STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WEST VALLEY NUCLEAR SERVICES CO., INC.	:	DECISION DTA NO. 811511
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1985 through February 28, 1990.	:	

Petitioner West Valley Nuclear Services Co., Inc., P. O. Box 191, Rock Springs Road, West Valley, New York 14171-0191, filed an exception to the determination of the Administrative Law Judge issued on April 11, 1996. Petitioner appeared by Phillips, Lytle, Hitchcock, Blaine & Huber (James A. Locke, Esq. And Martha L. Salzman, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

Petitioner filed a brief in support of its exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument was heard on June 12, 1997 in Buffalo, New York.

On December 11, 1997, the Tax Appeals Tribunal issued a decision retaining jurisdiction of the case and remanding the matter to the Administrative Law Judge for consideration of the issue of whether Tax Law § 1115(a)(15) or (16) was applicable to certain purchases of petitioner. The Administrative Law Judge issued his determination on remand on January 12, 1998.

Petitioner filed a brief in support of its exception to the remand and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner DeWitt dissents for the reasons set forth in a separate decision.

ISSUES

I. Whether purchases of tangible personal property and services pursuant to a Management and Operating Contract between petitioner and the United States Department of Energy are exempt from sales and use tax under Tax Law § 1116(a)(2) because such purchases were made by petitioner as agent for the Department of Energy.

II. Whether the above-referenced purchases are exempt from sales tax because petitioner purchased such property and services for resale to the Department of Energy.

III. Whether the Division of Taxation should be estopped from assessing sales and use taxes against petitioner herein because petitioner reasonably relied to its detriment on a letter dated February 22, 1982 issued to petitioner by the Division of Taxation.

IV. Whether particular purchases of property and services made pursuant to the Contract are exempt from tax pursuant to Tax Law § 1105(c)(3)(iii), § 1115(a)(15) or § 1115(a)(16).

V. Whether particular items purchased under the Contract qualify for the research and development exemption from tax under Tax Law § 1115(a)(10).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in the original determination in this matter issued on April 11, 1996 and in the determination on remand issued on January 12, 1998. These facts are set forth below.

History of the Project Site

1. In the early 1960's, New York State, through what is now known as The New York State Energy Research and Development Authority ("NYSERDA"), a public corporation, obtained title to approximately 3,300 acres of land in which to develop a nuclear research and development presence in Western New York. Between 1962 and 1966, Nuclear Fuel Services, Inc. ("NFS"), a subsidiary of W.R. Grace Company, designed and built a plant for commercial nuclear fuel reprocessing at the site and operated the plant from 1966 to 1972. Between 1966 and 1972, NFS reprocessed approximately 640 metric tons of nuclear fuel. Among other things, the reprocessing produced radioactive waste material, which was mixed with sodium hydroxide to change it from an acidic to a basic (pH) material, and stored in an underground carbon steel tank. In 1972, the facility was shut down for expansion to increase the plant's capacity.

2. During the 1970's, regulations, including seismic requirements imposed by the U.S. Nuclear Regulatory Commission, became more stringent. NFS eventually decided to go out of the commercial fuel reprocessing business because the requirements for strengthening the existing plant appeared to not be cost effective. In April 1976, NFS notified NYSERDA of its intention to withdraw from the nuclear fuel reprocessing business and terminate its lease with NYSERDA on December 31, 1980.

West Valley Demonstration Project Act

3. In 1980, the U.S. Congress passed the West Valley Demonstration Project Act (Pub L 96-368) (the "Act"), authorizing the U.S. Department of Energy (the "DOE") to carry out a high-level nuclear waste management demonstration project at the site for, among other things, "the purpose of demonstrating solidification techniques which can be used for preparing high level radioactive waste for disposal." (Pub L 96-368, § 2[a].) The DOE is the Federal agency

responsible for converting the existing liquefied high level radioactive waste to a solid form. The Act specifies that 10 percent of the costs of the West Valley Demonstration Project (the "Project") shall be paid by New York State, the remainder (90 percent) shall be paid by the DOE. (Pub L 96-368, §§ 2[b][4][C]; 3[b].)

4. Section 2(b)(4) of the Act provides that the Secretary of the DOE shall enter into a cooperative agreement with New York State. Effective October 1, 1980, a Cooperative Agreement was signed between the DOE and NYSERDA on the Western New York Nuclear Service Center at West Valley, New York (the "Cooperative Agreement"). The Cooperative Agreement provides that the DOE shall pay 90 percent of the total Project costs and NYSERDA shall pay 10 percent of such costs.

5. The project generally occupies approximately 200 acres within the 3,300 acre parcel owned by NYSERDA. Pursuant to the Cooperative Agreement, the DOE has assumed exclusive use and possession of the Project's premises (the 200 acres including the building, facilities and improvements thereon) for purposes of the Project. However, NYSERDA has retained title to the Project's premises. Use and possession of the Project's premises will be surrendered to NYSERDA upon completion of the Project. Additionally, it should be noted that Section 4.03 of the Cooperative Agreement and Section 2(a)(5) of the Act provide generally that the Project plant and premises must be decontaminated and decommissioned upon completion of the Project.

The Contractual Relationship Between Petitioner and the Department of Energy

6. Petitioner, West Valley Nuclear Services Company, Inc. (sometimes referred to herein as "WVNS"), was formed as a subsidiary of Westinghouse Electric Corporation for the purpose of competing for the management and operating contract for the Project and, subsequent to

winning the competition, fulfilling that contract. Petitioner has not engaged in any other business or activity other than its contract with DOE. Pursuant to DOE Contract No. DE-AC07-81NE44139 between DOE and petitioner (the "Contract"), which became effective August 26, 1981, petitioner operates, manages and performs a wide range of services for the DOE at the Project. The Contract, which provided for an initial term of five years, is a cost reimbursement management and operating ("M&O") contract. The Contract was a cost-plus fixed fee arrangement through September 30, 1983. The parties subsequently converted the Contract to a cost-plus base fee and award fee arrangement. Upon this arrangement, a portion of petitioner's fee was based on the DOE Project Director's evaluation of petitioner's management practices.

7. Generally, the Contract requires petitioner to manage, operate, and maintain the facilities of the Project, and to be responsible for overall program management including planning, scheduling, cost estimating, and system integration. In this regard, the Contract requires petitioner to appoint a full-time resident supervising representative, acceptable to DOE's contracting officer, who shall be in charge of all Project work at all times. The Contract further requires petitioner to be responsible for the employment of all personnel engaged in the work of the Project and for their training (and such personnel are not to be deemed employees of DOE or the U.S.); to administer all subcontracts, purchase orders and other contractual agreements made by petitioner; and to be responsible for maintaining satisfactory levels of employee competence, conduct and integrity.

8. As the DOE's M&O contractor for the Project, petitioner is subject to rules and regulations applicable to M&O contractors, which are identified in the Contract. In addition to the Contract, the relationship between petitioner and the DOE is governed by those provisions of

the Federal Acquisition Regulations (found at 48 CFR ch 1) (the "FAR"), formerly known as the Federal Procurement Regulations, and the Department of Energy Acquisition Regulations (found at 48 CFR ch 9) (the "DEAR") which are identified in the Contract. Many provisions in the Contract are direct quotes from the FAR and the DEAR. In fact, the 1986 version of the Contract includes direct and specific reference to the applicable regulations. The DEAR regulations include specific terms that must be included in an M&O contract. The DEAR includes a unique section regarding "M&O Contracting."

Procurements and Property Management

9. As will be shown, petitioner made a substantial amount of purchases under the Contract during the audit period. Petitioner's procurement policies and procedures, for which DOE approval is required, are included in its Procurement Manual. The Procurement Manual incorporates many provisions of the FAR and the DEAR and is modified to account for changes in regulations. The policies and procedures listed in the Procurement Manual summary and the summary itself are approved by DOE and cannot be changed without DOE approval. The Procurement Manual covers procedures and policies starting in the planning stage of procurements through the close out of procurements. The Procurement Manual also prescribes the method for implementing those policies and procedures which are subject to DOE approval.

10. Prior to the start of each fiscal year (October 1, through September 30), petitioner proposes the fiscal budget for the Project for that year. Petitioner submits the budget to the DOE for approval. When an employee of petitioner wants to purchase a piece of equipment for the project, the equipment would normally have been included in petitioner's budget recommendation and in the approved budget. If the item had not been included in the approved

budget, it cannot be purchased. Thus, the first step in procurement of an item for the Project is to see if the item is in the budget.

11. If the item is in the budget, it is then identified via a specification (i.e., a description of the work and basic and minimum requirements). During the audit period, the requisition for any expenditure over $10,000.00 required DOE review. The requisition for the item is prepared, signed by the employee requesting it, his immediate manager, and the budget person responsible for the applicable cost account. Depending on the price of the item, it may be signed off by petitioner's president before it is sent to petitioner's purchasing department.

12. When the approved requisition reaches petitioner's purchasing department, the purchasing department determines the applicable procedures for acquiring the item based on the Procurement Manual. Petitioner's purchasing department sends out for competitive bid proposals, if applicable, for the item, receives and evaluates bids, sends the proposals to the requisitioner, negotiates for the purchase, and prepares purchase orders to which its terms and conditions (which are approved by the DOE) are made applicable. If the award of the contract to a vendor requires DOE approval prior to award, petitioner requests DOE approval before awarding the contract and placing the purchase orders. The DOE's contracting officer for the Project is responsible for reviewing and approving purchases for the Contract. The contracting officer's procurement responsibility is to ensure that all Contract and applicable FAR and DEAR requirements are applied and to ensure that petitioner's procurement policies comply with the FAR and the DEAR. The DOE contracting officer does not always approve the purchases for which DOE approval is sought. For example, the DOE may determine that an item or service is not needed or may determine that the procurement process was deficient or noncompliant. In

those cases, the DOE would identify what action should be taken to rectify the deficiency, which action could include rebidding the requisition.

13. The DOE monitors petitioner's compliance with the Procurement Manual, the FAR and the DEAR in three ways. First, DOE review or approval is required for certain specific purchases. For example, during the audit period, DOE review was required for all requisitions over $10,000.00 and for certain awards. The current DOE specific approval requirements are set forth in Section 2.0 of the Procurement Manual. Moreover, the DOE has reserved the right to require petitioner to submit for approval any or all procurements under the Contract. Second, during the audit period the DOE contracting officer randomly sampled contracts and reviewed them for compliance. Third, as required by the FAR, the DOE performs contractor purchasing system reviews of the procurement systems of M&O contractors, including petitioner's procurement system.

14. Approximately every two years, the DOE has conducted a contractor purchasing system review of petitioner's procurement system. A contractor purchasing system review is a formal, in-depth review of petitioner's entire procurement system. Normally, five to ten DOE personnel are involved. With respect to procurement systems, a contractor purchasing system review includes a review of the contractor's purchasing procedures or manual to make sure it is up-to-date and in line with DOE requirements. In addition, a listing of purchases for the 12-month or 2-year period prior to the review is reviewed for unusual procurements, sole source procurements, procurements from suspended companies, and procurements that could represent unallowable costs. The DOE team performing the review then notifies petitioner of the transactions it wants to review. The DOE reviews the files for the transactions selected. The

DOE also reviews procurement activity as it relates to other departments, interviews the professionals, and looks at the adequacy of the training and expertise of the persons involved. After the review, the DOE provides a draft report to petitioner which, in turn, provides comments as to corrective actions to the DOE. The DOE then issues a final report with the corrective action to be taken. A copy of the finalized report is sent to DOE headquarters in Washington, which reviews the report, comments on it and instructs as to what to do about the contractor's purchasing system and future improvements. The DOE then monitors the corrective action via a follow-up audit.

15. DOE reviews of the procurement systems and procurements of non-M&O contractors are not nearly as extensive as its reviews of M&O contractors. Non-M&O contractors are reviewed under the FAR but not the DEAR. Moreover, that review is very minimal and is directed more toward commercial terms. The DOE generally does not mandate government terms or government-type purchasing procedures for non-M&O contractors.

16. Throughout the audit period, purchase orders issued by petitioner were made in the name of "West Valley Nuclear Services Corporation, Inc." Petitioner's purchase order forms applicable to the audit period indicate that the order is issued under DOE Contract No. DE-AC07-81NE44139 and is exempt from New York State sales tax. Although the purchase order forms state that a New York State tax exemption certificate is enclosed, petitioner did not acquire a tax exemption certificate from New York State. The purchase order forms do not state that petitioner is the agent of DOE or the United States, or that petitioner could make purchases as agent for DOE. Petitioner's purchase orders also incorporate by reference certain terms and conditions contained in other documents, such as the General Provisions for Fixed-Price Orders

(Form No. WV-19059). Form WV-19059 includes the portions of the FAR and the DEAR regulations that are required to be applied to subcontracts for the project. Many of these provisions are not contained in normal commercial contracts. For example, the Service Contract Act (41 USC § 351 et. seq.) and regulations of Secretary of Labor (Subpart C of 29 CFR 4), both of which apply to service procurements by Federal agencies, apply to subcontracts awarded by M&O contractors such as petitioner. The DOE requires petitioner to apply the Service Contract Act regulations (Subpart C of 29 CFR 4) in its subcontracts for services. The inclusion of certain provisions of the FAR and the DEAR in subcontracts are required by 48 CFR 970.71. Different terms and conditions may apply depending upon the dollar amount of the subcontract and, therefore, Form No. WV-19059 is separated into separate sections of applicable terms and conditions based on the dollar amount of the order. Form No. WV-19059 was approved by the DOE.

17. Section 4.107(b) of the Service Contract Act regulations provide, in pertinent part, as follows:

> [s]ometimes authority to enter into service contracts of the character described in the Act for and on behalf of the Government and on a cost-reimbursable basis may be delegated, for the convenience of the contracting agency, to a prime contractor which has the responsibility for all work to be done in connection with the operation and management of a Federal plant, installation, facility or program, together with the legal authority to act as agency [sic] for and on behalf of the Government and to obligate Government funds in the procurement of all services and supplies necessary to carry out the entire program of operation. The contracts entered into by such a prime contractor with secondary contractors for and on behalf of the Federal agency pursuant to such delegated authority, which have such services as their principal purpose, are deemed to be contracts entered into by the United States and

> contracts with the Federal Government within the meaning of the Act (29 CFR 4.107[b]).

This regulation is applicable to subcontracts for services entered into by petitioner as the DOE's M&O contractor for the Project. The DOE has delegated to its M&O contracts the authority discussed in 29 CFR 4.107(b). In this regard, the applicable regulation states that "[i]t is the policy of DOE that subcontracts awarded by management and operating contractors are subject to the Service Contract Act to the same extent and under the same conditions as contracts awarded directly by DOE." (48 CFR 970.7104-19[a].)

18. Section 10.3 of the Contract, regarding title to property, provides as follows:

> Title to Property. Title to all property furnished by the Government shall remain in the Government. Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any such property. The Contractor shall make such disposition of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the contractor, title to which vests in the Government under this section, are hereinafter referred to as "Government Property." Title to Government Property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government Property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty. Title to the NYSERDA Property furnished to the

> Contractor pursuant to Section 10.2 above shall remain in NYSERDA.

Thus, title to all property purchased by petitioner for the Project passes directly from the vendor to the government and never passes to petitioner. The DOE requires Section 10.3 to be included in the Contract. Vendors and subcontractors are advised that title to supplies passes directly to the government and not to petitioner. The regulations applicable to M&O contracts require that the title passage provision be included in subcontracts.

19. The provision regarding title passing directly from the vendor to the government is not included in non-M&O contracts. In non-M&O contracts title passes after reimbursement is made to the contractor, which can be 30 to 60 days after the property is received by the contractor.

20. The majority of the property purchased by petitioner under the Contract is delivered to the Project site in West Valley, New York. Some items purchased for the Project are first delivered to temporary warehouse space in Buffalo. In addition, on some rare occasions an item is delivered to another vendor for testing or incorporation into equipment that is then sent to the project site.

21. In making procurements for the Project, petitioner is required to follow the "Federal norm" described in 48 CFR 970.7103(b). The "Federal norm" rules do not apply to subcontracts of non-M&O contractors.

22. Similar to a direct Federal government procurement, procurements made by petitioner for the Project may be protested. In this regard, 48 CFR 970.7107(a) provides generally as follows:

> The General Accounting Office (GAO) policies on protests state that GAO will consider subcontract-level protests when the subcontracts are "by" or "for" the Government. The term "for" has generally been defined by the GAO as including acquisitions by management and operating (M&O) contractors.

In addition, with respect to procurements of automatic data processing equipment, the regulation provides as follows:

> The General Services Board of Contract Appeals hears subcontract level protests involving the purchase of Automatic Data Processing Equipment (ADPE) . . . only in cases in which the prime contractor is acting as a purchasing agent for the Government. Should a protest be lodged against an M&O's purchase of ADPE, upon receiving notice of the protest, the cognizant DOE contracting officer shall promptly notify local counsel and the Office of Assistant General Counsel for Procurement and Finance, headquarters (AGCPF). The Department's position on such subcontract level protests shall be coordinated with the AGCPF. The contracting officer, promptly after receipt of a protest, and the decision(s) of the GSBCA, shall also furnish a copy thereof with related pertinent correspondence to the Business Clearance Division, Headquarters (48 CFR 970.7107[g]).

