ORIGINAL

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U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

UNITED LAUNCH SERVICES, LLC, and THE BOEING COMPANY,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Case No. 12-380 C

COMPLAINT

Plaintiffs, United Launch Services, LLC ("ULS") and The Boeing Company ("Boeing"), through their undersigned counsel, state and allege as follows:

INTRODUCTION

1. This action arises out of the refusal of the United States Department of the Air Force ("Air Force") to honor its contractual commitments to reimburse hundreds of millions of dollars of costs incurred by Boeing in providing Delta IV launch services to the United States government as part of the Air Force's Evolved Expendable Launch Vehicle ("EELV") program. The Air Force agreed to reimburse these costs in a set of interrelated agreements designed to secure Boeing's continued participation in the EELV program after the Air Force decided to fundamentally restructure it. Through these agreements, the government ensured its continued access to space via Boeing's Delta IV launch vehicle, an expressed national security priority for both Congress and the President.

2. The costs at issue are a subset of the Delta IV costs that Boeing incurred from 1998 to 2006. Before the Air Force proposed to restructure the EELV program in early 2005, Boeing held the costs as inventoried assets and intended to recover them through the pricing of future Delta IV missions that would benefit from the company's early production efforts. The manner in which the Air Force proposed to restructure the EELV program threatened Boeing's recovery of a category of these inventoried costs known as "Deferred Support Costs" (or "DSC"). The Air Force's new contract structure, unlike the contract in place since the inception of the EELV program, failed to provide an established means by which Boeing could recover DSC.

3. Boeing clearly and repeatedly conditioned its willingness to participate in the restructured program on the government's agreement to contract terms ensuring Boeing's recovery of its inventoried costs, including DSC. In late 2006, after months of negotiations and review by senior government officials and auditors (including senior officials of the Air Force, the Defense Contract Management Agency ("DCMA"), and the Defense Contract Audit Agency ("DCAA")), Boeing and the Air Force entered into a set of agreements that contained just such terms. Significantly, the parties concluded these agreements shortly after DCAA's issuance of an audit report in May 2006 declaring the reimbursement of DSC a "procurement decision" for the Air Force.

4. The 2006 agreements expressly recognized that the methodology Boeing had been using to account for its Delta IV inventoried costs—known as "Lot Accounting"—complied with the federal Cost Accounting Standards ("CAS"), and promised to treat the methodology as compliant with CAS. They also established the Air Force's contractual commitment to reimburse DSC in fixed annual amounts over the next eight years. When subsequent

developments further complicated the recovery of another portion of Boeing's inventoried costs known as "Deferred Production Costs" (or "DPC"), the Air Force agreed in early 2008 to a similar contractual mechanism for the recovery of those costs as well. The government's agreement to reimburse DPC, as well as its agreement to reimburse DSC, followed necessarily from its contractual recognition of Lot Accounting as CAS compliant.

5. Despite these contractual commitments to reimburse DSC and DPC, the Air Force has refused to make any payment of DSC since October 2008 and any payment of DPC at all. The government also has formally repudiated its contractual obligation to make any further payments of DSC and has made clear that it has no intention of paying any amount of DPC. In June 2011, the government went a step further, demanding repayment of more than $72 million in DSC previously paid to Boeing, plus interest—a demand with which ULS, Boeing's successor-in-interest to the relevant contracts and agreements, promptly complied in order to prevent the accrual of interest and penalties pending resolution of the parties' dispute. And in May 2012, following multiple extensions, the Air Force summarily denied ULS's November 2011 certified claim seeking relief with respect to both DSC and DPC. Even as it has taken these steps, the Air Force has continued to assert its entitlement to credits that the parties calculated in reliance on Boeing's Lot Accounting methodology and that are predicated on the recovery of DSC.

6. In refusing to pay DSC and DPC, the government has not asserted that the costs at issue were incurred improperly, nor has it claimed that either Boeing or ULS failed to fully perform its obligations under the restructured EELV program contracts. Rather, the government has maintained that its various express contractual commitments to pay DSC and DPC are nonbinding and unenforceable. In so asserting, the government has relied primarily on the fact

that DCMA, despite initially concluding that CAS posed no obstacle to the reimbursement of the costs, has since reversed course and concluded that the costs are unallowable because Boeing's Delta IV Lot Accounting does not comply with CAS. The government's about-face on the meaning and application of CAS, years after the execution of the relevant contracts and Advance Agreements, provides no justification for its efforts to avoid its contractual commitments to pay these costs. Rather, the government's refusal to pay either DSC or DPC, and repudiation of its obligations to do so, constitutes an unexcused, material breach of its contracts with ULS.

