect to exercise these options.

22 In addition, TechDyn wasn't notified in February.
23 TechDyn was notified on December 9, as Mr. Johnson
24 testified. He personally was notified on December 9 of the
25 Air Force's decision. The decision is clearly set forth and

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1 the rationale for the decision doesn't have anything to do
2 with lower prices.

3 It has to do with the fact that the Air Force
4 decided not to buy the communications equipment. That's the
5 only rationale stated in this thing and beyond that it's
6 simply a matter of policy -- why go through a middleman and
7 pay a middleman's markup, which you saw here was something
8 like \$600,000, just to have the pleasure of dealing with
9 TechDyn? That's against public policy, as this memorandum
10 states.

11 There is no causation. There's no proof of it.
12 Mr. Boehlert once again skirted your question. What did
13 Whittaker do to cause this decision? It didn't do anything.
14 There's no evidence. This is not an issue that should go to
15 the jury, Your Honor.

16 JUDGE BROWN: Okay. I am pretty sure Mr. Work is
17 right. I'm pretty sure the jury won't give damages for
18 this. I sure wouldn't if I was hearing it without a jury
19 but again we are constantly admonished to send things to the
20 jury unless we're absolutely sure and I can always take care
21 of this later if the jury doesn't come up with the right
22 answer, but I'm going to let it go to the jury. It's
23 perhaps the only part of this case that I have a grasp of
24 and that I think the jury will, too, so let's at least give
25 them something they can decide that they'll understand.

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1 I deny the motion.

2 Are we ready to do the jury instructions?

3 MR. BOEHLERT: Your Honor, I know our motions do
4 come at the close of the evidence. I don't know if I need
5 to renew them to preserve them or not.

6 JUDGE BROWN: You do need to renew them to
7 preserve them and I'll assume that you have and they're
8 denied unless you have something you think --

9 MR. BOEHLERT: No, it's the same motions, Your
10 Honor, and I will for the record object to the denial of
11 those motions.

12 JUDGE BROWN: Yes. All right. Now, let me see if
13 I can put this together in any way that I can deal with it
14 because I had begun to review these.

15 (Pause.)

16 JUDGE BROWN: Okay.

17 MR. WORK: Your Honor, before we get into that, we
18 are making several proffers. Do we have to indicate that in
19 some formal way?

20 JUDGE BROWN: I don't think so. I think what you
21 can do is either -- would these be proffers of what the
22 witnesses that would have been -- that you think should have
23 been allowed to testify would have testified to had you been
24 allowed either rebuttal or to reopen your case?

25 MR. WORK: Right.

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1 JUDGE BROWN: Are you still pressing DD?

2 MR. BOEHLERT: Punitive damages?

3 JUDGE BROWN: Yes.

4 MR. BOEHLERT: Yes.

5 JUDGE BROWN: What for? Based on what evidence
6 would you be entitled to punitive damages?

7 MR. BOEHLERT: For the intentional submission of
8 the different pricing to the --

9 JUDGE BROWN: And just that entitles you to
10 punitive damages?

11 MR. RIDDLES: Your Honor, they did it knowingly.

12 JUDGE BROWN: Isn't that part of the element of
13 the offense tortious interference? Does tortious
14 interference always result in a punitive damage claim?

15 MR. BOEHLERT: Your Honor, this is also a directed
16 subcontract and I believe that an element of willful and
17 wanton conduct is certainly present in this case where, as
18 Ms. Raymond said, they knew that these prices were being
19 submitted to TechDyn, intending them to be relied on,
20 knowing TechDyn had to rely on them and, at the same time,
21 they were submitting lower and inconsistent prices. So as
22 far as malice and willful and wanton conduct, the evidence
23 is in the record.

24 JUDGE BROWN: I'm letting this go to the jury on
25 the basis that I'm 99.9 percent sure you're going to lose on

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1 this point. If I thought there was a chance you'd win --
2 well, I mean really -- it's just a very, very speculative
3 claim. And I'm sure not going to let punitive damages go to
4 the jury. There is no possibility of punitive damages in
5 this case. There's not the slightest evidence of malice or
6 wanton and willful conduct that would result in punitive
7 damages.

8 I strike the punitive damages. I deny DD and 51.
9 That brings us to EE.

10 MR. BOEHLERT: Your Honor, for the record, we
11 object to both the damages being stricken and --

12 JUDGE BROWN: Right.

13 MR. BOEHLERT: I'm not sure how you -- just for
14 housekeeping, do you prefer that I object as we're going
15 through these? I understand this to be kind of a
16 preliminary cut. I'm preserving my objections on the ones
17 you're denying.

18 JUDGE BROWN: Well, you do it like you think you
19 have to do it to preserve the point. My preference isn't
20 going to help you in the Supreme Court at all.

21 MR. BOEHLERT: Okay. Well, at this time I object
22 both to the striking of the punitive damages and also denial
23 of jury instruction DD and since we've already gone through
24 the other ones, I will come back.

25 Do I understand you to be saying though that what

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1 certainty. When the instruction was approved by the Supreme
2 Court, they took out, or with reasonable certainty. Because
3 of the possibility that we have different burden, that or
4 with reasonable certainty is a different burden than
5 preponderance of the evidence. And in order to make it
6 clear that there is just one burden, preponderance of the
7 evidence, the Court took that out. When I am talking to the
8 jury, I am talking about the greater weight of the evidence.
9 When I am deciding whether there is enough evidence to go to
10 the jury, I am perfectly happy to hear the words reasonable
11 certainty. But I do not want to give this jury an
12 instruction that reads reasonable certainty. That may
13 impose, thereby, a different burden, a different level of
14 proof, if you will, than what we have in the preponderance
15 of the evidence.

16 So, I think the Court means to say, you just have
17 one burden. It is by preponderance of the evidence, or
18 greater weight of the evidence. And we tell them they have
19 to be able to make a reasonable estimate. We tell them that
20 they have to show where it came from and that it is properly
21 attributable, and that applies to both of you, because both
22 of you are relying on Hale v. Fawcett. But that is why I
23 took that language out.

24 You actually see I struck it, because I was first
25 reading the instruction, and then I remembered the Supreme

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1 Court didn't like that language, reasonable certainty to a
2 jury.

3 MR. WORK: Well, how about making a breach -- and
4 this is quoting Corrigan, I'll just say, where the loss
5 results from several causes, plaintiff must show by the
6 preponderance of the evidence, the amount chargeable against
7 a particular defendant?

8 JUDGE BROWN: Let me see my thing, and let me see
9 if I can get that in there, if that's what you want.

10 MR. BOEHLERT: I think we are getting this very
11 cumbersome. I think we are making a mistake in --

12 JUDGE BROWN: Okay.

13 MR. WORK: I like the Hale v. Fawcett language.

14 JUDGE BROWN: Mr. Boehlert, what would you like to
15 say?

16 MR. BOEHLERT: I think we are making it too
17 cumbersome. First of all, I would like an opportunity to
18 read what you have written. But aside from that, I think we
19 are close to it. I just think we keep tagging things on.

20 (Continued on next page.)
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1 MR. BOEHLERT: Again, consistent with so many
2 other instructions we've had, these are arguments Mr. Work
3 intends to make to the jury but not jury instructions.

4 JUDGE BROWN: I think it may work to your
5 advantage if you let me change it like Mr. Work wants it.

6 MR. BOEHLERT: Always willing to listen.

7 JUDGE BROWN: Because I think that instruction
8 tells them if you can't prove it, you don't get anything.
9 Mr. Work's instruction will tell them if they can't prove
10 it, they can at least get the part they can prove.

11 MR. WORK: Well, then I am poor at speaking
12 because I think Hale v. Fawcett says if you can't prove what
13 portion is allocable to a particular defendant, then you
14 don't get anything.

15 JUDGE BROWN: Well, that's exactly what I think my
16 instruction said but I don't think that's exactly what this
17 says because this says it is for the jury to determine from
18 the evidence what part is attributable to a defendant and
19 what part to other causes.

20 That makes is sound like if you've got two causes
21 but you can show well, 50 percent was due to this party and
22 50 percent to that party, they can recover 50 percent. And
23 I don't think that's the law.

24 I think if you've got two causes and the jury
25 looks at it and they can't figure out that it's all due to

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1 this one party, you don't get that item.

2 MR. WORK: Here's what I think, for what lay
3 Virginia lawyer is worth. Or non-Virginia lawyer. And that
4 is if they don't prove with reasonable certainty or your
5 words preponderance of the evidence what proportion is
6 allocable, they don't get anything.

7 JUDGE BROWN: Well, that's why it says here --
8 just the last part of it reads this: And that it is
9 properly attributable to the other party's breach and unless
10 any such item or element of damage is thus proved by the
11 greater weight of the evidence, then the party seeking
12 damages cannot recover for such item or element.

13 MR. BOEHLERT: That's it.

14 MR. WORK: Could I show you another quote that you
15 have before you of Hale v. Fawcett? Hale v. Fawcett was a
16 motion to strike, just like our motion to strike, because I
17 don't think they have put any --

18 JUDGE BROWN: Right. I understand. That's the
19 problem. You're trying to take motion to strike language
20 and apply it to a jury.

21 MR. WORK: Here's the language in Hale v. Fawcett.

22 JUDGE BROWN: No evidence was produced to enable a
23 jury to form a reasonable estimate of what portion of the
24 damage was caused by the cattle entering through the narrow
25 opening between the cattle guard -- I always laugh when I

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1 read this because I've heard from them fussing about you
2 that you have a farm and always wondered if you put this in
3 here because of the cattle but they're relying on it too so
4 I guess they don't care about the cattle.

5 Cattle entering through and over the division
6 fence. That portion of the feed that was eaten by the
7 cattle that came through the -- well, I --

8 MR. WORK: Could I ask a question? In talking
9 with my colleague Bill Carey, he said there is a standard
10 Hale v. Fawcett instruction that every Virginia lawyer
11 knows.

12 JUDGE BROWN: Well, did he give it to you?

13 MR. WORK: He didn't give it to me because he said
14 that --

15 JUDGE BROWN: That's the every darn fool rule.

16 MR. WORK: Could we put this one on the side and
17 come back to it?

18 JUDGE BROWN: Well, wait a minute --

19 MR. WORK: I'll have somebody call Carey.

20 JUDGE BROWN: Well, wait a minute. Don't go away
21 mad yet.

22 MR. WORK: I'm on the brink.

23 (Pause.)

24 JUDGE BROWN: See, the trouble is I'm getting this
25 out of a --

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1 MR. WORK: There's Vickie. Vickie --

2 (Pause.)

3 MR. WORK: I'm going to send Ms. Mauser out to
4 call Carey and get him to direct us to the Hale v. Fawcett
5 instruction.

6 JUDGE BROWN: Well, it's not in the Virginia model
7 jury instruction, at least in the index to the cases that
8 does not appear, that case.

9 MR. WORK: Could we just reserve on this one and
10 come back to it? I'd like to get Carey's input on the
11 subject.

12 JUDGE BROWN: What year was Hale v. Fawcett?

13 MR. WORK: It was 1975, I believe -- '74 and then
14 Carr v. Citizens Bank was 1985.

15 JUDGE BROWN: Okay. That --

16 MR. WORK: How about Smith v. Pittston Company?
17 That's the third one, which is a '62 case.

18 (Pause.)

19 JUDGE BROWN: Smith v. Pittston is cited in the
20 old book but not for a specific instruction.

21 (Pause.)

22 JUDGE BROWN: The Smith v. Pittston is cited in a
23 multiple cause of a nuisance case. If a landowner is
24 damaged from a combination of nuisances originating from
25 different sources, the burden is on him to prove by the

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1 greater weight of the evidence the amount of his damage
2 caused by the defendant, which is similar to what you're
3 talking about.

4 MR. WORK: What I think we need after language
5 like that is what we have in the last sentence on page 34
6 going over to page 35, which makes clear your understanding
7 and mine that unless they sustain that burden, they can't
8 recover any damages.

9 MR. BOEHLERT: First of all, Your Honor, we're
10 talking about a general instruction not one tailored to
11 TechDyn or Whittaker and I think we're going to great
12 lengths here to strain to accommodate Mr. Work on something
13 that's not in the model jury instructions and isn't even
14 appropriate for this case.

15 You've fashioned something that I think certainly
16 accommodates whatever his concerns are and I ask that we
17 just move forward with this.

18 MR. WORK: I am trying to do you a favor, Mr.
19 Boehlert, because if you get an award that doesn't have this
20 then it's going to be reversible. This is fundamental
21 Virginia law.

22 MR. BOEHLERT: Well, I appreciate your assistance,
23 but I would ask that we confine ourselves to Virginia law
24 and move on.

25 (Pause.)

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1 MR. WORK: Judge Brown, Mr. Carey is looking and
2 he said call him back in 15 minutes.

3 JUDGE BROWN: Okay.

4 MR. WORK: So if Mr. Boehlert wants to move on,
5 we're willing to do that.

6 JUDGE BROWN: All right.

7 MR. BOEHLERT: Your Honor, I'd like to move on
8 with putting this to bed. I mean, we have a lot to cover
9 here and I don't mean to come back and revisit but I would
10 ask that we can --

11 JUDGE BROWN: I'm putting aside my instruction,
12 instruction PPP and instruction 35 for the moment.

13 Which brings us to instruction 36.

14 (Pause.)

15 JUDGE BROWN: And this is where we get into the
16 question of whether we're going to do it by instruction or
17 by the --

18 MR. WORK: By arguing from the clause. And our
19 position on that, Your Honor, is that when a clause is
20 unambiguous, as this clause which has been around for a long
21 time is, then the interpretation of it is a matter of law
22 and there ought to be an instruction on it.

23 MR. BOEHLERT: We already have an instruction,
24 Your Honor, on count 2. We're being redundant here at best
25 and this is what was rejected earlier. This is an

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1 instruction on count 2, remote control.

2 This is TechDyn's case. This is not Whittaker's
3 case now, so we've already covered this. That ought to be
4 in mine.

5 JUDGE BROWN: Well, what this covers is at least
6 in part, although Mr. Work will tell you vigorously not
7 enough, this FAR. And you haven't decided yet whether
8 you're going to let -- whether that is the FAR or not.

9 MR. BOEHLERT: Well, the contract -- just like
10 everything, the contract speaks for itself. It's over there
11 and he can argue from it but it's not --

12 JUDGE BROWN: Well, it's not over there until this
13 gets over there. It's not over there until the FAR gets
14 there, at least according to what he tells me, that the
15 qualifications for termination are not in the contract,
16 they're in the FAR made part of the contract and so if
17 that's true, then at least he's entitled to have that part
18 of that contract put in evidence.

19 MR. WORK: Your Honor, here's my position stated
20 succinctly. I think the interpretation of that clause is a
21 legal issue and there ought to be explicit instructions on
22 it.

23 If that's not the case and it's simply a matter of
24 argument for the jury, then Ms. Raymond's proffered
25 testimony on this, I think, should have been heard because

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1 she was going to say how she understood that clause based on
2 ten years of experience in this particular field when she
3 entered into this agreement.

4 And that testimony was excluded and we went
5 forward on the understanding that there would be
6 instructions, legal instructions, tailored to the default
7 termination --

8 JUDGE BROWN: I don't think it would be proper to
9 have her say what she thinks that clause means if it's all
10 that clear. If it's clear, it's clear.

11 MR. WORK: If it's clear, it's clear and it's a
12 matter of law and I believe that it's a matter of law.

13 JUDGE BROWN: Well, I don't think a contract is
14 ever a matter of law. I mean, I could tell them anything
15 about the contract and we don't do that. We don't tell them
16 what's in the contract.

17 MR. WORK: Your Honor --

18 MR. BOEHLERT: I'm going to assume the FAR is part
19 of the contract and they can go into evidence -- I have no
20 problem. It talks about the Government may enter default
21 judgments and what --

22 JUDGE BROWN: Well, let Mr. Work finish.

23 MR. WORK: I'll just show you the language. This
24 is from Winn v. Valdia Construction Company, a Virginia
25 Supreme Court case, 1985.

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1 It is a well established principle that when a
2 contract provision is clear and unambiguous, it is the duty
3 of the court, not the jury, to decide its meaning.

4 JUDGE BROWN: Well, but I don't tell the jury what
5 it means. In other words, what I do is I decide whether
6 it's been breached or not.

7 MR. WORK: I think you tell the jury what that
8 contract clause means.

9 JUDGE BROWN: I have never seen an instruction to
10 a jury telling the jury what's in a contract.

11 MR. WORK: The contract -- let me just proffer --
12 the contract between the parties -- TechDyn purportedly
13 default terminated Whittaker on a contract clause alleging
14 failure to make progress and so as to endanger performance
15 of the contract in accordance with its terms. You are
16 instructed that for that default termination to be valid,
17 TechDyn must show number one, number two, number three and
18 state the elements of the clause.

19 Otherwise, again, if Mr. Boehlert and I get up and
20 argue about what it means, it's not going to have any impact
21 upon the jury particularly since there is no evidence. We
22 tried to get it into evidence and were unable to do so and
23 it shouldn't be simply a matter of argument.

24 This clause has been around for many years and its
25 interpretation is well understood and it should be treated

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1 as a matter of law.

2 JUDGE BROWN: Okay. Have I heard from you? Your
3 position.

4 MR. BOEHLERT: Well, Your Honor, you've already
5 established what the burden of proof instruction is for the
6 remote control and that is a breach of contract burden of
7 proof and damages instruction which are already agreed to.
8 And this -- I do have no objection to having these clauses
9 become part of the contract. I believe they are part of the
10 contract. But it's not appropriate to put them in and for
11 this court to instruct this jury what those clauses mean.
12 And that's what this proffered instruction is.

13 Plus it's self-serving. I think it's
14 argumentative and for those reasons, I would ask that it not
15 be given.

16 JUDGE BROWN: Okay. Do you want to say anything
17 else?

18 MR. WORK: I think I'd only be repeating myself,
19 Your Honor. I think that --

20 JUDGE BROWN: All right. I deny 37 and those
21 clauses will be made a part of the contract. Poke them in
22 there where they go and you can read them.

23 MR. WORK: May I ask a question of whether we can
24 have evidence presented on their meaning?

25 JUDGE BROWN: No, you may not have evidence

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1 presented on their meaning.

2 MR. WORK: Or as to what the parties understood
3 they mean?

4 JUDGE BROWN: No. The reason that I allowed that
5 to some limited degree before was because the contract is so
6 long and I didn't want to repeat the whole thing. But this
7 is a very discrete little piece and you may read it to the
8 jury and you can argue exactly the words of it.