23. Protests of subcontractor procurements under a DOE M&O contract, such as the Contract, are handled by the General Accounting Office. If a subcontractor for the Project were to protest a solicitation or award, the subcontractor could proceed as if it was dealing directly with a Federal agency, following the protest procedures applicable to bidders of government contractors. This is a unique rule applicable to M&O contracts. The General Accounting Office will not take jurisdiction over protests of non-M&O subcontracts.

24. The DOE has to defend subcontractor protests under M&O contracts to the General Accounting Office. In such proceedings, the DOE contracting officer and the DOE counsel represent the DOE and the M&O contractor supports the contracting officer by providing

information. The DOE contracting officer, and not the M&O contractor, controls the resolution of the matter with the General Accounting Office. If the contracting officer finds merit in the protest, he can direct the M&O contractor to take whatever remedial action needs to be taken to resolve the protest.

25. Section 9.1 of the Contract provides, in part:

> Procurement arrangements under this contract shall be made in the name of the Contractor, shall not bind nor purport to bind the Government, shall not relieve the Contractor of any obligation under this contract (including, among other things, the obligation properly to supervise, administer, and coordinate the work of subcontractors) . . . .

26. DOE is responsible for paying all allowable costs under the Contract and DOE approval is required for petitioner to sue to enforce a subcontract.

27. As an M&O contractor, petitioner is authorized and required to use the Federal government's sources of supply in making purchases of materials, supplies, equipment and non-personal services for the Project. Pursuant to a letter dated October 9, 1981 from Charles E. Williams, a DOE manager to Mr. R. C. Mairson, petitioner's (former) Project Manager ("October 9, 1981 letter"), petitioner was "authorized under [its] U.S. Department of Energy (DOE) Prime Contract No. DE-AC07-81NE44139, to act as agent for the DOE for the purpose of placing orders against Federal Supply Services Stores Depots and Government supply contracts . . . ." In addition, the letter authorizes petitioner to "Issue Tax Exemption Certificates in lieu of payment of state or other taxes for which the DOE is not liable." The letter recognizes that it establishes an "express agency relationship" in connection with petitioner's performance of the authorized functions referred to therein. Petitioner received similar authorization letters from

the DOE dated July 17, 1991 and February 6, 1995. When petitioner uses a Federal supply source, petitioner gives the source a copy of the letter as proof that it is entitled to use the source just like the Federal government. The letter is a formality which reminds petitioner to use Federal supply sources, which it is required to do, and introduces petitioner to such sources. Without the letter, a Federal supply source would not accept a purchase order from petitioner.

28. Although the Contract is a cost reimbursement contract, petitioner does not advance its own money to pay vendors and subcontractors for the Project before reimbursement by the DOE. Instead, purchases of property and services for the Project are paid for using checks drawn against the DOE's special bank account. Money deposited in the special bank account belongs to the Federal government. The Special Bank Account Agreement provides that the Government has title to the credit balance in the special bank account. Money is deposited in the special bank account as the bank draws on a letter of credit issued by the DOE in favor of the bank.

29. The letter of credit is a checks-paid type of letter of credit. The checks-paid letter of credit requires a special contract between the DOE, the contractor (in this case, petitioner) and the financial institution. No new checks-paid letters of credit can be issued by the DOE unless it first obtains prior approval from the Department of the Treasury. The balance in the special bank account is to be kept as close to zero as administratively possible and the DOE monitors each check-paid letter of credit account to ensure the account balances are minimized. Letters of credit are very seldom used for non-M&O contracts.

30. As noted, under the Contract title for property purchased for the project passes to the government. Petitioner does not own anything purchased with DOE funds under the Contract. Petitioner does not own any tangible property. Moreover, petitioner has not claimed any

depreciation deductions on its Federal income tax returns because it does not own any depreciable property. Similarly, petitioner does not claim any research and development deductions or credits on its income tax returns since it is government money that is spent on such expenditures.

31. Petitioner is required to monitor the DOE's property at the Project site. Among other things, petitioner is required to affix a "U.S. GOVT. PROP. ID" bar code sticker on certain property when it is received at the Project site. Property costing $350.00 or more that is easily converted to personal use (sensitive property) and property costing over $5,000.00 (capital property) is so "tagged."

32. Sensitive property must be inventoried every year, capital property is inventoried every other year and the warehouse is inventoried on a perpetual basis. Office supplies and similar items must also be inventoried. The inventory information is reported to the DOE.

33. Petitioner is required to follow Federal government procedures to dispose of any property that is no longer needed at the Project. If property is no longer needed at the Project, it is made available to the entire DOE and entered onto the DOE's reportable excess automated property system. The property is included in a catalog and routed to DOE facilities for 30 days. If no one at the DOE needs the property, it is put on the General Services Administration's system and routed on its list for another 60 days. If the property is not picked up by a government agency from the inter-governmental excess property list, it is disposed of as the contracting officer or the DOE directs. Petitioner has negotiated an auction contract so that excess property from the Project that is not picked up from the list, once the DOE approves, is put out for auction and sold. Any money received from the sale of excess property from the

Project is deposited in the special bank account for future Project use. If the excess property is donated to charity, petitioner does not claim a charitable deduction for it because it is government property. If property is acquired by petitioner from the DOE's or General Services Administration's excess property lists, only the transportation cost to get the item to the Project site is incurred by the DOE. This is because the property is already owned by the Federal government.

34. Petitioner cannot use DOE property for any purpose other than performing its obligations under the Contract. Petitioner cannot even use DOE property at the Project in renegotiating the Contract when its term expires. Instead, petitioner, using Westinghouse money, rents separate space and equipment for such purpose.

35. Petitioner's employees also cannot use DOE property for their own personal purposes. Petitioner's employees are given instructions on the use of DOE property. Petitioner's Property Guide informs employees that:

> Government property may only be used to perform official work of the United States Government. Here at WVNS this means work that is performed under our contract with the Department of Energy. Any loss, damage or destruction of this property is to be promptly reported to your immediate supervisor and Property Accounting. Personal use of government property is strictly prohibited.

For each item of sensitive property, petitioner's employee who is responsible for the item is required to sign a Custodial Agreement. In the Custodial Agreement, the employee acknowledges that the property "is the property of the U.S. Government." In addition, signs in the warehouse remind anyone entering that "All Material Stored in this Warehouse is Property of the U.S. Government And is for Government Use Only."

36. The use of the DOE's property by petitioner's employees is monitored by security and management. If it is discovered that an employee of petitioner is using DOE property inappropriately or is taking it from the Project without proper authorization, the employee can be subject to disciplinary action.

37. At the end of the Contract, petitioner and its employees can take from the Project site only items that belong to them personally, i.e., that they paid for with their own money. Everything else would stay.

38. An M&O contract creates a "special relationship" between the Government and the contractor, for which Government-owned or Government-controlled facilities must be used and for which the Government must maintain a special, close relationship with the contractors (see, 48 CFR 16.604). The Contract does not, however, describe petitioner as DOE's agent. There is nothing in DOE's files which describes petitioner as the agent of DOE, or which describes any other M&O contractor as DOE's agent. Nor do the applicable regulations describe M&O contractors as "fiduciaries" of DOE.

39. M&O contracts are the exception to the type of contracts the DOE generally awards. To enter into an M&O contract the DOE must have the approval of either the Secretary of Energy or the Under-Secretary or Deputy Secretary, which is not typical of the level of authorization for any other contract DOE enters into. The level of authorization is required for an M&O contract because of the close, ongoing relationship between the DOE and the M&O contractor.

Vitrification and Pretreatment

40. As noted above, a major purpose of the Project is "demonstrating solidification techniques which can be used for preparing high level radioactive waste for disposal" (Pub

L 96-368, § 2[a]). Between April through June of 1983, the DOE determined that the high level waste at West Valley would be converted to a borosilicate glass form, through a process called vitrification. In the early 1980's the DOE had been investigating the vitrification process, but only in laboratories on a small scale basis. No full scale demonstration of the applicable vitrification process had been performed.

41. At that time the French, Belgians, British, Japanese and Soviets were also developing vitrification processes. Indeed, a large scale vitrification facility was in operation in France prior to the commencement of the West Valley Project. The French vitrification process could not be used in the United States, however, because of the differences in the manner in which France and the United States stored their wastes. In France, nuclear waste is stored in an acidic form in stainless steel tanks. There are no particles in the wastes, solids having been dissolved in nitric acid for storage. In the United States, nuclear waste is stored in a basic (i.e., with a pH greater than 7) or caustic state in carbon steel tanks. In the United States, the waste is a combination of a solid and a liquid stored in the same tank. The U.S.-type of waste could not be fed into the French vitrification process machines because the solid part of the waste would result in plugging, and would handicap operations. Therefore, it was necessary to develop a vitrification process and facility different from that used in France.

42. The DOE also has responsibility for two other sites that have nuclear waste similar to the waste located at the Project site. These two other sites are the Savannah River site in South Carolina and the Hanford site in the State of Washington. The Project site has two tanks of high level nuclear waste. The Hanford site has 177 tanks and the Savannah River site has 51 tanks of high level nuclear waste.

43. In the early 1980's, bench scale developmental work on the vitrification process was being performed at the Pacific Northwest Laboratory at the Hanford site and in laboratories at the Savannah River site, using small furnaces (melters) and very small quantities (milliliters) of high level waste which were mixed with glass-forming chemicals to produce borosilicate glass. The glass was then analyzed for various properties, including leach resistance (i.e., how well the glass retains the radioactive material). However, no full scale testing or demonstration of the vitrification process had been performed. In fact, to the date of the hearing, vitrification has not been performed in the United States on a full scale basis using radioactive waste.

44. In this regard, the House of Representatives Science and Technology Committee's report on the Act states the following:

> Existing federal regulations require that new, commercially reprocessed high-level liquid nuclear wastes be solidified for ultimate disposal within five years after production. Various solidification technologies and handling techniques have been under development for sometime to fulfill this requirement. However, technical information and first hand experience, which can only be obtained from data collected from the proper scaling of demonstration projects utilizing solidification technologies, is lacking and is necessary to provide an important link in the ultimate implementation of an overall national nuclear waste management program. The Committee believes that the technological base is adequate to proceed with such a scaled up demonstration of solidification, handling, and disposal techniques. . . . The West Valley project offers the next logical step in efforts to demonstrate existing technological capability in the nuclear waste area, as well as providing a valuable opportunity for additional research and development . . . . [T]he major benefit from this project will accrue to the Federal Government and the National Nuclear Waste Management Program through advancement of research and development of handling, processing, solidification, and decommissioning techniques for high level nuclear waste . . . . (HR Rep No. 96-1100, 96th Cong, 2d Sess, Pt. 1, 7, 8, reprinted in 1980 US Code Cong & Admin News 3099, 3103.)

45. The views of DOE on the value of the West Valley Demonstration Project were also set forth in the Science and Technology Committee's report:

> The proposed solidification project at West Valley would be of significant value to the national waste management program. It would demonstrate the removal, processing, and solidification of alkaline and acid high-level wastes in an integrated production scale plant. We have never demonstrated the solidification of alkaline high wastes on a significant scale. The acidic high-level wastes at West Valley are derived from thorium fuel. We have little experience with such thorium wastes. We have demonstrated the solidification of acidic uranium based high-level waste on a limited scale but have not operated a production scale system for that purpose either. The operation of such an integrated demonstration provides valuable information that is not attainable either from small-scale or limited radioactive tests, or from full-scale "cold" tests.
>
> Specifically, the West Valley Solidification Program will provide valuable information to the national waste management program in a number of ways. A significant decontamination effort will be required including the removal of old equipment from the reprocessing plant so that the solidification project equipment can be installed. This initial decontamination of the plant and the disposition of the old equipment will give us more experience for future decontamination and decommissioning (D&D) activities.
>
> Second, the project includes the removal of the dense sludge layer from the bottom of the tank, and the D&D of the storage tanks. The West Valley tanks have a complex structure that will give us operational experience that is not attainable at our sites and may advance waste removal technology. The D&D of the tanks will represent the first cleanup and disposal of a high-level waste storage tank.
>
> Third, the project will demonstrate the operation of a full-scale solidification system. We have immobilized waste on a laboratory scale and have calcined Idaho's wastes for over seventeen years. Acidic waste from six commercial spent fuel assemblies has been vitrified. Mockups and small scale “cold” and “hot” process operations are being performed at several facilities;

> however, the West Valley program will represent the first fully integrated, sustained operation of a "hot" high-level waste (HLW) solidification system. The West Valley project represents a logical next step towards the larger facility that we are planning for immobilizing the defense high-level wastes at Savannah River, and it may utilize one of the advanced waste forms we are developing as alternatives to borosilicate glass.
>
> Certain environmental analyses and the environmental impact statement for West Valley will be the first for a high-level waste solidification project and will be valuable for future projects.
>
> Finally, the project will demonstrate solidification of high-level wastes from the thorium fuel cycle. Such wastes has [sic] been solidified in the laboratory on a very small scale. A plant scale demonstration at West Valley would be a major advance.
>
> For budget purposes, our West Valley activities were classified as a remedial action pending a definition of the scope of DOE's involvement. The project definition has clearly shown that the project will have considerable value as a demonstration of high-level waste technology. We are, therefore, managing the project along with our technology and defense waste operating programs rather than as a remedial action, and will request any future authority under a separate category in the commercial waste management budget. (HR Rep No. 96-1100, 96th Cong, 2d Sess, pt. 1, 13, 14, reprinted in 1980 US Code Cong & Admin News 3099, 3109, 3110)

46. The report of the House Science and Technology Committee further states that:

> [t]he Committee intends this project to demonstrate technologies available for handling, processing, and solidifying high level liquid nuclear wastes as well as for decommissioning and decontamination on everything contaminated as a result of the solidification process towards the end of this project. (HR Rep No. 96-1100, 96th Cong, 2d Sess, pt. 1, 8 reprinted in 1980 US Code Cong & Admin News 3099, 3104.)

47. The House Committee on Interstate and Foreign Commerce also reported on the Act, prior to its passage, stating, in part:

> This Committee recognizes that the program authorized under this bill has an important demonstration value, in that past high-level liquid radioactive waste activities have been confined to small scale projects. Consequently, a program of the magnitude of the West Valley project has significant demonstration implications, expanding the waste solidification program beyond its present research and development stage . . . .
>
> However, the basis for this Committee's action in reporting this bill was primarily directed towards the health and safety implications posed by the storage of high-level radioactive waste in liquid form . . . . Consequently, this Committee views the project authorized by this legislation as essentially a remedial action program with substantial demonstration value . . . . (HR Rep No. 96-1100, 96th Cong, 2d Sess, pt. 2, 15 reprinted in 1980 US Code Cong & Admin News 3099, 3122.)

48. Representatives of the General Accounting Office testified before the House Interstate and Foreign Commerce Committee at a hearing on the Act. The legislative history of the Act indicates that:

> The GAO went on to state that "[i]n our view, the proposed project at West Valley should more logically be described as a remedial action program with some demonstration value than as a demonstration project where they have full Federal support. While dealing with West Valley's high-level liquid waste may help build public confidence of how commercial high-level liquid waste can be permanently disposed of, the technical demonstration benefits of this project are limited". (HR Rep No. 96-1100, 96th Cong, 2d Sess, Pt. 2,7 reprinted in 1980 US Code Cong & Admin News 3099, 3114.)

49. Taking the vitrification process which has been performed only at laboratory scale to a full scale facility involves technical complexities, including maintaining the equipment so it has a sufficient service life and operating the equipment remotely. A full scale demonstration of the process and technologies is necessary to show not only that it can be done, but also to prove the

methods by which it can be done. In addition, it is necessary to demonstrate that the waste form produced will meet the requirements for disposal at a Federal repository.

50. A facility in which the vitrification would take place at the Project was designed. Part of the design effort involved taking samples from the high-level radioactive waste tank at the Project site. The samples were taken to identify the analytical makeup of the contents of the tank and to compare that to the borosilicate glass to be made. Petitioner spent considerable time testing the waste and developing the best chemical "recipe" to be used to produce the vitrified glass logs. It was determined that if all the waste in the tank was solidified in glass logs (2 feet in diameter and 10 feet long cylinders), 1500 to 1800 glass logs would be produced because of the chemical makeup, as opposed to the radioactivity, of the waste in the tank. Petitioner sought to develop and developed a pretreatment system for separating the chemical constituents of the tank from the radioactive material, which reduced to about 300 the number of glass logs to be produced. It was important to reduce the number of glass logs to minimize the disposal space required for them.

51. Although it contained only simulated waste, the first glass log was produced by petitioner in December 1984. Previously, a full-size, nonradioactive glass log was produced using the West Valley reference process by Pacific Northwest Laboratories in or about mid-1983.