7. Furthermore, DCMA's new position on CAS is wrong. Lot Accounting is not in conflict or nonconformance with CAS, and nothing in the CAS standards otherwise precludes Boeing's use of Lot Accounting or poses an obstacle to ULS's recovery of the costs at issue in this litigation. Moreover, and in any event, it is undisputed that the CAS standards did not govern Boeing's use of Lot Accounting for its pre-2006 Delta IV production effort, and the Air Force has identified no authority permitting the government retroactively to apply those standards to Boeing's use of Lot Accounting.

8. Boeing and ULS bring this action to recover the amounts of DSC and DPC past due and the amounts of DSC that ULS was forced to refund, and to establish the Air Force's obligation to pay the balance of these costs as additional amounts become due in the future.

PARTIES

9. Plaintiff ULS is a limited liability company organized and existing under the laws of the State of Delaware. Its principal place of business is located at 9501 East Panorama Circle, Centennial, CO 80112. ULS is a subsidiary of United Launch Alliance, LLC ("ULA"). The Members of ULS (and their respective shares of interest in the company) are: ULA (90%);

Boeing (5%); and Lockheed Martin Commercial Launch Services (5%). ULA is a limited liability company organized and existing under the laws of the State of Delaware. Its principal place of business is located at 9501 East Panorama Circle, Centennial, CO 80112. The Members of ULA (and their respective shares of interest in the company) are Boeing (50%); and Lockheed Martin Corporation (48%), Lockheed Martin Commercial Launch Services (1%), and Lockheed Martin Overseas Corporation (1%) (collectively, "Lockheed Martin").

10. Plaintiff Boeing is a corporation organized and existing under the laws of the State of Delaware. Its principal place of business is located at 100 North Riverside, Chicago, IL 60606. The original contracts were awarded to Boeing Launch Services, Inc., a subsidiary of Boeing. Those contracts were later novated to ULS. A final decision at issue in this complaint was subsequently sent to Boeing Defense, Space & Security, a Boeing business unit.

11. The defendant is the United States, acting through the Air Force and the DCMA.

JURISDICTION AND PROCEDURAL BACKGROUND

12. This action is an appeal of four final decisions rendered by contracting officers pursuant to the Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. § 7103. This Court therefore has jurisdiction pursuant to the CDA, 41 U.S.C. § 7104(b)(1), and the Tucker Act, 28 U.S.C. § 1491(a)(1).

A. Final Decisions With Respect To DSC

13. On June 16, 2011, Shawn R. Mapel, Administrative Contracting Officer for the DCMA, issued two virtually identical contracting officer's final decisions—one addressed to ULS and the other addressed to Boeing—in which he found that Boeing's Lot Accounting

practice and ULS's billing of DSC failed to comply with CAS 405 and 406 and that the cost impact of the purported noncompliance is the full amount of DSC the government had agreed to pay ($271,152,672).

14. Both final decisions demanded repayment of the same $72,198,875 in principal, which the Air Force had already paid at the time of the decision, plus $17,036,292 in interest on that principal, for a total of $89,235,167, which was subsequently revised to $89,235,166.70.

15. In compliance with these demands, ULS refunded $89,235,166.70 on July 1, 2011, thereby avoiding the accrual of interest penalties pending resolution of the parties' contractual dispute.

16. This action constitutes an appeal of the June 16, 2011 final decision addressed to ULS, as well as an appeal of the June 16, 2011 final decision addressed to Boeing (together, the "June 16, 2011 DCMA final decisions").

B. Denial Of ULS's Certified Claim For DSC And DPC

17. On November 10, 2011, ULS submitted a claim to the Air Force, certified consistent with the requirements of 41 U.S.C. § 7103(b) and Federal Acquisition Regulation ("FAR") 33.207(c). The claim sought relief with respect to both DSC and DPC.

18. With respect to DSC, the claim sought: (i) payment of $77,179,119, which represented the amount of DSC that the Air Force had been billed but declined to pay as of the submission of the claim; (ii) return of the $89,235,166.70 that ULS refunded on July 1, 2011; and (iii) payment of $33,894,084, which represented the DSC due in 2011 for which the Air Force refused to incorporate the contract line item that would enable billing and payment. ULS

reserved the right to seek additional amounts of DSC ($33,894,084 in 2012 and $33,894,084 in 2013) upon satisfaction of the conditions for payment.

19. With respect to DPC, the claim sought: (i) $40,956,790 of DPC for those missions that had been ordered and definitized by the government as of the date the claim was submitted; and (ii) $19,158,582 of DPC for those missions that, when they were ordered, were the subject of "not-to-exceed" prices that did not include DPC, but that had not yet been definitized as of the date the claim was submitted. ULS reserved the right to claim additional amounts when subsequent developments made such claims ripe.

