

MEANS, MOTIVE AND OPPORTUNITY USCG FCA HIDDEN ALTERNATE REMEDIES

1. Excerpts from USCG documents before legally intervening in a "sealed" lawsuit.^{1 2}

"The actual classification of the damages into the appropriate category was in large part done by the DOJ attorneys assigned to the case with input, primarily regarding contractual matters from agency representatives." "V. Power By The Hour (PBTH). ...It was thus imperative that the Coast Guard obtain some relief from expected future costs in conjunction with the present settlement of all false claims." "The Coast Guard's decision to enter into some type of PBTH contract is best illustrated by a consideration of alternative solutions as discussed below: Cash Payments: Although it may have been possible to reduce the expected future losses to a cash settlement, ... this was perhaps the least desirable alternative.

"...These incentives are difficult if not impossible to achieve in a cash settlement. In addition fiscal constraints make it very difficult to return a cash recovery to an agency appropriation account. Though recent Comptroller General opinions indicate that cash recoveries from contractors can be used to fund the cost of repair or correction, in this case the appropriate agency account would have to be credited on a fiscal year basis. It would be administratively very difficult to apply the full cash settlement towards the excess cost of repair in any given fiscal year. To the extent (P.13) that the Coast Guard was unable to return cash payments to an agency account for repair/overhaul, it would have been in the worst possible position of buying defective parts in effect without a corresponding reduction in price since "unused" cash payments would be deposited in the "miscellaneous receipts" account of the U. S. Treasury. Perhaps the most serious drawback to a present cash settlement for projected future cost is that it puts the Coast Guard at risk if projections prove to be understated. ...As can be seen, except for a cash settlement the common failure of the alternatives discussed above is they to some extent all turn on the Coast Guard being able to effectively enforce its contract rights in future dealings with TLC."

"...Once the false (P.14) claims allegations against TLC are settled, the Coast Guard loses the considerable leverage that flows from the tremendous civil and criminal liability that could result if DOJ pursued the false claims allegations to litigation. Even weak contractual claims which would otherwise not be pursued at all or settled for a fraction on the dollar can be pursued to a successful resolution as part-and-parcel of a false claims settlement."

"Under the direction of Commandant (G-EAE), I entered into a series of negotiations between Textron-Lycoming, their legal counsel (McKenna, Conner, and Cuneo) and the United States Government. As the Aeronautical Engineering Project Officer, I worked closely with trial attorneys from the Civil Division of the U.S. Department of Justice. The purpose of these negotiations was to explore a potential out of court settlement of civil breach of contract and criminal False Claims Act allegations regarding the contracts to provide LTS101 turbine engines and spare parts to the U.S. Coast Guard. These negotiations commenced on 28 July 1989 and after various sessions culminated in a conceptual settlement agreement on 2 November

¹ *Analysis Of Settlement, USCG/DOJ/AVCO, by USCG's Phillip M. Gillihan, Norfolk, Virginia, dated about March 2, 1990.*

² *Settlement Negotiations With Textron-Lycoming by T. W. Sechler, USCG'S Lead Negotiator, Aeronautical Engineering Project Officer, dated December 12, 1989.*

1989. I acted as lead negotiator for the U.S. Coast Guard. Mr. Charles Kuintzle, Vice President, Business Strategies, was the lead negotiator for Textron-Lycoming... "

"6. The meat of the settlement for the Coast Guard is the six year, commercial derivative PBTH agreement."

"...This cash amount will not convey to the Coast Guard. Instead it will be paid to the U.S. Treasury to reimburse theoretical incremental appropriations that were necessary to support the LTS101. All other terms of the settlement were constructed to insure that the Coast Guard receives the benefit of the bargain."

2. "... but instead I will discuss the intent of the settlement and the benefits to the Coast Guard..." T. W. Sechler Copy: Mr. Vogel, U. S. Department of Justice, LT Dinicola, Chief, Contracting Branch, ARSC, CDR Foley, Commandant (G-EAE-3)

2. Disclosed FCA Fraud Proceeds

Payment: \$17,000,000.00 cash payment to U.S. Treasury Department.