52. The main waste tank (8D-2) at the Project site had 600,000 gallons of radioactive waste in it when petitioner arrived at the Project. To separate out the radioactivity (Cesium 137) from the waste in the pretreatment system, petitioner selected an ion exchange medium called zeolite. This use of zeolite had been previously demonstrated and tested on a small scale. Petitioner received considerable support from Pacific Northwest Laboratories in the tailoring of

the zeolite for petitioner's use. Petitioner installed a pump in the main tank and process equipment, including ion exchange columns, in a spare tank (8D-1). The liquid in the main tank was run through the ion exchange columns containing zeolite in the spare tank. The zeolite removed Cesium 137 from the liquid waste. The waste from which the Cesium 137 had been removed then went through a liquid waste treatment system in which excess water was boiled off, resulting in a small volume of pretreated waste. After the pretreated waste had Cesium 137 removed, using zeolite in the ion exchange columns in the spare tank, and had gone through the liquid waste treatment system, the pretreated waste then went through a cement solidification system in which it was mixed with cement and then fed to 71 gallon square drums which were transported to a drum storage building (the "drum cell") for storage.

53. The radioactive dose rate of the cement drums is much lower than the expected dose rate of the glass logs to be produced in the vitrification process. The radioactive dose rate from the glass logs is expected to be about 70,000 to 100,000 times higher than the dose rate from the cement drums.

54. Petitioner then performed a "sludge wash" on the waste in the main tank. Simply put, this involved mobilizing the sludge or mixing it up in the bottom of the tank, suspending it in water, running pumps installed in the tank and then shutting the pumps off. In the process, chemicals that had previously been precipitated in the sludge were more readily soluble in the liquid and some redissolved in the liquid. This liquid waste was then run through the pretreatment system and converted to cement form after Cesium 137 and excess water had been removed in the pretreatment system. The pretreatment system is operated remotely because the radiation level is too high for hands-on operation.

55. When petitioner completes the sludge washes, it will move the used zeolite, which is now in the bottom of the spare tank, to the main tank. Thus, the radioactivity that was removed in the pretreatment system will go back to the main tank to be fed with the remaining "washed" sludge into the vitrification process and made into glass logs.

56. The pretreatment system resulted in a number of new developments. First, a recipe had to be developed for the cement waste that would meet U.S. Nuclear Regulatory Commission ("NRC") requirements. Petitioner's cement recipe was the first that the NRC accepted for Type C cement. In addition, each time the chemistry of the feed stream of waste material changed, petitioner had to demonstrate again for the NRC that it had a suitable cement recipe for that particular feed stream. Part of NRC's review and acceptance of the cement involved petitioner's agreement to periodically test the cement for long-term radioactive and structural performance against NRC requirements.

57. A square drum was designed for storage of the cement so that the stored drums would take up less space than the normal round drums. Round drums take up more space because of the void space between them. Petitioner developed the square drum with the help of a commercial supplier.

58. The use of zeolite as an ion exchange material was advanced at the Project. Before its use at the Project, there had only been limited experience with zeolite. It had not been used in the size of the ion exchange columns that petitioner needed to use. Petitioner had been concerned whether the zeolite's decontamination factor, the gauge of the efficiency of the Cesium removal, would be present in a large scale use. Because of the Project's success with zeolite, the

Savannah River site is looking at using ion exchange as a means of pretreatment in lieu of processes they had been considering.

59. The sludge mobilization process also resulted in a new development, modified pumps, which can be used in sludge mobilization. While petitioner utilized mixer pump designs obtained from the Savannah River facility, petitioner identified those designs for use at West Valley. The Savannah River site subsequently modified its pumps based on the Project's experience with sludge mobilization pumps.

60. With respect to the vitrification process, petitioner has performed and continues to perform, and has had and continues to have others perform, laboratory scale testing. In addition, a full scale prototype of the vitrification facility was constructed at the Project site. This involved the design, fabrication, purchase and installation of equipment. Petitioner's use of a full scale prototype after only laboratory scale testing differed from normal practice. Typically, testing is done on increasingly larger scales between laboratory scale and full scale testing. The full scale prototype facility was operated on a "hands-on" basis, without radioactive shielding. For a five-year nonradioactive test run, petitioner operated the prototype vitrification facility using a nonradioactive waste simulant to represent the high level radioactive waste. As part of this testing, petitioner added pieces to the system as each new component was built. This approach allowed petitioner to begin testing the system components right away. After the five-year test, the equipment was removed and certain items were examined. For example, the slurry fed ceramic melter, the main piece of vitrification equipment, was destructively examined to evaluate its condition and determine the suitability of its design and materials for radioactive use.

61. The five-year nonradioactive test program demonstrated that the system and its components could work on a full scale basis, that the chemicals could be mixed and transferred from tank to tank without unwanted settling, and that the distributive control system could be used to control the facility. In addition, during the last 45 days of the 5-year nonradioactive vitrification test program, the system was operated remotely, which demonstrated that the system was capable of remote operation.

62. After the five-year test program, petitioner installed a one-twelfth scale melter (the "mini melter") which it is using for further nonradioactive testing of the actual process of glass production.

63. The radioactive vitrification operation at the Project, which has not begun, is expected to last for 30 months, or approximately one-half of the length of time of the five-year test operation. It is expected that vitrification of the nuclear waste at the Savannah River site will take 30 years and at the Hanford site will take 30 to 40 years. Neither the Savannah River site nor the Hanford site has begun radioactive operations.

64. Since the five-year test program was completed, petitioner has been converting the vitrification facility from nonradioactive to radioactive use. This includes installing walls, shielding, piping and piping penetrations, windows and equipment.

65. At the DOE's request, petitioner has prepared approximately 70 technical reports, with 30 more scheduled. The DOE pays for the cost of the reports. In addition, at the DOE's expense, petitioner's engineers and scientists present papers and give speeches to technical associations regarding the Project.

66. From the DOE's perspective, the Project is a research and development contract. Petitioner's fee for the Project depends, in part, upon the DOE's characterization of the type of work performed. From the time petitioner began receiving an award fee and up until the late 1980's, the DOE classified the Project wholly as research and development. Beginning in the late 1980's, the DOE moved away from its 100 percent research and development classification to classifying the Project as 75 percent research and development and 25 percent production. The DOE considers the vitrification and cement solidification processes as research and development and considers site services, such as maintenance and janitorial services, as production. The award fee pool for the Project is reduced if the portion of the Project considered by the DOE to be research and development is decreased. Thus, the DOE pays a higher fee with respect to the percentage of the work that is classified as research and development.

67. After the high level radioactive waste at the Project site is solidified and all the requirements of the Act are fulfilled, the DOE is required to turn the site back to NYSERDA. The condition of the Project facilities at the time of surrender of the Project site at NYSERDA has not been determined, and will be the subject of an environmental impact statement before a final determination is made by the DOE. A number of alternatives for site closure will be considered. At one extreme is an alternative called the "no action alternative," which would mean the facility would remain forever as it is at the end of the Project activities. At the other extreme is an alternative which would involve removing everything from the site to allow unrestricted future use. This would include exhuming waste buried by NFS, demolishing buildings, decontaminating soil, etc. There are at least three alternatives between the two

extremes under which, to varying degrees, the buildings at the site are cleaned up and the facilities constructed for the Project are removed.

Reliance on February 22, 1982 Letter

68. Petitioner received a letter dated February 22, 1982 (the "February 22, 1982 letter") from Arthur Proper of the Sales Tax Instructions and Interpretations Unit (the "Unit") of the Division of Taxation ("Division") stating, in relevant part:

> Your file requesting exemption from sales tax has been forwarded to us for review and comment.
>
> Based on the information furnished in a letter dated October 9, 1981 by the Department of Energy Idaho Operation Office, it is considered that you may act as an agent in the performance of contract No. DE-AC07-81ME44139[sic].
>
> As an agent for the federal government you may make purchases on their behalf. In order for the transaction to be exempt from sales tax, the billings must be billed to West Valley Nuclear Services Company, Inc. as agent for Department of Energy Idaho Operations Office. The payment for the purchases must be made from a special fund created for that purpose.

69. Neither petitioner nor the Division has any record of what was sent to the Division and what was reviewed by the Division which resulted in the issuance of the February 22, 1982 letter. The February 22, 1982 letter refers to a letter dated October 9, 1981, which is discussed herein at Finding of Fact "27."

70. Petitioner implemented the February 22, 1982 letter by sending a copy of the letter to all its vendors, implementing payment via the DOE's special bank account and the DOE checks-paid letter of credit, and including on its purchase order form that the purchase is made under a prime contract with the DOE and is exempt from sales tax.

71. During the audit period, petitioner relied on the February 22, 1982 letter and did not pay sales tax on purchases made under the Contract. During the audit period, petitioner sent a copy of the February 22, 1982 letter to all its vendors and subcontractors.

72. After the February 22, 1982 letter petitioner corresponded with the Unit by a letter dated February 15, 1984 from G.E. Whitfield, one of petitioner's senior subcontract administrators, to Mr. A. Proper of the Unit. The letter from Mr. Whitfield states that it is submitted based on a telephone conversation on February 14, 1984, discusses the Project generally, and sales tax requirements of construction contractors (i.e., subcontractors) for the Project. Among other things, the letter notes that "[y]our letter of February 22, 1982, relative to WVNS tax exempt status (copy enclosed) is not applicable to the third party, the subject construction contractors." The Unit responded to the February 15, 1984 letter by a letter dated March 12, 1984 from Nora Knaggs of the Unit addressed to Mr. Whitfield, which states that it is in reply to the February 15, 1984 letter and discusses only purchases made by subcontractors.

73. On August 4, 1987, the Division's Technical Services Bureau received a petition for an advisory opinion from Butler Mechanical, Inc. An advisory opinion dated December 22, 1987 was issued in response to said petition (see, TSB-A-88[7]S). The advisory opinion states that Butler Mechanical, Inc. has a contract to perform services at the Project. The issue presented in the advisory opinion is whether Butler Mechanical, Inc. is "required to pay sales tax on equipment it rents when it performs a contract for the Federal government." The advisory opinion indicates that Butler Mechanical, Inc. submitted a copy of the Contract and a copy of the February 22, 1982 letter in support of its petition. In its petition Butler Mechanical, Inc. asserted that it was acting as an agent for the Federal government, and that, as such, the Federal

government was the lessee of equipment used by Butler Mechanical, Inc. to perform services. The advisory opinion rejected this assertion of agency and also concluded that the February 22, 1982 letter wrongly determined that petitioner (i.e., WVNS) was an agent of the Federal government. The advisory opinion explicitly rescinded said letter and stated that Butler Mechanical, Inc. could not rely on the letter.

74. On August 29, 1989, the Division's Technical Services Bureau received a petition for an advisory opinion from petitioner wherein petitioner raised the issues of whether it was an agent of the Federal government and whether, based on the February 22, 1982 letter, the Division was estopped from assessing any sales or use tax prior to January 31, 1989. The opinion indicates that petitioner submitted copies of the Contract and the February 22, 1982 letter to the Technical Services Bureau. In an advisory opinion dated February 7, 1990, the Technical Services Bureau rejected petitioner's assertion of agency status and further stated that the February 22, 1982 letter was erroneous and that petitioner may not rely on that letter (see, TSB-A-90[7]S).

Audit Results

75. The audit herein began with a meeting between representatives of petitioner and auditors of the Division on January 25, 1989. During the course of this meeting the Division's auditors advised petitioner's representatives of the Division's position that it did not consider petitioner to be an agent of the Federal government. The auditors specifically advised petitioner's representatives of the advisory opinion issued to Butler Mechanical, Inc., dated December 22, 1987.

76. Following a computer-assisted statistical sampling audit of petitioner's books and records, the Division issued two notices of determination and demands for payment of sales and use taxes due dated March 13, 1991 (the "Notices"), asserting additional sales and use tax due in the aggregate amount of $4,547,448.18, plus interest, for the period December 1, 1985 through February 28, 1990. At the hearing, the Division conceded the portion of the tax set forth on the notices that was based on statistical sampling and not a detailed audit, reducing the amount of tax at issue to $2,694,167.37. Also at the hearing, petitioner conceded that $3,422.18 of tax is due with respect to items the costs of which were unallowable costs under the Contract and were paid out of petitioner's fee. Following the hearing, the Division conceded the nontaxability of three items (see, letter from Brian McCann, Esq., to the administrative law judge dated May 1, 1995). The total tax originally alleged to be due with respect to the three items conceded by the Division is $9,124.31. As a result of these concessions, the total tax remaining at issue in this matter is $2,681,620.88.

77. Following the hearing, petitioner submitted a schedule of purchases of property and services which the Division treated as taxable in the audit. Petitioner does not concede that these items are taxable, but has conceded that they do not qualify for the capital improvement or research and development exemptions from sales and use tax. The total tax alleged to be due with respect to such items is $516,170.80. At the hearing, petitioner submitted a schedule of the utilities transactions (i.e., telephone, natural gas and electricity) with respect to which the Division alleges tax is due. Pursuant to the Cooperative Agreement, the DOE is required to pay or cause to be paid all charges or expenses for such utilities. Total tax alleged to be due with respect to purchases of such utilities is $336,896.98.

78. The Project and the DOE have not set aside funds or budgeted for payment in the event this case is resolved in favor of the Division. Given the way the DOE budget process works, if tax is ultimately determined to be due, the Project's budget would need to be replanned and either something planned would be delayed or just not done. If some aspect of the Project is delayed, e.g., either because petitioner has to delay purchases or lay off employees to cover the tax liability, petitioner's award fee may be reduced. An impact to the Project's schedule may have an indirect impact on petitioner's and Westinghouse's ability to successfully bid future work. Petitioner has had some experience in the past with not being within schedule and within budget. Petitioner was criticized and its award fee scores were lowered and its fee earned was reduced as a result. More recently, petitioner has stayed on or slightly ahead of schedule and on or slightly under budget and has been rewarded in the award fee process. Failure to continue to deliver on schedule and on or under budget may result in petitioner's being subjected to budget cuts. If, instead of relying on the February 22, 1982 letter, sales tax had been paid as items were purchased during the audit period, petitioner would have been better able to manage the effect of the tax on the Project's budget.

Specific Purchases Claimed by Petitioner to Result in Capital Improvements

79. Petitioner asserts that the following items were capital improvements, excluded and exempt from sales tax pursuant to Tax Law § 1105(c)(3)(iii) and § 1115(a)(15), or, alternatively, were tangible personal property exempt under Tax Law § 1115(a)(16):

a. Vitrification - Building Components (Ex. 41, pt. 5, P.O. Nos. 12753, 39620 and 30712). These purchase orders relate to the construction of building facilities for vitrification, including the construction and installation of three to four feet thick concrete columns, walls and roof (P.O.

No. 12753), 3600 tons of crusher run limestone used for part of the building foundation (P.O. Nos. 39620) and a steel floor/pit cover (P.O. No. 30712).

b. Conveyor/cranes.

1. Drum Load Out Conveyor System (Ex. 45, second summary, pt. 2, P.O. Nos. 21740, 30697, 21148, 24063, 28423, 21342, 15210, 35534, 05838 and 22587). The square drums enter and leave the cement solidification system ("CSS") on a conveyor, roller system. The conveyor system is fairly light at the load end stage, when the drums are light and empty. After the drums have been filled with cement, they weigh approximately 1,000 pounds each. The drum load out conveyor system is heavier than the load in system and consists of a series of conveyors, drive motors and roller systems that operate remotely from a control room. The drum load out conveyor system also includes heavy duty scales and monitoring systems for weighing and monitoring the drums. The drum load out conveyor system is attached to the structural steel of the building and is bolted and grouted into the building's concrete floor assembly. The drum load out conveyor system was specifically designed to function in the location in which it is located. The CSS, which is part of the pretreatment system, could not operate without the conveyor, which is tightly packaged into a very small area.

2. Drum Cell Conveyor (Ex. 45, second summary, pt. 4, P.O. No. 24632). The drum cell conveyor is another conveyor/roller system. It is located in the drum cell where the cement-filled square drums are stored. The conveyor takes the drums from the square drum transport cask into the drum cell to the point where the drum cell crane can then reach the square drums. The conveyor system is in a tight shielded cell area. It was designed specifically to take two drums at a time, separate them, lay each on its side and set it in a diamond configuration so the

drum cell crane can pick it up. The conveyor system is attached to the drum cell in a concrete shield wall area and is anchored to the concrete structure. The drum cell could not be used as intended without the conveyor.

3. Drum Cell Crane (Ex. 45, second summary, pt. 5, P.O. No. 21053). The drum cell crane is operated remotely in the drum cell. It picks up square drums from the drum cell conveyor, and moves and stations them inside the drum cell. The drum cell crane was designed for this specific use. Removal of the drum cell crane would require dismantling the building structure. The drum cell could not be used as intended without the drum cell crane.

c. Ventilation Systems.