9 MR. WORK: But you did allow it on things that
10 aren't nearly so arcane. You allowed Mr. Morrison to
11 testify well, I understood the contract in this respect to
12 mean such and such.

13 JUDGE BROWN: I wouldn't want to be wrong twice.

14 MR. WORK: This is an arcane provision that is not
15 known to these people nor to you.

16 JUDGE BROWN: It looks very simple to me, reading
17 it.

18 MR. WORK: It is not very simple. And to argue
19 about --

20 MR. RIDDLES: Your Honor, I object to just going
21 on and on.

22 JUDGE BROWN: I'm not going to argue with you any
23 more, Mr. Work. I've made my ruling and I know you don't
24 like it and we're going to live with it.

25 MR. BOEHLERT: Just for clarification, Your Honor,

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1 I think you said 37.

2 Did you mean instruction 36?

3 JUDGE BROWN: Thirty-six. Instruction -- yes. I
4 was reading the page number up at the top. It's instruction
5 number 36.

6 MR. WORK: I take exception and I take exception
7 also to the exclusion of evidence as to how the parties
8 understood this clause at the time they entered into the
9 contract.

10 JUDGE BROWN: Okay. Now, where is the FAR now?

11 MR. BOEHLERT: These clauses?

12 JUDGE BROWN: Yes. Well, where are we going to
13 put them? Is there a space in the contract where they are
14 referenced in the beginning?

15 MR. WORK: Yes.

16 JUDGE BROWN: Put it in there. So it's in that.
17 And I don't know where it is. Do you know where it is?

18 MR. BOEHLERT: May I just ask that the changes
19 clause also be part of that?

20 You proffered that earlier. Do you have the
21 changes clause?

22 MR. WORK: I have the changes clause but if we're
23 going to put that in we've got another problem because then
24 I really do need testimony on it, as I said when the issue
25 came up.

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1 JUDGE BROWN: I don't know what the changes clause
2 is. Show me what it is. But will you put that in the book?

3 MR. BOEHLERT: Yes.

4 MR. WORK: The changes clause, Your Honor, is a
5 clause that says that the buyer may unilaterally change the
6 scope of work. It has a concomitant duty to pay the
7 contractor for added work.

8 JUDGE BROWN: Okay.

9 MR. WORK: It says on its face that there must be
10 notice and so forth and so on but it has been interpreted
11 for 30 years to include not only formal changes of the kind
12 that are expressed in the clause but also constructive
13 changes and that's what I tried to have Mr. Thompson testify
14 about and that's what I've tried to have Ms. Raymond testify
15 about and then when Ms. Raymond was on and we were
16 addressing this and we addressed it for about a half hour,
17 and I said well, if the clause is coming in, then I need
18 testimony as to how it's interpreted and how she understood
19 it at the time. And you said well, I'm not going to give an
20 instruction about notice -- you can forget that.

21 So what we have done is to tailor instructions
22 based on your comments and that instruction is found at
23 page -- let's see -- which page is it?

24 (Pause.)

25 JUDGE BROWN: It's page 68, instruction 57. And

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1 that is tailored specifically to the comments you made at
2 the bench conference while Ms. Raymond was testifying.

3 JUDGE BROWN: Page 68 of the one that I'm looking
4 at doesn't begin an instruction. Page 67 begins an
5 instruction number 62. Instruction 57?

6 (Pause.)

7 (Continued on next page.)

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1 MR. BOEHLERT: The issue as I understand it, is
2 whether the clauses are going to be accepted. And two
3 clauses were proffered. And they have gone in as part of
4 the contract. And I am simply attempting to proffer another
5 clause, which, is a changes clause.

6 JUDGE BROWN: Let me see it.

7 MR. BOEHLERT: It's 52.243-1, changes, fixed
8 price. Which is the clause that the defendant's entire case
9 is premised on.

10 JUDGE BROWN: Maybe, but the problem with it is,
11 it talks about equitable adjustment.

12 MR. BOEHLERT: Well, we will have to get to that
13 instruction. But that is what the defendant is --

14 JUDGE BROWN: Well, I'll put it aside until we get
15 to instruction 57. Let's do instruction 37. Instruction 37
16 relates to instruction 36, I think.

17 MR. BOEHLERT: Right.

18 JUDGE BROWN: Where do you get these requirements,
19 Mr. Work?

20 MR. WORK: In the authorities that are cited at
21 the bottom of the page, Your Honor, and many others. Lisbon
22 is a case, in Federal Circuit decision, which is on point.
23 But there are a number of others.

24 These relate, this particular instruction, Your
25 Honor, relates to the fact that in this case, as you know,

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1 there was no, there was a schedule at one time, under the
2 subcontract. That schedule quickly became obsolete. The
3 Government issued new schedules for the prime contract, but
4 TechDyn never got around to changing the subcontract. So,
5 when they defaulted Whittaker, the schedule was obsolete by
6 two years. I mean, the contract was supposed to be
7 completed in 86, and now we are in August -- excuse me,
8 January of 89.

9 JUDGE BROWN: I overrule it over your vigorous
10 exception and belief that I am totally wrong. That you
11 don't have to have a schedule if you are not making
12 progress, not making progress to substantially --

13 MR. WORK: But look at the language of the clause.
14 The clause says, so as to endanger performance of the
15 contract in accordance with its terms, including schedules.

16 JUDGE BROWN: Well, if you haven't got a schedule,
17 you still have to complete the contract. If you are
18 endangering the completion of the contract, period, --

19 MR. WORK: There is no schedule for the completion
20 of the contract.

21 JUDGE BROWN: The problem is, this is an argument
22 you and I have made a long time ago. And you think I am
23 wrong. But there is no point in arguing it now to the jury.
24 Because I have said that they can understand what
25 endangering the completion of the contract is without having

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1 Fifty-three. Well, I guess it was you prompted
2 the implied good faith --

3 MR. WORK: I'm going to withdraw that.

4 JUDGE BROWN: All right. Fifty-three is denied.
5 I don't want to have two files.

6 (Pause.)

7 MR. BOEHLERT: Why do they take away the good
8 ones, Judge?

9 JUDGE BROWN: Well, because I told him to.

10 Now, I'm having a hard time now with the
11 instructions on the claim because I'm not sure -- on
12 Whittaker's claim -- because it's not quite in the format
13 that we --

14 MR. WORK: Your Honor, I'm prepared to revisit the
15 Hale v. Fawcett issue now. We do have an instruction
16 approved by the Virginia Supreme Court.

17 JUDGE BROWN: Okay. What case --

18 MR. WORK: It's a case called Cooper v. Whitney
19 Oil in 1984.

20 JUDGE BROWN: Was it in the model jury
21 instructions?

22 MR. WORK: It was in a book called Imrok 2nd,
23 1990.

24 JUDGE BROWN: 1990 -- I don't have it. That's
25 this book that I call the doubles book but I don't think I

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1 have the 1990 version. I'm sure I don't. I have the 1982
2 pocket part.

3 MR. WORK: We checked in the courthouse library
4 and it wasn't down there. We got this language from Bill
5 Carey's office over the phone.

6 JUDGE BROWN: Okay. Let me see what it is.

7 (Pause.)

8 JUDGE BROWN: Good thing we sent the jury home.

9 (Pause.)

10 JUDGE BROWN: Well, if you want that one instead
11 of the one I did, I'll give it to you.

12 MR. WORK: Thank you.

13 MR. BOEHLERT: Your Honor, I'd like to look at
14 that. Your Honor, again, it has to be a generic
15 instruction. It's not an instruction aimed at TechDyn as
16 opposed to Whittaker.

17 JUDGE BROWN: Well, we can do that. That won't be
18 hard to do.

19 (Pause.)

20 JUDGE BROWN: We really shouldn't call it 52,
21 though, because I'm going to foot the old 52 in here and
22 note that it was denied. Where are we -- 66?

23 MR. PROXMIRE: Sixty-seven.

24 JUDGE BROWN: Sixty-seven. Okay.

25 MR. BOEHLERT: Do you want to take a cut, Judge,

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1 at making this neutral or how are we going to do that?

2 JUDGE BROWN: Sure.

3 MR. WORK: Your Honor, I think it is 66. I think
4 you're right -- it is 66.

5 JUDGE BROWN: Well, it's 67 now.

6 (Pause.)

7 JUDGE BROWN: Well, you can just say if you
8 believe from a preponderance of the evidence that damage
9 resulted from two causes, for one of which a party is
10 responsible the burden is upon -- I don't know.

11 MR. RIDDLES: The party seeking to recover.

12 JUDGE BROWN: Yes. Mr. Riddles sounds like he can
13 do it.

14 MR. BOEHLERT: Well, you know -- the party of the
15 first part and second part and it gets -- I don't care who
16 does it but --

17 JUDGE BROWN: Well, let Mr. Riddles try it and
18 we'll take a ten-minute recess and come back and Mr. Riddles
19 and Mr. Work will have agreed on the language of the
20 instruction.

21 (Brief recess.)

22 (Continued on next page.)

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1 BAILIFF: Please remain seated and come to order.

2 JUDGE BROWN: Did you get it revised?

3 MR. RIDDLES: Your Honor, I took a cut at it and
4 I'll object to the instruction even after my own amendment
5 of it. I tried to make it generic. I think it is -- just
6 reading it from the standpoint of a trial lawyer, I still
7 can't understand it.

8 JUDGE BROWN: Well, that's why Doubles was thrown
9 out the VMJI was put in, because Doubles is a little
10 esoteric.

11 MR. RIDDLES: I've also read, however, the -- and
12 I've tried to make it generic. Mr. Work has it and I don't
13 think I'm going to be able to agree with him even after I
14 took a cut at revising it.

15 I've looked at the Court's drafted instruction on
16 these issues and I find that this fairly covers it. I'm not
17 trying to flatter the Court, I wish I'd have written it.
18 But it fairly covers it. It covers all the issues. It's
19 intelligible to the jury and it covers, as I see it, every
20 argument that Mr. Work wants to make.

21 JUDGE BROWN: It would probably be a little safer
22 to give an instruction that's already been approved by the
23 Supreme Court than to give one that I made up because as
24 I've told you before, the Supreme Court is notoriously
25 lacking in respect for my ability to speak and write.

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1 MR. RIDDLES: Well, Your Honor, I've argued before
2 the Supreme Court of Virginia and I'm confident that I could
3 proffer this instruction to them and feel good about it.

4 I don't want to get us reversed either, but I tell
5 you that instruction is not going to be clear and in my
6 experience, and I've done a lot of these trials, that's
7 going to be the kind of a thing that a jury's going to ask
8 questions about. They're not going to understand it.

9 JUDGE BROWN: Let me see it now as it's revised.

10 MR. WORK: Well, unfortunately it doesn't work as
11 revised, Your Honor, and I'm not sure that it would be made
12 generic. I don't agree with it and Mr. Riddles has
13 introduced an element of confusion.

14 JUDGE BROWN: You still don't like mine?

15 MR. WORK: I love yours and I think you could give
16 that one, too, because I think it's an appropriate
17 instruction but --

18 JUDGE BROWN: Well, it says the same thing as this
19 one, doesn't it?

20 MR. WORK: No, not quite. Unless they show --

21 JUDGE BROWN: Let me have mine back up here.

22 (Pause.)

23 JUDGE BROWN: Unless they show --

24 MR. WORK: Unless they show with a reasonable
25 degree of certainty what portion of this mass of damages

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1 they're trying to collect against Whittaker is allocable to
2 Whittaker, then they can't recover any damages. Zero.

3 (Pause.)

4 MR. RIDDLES: Your Honor, I would say that what we
5 have here is an argument that Mr. Work wants to make to the
6 jury and as has so often happened in this case, it's a
7 subtle spin on it, on what the reality is that gets us into
8 that area that does prejudice the thinking of the jury.

9 We're beyond instructing them now and getting into
10 that area of argument that makes it very dangerous to do and
11 not clear.

12 Whereas the Court's instruction, although it
13 doesn't say all the argument Mr. Work wants to make, is an
14 accurate reflection of the law of damages in Virginia.

15 (Pause.)

16 JUDGE BROWN: Ms. Secretary, do you take
17 dictation? You do? Not many people do any more.

18 Have you got a pencil and a piece of paper?
19 Because I've scratched this thing up so bad I think I'm
20 going to dictate it to you and this is what I'm going to
21 give.

22 (Pause)

23 JUDGE BROWN: How fast do you take it? Just
24 kidding.

25 MR. BOEHLERT: As fast as you can talk.

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1 JUDGE BROWN: The first -- well, where are we
2 in -- I guess -- I don't know whether this is a Defendant's
3 or a -- let's call it instruction 1Z. All right. That's
4 not a 12, that's instruction 1Z.

5 The first part of it will be written pretty
6 clearly on this page and it's just that it gets confusing at
7 the end.

8 Damages are not presumed nor may they be based
9 upon speculation but must be proven. The burden is upon the
10 party seeking damages to prove by the --

11 MR. BOEHLERT: A little fast, Your Honor. I said
12 as fast as you can talk, not as fast as you can read.

13 (Laughter.)

14 JUDGE BROWN: Nobody takes dictation any more.

15 But must be proven. The burden is upon the party
16 claiming damages to prove by the greater weight of the
17 evidence any damage claimed and that it is properly
18 attributable to the other party's breach; and unless any
19 such damage is thus proven by the greater weight of the
20 evidence, then the party claiming damage cannot recover for
21 such damage.

22 Terrible English, but anyway. Paragraph.

23 If you believe from the greater weight of the
24 evidence that any damage resulted from two causes -- let's
25 say -- instead of two, let's say multiple -- more than one.

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1 MR. BOEHLERT: I don't want to interrupt, Judge,
2 but I think it's so confusing -- two causes -- isn't it more
3 than one party?

4 JUDGE BROWN: No.

5 MR. BOEHLERT: One party can cause damage in more
6 than one way.

7 JUDGE BROWN: I'm doing it by what the instruction
8 says.

9 If you believe from the greater weight of the
10 evidence that any damage resulted from more than one cause,
11 for one of which the other party is responsible, the burden
12 is upon the party claiming damage to prove by the greater
13 weight of the evidence the share of damage for which the
14 other party is responsible.

15 I hope this goes to the Supreme Court.

16 If a party fails so to prove damage, then the
17 party cannot recover for any such damage.

18 Now, I think it's clear if you read it three or
19 four times. And it's all here and that's the instruction
20 I'm going to give over both parties' objections.

21 MR. WORK: Objection.

22 MR. BOEHLERT: For the record, Plaintiff also
23 objects.

24 JUDGE BROWN: All right. We're down to
25 instruction 55.

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1 MR. WORK: Your Honor, you had asked for a generic
2 waiver instruction and we have one.

3 JUDGE BROWN: I guess we're not down to
4 instruction 55 yet.

5 Did you give them a copy or show it to them?

6 MR. WORK: I think -- yes, we showed it to them.

7 (Pause.)

8 JUDGE BROWN: Well, that's not really what you
9 want, though, is it?

10 MR. WORK: No, not really.

11 JUDGE BROWN: I mean, that doesn't even really
12 apply to this case.

13 MR. WORK: Well, I think we need one that's more
14 specific than that. That's our position.

15 JUDGE BROWN: Well, what I meant by generic was
16 just not -- I don't even remember when we said it. Was it
17 in connection with whether the --

18 MR. WORK: It was in connection with the RCE
19 default termination and the fact that the schedule had
20 passed by more than two years.

21 JUDGE BROWN: Okay. I don't really know how you
22 can do one but this certainly won't do it.

23 MR. WORK: Okay. Let me have one of my colleagues
24 come up and get it and they can work on it.

25 JUDGE BROWN: Okay.

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1 (Pause.)

2 JUDGE BROWN: All right. Let's go to instruction
3 55.

4 MR. WORK: Your Honor, in that connection, I have
5 the portion of the transcript from which we crafted this
6 particular instruction.

7 Excuse me -- I may be jumping ahead.

8 JUDGE BROWN: Well, why don't we go -- forget 55
9 and 56 for the moment, anyway, and look at 57?

10 MR. WORK: Your Honor, except I can't forget 56.
11 That is key.

12 JUDGE BROWN: Well, all right. But put it aside
13 for a minute.

14 MR. WORK: All right. Here is -- this is the
15 colloquy that took place during Ms. Raymond -- and I have
16 marked the particular passages with clips. Those pages --
17 I think there are several lines on each page that are
18 relevant.

19 (Pause.)

20 JUDGE BROWN: Okay.

21 MR. WORK: And the notice issue came up and you
22 said not in this court and then finally you said there maybe
23 breaches and that's one thing and in addition to that if you
24 cause somebody to do additional work, that person is going
25 to get paid for it and that's what we've tried to do as we

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1 crafted 57.

2 MR. BOEHLERT: What I suggest we do, Your Honor,
3 is go back to the Plaintiff's proffered instructions, the
4 lettered instructions which, as we can see, conform much
5 more closely to the model jury instructions now that we're
6 into Whittaker's case.

7 JUDGE BROWN: What number?

8 MR. BOEHLERT: Well, we left off at HH.

9 JUDGE BROWN: Let me see if I can find that.

10 (Pause.)

11 JUDGE BROWN: Why isn't it just as simple as the
12 three issues in 57?

13 (Pause.)

14 MR. BOEHLERT: Well, first of all, it's not
15 consistent with their pleadings. You've held TechDyn
16 strictly to their pleadings in this case and for right or
17 wrong, you've dismissed out substantial portions of our case
18 because of that.

19 Your Honor, I'm going to ask that Defendant be
20 held to the same standard. They pled their case based on
21 the Federal changes clause and Mr. Work has told you already
22 today that they don't have a breach of contract action per
23 se but that they want a remedy under the Federal changes
24 clause, 52.243-1.

25 And a significant element in getting remedy under

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1 that is the notice requirement plus a second element of
2 instruction 57 talking about whether originating with
3 TechDyn or the Air Force is argumentative, it's beyond the
4 scope of the clause and if they're going to plead their case
5 against TechDyn on their changes theory, then they have to
6 be able to prove their case under that changes theory.

7 JUDGE BROWN: Well, the problem with that is that
8 gets us into the equitable adjustment.

9 MR. BOEHLERT: Well, Your Honor, that's what they
10 pled. That's what the Plaintiff has prepared his defense
11 against for more than a year and that's the theory that Mr.
12 Work today told you that they're prepared to pursue.