Cash Value: \$17,000,000.00 cash payment.

"This cash amount will not convey to the Coast Guard. Instead it will be paid to the U.S. Treasury to reimburse theoretical incremental appropriations that were necessary to support the LTS101."

3. USCG's "Alternate Remedies" Diverted and Hidden From U.S. Treasury

Forfeiture: AHC's U.S.B.O.C.A. "Administrative Claims" On The U.S. Coast Guard ^{3,4}

Cash Value: \$ 26,440,130.00

"...and to accept Aerospatiale's offer to dismiss administrative claims against and to grant other valuable consideration to the Government, in settlement of the above referenced suit..."

"...These are complex appeals involving approximately \$26,440,130.00 in claims."

"...Negotiations between the parties have resulted in settlement of other appeals involving some \$40,000,000.00..."

Fraudulent Misrepresentation by the government: "Ballew also named Aerospatiale Helicopter Corporation, the helicopter's manufacturer, as a defendant. However, no evidence was discovered to suggest that Aerospatiale participated in Textron Lycoming's misconduct." DOJ's Press Release dated July 11, 1990.⁵

³ D.O.J. File No. 46-73-1322. Memorandum For File. Re: United States ex rel. Robert C. Ballew v. Aerospatiale Helicopter Corporation and Textron Lycoming Corporation, Civ. Action No. 4-88-287-E (N.D. Tex.) Stuart M. Gerson, US Assistant Attorney General, March 15, 1990.

⁴ Order To Dismiss With Prejudice, Appeals Of Docket Nos. 1905, 1924, 1925, 1935, 1962, 1981, 1982 relating to Prime Contract DOT-CG-80513A, Aerospatiale Helicopter Corporation. Department of Transportation, Board of Contract Appeals, Washington, D.C. Appearances: For (AHC) the Appellant: Stan Hinton, Esq., Duke & Riley, Dallas, Texas. For (USCG) the Respondent: Robert W. Jones. Esq., United States Coast Guard, Washington, D.C.

⁵ DOJ's Press Release # 90-276, dated July 11, 1990, Headline - "The Department of Justice announced today a \$17.9 million settlement, the largest ever of a whistleblower lawsuit."

Confirmed As An Alternate Remedy: *"In addition, authority is granted to accept... and to accept Aerospatiale's offer to dismiss administrative claims against and to grant other valuable consideration to the Government, in settlement of the above referenced suit, and to move to dismiss that suit (Civ. Action No. 4-88-287-E (N.D. Tex.)) with prejudice."*⁶

Forfeiture: Standards of Minimum Acceptable Performance Criteria

Cash Value: \$??? (Forfeiture = "a major concession...")

"Textron-Lycoming's acceptance of provisioning oriented forecast failure rates as minimum acceptable performance was a major concession. Coast Guard consumption data and the derived experienced service lives are very soft, and would have been extremely difficult to prove in a strict legal environment."

Forfeiture: Power-By-The-Hour Contract

Cash Value: \$300,000,000.00 over 30 years or fleet life; \$60,000,000.00 over 6 years.

"5. Future damages are prevented by the "Power by the Hour" (PBTH) fixed price maintenance contract. The meat of the settlement for the Coast Guard is the six year, commercial derivative PBTH agreement. PBTH is a common commercial fixed price per engine hour maintenance agreement utilized to guarantee future support costs for potentially risky turbine engine maintenance. The very unsettling past and uncertain future of the LTS101 make a PBTH agreement highly advantageous. Normally the military would not be offered a PBTH agreement. ...The Coast Guard specifically requested this arrangement as part of any potential settlement."

Forfeiture: Free Engine Overhauls

Cash Value: \$1,740,000.00 = \$58,000.00 per Overhaul x 6 Months x 5 Per Month

"... I insisted upon a transition period with its own method of preventing damage to the Coast Guard. During the transition period, which commences immediately upon signing the settlement M.O.U. and extending until award of the PBTH contract, Textron-Lycoming will perform 5 no cost engine overhauls per month. This transition period shall not exceed 6 months."

Forfeiture: All Future Spare Parts Costs

Cash Value: \$??? = Recurring forfeiture of all future spare parts costs.