1. Contact Size Reduction Facility Ventilation System (Ex. 47, pt. 1, P.O. Nos. 25680, 29695, 28679, 29915 and 21237). These purchase orders relate to the ventilation system in the contact size reduction facility, a facility used to volume reduce radioactive waste to minimize the amount that needs to be stored. The ventilation system is used to control the airborne contamination by exhaust ventilation. The ventilation system is a high-efficiency air filtration bank of filters that removes airborne contamination from the air prior to releasing it into the environment through a stack and release point. The contact size reduction facility ventilation system is housed in its own separate building installed on top of another building. Removal of the ventilation system would require completely disassembling the building in which it is enclosed, and cutting free the welded supports that support the weight of the ventilation system on the roof.

2. STS Ventilation System (Ex. 47, pt. 2, P.O. Nos. 25541 and 15264). These purchase orders relate to the ventilation system for the supernatant treatment system ("STS"), which is part

of the pretreatment system. The ventilation system consists of filters in a welded housing and exhaust blowers. The STS ventilation system was installed while the building was under construction. The building was built over the top of the ventilation system, with concrete walls poured on each side to segregate the ventilation system from other pieces of equipment in the building. As a result, the ventilation system could not be removed without damaging the building. The building would need to be dismantled to remove the STS ventilation system. The STS ventilation system is attached to the building via stainless steel welded to supports in the floor of the building.

3. Temporary Ventilation System (Ex. 47, pt. 3, P.O. Nos. 12720 and 14571). In order to construct the STS system, a temporary ventilation system was necessary before the permanent STS ventilation system was installed. This temporary system was used during construction of the STS and has since been removed. It was necessary to install the temporary system before the permanent system was in place in order to have some ventilation system to prevent contamination from backing up during construction.

d. Environmental Monitoring Wells (Ex. 47, second summary, P.O. Nos. 37777, 23387, 40327 and 21363). Environmental monitoring wells have been installed at the Project to monitor groundwater for environmental purposes. Each of the wells consists of a six-inch casing that is drilled down to the appropriate depth for the well depending upon the location of the groundwater table. The ground is drilled and the casing, which is a piece of pipe, is set. Water samples are drawn out periodically for chemical and radioactivity analysis. The casings are not removed and their removal would damage them. If a monitoring well is taken out of service for

any reason, it is plugged with concrete and made unusable. If the casing were removed, it would leave a hole in the ground.

e. Building/Structures.

1. Sprung Structure (Ex. 47, third summary, pt. 1, P.O. No. 13846). The sprung structure is a weather enclosure consisting of a metal frame with a soft-skinned exterior. It was installed over an area in which environmental monitoring wells had been installed so the wells could be monitored during the winter.

2. Hazardous Waste Storage Buildings (Ex. 47, third summary, pt. 2, P.O. No. 40865). There are four small hazardous storage buildings at the project site which are used to hold hazardous, as opposed to radioactive, waste. The buildings are "heavy duty", explosive-proof and fire protective. They are on concrete foundations and have electricity running to them through an underground conduit. Each building is anchored down to anchors set in the concrete foundation.

3. Lag Storage Building (Ex. 47, third summary, pt. 3, P.O. No. 23676). The lag storage building is a weather structure in which low level radioactive waste is stored. It is similar to the sprung structure, but considerably larger and is anchored to the ground over a gravel base foundation.

4. CSRF Ventilation Building (Ex. 47, third summary, pt. 4, P.O. No. 26735). The contact size reduction facility ventilation building houses the contact size reduction facility ventilation system. This building is attached to the roof of the process building.

5. VIT Glass Lab Room (Ex. 47, third summary, pt. 5, P.O. Nos. 24375 and 12689). The VIT glass lab is a small test laboratory in which radioactive glass waste form testing is

performed. The lab itself was a prefabricated structure that was installed and then the building was built, or closed in, around it. Essentially, the room was a modular office building brought in in pieces and installed. However, it was then enclosed within new walls that separated it from the original building into which it was installed. Removing the VIT glass lab room, would involve its disassembly and tearing down walls in the building. It is attached to the walls and floor via a concrete foundation, metal, studs and drywall.

6. Sprung Structure Storage Building (Ex. 47, third summary, pt. 6, P.O. No. 22497). The sprung structure storage building is a weather enclosure for radioactive waste storage. It is a metal structure over which a fabric skin is stretched. It has a joint in the middle, so that it can be pulled apart and runs on tracks in the ground to open and close. The tracks are anchored into the ground.

7. Temporary Air Lock (Ex. 47, third summary, pt. 7, P.O. No. 12702). The temporary air lock was a wood frame with a plywood exterior. It was anchored to the building with expansion anchors and was put in temporarily to provide access to a cell, access to which was necessary for the CSS. The temporary air lock was installed as a temporary but necessary measure to provide access to the cell before a permanent air lock could be installed.

f. Miscellaneous Audit Exception Items.

1. Boiler Upgrades (Ex. 47, fourth summary, pt. 1, P.O. Nos. 27746, 20506 and 25185). These purchase orders relate to the replacement of the boiler control system and boiler feed water pumps for the Project. As part of the upgrades, the piping for the old pumps had to be removed with new piping installed as well as new concrete pads poured for the pumps. Each

pump sits on a large concrete foundation and is cemented in place to prevent vibration or misalignment of the pump. The boiler upgrades could not be removed without damaging them.

2. Main Plant Air Compressor (Ex. 47, fourth summary, pt. 2, P.O. No. 38221). This purchase order is for the purchase and installation of a new air compressor for the Project. The air compressor has a large concrete base underneath to which it is cemented in place. The air compressor could not be removed without damaging it.

3. Lab Sinks and Cabinets (Ex. 47, fourth summary, pt. 3, P.O. Nos. 37984 and 37209). These purchase orders relate to the installation of industrial grade cabinets and sinks in laboratories. They are bolted to the wall and to the floor and the sink is attached to plumbing facilities.

4. Sewage Treatment Plant Upgrades (Ex. 47, fourth summary, pt. 4, P.O. Nos. 22043, 37744 and 36076). As the number of workers at the Project has increased, the waste water treatment handling facilities at the Project have had to keep pace with a growing population. As a result, upgrades and size increases have been made to the sewage treatment plant to keep up with the growing population. These purchase orders relate to the installation of aboveground and inground sewage tanks to handle increased capacity. The inground tank could not be removed without damaging the sewage treatment plant and leaving a hole in the ground. The aboveground sewage tank is necessary to run the facility and could not be removed without dismantling the building in which it is housed.

5. Chemical Feed System (Ex. 47, fourth summary, pt. 6, P.O. No. 14730). The chemical feed system is used in the water clarification process for the Project. The system's tanks are anchored to concrete foundations and pumps are bolted to a steel structure and piping

systems that run overhead. Removal of the chemical feed system is possible; however, it would be impossible to operate the raw water clarifier and have water for use at the Project without them.

6. Supercompactor and Supercompactor Enclosure (Ex. 47, fourth summary, pt. 7, P.O. Nos. 22359 and 27543). The supercompactor is used to crush 55 gallon drums of radioactive waste in order to reduce the volume of the waste. The supercompactor is installed inside a weather enclosure that is attached to the side of a building. The supercompactor could not be removed without damaging the enclosure. If the supercompactor and its enclosure were removed, there would be a hole in the side of the building.

7. Repair Door Closer (Ex. 47, fourth summary, pt. 8, P.O. No. 24987). This is a purchase order for the service of repairing a door closer on the main entrance doorway of the process plant.

8. Drain Piping (Ex. 47, fourth summary, pt. 9, P.O. No. 43236). This purchase order relates to a drain system that was installed for storm water runoff around a low level radioactive waste holding lagoon. It is installed in the ground in a trench around the lagoon and is set in gravel so that the water gets into the gravel and then goes into the drain pipe and down the ditch. If the piping were removed, the drainage ability would be damaged and there would be a hole in the ground.

9. Electric Wire to NYS Burial Ground (SDA) (Ex. 47, fourth summary, pt. 10, P.O. No. 39124). This purchase order is for electric wire that was purchased for providing power to a building in the New York State disposal area which is not within the Project boundaries. The

wire was installed above ground. If the wire were removed, there would be no electric service to the New York State disposal area.

10. Damper (Ex. 47, fourth summary, pt. 11, P.O. No. 37344). This purchase order is for a damper, which is a valve for the ventilation system in the master slave manipulator repair shop and it is used to control the amount of ventilation out of the shop. It is bolted into the ventilation system and regulates the amount of exhaust air flow out of the area.

11. Tubing (Ex. 47, fourth summary, pt. 12, P.O. No. 24912). This purchase order is for tubing fittings for ventilation instrumentation necessary for the operation of instrumentation associated with the ventilation system.

12. Valve (Ex. 47, fourth summary, pt. 13, P.O. No. 34949). This purchase order is for hand valves for a steam turbine. The valves are installed in a turbine casing and regulate the amount of steam. The valves are necessary to operate the turbine. The turbine drives a backup piece of safety equipment and without the hand valve could not be operated.

13. Carbon Steel Plate (Ex. 47. fourth summary, pt. 14, P.O. No. 43642). The carbon steel plate is a piece of steel shielding that was installed for shielding a personnel contamination monitor in an area with background radiation. The plate was bolted to the walls and ceiling around the personnel contamination monitor, which could not be used if the plate were removed.

14. Lads Booth (Ex. 47, fourth summary, pt. 15, P.O. No. 18310). The lads booth is a liquid abrasive decontamination system. It is a small glove box used for decontaminating small pieces of equipment, hand tools and hardware. The booth is made of stainless steel and is welded to steel structural supports in the building in which it is housed.

15. Door Upgrade (Ex. 47, fourth summary, Pt. 16, P.O. No. 25926). This purchase order relates to parts that were purchased to upgrade a shield door drive mechanism that is in a process mechanical cell in order to put the door back into service.

16. Metal Cover (Ex. 47, fourth summary, pt. 17, P.O. No. 28436). The metal cover is a steel box which covers pipe stubs from the STS. It also covers a hole in the wall so that if it were removed, there would be a hole in the building, as well as a loss of contamination control from the building.

17. FRS Filter and Piping Systems (Ex. 47, fourth summary, pt. 18, P.O. No. 13832). This purchase order is for a filtration system used in the nuclear fuel storage pool which replaced an older filtration system. It is used to maintain the clarity of the water.

18. Warehouse Restrooms Renovation (Ex. 47, fourth summary, pt. 19, P.O. No. 20521). This purchase order is for renovating and replacing components of a restroom.

19. Locker Room Renovation (Ex. 47, fourth summary, pt. 20, P.O. No. 12723). This purchase order relates to the renovation of the locker room facility to accommodate more employees. The renovation included relocating walls to enlarge the locker room facility and installing additional lockers and shower facilities.

Research and Development

80. Petitioner asserts that the following items are exempt from sales and use taxes pursuant to section 1115(a)(10) of the Tax Law:

a. Equipment and Materials Used in the Five-Year Full Scale Vitrification Testing Program

1. Concentrator Feed Makeup Tank (Ex. 41, pt. 1 - Tanks, P.O. Nos. 17985 and 30659).

2. Cold Chemical Tank (Ex. 41, pt. 1 - Tanks, P.O. No. 12700).

3. Insulation of Cold Chemical System Tank (Ex. 41, Pt. 1 - Tanks, P.O. No. 30358). It should be noted that this item is also being used for testing with the mini melter.

4. Grinder (used to prepare laboratory simulations of feed material) (Ex. 41, pt. 1 - Tanks, P.O. No. 33764).

5. Vacuum Action Pneumatic Conveying System (Ex. 41, pt. 1 - Tanks, P.O. Nos. 32600 and 38053).

6. Fifty-Foot Flat Tape Device (Ex. 41, pt. 1 - Tanks, P.O. No. 35950).

7. Stainless Steel Portable Tanks (Ex. 41, pt. 1 - Tanks, P.O. No. 42421).

8. Distributive Control System (Ex. 41, pt. 2 - VIT Test Control System, P.O. Nos. 05839, 05836, 22586, 34169, 21681, 24462, 33392, 37048, 21827, 36876, 38140, 39622, 05254, 10284, 17001,22209, 22788, 39623, 15471 and 23615). This item is also being used for testing with the mini melter.

9. Miscellaneous Equipment Used in the Five-Year Testing Program (Ex. 41, pt.3 - VIT Testing Mechanical Equipment and Devices, P.O. Nos. 17960, 35233, 41416, 30871, 22234, 15868, 13516, 17025, 22207, 30327 and 20869). Some of these items may have been reused in the mini melter facility.

10. Temporary Access Platforms (Ex. 41, pt. 5 - Building Components, P.O. No. 32065)

11. Condenser and Support Platform (Ex. 41, pt. 5 - Building Components, P.O. No. 12648).

12. Slurry Sample Station (Ex. 41, pt. 6 - Slurry Sample Station, P.O. Nos. 35207, 31410 and 28826). This item will also be used in radioactive operations.

13. Melter-Related Equipment (used in five-year full scale testing and/or mini melter) (Ex. 41, pt. 8 - Melter-Related Equipment, P.O. Nos. 15290, 20884, 34133, 35432, 28686, 31168 and 35211).

14. Off Gas Line and Mist Eliminator (Ex. 41, pt. 9 - VIT Ventilation System, P.O. Nos. 12666 and 27580).

15. VAX (Ex. 40, pt. 1 - VAX and VAX Upgrades, P.O. Nos. 17962, 34163, 22490, 22585, 40996, 22612, 39457 and 20968). The VAX is a computer which supported the five-year testing program by receiving and performing analyses of the data generated.

16. Thickness Gauge (Ex. 40, pt. 6 - Thickness Gauge, P.O. No. 40742).

17. Vitrification Testing Chemicals, Simulants, Gases and Glass (Ex. 40, second summary pt. 1 - VIT Testing Chemicals, Simulants, Gases and Glass, P.O. Nos. 20218, 23093, 27641, 28284, 31124, 32498, 34845, 37899, 15611, 36975 and 35606). These consist of glass forming chemicals, waste simulants and frit glass that were fed through the melter during the five-year test program while testing glass recipes and various waste simulants.

18. Prototype Canisters (Ex. 40, second summary pt. 2 - Prototype Canisters, P.O. Nos. 12202, 20866, 32861 and 34014). The prototype canisters were all filled with glass in the five-year nonradioactive testing program. Petitioner also performed tests, such as drop tests, on

the canisters after they were filled with glass. One of the purchase orders (P.O. 34014) is for three evacuated canister test models for use in emptying the melter if a failure occurs.

19. Corrosion Coupons (Ex. 40, second summary pt. 3 - Corrosion Coupons, P.O. No. 14811). Corrosion coupons were used early in the five-year, full scale testing program. The metal corrosion coupons were lowered into the molten glass in the melter to test the corrosivity of the molten glass with the particular metal.

b. Mini Melter

In 1989, a mini melter was constructed and installed in the same facility where the five-year testing program was being conducted. The mini melter was and is used for nonradioactive testing of variations in the glass recipe. The mini melter is used to look at the effects of minor alterations in the waste constituents or the glass forming chemicals being supplied, and variations in the manner in which the chemical and physical conditions in the melter are controlled. The mini melter has and will be used exclusively for research of glass mixtures (Ex. 40, pt. 3 - Scale Model VIT Melter, P.O. Nos. 34050, 36924 and 39196).

Petitioner used 30 gallon stainless steel drums to hold the glass from the mini melter, instead of the canisters used in the five-year full scale testing program (Ex. 40, second summary pt. 2 - Prototype Canisters, P.O. No. 40219).

c. Miscellaneous VIT Laboratory Equipment

The VIT lab at the Project site is used to perform some of the detailed analysis of the glass waste form, such as crystalline structure and the effects of processing changes on the structure of the glass. The performance of the glass is important in terms of both the repository and establishing conditions for storing the glass before it is shipped to the repository. The VIT lab is

used to perform tests on nonradioactive small size samples and is not used to perform tests on radioactive glass. The following items, which the Division has treated as subject to tax, are used by or in the VIT Lab:

1. Microscopes (Ex. 40, pt. 7A, P.O. Nos. 17961, 23452 and 21423).
2. Crucibles (Ex. 40, pt. 7B, P.O. No. 17044).
3. Ceramic Metalograph (Ex. 40, pt. 7C, P.O. No. 17918).
4. Lab Hood (Ex. 40, pt. 7D, P.O. No. 17939).
5. Tube Furnace and Insulation (Ex. 40, pt. 7E, P.O. Nos. 20108 and 21695).
6. Image Analyzer (Ex. 40, pt. 7F, P.O. No. 21875).
7. Differential Thermal Analysis System (Ex. 40, pt. 7G, P.O. No. 22033).
8. Dispenser/Grinder (Ex. 40, pt. 7H, P.O. No. 22111).
9. Furnace Thermocouples (Ex. 40, pt. 7I, P.O. No. 32491).
10. Sample Bottles (Ex. 40, pt. 7K, P.O. No. 21776).

d. Laboratory Equipment

The following items are laboratory equipment used in different labs at the project site:

1. Total Organic and Inorganic Analyzer (Ex. 48, pt. 1A, P.O. No. 37952). This item measures the carbon content in a given sample. The analyzer is being used to measure the carbon content of vitrification samples from the mini melter.