13 So unavoidably we are at that issue now where I do
14 proffer to the Court -- or it's already been discussed and
15 is part of the subcontract -- the changes article. That's
16 what Defendant's case is premised on and they have to meet
17 the test there.

18 The case law in Virginia is clear -- I think it's
19 the Brindersen case -- that notice requirements are
20 extremely strictly construed in Virginia and that to allow
21 the Defendant at this late date to create some standard less
22 than what they've pled and are trying to prove and that is a
23 remedy under the Federal changes clause would be just flat
24 out contrary to the pleadings, contrary to the proof that
25 the Defendant's put on and contrary to the law of both the

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1 / contract and the state of Virginia.

2 JUDGE BROWN: Let me see the changes clause that
3 you think applies.

4 (Pause.)

5 JUDGE BROWN: It's 52.243-1.

6 MR. BOEHLERT: Yes.

7 (Pause.)

8 JUDGE BROWN: Have I heard what you want to say?

9 MR. BOEHLERT: So far. Yes, sir.

10 JUDGE BROWN: Mr. Work.

11 MR. WORK: Your Honor, this is going to sound very
12 rough, that Mr. Boehlert knows better than what he just said
13 to you. That changes clause for 30 years has been
14 interpreted to subsume both formal changes for which notice
15 is required and a formal change is an advance contract
16 modification --

17 JUDGE BROWN: Well, there weren't any of those,
18 right?

19 MR. WORK: And constructive. There were none of
20 those either for them from the Air Force or for us from
21 TechDyn. And they recovered.

22 The clause also subsumes constructive changes and
23 the dialogue we had with Your Honor at that bench conference
24 when Ms. Raymond was going to testify about this clause
25 captured the moment. You said -- and let me just quote it

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1 because I went home that night feeling that we were going to
2 have an adequate instruction and we didn't need the
3 testimony I proposed to put on.

4 You said it several times. You said first, "No,
5 if they've asked you to do something that wasn't in the
6 original contract that they should pay for it." That was
7 you.

8 Work: "But that's breach of contract."

9 Judge Brown: "But the jury doesn't understand
10 that."

11 And then I go on to say "Before the changes clause
12 ever came into existence, there was a recognition of
13 constructive changes. It goes back 30 years."

14 And the question comes up as to whether we'll put
15 the changes clause before the jury without any testimony on
16 it and I say that Boehlert's going to argue that there are
17 notice requirements for constructive changes and Mr.
18 Boehlert says there are notice requirements and you say,
19 "Not in this court."

20 And then you go on to say, "I didn't say breach of
21 contract, I said two things. First, if they breached the
22 contract and that caused damage, you get to recover.
23 Second, if they ask you to do additional work that is not
24 within the original contract, they've got to pay for it."

25 And finally, Judge Brown: "Here's the ruling. I

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1 am going to -- you all can fashion and submit to me very
2 simple instructions that will tell the jury --" and that's
3 what we're trying to do here, "number one, if A breached the
4 contract and B suffered damages, thereby B can recover.
5 Number two, if A directed, caused or how ever you want to
6 put it, additional work to be done under the contract, then
7 B thereby had additional work not contemplated within the
8 contract, B can recover for it." And that's exactly what
9 we've done here and I think we've put it very succinctly in
10 those three clauses.

11 The reason that we are offered Mr. Thompson and
12 Ms. Raymond to testify about what they understood -- what
13 Ms. Raymond understood the contract and that changes clause
14 to mean and what the industry as a whole understood it to
15 mean through Mr. Thompson was that if the clause was going
16 to go in that it had to be explained. It had to be
17 explained that not only does the clause cover the kind of
18 formal changes that are specifically addressed in the
19 clause, but also covers constructive changes, evolutionary
20 kind of changes that we've seen in the program for which
21 you're entitled to get paid with or without notice.

22 And Ms. Raymond, as you know, did not testify on
23 that subject after Your Honor made the comments in this
24 transcript. And what we've tried to do is precisely capture
25 what you've said, which I think is an accurate statement of

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1 the law.

2 Brendersen, incidentally, which is a case I've
3 cited to Your Honor which is a 4th Circuit decision that
4 says, we think, the Supreme Court of Virginia, if confronted
5 with a situation where there is a standard Federal clause,
6 will infer, presume that the parties intended that clause to
7 be followed as it's interpreted in the Federal procurement
8 industry and we've relied on that. It does not say what Mr.
9 Boehlert says.

10 JUDGE BROWN: Okay. You have the last word.

11 MR. BOEHLERT: Yes, I do, Your Honor.

12 I'm referring now to the amended counterclaim that
13 the Defendants have filed in this case which is the case
14 itself and paragraph 28 --

15 JUDGE BROWN: Now, wait a minute. I'm not sure
16 I've got the amended counterclaim. I've got a counterclaim.

17 MR. BOEHLERT: March --

18 JUDGE BROWN: Here it is. Paragraph?

19 MR. BOEHLERT: Twenty-eight, please.

20 JUDGE BROWN: Twenty-eight. Okay.

21 MR. BOEHLERT: Reading that, it says "WES
22 initially submitted a claim for equitable adjustment of
23 subcontract costs in accordance with FAR 52.243-1B as
24 incorporated in the subcontract in article 2-9 in late May
25 1987." The paragraph then says how that claim was updated.

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1 Now, this is the Defendant's case, this paragraph
2 30. "TechDyn has breached the terms of subcontract 125001
3 as set forth in FAR 52.243-1B by refusing and failing to
4 substantively analyze the claim and pay WES the sums due in
5 full as an equitable adjustment to the subcontract price."

6 JUDGE BROWN: So what should happen now?

7 MR. BOEHLERT: Okay. Then we have to measure that
8 claim by the parameters of the clause that they say we
9 breached. And one of the critical elements to even have a
10 claim is the paragraph in the changes clause regarding
11 notice.

12 And I misspoke earlier. I did mention the
13 Brendersen case. I meant the McDivot & Street v. Marriott
14 Corporation case, 713 F.2nd 906, Eastern District, where the
15 court there very strictly construed a notice requirement and
16 precluded the recovery of damages.

17 I would also cite to the Court the case of Dan
18 River, Inc. v. Commercial Union Insurance Company, Virginia
19 Supreme Court 1984, 317 S.E. 2nd 485, where the court held,
20 "Consequently, we hold that the trial court properly ruled
21 the notice was untimely." And they barred the claim.

22 In this case, Your Honor, we cannot ignore what
23 the Defendant has sued for.

24 JUDGE BROWN: When was the notice given in this
25 case?

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1 MR. BOEHLERT: Never. And there's been no
2 evidence that notice was given -- timely, untimely or
3 otherwise. And for that reason, Your Honor, for them to
4 prove their case under the clauses which they've sued, they
5 would have to show written notice consistent with the
6 clauses that they invoke.

7 Now, I've heard you say, Your Honor, in the past
8 that well, like many cases, the AIA contracts and no one
9 gives notice and there's constructive notice and what have
10 you -- I understand what you've said, Judge, but I
11 respectfully disagree with you that this contract and
12 especially the clause that they're invoking for a remedy has
13 a strict notice requirement and the courts of Virginia, both
14 the Federal courts in McDivot & Street which has an
15 excellent discussion of notice, a very harsh remedy, but
16 notice was certainly a condition precedent to payment in
17 that case and the court denied any remedy at all and the
18 same thing happened in the Dan River case.

19 JUDGE BROWN: Well, if that's the law, you're
20 entitled to recovery. No question for the jury. Right?

21 MR. BOEHLERT: If that's the law and they're
22 pursuing the changes clause and gave notice --

23 JUDGE BROWN: Right.

24 MR. BOEHLERT: Right.

25 JUDGE BROWN: There's no question for the jury.

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1 MR. BOEHLERT: There should be no question for the
2 jury --

3 JUDGE BROWN: You should win.

4 MR. BOEHLERT: Whether notice was given or not is
5 probably a fact question.

6 JUDGE BROWN: But there's no evidence of it, is
7 there?

8 MR. BOEHLERT: I am unaware of any evidence at all
9 of notice.

10 JUDGE BROWN: So there's no reason to send that
11 claim to the jury.

12 MR. WORK: Correct, Your Honor.

13 MR. BOEHLERT: You're right.

14 JUDGE BROWN: Head down, eyes closed, hands in the
15 prayer position, I'm going to send it to the jury.

16 So have I heard what you want to say? I think I
17 understand your position.

18 MR. BOEHLERT: Okay. Well, then, let's send it to
19 the jury with the clause that they've invoked and that's the
20 changes clause. And that for the jury to find for them --

21 JUDGE BROWN: Now, if that clause clearly doesn't
22 apply in this case --

23 MR. BOEHLERT: Well, Your Honor --

24 JUDGE BROWN: Because you keep arguing the notice
25 provision but there was never -- there was never a written

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1 order of anybody requiring them to do any additional work so
2 we don't even need to get to their notice question. They
3 lose before we get there because there never was any such
4 thing.

5 MR. BOEHLERT: That's right, Your Honor. That's
6 why pleadings are important and you've strictly construed
7 the Plaintiff's pleadings. We have to construe what the
8 Defendant pled it's case to be and that was under the
9 Federal changes clause. Now, they must have thought --
10 maybe they failed to prove the written notice.

11 The fact that it's not in evidence doesn't mean
12 there was no written notice. There's letters galore in
13 there concerning issues of work and what work was done and
14 why it was done. I don't know if they're arguing that was
15 notice or not. Anything can be -- I mean it's an element of
16 the case.

17 Now, I've heard no evidence of notice but the fact
18 they miss an element of their case doesn't mean they can
19 come back and replead their case. They've sought a remedy
20 under a specific clause. Notice is a condition precedent
21 for them to recover and, Your Honor, both the state and
22 Federal courts have been extremely clear on that issue that
23 if that's the law of the parties, they entered into the
24 contract, that they're bound by it.

25 You can't write that notice requirement out of

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1 this contract. It would be unfair both to the parties
2 because of the nature of the contract itself and it would
3 certainly be very prejudicial to us, to TechDyn, because the
4 Plaintiff's case is framed solely around that clause.

5 JUDGE BROWN: The Defendant's case.

6 MR. BOEHLERT: The Defendant's case is framed
7 around that clause. So for that reason, Your Honor, I say
8 that it should not go to the jury. I agree with you. I
9 think I told you a long time ago that I feel that there is a
10 condition precedent that they could not meet and you should
11 strike their case prior to going to the jury and that was
12 one of the motions to strike the evidence which you've
13 denied. I would like to renew that now.

14 But barring that and sending this to the jury, it
15 has to go. They have to consider their claims consistent
16 with the clauses they're suing under.

17 So for that reason, Your Honor, I proffer that
18 clause as a basis for the jury instructions.

19 JUDGE BROWN: I'm not going to give that to the
20 jury. I'm going to give to the jury a modified version of
21 57. I don't read the Defendant's pleading in the same way
22 as you do. I don't know that I even read the Defendant's
23 pleading like the Defendant reads it.

24 But I read the Defendant's pleading in this
25 manner: the Defendant had a claim under which they should

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1 have been -- that should have been presented to the Air
2 Force under the changes clause for equitable adjustment.
3 TechDyn refused to consider it, wouldn't give it any
4 consideration at all, wouldn't listen to them, wouldn't
5 present it, as a result of which Whittaker has been damaged.
6 Now Whittaker is here to collect that damage. And the jury
7 can't deal with equitable adjustment because equitable
8 adjustment has to do with a whole lot of things that the
9 jury can't consider at all.

10 So I am going to present to the jury the simple
11 question of did -- well, I'll present it like they wanted,
12 did TechDyn require additional work not in the original
13 contract, have they been paid for it, did that cause them
14 extra work and have they been paid for it extra money?

15 And we'll see what the jury says. And if it
16 wasn't right to send it to them at all to consider it, then
17 of course that can be taken care of in a very simple manner.

18 Now, I want this instruction to be in the form
19 that the other instructions are. And I think what we need
20 to do is take out the first and second paragraphs and start
21 with the same kind of thing that we've done before. We
22 really haven't been entirely consistent because we've been
23 doing primarily a finding instruction instead of an issues
24 instruction and we just haven't got time to go back and redo
25 the whole thing at this point. So I'm just going to do a

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1 finding instruction.

2 You shall find your verdict for Whittaker on --
3 what count is this?

4 MR. WORK: Count 1.

5 JUDGE BROWN: Count 1 of the counterclaim if you
6 find or if Whittaker has proved by the greater weight of the
7 evidence that point one, that TechDyn caused Whittaker to
8 perform added work beyond what was required or contemplated
9 on the original terms of the ICCE subcontract; two, that the
10 added work, whether originating with the Air Force or with
11 TechDyn itself caused Whittaker to incur added costs;
12 three -- well, okay. Whittaker had not been compensated for
13 the added work.

14 MR. BOEHLERT: May I object, Your Honor, to
15 paragraph 2? There's nothing in the contract that talks
16 about the Air Force at all and there's no law cited. This
17 case is against -- we've been prevented from raising
18 evidence about the Air Force participation in this matter.
19 Plus, Your Honor, there's been a motion in limine to prevent
20 the Plaintiff from proving that the Air Force is actively
21 administering the Air Force claim.

22 JUDGE BROWN: Well, the reason this case, of
23 course, never should have been in this court at all is
24 because the Air Force should have at least testified here
25 and the whole thing should have been taken up before the Air

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1 Force. But you wouldn't do that. And I didn't make you do
2 it. And they wouldn't do it and you didn't want to do it so
3 now we're going to let this jury do it. But it ought to be
4 at the Air Force. You ought to nonsuit right this second
5 and go to the Air Force.

6 MR. BOEHLERT: With all due respect, Your Honor,
7 that is not the situation. It was the Defendants who would
8 not certify their claim that did not allow this to be in the
9 Federal process. It had nothing to do with TechDyn.

10 JUDGE BROWN: If you as the contractor pass on to
11 them added work that's required by the Air Force, you've got
12 to pay for it in this court. Then you can make your claim
13 against the Air Force. That's the way it works. You are
14 the general contractor. They are the subcontractor.

15 If you make them do extra work, I don't care if
16 Susie told you to do it, you've got to pay them for it.

17 MR. BOEHLERT: Okay, Your Honor. Then the
18 instruction should be if TechDyn ordered additional work.
19 It should make no reference to the Air Force at all.

20 JUDGE BROWN: Well, I want to make it clear to the
21 jury that it doesn't matter where it originates. It doesn't
22 say the Air Force ordered it.

23 But I just want to have it in the same format that
24 we've been using, at least with regard to the finding
25 instruction part.

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1 MR. BOEHLERT: Your Honor, I note my objection to
2 this instruction. I just would like you to know if you
3 don't that Whittaker's claim is actively being resolved and
4 evaluated by the Air Force as we sit here.

5 JUDGE BROWN: Well, I hope that will take care of
6 it.

7 MR. BOEHLERT: So there's no misunderstanding in
8 your mind as to the posture of that claim.

9 JUDGE BROWN: Why isn't your claim being processed
10 by the Air Force?

11 MR. BOEHLERT: It is not a claim against the Air
12 Force. It's a claim against Whittaker Corporation for
13 failing to do their work.

14 JUDGE BROWN: Well, I'll bet the Air Force would
15 help you with it if you asked them.

16 Anyway, what count is this? Count 1?

17 MR. WORK: Count 1.

18 (Pause.)

19 JUDGE BROWN: Okay. Redo 57 as 68.

20 MR. RIDDLES: Sixty-eight, Your Honor?

21 JUDGE BROWN: I think -- aren't we at -- didn't we
22 deal with 67?

23 MR. RIDDLES: Okay.

24 JUDGE BROWN: All right. Now, that brings us to
25 55 and 56.

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1 MR. BOEHLERT: Just for the record, Plaintiff
2 again objects to instruction 68.

3 JUDGE BROWN: Right. Fifty-five -- any objection
4 to 55?

5 (Pause.)

6 JUDGE BROWN: I think that's argument and covered
7 by 68. I deny that one.

8 Now, 56 -- the one that you really are interested
9 in seeing take place.

10 Any objection to 56?

11 MR. BOEHLERT: Yes, Your Honor. There are motions
12 in limine. The Air Force is out of this case. You said
13 that a long time ago. And your instruction number 68 covers
14 that issue of whether the work originated from TechDyn or
15 Whittaker.

16 In the Erikson case, the one that Defendant keeps
17 coming to you for, it says that the subcontractor can pursue
18 its remedy either against a prime contractor in a pass
19 through status against the owner, which is the Air Force.
20 The instruction is legally erroneous. It has no bearing on
21 this case and it's contrary to a motion in limine that you
22 entered earlier that says the Air Force is not going to be
23 discussed here, whether one party or the other has a remedy
24 against it.

25 JUDGE BROWN: Okay. Why isn't 56 covered by 68,

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1 which says you can recover if you had additional work to be
2 done outside the scope of the contract even when it
3 originated with the Air Force or with TechDyn?

4 MR. WORK: It could be covered with some
5 additional language but everyone I've talked to who has sat
6 in parts of this trial has raised the question does
7 Whittaker have a cause of action against the Air Force and
8 some of this work obviously originated with the Air Force
9 and was flowed down to TechDyn. It is the fundamental
10 issue, fundamental threshold legal issue relating to
11 Whittaker's claim. It is an issue that if it is not
12 instructed upon could result in great confusion with a juror
13 saying well, they can go off, can't they, against the Air
14 Force? You have to close that gap of understanding and make
15 it clear that as a -- and, in fact, when you were discussing
16 this matter a moment ago, you made it very clear so this
17 language is not magic, but you said regardless of whether
18 the work originated with the Air Force and it was flowed
19 down or whether it originated with TechDyn, Whittaker is
20 entitled to recover against TechDyn. It has no cause of
21 action against the Air Force.

22 That is fundamental to understanding Whittaker's
23 claim in this case. Without it, whether or not Mr. Boehlert
24 makes argument that this is all stuff that they should be
25 working the Air Force with or not, it is easy to imagine a

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1 situation wherein one of these jurors gets it in his head
2 that the Air Force is at fault, not this little company
3 called TechDyn and so we're not going to provide any remedy
4 because Whittaker can go off against the Air Force. That
5 could easily happen without an instruction as to the law and
6 this is purely law.

7 Mr. Boehlert says that Erikson sets forth two
8 courses for the subcontractor and in fact it does but not
9 the two courses that Mr. Boehlert outlined. One of them is
10 the one that Mr. Boehlert said namely a claim against the
11 prime contractor and the other, and I'm quoting Boehlert at
12 the bottom of page 67 -- excuse me -- I'm quoting Erikson at
13 the bottom of page 67 or prosecuting a claim against the
14 Government through and in the right of the prime
15 contractor's contract with the prime contractor's consent
16 and cooperation.

