UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
Alliant Techsystems, Inc.	**)**	
and	**)**	**Docket No. CAA-III-075**
Riteway Services, Inc.	**)**	
	)	
Respondents	**)**	

ORDER ON MOTIONS

In this proceeding under Section 113(a)(3) and (d) of the Clean Air Act, complainant, EPA, has filed three motions in advance of the hearing, which hearing has now been rescheduled to commence on **February 17, 1998 in Cumberland, Maryland**. The alleged violations involve whether the Respondents adequately wetted, and kept wet, the regulated asbestos containing materials and whether there were visible asbestos emissions to the outside air.

EPA's Motion to Strike Affirmative Defense and Motion in Limine

EPA seeks to prevent the Respondents, Alliant Techsystems, Inc. ("Alliant") and Riteway Services, Inc. ("Riteway"), from raising as an affirmative defense the assertion that they are not liable for the alleged Clean Air Act violations, as a result of a private contractual agreement providing for their defense and indemnification in connection with any claimed environmental violation. As grounds for this motion to preclude an indemnification defense, EPA asserts that the Respondents have failed to raise the defense in their answer or otherwise; that it is insufficient as a matter of law and void on public policy grounds; that the defense is "immaterial, impertinent, and/or frivolous; and that it would confuse the issues in the case. Motion at 2. For the reasons which follow, EPA's motion is granted.

EPA observes that in Respondent's Prehearing Exhibit No. 15, there is included a cover page from a Facilities Restoration Project - FY 1995, entitled "Demolish Buildings,

Specification NO.95-F," together with an indemnification clause on a separate page, identified as

"95-F-01010-4." [1] EPA notes that, other than the cover page, this was the only page included from this document. The Respondents have identified Exhibit 15 as "Portions of Contract for work performed between Carl Belt, Inc. and Alliant Techsystems, Inc." Respondents' Answering Prehearing Exchange at p.8. EPA notes that within the page identified as 95-F-01010-4 is Paragraph 6.5.2 and that this paragraph provides that "[t]he Subcontractor agrees to defend, indemnify and save the Contractor (as defined in this Article) harmless from and against all liability...for any Claim...[of]...damage to the environment..."

While EPA objects to this document on the basis that the Respondents have failed to raise an indemnity defense in their joint answer, and that there has been only a partial submission of the document, EPA's overriding objection is based on its position that private indemnification agreements are irrelevant to the liability and penalty considerations under the Clean Air Act. Motion at p.5. Noting that the consolidated procedural rules (40 CFR Part 22) do not address standards for a Motion to Strike, EPA observes that the Federal Rules of Civil Procedure provide, under 28 U.S.C. Rule 12(f), that a court may strike any insufficient defense or immaterial matter from a pleading.

In response, Alliant/Riteway state that they do not intend to introduce the indemnification agreements for the purpose of a defense to the EPA's enforcement action, but rather in connection with the limited purpose of "the calculation of the amount, if any, of the civil penalty to be due in the enforcement action." Alliant/Riteway Response to Motion at 1. Alliant/Riteway, while observing that Riteway has contractual obligations with Alliant and Carl Belt, Inc., agrees with EPA that indemnification agreements can not insulate a respondent from primary liability under the Clean Air Act.

However, Alliant/Riteway maintain that the *existence* of such an agreement is relevant as an essential element of the proceeding for the calculation of the penalty. The motion indicates that Riteway is "a small business with virtually no assets who has agreed to indemnify both Carl Belt, Inc., and Alliant." Although Riteway apparently has "virtually no assets," it is represented, somewhat paradoxically, that Riteway intends to honor its indemnification agreement. Alliant/Riteway take the position that the "[a]greements nonetheless establish the **priority for payment** of any civil penalties as between Riteway, Alliant and Carl Belt, Inc." (emphasis added) and that Riteway's intention to indemnify should be considered in assaying the impact of any penalty which may be assessed against it.

While EPA is correct that the Respondents failed to file the requisite motion, pursuant to the requirements of 40 C.F.R. §§ 22.15(b) and 22.15(e), I need not rule on this ground as

[1] Although EPA states that it included Respondents' Prehearing Exhibit No. 15 as attachment 1, that attachment is actually a copy of an order issued by a judge in another case and relied upon by EPA later in its argument on this motion. The omission is of no consequence as the presiding judge already had in his possession the Respondent's prehearing submittal, which included Exhibit 15.

the Respondents do not present this material as a formal defense to liability and, in any event, I am rejecting the limited purpose for which it is being offered.
EPA has named Alliant Techsystems and Riteway Services as the respondents in this matter. The proposed penalty amount sought by EPA is not parsed between the respondents. Rather the proposed amount is a single amount proposed to be assessed against both respondents. Section 113 (e)(1) of the Clean Air Act specifies penalty assessment criteria, and requires consideration of the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and such other factors as justice may require. 42 U.S.C. 7413 (e).