"And, this price includes all field and depot parts and depot labor, thus effectively negating any future expenditure on virtually all LTS-101 spare parts. Current estimates of internal Coast Guard depot costs to support the LTS101 are based upon the existing pricing agreements for spare parts." (Note: 100% retail pricing)

Forfeiture: Defect Repairs Within The PBTH Contract.

Cash Value: \$45,000.000.00.

⁶ D.O.J. File No. 46-73-1322. Memorandum For File. Re: United States ex rel. Robert C. Ballew v. Aerospatiale Helicopter Corporation and Textron Lycoming Corporation, Civ. Action No. 4-88-287-E (N.D. Tex.) Stuart M. Gerson, US Assistant Attorney General, March 15, 1990.

"The fixed rate includes the cost of developing and implementing the very expensive technical modifications that should mature the engine. A recent estimate for the initial incorporation of the planned product improvements in the Coast Guard fleet was \$45 million." (Note: The USCG is paying the Defendants to repair their own defects. Why?)

Forfeiture: Cancellation or Reduction = The Expensive Sustaining Engineering Contract
 Cash Value: Minimum Estimate = \$3,000,000.00 = \$500,000.00 per year x 6 Years (PBTH).
"Terms discussed above, combined with the five free field service representatives, allow the Coast Guard to cancel or greatly reduce the expensive sustaining engineering contract for the LTS101."

Forfeiture: Economic and Technical Risks
 Cash Value: \$??? (Forfeiture of Work and Costs).
"The PBTH agreement transfers most of the current and future economic and technical risk to Textron-Lycoming."

Forfeiture: Production Inspection Exception
 Cash Value: \$???

"The agreement provides for a Coast Guard COTR in-plant at Textron-Lycoming to provide quality oversight. The normal provisions of the government inspection clause would also apply."

Forfeiture: Return All Excess Inventories For Full Credit
 Cash Value: \$??? ("tremendous economic value")
"The ability to transfer for credit all existing inventories of LTS101 material at the initiation of contract performance is an extremely attractive provision. While this provision may be difficult to execute, it has tremendous economic value and should be pursued vigorously."

Forfeiture: Rights To Revoke PBTH Agreement Format
 Cash Value: \$???. Multiplier (6 year PBTH Contract changed to Fleetlife/30)
"If the PBTH arrangement is very effective at supporting the LTS101, we may desire to continue the arrangement for the life of the LTS101. To address these concerns, Textron-Lycoming has agreed to offer PBTH contracts on an annual basis, at "market rates" beyond the six years governed by the settlement."

4. 05/26/88 - Defendant's fax of undisclosed fraud proceeds forfeited as Alternate Remedies After Initiation of Qui Tam Investigation.⁷

A 6-page FAX from the AVCO Program Coordinator to the AHC Director of Materials, dated May 26, 1988, lists all of the items enacted, performed, and forfeited in settlement of obligations triggered by Ballew's qui tam lawsuit.

The table below is a simple recap of the items described in the 6-page FAX and represents proceeds of at least \$26,000,000.00. These undisclosed proceeds are in addition to the approximately \$17,000,000.00 disclosed and described to the court.

Also, it does not include the additional \$27,000,000.00 that AHC forfeited to the USCG in the specific Dockets dismissed in the Department of Transportation's Board of Contract Appeals (BOCA), 14 days after the U.S. District Court for the Northern District of Texas, Fort Worth Division, approved this case's settlement.

Grand total "disclosed" + identified "hidden" qui tam recovery - Grand total = \$70,851,130.00
 Part 1 - disclosed qui tam recovery - Cash paid to u.s. treasury by defendant as qui tam settlement \$17,000,000.00
 Part 2 - hidden qui tam recovery - Forfeited administrative claims in board of contract appeals \$26,440.130.00 +:
 Part 3 - hidden qui tam recovery per AvcoLycoming Textron's Lee Remsen