17 So it's a prime contractor's claim, it's not a
18 subcontractor's claim. There is no right of action of
19 subcontractor against the Air Force. That is, as far as I'm
20 concerned, the most important issue in this case.

21 (Continued on next page.)
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1 JUDGE BROWN: I got my statement out of 68 and I
2 think 68 covers it. I deny 56.

3 MR. WORK: Your Honor, could I just suggest the
4 tailoring that I suggest with regard to 58? Where you say,
5 two, that the added work, whether it originates with the Air
6 Force and is flowed down by TechDyn, or whether it
7 originates with TechDyn itself. Just to make that separated
8 clause a little clearer.

9 JUDGE BROWN: I think it is clear as it is, and I
10 deny to motion to add that. That isn't language out of the
11 56, any way. We are down to instruction 58.

12 (Pause.)

13 MR. BOEHLERT: Well, I based, on the model
14 instruction, why don't we use the model instruction. I
15 don't know how it is modified here. And I would like to
16 look at it.

17 JUDGE BROWN: I suspect there isn't a model for
18 that, because it's not a breach, it's an added work. But if
19 there is a model --

20 MR. BOEHLERT: Well, they're saying 9.010.

21 MR. WORK: The model, Your Honor, references, as I
22 understand it from Ms. Mauser, the second sentence. But the
23 first sentence, is unique to the circumstance where we are
24 talking not breach but added work.

25 MR. BOEHLERT: We are not claiming breach? I just

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1 want to understand their theory of the case.

2 JUDGE BROWN: It seems to me pretty simple. You
3 caused them to do additional work. You didn't pay them for
4 it. Now you have to pay them.

5 MR. BOEHLERT: Is that a breach, or what is that?
6 Is that unjust enrichment. I would like more particularly -
7 -

8 JUDGE BROWN: You caused me extra work and you
9 didn't pay me for it. Call it Susie, if you want to, but
10 what's wrong with instruction 58? You can't see that if you
11 caused me to do additional work, and you don't pay me for
12 it, under that contract, you don't have to pay?

13 MR. BOEHLERT: That's right, because under the
14 changes clause, there are three changes in the contract.
15 And they keep saying that the plaintiff has a right to order
16 --

17 JUDGE BROWN: Well, quite beating that dead horse.
18 Here he says he has to prove it by the greater weight of the
19 evidence. Isn't that good for you? If you lose on the
20 other point, surely you want this?

21 MR. BOEHLERT: But it goes on, Your Honor, citing
22 a negligence instruction?

23 MR. RIDDLES: But it goes on an increase clause,
24 you have --

25 JUDGE BROWN: We put it in every instruction.

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1 It's like your CC.

2 MR. BOEHLERT: What is CC? I don't mind be fair
3 to both sides, but I don't think that this is a proper
4 instruction.

5 MR. RIDDLES: I don't know how you get that from
6 every instruction, Your Honor, where it says to permit you
7 to make a reasonable estimate of each item of these costs.

8 JUDGE BROWN: We didn't put that in your
9 instruction?

10 MR. BOEHLERT: No.

11 MR. RIDDLES: No, sir.

12 MR. BOEHLERT: Please stick to the model
13 instructions on damages.

14 MR. RIDDLES: And the model instruction they cite
15 is a negligence instruction.

16 MR. BOEHLERT: 45.500, I think is the model
17 instruction of damages. Isn't this covered by that clause
18 that you just dictated?

19 JUDGE BROWN: Which one is that?

20 MR. BOEHLERT: 12.

21 JUDGE BROWN: All right. Well, I tell you, if you
22 don't want that last part of that, we'll sure take it out.
23 But we need to give the first part.

24 MR. BOEHLERT: The first sentence?

25 JUDGE BROWN: Yes. You don't want the last two

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1 sentences, though, is that right?

2 MR. BOEHLERT: That's right.

3 JUDGE BROWN: All right, we take them out and note
4 Whittaker's objection. We cover that subject to some degree
5 in 1Z. Okay, 58 as modified. Fifty-nine? Now we get to
6 our quantum merit question. Why do you need to tell them,
7 the jury, as far as that is concerned, whether you are
8 talking quantum rep or contract, or who struck John?

9 MR. WORK: I think the reason --

10 JUDGE BROWN: We told the jury, and Mr. Boehlert
11 can call it whatever he wants to, and I don't care what you
12 call it. And you can figure it out when you get to the
13 Supreme Court, what you are going to call it.

14 MR. WORK: I think the reason, Your Honor, is
15 related to just what you said, at least that's the argument
16 I've tried on Ms. Mouser.

17 JUDGE BROWN: Did it work?

18 MR. WORK: It worked. At least, for appearances.
19 The first sentence of the second paragraph, deal with it.
20 Mr. Boehlert here is saying there is no rights under the
21 changes clause for kind of constructive change. I think he
22 knows better, but that is what he is saying. And if he
23 makes his argument to appellate court, he may say there is
24 not contractual basis, and you don't have quantum merit
25 account, and therefore, there is no basis for recovery. And

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1 therefore, I think it is appropriate that there be an
2 instruction on quantum merit.

3 JUDGE BROWN: I am not going to give it, because I
4 am not going to bother the jury with what the theory is. I
5 have told the jury, and whether you want to call it
6 contract, or whether you want to call it quantum merit, I
7 don't care. I believe under the circumstances of this case,
8 that if TechDyn got Whittaker to do additional work, not
9 within the contract, they had to pay for it. And if they
10 didn't pay him, and there was additional work done, and a
11 cost incurred, and Whittaker proved it, Whittaker can
12 recover.

13 I don't care whether you call it quantum merit or
14 contract. And there is no point in telling the jury what we
15 are calling it. So, we will call it count one, and it will
16 go under count one. but you will understand that I don't
17 care whether it is count one or count two.

18 MR. WORK: Exception noted?

19 JUDGE BROWN: Yes.

20 MR. BOEHLERT: Your Honor, I ask that defendant's
21 exhibit 108, in that exhibit, talks about count to quantum
22 merit, recovery can be stricken.

23 JUDGE BROWN: Let me see 108. I don't want to
24 confuse the jury with something -- did we --

25 MR. WORK: Yes, we revised that and now we have to

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1 revise it further, as a result of your comments this
2 morning.

3 JUDGE BROWN: I don't think we ought to put that
4 in there. Because I think that will be confusing to the
5 jury. Okay, 60. Isn't there some way to do this in an
6 understandable way to the jury, and not get them into a lot
7 of jargon. I mean, why tell them that it converts this, or
8 converts to that. Why not just tell them that, if they
9 found from the evidence, that the termination, the default
10 termination was improper, then TechDyn may recover the costs
11 that it actually performed, incurred.

12 MR. WORK: That's fine. Just so we'll revise it.
13 The reason that I thought, objected to the language of the
14 contract, the material -- I don't think that it is essential
15 to have those closing --

16 JUDGE BROWN: Well, write one up and get our
17 secretary here to type it up so we can look at it. And they
18 can object to it if they wish. But I just think 60 gets us
19 into a lot of jargon that we don't need.

20 MR. BOEHLERT: I proffer the court plaintiff's
21 exhibit 105.

22 JUDGE BROWN: Plaintiff's --

23 MR. BOEHLERT: Plaintiff's instruction YY. The
24 reason that I do that is, the defendant wants to recover
25 under these special clauses. And they know, in order to do

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1 that, they have to meet the requirements of that. One of
2 the requirements, in order to recover for default
3 termination, is that they have to show that they were for
4 profit, that they were not in a loss situation, there's a
5 lost suggestion factor that they supplied for anything they
6 recovered that they might have.

7 It's a very onerous burden to recover under a
8 termination for convenience. And they can't have it both
9 ways, quite frankly. They are coming at it, and proffer to
10 you, and have you accept the termination for convenience
11 clause, arguing to you that that is their measure of
12 recovery, and then get some very loose instruction as to how
13 to compute those damages.

14 JUDGE BROWN: What is the damage proof under that,
15 under count three?

16 MR. WORK: Damage proof is Mr. Cannady's and Ms.
17 Raymond's discussion of the costs incurred in performing the
18 RCE work, which are listed on defendant's exhibit 108. And
19 were detailed in --

20 JUDGE BROWN: I don't see it on exhibit 108.

21 MR. WORK: Yes, you do.

22 JUDGE BROWN: I do?

23 MR. WORK: Remote control element 426,000. The
24 fourth item down.

25 JUDGE BROWN: That's under count one.

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1 MR. WORK: Right. And that is where, those costs
2 under count three are aggregated in count one. There are
3 really two elements of cost that one can recover. One the
4 cost of performance, and two the cost of winding up. And
5 instead of trying to make that complicated on this chart,
6 you simply aggregated them under count one in the 426. And
7 I guess my response to what Mr. Boehlert has just said, and
8 I again find his comment very ironic, because we tried to
9 show what the results of Whittaker's performance in this
10 contract were from the standpoint of cost, and he repeatedly
11 objected, with success. And none of that evidence is in
12 this case at this point.

13 And for him now to rely on the fact that we should
14 have shown what our costs were relative to our revenues is
15 indeed ironic.

16 MR. BOEHLERT: As certainly an element of proof,
17 if they, to simply show your costs, and not to show the
18 amount you have been paid, is -- because there is testimony
19 as to the amount that they were paid. Those are strictly
20 costs.

21 JUDGE BROWN: He said the costs actually incurred
22 in performing its work on the RCE to the extent has not been
23 previously compensated.

24 MR. BOEHLERT: He has said that?

25 JUDGE BROWN: No, that's what instruction 60 says.

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1 MR. BOEHLERT: Well, that's not what he just said.
2 He said those were for the costs. But they had no proof as
3 to the amount they were compensated.

4 That's just a summary of costs. They spent
5 \$426,000 that they have to show the amount of the
6 subcontract value for that work, as well, in order to
7 recover, to diminish it by the amount that they were paid.
8 They are simply stating that those are our costs. Those are
9 our costs.

10 MR. WORK: Your Honor, again, this was what was
11 addressed, this issue was addressed in the claim. Which,
12 TechDyn didn't want to get in this case. And it is not in.

13 JUDGE BROWN: Well --

14 MR. BOEHLERT: Has to prove its damages, whether
15 its to the claim or otherwise.

16 JUDGE BROWN: If the claim were in, the damages
17 had to come in some other way.

18 MR. WORK: The damages, Your Honor, came in
19 through testimony. You know, I felt fairly strongly that
20 when there is voluminous, contemporaneous document, which is
21 certainly subject to hearsay rules, on the one hand, and
22 litigation document, which TechDyn used on the other, that
23 the former should come in and the latter shouldn't. And
24 just the opposite happened. Mr. Boehlert wants the answers
25 to those questions, he can go to the claim, that was --

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1 JUDGE BROWN: Well, Mr. Boehlert doesn't want the
2 answer, the jury wants the answer. What I'm asking you is,
3 what is the evidence before the jury?

4 MR. WORK: The evidence before the jury are that
5 these are the uncompensated costs that were recorded on
6 Whittaker's books, plus the costs of winding up. And that
7 is in the testimony.

8 JUDGE BROWN: Okay, so you say there is testimony
9 from which the jury could determine that that \$426,000 is
10 the figure, is the unreimbursed cost?

11 MR. WORK: Plus performance, plus winding up
12 costs.

13 JUDGE BROWN: And where do you get that this is
14 what you are entitled to recover?

15 MR. WORK: That is right out of the termination
16 for convenience clause, which is before you, Your Honor.

17 JUDGE BROWN: Well, you say before me, remember
18 that thing I gave you that is aid we refused, the changes
19 clause, is it in that?

20 MR. WORK: No, it's in the default and termination
21 for convenience clause, which you gave to the --

22 JUDGE BROWN: I think it's to be put in the
23 record, let me see it.

24 (Continued on next page.)
25

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1 JUDGE BROWN: Remember that you put it in where
2 the FAR was referred to? Let me see it a second. Where is
3 it in here?

4 MR. WORK: I'm pulling it out now.

5 MR. BOEHLERT: Your Honor, concerning the same
6 area where the administrative costs appear to be costs of
7 litigation, legal fees, and there is no testimony as to what
8 those costs are.

9 JUDGE BROWN: Here, I think I found it. Let's
10 see.

11 MR. WORK: Right at the bottom of the second page,
12 and then the first column and over to the top of the second.

13 (Pause.)

14 JUDGE BROWN: Well, I'm not finding a place where
15 it sets out what the items of the claim are. Where do you
16 see that? Where do you see what you can collect for?

17 MR. WORK: You see at the page numbered at the
18 bottom left hand corner, 52 224?

19 JUDGE BROWN: Yes.

20 MR. WORK: And then you see the list, a total,
21 number two, a total cost incurred.

22 JUDGE BROWN: I'm sorry, I'm in the wrong column.
23 All right.

24 (Pause.)

25 MR. BOEHLERT: What the paragraph number, what's

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1 the FAR section?

2 MR. WORK: 52 249. This is the right one.

3 MR. BOEHLERT: I content, Your Honor, that there
4 is no evidence that any of the cost incurred by Whittaker.

5 JUDGE BROWN: Well, I am going to let the jury
6 determine that.

7 MR. WORK: I think Mr. Boehlert's comment
8 demonstrates the situation we are in. He will argue there
9 is no evidence and we had four volumes of evidence that he
10 didn't want to get in the record.

11 JUDGE BROWN: Well, evidence has a particular
12 meaning. And what I rule is that was not evidence.

13 MR. BOEHLERT: Your Honor, it is plaintiff's
14 proffered instruction, DDD, that is the proffered damages
15 instruction.

16 JUDGE BROWN: DDD?

17 MR. BOEHLERT: Right.

18 JUDGE BROWN: Let's see DDD.

19 MR. BOEHLERT: It is simply a matter of law,
20 Whittaker does not get carte blanche, even if they did get
21 termination for convenience. That their recovery is limited
22 to what they would have otherwise recovered under the
23 contract. It is limited by the contract price as well as
24 the fact that if they are in a loss position, which clearly
25 in this case, they were, then any recovery they might have

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1 is diminished by a loss adjustment factor, that this
2 instruction tells the jury how to compute that.

3 MR. WORK: Your Honor, the point here, that
4 TechDyn chooses to ignore, is that there is a lot of
5 evidence in this trial, that an awful lot of added work was
6 performed with regard to the RCE. Due to all the studies,
7 and everything that Whittaker had to perform, and all the
8 gyrations that had to go through, that this figure not only
9 reflects contract work performed, but added work performed
10 relating to the RCE. And of course, on that added work
11 performed, there is no loss adjustment.

12 We tried to show what our costs versus our
13 revenues were, but they objected. So, even as to contract,
14 work, there can be no reduction for loss factor here.

15 JUDGE BROWN: I believe that DDD properly states
16 the measure of damage. I strike the last sentence where it
17 says not entitled to any other costs. And the rest of it
18 will be given 60 is denied.

19 MR. WORK: Can I look at DDD for just a moment,
20 please?

21 JUDGE BROWN: Yes.

22 MR. WORK: Your Honor, it doesn't take into
23 account added work.

24 JUDGE BROWN: The added work is taken into account
25 in the added work request. In other words, you hadn't

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1 separated out the added work with regard to the RCE and the
2 added work with regard to the other.

3 MR. WORK: Yes, we have.

4 JUDGE BROWN: Where?

5 MR. WORK: It's all in the \$26,000.

6 JUDGE BROWN: I don't know how the jury will ever
7 figure out what is what. How would the jury know what part
8 of it was one and what part of it was the other?

9 MR. WORK: It would have known if our claim had
10 come in.

11 JUDGE BROWN: Well, there is another way to put
12 that. But, I grant DDD and deny 60. I'm to 61. Is there
13 objection to 61?

14 MR. WORK: Your Honor, I take exception to DDD, in
15 particular on the basis that we were denied a right to show
16 our costs and revenues in this program.

17 JUDGE BROWN: Your objection is noted. Exception
18 is noted. Sixty-one? Why is Whittaker entitled to
19 interest?

20 MR. WORK: Whittaker has been paid one progress
21 payment since November 1986.

22 JUDGE BROWN: Was there in the contract interest?

23 MR. WORK: Why are they entitled to interest?

24 JUDGE BROWN: I don't know if anybody is entitled
25 to interest. The jury can decide whether interest -- you

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1 are telling me here to tell the jury to give you interest.
2 And I don't know any authority to do that. It seems to me
3 that this could be done much more simply. This could simply
4 be done by saying that if there is -- if Whittaker has
5 presented invoices for progress payments to TechDyn, for
6 which payment has not been made, the jury ought to pay you.
7 I mean, we go through a lot of who struck John here.

8 MR. WORK: Well, in --

9 JUDGE BROWN: Isn't your claim just for invoices
10 that haven't been paid?

11 MR. WORK: What's interest?

12 JUDGE BROWN: Well, interest is something the jury
13 determines. I don't tell them about that. They can -- we
14 can tell them in a separate instruction, but they can give
15 interest on any of these, for anything they want to. But
16 there is no separate claim, there is no right to interest,
17 absent a contractual right. But this is a very complex
18 statement of a very simple --

19 MR. WORK: Why don't you let us take a crack at
20 that?

21 JUDGE BROWN: Take a crack at simplifying it.
22 Sixty-one is denied as it is. Just do it like the model
23 says. If you find from the evidence that invoices were
24 presented for progress payments, and payment was not made,
25 and is now due, then you shall find your verdict for

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1 Whittaker and award it damages such as you find it hasn't
2 been paid. Something like that.

3 MR. WORK: There is a specific provision in the
4 contract. In the clause relating the payment of interest.

5 JUDGE BROWN: You can tell me where that is?

6 MR. WORK: That's in a flow down clause. I'm not
7 sure if we have it here.

8 JUDGE BROWN: Absent a contract, you don't get
9 interest unless the jury awards it. If it is in the
10 contract, let's see it. Sixty-two, I don't give in this
11 way. I tell them orally they need to be unanimous and come
12 back with verdict, damage account. So, I deny 62.

13 Oh, you mean you have redone that. All right.
14 Okay, I have some pieces left handing here. Instruction 1Z,
15 exceptions are noted, but it is granted. That is the one
16 about, that's my damages are not presumed instruction.