20. With respect to both DSC and DPC, ULS requested: (i) interest pursuant to 41 U.S.C. § 611 (now codified at 41 U.S.C. § 7109), and (ii) confirmation of its rights to recover those amounts of DSC and DPC that are contemplated by the parties' agreements, but that had not yet become due or quantified as of the submission of the claim.

21. On January 10, 2012, Alan R. Mak, Contracting Officer for the Department of the Air Force, Headquarters Space and Systems Center, informed ULS that a contracting officer's final decision would be issued no later than April 13, 2012. On April 13, 2012, Mr. Mak extended the time to issue a final decision until May 15, 2012.

22. On May 15, 2012, Mr. Mak issued two separate contracting officer's final decisions denying the certified claim submitted on November 10, 2011. One final decision expressly denied the certified claim with respect to DSC, stating that the Air Force was denying "in its entirety those portions of the 10 November 2011 claim that do not assert or rely upon the allowability of DSC pursuant to CAS." The decision reasoned that the government's actions "did not create an irrevocable binding contractual obligation to recognize DSC as an allowable

cost, or to pay unallowable DSC." The other final decision expressly denied the certified claim with respect to DPC, stating that the Air Force was denying "in its entirety those portions of the 10 November 2011 claim that do not assert or rely upon the allowability of DPC pursuant to CAS." The decision reasoned that the government's actions "did not create any contractual obligation to recognize the allowability of DPC costs." Insofar as the May 15, 2012 decisions did not expressly deny the remaining portions of ULS's certified claim with respect to either DSC or DPC, those portions are deemed denied pursuant to 41 U.S.C. § 7103(f)(5).

23. This action constitutes an appeal of the contracting officer's denial and deemed denial of ULS's certified claim, as set forth in the two decisions issued on May 15, 2012; that is, it constitutes an appeal of the contracting officer's denial and deemed denial of ULS's claim with respect to both DSC and DPC.

FACTUAL BACKGROUND

I. The Evolved Expendable Launch Vehicle Program

A. Origins And Assumptions Of The EELV Program

24. The Air Force initiated the EELV program in the mid-1990s to support access to space for the Department of Defense, the intelligence community, NASA, and the Departments of Transportation and Commerce by assuring the availability of reliable, long-term launch capabilities and reducing the recurring costs for the overall launch system. The program was to accomplish this objective by contracting for the development of a new family of expendable launch vehicles, facilities, and services.

25. A critical assumption underlying the Air Force's goals for the EELV program was the existence and continuation of a robust commercial market for launch services. The Air Force believed that EELV launch-service providers would be able to provide more affordable launch services for the government if they were able to provide services—and allocate infrastructure costs—to both commercial and governmental customers. To realize these efficiencies, the Air Force required EELV launch service providers to have a manufacturing capability adequate to meet the anticipated payload-launch requirements of both sets of customers.

26. The initial Low Cost Concept Validation phase of the EELV program began in 1995 and included four contractors: Boeing, Lockheed Martin, McDonnell Douglas, and Alliant Techsystems. The second, Pre-Engineering, Manufacturing and Development ("Pre-EMD") phase began in 1996 and included only two contractors, McDonnell Douglas (which Boeing later acquired) and Lockheed Martin.

27. The third phase of the EELV program required the development and production of the new launch vehicles and infrastructure, as well as the use of those launch vehicles to provide launch services for the first group of government payloads. The Air Force originally contemplated the selection of a single contractor for the final phase, but, in November 1997, the Office of the Secretary of Defense decided that both Pre-EMD contractors would provide launch services using separate families of launch vehicles: Boeing (which by that time had acquired McDonnell Douglas) would develop the Delta IV family of launch vehicles; Lockheed Martin would develop the Atlas V family of launch vehicles.

28. The Air Force implemented this two-platform approach by issuing a request for proposals ("RFP") on June 19, 1998, to allocate work between the two contractors for the third

phase of the EELV program. The RFP anticipated the award of two contracts to each EELV contractor. The first contract would be an Other Transaction Agreement under which the government was to provide funding for a portion of the contractor's efforts to design and develop launch capabilities. The second contract, known as an Initial Launch Services Contract, would be a FAR Part 12, commercial-item contract under which the Air Force would issue delivery orders for launch services as launch requirements arose.