<i>Description and Qty U/M</i>	<i>Subtotal Value</i>
<i>Engineering Investigations - define LT101 problems / seek solutions. 1 Lot</i>	<i>\$4,000,000.00</i>
<i>Engineering Investigations 1 Lot</i>	<i>\$6,000,000.00</i>
<i>Engineering Investigations 1 Lot</i>	<i>\$6,000,000.00</i>
<i>Engineering Investigations 1 Lot</i>	<i>\$6,000,000.00</i>
<i>"...among other efforts" ? Lot ?</i>	<i>\$???</i>
<i>"a new bladed PT Rotor is being designed" 360 Kits</i>	<i>\$???</i>
<i>"interim design package to reduce coking" 360 Kits</i>	<i>\$???</i>
<i>"a redesigned combustor housing to eliminate the coking" 360 Kits</i>	<i>\$???</i>
<i>"...determine GP blade problem and remedial action" 360 Kits</i>	<i>\$???</i>
<i>"...removal of G.P. wheels having over 600 hours" 16 Ea.</i>	<i>\$???</i>
<i>"...to reblade G.P. wheels provided by AS&SC" ? Ea.</i>	<i>\$???</i>
<i>"...short term provisioning of ALT manpower" ? Lot</i>	<i>\$???</i>
<i>"...developed these improved components at our expense" ? Lot</i>	<i>\$???</i>
<i>"has already done the following to reduce cost of ownership": - - - - -</i>	
<i>"provide at no cost to the USCG, 135 #4/5 bearing kits" 135 Kits</i>	<i>\$411,000.00</i>
<i>"provide warranty outside of contractual obligations on PT rotors..." ? Lots</i>	<i>\$???</i>
<i>"providing spare parts provisioning at no cost to the USCG" ? Lots</i>	<i>\$???</i>
<i>"ordered long lead items... reduce cost to the USCG" ? Lot</i>	<i>\$???</i>
<i>" a 40% discount from commercial price list - DTCG38-86-C-00057." 1 Lot</i>	<i>\$5,000,000.00</i>
<i>"provided engine & test cell specifications to the USCG at no cost" 1 Lot</i>	<i>\$???</i>
<i>"provided additional engines at substantially reduced prices" ? Lots</i>	<i>\$???</i>
<i>"hired to collect data... stationed at AR&SC... no cost to the USCG" ? Lot</i>	<i>\$???</i>

Minimum qui tam recovery hidden from U.S. Treasury Department by DOJ = **\$53,851,130.00+**

⁷ Fax from Lee Remsen of AvcoLycoming-Textron Program Manager to Ron Childs, AHC Director of Materials, dated 05/26/88, pages 1 -6.

TEXTRON Lycoming

STRATFORD, CT

THIS DOCUMENT WAS TRANSCIVED

TO: AHC

ATTN: MR. RON CHILDS, DIRECTOR, MATERIALS

FROM: LELAND J. REMSEN

TOTAL PAGES: 6 (INCLUDES HEADER)

SEND/RECEIVE

COMMENTS:

DEAR MR. CHILDS:
PLEASE FIND ENCLOSED OUR FORMAL RESPONSE TO THE
USCG'S COMPLAINTS ABOUT THE LTS 101-750 GAS TURBINE
ENGINES IN THE HH-65A AIRCRAFT.

WE REGRET ANY INCONVENIENCE CAUSED BY THE DELAY IN
TRANSMITTING OUR REPLY TO YOU. PLEASE CONSIDER
THE IMPORTANCE OF THIS MATTER WHEN ACCEPTING OUR
APOLOGY.

YOUR TRULY,

LELAND J. REMSEN

PROGRAM OFFICE

OUR TELECOPIER NUMBER IS:

(203) 377-6737

DATE: 26 May 1988

TIME: _____

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL BACK
AS SOON AS POSSIBLE

TEXTRON Lycoming

Stratford Division
 Textron Lycoming /
 Subsidiary of Textron Inc.