17 Instruction ZZZ, triple J, is a material breach
18 occurs if a party fails to do something it is supposed to
19 do. That was granted. Double C. I don't know why, why are
20 these hanging here? I think I granted those, but I didn't
21 put them in the right pile.

22 Does anybody show what I did with CC?

23 MR. PROXMIRE: Yes, I've got, granted denied 54
24 defendant's.

25 JUDGE BROWN: Yes, I think these are. I just made

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1 the wrong pile there for a minute. Now, that leaves a bunch
2 of the plaintiff's instructions about the defendant's case
3 unresolved.

4 MR. BOEHLERT: Your Honor, before we go to that,
5 if we might, there were several other ones that I know we
6 have had retyped. And I would like Mr. Proxmire to address
7 those with you.

8 MR. PROXMIRE: Yes, here's the ones --

9 MR. WORK: May I see them, please?

10 JUDGE BROWN: Yes, take them to him. Okay, we
11 were addressing my instruction that became 1Z and 35 and PPP
12 all together. The instruction 1Z is granted, 35 and PPP are
13 denied.

14 Of the remaining instructions, I have HH for the
15 plaintiff. And I am going to read these, and if you think
16 there is one --

17 MR. BOEHLERT: Just for the record, I would like
18 to note my objection to the granting of 1Z.

19 JUDGE BROWN: Okay. Do you think any of these
20 ought to be addressed, otherwise they are all denied. HH,
21 II, gotten to any yet? II relates to equitable adjustment,
22 and I'm not talking about equitable adjustment.

23 MR. BOEHLERT: Well, Your Honor, I object on HH
24 and I also object on II.

25 JUDGE BROWN: JJ, denied. Exception noted. KK

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1 edited both of those. Your Honor, on count four, do either
2 of -- Any way, let's go to count one, then.

3 I know I took out that, right there. Let's go
4 back to count four, then. As proffered, these instructions
5 75 and 75A are defendant's proffered instructions.

6 MR. RIDDLES: Did I take back this?

7 [Asides.]

8 JUDGE BROWN: Okay, are 75 and 75A all right?

9 MR. WORK: Yes, Your Honor.

10 MR. BOEHLERT: For the record, defendant objects
11 to them, I mean the plaintiff objects to this.

12 JUDGE BROWN: Okay, I still need some instructions
13 on counts one and three of the counter claim.

14 MR. BOEHLERT: Okay, Your Honor, I've looked at
15 these again, and I understand that -- are both of these new?
16 The issues and the findings? I guess the findings for 68,
17 previously existed. Which was an issues, and now there is a
18 findings instructions being proffered.

19 JUDGE BROWN: Right.

20 MR. BOEHLERT: Your Honor, I would like to re-
21 address with you on instruction 68, the issues instruction,
22 and what it is, is first, did TechDyn cause Whittaker to
23 perform added work beyond what was required or contemplated
24 under the original terms of the ICCE subcontract?

25 Your Honor, this is a subcontract, a concept of

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1 the work contemplated under the terms has no foundation in
2 law. And I know we looked at this earlier, and it hadn't
3 been retyped until just now. And I've seen it retyped. And
4 that's a grossly improper instruction. I would like to give
5 it back to you -- in this other proffered instruction.

6 JUDGE BROWN: Well, I suppose, probably Whittaker
7 would just as soon have or contemplated out, since if it is
8 just what was absolutely required of the contract, that's
9 more favorable to them. Sounds like to me like they were
10 trying to be a little favorable to you. But, if you don't
11 want it, what's Whittaker's position?

12 MR. WORK: Even handed, I think it should be in,
13 just because that's the reality of the situation, Your
14 Honor.

15 JUDGE BROWN: The problem is, Mr. Boehlert, that
16 in truth, at least from their point of view, and I would
17 find, if I were the jury, it wasn't very clear what they
18 were supposed to do. So, they had to do a lot of things
19 that weren't absolutely within the words of the contract.
20 And they are not asking for those.

21 MR. BOEHLERT: Well, they are asking for things
22 that were beyond the scope of the contract. And they have
23 to prove that. What was in their contemplation, whose
24 contemplation? TechDyn's? The Air Force's? Beyond the
25 contemplation, that's a completely ambiguous phrase, and it

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1 has -- there is binding, written subcontract between the
2 parties here.

3 JUDGE BROWN: Okay. Anything else?

4 MR. BOEHLERT: Well, no, Your Honor.

5 JUDGE BROWN: I think it fits the facts of this
6 case, and I overrule the objection. Sixty-eight and 68-
7 A are granted along with the instruction in connection with
8 that count one.

9 Now, what we are calling count three --

10 MR. BOEHLERT: Your Honor, for the record, before
11 we move on, I would like to object strenuously to 68 and 68-
12 A.

13 JUDGE BROWN: Okay, your objection is noted. Do I
14 have a count three, or count two, I don't care what you call
15 it.

16 MR. BOEHLERT: There is a damages instruction has
17 been accepted, so the only thing at issue are the issues in
18 the findings instructions. And those are being proffered
19 and defendant's instructions 76 and 76.5.

20 MR. WORK: I wrote those. I wrote those. Did I
21 get that?

22 MR. BOEHLERT: No, it's not. What there, what
23 exists for count three is a damages instruction. And what
24 you asked for is a findings and issue instruction.

25 JUDGE BROWN: He said he was going to try to redo

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1 JUDGE BROWN: Okay.

2 (Pause.)

3 JUDGE BROWN: Were there any you wanted copies of?

4 MR. BOEHLERT: I know there are.

5 MR. PROXMIRE: Yes, I writing them down.

6 (Pause.)

7 MR. BOEHLERT: I would ask the Court to accept
8 this changes clause which is part of the contract as part of
9 the contract and allow counsel to argue from it as
10 appropriate.

11 JUDGE BROWN: I think it's this one here. It's --

12 MR. BOEHLERT: It's 52 --

13 JUDGE BROWN: Yes -- 52.243-1. Correct?

14 MR. BOEHLERT: Yes, sir.

15 JUDGE BROWN: We have put what we want of that in
16 an instruction and I deny its admission and it is up here
17 and will be marked as an exhibit -- what does it need to be
18 to get beyond where you are? How about 3000? Will that get
19 us there -- 1006?

20 MR. BOEHLERT: 2006.

21 JUDGE BROWN: 2006? It's marked as Exhibit 2006,
22 refused. It will be part of the record in the case.

23 MR. BOEHLERT: I can't understand how certain of
24 these clauses that are part of the contract are in evidence
25 and are up there and then other clauses, every much as part

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1 of the contract as those clauses --

2 JUDGE BROWN: Because some of them we treated as
3 matters of law and some of them we're just going to let the
4 jury have and look at. And we're not going to combine the
5 two. And that one we put in an instruction and the other
6 two we did not.

7 MR. BOEHLERT: Yh, I object to that.

8 JUDGE BROWN: I understand. Your exception is
9 noted.

10 Nine o'clock in the morning I'm going to start
11 reading instructions. See you then.

12 (Whereupon, at 7:25 p.m., the hearing was
13 recessed, to be reconvened the following day, Tuesday, July
14 30, 1991, at 9:00 a.m.)
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2

1 P R O C E E D I N G S

2 MR. BOEHLERT: The Plaintiff objects to the
3 following instructions that were granted: 68, 68A, 58, 2,
4 10, 41, 46, 67, 63, 64, 65, 70, 75, 75A, 76, 76A, 76.5, in
5 addition to any other instructions previously objected to.

6 For the instructions that were denied by the
7 Court, Plaintiffs object to the following: EEE, FFF, GGG,
8 HHH, CCC, BBB, AAA, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ,
9 RR, SS, TT, UU, VV, WW, XX, YY, ZZ, TTT, NNN, N, K, E, A,
10 FF, EE, DD, Y, X, V, U, T, R, in addition to any other
11 objections previously lodged.

12 (Whereupon, the objections were concluded.)

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**EXCERPTS OF TRIAL PROCEEDINGS OF
JULY 30, 1991**

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 either of you.

2 I wouldn't think either of you would be talking
3 longer than an hour and a half at one time because you've
4 only got two hours total. So I would think we would get the
5 whole of an argument in before we had to break. Maybe
6 logically break after each section of an argument. Let's
7 see how it goes.

8 Bring them in.

9 (Pause while jury is seated.)

10 JUDGE BROWN: Okay. We have come to the point
11 where we're going to very shortly give you the case to
12 decide. Let me just say a word about the scheme of these
13 instructions. I'm going to read you first the instructions
14 and then, of course, you'll hear the closing argument of
15 counsel.

16 You will see as you hear the instructions that
17 TechDyn has four claims, or what we call in law counts,
18 against Whittaker. Whittaker has three claims, or what we
19 call counts, against TechDyn. You will be deciding all of
20 those issues. And the scheme of the instructions is there
21 are some general instructions first and then with regard to
22 each one of those claims or counts by each party, there are
23 some instructions that tell you how you find for either
24 party and then there are some general instructions at the
25 end.

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**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 You must not base your verdict in any way -- and I
2 will say one other thing. You will get these instructions
3 to look at so you don't have to memorize all the
4 instructions or take notes -- you can take notes if you wish
5 while I'm talking and you can certainly take notes during
6 the closing argument but you will have my instructions in
7 writing to take back with you.

8 You must not base your verdict in any way upon
9 sympathy, bias, guesswork or speculation. Your verdict must
10 be based solely upon the evidence and the instructions of
11 the Court.

12 You are to consider all of these instructions as a
13 whole. You may not disregard any instruction or give
14 special attention to any one instruction or question the
15 wisdom of any rule of law or any rulings by the Court.

16 Charts and summaries have been shown to you to
17 help you understand the testimony of certain witnesses and
18 some of the exhibits which were received into evidence. The
19 charts and summaries are not evidence. They are only as
20 good as the underlying that supports them. You should
21 therefore give them only such weight as you think the
22 underlying evidence deserves.

23 You are the judges of the facts, the credibility
24 of the witnesses and the weight of the evidence. You may
25 consider the appearance and manner of the witnesses on the

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 stand, their intelligence, their opportunity for knowing the
2 truth and for having observed the things about which they
3 testified, their interest in the outcome of the case, their
4 bias and, if any have been shown, their prior inconsistent
5 statements or whether they have knowingly testified
6 untruthfully as to any material fact in the case.

7 You may not arbitrarily disregard believable
8 testimony of a witness. However, after you have considered
9 all the evidence in the case, then you may accept or discard
10 all or part of the testimony of a witness as you think
11 proper.

12 You are entitled to use your common sense in
13 judging any testimony. From these things and all the other
14 circumstances of the case you may determine which witnesses
15 are more believable and weigh their testimony accordingly.

16 You must not consider any matter that was rejected
17 or stricken by the Court. It is not evidence and should be
18 disregarded.

19 Any fact that may be proved by direct evidence may
20 be proved by circumstantial evidence. That is, you may draw
21 all reasonable and legitimate inferences and deductions from
22 the evidence.

23 In considering the weight to be given to the
24 testimony of an expert witness, you should consider the
25 basis for his opinion and the manner by which he arrived at

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 it.

2 When one of the parties testifies unequivocally to
3 facts within his own knowledge, those statements of fact and
4 the necessary inferences from them are binding upon him. He
5 cannot rely on other evidence in conflict with his own
6 testimony to strengthen his case. However, you must
7 consider his testimony as a whole and you must consider a
8 statement made in one part of his testimony in the light of
9 any explanation or clarification made elsewhere in his
10 testimony.

11 If during the trial evidence was introduced that a
12 witness had previously made a statement that was
13 inconsistent with his testimony at this trial, then the only
14 purpose for which that evidence was admitted was its bearing
15 on the witness' credibility. It is not proof that what the
16 witness may have said earlier is true.

17 Where more than one count is involved, as in this
18 case, you should consider each count, including the damages
19 sought and the evidence pertaining to it separately, as you
20 would have had each count been tried before you separately.
21 But in determining any fact and issue, you may consider the
22 testimony of all witnesses regardless of who may have called
23 them and all of the exhibits received in evidence regardless
24 of who produced them.

25 You should determine what a party's recovery, if

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 any, should be under each count in accord with my
2 instructions without regard to a party's recovery under any
3 other count.

4 The last sentence I determine to strike. I didn't
5 strike it on the instructions, but I'm doing it now.

6 (Pause.)

7 TechDyn's claim for the loss of new or other
8 business and profits has been removed from your
9 consideration by the Court. You are instructed to ignore
10 and disregard all evidence which was introduced with respect
11 to that claim and you are further instructed that the
12 dismissal of that claim should have no bearing on your
13 resolution of TechDyn's other claims.

14 When a party has the burden of proof on an issue,
15 then he must prove that issue by the greater weight of all
16 the evidence. This is sometimes called the preponderance of
17 the evidence. It is that evidence which you find more
18 convincing. The testimony of one witness whom you believe
19 can be the greater weight of the evidence.

20 For a contract to exist, the minds of the parties
21 must have met on every material term of the alleged
22 agreement. A contract must be both complete and reasonably
23 certain. It is complete if it includes all the essential
24 terms. It is reasonably certain if all the essential terms
25 are expressed in a clear and definite way.

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 Interpretation of a contract is primarily a
2 determination of what the parties intended.. In determining
3 their intent, you should first consider the words they use.
4 The words should be given their plain and ordinary meaning
5 unless an obviously different meaning is apparent.

6 You may also consider the subject matter of the
7 contract, the situation of the parties, the purpose of the
8 parties in making the contract and the surrounding
9 circumstances.

10 If you have a doubt about the meaning of the terms
11 of the contract, the conduct of the parties under the
12 contract may furnish proper interpretation. The
13 interpretation by the parties is entitled to great weight.
14 However, any interpretation suggested or supported by the
15 act of the parties must be reasonable and not in conflict
16 with the actual terms of the contract.

17 In interpreting a contract, you should resolve any
18 doubts about the meaning of a word or phrase against the
19 party who prepared, supplied or inserted the language in the
20 contract.

21 The customs and usages of the trade may be shown
22 to establish a point on which the contract is silent or
23 unclear. To show the existence of a custom or usage of the
24 trade, a party must prove by the greater weight of the
25 evidence that the custom was well established and was

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 generally followed in the trade at the time the contract was
2 made.

3 The contract should be considered as a whole. No
4 part of it should be ignored. The contract should be
5 interpreted to give effect to each of the provisions in it.
6 No word or phrase in a contract should be treated as
7 meaningless if any meaning which is reasonable and
8 consistent with the other parts of the contract can be given
9 to it.

10 A party to the contract who prevents the other
11 party from performing his obligations under a contract has
12 breached the contract.

13 A material breach of a contract occurs if a party
14 fails to do something which he is bound to do according to
15 the contract which is so important and essential to the
16 contract that the failure defeats the very purpose of the
17 contract.

18 Damages are not presumed nor may they be based
19 upon speculation but must be proven. The burden is upon the
20 party claiming damages to prove by the greater weight of the
21 evidence any damage claimed and that it is properly
22 attributable to the other party's breach. And unless any
23 such damage is such proven by the greater weight of the
24 evidence, then the party claiming damage cannot recover for
25 such damage.

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 If you believe from the greater weight of the
2 evidence that any damage resulted from more than one cause
3 for one of which the other party is responsible, the burden
4 is upon the party claiming damage to prove by the greater
5 weight of the evidence a share of damage for which the other
6 party is responsible. If a party fails so to prove damage,
7 then the party cannot recover for such damage.

8 To recover lost profits, a party must prove with a
9 reasonable degree of certainty that it would have made lost
10 profits. Lost profits which are speculative or uncertain
11 are not recoverable.

12 Your verdict must be based on the facts as you
13 find them and on the law contained in all of these
14 instructions.

15 The issues on count 1 relating to the processing
16 and display functional area (PDFFA) of TechDyn's case are:

17 (1) Was there a contract between the parties?

18 (2) If there was, did the Defendant breach it?

19 On these issues, the Plaintiff has the burden of
20 proof.

21 (3) If the Plaintiff is entitled to recover, what
22 is the amount of his damage?

23 On this issue, the Plaintiff has the burden of
24 proof.

25 Your decision on these instructions must be

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 governed by the instructions that follow and precede.

2 On count 1 of Plaintiff's case, you shall find
3 your verdict for the Plaintiff if he has proved by the
4 greater weight of the evidence that:

5 (1) There was a contract between the parties;
6 and,

7 (2) If the Defendant breached the contract.

8 You shall find your verdict on count 1 for the
9 Defendant if:

10 (1) the Plaintiff failed to prove either or both
11 of the elements above.

12 If you find your verdict for TechDyn under count
13 1, then TechDyn is entitled to recover as damages all of the
14 losses it sustained, including gains prevented which are a
15 direct and natural result of the breach which TechDyn has
16 proved by the greater weight of the evidence. TechDyn's
17 losses must have been reasonably foreseeable by the parties
18 when they entered the contract.

19 The issues on count 2 relating to the remote
20 control element (RCE) of TechDyn's case are:

21 (1) Was there a contract between the parties?

22 (2) If there was, did the Defendant breach it?

23 On these issues, the Plaintiff has the burden of
24 proof.

25 (3) If the Plaintiff is entitled to recover, what

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**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 is the amount of his damage?

2 On this issue, the Plaintiff has the burden of
3 proof.

4 Your decision on these issues must be governed by
5 all the instructions. It says the instructions that follow
6 but it means all of them.

7 On count 2 of the Plaintiff's case, you shall find
8 your verdict for the Plaintiff if he has proved by the
9 greater weight of the evidence that:

10 (1) There was a contract between the parties; and

11 (2) The Defendant breached the contract.

12 You shall find your verdict on count 2 for the
13 Defendant if:

14 (1) The Plaintiff failed to prove either or both
15 of the elements above.

16 If you find your verdict for TechDyn under count
17 2, then TechDyn is entitled to recover as damages all of the
18 losses it sustained, including gains prevented which are a
19 direct and natural result of the breach which TechDyn has
20 proved by the greater weight of the evidence. The losses
21 must have been reasonably foreseeable by the parties when
22 they entered into the contract.

23 TechDyn bears the burden of proving the amount of
24 its excess procurement costs. To do so, TechDyn must
25 prove by the greater weight of the evidence first that

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 TechDyn has actually incurred reprocurement costs; second,
2 that the cost of reprocuring the materials and services
3 which Whittaker was to provide for the RCE was both
4 reasonable and greater than the amount that TechDyn was
5 required to pay Whittaker for these materials and services
6 under the ICCE subcontract; and, third, that the goods and
7 services which TechDyn reprocured were the same or
8 substantially similar to the goods and services that
9 Whittaker was obliged to provide under the contract.