29. On October 16, 1998, the Air Force and Boeing executed the two Boeing-related contracts contemplated by the RFP: (1) an Other Transaction Agreement (Contract No. F04701-98-9-0005), under which the government would fund a portion of Delta IV design and development, and (2) an Initial Launch Services contract (Contract No. F04701-98-D-0002) (the "ILS Contract"), which allocated to Boeing's Delta IV family of launch vehicles a share of the 34 EELV missions that the government included in the RFP. The FAR Part 12, commercial-item ILS Contract enabled the Air Force to place purchase orders for launches at firm, fixed prices.

30. Neither the Other Transaction Agreement nor the ILS Contract were subject to CAS.

B. The Challenges Facing The EELV Program Under The Air Force's ILS Contract Model

31. The EELV program encountered a number of challenges under the Air Force's original contract model. Although that model was premised on the Air Force's belief that it could obtain launch services at a lower cost by leveraging demand in the commercial market, it eventually became clear that there were few commercial customers for EELV launch services.

Moreover, the government ordered launches at a much slower rate than it had originally forecasted.

32. These developments forced Boeing to reassess and to reduce the anticipated number of missions that it would launch on its Delta IV launch vehicles and to decrease the rate at which it expected those launches to occur. As a result, Boeing's costs per launch increased dramatically and Boeing incurred substantial losses on the Delta IV program. In its financial statements for the second quarter of 2003, Boeing recognized a "reach-forward" loss of $835 million related to the program; Boeing also recognized additional, smaller losses both before and after the second quarter of 2003. These losses are separate from, and do not include, the costs constituting DSC and DPC that are at issue in this action.

33. In a June 25, 2004 letter to the Air Force, Boeing explained that, because of the lack of a commercial market for EELV launch services, the Air Force's EELV program model was no longer a viable business option for the company. Without significant changes to that model, Boeing explained, the company would have to discontinue Delta IV operations after performing its existing contractual commitments.

34. Beginning as early as 2002, Congress and the President took notice of the challenges facing the EELV program under the Air Force's original contract model and took numerous steps to address those challenges through legislation and policy directives.

35. The Bob Stump National Defense Authorization Act for Fiscal Year 2003 required the Secretary of Defense to "evaluate all options for sustaining the space launch industrial base of the United States" and to "develop an integrated, long-range, and adequately

funded plan for assuring access to space by the United States." Pub. L. No. 107-314, § 912(a), 116 Stat. 2458, 2621-22 (2002).

36. The next year, in the National Defense Authorization Act for Fiscal Year 2004, Congress called "for the President to undertake actions appropriate to ensure, to the maximum extent practicable, that the United States has the capabilities necessary to launch and insert United States national security payloads into space." Pub. L. No. 108-136, § 912, 117 Stat. 1392, 1565 (2003) (codified as amended at 10 U.S.C. § 2273). This Act specified that, in accomplishing this task, the President was to provide resources sufficient to assure "the availability of at least two space launch vehicles" and "a robust launch infrastructure and industrial base." *Id.*

37. On December 21, 2004, the President authorized a new national space transportation policy. The U.S. Space Transportation Policy recognized that the "significant downturn in the market for commercial launch services has undermined … the ability of industry to recoup its significant investment in current launch systems and effectively precludes industry from sustaining a robust industrial and technology base sufficient to meet all United States Government needs." The Policy concluded that "[t]o assure access to space for United States Government payloads, therefore, the United States Government must provide sufficient and stable funding for acquisition of U.S. space transportation capabilities…." Singling out the EELV program, the Policy stated that, "[f]or the foreseeable future, the capabilities developed under the [EELV] program shall be the foundation for access to space," and directed the Department of Defense to "fund the annual fixed costs for both launch services providers" until such time as a reliable capability "can be maintained without two [EELV] providers."

C. The Restructuring Of The EELV Program And The Formation Of United Launch Alliance

38. Pursuant to and consistent with these presidential and congressional directives, the Air Force initiated a fundamental restructuring of the EELV program.

39. In January 2005, after intensive study of the options, the Air Force Space and Missile Systems Center ("SMC") presented a proposed "EELV Restructure" to the EELV contractors (Boeing and Lockheed Martin). The proposed restructuring would maintain two EELV providers, with each contractor receiving two contracts awarded pursuant to FAR Part 15 (Contracting by Negotiation)—one to pay for launch capability on a cost-reimbursement basis and the other to pay for the launch vehicles and services required to launch specific payloads as the missions were ordered. The price of each launch would be established on a negotiated, fixed-price plus incentive fee basis.