550 Main Street
 Stratford, CT 06467
 203/385-2000

26 May 1988
 MO052588/WWH

Aerospatiale Helicopter Corp.
 2701 Forum Drive
 Grand Prairie, Texas 75053-4005

Attention: Mr. Ron Childs, Director Materials

Gentlemen:

Textron Lycoming is pleased to provide a response to your 29 April 1988 letter which enclosed a letter from the USCG 4200/199, 27 April 1988. It is not the intention of Textron Lycoming to formalize our activity with the United States Coast Guard on the basis of the response in the following several paragraphs. We intend to continue a very co-operative business arrangement and have, in fact, offered what we consider a substantive response in the latter portion of this letter. Nevertheless, we must preface our substantive offer with a response which we feel is necessary because the USCG letter took certain positions which permit us no choice.

The letter dated 27 April 1988 from the United States Coast Guard indicates that previously accepted aircraft and certain spare parts, as well as ordered yet undelivered aircraft and spare parts, all pursuant to the above referenced contract, do not comply with certain engine model specifications. The USCG's letter further indicates that its investigation revealed that the failures of components as to which it alleges noncompliance with specifications, constitute failures which are "the result of defects latent in nature or ... such gross mistakes as amount[s] to fraud." From that the USCG's letter concludes that previous Coast Guard "acceptance of products is not conclusive and the USCG has those remedies, among others, set forth in the 'Inspection' clause." Textron Lycoming categorically rejects these contentions. There is absolutely no evidence to indicate that the "failures" of which the USCG complains are "defects latent in nature." Furthermore, there is absolutely no evidence to indicate "such gross mistakes as amounts to fraud." It is evident to us from our review of the communications between Textron Lycoming and AHC that Textron Lycoming fully disclosed any and all difficulties and "failures" encountered with respect to these engines.

TEXTRON Lycoming

Mr. Ron Childs

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26 May 1988

To permit general, unsubstantiated allegations of latent defects or gross mistakes such as to amount to fraud, to serve to undermine the carefully crafted government procedure for procurement, in which acceptance is final - absent very exceptional circumstances which assuredly are not present, would subvert the entire structure of government contracting. Without attempting to respond in detail to the particular allegations of noncompliance with specifications referenced in the USCG's letter, we would like to note that these specification provisions are in the nature of what might be termed "warranty". It is most evident from the language and history of negotiation of this contract that the USCG elected not to seek and pay for a warranty, whether encompassing these or any other provisions, but rather chose to assume that risk itself.

Our decision not to comment in detail upon the alleged noncompliance with specifications should not be considered as an admission of any such noncompliance. We would like merely to note at this time that the frequent and substantial additions to aircraft weight, together with major changes in the mission profile and maintenance philosophy to which Textron Lycoming originally bid, serve to render any indications of anticipated field service life meaningless. Those changes in the aircraft, its mission, and support of it have had the effect of wearing out and consuming engine parts far more rapidly than could have been originally anticipated with a lighter helicopter, less damaging mission profile, and different logistical support philosophy.

Moving now from contractual issues to Textron Lycoming's commitment to the LTS101, we agree with the USCG that an amicable settlement of the technical problems described in their letter is in the best interest of both Textron Lycoming and the USCG. We also agree that invoking contractual remedies is an inappropriate solution. While the understanding of what constitutes "substantive" response is a subjective interpretation, Textron Lycoming believes the following is, in our opinion, a substantive response:

1. Textron Lycoming desires and insists that despite the on-going contractual discussions, it is our commitment that HH-65 AVAILABILITY be increased and the COST OF OWNERSHIP of our product be decreased. We believe that our actions to date and the following actions planned will prove this point.

AVAILABILITY

Textron Lycoming understands that the Mission Capable (MC) goal for the HH-65 is 71% or better. We are confident that the planned improvement package discussed at the USCG/Textron Lycoming Stratford program meeting on 19 May 1988 will yield the

TEXTRON Lycoming

Mr. Ron Childs

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26 May 1988

desired MC goal when planned improvements are incorporated by Textron Lycoming Stratford and the USCG. In order to assure the accomplishment of our planned goal:

Textron Lycoming has committed itself to a major program of Company funded engineering improvements to the LTS 101. We invested over \$4.0M in 1987 in engineering investigations to define LT101 problems and to seek solutions. In 1988 we will invest over \$6.0M and similar amounts in 1989 and 1990. These dollars and our efforts, while devoted to LTS 101 improvements, are specifically focused on the three problems identified in the USCG's letter. Specifically the following, among other efforts, are well underway.