10 Your verdict must be based upon the facts as you
11 find them and on the law contained in these instructions.

12 The issue in count 3 of TechDyn's motion for
13 judgment is did Whittaker tortiously interfere with
14 TechDyn's business relations with the Air Force?

15 TechDyn alleges the following:

16 (1) That in its contract with the Air Force
17 TechDyn had an option to perform additional work for the Air
18 Force in Alaska and in the Pacific Region;

19 (2) That Whittaker knew of TechDyn's option to
20 perform additional work for the Air Force;

21 (3) That Whittaker intentionally interfered with
22 TechDyn's option and that Whittaker's interference caused
23 the Air Force to give that work directly to Whittaker, not
24 to TechDyn; and

25 (4) That TechDyn suffered damage as a result of

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**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 Whittaker's interference.

2 On each of the above allegations, TechDyn has the
3 burden of proof.

4 You shall find your verdict for TechDyn under
5 count 3 if TechDyn has proved each of the following by the
6 greater weight of the evidence:

7 (1) That TechDyn had an option to perform
8 additional work for the Air Force in Alaska and in the
9 Pacific region;

10 (2) That Whittaker knew that TechDyn had an
11 option to perform additional work for the Air Force in
12 Alaska and the Pacific region;

13 (3) That Whittaker intentionally interfered with
14 TechDyn's option to perform additional work in Alaska and
15 the Pacific region which caused Whittaker, not TechDyn, to
16 receive that work; and

17 (4) That TechDyn suffered damage as a result of
18 Whittaker's interference.

19 You shall find your verdict for Whittaker under
20 count 3 if TechDyn failed to prove any or all of the
21 elements above.

22 (Continued on next page.)
23
24
25

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 JUDGE BROWN: TechDyn has the burden of proving
2 not only that the alleged ACC/PACAF option existed in ICCE
3 prime contract, but that the option existed at the time of
4 Whittaker's alleged interference. If the option had
5 expired, or was no longer in existence when the alleged
6 intentional interference took place, there could have been
7 no interference with it, by Whittaker.

8 If you find your verdict for TechDyn under count
9 three, then TechDyn is entitled to recover all losses
10 sustained, including gains prevented as a direct and natural
11 result of Whittaker's interference with TechDyn's option
12 with the Air Force.

13 The issues on count four of TechDyn's case are,
14 first, at the time of Whittaker's submission of an ACC/PACAF
15 proposal to the Air Force, Whittaker had an existing
16 contractual obligation in its ICCE subcontract with TechDyn
17 relating to the ACC/PACAF work. ACC is Alaska, so on, PACAF
18 is Pacific. I got that much.

19 Second, that by submitting its proposal to the Air
20 Force for the ACC/PACAF work, Whittaker breached, or failed
21 to fulfill such a contractual obligation.

22 And third, as a result of the breach, TechDyn
23 sustained damages.

24 You shall find your verdict for TechDyn if TechDyn
25 proved by the greater weight of the evidence the following:

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 First, that at the time of Whittaker's submission, of an
2 ACC/PACAF proposal to the Air Force, Whittaker had an
3 existing contractual obligation in its ICCE subcontract with
4 TechDyn relating to the ACC/PACAF work.

5 Second, that by submitting its proposal to the Air
6 Force, for the ACC/PACAF work, Whittaker breached or failed
7 to fulfill such a contractual obligation. And third, as a
8 result of the breach, TechDyn sustained damages. If TechDyn
9 fails to prove any of the above, you shall find for
10 Whittaker.

11 If you find your verdict for TechDyn under count
12 four, then TechDyn is entitled to recover as damages, all of
13 the losses it sustained, including gains prevented, which
14 are a direct and natural result of the breach, which TechDyn
15 proved by the greater weight of the evidence. The losses
16 must have been reasonably foreseeable by the parties when
17 they entered the contract.

18 The issues in count one of Whittaker's counter
19 claim are: First, did TechDyn cause Whittaker to perform
20 added work beyond what was required or contemplated under
21 the original terms of the ICCE contract. Second, did the
22 added work, whether originating with the Air Force or with
23 TechDyn itself, cause Whittaker to incur added costs. And
24 third, has Whittaker been compensated for the added work.

25 On these issues, Whittaker has the burden of

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 proof. You shall find your verdict for Whittaker under
2 count one of Whittaker's counter claim, if Whittaker proves
3 by the greater weight of the evidence, the following.
4 First, that TechDyn caused Whittaker to perform added work
5 beyond what was required or contemplated under the original
6 terms of the ICCE subcontract. Second, that the added work,
7 whether originating with the Air Force or TechDyn, caused
8 Whittaker to incur added costs. And third, that Whittaker
9 has not been compensated for the added work.

10 If Whittaker fails to prove any of the above, you
11 shall find for TechDyn.

12 Whittaker has the burden of proving, by the
13 greater weight of the evidence, the amount by which its
14 costs were increased as a result of the performance of added
15 work.

16 There isn't any count two. So, we go from count
17 one to count three. Not of concern to you.

18 In count three of Whittaker's counter claim, the
19 issues are: First, did TechDyn terminate Whittaker for
20 default on the RCE portion of the subcontract. Second, was
21 TechDyn's default termination of Whittaker improper under
22 the subcontract. On these issues, Whittaker has the burden
23 of proof.

24 In count three of its counter claim, Whittaker
25 alleges that TechDyn improperly default terminated Whittaker

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 on the RCE portion of the subcontract. If you find that
2 TechDyn's default termination was improper, then you must
3 convert the default termination into what is known as a
4 termination for convenience.

5 If you find that the default termination was not
6 improper, then you must find for TechDyn under count three.
7 If you find your verdict for Whittaker on count three of the
8 counter claim, Whittaker is entitled to recover the
9 following: (A) Its unreimbursed costs of performance,
10 including the costs of any added work that was performed on
11 the RCE. (B) Its costs incurred in shutting down and
12 closing out its work on the RCE. (C) Any profit it would
13 have made on the RCE work under the original contract. And
14 (D) a reasonable profit on any added work performed.

15 If you find that Whittaker would have incurred a
16 loss on its RCE work under the original contract, had that
17 work been completed, you should reduce Whittaker's recovery
18 by any amount saved by not having to complete the original
19 contract work. The burden is on Whittaker to prove its RCE
20 performance costs, shutting down costs and profits by the
21 greater weight of the evidence.

22 In count four of Whittaker's counter claim, the
23 issues are: First, did Whittaker submit invoices for
24 progress payments. Second, did Whittaker perform work
25 covered by those invoices and was payment due on them. And

**JULY 30, 1991 PROCEEDINGS
JUDGE'S INSTRUCTIONS TO JURY**

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1 third, did TechDyn fail to pay Whittaker all those invoices.
2 On these issues, Whittaker has the burden of proof.

3 You shall find your verdict for Whittaker under
4 count four of Whittaker's counter claim if Whittaker proved
5 by the greater weight of the evidence that:

6 (1) It submitted invoices for progress payments,

7 (2) Whittaker performed the work covered by those
8 invoices and that payment was due under the contract; and

9 (3) TechDyn did not pay Whittaker on those
10 invoices.

11 If Whittaker fails to prove any of the above, then
12 you shall find for TechDyn.

13 That concludes the reading of the instructions.
14 We are now ready for closing argument.

15 MR. BOEHLERT: Good morning ladies and gentlemen.
16 I want to thank you on behalf of the TechDyn Corporation
17 very much for your attention and present at this trial over
18 the last month.

19 We have heard a lot over the last month. And as
20 you sit there now, as the judges of this case, you are going
21 to be asked to decide two very important issues, when you
22 step back into that jury room in a few minutes. And some of
23 those issues are, is did Whittaker and TechDyn have a
24 contract? Now, you are going to have to decide that.

25 Another issue you are going to have to decide, is

**EXCERPTS OF TRIAL PROCEEDINGS OF
AUGUST 1, 1991**

AUGUST 1, 1991 PROCEEDINGS - JURY VERDICT

2

P R O C E E D I N G S

THE COURT: Okay. Bring the jury in.

(At 11:50 a.m. the jury returned to the courtroom,
and the following proceedings were held:)

THE CLERK: Members of the jury have you reached a
verdict?

JUROR NO. 6: Yes.

THE CLERK: And is your verdict unanimous?

JUROR NO. 6: Yes.

THE CLERK: We, the jury, join in the case of
Techdyn Systems Corporation, plaintiff vs. Whittaker
Corporation, defendant, find our verdict in favor of Techdyn
Systems Corporation on count one of Techdyn Systems' claim and
assess damages in the amount of \$2,101,000. We, the jury,
join in the case of Whittaker Corporation, defendant vs.
Techdyn Systems Corporation, plaintiff, find our verdict in
favor of Whittaker Corporation on count two of Techdyn Systems
Corporation's claim.

THE COURT: Let me see that.

(Handing to the Court.)

It's stated -- none of us noticed that it's stated
backwards in the form. It says in the case of Whittaker
Corporation vs. Techdyn, find in favor of Whittaker of count.

AUGUST 1, 1991 PROCEEDINGS - JURY VERDICT

3

1 two of Techdyn's claim. It's supposed to be -- that verdict
2 form, I think, was supposed to relate to Techdyn's claim. Do
3 you think it clearly relates to Techdyn's claim even though
4 it's not stated that way? Do you all understand what I'm
5 saying? The verdict form was typed wrong. In fact, let me
6 see the first one.

7 (Handing to the Court.)

8 In fact, counts two, three and four of Techdyn's
9 case are stated wrong on the verdict form. They're stated
10 right in Whittaker's claim. And if it's clear to everyone
11 that we are talking about the count of the claim that is last
12 mentioned in the verdict form, then we'll go ahead and see
13 where we are.

14 THE CLERK: Just read it as it is?

15 THE COURT: Just read it as it is. But it's just
16 wrong. The way we phrased it is wrong. We phrased the wrong
17 verdict -- party versus the wrong party. Then the claim is
18 stated right. And that's where we are. Okay. Go ahead.

19 THE CLERK: We, the jury, join in the case of
20 Whittaker Corporation, defendant vs. Techdyn Systems
21 Corporation, plaintiff, find our verdict in favor of the
22 Whittaker Corporation on count two of Techdyn Systems
23 Corporation's claim.

AUGUST 1, 1991 PROCEEDINGS - JURY VERDICT

4

1 THE COURT: Actually, the plaintiff and defendant
2 are stated right. It's just reserved. Go ahead.

3 THE CLERK: We, the jury, join in the case of
4 Whittaker Corporation, defendant vs. Techdyn Systems
5 Corporation, plaintiff, find our verdict in favor of Whittaker
6 Corporation on count three of Techdyn Systems Corporation's
7 claim. We, the jury, join in the case of Whittaker
8 Corporation, defendant vs. Techdyn Systems Corporation,
9 plaintiff, find our verdict in favor of Whittaker Corporation
10 on count four of Techdyn Systems Corporation's claim. We, the
11 jury, join in the case of Whittaker Corporation, defendant vs.
12 Techdyn Systems Corporation, plaintiff, find our verdict in
13 favor of the defendant Whittaker Corporation on count one of
14 Whittaker Corporation's claim and assess damages in the amount
15 of \$422,676. We, the jury, join in the case of Whittaker
16 Corporation, defendant vs. Techdyn Systems Corporation,
17 plaintiff, find our verdict in favor of the defendant
18 Whittaker Corporation on count three of Whittaker
19 Corporation's claim and assess damages in the amount of
20 \$142,000. We, the jury, join in the case of Techdyn Systems
21 Corporation, plaintiff vs. Whittaker Corporation, defendant,
22 find our verdict in favor of Techdyn Systems on count four
23 of Whittaker's claim against Techdyn. David D. Brown,

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AUGUST 1, 1991 PROCEEDINGS - JURY VERDICT

5

1 foreman.

2 THE COURT: Let me see counsel up here for a
3 minute.

4 (Counsel approached the bench and the following
5 proceedings were held:)

6 Let me show you what I'm talking about in case you
7 couldn't tell it from what I said. There's count one of
8 Techdyn's claim. And it says Techdyn Systems Corporation,
9 plaintiff vs. Whittaker Corporation, defendant. Techdyn
10 Systems' claim for damages count one. All right. But when
11 you come to count two, three and four, what we did for some
12 strange reason is put Whittaker Corporation first. But we did
13 put Whittaker Corporation, defendant. We just didn't put
14 versus. And everybody approved the form. And nobody caught
15 it. But it seems clear from what I asked the jury and it
16 seems clear from the form that we are talking about count two
17 of Techdyn Systems Corporation's claim. So do we agree that
18 these forms of the verdict are acceptable and relate to the
19 claim and count that they say they do?

20 MR. BOEHLERT: On count one, yes, Your Honor. On
21 counts two, three and four I ask that you pole the jury and,
22 perhaps, send them back to the jury room to come out and
23 unanimously declare that if that is their intent. If it is

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V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

TECHDYN SYSTEMS CORPORATION

Plaintiff,

v.

WHITTAKER CORPORATION

Defendant.

AT LAW NO. 94144

**PLAINTIFF'S OBJECTIONS AND PROFFERED TESTIMONY
IN OPPOSITION TO TRIAL COURT'S RULINGS PRECLUDING AND
STRIKING PLAINTIFF'S EVIDENCE**

COMES NOW Plaintiff, TechDyn Systems Corporation (hereinafter "TechDyn"), through counsel, and renews its objections, and restates its exception, to the following rulings of the trial court:

1. The Court's Pretrial ruling excluding Plaintiff's proffered evidence concerning criminal activity of the Defendant, Whittaker Corporation.

2. The Court's ruling preventing Plaintiff from establishing evidence of TechDyn's lost profits incurred by TechDyn as damages resulting from the breaches of contract by Defendant Whittaker Corporation, and the Court's grant of Defendant's Motion to Strike with respect thereto.

The basis for this motion is set forth below, including TechDyn's proffers of the testimony which would have been provided by TechDyn, but for the Court's rulings.

I. PLAINTIFF TECHDYN'S OPPOSITION, EXCEPTIONS, AND PROFFERS
OF TESTIMONY RELATING TO THE CRIMINAL CONVICTIONS OF THE
WHITTAKER CORPORATION

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TechDyn also made oral argument before the Court objecting to Whittaker's Motion in Limine. Over TechDyn's objection, the Court granted Whittaker's Motion in Limine. TechDyn hereby renews its objection and exceptions to the Court's ruling as set forth in said Memorandum and Supplemental Memorandum, and in the oral argument before the Trial Court. In addition, TechDyn proffers the testimony set forth below.

I. PLAINTIFF TECHDYN'S OPPOSITION, EXCEPTIONS, AND PROFFERS
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A. Plaintiff Proffers Testimony That The Criminal Activities of Scott Lamberth Diverted His Full Time and Attention From the ICCE Subcontract, and Deprived WCCS and TechDyn of Corporate Leadership.

1. The Criminal Activities of Scott Lamberth Diverted His Full Time and Attention From The ICCE Subcontract

During the timeframe 1987 to 1988, WCCS President Scott Lamberth made dozens of telephone calls to his co-conspirators concerning bribes, and efforts to disguise bribes, to Jack Sherman [Plaintiff's Exhibit 1526]. In addition, Lamberth travelled to Northern Virginia on at least two occasions and personally paid bribes to Sherman (Id.). Finally, to disguise these activities, Lamberth and his cronies were constantly engaged in generating "invoices" for services never performed, "purchase orders" for technical services, the transmission of fraudulent "studies", and the submission of false claims to the U.S. for reimbursement of bribes paid to Sherman (Id.). No corporation can long survive these kinds of activity by its President, let alone fulfill its contract obligations. WCCS was no exception.

B. Plaintiff Proffers Testimony That The Criminal Activities of WCCS Vice President Ingram and Director of Operations Van Tassel deprived WCCS and TechDyn of Corporate Leadership

An organization without effective leadership simply cannot be expected to perform its obligations in an efficient effective manner. Sadly, President Lamberth was not the only corporate official involved in Whittaker's criminal activity. The Vice

President, Ingram, and the Director of Operations, Van Tassel, were also heavily involved in the bribery and false claims schemes. Ingram (as well as Lamberth) worked out of the California office of WCCS, where the ICCE Project Software was under development and testing. Van Tassel managed the Arkansas plant, where Radil-A hardware for the project was under development. As reflected in the criminal information, the effort to conceal bribes to Mr. Marlowe, Mr. Muldoon, Mr. Sherman and Mr. Illeman consumed a considerable amount of corporate energy by these officials. These activities directly coincide with Whittaker software delays, and delays in hardware delivery. It would be wholly misleading to the jury to allow Whittaker to press its counterclaim (alleging TechDyn failure to perform) while denying the truth of Whittaker's criminal activities.

C. Plaintiff Proffers Testimony That Evidence of Whittaker's Corporate Routine of Bribery and False Claims Is Relevant To Show Lack Of Contracting Expertise

From December 1981 to July 1988, Scott Lamberth and his conspirators were involved in over \$6 million of contract work (excluding the ICCE contract). On every one of those contracts, and during the entire 7 year timespan, these WCCS officials were bribing their way to government acceptance. Despite this loathsome record, Whittaker would introduce evidence that it is a highly experienced, competent government contractor. In fact, its primary area of expertise is in pay-offs. The Defendant has opened the door. The jury must be afforded access to the whole

truth. J. Weinstein & M. Berger, Weinstein's Evidence, §401 [07], United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976) cert. denied 429 U.S. 1111, 97 S. Ct. 1149. (1977), United States v. Johnson, 634 F.2d 735 (4th Cir. 1980), United States v. Cook, 538 F.2d 1000 (3rd Cir. 1976).

D. Plaintiff Proffers Testimony That The FBI Investigation, Indictments and Guilty Pleas Distracted Whittaker, Thus Impeding Its Performance

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On June 24, 1988, the FBI issued search warrants for "Operation Ill Wind," simultaneously seizing corporate records of Whittaker and numerous other corporations involved in government contracting. Whittaker's records were seized, and placed under FBI padlocks. Whittaker's Arkansas plant was padlocked, thus denying Whittaker personnel access to the technical facility where Radil-A hardware was undergoing modification. Thus all of Whittaker's operational capability was shut down including the software, hardware and administrative elements of the ICCE sub-contract.

Six days later, on July 1 1988, Whittaker announced yet another merger of WCCS, this time into Whittaker Electronic Division ("WES"). The name "WCCS" disappeared. Another corporate relocation occurred.