Assuming that liability is established against one or both Respondents, it does not advance the resolution of the issues before me to consider the indemnity agreement in any penalty determination. Indeed I find that such consideration would only serve to confuse the issues. Alliant and the putative indemnifier, Riteway, have been charged, jointly and severally, with the alleged violations. Should liability be established, the statute provides the criteria that I am to consider in assessing an appropriate penalty. Those factors do not include consideration of an indemnification agreement. Were I to consider such an agreement, even for the ostensibly limited purpose of assessing penalties, such consideration would have the potential for a significant and unwarranted impact upon the civil penalty. Thus to allow the consideration of the indemnification agreement for the asserted "limited purpose" of establishing the priority for payment would amount to a semantic limitation only, because such consideration would still effectively operate to affect liability in a most meaningful manner, by impacting the civil penalty itself. Thus I find private indemnification agreements irrelevant as to the penalty portion of this proceeding and, accordingly, Respondents will not be allowed to introduce such evidence nor other evidence regarding who will pay the civil penalty.

Further, although my order is not issued on such grounds, and the Respondents disavow its use for a defense to liability, I note the existence of arguments that an indemnification defense has no place in such proceedings on the basis that it violates the public policy underlying the Clean Air Act. The rationale expressed in the cases cited by EPA: Beerman Realty Company v. Alloyd Asbestos Abatement Company (100 OhioApp. 3d 270; 653 N.E. 2d 1218; 1995 Ohio App. LEXIS 30, January 11, 1995, and U.S. v. J & D Enterprises of Duluth (955 F.Supp. 1153; 1997 U.S. Dist. LEXIS 8638, February 5, 1997) is based upon the recognition that the Clean Air Act and the asbestos NESHAP provide for strict liability on both owners and operators and that, consistent with that intent, it would defeat the underlying purposes of the Act to allow an individual who has been held liable for a civil penalty to receive indemnification for such penalties. For that reason these cases hold that it would be improper to excuse responsibility simply by contracting it away.

EPA's Motion for Limited Prehearing Discovery

Through Request for Production of Documents

In this motion EPA seeks the production of the following documents:

> 1. those specific drawings, specifications, exhibits and additional materials which are incorporated within, and made part of the contract which Respondents have submitted, in selected portions, as Respondents' Prehearing Exhibit No. 12; 2. all missing portions of those contracts,... which Respondents have submitted, in part, as Respondents' Prehearing Exhibit No.15; and 3. Respondent Riteway Services, Inc.'s fiscal year 1995 and 1996 tax returns and all corresponding financial information (including financial statements, balance and cash flow statements) from Respondent Riteway Services, Inc. for fiscal years 1995 and 1996 which have not previously been provided to Complainant (and to the extent that such documents have been prepared).

Motion at 11.

The discovery criteria are set forth at 40 C.F.R. § 22.19(f)(1). In ruling on such motions the guiding criteria involve whether the discovery will result in "unreasonable delay," whether the information is not "otherwise available," and whether it has "significant probative value." Where these criteria are satisfied, the judge's order granting discovery shall include the "conditions and terms thereof." 40 C.F.R. § 22.19(f)(3).

Respondent's Exhibit No. 12 is described as "Contract for work performed by Riteway Services, Inc. on behalf of Carl Belt, Inc. It references other plans, specifications and drawings as set forth with particularity in EPA's motion at pages 3- 5. . Respondent does not object to the production of these documents, but seeks to have EPA either appear to review the documents at Respondent's facility or to have EPA pay for the cost of copying the documents.

These documents have relevance, as they are obviously related to the work described in that exhibit and the exhibit is incomplete to some degree without this information. However, the importance of these documents to the violations at issue is unclear. Accordingly, the Respondent is directed to make the documents available for EPA's review at Respondent's facility or EPA may arrange to pay for the cost of copying the documents.