40. Two months later, in March 2005, the Air Force issued its formal EELV Revised Acquisition Strategy. The Air Force attributed the need to restructure the EELV program to what it described as the "collapse of the commercial space launch market" that had served as the foundation for the original acquisition strategy. Failure to restructure the program, the Air Force explained, would "threaten[] DOD's assured access to space." In the Revised Acquisition Strategy, the Air Force confirmed that the restructured program would adopt the two-contract structure it had proposed in January: (1) a "Launch Capability Contract" to cover "launch infrastructure and mission related elements" on a cost-reimbursement basis, and (2) a "Launch Service Contract" to cover launch and mission hardware and mission assurance instrumentation in the negotiated price of each ordered launch. The Revised Acquisition Strategy also stated

that: "A Government review of both contractors' investments and costs will be performed. This will support the Government's determination of contractor costs that can be recovered in compliance with existing contracts (Other Transaction Agreements (OTA), Initial Launch Services (ILS)) and current Cost Accounting Standards (CAS)."

41. The Air Force's Revised Acquisition Strategy expressly "encourag[ed] both contractors to pursue the most efficient business arrangements possible" that would allow for the maintenance of two families of launch vehicles. In particular, the Revised Acquisition Strategy sought to enable "continued evolution of the EELV program through potential Lockheed Martin and Boeing teaming for launch/base support services."

42. The Air Force's reference to encouraging "efficient business arrangements" reflected the fact that Boeing and Lockheed Martin were already far along in negotiations to establish a joint venture that would pool their launch-system assets. In 2004, Boeing and Lockheed Martin had initiated these discussions with the Air Force's knowledge. Two months after the Air Force released its Revised Acquisition Strategy, the two companies entered into a formal agreement to establish a joint venture with respect to their EELV operations. The companies executed a Joint Venture Master Agreement ("JVMA") on May 2, 2005.

43. The JVMA stated that the companies "intend[ed] for the joint venture to maintain each of the Members' independent [EELV] System platforms and thereby support assured access to space while operating as a combined entity to enhance operating efficiencies and reduce costs." To this end, the JVMA required both companies to transfer their EELV program launch infrastructure and launch vehicle assets—i.e., intellectual property, production and launch facilities, inventory (including the inventoried costs at issue here), and other assets needed to

provide launch services—to a newly formed entity. That entity, ULA, began operations effective December 1, 2006. The EELV program contracts were novated to ULS and the launch-service assets identified in the JVMA were transferred to ULA.

44. On April 18, 2008, the government executed a formal novation agreement recognizing ULS as the successor-in-interest to Boeing's EELV program contracts, "including but not limited to claims arising out of or related to the Contracts arising prior to the date of [the novation agreement] (which claims are not waived or otherwise altered by any term of [the novation agreement])." The novation agreement was made effective retroactively as of December 1, 2006.

II. Inventory-Recovery Issues Arising From The EELV Program's Restructuring

45. The Air Force's restructuring of the EELV program gave rise to the issues that are the subject of this action. Those issues relate to the recovery of costs that Boeing incurred during performance of the ILS Contract from 1998 to 2006 and accounted for using its established and disclosed accounting methodology known as "Lot Accounting."

A. Lot Accounting

46. In 1988, McDonnell Douglas Astronautics Company – Huntington Beach ("MDAC-HB") (a subsidiary of McDonnell Douglas) adopted a cost accounting practice called "common job accounting" to account for production costs associated with MDAC-HB's production of Delta II launch vehicles (a predecessor to the Delta IV family of launch vehicles) for the federal government.

47. From that point forward, MDAC-HB relied on the practice for the Delta II program and included a description of the practice in its Cost Accounting Standards Board Disclosure Statements (CASB D/S-1).

48. Also from 1988 forward, MDAC-HB's common job accounting practice was subject to ongoing review by government auditors. To ULS's and Boeing's knowledge, the government never disallowed or questioned Delta II program costs on the ground that the practice was not compliant with CAS.

49. MDAC-HB continued using common job accounting when McDonnell Douglas was acquired by Boeing in 1996.

50. Beginning in 1998, Boeing applied its existing, disclosed cost accounting practice—under the name Lot Accounting—to account for Delta IV hardware production costs.

51. Under Lot Accounting, as implemented on the Delta IV program, as Boeing incurred the costs each year necessary to build EELV launch vehicles, it allocated those costs by category to a pre-defined "lot" of hardware end-items (determined by the number of end-items required to support a projected number of missions); these end-items included both the hardware components of the Delta IV launch vehicles themselves (e.g., common booster cores ("CBCs")) and end-items reflecting common support effort (e.g., program management). The costs were further distributed to each projected mission—both ordered and unordered—that was to be served by the end-items in the lot, thereby distributing the costs proportionally across missions in accordance with the configuration of the launch vehicles anticipated to be used on those missions.