In the meantime, Whittaker officials were responding to the ongoing investigation, preparing its defenses, conferring

with its counsel and doing all the things a major corporation must do when confronted with such charges.

These distractions led to significant delays and suspensions of work on the part of Whittaker, and the absence of key Whittaker officials from important project review sessions in California.

2. The Ongoing Investigation Impacted Whittaker's Performance

Needless to say, after the FBI seizures, Whittaker discharged its consultant, Mr. Lamberth (Indeed, Mr. Lamberth was on business for Whittaker in Washington when the June 24, 1988 search warrants were issued). By January of 1989, Whittaker was informed of the Government's charges against it. And on September 26, 1989, Whittaker entered its plea. Absent these distracting activities, Whittaker may have attended to its yet uncompleted subcontract duties.

E. Plaintiff Proffers Testimony That Whittaker's Criminal Fines and Penalties of \$3,000,000 Depleted Its Assets and Impaired Its Performance Of Its Subcontract Obligations

In late 1989, Whittaker was assessed fines and penalties of over \$3,000,000 for its conspiracy, bribery and false claims convictions. In addition, Whittaker undoubtedly incurred attorneys' fees necessary for crafting plea agreements on its own behalf, and that of its indicted officials. At that time, Whittaker was over 3 years late on its planned schedule of performance. Instead of devoting its money and resources to comple-

tion of the ICCE subcontract, Whittaker was paying a portion of its obligations to the United States and its people. Critical capital was lost, thus contributing to the fact that Whittaker has yet to complete the subcontract. It is essential that the jury weigh this fact in its deliberations.

F. Plaintiff Proffers Testimony That The Investigation, Convictions and Prison Terms of Whittaker Officials Deprived Whittaker of Senior Contract Management, and Deprived TechDyn Of Its Contract Rights

The FBI's lengthy and thorough investigation of Mr. Lamberth's criminal activities resulted in his conviction, and sentence of ten months incarceration. Similarly, Mr. Van Tassel was sentenced to three months imprisonment. Although Mr. Lamberth testified for the government at Mr. Ingram's trial, Ingram was acquitted. Ingram contended that he warned WCCS officials not to bribe the government official. While these men were thus occupied, Whittaker remained unable to perform its subcontract. TechDyn's subcontract with Whittaker clearly contemplated a subcontractor with competent personnel, fully devoted to the timely completion of its subcontract obligations. These reasonable contractual expectations cannot be, and were not, fulfilled by Whittaker officials from prison cells.

G. TechDyn Proffers Evidence of Whittaker's Criminal Activity To Rebut Whittaker's Counterclaims and Defenses Against TechDyn During Cross Examination

Whittaker has filed voluminous counterclaims, defenses, and documentary exhibits purporting to affix blame against

TechDyn for Whittaker's failure to perform. For example, Whittaker claims that TechDyn unreasonably failed to certify Whittaker's claim to the Air Force; failed to "shield" Whittaker from Air Force performance demands; and attempted to extort a contribution from Whittaker to TechDyn. (See p.2 Synopsis of Whittaker Corporation's Counterclaim)

These contentions are specious, particularly when viewed in light of Whittaker's track record of criminal activity in its performance of government contracts. By making these contentions, Whittaker has "opened the door" to the truth. Thus, TechDyn proffers evidence of Whittaker's criminal convictions to rebut the contentions made in Whittaker's counterclaim and made by Whittaker's witnesses during trial.

TechDyn also proffers evidence of Whittaker's criminal activity to impeach the corporation during cross examination. A corporation acts through its representatives, therefore when a representative of the corporation testifies his credibility may be impeached by showing that the corporation was convicted of a crime. Whittaker Corporation, itself, was convicted of a violation of 18 U.S.C. §371 (conspiracy to bribe, file false claims and defraud the United States) and 18 U.S.C. §201 (bribing a public official). Accordingly, TechDyn now proffers Whittaker's past convictions to impeach the credibility of Whittaker and its representatives.

II. PLAINTIFF TECHDYN'S RENEWAL OF ITS OPPOSITION, EXCEPTIONS AND PROFFERS OF TESTIMONY REGARDING TECHDYN'S LOST PROFITS RESULTING FROM THE ACTIVITIES OF DEFENDANT WHITTAKER CORPORATION.

During the course of the presentation of Plaintiff's evidence, and in particular during the direct examination of William C. Hise, Vice President of TechDyn, the Trial Court granted Defendant Whittaker's Motion to Exclude Plaintiff's Exhibit 901, together with other evidence relating to actual, adjusted, and lost revenues of the TechDyn Corporation resulting from profits lost as a result of the activities of the Defendant Whittaker Corporation. In particular, the Court ruled that Plaintiff may not introduce evidence of lost profits based upon historical revenues, for the purpose of demonstrating a loss of such revenues as a result of the ICCE Project. Subsequently, the Court further excluded the testimony of Plaintiff's proffered expert, Mr. Ripper, concerning his opinion as to the profits lost by TechDyn on five specific contracts for which the TechDyn Corporation presented bids and yet were not awarded the bids.

Subsequently, the Court granted Defendant's Motion to Strike testimony of Mr. Ripper and Mr. Hise regarding said lost profits. Plaintiff TechDyn hereby renews its objections and exceptions to the Court's ruling and proffers the testimony and evidentiary matters set forth below.

A. Testimony and Evidentiary Exhibits of Mr. William Hise Regarding TechDyn's Historical Revenues.

Mr. William Hise would have testified as to the authenticity and accuracy of Plaintiff's Exhibit 901, setting forth the annual revenues of the TechDyn Corporation for the entire period of the corporation's history. Mr. Hise would have further explained that these revenues are true and accurate, and that the corporate revenues of the TechDyn Corporation declined sharply during and after TechDyn's involvement in the ICCE Project. Mr. Hise would further testify that the ICCE Project had a direct and adverse impact upon the marketing efforts of the TechDyn Corporation, in that TechDyn was unable to utilize the services of personnel involved on the ICCE Project to identify projects which were appropriate for TechDyn activities, and to develop the technical and/or other portions of the requests for proposals actually submitted by TechDyn in response to specific solicitations for bid. As a result, Mr. Hise would testify, TechDyn was required to propose "new hires" to fill the technical requirements and positions set forth in their respective requests for proposal which adversely impacted upon TechDyn Corporation's ability to procure said work.

B. Testimony of Plaintiff's Proffered Expert, Mr. Ripper.

Mr. Ripper, who was accepted by the Court as an expert in the field of lost profits, would have testified as follows:

1. Overall Conclusion:

Based on problems caused by Whittaker and the ICCE Project, TechDyn was precluded from receiving approximately \$18 million of revenues in fiscal years 1988-1991. As a result, TechDyn lost profits of \$2,314,338.00. Mr. Ripper reached this conclusion by the following process:

a. In the five year period preceding the time TechDyn received the ICCE Contract, TechDyn's revenues rose at an annual growth rate of approximately 38.6 percent per year (excluding the SBA Special Pilot Project in 1981 and 1982).

b. As set forth in Plaintiff's proposed exhibits 901, 904, 905, 906, and as specifically summarized in Plaintiff's Exhibit 903, and in conjunction with the supporting testimony of Messrs. Roundtree, Morrison and Hise, Plaintiff's Exhibit 605(a), and other sources relied upon by Mr. Ripper, a conservative projection of TechDyn's gross revenues but for the ICCE Contract is 5 percent per year for the period 1987 through 1991.

2. By comparing the actual revenues with TechDyn's "would have been" revenues, TechDyn lost revenues as follows:

- a. 1988 - \$952,335
- b. 1989 - \$2,930,434
- c. 1990 - \$5,970,204
- d. 1991 - \$7,905,531

3. The foregoing lost revenues are subject to additional adjustments for direct and indirect costs. Mr. Ripper has studied the historical relationship between revenues and direct and indirect costs, and determined that for every dollar of revenue, TechDyn incurred 85 cents of direct and indirect costs. Therefore, Mr. Ripper calculated the direct and indirect costs that TechDyn would have spent to generate the lost revenues by multiplying the lost revenues by 85 percent. These adjustments, by year, are summarized below:

- a. 1988 - \$809,485
- b. 1989 - \$2,490,869
- c. 1990 - \$5,740,673
- d. 1991 - \$6,719,701

4. An additional adjustment is required in order to determine lost profits. That adjustment sets forth the general and administrative expenses that would have been spent by TechDyn to generate the lost

revenue. The general and administrative expenses are the expenses associated with, among other things, the corporate headquarters. Examples of these expenses include Mr. Morrison's salary, Mr. Hise's salary, secretaries, other headquarters personnel, rent and the like. Unlike direct and indirect costs, most general and administrative expenses do not increase as revenues increase. Mr. Ripper calculated the additional general and administrative expenses that TechDyn would have spent to generate the lost revenues as 3 percent. Thus, Mr. Ripper calculated the additional general and administrative expenses that TechDyn would have spent to generate the lost revenues by multiplying the lost revenues by 3 percent, thus rendering the following findings for additional adjustment:

- a. 1988 - \$28,570
- b. 1989 - \$87,913
- c. 1990 - \$179,106
- d. 1991 - \$237,166

5. Lost Profits:

By subtracting the direct and indirect costs and the general and administrative expenses from the lost

revenues, Mr. Ripper arrived at lost profits as follows:

- a. 1988 - \$114,280
- b. 1989 - \$351,652
- c. 1990 - \$716,425
- d. 1991 - \$948,664

6. Based upon this method of calculation, Mr. Ripper concluded that TechDyn lost profits of \$2,314,338 (including interest).

7. As an alternative method of calculating these damages, and as a cross check thereto, Mr. Ripper calculated the profits that were lost from five specific projects identified in Plaintiff's Exhibit 505(a), which according to the testimony of Mr. Roundtree, were jobs actually bid by the TechDyn Corporation, but which were not rewarded, as a result of the ICCE Project. Mr. Ripper calculated the lost profits from these specific projects as follows:

- a. TechDyn Project Proposal No. 715 - \$6,542
- b. TechDyn Project Proposal No. 806 - \$327,660
- c. TechDyn Project Proposal No. 904 - \$34,118
- d. TechDyn Project Proposal No. 908 - \$810,138
- e. TechDyn Project Proposal No. 001 - \$297,374

DATED: July 17, 1991.

Respectfully submitted,

TECHDYN SYSTEMS CORPORATION

By: 

Benjamin T. Riddles, II
WATT, TIEDER, KILLIAN & HOFFAR
7929 Westpark Drive, Suite 400
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(703) 749-1000

Counsel for Plaintiff

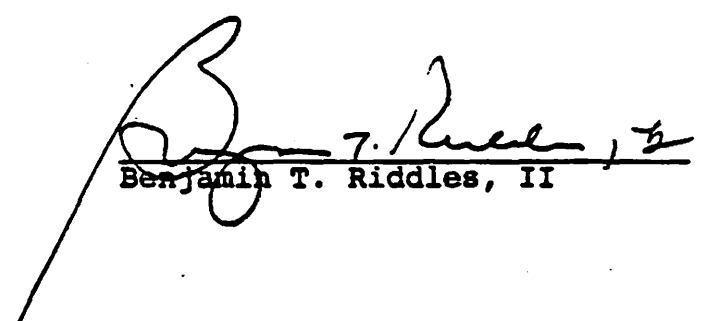
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Plaintiff TechDyn's Objections, and Proffered Testimony, In Opposition to Trial Court Rulings Precluding, and Striking, Evidence Proffered by Plaintiffs was sent via hand-delivery this 17th day of July, 1991, to:

Peter B. Work, Esquire
Jean-Pierre Swennen, Esquire
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

and

William L. Carey, Esquire
Miles & Stockbridge
11350 Random Hills Road
Suite 500
Fairfax, VA 22030



Benjamin T. Riddles, II

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

TECHDYN SYSTEMS CORPORATION

Plaintiff,

v.

WHITTAKER CORPORATION

Defendant.

AT LAW NO. 94144

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION
IN LIMINE FOR A PRETRIAL RULING TO PRECLUDE
EVIDENCE OR COMMENTARY CONCERNING CRIMINAL
MATTERS INVOLVING WHITTAKER COMMAND AND CONTROL
SYSTEMS. SCOTT M. LAMBERTH AND JOHN FRANKLIN VAN TASSEL

Plaintiff, TechDyn Systems Corporation ("TechDyn"), submits this memorandum in opposition to Defendant, Whittaker Corporation's Motion in Limine for a Pretrial Ruling to Preclude Evidence or Commentary Concerning Criminal Matters Involving Whittaker Command and Control Systems, Scott M. Lamberth and John Franklin Van Tassel.

INTRODUCTION

On September 27, 1989, pursuant to a resolution of the Board of Directors of Defendant Whittaker Corporation, Whittaker Command and Control Systems ("WCCS") entered a plea of guilty to the following crimes:

COUNT I

(Violations of 18 U.S.C. §371)

- **Conspiracy to defraud the United States.**
- **Conspiracy to bribe a public official.**
- **Conspiracy to file false claims.**

COUNTS II, III

(Violations of 18 U.S.C. §201)

- **Bribery of a Public Official**

[See Plaintiff's Exhibits 1526-1527, copies attached]

These criminal acts were committed by (among others):

- 1. Scott Lamberth, President of WCCS, and a consultant to Whittaker Corporation.**
- 2. Leonard Ingram, Vice President of WCCS.**
- 3. John Van Tassel, Director of Operations at WCCS' plant in Arkansas.**

WCCS (now "Whittaker") was convicted of each offense and sentenced to pay over \$3,000,000 in fines and civil penalties.

[See Plaintiff's Exhibits 1527-1529, copies attached]

Each of the above-named individuals was involved in the administration, management and oversight of Whittaker's performance of the ICCE subcontract at issue in this trial. Their crimes were committed during the same time frame that Whittaker was failing to perform the ICCE subcontract with TechDyn.

Perhaps understandably, Whittaker seeks to prevent the jury from considering this highly probative evidence. Whittaker's attempt must fail:

First, evidence of Whittaker's criminal activity is directly relevant to establish that Whittaker's inability to satisfactorily perform under the terms of the subcontract work was attributable to its own incompetence and criminal involvement and not to any fault on the part of TechDyn. Since this is the central issue of the case, the probative value of such evidence clearly outweighs any incidental prejudicial effect.

Second, evidence of the criminal matters at issue will reveal a longstanding, deeply ingrained routine business practice of bribery and submitting false claims in factual situations identical to those in this case by WCCS from whom Whittaker Corporation assumed all responsibilities and liabilities under the terms of the subcontract.

Third, since bribery and fraud constitute crimes of moral turpitude, evidence of Whittaker's conviction for those crimes is admissible for the purpose of impeaching the testimony of witnesses who are representatives of Whittaker. Thus, evidence and commentary concerning the criminal activity of Whittaker and former Whittaker employees Scott M. Lamberth and Franklin Van Tassel is relevant and clearly admissible under the law. Accordingly, Defendant's motion should be denied.

FACTUAL BACKGROUND

TechDyn instigated this lawsuit for breach of contract because Whittaker proved completely incapable of performing in a satisfactory manner under the terms of the subcontract. Whittaker's counterclaim acknowledged its inability to perform under the subcontract to the satisfaction of TechDyn. However, Whittaker maintained that its failure was not due to any fault of Whittaker's but rather was a consequence of: (1) modifications by the Air Force which TechDyn flowed down to Whittaker and which Whittaker felt unreasonably complicated the subcontract; and (2) TechDyn's failure to provide Whittaker with adequate supervision and direction in accordance with its role as prime contractor. Whittaker also maintained that TechDyn was unreasonably reluctant in certifying Whittaker's claims for equitable adjustment based on these Air Force changes. In point of fact, however, the changes instituted under the contract by the Air Force were not unduly complex, and TechDyn fulfilled all of its obligations as prime contractor under the terms of the contract. Whittaker was simply unable to perform. Its incompetence has been masked over the years as a result of its routine business practice of ensuring the successful and profitable completion of contracts with the government by bribing government officials and submitting false and fraudulent claims.

Moreover, during the precise timeframe when Whittaker was supposed to be performing the TechDyn subcontract, Whittaker was

indicted for bribery and the fraudulent submissions of claims. As a result, much of the time, money, effort and manpower which Whittaker needed to devote to the TechDyn subcontract, to have any hope of successful completion, was diverted to assist in Whittaker's defense against the criminal indictments. Thus, as explained below, evidence of Whittaker's conviction for these crimes of moral turpitude and its longstanding history of criminal conduct is relevant to prove that Whittaker was unable to perform satisfactorily under the terms of the subcontract because of its own incompetence, which had previously gone undetected because of its routine business practices of bribery and submitting fraudulent claims.

ARGUMENT

As discussed above, there are three distinct theories which support the admissibility of Whittaker's past criminal convictions for bribery and submitting fraudulent claims. First, the law in Virginia provides that evidence of past criminal convictions is generally admissible, and excluded only under very specific circumstances which do not exist in this case. Second, this evidence is admissible to establish Whittaker's repetitive practice of submitting fraudulent claims and bribing corporate and government officials as a routine business practice in factual situations identical to those in this case. Finally,

Whittaker's past criminal convictions are admissible to impeach the credibility of all witnesses who are Whittaker employees.

I. EVIDENCE OF WHITTAKER'S PAST CRIMINAL CONVICTIONS IS ADMISSIBLE UNDER THE GENERAL RULE IN VIRGINIA ADMITTING SUCH EVIDENCE

The standard which governs the admissibility of past criminal convictions as evidence in Virginia closely parallels the standard set forth in Rule 404(b) of the Federal Rules of Evidence and is set forth in Williams v. Commonwealth, 203 Va. 837, 841, 127 S.E.2d 423, 426 (1962), as follows:

Evidence which shows or tends to show the accused guilty of the commission of other offenses at other times is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense similar to that charged; but if such evidence tends to prove any other relevant fact of the offense charged, and is otherwise admissible, it will not be excluded merely because it also shows him to have been guilty of another crime.

Id. at 841, 127 S.E.2d 423, 426 (1962) (quoting Day v. Commonwealth, 196 Va. 907, 914, 86 S.E.2d 23, 26 (1955)). It has been noted that this standard "gives the courts great flexibility, and the possible situations, in which such evidence might be admissible are therefore numerous." C. Friend, The Law of Evidence in Virginia, § 152, p. 398 (1988). As such, it has also been recognized that the determinative test for admissibility is generally "whether the legitimate probative value of the evidence

of the other offenses outweighs the prejudice to the accused." C. Friend, The Law of Evidence in Virginia, § 152, p. 398 (1988). As the court in Lewis v. Commonwealth, 225 Va. 497 303 S.E.2d 890, has stated the standard:

Whenever the legitimate probative value outweighs the incidental prejudice to the accused, evidence of prior offenses, if otherwise competent, is admissible.