Respondent's Exhibit No. 15, is described at page 8 of its Answering Prehearing Exchange as "Portions of Contract for work performed between Carl Belt, Inc. and Alliant Techsystems, Inc." This exhibit consists of eight pages. The first three pages

relate to a purchase order, on Alliant Techsystems letterhead, reference Specification 95-F, and list "P. Cunningham" as the buyer and "Carl Belt Inc" as the seller. The next three pages consist of a cover letter to Mr. Carl Belt and an accompanying two page subcontract [2] which also references Specification 95-F and Patrick Cunningham. The last two pages of the exhibit consist of a cover letter, referencing Specification No. 95-F, and a single page of that contract, page 95-F - 01010-4. .

EPA makes two requests concerning this exhibit. First, to the extent, if any, that this exhibit includes materials from different contracts between different parties, EPA seeks their identification. Second, EPA seeks the complete form of the documents contained in the exhibit.

The Respondents have voiced no objection to this aspect of the EPA's motion and have represented that they have already provided EPA with the entire Contract for Specifications numbered 95-F. For the reason given regarding exhibit No. 12, (next above), EPA's request is granted. EPA is entitled to see the complete documents referenced in Exhibit No. 15, and to identification and clarification (if any) of different contracts between different parties in that exhibit.

Last, EPA seeks fiscal year tax returns and corresponding financial information such as balance and cash flow statements, from Respondent Riteway Services, Inc., as it has implicitly raised this issue in its defense. By its Answering Prehearing Exchange, submission at Exhibit No. 3, Respondent Riteway has submitted tax returns for 1994 (and several preceding years) and other financial records. Respondents do not object to this discovery request and they represent that the 1995 tax return was filed with EPA together with its response to EPA's motion. Respondents are directed to provide the 1996 tax return of Riteway to EPA at the time it is filed with the Internal Revenue Service. If either Respondent intends to take the position that it is unable to pay the proposed penalty, or that payment will have an adverse effect on the Respondents' ability to continue in business, such Respondent shall furnish supporting documentation in the form of financial statements and tax returns. Thus, to the extent that Riteway or Alliant is asserting this in its defense, updated financial records are to be supplied to EPA.

All additional discovery directed by this order shall be completed by January 14, 1998.

EPA's Motion to Amend Prehearing Submittals

In its third motion EPA seeks to amend its list of witnesses from that originally submitted, by deleting witness Elizabeth Ferraiolo and substituting Richard Ponak, who was also named on the original witness list. Ms. Ferraiolo was to testify about the EPA's calculation of the penalty, including the agency's consideration of the statutory factors and the agency's policies in arriving at the amount sought. EPA explains that Ms.

[2] This two page subcontract is incomplete as both pages are cut off at the top, at least on the judge's copy. Respondent is directed to provide a complete copy of those pages to the presiding judge and to EPA if its copy is incomplete.

Ferraiolo has retired from public service and that the witness who will testfiy in her place is employed by the same EPA section and has the same job responsibilities as held by her. Respondents have no objection to EPA's motion.

There is nothing unique to the subject matter about which Ms. Ferraiolo was to testify. Even if Ms. Ferraiolo had personally done the penalty calculation, other qualified witnesses can read the records generated by that effort and agree or disagree with the conclusions made.

The opportunity to cross examine has not been diminished by the substitution and accordingly the motion is granted. The motion also seeks to have the original witness list references to Mr. Ponak as an "expert" witness stricken. EPA relates that these references were inadvertent and that it does not intend to present Mr. Ponak as an "expert." Again, Respondent has no objection to EPA's motion. As the error was inadvertent and, more significantly, causes no prejudice to Respondent's defense, it is also granted.

William B. Moran,
Administrative Law Judge
Dated: December 4, 1997
Washington, DC

IN THE MATTER OF ALLIANT TECHSYSTEMS, INC. AND RITEWAY SERVICES, INC., Respondents

Docket No. CAA-III-075

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Motions**, dated December 4, 1997, was sent in the following manner to the addressees below:

Original by Pouch Mail to: Lydia Guy
Regional Hearing Clerk
U.S. EPA, Region 3
841 Chestnut Building
Philadelphia, PA 19107

Copy by Regular Mail to:

Counsel for Complainant:	A. J. D'Angelo, Esquire Assistant Regional Counsel U.S. EPA, Region 3 841 Chestnut Building Philadelphia, PA 19107
Counsel for Respondent:	Jeffrey S. Getty, Esquire Geppert, McMullen, Paye & Getty 21 Prospect Square Cumberland, MD 21502

_____

Aurora M. Jennings

Legal Assistant

Office of Administrative Law Judges

Environmental Protection Agency

Date: December 4, 1997

Washington, DC