52. For financial accounting purposes, Boeing recorded EELV launch service costs as an asset in its work-in-process ("WIP") inventory account and recognized them as costs of sales of the mission to which they were allocated.

53. Boeing's proportional distribution of costs using Lot Accounting meant that the launch vehicle's configuration, not the timing of the specific mission, determined the costs distributed to that mission. When applying Lot Accounting for financial accounting purposes, the same costs would be distributed to all the missions using the same launch vehicle configuration, whether the mission was ordered or unordered. As a result, the higher production costs incurred in earlier periods were distributed across all of the missions that, by consuming end-items in the lot, would receive a benefit from the effort associated with those early-period costs. By distributing production costs in this way, Lot Accounting matched expenditures with the missions they benefited. This method of distribution also facilitated Boeing's provision to its customers of flat pricing across all the missions using end-items in the lot.

54. In 1998, in anticipation of the award of the ILS Contract and commencement of Delta IV production, Boeing implemented its disclosed Lot Accounting approach by establishing Lot 1 (also referred to as Common Production Lot 949C), which consisted of a subset of the total units to be produced over the course of the Delta IV program. In defining the size of Lot 1, Boeing relied on contemporaneous projections of the number of missions anticipated during the first two-and-a-half years of the program; these projections were based on assumptions that Boeing and the government shared about the commercial-launch market. As defined by Boeing, Lot 1 consists of 42 CBCs and different quantities of other hardware end-items, such as fairings and upper stages, that are necessary to support the group of missions consuming the 42 CBCs. Because the missions have not been ordered at the rate the parties initially expected, the lot has

spanned a longer time period than originally anticipated. But the definition of Lot 1 as consisting of 42 CBCs and associated end-items has not changed since the lot was first established in 1998.

55. As MDAC-HB (and later Boeing) had done on the Delta II program, Boeing relied upon the Lot Accounting practice as described on its CASB D/S-1 Disclosure Statements in accounting for Delta IV hardware production.

B. The Air Force's Proposed ELC Contract Structure And The Need To Negotiate The Recognition And Recovery Of Deferred Support Costs

56. By the time the Air Force proposed restructuring the EELV program in 2005, Boeing, applying its Lot Accounting practice, had, for financial accounting purposes, distributed hundreds of millions of dollars of Delta IV hardware production costs to anticipated, but as-yet unordered missions. Boeing expected to recover these inventoried costs through the pricing of those missions. Boeing held the costs in its WIP inventory along with other costs associated with EELV missions that had not yet been launched.

57. Boeing had incurred a significant portion of the inventoried hardware production costs in connection with program management ("PM") and hardware support ("HS") (together, "PM&HS") effort required to produce the Delta IV hardware. These costs included non-touch labor costs associated with the production operation, all overhead costs for the non-touch labor, computer operations costs, expenses for travel for supplier management, relocation expenses, integration and systems engineering costs, the cost of transporting common booster cores, program quality costs, host administration costs, business support costs, supplier quality and development costs, and business unit general and administrative expenses. More specifically,

program management effort was expended to develop and maintain schedules and information systems; to manage information systems, subcontracts, security, safety and environmental compliance; to report cost data; and to undertake other tasks relating to the overall production effort. The hardware support effort consisted of, *inter alia*, the engineering effort necessary to refine the design of the launch vehicles and components for producibility; the planning, support and development of manufacturing processes; industrial, quality, mechanical, and other engineering services; and configuration management.

58. These system-level and engineering efforts enabled Boeing to manufacture and deliver the specification-compliant hardware that made up the Delta IV launch vehicles. The PM&HS costs thus benefited the production of *all* the hardware end-items in Lot 1—including the end-items to be used on anticipated but as-yet unordered missions. Accordingly, under Lot Accounting, the PM&HS costs would be distributed proportionally across missions and recovered through the pricing of those missions.

59. The Air Force's restructuring of the EELV contract complicated the recovery of these costs. Consistent with its Revised Acquisition Strategy, the Air Force proposed to split the work formerly performed under the single ILS Contract into distinct categories of work under two separate FAR Part 15 contracts. The proposed EELV Launch Capability Contract (known as the "ELC Contract") would be a cost-reimbursement contract and would govern the effort required to maintain the launch-infrastructure and mission-related elements. The proposed EELV Launch Services Contract (known as the "ELS Contract") would be a firm fixed-price incentive-fee contract and would govern the effort required to launch specific payloads (including the production of launch vehicles) when ordered by the Air Force.