2. Total Organic Carbon Analyzer (Ex. 48, pt. 1B, P.O. No. 27701). This analyzer was used for testing the carbon content of vitrification samples from the five-year full scale testing program.

3. Buck Atomic Absorption Spectrophotometer (Ex. 48, pt. 1C, P.O. No. 37444). This instrument is used to measure the chemical composition of a sample. The instrument was used sparingly to measure samples during the five-year, full scale testing program and is currently used with mini melter samples and for a small subset of samples that measure the iron content in water in the pretreatment system.

4. Upgrade Atomic Absorption Unit (Ex. 48, pt. 1D, P.O. No. 41388). This instrument measures the iron or potassium in a nonradioactive sample. Throughout the audit period, 50 to 60 percent of the use of this instrument was for vitrification samples; now the percentage is well over 70 to 80 percent.

5. Spectroanalyzer (Ex. 48, pt. 1E, P.O. No. 39413). This instrument was purchased but not used during the audit period. Since then, it has been used to determine the composition of samples taken from the pretreatment system and for laboratory simulations of the pretreatment process. The instrument will also be used in the radioactive vitrification process.

6. Scanning Spectrophotometer (Ex. 48, pt. 1F, P.O. No. 33024). This instrument is used to measure the amount of iron in the glass after vitrification. The instrument was used solely in the five-year, full scale testing program.

7. Alpha/Beta Counting System (Ex. 48, pt. 1G, P.O. No. 21826). This instrument measures the alpha and beta radiation content of a sample. It was used almost exclusively on pretreatment process samples.

8. Digital Pressure Indicator (Ex. 48, pt. 1H, P.O. No. 43322). Petitioner makes verification cubes of cement made in the pretreatment systems in the laboratory and crushes the cubes. Pressure indicators are used to measure the pressure when a cube is crushed.

9. Titrators (Ex. 48, pt. 1I, P.O. No. 20665). Titrators are small laboratory tools used to add a known amount of acid or caustic to a sample. The titrators were used in the vitrification and pretreatment processes.

10. Conductivity Meters (Ex. 48, pt. 1J, P.O. No. 20743). Petitioner uses the conductivity meters to make sure that the water used to dilute samples in the laboratory is pure so as not to bias the results of tests performed on the vitrification and pretreatment samples.

11. Osmosis System (Ex. 48, pt. 2A, P.O. No. 34940). This system was used to purify water in the laboratory to support vitrification and pretreatment analyses.

12. Water Distillation System (Ex. 48, pt. 2B, P.O. No. 25094). This item was a backup to the osmosis system and was also used to purify water for vitrification and pretreatment samples.

13. Microwave Unit (Ex. 48, pt. 2C, P.O. No. 15632). This microwave oven was used to heat samples in acid to dissolve solids in samples. This was used for vitrification testing.

14. Components of Cell Density Control Panel (Ex. 48, pt. 2E, P.O. No. 23233). The density of radioactive solutions in the pretreatment system is measured remotely using a cell density control panel located outside a radioactive cell.

15. Flasks, Beakers and Funnels (Ex. 48, pt. 3A, P.O. Nos. 31866, 33207, 38131 and 41495). These items are used to handle samples in the laboratory. The flasks, funnels and beakers were used almost exclusively to support vitrification and pretreatment testing of samples.

16. pH Electrode (Ex. 48, pt. 3B, P.O. No. 26904). This instrument is used to measure the pH of a sample. Petitioner's pH electrodes were used almost exclusively on vitrification and pretreatment samples.

e. Pretreatment Chemicals

1. Chemicals for STS (Ex. 44, pt. 11, P.O. Nos. 22107 and 28985). These purchase orders relate to chemicals which are used in the STS ion exchange process. Primarily, this consists of zeolite. This section also includes other chemicals (P.O. No. 28985) which have been used to simulate the waste for preliminary testing of the ion exchange columns. The simulate chemicals were used for nonradioactive testing of ion exchange media.

2. Chemicals for LWTS (Ex. 45, pt. 8, P.O. Nos. 37618, 20802 and 21738). These purchase orders are for chemicals that are used in the liquid waste treatment system ("LWTS"), which is a part of the pretreatment system. Resins are added to the vessels for ion exchange processing. In addition, sodium silicate is added to prevent foaming in the high-shear mixers of the CSS.

3. LWTS Waste Simulant (Ex. 45, pt. 9, P.O. No. 15245). This simulant was used for nonradioactive "cold" testing before radioactive operation of the pretreatment system.

f. Square Drums and Drum Handling Equipment.

1. Square Drums (Ex. 45, second summary, pt. 1, P.O. No. 21682). Square drums were developed for the Project for the purpose of holding the cement waste form. Square drums had never been used for radioactive waste storage before their development for use at the project.

2. Shielded Drum Transport Cask and Square Drum Lifter (Ex. 45, second summary, pt. 3, P.O. Nos. 24364 and 35156). The shielded drum transport cask is attached to a truck and is used to move the square drums from the drum load out conveyor system to the drum cell. The square drum lifter is attached to a forklift and is used for moving the square drums.

g. Supernatent Treatment System

1. Scale Model Ion Exchange Column (Ex. 44, pt. 4, P.O. No. 12634). A scale model, clear plastic ion exchange column was used to test the ion exchange media chosen for use in the STS.

2. Master Slave Manipulators (Ex. 44, pt. 7, P.O. Nos. 28896, 30569, 35369 and 16494). Master slave manipulators are used to operate remotely radioactive systems that cannot be handled directly by the persons operating them. A worker stands in an area called an operating aisle and manipulates the gripper arm of the master slave manipulator on the operator side of a shield wall. The robot arm of the manipulator, which is on the other side of the shield wall, moves based on the operator's movement of the gripper arm. A master slave manipulator is used to operate valves and instruments which run the STS system. In addition, master slave manipulators are used for laboratory activities such as picking up beakers and taking samples. The STS system could not be run without the master slave manipulators because individuals cannot operate the valves directly on a hands-on basis. Similarly, when master slave manipulators are used in the labs, they are used to take radioactive samples and manipulate them where the laboratory personnel could not do this directly.

h. Miscellaneous Items.

1. Sludge Samplers (Ex. 40, pt. 2, P.O. Nos. 34481, 36161 and 41394). The sludge samplers were used to extract samples of the sludge so that chemical and radioactive analyses could be performed to better characterize the sludge which will be the feed material for vitrification of the radioactive waste.

2. VIT Computers (Ex. 40, pt. 4, P.O. Nos. 14836, 42384, 36191, 33689 and 40665). The VIT computers were used to perform design and development work with respect to the

vitrification facility. For example, the items included on P.O. No. 14836 were used in connection with a design program used to design removable piping sections for the radioactive vitrification operations. Another purchase order (P.O. No. 42384) is for equipment for computer aided drafting used for performing design support for the vitrification facility. Other purchase orders were for computers used by design engineering for the vitrification facility (P.O. No. 36191), vitrification test engineering (P.O. No. 33689) and process development -- the engineers responsible for the glass recipe and related development work (P.O. No. 40665).

3. Scanning Calorimeter (Ex. 40, pt. 5, P.O. No. 17298), which is used to measure the heat given off by an object. This item was delivered to Alfred University and is used there as part of the research and development work Alfred provides for the Project on the glass.

4. Video Inspection System (Ex. 40, pt. 8, P.O. Nos. 39840 and 24269). One purchase order (P.O. No. 39840) is for a closed circuit television camera unit for the vitrification facility which was tested in the vitrification test facility over a nine-month period. The other purchase order (P.O. No. 24269) is for a camera used to do an internal inspection of a tank in the off gas system.

5. Abrasive Cutting System (Ex. 41, pt. 7, P.O. Nos. 25645, 37386 and 26661 and Ex. 45, pt. 1, P.O. No. 16539). The abrasive cutting system is a high pressure water and frit sprayer. It was developed for the DOE by a small business and implemented at the Project. The spray can be controlled to give a very fine cut. The system was used to cut a cement wall, only a portion of which was radioactive, to reduce the amount of radioactive debris material resulting from cutting through concrete necessary to modify an existing building at the Project site. The abrasive

cutting system has also been used as a high pressure cleaning system to remove the cement buildup inside the high shear mixers used in the cement solidification system.

6. Chemicals for Low Level Waste Treatment System (Ex. 47, fourth summary, pt. 21, P.O. Nos. 36275, 37168, 08361, 37177, 39730 and 40959). The Project produces approximately 12 million gallons of low level liquid waste per year. The chemicals in this category are used in the ion exchange treatment of this low level radioactive waste so that it can be released into the environment below regulatory guidelines for radioactive nuclear content. The low level waste treatment facility is used as a test bed for new resins on the market. For example, the Project was the first facility to ever try the chemical associated with purchase order number 40959.

Capital Improvement and Research and Development

81. Petitioner asserts that the following items, which the Division has treated as subject to tax, are exempt from sales and use taxes pursuant to both the capital improvement and research and development exemptions:

a. Vitrification Facility

1. Cold Chemical Tanks (Ex. 41, pt. 1 - Tanks, P.O. No. 27485), which are installed in the cold chemical facility for use in the radioactive vitrification operations. The tanks are necessary for the vitrification process because they will hold the nonradioactive (i.e., "cold") chemicals to be used in vitrification. The tanks are bolted or cemented in place, and surrounded by structural steel for support. Equipment and piping, including a feed system, is welded to each tank and the feed system is permanently mounted to the building. The building has been constructed around the tanks. The tanks cannot be removed without destroying the building.

2. Vitrification Process Cell Crane (Ex. 41, pt. 4 - VIT Process Cell Crane, P.O. No. 20504). This purchase order is for two cranes for radioactive service in the vitrification facility. One crane has a 25-ton capacity and the other has a 4½-ton capacity. The crane moves via wheels at the end of the crane's gantry beam which roll on steel beams/rails that are embedded in the wall of the building. The rails are not removable. Moreover, the crane cannot be removed without damaging it. The cranes will be used to move the canisters during radioactive vitrification operations.

3. Vitrification Ventilation Systems (Ex. 41, pt. 9 - VIT Ventilation Systems, P.O. Nos. 35661 and 36250). One purchase order (P.O. No. 35661) is for in-cell off-gas equipment that is part of the off-gas treatment system located within the radioactive shielded sealed cell. The equipment, including condensers, mist eliminators, preheaters and ultra high efficiency filters, is welded to embedments that are formed as part of the floor of the cell and cannot be removed without damaging them. The equipment will be used to process and filter gases that are drawn from the vitrification process vessels and melter during radioactive vitrification. Purchase order number 36250 is for high efficiency particulate absolute ("HEPA") filter units. The primary HEPA units are located inside the radioactive cell and the secondary units are located outside the cell, with air flowing from outside (nonradioactive) to inside the radioactive cell. The HEPA units are welded into place.

4. Transfer Assembly (Ex. 48, pt. 2D, P.O. No. 26458). The transfer assembly is a stainless steel box with ports that contain plastic coated grabber assemblies and is used to remove radioactive samples remotely. The transfer assembly is bolted to the wall on the outside of a

radioactive cell and covers a hole in the wall. If the transfer assembly were removed, there would be a hole in the wall which would have to be sealed to prevent radioactive contamination.

b. Pretreatment System

As noted previously the pretreatment system consists of the supernatant treatment system ("STS"), liquid waste treatment system ("LWTS") and cement solidification system ("CSS"). The purpose of the pretreatment system is to reduce the amount of waste to be vitrified, thereby reducing the number of glass logs to be made and eventually stored in the repository. It is petitioner's position that the pretreatment system equipment is exempt from sales and use taxes pursuant to section 1115(a)(10) of the Tax Law. In addition petitioner asserts that the following items included in the pretreatment system are exempt from sales and use taxes because they are capital improvements:

1. Supernatant Treatment System ("STS")

A. Construction and Installation of STS (Ex. 44, pt. 1, P.O. Nos. 24172, 28634, 25913, 10277, 26709, 28635, 26600, 31527 and 30496). These purchase orders are for equipment and construction services for the installation of the STS, such as mechanical and electrical support near the completion of the STS system construction.

B. Pumps (Ex. 44, pt. 2, P.O. Nos. 17984, 20112, 27674, 20080, 30254, 33233, 15604, 25500, 27051, 27083, 37613 and 38826). Pumps are used in the STS to move water and liquid throughout the system. Purchase order No. 20080 is for ten long-shafted centrifugal mobilization pumps which were installed vertically down into the underground high level waste tank to mobilize or mix the contents of the tank or pump material out of the tank and into the STS system (i.e., the ion exchange columns in the spare tank). These pumps have flanges at the

upper end of a long shaft, which are bolted to stainless steel in the tank riser at the top of the tank. The pumps cannot be removed without damaging them and none of the pumps have been removed at the Project. Other pumps are installed throughout the STS for moving water through the system. Purchase order 33233 is for a weather enclosure over a mobilization pump. The enclosure would have to be cut up to remove it.

C. Tank Risers (Ex. 44, pt. 3, P.O. Nos. 17983 and 21944). Tank risers are used to access the underground high level waste tank and the spare tank. A tank riser is a large (30-inch) diameter pipe which is installed underground and attached to the top of the tanks. A piece of equipment, such as a mobilization pump, is installed in the tank through a tank riser. Each tank riser is welded to the top of a waste tank underground. Removal of a tank riser would require cutting it free of the waste tank, cutting it up while pulling it out of the ground (similar to removal of a well), and would leave a hole in the ground. No tank risers have been removed at the Project site.

D. Ion Exchange Columns (Ex. 44, pt. 4, P.O. Nos. 12634, 14554, 43362 and 36067). The ion exchange columns are installed into the spare underground waste tank. The ion exchange columns are welded to steel support structures which are welded to another steel structure installed above the tank, the intent being to not put the weight of the columns on the tank itself. The ion exchange columns are also welded to piping that goes to and from the columns and carry water through the STS system. An ion exchange column could not be removed without damaging it, the tank to which it is attached or the piping attached to the column.

E. Tanks (Ex. 44, pt. 5, P.O. Nos. 11782, 17275, 34674, 15672, 15999, 34570 and 34614). This category includes tanks, vessels and support equipment necessary to operate the ion exchange columns of the STS. The tanks are installed in the same manner as the ion exchange columns (i.e., they are welded to the steel structure that supports an ion exchange column). Similar to the removal of an ion exchange column, the tanks cannot be removed without damaging them. One of the purchase orders in this section (P.O. No. 34674) is for a remote arm assembly used to access the bottom of the ion exchange column down in the waste tank. The arm is installed on a long steel beam supported over a welded structure at the top of the tank riser. The arm cannot be removed from the tank without cutting it into pieces.

F. Shield Walls and Piping (Ex. 44, pt. 6, P.O. Nos. 15670, 12708, 28297, 17293, 17941, 18433, 18434, 17213, 21530, 31660, 31230, 29733 and 31291). Shield walls are installed in the STS system between the radioactively contaminated valve aisle and the operator aisle to protect personnel from radiation exposure associated with the valve aisle. The shield walls include shielded windows through which the operators can see valves and instrumentation they need to operate remotely using master slave manipulators. There is also a shield wall behind the valve aisle. This shield wall is a two-part unit with stainless steel on each side and a cavity in between into which concrete is poured once the shield wall is put in place. The piping that makes up the STS runs from tanks and vessels in the ion exchange column in the spare waste tank, through a vault area and to the valve aisle, and passes through the concrete shield wall. Items in this section also include instrument racks into which piping and tubing runs and which is a part of the controls of the STS system.

G. Control Panel (Ex. 44, pt. 8, P.O. Nos. 20134, 33378 and 38107). The STS is a centrally-monitored system which is operated in part through a control room in which control panels are installed. Wiring from parts of the system come into and go out of the panel. The back of the panel is a walk-in room from which instruments and wiring can be accessed. The main STS control panel cannot be removed without damaging the building in which it is housed because the control panel was set in place and then a room was built around the control panel. The control panel could be removed without damaging it only if the building around the control panel were disassembled. There are also separate control panels for particular portions of the STS. For example, P.O. No. 33378 is for a sludge mobilization pump control panel and P.O. No. 38107 is for a hydrogen sensor and monitor for monitoring hydrogen gas in the high-level waste tank. The supernatant treatment system cannot be operated without the control panels.

H. Radiation Monitoring System (Ex. 44, pt. 9, P.O. Nos. 26569, 17995, 33520 and 18403). Radiation monitors are installed throughout the STS system to determine the performance of the system and ensure the safety of the operators. These monitors are installed on the equipment and are not used for monitoring personnel. The monitors are installed by welding them onto a part of the piping transfer system and are shielded so that background radiation is not picked up on the monitors.