- (1) PT Rotor - a new bladed PT Rotor is being designed and will be available to the USCG in late 1989 or early 1990.
- (2) Coking - An interim design package of improvements to reduce coking in the LTS 101 has been identified and will be available to the USCG in mid-1988.

In addition, a redesigned combustor housing to eliminate the coking problem will be available to the USCG in 1990.

- (3) GP Blades - Textron Lycoming is currently working with the USCG to determine the severity of its GP blade problem and remedial action. A meeting is scheduled no later than 31 May 1988 with the Commanding Officer AR&SC, Captain Joe Coleman and his staff, to define our complete course of action.

In the meantime, we have agreed with AR&SC to the removal of these G.P. wheels identified by the USCG (16 each) having over 600 hours. We have further agreed with AR&SC to reblade G.P. wheels provided by AR&SC to produce a rotatable pool. Additionally, we are planning short term provision of Textron Lycoming manpower to assist AR&SC in maintaining planned engine throughput.

In addition to the individual solutions to the problems described above, Textron Lycoming has defined a proposed group of improvements to the LTS 101-750B-2 which we have termed a "Medallion" engine. These "Medallion" engines are specifically planned to improve longevity of the engine. The technical content of the "Medallion" engines have been discussed in detail with the USCG in program meetings. We have developed these improved components at our expense and have reached an agreement

TEXTRON Lycoming

Mr. Ron Childs

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26 May 1988

with AR&SC to conduct a series of flight test evaluations to validate the proposed improvements.

COST OF OWNERSHIP

Textron Lycoming has also begun and will continue a substantial program to address the USCG's concern over the cost of ownership of the LTS 101 and has already done the following to reduce cost of ownership:

- (1) Provided, at no cost to the USCG, 135 No. 4/5 bearing kits at a value \$411K.
- (2) Provided warranty outside of contractual obligations on PT Rotors including substantial discount.
- (3) Provided spare part provisioning at no charge to the USCG.
- (4) Ordered long lead hardware in anticipation of USCG orders increasing Textron Lycoming cost but reducing lead time to the USCG.
- (5) Provided a 40% discount from commercial list price for spares on Contract No. DTCG 38-86-C-00057.
- (6) Provided engine and test cell specifications to the USCG at no charge.
- (7) Supplied additional engines substantially reduced in price.
- (8) Hired an individual to collect data, to be stationed at AR&SC at Textron Lycoming expense, in order to define field problems as they are reported.

Textron Lycoming has and will continue to participate in the LTS 101 cost benefit analysis study to allow the USCG visibility into the value and benefit of additional investment in the LTS 101 fleet.

In reviewing the basic contract, we find the original planned engine support costs were based on assumptions of aircraft use and USCG maintenance philosophy. As pointed out in paragraph 4 of this letter, changes in aircraft weight, mission profiles and, particularly maintenance concepts, all contribute to a higher than planned cost per hour. None of this includes any discussion of escalation factors. Regardless of the data above, Textron Lycoming is willing to enter discussions with the USCG to attempt to reach an understanding on future cost containment.

In summary, Textron Lycoming intends to continue our demonstrated commitment to improve both the availability and cost of ownership of the LTS 101. We believe that the actions completed and planned described above constitute substantive commitment of resources by Textron Lycoming to the improvement of the LTS 101. In order to assure understanding and agreement between Textron

TEXTRON Lycoming

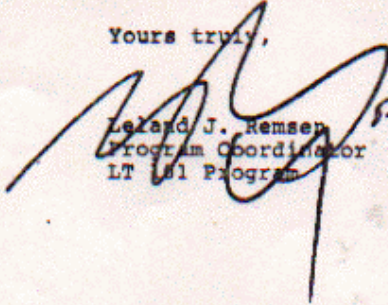
Mr. Ron Childs

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26 May 1988

Lycoming Stratford and the USCG, we suggest a meeting with the USCG and AHC so that we may fully explore the issues on the MH-65/LTS 101 Program.

Yours truly,



Leland J. Remsen
 Program Coordinator
 LT 101 Program

5-26-88

db

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