60. The proposed ELC Contract included PM&HS activities within its scope of work, but as a FAR Part 15 cost-reimbursement contract, with respect to the reimbursement of costs, it contemplated only the reimbursement of the actual PM&HS costs incurred during each year of contract performance. The proposed ELC Contract thus lacked an established mechanism for the recovery of the inventoried PM&HS costs that Boeing had incurred in earlier years and allocated to end-items anticipated to be consumed in future missions.

61. Soon after learning of the Air Force's proposal for the ELC Contract, and repeatedly thereafter, Boeing made clear that its ability to recover its inventoried costs was a precondition of its continued participation in the EELV program. The parties ultimately agreed to address this need by entering into a set of agreements that were incorporated into the ELC Contract. These agreements recognized the compliance of Boeing's Lot Accounting practice with CAS and established a mechanism for the government to reimburse Boeing a fixed amount of PM&HS costs—$271,152,672 (the amount referred to as DSC)—over the next eight years of the ELC Contract.

III. The Government's Agreement To Pay Specified Amounts Of Deferred Support Costs And Recognize Lot Accounting As CAS Compliant

A. DCAA Audits Of Boeing's Proposal And Negotiation Of Advance Agreements

62. The Air Force issued its RFP for the new ELC Contract on April 6, 2005. The Air Force issued its final RFP for the ELS Contract on April 21, 2005.

63. Boeing submitted its initial ELC and ELS Contract proposals on June 20, 2005. As part of both proposals, Boeing sought an advance agreement (i) establishing the means through which Boeing would recover its inventoried Lot 1 costs, including in particular its PM&HS costs; and (ii) confirming the government's continued acceptance of Lot Accounting under the restructured program.

64. The DCAA completed its initial audit of Boeing's ELC Contract proposal in just five weeks. In its July 29, 2005 Audit Report (No. 4461-2005A21000005), the DCAA questioned Boeing's proposed recovery of the inventoried PM&HS costs (now known as DSC), suggesting that Boeing's accounting for those costs might have violated CAS or the FAR cost principles. Based on this and other factors, the DCAA concluded that Boeing's proposal contained a significant amount of questioned and unsupported costs and did not provide an adequate basis for price negotiation.

65. The DCAA acknowledged that its review had been "significantly limited" by "time constraints." It also committed to "continue to review requested data as it becomes available and provide … additional information or a supplemental report if contract negotiations have not concluded and the supplemental report would serve a useful purpose."

66. Thereafter, Boeing and the Air Force held extensive discussions regarding Lot Accounting and the recovery of Boeing's inventoried costs, including the issues identified in the DCAA's July 2005 audit.

67. In October 2005, following these discussions, representatives of the Air Force agreed in principle to a Boeing proposal for the reimbursement of DSC over multiple years under fixed-price CLINs in the ELC Contract. The Air Force conditioned its ultimate agreement to this

arrangement on "legal review, DCAA/DCMA review, approval of CAS Waiver (if needed) and final [Air Force] concurrence," including approval by senior Air Force leaders.

68. In light of the uncertainty created by the Air Force's conditional agreement and DCAA's July 2005 audit, Boeing refrained from further negotiation of the terms and conditions of the ELC Contract while the Air Force determined whether to address DCAA's concerns by seeking a CAS waiver. Boeing made clear to the Air Force that, should the Air Force decide to seek a CAS waiver, Boeing would be willing to support such an effort to resolve the outstanding issues as expeditiously and efficiently as possible, even though Boeing believed that no such waiver was necessary.

69. On December 13 and 19, 2005, at the Air Force's request, Boeing made detailed presentations to dozens of DoD officials (including officials from the Air Force's Space & Missile Command, DCAA, DCMA, the National Reconnaissance Office, and the Air Force General Counsel's Office) regarding the recovery of its inventoried costs. These presentations described the background and context of the cost-recovery issue and the reasons Boeing considered recovery of these costs necessary and appropriate, including the reasons why Lot Accounting was compliant with CAS and DSC did not represent a loss on prior contracts.

70. After the December 13 meeting, DCAA agreed to reconsider the findings in its July 2005 audit report questioning the recoverability of DSC. On information and belief, the Air Force decided shortly thereafter not to pursue a CAS waiver pending completion of the DCAA's reconsideration process.

71. On January 17, 2006, Boeing submitted a revised ELC Contract proposal. At the Air Force's request, DCAA audited the revised proposal. The audit took place over roughly four

months and involved more than 100 DCAA requests for information from Boeing. Boeing extended its full cooperation to the auditors, and adjusted its proposed calculation of DSC after exchanging information with DCAA.