I. Pneumatic Transfer System (Ex. 44, pt. 10, P.O. No. 22470). This purchase order relates to the purchase, installation and construction of a transfer system used to transfer samples from the STS valve aisle, through the process building, and into the hot cells of the laboratory. The system is an overhead transfer system and operates similar to a vacuum tube transfer system used at drive-through windows at banks. The system consists of welded piping with radiation

detectors located at points along the system, so that if a sample gets stuck an alarm will sound. The transfer system runs both inside and outside of a building. Outside, the transfer system runs on a support structure that gets up to 20 feet off the ground, so that it is far away from people. The entire system is welded together and is highly contaminated inside. It could not be removed without damaging it and it would have to be cut up if it were removed.

2. Liquid Waste Treatment System ("LWTS") and Cement Solidification System ("CSS").

As discussed previously, the LWTS removes excess water from the pretreated waste and the cement solidification system converts the pretreated waste to a cement form which is stored in square steel drums. The LWTS and CSS, as part of the pretreatment system, are necessary for the reduction of the amount of waste to be vitrified.

A. Cement Solidification Mixers (Ex. 45, pt. 1, P.O. Nos. 21164,26762, 21588 and 32125). High shear cement solidification mixers are used in the CSS to mix the pretreated waste and cement. The mixers are bolted to stands that provide structural support for them and are attached to the CSS system via piping so that ingredients can enter the mixers. The cement solidification system is a high volume prototype for the pretreatment of high level radioactive waste. The mixers used in the CSS can be contrasted with the Ross mixers petitioner uses for cement solidification of low level radioactive waste and which are not part of the pretreatment system. Unlike the high shear cement solidification mixers used in the pretreatment system, Ross mixers are used at other sites in the United States.

B. Tanks (Ex. 45, pt. 2, P.O. Nos. 13585, 17931, 14135, 14517 and 14889). The LWTS consists of a number of tanks and vessels through which the pretreated waste passes while

the water is being removed. The purchase orders in this category are for such tanks and vessels. The tanks and vessels are supported on structural steel and cemented or grouted in place for structural support, and are also attached via a piping system.

C. Control Panel (Ex. 45, pt. 3, P.O. Nos. 15654, 40452, 15948, 17930 and 17937). This section deals with portions of a control system for the LWTS, which is similar to the STS control panel, but has a significantly greater number of control features. The LWTS control panel is fabricated in the same way as the STS control panel that comes in a unit which includes an area that can be walked into in the back. The panel is 8 feet tall, 10 feet wide and 20 feet long. The control panel came as an entire unit which is put into place by a crane and the building structure was then built around it. Therefore, the control panel cannot be removed without damaging the building. The control panel is necessary to operate the LWTS.

D. LWTS and CSS Construction and Installation (Ex. 45, pt. 4, P.O. Nos. 22144, 22449, 26762, 26983, 10297, 12635, 29024, 29073, 23342, 43293, 17936, 36831, 17220, 17282, 31381, 26149, 28687, 28786, 40609, 17012, 26365, 26573, 12707, 28712, 26643, 15961, 24120 and 37646). This section relates to the construction and installation of the LWTS and CSS systems. In general, this category involves the purchase of equipment, piping, valves and instruments and the construction and installation of the equipment and hardware that makes up the LWTS and CSS. Much of the existing process building that was in existence before the beginning of the project was reused and equipment for the CSS and LWTS was installed in the existing building. This involved installing piping, tanks, vessels, etc. The purchase orders in this section represent the "guts" of the LWTS and CSS.

E. Radiation Monitoring System (Ex. 45, pt. 5, P.O. Nos. 18403, 23380, 26573 and 20566). This monitoring system is similar to the one used for the STS and consists of radiation monitors which monitor process equipment, rather than people, and is necessary for the operation of the LWTS and CSS.

F. Master Slave Manipulators (Ex. 45, pt. 6, P.O. Nos. 36746, 36776, 38812, 38815, 38890 and 12924). These purchase orders are for a master slave manipulator for the analytical lab and parts for master slave manipulators. Master slave manipulators are used to run the CSS and LWTS, as well as in the laboratories for taking samples from the systems.

G. Sample Station/Glove Box (Ex. 45, pt. 7, P.O. Nos. 27946, 28425 and 26858). Sample stations/glove boxes are used in the LWTS to take samples to be analyzed in the lab. These are used so the operator does not come into contact with a radioactive sample. A glove box is a stainless steel box with glass or plexiglass on top so the operator can visually see into the box. The operator can reach into the box via glove ports which are used to manipulate the samplers inside the glove box assembly. Glove boxes are necessary in the pretreatment system in order to take samples for testing.

82. The Contract between DOE and petitioner specifically includes construction activities to be performed by petitioner or by subcontract. The Contract contemplates the "construction of new facilities or the alteration or repair of NYSERDA or Government-owned facilities at the plant." (Contract Art. IV, § 4.3.)

83. In remanding this matter, the Tribunal directed me to consider whether those purchases set forth by petitioner in pages 12-26 and 43-57 of Appendix A to its post-hearing brief are exempt under Tax Law § 1115(a)(15) and (16). For the record, the purchases set forth

by petitioner in pages 12-26 of Appendix A are described in Finding of Fact "79" in the April 11, 1996 determination. The purchases set forth in pages 43-57 are described in Finding of Fact "81".

84. Of the purchase orders discussed in Finding of Fact "79", the following constitute purchases of tangible personal property: P.O. Nos. 39620, 30712, 21740, 30697, 21148, 24063, 21342, 15210, 35534, 05838 (itemized purchase order for tangible personal property and services), 22587, 21053 (itemized purchase order for tangible personal property and services), 29695, 28679, 29915, 21237, 15264, 14571, 37777, 13846, 40865, 26735, 24375, 22497, 38221 (itemized purchase order for tangible personal property and installation), 37984, 37209, 22043, 37744, 36076, 43236, 39124, 37344, 24912, 34949, 43642, 18310, 25926, 28436, and 13832.

85. Of the purchase orders discussed in Finding of Fact "79", the following constitute either purchases of services or purchases of tangible personal property and services with no itemization of the cost of the property: P.O. Nos. 12753, 28423, 24632, 25680, 25541,12720, 23387, 40327, 21363, 23676, 12689, 12702, 27746, 20506, 25185, 14730, 22359, 27543, 24987, 20521, and 12723.

86. Of the purchase orders discussed in Finding of Fact "81", the following constitute purchases of tangible personal property: 27485, 20504 (itemized purchase order for tangible personal property and services), 26458, 30496, 17984 (itemized purchase order for tangible personal property and services), 20112, 30254, 33233, 15604, 27051, 27083, 37613, 38826, 17983, 21944, 14554, 43362, 36067, 11782, 17275, 34674, 15672, 15999, 34570, 15670, 12708, 28297, 17293, 17941, 18433, 18434, 17213, 21530, 31660, 31230, 29733, 31291, 33378, 38107, 17995, 33520, 18403, 21164, 21588, 32125, 13585, 17931, 14135, 14517, 14889, 15654, 40452,

15948, 17930, 17937, 22144, 22449, 29024, 23342, 43293, 17936, 36831, 17220, 31381, 26149 (itemized purchase order for tangible personal property and services), 28687, 28786, 40609, 17012, 15961, 24120, 18403, 23380, 20566, 36746, 36776, 38812, 38815, 38890, 12924, 27946, and 26858.

87. Of the purchase orders discussed in Finding of Fact “81", the following constitute either purchases of services or purchases of tangible personal property and services with no itemization of the cost of the property: 35661, 36250, 24172, 28634, 25913, 10277, 26709, 28635, 26600, 31527, 27674, 20080, 25500, 12634, 34614, 20134, 26569, 22470, 26762, 26983, 10297, 12635, 29073, 17282, 26365, 26573, 12707, 28712, 26643, 37646, 26573, and 28425.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge considered petitioner's argument that all of its purchases were exempt from sales and use taxation pursuant to Tax Law § 1116(a)(2) because petitioner made such purchases as an agent of the Federal government (DOE). The Administrative Law Judge rejected the Division's argument that the phrase "insofar as it is immune from taxation" in Tax Law § 1116(a)(2) is more restrictive than Tax Law § 1116(a)(1) (applicable to the State of New York, its agencies, instrumentalities and political subdivisions) in that the exemption is co-extensive with the constitutional doctrine of Federal tax immunity and applies only where the imposition of tax would be constitutional. The Administrative Law Judge noted that a state "can tax any private parties with whom [the United States] does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals" (Determination, conclusion of law “H”).

The Administrative Law Judge considered the decision of the Supreme Court in ***United States v. New Mexico*** (455 US 720, 71 L Ed 2d 580). In a footnote, the Administrative Law Judge noted that in ***New Mexico,*** the State sought to impose taxes on purchases of property and services made by private contractors pursuant to management contracts with the Atomic Energy Commission (now the DOE). The contractual relationship between the contractors and the Federal agency was substantially similar to that of petitioner and the DOE in this case. The Supreme Court held that the imposition of taxes by the State of New Mexico did not offend notions of Federal supremacy. Considering the factual similarities between ***New Mexico*** and the instant matter, the Administrative Law Judge concluded that it is clear that the imposition of tax herein does not violate Federal tax immunity.

Since the Tax Appeals Tribunal has determined that purchases by common law agents of the State of New York, in the scope of their agencies, are exempt from sales and use taxes under Tax Law § 1116(a)(1) (***citing Matter of MGK Constructors***, Tax Appeals Tribunal, March 5, 1992), the Administrative Law Judge concluded that any unjustified difference in the treatment of State versus Federal contractors constitutes a violation of the doctrine of intergovernmental tax immunity. The Administrative Law Judge concluded that since the imposition of tax herein does not violate principles of Federal sovereignty, if petitioner was not a common law agent of DOE it is not eligible for exemption under either interpretation of Tax Law § 1116(a)(2).

The Administrative Law Judge noted that agency is a "fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to act [citation omitted]" (Determination, conclusion of law "E") and that a finding of agency requires a showing that the principal

authorized a fiduciary relationship. The Administrative Law Judge concluded that similar to the DOE management contract at issue in ***United States v. New Mexico*** (***supra***), "[t]he complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms" (Determination, conclusion of law "F").

The Administrative Law Judge analyzed the relationship of petitioner and the DOE and found that certain aspects of that relationship supported petitioner's claim that it was the DOE's agent. For example, petitioner was contractually bound to follow relevant portions of the FAR and DEAR generally and the portions of the DEAR applicable to purchasing systems of M&O contractors in particular and the DOE monitored petitioner's compliance with such requirements. Additionally, protests of procurements made by petitioner for the project were treated as if they were contracted by DOE. Further, petitioner was required to use Federal sources of supply where possible in making purchases for the Project.

However, the Administrative Law Judge found facts indicating that petitioner was not an agent of DOE. Neither the Contract nor the regulations governing petitioner's conduct contained an express reference to an agency relationship between petitioner and DOE. The Administrative Law Judge found that it was reasonable to infer that the failure of the documents to expressly designate agency status to petitioner indicated a lack of consent by DOE and petitioner to create such a relationship. The Administrative Law Judge also concluded that certain provisions in the Contract were inconsistent with petitioner's claim of agency. Finally, section 9.1 of the Contract provides that all purchase orders must be made in the name of petitioner and that such orders "shall not bind nor purport to bind" the United States. The Administrative Law Judge found that this provision was significant because an "agent holds the power to alter the legal relationship

between his principal and third parties in matters within the scope of the agency" (***Smirlock Realty Corp. v. Title Guar. Co.***, 70 AD2d 455, 421 NYS2d 232, 238, ***affd*** 52 NY2d 179, 437 NYS2d 57).

Thus, the Administrative Law Judge concluded that petitioner had failed to establish that it was acting as the agent of DOE in making the purchases at issue herein and in performing its duties under the Contract.

The Administrative Law Judge rejected petitioner's alternative argument that if its purchases made under the Contract were not exempt pursuant to Tax Law § 1116(a)(2), then such purchases were excluded from sales tax as purchases for resale. The Administrative Law Judge concluded that to qualify for the resale exclusion under Tax Lax § 1105(a), petitioner must show that the purchases were made for one and only one purpose: resale. Irrespective of the fact that title to the tangible personal property purchased under the Contract passed to DOE, petitioner's purpose in making the purchases at issue was to enable it to fulfill its contractual obligation to manage and operate the Project and such property was used and consumed by petitioner in connection therewith. The Administrative Law Judge distinguished the cases relied on for this argument (***Bethlehem Steel Co. v. Joseph***, 284 App Div 5, 130 NYS2d 178 and ***Matter of Sweet Assocs. v. Gallman***, 36 AD2d 95, 318 NYS2d 528, ***affd*** 29 NY2d 902, 328 NYS2d 857) as being based on different statutory and regulatory schemes.

The Administrative Law Judge concluded, however, that petitioner was entitled to rely on the representation made by the Division in its letter of February 22, 1982 that petitioner "may act as an agent in the performance of contract No. DE-AC07-81ME44139." The Administrative Law Judge concluded that it was reasonable for petitioner to so rely on the Division's

representation and such reliance was to the detriment of petitioner. Thus, petitioner met the test for estoppel established by the Tribunal in ***Matter of Harry's Exxon Serv. Sta.*** (Tax Appeals Tribunal, December 6, 1988) and the Division was estopped from collecting sales tax on petitioner's purchases. Such estoppel, however, was limited to the period prior to January 25, 1989. The Administrative Law Judge found that petitioner was put on notice as of January 25, 1989 of the Division's position that it was not an agent of the Federal government. During the course of a meeting between representatives of petitioner and the Division's auditors on that date, the auditors orally advised petitioner of the Division's revised position on the agency issue.

The Administrative Law Judge rejected petitioner's argument that certain of its purchases resulted in capital improvements to real property and were, thus, excluded from the imposition of sales tax. The Administrative Law Judge concluded that while there was no issue as to whether the improvement substantially added to the value of the real property, certain of the purchases claimed by petitioner to have resulted in capital improvements did not meet the affixation requirement of Tax Law § 1101(b)(9)(ii). Further, petitioner failed to establish that any of the improvements in question were intended to be permanent as required by Tax Law § 1101(b)(9)(iii). The Administrative Law Judge found no evidence in the record as to which of the subject improvements had some reasonable possibility of remaining at the site following the Project's conclusion. Additionally, since the language in the Contract indicated an intent that property installed at the Project not become part of the realty, petitioner failed to show an intention of permanency with respect to each of the specific improvements claimed herein to be a capital improvement.

As to petitioner's argument that certain of its purchases were exempt from tax under Tax Law § 1115(a)(10) as tangible personal property purchased for use or consumption directly and predominantly in research and development (hereinafter "R&D") in the experimental or laboratory sense, the Administrative Law Judge analyzed the purchases at issue and concluded that petitioner established entitlement to the R&D exemption for its purchases of equipment and materials used in the five-year full scale vitrification program, purchases made in connection with the mini melter, purchases of miscellaneous VIT lab equipment, laboratory equipment, and the vitrification facility. However, petitioner did not establish entitlement to the R&D exemption with respect to purchases made in connection with the cement solidification system, the liquid waste treatment system, or the supernatant treatment system. Finally, the Administrative Law Judge disallowed the R&D exemption for those purchase orders claimed as eligible by petitioner but which were for services alone since that exemption is limited to purchases of tangible personal property and does not extend to installation and repair services. However, as to claimed purchase orders and invoices which listed a breakdown of charges for property and services, to the extent that such purchases are otherwise eligible for the R&D exemption, charges for tangible personal property contained in such purchase orders and/or invoices qualified for the exemption.

The Administrative Law Judge also concluded that petitioner was not subject to the use tax under Tax Law § 1110 with respect to its purchases because of his determination that such purchases were subject to sales tax.

In his determination on remand, the Administrative Law Judge concluded that pursuant to Tax Law § 1115(a)(15) and (16), in making the purchases described in Findings of Fact "79" and

“81," petitioner was acting as a contractor and the tangible personal property purchased as described therein became integral component parts of the real property, property or land owned by NYSERDA. Accordingly, the purchases of tangible personal property set forth in Findings of Fact “79" and “81" (the specific purchase orders for which purchases are listed in Findings of Fact “84” and “86”) were exempt from tax pursuant to Tax Law 1115(a)(16) . However, the Administrative Law Judge concluded that petitioner did not show entitlement to exemption under Tax Law § 1115(a)(15) or (16) for the purchase orders listed in Findings of Fact “85" and “87" because these purchase orders indicate either purchases of services or purchases of tangible personal property and services without an itemization of the amount of property so purchased.

ARGUMENTS ON EXCEPTION

Petitioner agrees with the Administrative Law Judge's conclusion that Tax Law § 1116(a)(2) does not require the Federal government to make its purchases directly in order for them to be exempt from taxation but it may use entities such as petitioner as a purchasing agent and still retain its immunity from sales and use taxation. Petitioner argues, as it did before the Administrative Law Judge, that the only relevant inquiry is whether petitioner is an agent of the DOE in making purchases for the Contract. Petitioner relies on 20 NYCRR 541.3(a) which provides that when a contractor's customer is a governmental entity under Tax Law § 1116(a)(1) or (2), the signed contract is sufficient proof of the exempt status of purchases made for the contract. Further, relying on general agency principles, in accord with the decision of the Tax Appeals Tribunal in ***Matter of MGK Constructors*** (***supra***), petitioner argues that it acted as DOE's agent in making purchases for the project because it acts on behalf of DOE and is subject to DOE's control with respect to such purchases.