Id. at 500, 303 S.E.2d at 893.

The bottom line is that evidence of prior convictions must pass a two-pronged test of admissibility:

- (1) It must be determined that such evidence is relevant to prove something other than simply "the character of the accused or his disposition to commit an offense similar to that charged." Williams, 203 Va. at 841, 127 S.E.2d at 426; and
- (2) It must be determined that the probative value of such evidence outweighs the incidental prejudicial effect which accompanies such evidence. Lewis, 225 Va. at 500, 303 S.E.2d at 893.

In this civil case, TechDyn seeks the admission of Whittaker's past criminal convictions, not to establish Whittaker's character or its disposition to commit a similar crime, but rather because such evidence is relevant to prove a variety of facts which establish that Whittaker breached its contract with TechDyn, while TechDyn acted in good faith throughout and fulfilled all of its contractual obligations with Whittaker.

IV. EVIDENCE OF THE CRIMINAL CONVICTIONS IS RELEVANT TO
SHOW THAT WHITTAKER'S CRIMINAL ACTIVITIES, INDICTMENT
AND CONVICTION IMPEDED ITS ABILITY TO PERFORM THE
ICCE SUBCONTRACT

A. The Sheer Magnitude of Criminal Activity by
Whittaker Executives Prevented Performance
of the Subcontract

1. The Criminal Activities of Scott Lamberth
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Whittaker was over 3 years late on its planned schedule of performance. Instead of devoting its money and resources to completion of the ICCE subcontract, Whittaker was paying a portion of its obligations to the United States and its people. Critical capital was lost, thus contributing to the fact that Whittaker has yet to complete the subcontract. It is essential that the jury weigh this fact in its deliberations.

E. The Investigation, Convictions and Prison Terms of Whittaker Officials Deprived Whittaker of Senior Contract Management, and Deprived TechDyn Of Its Contract Rights

The FBI's lengthy and thorough investigation of Mr. Lamberth's criminal activities resulted in his conviction, and sentence of ten months incarceration. Similarly, Mr. Van Tassel was sentenced to three months imprisonment. Although Mr. Lamberth testified for the government at Mr. Ingram's trial, Ingram was acquitted. Ingram contended that he warned WCCS officials not to bribe the government official. While these men were thus occupied, Whittaker remained unable to perform its subcontract. TechDyn's subcontract with Whittaker clearly contemplated a subcontractor with competent personnel, fully devoted to the timely completion of its subcontract obligations. These reasonable contractual expectations cannot be, and were not, fulfilled by Whittaker officials from prison cells.

V. EVIDENCE OF WHITTAKER'S CRIMINAL ACTIVITY IS
ADMISSIBLE TO SHOW THE TRUE MOTIVE AND PURPOSE
UNDERLYING WHITTAKER ACTIONS

A. It is a Well-Settled Principle That Prior
Convictions Are Admissible To Show The
Defendant's Motive and Intent

It is a well established principle in Virginia that evidence of other offenses is admissible if it tends to prove any relevant element of the offense charged such as motive, intent, or knowledge of the accused. Kirkpatrick v. Commonwealth, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). This fundamental evidentiary principle has been applied in numerous cases. E.g. Barber v. Commonwealth, 5 Va. App. 172, 360 S.E.2d 888 (1987), (The court held that evidence that the defendant was involved in a prior criminal criminal conspiracy was highly analogous and close in time to the present allegations and was relevant to the defendant's intent to distribute marijuana and therefore was admissible to establish such intent); Hawks v. Commonwealth, 228 Va. 244, 321 S.E.2d 650 (1984), (The court held that evidence that the defendant raped a woman whom he was charged with abducting was relevant to demonstrating his intent to deprive the woman of her liberty and was therefore admissible even though the defendant was not charged with rape. The probative value of such evidence of intent outweighed whatever prejudice the evidence might have caused.); Evans v. Commonwealth, 222 Va. 266, 284 S.E.2d 816 (1981), (The court held evidence of unrelated criminal charges pending in another state against the defendant admissible to prove that his intent to kill a police officer guarding him

and to escape.); Brooks v. Commonwealth, 220 Va. 405, 258 S.E.2d 504 (1979), (In a prosecution for welfare fraud, court held that defendant's prior convictions of welfare fraud was relevant to prove that the defendant willfully failed to notify the authorities of changes in her financial circumstances.) See also Moore v. Commonwealth, 222 Va. 72, 228 S.E.2d 822 (1981); Minor v. Commonwealth, 213 Va. 278, 191 S.E.2d 825 (1972).

More recently, the Court of Appeals in Virginia has held that evidence of statements by the defendant and of prior crimes similar in nature and near in time was admissible because it tended to establish a course of conduct, and motive, for committing the offenses charged. McGill v. Commonwealth, 10 Va. App. 237, 242, 391 S.E.2d 597, 602 (1990).

This common law principle followed in Virginia is codified in the Federal Rules of Evidence, Rule 404(b) which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b) (emphasis added).

Rule 404(b) is the evidentiary standard in civil cases as well as criminal cases. Dial v. Travelers Indemnity Co., 780 F.2d 520, 523 (5th Cir. 1986).

In Dial, in an action for recovery on a fire insurance policy, the defendants sought to introduce evidence of three

other fires at properties which the plaintiff or the plaintiff's family owned. The court held that evidence of similar conduct occurring near the time of the event in question was especially relevant and was admissible to show a motive or intent of the plaintiff to set the fires. Id. at 523.

In the case at hand, evidence of Whittaker's past criminal activity in similar contracts during the time it was supposedly working on the TechDyn contract is relevant to establish the true motives for Whittaker's actions and should be admitted for this purpose to fully inform the jury of the circumstances under which Whittaker was operating.

B. Evidence of The Criminal Convictions Is Probative Of Whittaker's True Motive In Suspending Work On The Project From July to September, 1988

On July 21, 1988, TechDyn officials met with Whittaker officials at the WES Corporate Offices in California. At that meeting, WES informed TechDyn that it was suspending work on the Project because of contract interpretation disputes with TechDyn. In fact, however, this "suspension" immediately followed the June 24, 1988 FBI seizure of Whittaker's records, and initiation of public criminal investigation of Whittaker. Clearly, Whittaker was unable to perform even if it wanted to. The jury is entitled to know these facts in order to assess the true motive for Whittaker's suspension.

C. Evidence of Criminal Conviction For False Claims Will Reveal Whittaker's Motive in Withdrawing Its Claim Against the Air Force and Reinstating It Against Techdyn

On April 13, 1988, while Mr. Lamberth and others were engaged in fraudulent schemes, WCCS presented a claim for additional compensation against the Air Force and TechDyn. Subsequently, WCCS certified specific elements of its claim for which it sought compensation from the Air Force.

After Operation Ill Wind became public, and during an audit of Whittaker's claim by the Defense Contract Audit Agency (DCAA), Whittaker advised the Government that it was withdrawing its claim against the Air Force. Later, Whittaker pleaded guilty to filing a false claim on July 1, 1988 (seeking reimbursement of a \$30,000 bribe paid to Mr. Illeman).

In February of 1989, Whittaker resubmitted its claim -- this time, asserting a right of entitlement to payment from TechDyn. Evidence of the criminal conviction is highly probative of the true motive for Whittaker's ambivalence: To avoid a second Federal prosecution for false claims, and other Federal penalties for fraudulent certification of claims to the United States.

D. Evidence of Whittaker's Criminal Activities and Convictions Is Probative of Whittaker's Intent in Ordering Multiple Corporate Reorganizations, Name and Management Changes

TechDyn originally entered into this subcontract with 4C Corporation. Subsequently, 4C was taken over by Whittaker. Then

Whittaker (1) caused 4C's name to be changed to Whittaker Command & Communications Corporation ("WCCS"); (2) merged WCCS with Lee Telecommunications Corporation ("LTC"), also owned by Whittaker, and thereby replacing WCCS Senior Management with Mr. Lamberth, et al; and (3) merged WCCS into WES Corporation (within one week after Operation Ill Wind Search Warrants). Each of these corporate changes involved extensive changes of personnel (especially senior executive personnel), plant and facilities relocations, and disruption of continuity. The jury is entitled to consider and conclude that these changes were brought about by Whittaker's effort to avoid the taint of the multiple criminal convictions and indictments levied against it.

**EVIDENCE OF WHITTAKER'S CRIMINAL ACTIVITY IS
RELEVANT TO REBUT WHITTAKER'S COUNTERCLAIMS
AND DEFENSES AGAINST TECHDYN**

Whittaker has filed voluminous counterclaims, defenses, and documentary exhibits purporting to affix blame against TechDyn for Whittaker's failure to perform. For example, Whittaker claims that TechDyn unreasonably failed to certify Whittaker's claim to the Air Force; failed to "shield" Whittaker from Air Force performance demands; and attempted to extort a contribution from Whittaker to TechDyn. (See p.2 Synopsis of Whittaker Corporation's Counterclaim)

These contentions are specious, particularly when viewed in light of Whittaker's track record of criminal activity in its performance of government contracts. Whittaker has "opened the

door" to the truth. The Law in Virginia, and indeed in all jurisdictions, will not permit the criminal Defendant to have it both ways, presenting favorable evidence while depriving the jury of the truth of unfavorable evidence.

This critical evidentiary principle was properly applied in United States v. Johnson, 634 F.2d 735 (4th Cir. 1980). In that case, the defendant appealed her conviction for federal income tax evasion on the grounds that evidence of her overstated Medicaid billings had been improperly admitted under Rule 404(b) of the Federal Rules of Evidence. In reaching this decision, the Court noted that in her defense, Johnson had portrayed herself as an "altruistic healer of the sick, whose concerns lay elsewhere than attending to her financial interests and resulting legal responsibilities." Id. at 736. Because Johnson had opened the door in portraying herself in this manner, the Court reasoned that evidence of prior criminal acts was admissible for purposes of rebuttal. By defending herself in this manner, the Court reasoned that she had in effect waived the protections otherwise afforded her under Fed. R. Evid. 404(b).

More recently, in Weiskopf v. Bond, 739 F.Supp. 1084 (E.D. La., 1990), the United States District Court for the Eastern District of Louisiana admitted evidence of previous instances of insurance fraud practiced by the insured, not to show fraud in the case at hand, but, to justify the insurer's refusal to provide coverage in defending itself against the insured's allegation of bad faith denial of coverage. In balancing the

probativity of the evidence against its incidental prejudicial effect, the Court concluded that evidence of past instances of fraud committed by the insured carried "high probative value," and that any undue prejudice associated with such evidence was "substantially outweighed" by the "highly probative nature of the evidence." Id. at 1086

CONCLUSION

The above analysis serves to highlight the necessity and propriety of admitting evidence of Whittaker's past criminal convictions for bribery and submitting false claims. Denying the admissibility of this evidence would deny TechDyn of its right to fully present its case and deprive the jury its right to decide the case with complete knowledge of all the pertinent facts and relevant history surrounding the case. Thus, for the reasons stated herein, TechDyn requests that Whittaker's Motion in Limine for a Pretrial Ruling to Preclude Evidence or Commentary Concerning Criminal Matters Involving Whittaker Command and Control Systems, Scott M. Lamberth, and John Franklin Van Tassel be denied.

DATED: June 18, 1991.

Respectfully submitted,

TECHDYN SYSTEMS CORPORATION

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Plaintiff TechDyn Systems Corporation's Motion in Limine to Prevent Defendant From Offering Any Evidence of Alleged Counterclaim Damages Because of Defendant's Failure to Comply with Discovery was sent via hand-delivery this 18th day of June, 1991, to:

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Benjamin T. Riddles

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

TECHDYN SYSTEMS CORPORATION)

Plaintiff,)

v.)

AT LAW NO. 94144

WHITTAKER CORPORATION)

Defendant.)

**PLAINTIFF'S SUPPLEMENTAL AUTHORITY IN
OPPOSITION TO WHITTAKER'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE OF CRIMINAL CONVICTION**

I. TECHDYN MAY USE CRIMINAL CONVICTION TO IMPEACH WHITTAKER

**A. Past Convictions Admissible to Impeach
Adverse Witness in Civil Action**

In Virginia, when a witness testifies, the credibility of the witness may be impeached by showing that the witness was convicted of certain crimes. Friend, The Law of Evidence in Virginia §50, p. 144 (1988). That rule is codified in the Criminal Law subpart of the Virginia Code which states in pertinent part:

A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit.

Va. Code Ann. §19.2-269.

The foregoing rule is applicable to attack the credibility of a witness in a civil action in Virginia. In

Chesapeake & Ohio Railway Company v. Hanes, 196 Va. 806, 86 S.E.2d 122 (1955), the Supreme of Court of Virginia stated:

There was evidence that Shaffer had been convicted of making a false statement, knowing it to be false, in support of a claim for unemployment benefits. Code §60-112. Since such an offense, although a misdemeanor, involved moral turpitude, evidence of the conviction was admissible as bearing on his credibility.

86 S.E.2d at 126.

More recently, the Supreme Court of Virginia again held that conviction of a crime may be used to discredit the testimony of a witness in a civil action. In Furrow v. State Farm Mutual Automobile Insurance Co., 375 S.E.2d 738 (Va. 1989), the Supreme Court stated:

The mere fact that a witness is a felon does not make his testimony incredible as a matter of law. A person convicted of a felony is a competent witness, but the fact of conviction may affect his credit. Va. Code §19.2-269.

375 S.E.2d at 740.

Thus, the criminal law rule that evidence of a conviction may be used to impeach the witness is applicable to civil law actions.

B. Conviction Admissible to Impeach If Conviction Involves Felony or Misdemeanor Affecting Moral Turpitude

Under the foregoing rule, a conviction may be used to impeach a witness if the conviction was for a misdemeanor involving moral turpitude or any felony. See, Chesapeake & Ohio Railway v. Hanes, 196 Va. 806, 86 S.E.2d 122 (1955) (a misdemeanor conviction for making false statement admissible);

Harmon v. Commonwealth, 212 Va. 442, 446, 185 S.E.2d 48, 51 (1971) (a conviction for any felony admissible when cross-examining a witness).

In Virginia, bribery is considered a crime involving moral turpitude. In Great Coastal Express, Inc., v. Ellington, 334 S.E.2d 846 (Va. 1985), the Supreme Court of Virginia ruled that "commercial bribery" is considered a crime involving moral turpitude. In the Court's decision, it stated as follows:

We hold that the court did not err in making this determination as a matter of law and that it correctly characterized commercial bribery as an offense involving moral turpitude so as to be the subject of defamation per se.

334 S.E.2d at 851.

Further, conviction of the witness in another jurisdiction is admissible to impeach the witness if the crime for which the witness was convicted is a felony in Virginia or involves moral turpitude. Friend, Law of Evidence in Virginia, §50 p. 145 (1988). Thus, a conviction for bribery outside the Commonwealth is permissible to impeach a witness in this jurisdiction.

C. The Scope of Inquiry Limited When Impeaching a Witness

Importantly, when cross-examining a witness that was convicted of a crime, the scope of questioning is subject to limitations. Friend, Law of Evidence in Virginia, §27 P. 76 (1988). The witness may be examined about the number and nature

of its convictions, but not the details of the convictions. Sadowski v. Commonwealth, 219 Va. 1069, 1071, 254 S.E.2d 100, 101 (1979). However, if the subject of a past conviction is raised on direct examination, the scope of allowable cross-examination is increased to permit examination of the accuracy of the witness's testimony on direct. McAmis v. Commonwealth, 225 Va. 419, 304 S.E.2d 204 (1983).

D. Use of Past Criminal Conviction to Impeach
Testimony of Corporate Official

The issue of whether a past criminal conviction of a corporation can be used to impeach the testimony of an employee of that corporation in a subsequent civil action is a rare and vexatious issue. As the Supreme Court of Appeals of West Virginia stated:

Neither party cites a case which supports or refutes this proposition -- (that past conviction of corporation is admissible). Our research has uncovered only two cases which appear to address this issue. Commentators are silent on the question. The point is vexatious simply because a corporation, as an artificial entity speaks and acts only through its officials.

CGM Contractors v. Contractors Environmental Services, Inc., 383 S.E.2d 861 (W.Va. 1989).

However, in the few cases confronted with this issue, courts have found it proper to use a past corporate conviction to impeach a corporate witness within certain guidelines. In CGM Contractors, supra, the Court found it was

proper to use a past conviction of a corporation to impeach the testimony of an employee of that corporation. In making that determination, the Court stated:

Thus, to a substantial degree, the crime of the corporation is interwoven with the acts of its officials. Such criminal acts are reflective of the character of the persons who manage the corporation. Consequently, it would seem reasonable to utilize a corporate crime to impeach a corporate official's credibility if the official is connected to the crime so long as the conviction meets the Rule 609 criteria.

383 S.E.2d at 865-866.

The United States Supreme Court has also commented on the matter of using a past corporate conviction to cross-examine a witness and has ruled that a past conviction is admissible for limited purposes. In United States v. Trenton Potteries, Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed 700 (1927), a defendant corporation called as a witness the manager of another corporation. On cross-examination, the government asked the manager if he was aware that his employer had pled guilty to a violation of the Sherman Act. The Supreme Court found that admission of this evidence was proper "if admissibility were urged on the ground that it was directed to the bias of the witness ... or that it was preliminary to showing his implication in this supposed offense, and thus affecting his credibility" 273 U.S. at 404-405, 47 S.Ct. at 387, 71 L.Ed at 708 (Citations omitted).

E. Conclusion

In a civil action, past convictions are admissible for the purpose of impeaching a witness. A prior conviction involving any felony or misdemeanor that involves moral turpitude is admissible to impeach.

A past conviction of a corporation may be used to impeach a representative of the corporation. The jury must be instructed that the sole purpose of the conviction is to impeach the witness's credibility and not to prove the ultimate issue of the case. If all of the above-referenced factors are satisfied, the prior corporate conviction can be used to impeach the corporate witness.

DATED: June 20, 1991.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Plaintiff TechDyn Systems Corporation's Supplemental Authority In Opposition to Whittaker's Motion in Limine to Exclude Evidence of Criminal Conviction was sent via hand-delivery this 20th day of June, 1991, to:

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