Petitioner argues that although the Administrative Law Judge analyzed all the elements of petitioner's contract with the DOE, he overlooked the most important point - the only issue is whether petitioner is the purchasing agent of the DOE in making purchases for the project, not whether the DOE has control over all of petitioner's activities under the Contract. In other words, petitioner argues that it is an agent for purposes of purchasing only and is not the agent of the DOE in respect to every aspect of the performance of its contractual duties.

Petitioner also contends that if its purchases under the Contract were not exempt pursuant to Tax Law § 1116(a)(2), they were excluded from sales tax pursuant to Tax Lax § 1105(c) as purchases for resale. Petitioner argues that it is entitled to the resale exclusion with respect to all purchases made under the Contract because all such property and services are immediately resold to DOE. Petitioner notes that, under the Contract, title to all such property passes directly from the vendor to DOE. Petitioner further notes that once property is purchased under the Contract, petitioner is required to account for and to treat the property as owned by DOE. When the property is no longer needed, petitioner disposes of it using DOE procedures. Petitioner asserts that such facts indicate that all property purchased under the Contract is resold and, therefore, not subject to tax.

Petitioner agrees with the determination of the Administrative Law Judge that the Division should be estopped from assessing sales and use taxes because petitioner reasonably relied on the Division's letter dated February 22, 1982 to its detriment. However, petitioner argues that the Administrative Law Judge erred in determining that the estoppel period ended on January 25, 1989. Rather, petitioner states that such period should be extended to February 12, 1990, the

date on which petitioner was first clearly and unequivocally advised by the Division that it could no longer rely on the February 22, 1982 letter.

Petitioner disagrees with the conclusion of the Administrative Law Judge that certain of its purchases were not entitled to exemption as having resulted in capital improvements to real property because petitioner did not establish that such improvements met the affixation requirement of Tax Law § 1101(b)(9)(ii) or were intended to be permanent as required by Tax Law § 1101(b)(9)(iii). Further, petitioner argues that even if it has failed to establish that the improvements considered by the Administrative Law Judge qualify as capital improvements, petitioner's purchases should still qualify for exemption pursuant to Tax Law § 1115(a)(15) and (16) as tangible personal property used in erecting a structure or building of; adding to, altering or improving real property of; or maintaining, servicing or repairing real property of an exempt organization. Petitioner argues that the Administrative Law Judge's determination does not address the applicability of these sections.

Petitioner also asserts that the Administrative Law Judge failed to accord certain of its purchases an exemption pursuant to Tax Law § 1115(a)(10), which exempts from sales and use tax "[t]angible personal property purchased for use or consumption directly and predominantly in research and development in the experimental or laboratory sense." Finally, petitioner argues that the Administrative Law Judge erred in determining that certain purchase orders, which include separate charges for R&D materials and equipment, do not include a breakdown of charges for property and services.

The Division, in addition to opposing the assertions of petitioner, argues in support of its exception that the Administrative Law Judge erroneously concluded that Tax Law § 1116(a)(2) is

not limited to situations where the imposition of tax would be unconstitutional. As such, the Administrative Law Judge's determination is beyond the jurisdiction of the Division of Tax Appeals because it amounts to a determination of the facial validity of Tax Law § 1116(a)(2). Rather, that section is appropriately applied only when the tax is on the United States itself or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities. Since the purchase transactions involved in this proceeding are not immune from state taxation (relying on ***United States v. New Mexico***, ***supra***) the sales tax was properly imposed on petitioner. Further, the Division argues that the Administrative Law Judge correctly concluded that petitioner is not an agent of the DOE, primarily based on the contractual provisions specifying the non-liability of the Federal government for purchase orders in the name of petitioner and petitioner's control over the many facets of the project.

The Division asserts that the Administrative Law Judge erred in concluding that the February 22, 1982 letter provided the basis for an estoppel claim against the Division and that petitioner did not demonstrate the elements necessary to entitle it to have relied on that letter nor that it was relied on to petitioner's detriment. In any event, the Division argues that an estoppel claim should not extend beyond the date found by the Administrative Law Judge to be the date on which petitioner was clearly advised by the Division that it was no longer entitled to rely on the February 22, 1982 letter.

OPINION

Agency

Tax Law § 1105 imposes sales tax on the receipts from every retail sale of tangible personal property and on certain enumerated services unless otherwise specifically exempted from tax. Tax is imposed on the "customer" (defined to include "purchaser" Tax Law § 1131[2]) and collected by the seller (Tax Law § 1132[a]). Thus, where an exemption from taxation is premised on the status of the purchaser (such as in Tax Law § 1116[a][2]), it is necessary to identify the purchaser in a particular transaction in order to determine eligibility for exemption.

Section 1116(a)(2) of the Tax Law provides for an exemption from sales and use taxes with respect to purchases made by:

> The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons.

There is a corresponding exemption provided by Tax Law § 1116(a)(1) for purchases made by New York State, its agencies, instrumentalities, public corporations and political subdivisions. Neither section 1116(a)(1) or (a)(2) provide that purchases made by an agent of an entity entitled to exemption from taxation pursuant to those sections, when such agent is acting within the scope of its agency, are exempt from taxation. However, neither section precludes such an entity from using an agent to make tax-exempt purchases on its behalf.

In ***MGK Constructors***, the Tribunal found that pursuant to 20 NYCRR 541.2(c), a contractor acting as an agent of the City of New York would not be subject to sales tax on purchases made pursuant to its contract with the City. That case concerned a particular type of contractor (as defined in 20 NYCRR 541.2[d]) specifically engaged in improving or repairing real property of a governmental entity or exempt organization. The Division does not question

our decision in ***MGK Constructors*** but argues that, unlike the State of New York or one of its political subdivisions, in order for an agent of the United States to be entitled to this exemption, it must be so closely aligned with the Federal government as to meet the constitutional immunity standard set forth in ***United States v. New Mexico (supra)***. The Division argues that Tax Law § 1116(a)(2) incorporates a constitutional immunity standard such that it will not apply to transactions that are not immune from taxation.

The Division, in 20 NYCRR 529.3, recognizes that the phrase "insofar as it is immune from taxation" used in Tax Law § 1116(a)(2) means that where Congress has waived immunity from taxation with respect to its instrumentalities or agencies (such as in the case of national banks) no sales or use tax exemption is available. That phrase does not infer, however, that the Federal government is without authority to designate an agent that may make purchases on its behalf and obtain the same tax exemption to which the United States, as principal, is entitled. The Division argues that section 1116(a) only applies if the levy of tax on a particular transaction would be unconstitutional and that consideration of whether or not the statute applies to contractors for the Federal government who are not themselves immune from taxation is beyond the jurisdiction of the Division of Tax Appeals to consider. We disagree. There is no authority offered for such an interpretation nor does the statute support it.

Petitioner concedes that immunity from taxation is not at issue herein. Rather, petitioner argues that it is a common law agent of DOE and, as such, is entitled to make tax-exempt purchases on behalf of its principal, just as it would if it were the common law agent of the State of New York or one of its political subdivisions. In effect, petitioner argues that a common law agent of DOE is in a somewhat different fiduciary relationship with DOE than an entity that

shares the government's immunity from taxation. Thus, petitioner argues that the decisions of the United States Supreme Court relied on by the Division concerning the immunity of contractors from state-imposed sales and use tax are inapposite to this case.

In ***United States v. New Mexico*** (***supra***), relied on by the Division to support its position, the Supreme Court considered whether a DOE contractor, under a contract similar in many respects to the one at issue herein, was immune from taxation on its purchases made pursuant to the Contract. In its decision, the Court reviewed its prior decisions on the issue of state taxation of Federal contractors, stating that "the decisions fail to speak with one voice on the relevance of traditional agency rules in determining the tax-immunity status of federal contractors" (***United States v. New Mexico***, ***supra***, 71 L Ed 2d, at 591). The Court concluded, as did the Administrative Law Judge herein, that "the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms" (***United States v. New Mexico***, ***supra***, 71 L Ed 2d, at 585). Immunity, noted the Court, may not be conferred simply because the tax has an effect on the United States. In ***State of Alabama v. King & Boozer*** (314 US 1, 86 L Ed 3), the Court concluded that the fact that the contractor is purchasing the property for the United States is irrelevant, even though title vested in the government immediately upon shipment by the seller. The Court in ***New Mexico*** found that immunity was only appropriate in one circumstance: "[t]hus, a finding of constitutional tax immunity requires something more that the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes'" (***United States v. New Mexico, supra***, 71 L Ed 2d, at 593). The Court noted that this was in accord with its decision in ***United States v. Boyd*** (378 US 39, 12 L Ed 2d 713). In ***Boyd***, the government

argued a position similar to that put forth by petitioner: contractors who were agents of the federal government were entitled to tax exemption. Without discussing traditional agency rules, the Court rejected the argument and stated: “we cannot believe that [the contractors are] 'so assimilated by the Government as to become one of its constituent parts’" (***United States v. Boyd***, ***supra***, 12 L Ed 2d, at 719).

One acting as an agent is not always denied the ability to make tax-exempt purchases on behalf of the United States. Indeed, in ***Kern-Limerick v. Scurlock*** (347 US 110), the Supreme Court found that pursuant to the terms of the Armed Services Procurement Act of 1947, the Armed Services was authorized to use agents, other than its own personnel, to handle the details of purchases. The Court, in distinguishing the Contract in issue from that employed in ***State of Alabama v. King & Boozer (supra),*** found that the significant difference in Kern-Limerick's contract was that the Contract at issue specifically stated that the Contractor was to act as the purchasing agent of the government and the government was directly liable to the vendors for the purchase price. The purchase orders and requests for bids also noted that the purchase was made by the government, which was obligated to the vendor for the purchase price. Thus, the Court held in ***Kern-Limerick*** that the government was the disclosed purchaser and the purchasing agent had no liability to the seller arising from the transaction. The Court also recognized that "since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, [footnote omitted] for decisions consistently prohibit taxes levied on the property or purchases of the Government itself" (***Kern-Limerick v. Scurlock***, ***supra***, at 122-123).

In order to apply section 1116(a)(2), there cannot be both a constitutional immunity standard such as has been developed by the Supreme Court and a separate common law agency standard. We agree with the Administrative Law Judge that there is no authority or reason for treating the Federal government in a different manner than the State of New York. In ***United States v. Forst*** (442 F Supp 920, ***affd*** 569 F2d 811), the Court analyzed ***State of Alabama v. King & Boozer*** (***supra***) and ***Kern-Limerick v. Scurlock*** (***supra***) to determine who, as between the Federal contractor and the United States, was the purchaser liable under state law for the payment of sales tax. The Court stated:

> These two cases make it clear that it is not critical who holds title to the purchased items as between the United States and its contractor. Nor is the degree of control over the contractor that the United States exercises with respect to the purchases critical. The key factor is whose credit, between the United States and the contractor, is bound by the purchasing agreement with the seller (***United States v. Forst***, ***supra***, at 924).

We believe that the only relevant inquiry for our purposes herein is to determine who is the purchaser. In so doing, we are being consistent with the provisions of Tax Law § 1131(2) which looks to the "purchaser" in order to determine whether or not an exemption under section 1116(a) applies. By focusing on the identity of the actual purchaser, we are also consistent with the position we set forth in ***MGK Constructors***. In that case, we relied on traditional agency principles (requiring an authorization of a fiduciary relationship by the principal, consent by the agent to act on the principal's behalf and the agent must be subject to the principal's control) and also on the analysis of the Supreme Court in ***Kern-Limerick***. Given the contractual arrangements existing between DOE and petitioner in the present case, our focus on the identity of the actual

purchaser merely recognizes the difficulties encountered in attempting to simply apply traditional agency notions to the complexities of Federal contracts.

Petitioner and the Division each present arguments concerning the numerous provisions of the Contract, regulations and purchase orders employed by petitioner in making its purchases pursuant to the Contract. The most significant item in the relationship between petitioner and the DOE for purposes of our analysis is contained in section 9.1 of the Contract, which provides that "Procurement arrangements under this contract shall be made in the name of the contractor, shall not bind nor purport to bind the Government, shall not relieve the Contractor of any obligation under this contract." Thus, despite all the control exerted over the conduct of petitioner by DOE, neither DOE or the United States is listed on petitioner's purchase orders or invoices as the purchaser, a fact found significant for establishment of an agency in ***Kern-Limerick v. Scurlock (supra)***. Nor is the government directly obligated to the vendors for the purchases made by petitioner. This missing element indicates a lack of general authority to "alter the legal relationship between his principal and third parties in matters within the scope of the agency," an indicia of an agency relationship in ***Smirlock Realty Corp. v. Title Guar. Co.*** (***supra,*** 421 NYS2d, at 238).

Thus, we concur in the analysis undertaken by the Administrative Law Judge in his determination of the terms of the Contract, the applicable Federal regulations pertinent to petitioner's purchases and the testimonial and documentary evidence included in the record as well as his ultimate conclusion that petitioner failed to establish that it was acting as an agent of DOE in making the purchases at issue herein and in performing its duties under the Contract. Petitioner argues that we should not be concerned whether or not petitioner acted as an agent of

DOE for all purposes but only insofar as concerns purchases made pursuant to the Contract. We agree with petitioner's argument that the focus relevant for our purposes herein is a narrow one, and not as broad as undertaken by the Administrative Law Judge. In spite of this, however, we believe that the Administrative Law Judge arrived at the proper conclusion in this case. As in ***Forst***, the key factor herein is that it was petitioner's credit, and not that of DOE that was bound on the purchases. We add to the Administrative Law Judge's conclusion only that, as a result, petitioner failed to establish that DOE, and not petitioner, was the purchaser of the materials at issue. This reconciles the Administrative Law Judge's conclusion that the DOE letter to petitioner of October 9, 1981, which contains an express reference to an agency relationship made by DOE, and which "authorized [petitioner] under [its] U.S. Department of Energy (DOE) Prime Contract No. DE-AC07-81NE44139, to act as agent for the DOE for the purpose of placing orders against Federal Supply Services Stores Depots and Government supply contracts . . ." did not purport to confer general agency status upon petitioner with respect to its performance of its duties under the Contract. Rather, it conspicuously restricted such status to the placing of orders with Federal supply sources.

Petitioner also argues that 20 NYCRR 541.3 specifically exempts petitioner's contract purchases from taxation. Section 541.3(a) provides that when a contractor's customer is a governmental entity, described in Tax Law § 1116(a)(1) or (a)(2), "the contract signed by the government representative and the prime contractor is sufficient proof of the exempt status of purchases made for such contract." A "contractor" is defined in 541.2(d) as one who engages in "erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining,

demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land."

We agree with the Division that this provision applies to purchases by contractors of tangible personal property for use in performing construction contracts, as such contracts are defined in 20 NYCRR 541.2 (as were at issue in ***MGK Constructors***). This is not the type of contract existing between petitioner and DOE in the present case. If petitioner were correct, it would necessarily exempt all purchases by any party contracting with the Federal government without the ability to analyze the relationship of the contracting parties, an interpretation not warranted by the provisions of Tax Law § 1116(a) or our decision in ***Matter of MGK Constructors (supra).***

Sales for Resale

Having concluded that petitioner, and not DOE, was the purchaser of the tangible personal property and services used to fulfill the Contract, we must explore petitioner's argument that its purchases were excluded from sales tax as purchases for resale.

Tax Law § 1105(a) imposes a sales tax upon the receipts from retail sales of tangible personal property with certain exceptions which are not germane. The term "retail sale" is defined as the sale of tangible personal property to any person for any purpose other than for resale (Tax Law § 1101[b][4][i][A]). An individual who purchases an item for the purpose of sale or rental, purchases it for resale within the meaning of the statute ***(Matter of Albany Calcium Light Co. v. State Tax Commn***., 44 NY2d 986, 408 NYS2d 333). In addition, in order to qualify for the resale exclusion, the tangible personal property must be purchased exclusively for the purpose of resale (***Matter of Micheli Contr. Corp. v. New York State Tax Commn.,*** 109

AD2d 957, 486 NYS2d 448; ***Matter of Savemart, Inc. v. State Tax Commn***., 105 AD2d 1001, 482 NYS2d 150, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029; ***Matter of P-H Fine Arts Ltd.***, Tax Appeals Tribunal, October 13, 1994, ***confirmed Matter of P-H Fines Arts Ltd. v. New York State Tax Appeals Tribunal,*** 227 AD2d 683, 642 NYS2d 232, ***lv denied*** 89 NY2d 804, 653 NYS2d 543; ***Matter of AGL Welding Supply Co.***, Tax Appeals Tribunal, April 28, 1994, ***confirmed Matter of AGL Welding Supply Co. v. Commissioner of Taxation & Fin.***, 238 AD2d 734, 656 NYS2d 502). Tax Law § 1132(c) places the burden of proving that purchases are for resale upon the person claiming the same.

The terms "sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration" (20 NYCRR 526.7[a]). This regulation contemplates that each sale or resale of tangible personal property shall consist of: (i) a consideration and (ii) a transfer of title or possession of the tangible personal property.

The Division's regulations regarding the resale exclusion provide:

> (1) Where a person, in the course of his business operations, purchases tangible personal property or services <u>which he intends</u> to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.
>
> (2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate
>
> (3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property . . . (20 NYCRR 526.6[c][1], [2] and [3], emphasis added).

Under the above regulations, for there to be a purchase and a resale there must be two transactions. First, the buyer "in the course of his business" makes a purchase of tangible personal property (pays consideration in exchange for the transfer of title or possession or both of tangible personal property) which he intends to sell to his customers. To avoid double taxation, the regulation does not require the buyer to pay sales tax to the vendor at this stage (20 NYCRR 526.6[c][3]). Second, when the tangible personal property is resold (i.e., title or possession or both is again transferred for new consideration) to his customer, the regulation provides that this resale would be subject to sales tax (20 NYCRR 526.6[c][3]).

Petitioner claims that it is entitled to the resale exclusion with respect to all purchases made under the Contract, i.e., that all such property and services are resold to DOE. When petitioner makes a purchase under the Contract, it pays the vendor and the property is delivered to petitioner even though the Contract between petitioner and DOE provides that title to all such property passes directly from the vendor to DOE. Petitioner is then reimbursed for the purchase price by DOE. Once property is purchased under the Contract, petitioner is required to account for and to treat the property as owned by DOE. When the property is no longer needed, petitioner disposes of it using DOE procedures. Petitioner asserts that such facts indicate that all property purchased under the Contract is resold and, therefore, not subject to tax.

In ***Matter of MGK Constructors*** (***supra***), we addressed the issue of whether the purchases of guard services by a construction contractor pursuant to a contract with the City of New York were excluded from sales tax as purchases for resale. In that case, MGK had contracted with the City to build a water tunnel. MGK was required under the contract to

provide guard services, and those guard services were used by MGK to protect the work site. In ***MGK***, we emphasized that the contract with the City was for the construction of the water tunnel and not for the provision of guard services. Guard services were used by MGK at its work sites and this was just one of many expense items that MGK incurred as an incident to carrying out its contractual obligations with the City. We held that MGK's purchases of guard services were not made for the exclusive purpose of resale to the City.

The term "use" for purposes of the Tax Law and the regulations includes the:

> exercise of any right or power over tangible personal property by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time . . . any affixation to real property, or any consumption of such property (20 NYCRR 526.9[a]; Tax Law § 1101[b][7]).

In this case, as in ***MGK***, this petitioner's evidence fails to establish that its purchases under the Contract were exclusively for resale. As in ***MGK***, the record establishes that petitioner's purchases of tangible personal property and services were for its use in carrying out its management and operating contract with DOE, not for the purposes of resale.

Further, the evidence fails to show that there was any "resale" of the property to DOE. Instead of having two separate and distinct transactions, i.e., a purchase with consideration and a subsequent resale to a customer for consideration, we have a single transfer of title or possession, and a single consideration. Petitioner places an order for tangible personal property, the property is transferred to petitioner's possession and, pursuant to petitioner's contract with DOE, title is immediately transferred from the vendor directly to DOE. DOE later reimburses petitioner for the purchase. However, reimbursement for a previous transaction does not constitute a second sales transaction because there is no second transfer of title or possession. Following petitioner's

logic, any purchaser who directs that his goods be delivered to a third party may claim a purchase for resale.

Further, we view the facts in ***United States v. Forst (supra)*** as being nearly on all fours with the facts here. In ***Forst***, the contractor had a cost plus fixed fee contract to operate an Army ordnance facility. The contractor was responsible for procuring raw materials used in manufacture as well as all other tangible personal property needed to carry out its contract. Tax was imposed only on the latter category of property. As in the instant case, purchase orders specified that materials were being acquired in the performance of a government contract and that title to all materials vested in the government upon delivery. As in the instant case, the credit of the government was not bound by these purchase orders.

The parties in ***Forst*** stipulated that the contractor was not an agent of the Federal government, and was responsible for furnishing all materials adequate for fulfillment of the contract. The Court in ***Forst*** found that in view of the contractual and business relationship of the parties, the contractor and not the government was the "purchaser" of the property used to carry out the contract and, hence, the one upon whom the incidence of taxation fell. The Court concluded that a claimed resale to the government did not occur. The Court noted that the "sales tax is designed to be legally incident only on the final consumer-purchaser" (***United States v. Forst***, ***supra***, at 925), and the resale exemption is designed only to prevent "multiple sales tax incidence for the same tangible personal property" (***United States v. Forst, supra,*** at 925). The Court found that the exemption was inapplicable to the contractor in ***Forst***, which was the final consumer-purchaser of the property, even though the contractor never had legal title to the property. Despite the fact that the contractor was reimbursed by the United States for its

purchases, and the fact that the United States held title and reimbursed the contractor for the cost of this property, the Court concluded the property was not "resold" to the United States government (***United States v. Forst***, ***supra***).

We find the analysis and conclusion of the District Court in ***Forst*** on the issue of sale for resale to be compelling. While title to the property in this case passed to DOE, petitioner was the purchaser-consumer. The property was delivered to petitioner for its use in carrying out its contract with the government. We conclude that, as the Court did in ***Forst***, that petitioner's purchases were made for the purpose of meeting its obligations under the Contract to manage and operate the plant and were used and consumed by petitioner in connection therewith. As such, petitioner's purchases were not made exclusively for resale (***Matter of Micheli Contr. Corp. v. New York State Tax Commn., supra***; ***Matter of Savemart, Inc. v. State Tax Commn***., ***supra***; ***Matter of AGL Welding Supply Co.***, ***supra***).

Further, there is no evidence that petitioner ever provided its vendors with a resale certificate (***see***, 20 NYCRR 526.6[c][2]). While this fact alone might not be fatal to petitioner's showing that its purchases were for resale (20 NYCRR 532.4[b][6]), it still had the burden to come forward with clear and convincing evidence to prove that it is entitled to be excluded from the tax (Tax Law § 1132[c]). As in ***Forst,*** the facts in this case do not support the conclusion that petitioner resold the property to the government. Under the facts in this record, we conclude that petitioner has failed to carry its burden of showing that the resale exclusion is applicable to its purchases.

We have reviewed the remaining issues to which the parties have taken exception, including whether the Division should be estopped from assessing sales and use taxes because of

petitioner's detrimental reliance on the Division's February 22, 1982 letter; whether the Administrative Law Judge properly determined whether certain purchases were entitled to an exemption because they resulted in capital improvements to real property; whether the Administrative Law Judge properly determined whether certain purchases by petitioner qualified for the exemption set forth in Tax Law § 1115(a)(15) and (16) as tangible personal property used in erecting a structure or building, adding to, altering or improving real property or maintaining, servicing or repairing real property of an exempt organization; and whether the Administrative Law Judge properly determined that certain purchases were exempt from tax pursuant to Tax Law § 1115(a)(10) as tangible personal property purchased for use or consumption directly and predominantly in research and development in the experimental or laboratory sense, and that certain of the invoices therefor did not set forth a breakdown of charges for property and services.

After carefully reviewing the analysis given to the aforementioned issues by the Administrative Law Judge and the arguments made by the parties on exception, including the additional briefs received on the exception to the determination on remand, we affirm the determination of the Administrative Law Judge based on the reasoning contained therein and the exhaustive analysis of the voluminous documentation constituting the basis therefor. We believe that the Administrative Law Judge completely and correctly handled each and every issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of West Valley Nuclear Services Co., Inc. is denied;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is affirmed;

4. The determination of the Administrative Law Judge on remand is affirmed; and

5. The petition of West Valley Nuclear Services Co., Inc. is granted to the extent set forth in the determination of the Administrative Law Judge dated April 11, 1996, as set forth in conclusion of law "Z," and to the extent set forth in the determination on remand of the Administrative Law Judge dated January 12, 1998, as set forth in conclusion of law "DD," but is otherwise denied.

DATED: Troy, New York
November 13, 1998

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner

COMMISSIONER DeWITT dissenting:

I agree with the majority opinion insofar as it concludes that petitioner was not acting as an agent of DOE when it made its purchases of tangible personal property and services pursuant to the Contract. However, I respectfully dissent from the majority opinion insofar as it concludes that petitioner's purchases were not sales for resale. Rather, I believe that the property and services purchased by petitioner pursuant to its Contract with DOE were not subject to the imposition of sales tax because they were purchased for resale to DOE. As this would be dispositive of the exceptions pending in this matter, I take no position on the issues concerning estoppel, entitlement to exemption pursuant to Tax Law § 1105(c)(3)(iii), § 1115(a)(15) or (16) and the research and development exemption under Tax Law § 1115(a)(10).

As set forth above in the majority opinion, Tax Law § 1105 imposes sales tax on the receipts from every retail sale of tangible personal property and on certain enumerated services. A "retail sale" is defined in Tax Law § 1101(b)(4) as a "sale of tangible personal property to any person for any purpose, other than . . . for resale as such." Section 1105(c) imposes tax on the receipts from every sale, except for resale, of the services enumerated therein.

The regulations addressing the resale exclusion state:

> (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.
>
> (2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate (20 NYCRR 526.6[c][1] and [2]).

In ***Matter of Albany Calcium Light Co. v. State Tax Commn.*** (***supra***), the Court noted that while the sales and use tax law does not define the term "resale," it appeared that "a purchaser who acquires an item for the purpose of sale or rental (Tax Law, § 1101, subd. [b], par. [5]) purchases it for resale within the meaning of the statute" (***Matter of Albany Calcium Light Co. v. State Tax Commn.*** (***supra***, at 334).

In ***Matter of Micheli Contr. Corp. v. New York State Tax Commn.*** (***supra***), the petitioner leased or purchased construction equipment and, in some cases, re-leased it but also used some of it in its own business operations. The Appellate Division, relying on ***Albany Calcium***, upheld the Tax Commission's determination that, in order for the purchase of equipment to be exempt from taxation as a sale for resale, it must have been purchased exclusively for resale or re-lease.

A mixed use of equipment between petitioner's own use and the leasing of such equipment to third parties does not satisfy this requirement.

If a resale occurred following petitioner's purchases under the Contract at issue herein, then petitioner's purchases were not taxable retail sales but non-taxable sales for resale. The Division argues that petitioner's purchases were not sales for resale because petitioner used the tangible personal property in the performance of its contractual obligations to DOE. Thus, petitioner did not meet the judicially developed requirement that in order to qualify for the resale exclusion from tax, property must be purchased exclusively for resale ***(Matter of Micheli Contr. Corp. v. New York State Tax Commn., supra***). The Division argues that any use by petitioner prior to its resale negates the exclusivity of purchase.

There is no question that petitioner ultimately used that which it purchased to carry out its contractual obligations to DOE. However, that does not resolve our inquiry as to whether or not the property and services purchased by petitioner were resold to DOE prior to such use. If a resale occurred prior to petitioner's use of such property and services, then petitioner was merely using government property to carry out its obligations, and such use is not a transaction subject to the imposition of sales or use tax.

In an effort to identify the purchaser in these transactions for purposes of applying Tax Law § 1105, we have focused intently on the "purchasing" activities engaged in by petitioner and its relationship to vendors and to DOE in this regard. However, we cannot ignore the contractual and regulatory scheme controlling the selection of materials and services to be purchased, prescribing the purchasing methodology and establishing a method for reimbursement

which, at the end of this process, placed title, possession and control of all property and services purchased in DOE.

Thus, the transactions engaged in by petitioner, its vendors and DOE must be reviewed in their totality in order to determine whether the purchased items were resold to DOE. First, it must be decided if the items were purchased by petitioner with the intent that they were to be resold. In this regard, it is noted that Tax Law § 1101(5) defines both a "purchase" and a "sale" in identical terms: "[a]ny transfer of title or possession or both . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor." Although I concur in the majority's conclusion that petitioner is a "purchaser," the record discloses that petitioner never acquires title, obtains possession or control, or expends its own funds to pay its vendors. Without viewing these purchases as part of an integrated transaction, i.e., a "purchase" by petitioner and an immediate "resale" by petitioner to DOE, petitioner's status as a purchaser would be dubious.

The Administrative Law Judge found that petitioner only purchased items that had been approved by DOE as part of petitioner's budget. The Contract specified that title to the property purchased passed directly from the vendor to DOE. Petitioner could not use the purchased property for its own purposes and could not dispose of such property other than in carrying out its contractual duties or in accord with DOE guidelines. All property was considered government property and, as found by the Administrative Law Judge, petitioner did not own anything purchased with DOE funds nor did petitioner own any tangible personal property. Petitioner, while purchasing in its own name and obligating itself to its vendors for the purchase price, never advanced its own funds to meet these obligations. DOE was obligated to reimburse petitioner for

its purchases and, in this regard, provided a special account containing DOE funds which were specifically designated for payment of vendors. According to testimony of petitioner's witness, the balance in such account was maintained as close to zero as possible, with funds being drawn against a letter of credit given by DOE to the bank and deposited in the account on a daily basis. Such funds, though administered by petitioner and DOE, never became the property of petitioner. Funds were remitted directly to vendors.

The role of petitioner in these transactions was to place orders in its name, thus, interposing itself between DOE and the vendors and insulating DOE from liability to vendors. However, it is petitioner which directed the vendors, via its purchase invoice, to transfer title and possession directly to DOE. This is an incident of both petitioner's purchase and of its resale pursuant to Tax Law § 1101(5). By placing an order with vendors in its own name, and obligating itself to vendors for payment, it purchased the goods and services at issue. At the same time, by directing that title pass directly to DOE and receiving reimbursement from DOE, it resold these same items to DOE.

Based on the foregoing, I conclude that purchases made by petitioner pursuant to its Contract with DOE were made with the intent that the purchased items be resold to DOE. As to the requirement that such purchases be made exclusively for resale, I believe that the record supports that petitioner has met its burden to show that all purchases made pursuant to its Contract with DOE were made exclusively for resale.

The majority concludes that a sale for resale requires two distinct transactions in order to qualify as such. I disagree. I find no support for such a restrictive interpretation in the statute. To the contrary, I believe that Tax Law § 1101(5), in defining a purchase and sale as a transfer of

title or possession, by any means and in any manner, is broad enough to encompass the integrated transactions engaged in by petitioner and DOE.

The requirement of a separate resale transaction would seem to elevate form over substance. If the government had purchased the property and services directly, no sales tax would have been imposed. In that case, the government would have acquired title and possession of that which it purchased in return for providing consideration to its vendors. Here, the government accomplished exactly the same result but, through its contractual relationship with petitioner, caused purchases to be made by petitioner in the first instance. Absent a discrete resale transaction, the majority finds that the transaction consisted solely of a purchase by petitioner. However, petitioner has retained no incidents of ownership or possession over that which it purchased.

I believe that the ultimate transfer of title and possession was from the vendors to DOE and that DOE remitted to the vendors valuable consideration for the purchased property and services. While there is no dispute that petitioner's role in the transactions was sufficient to make it a purchaser, I cannot reconcile the majority's result with what I conclude to be the ultimate result of an immediate resale by petitioner to DOE.

The majority relies on ***United States v. Forst (supra)*** for its position that a resale did not occur. The Court in ***Forst*** concluded that the resale exemption is designed only to prevent a "multiple sales tax incidence for the same tangible personal property" (***United States v. Forst***, ***supra***, at 925). The Court found that the contractor in that case was the final consumer-purchaser of the property, in spite of the fact that the United States held title and reimbursed the contractor for the cost of this property. On appeal, the United States Court of Appeals for the 4th Circuit

affirmed the decision of the District Court without discussing that portion of the decision relating to resale. I do not find the analysis or conclusion of the District Court in ***Forst*** on the issue of sale for resale to be instructive for our purposes. There was no apparent consideration of whether or not a sale by the contractor to the government took place.

The Division argues that a resale could not occur because petitioner did not issue resale certificates to its vendors. A vendor who accepts in good faith a timely and properly completed resale certificate from a purchaser is relieved of the responsibility of collecting tax from its customer and has met its burden of proof to prove that the transaction is nontaxable (Tax Law § 1132[c]; 20 NYCRR 532.4[b][2]). However, the Division's own regulations provide that the failure of a vendor to receive timely or proper documentation of the claimed exempt status of a transaction "does not change the tax status of the transaction" (20 NYCRR 532.4[b][6]). Thus, the failure of petitioner to remit resale certificates to its vendors does not change my conclusion herein.

I conclude, therefore, that the property and services purchased by petitioner pursuant to its contract with DOE were not subject to the imposition of sales tax because they were purchased for resale to DOE and I would reverse the determination of the Administrative Law Judge on this issue.

DATED: Troy, New York
November 13, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President