72. On May 8, 2006, DCAA issued a comprehensive audit report—totaling more than 50 pages—assessing Boeing's revised ELC Contract proposal. According to the report, DCAA's audit activities included reviewing Boeing's proposed calculation of DSC; reviewing its proposed allocation of Delta IV Lot 1 costs between activities that would be encompassed by the ELC and ELS Contracts; conducting statistical and physical unit sampling; comparing Boeing's rates with negotiated, audit recommended, and Forward Pricing rates; and raising questions regarding costs with Boeing. DCAA also addressed the accounting questions presented by Boeing's proposed recovery of DSC.

73. In contrast to the July 2005 audit report, the May 2006 audit report did not find that CAS and FAR cost principles prohibited the Air Force from compensating Boeing for these inventoried costs. Rather, DCAA recognized that the DSC "represent historical effort incurred thus far in Lot 1 (primarily under the existing ILS contract) that are above the average cost per launch anticipated in the current EAC [Estimates at Completion] assumptions," and advised the Air Force that "we consider it a procurement decision as to whether or not payment of these costs will further the objective to maintain Assured Access to Space as a vital national security interest." DCAA concluded that the Air Force had discretion to negotiate the amount of these inventoried costs: "[W]e believe it is the Air Force's decision, in accordance with the Acquisition Strategy, to determine any amount the contractor should be paid for prior incurred costs in order to assure continued access to space."

74. Thus, DCAA's second audit report removed the CAS and FAR noncompliance concerns raised in the July 2005 initial audit report, facilitating the parties' negotiated resolution of the open issues related to the recovery of DSC.

B. The ELC Contract And Related Advance Agreements

75. On June 19, 2006, shortly after the release of DCAA's May 2006 audit report, Boeing and the Air Force executed a memorandum of understanding ("MoU") setting forth an agreement in principle with respect to the ELC Contract and the payment of DSC. The MoU was signed on behalf of the Air Force by Mark Jensen, Contracting Officer, in a proper exercise of his authority.

76. In the MoU, the Air Force agreed that recovery of these inventoried costs would be through "a fixed price CLIN under the ELC contract that will be billed once each fiscal year" and that the total "CLIN value will be calculated over an estimated 8 year period." The MoU further acknowledged that execution of the ELC Contract "may be contingent upon the execution and approval of the following Advance Agreements: … (ii) Lot Accounting [and] (iii) Unabsorbed/ Deferred Support Costs."

1. The DSC Advance Agreement

77. With the MoU in place, between June and November of 2006, DCMA personnel at the local and headquarters levels exchanged numerous draft advance agreements regarding DSC with Boeing representatives.

78. On or around November 3 and 4, 2006, senior officials from DCMA, DCAA, the Air Force SMC, and the Air Force General Counsel's office convened a formal Contract

Management Board of Review for Advance Agreements. Such review boards are convened to "ensure reasonable exercise of judgment and adequate documentation in support of such judgment decisions" with respect to advance agreements relating to contracts involving annual costs of $10 million or more.

79. At the meetings of the Contract Management Board of Review for Advance Agreements for the proposed ELC Contract, government representatives produced their own versions of two advance agreements addressing DSC and Lot Accounting. The government had drafted these versions without Boeing's involvement, and it presented them to Boeing on a take-it-or-leave-it basis.

80. The first advance agreement, which Boeing and the government executed on November 8, 2006, was the Evolved Expendable Launch Vehicle (EELV) Program Advance Agreement on Delta IV Program Management and Hardware Support (the "DSC Advance Agreement"). The DSC Advance Agreement states, in full:

> This advance agreement is entered into by and between Boeing Launch Services (BLS), and the United States of America, represented by the Division Administrative Contracting Officer (DACO) in accordance with Section 31.109 of the Federal Acquisition Regulation (FAR).
>
> The parties agree that the amount of $271,152,672 represents costs for program management and hardware support under the Delta IV program that were incurred and placed in an inventory account prior to June 1, 2006, but were neither allocable to nor payable under obligations on contracts entered into or performed prior to that date. The Air Force has discussed the potential to compensate the contractor for such unreimbursed expenses on a separate line item on future contracts, and has agreed on a method by which the contractor may be paid for 1/8 share of such $271,152,672 amount as a fixed-price contract line item in each year of future contracts, if awarded. Any such line item related to these expenses is separate from recovery of costs under cost-reimbursement provisions of such contracts.
>
> The undersigned agree to the terms and conditions of this advance agreement.

81. The DSC Advance Agreement was signed on behalf of the United States by John Caudill, Division Administrative Contracting Officer, DCMA Boeing, Network & Space Systems, Huntington Beach Residency, in a proper exercise of his authority.

2. The Lot Accounting Advance Agreement

82. The second advance agreement, which Boeing and the United States executed on November 13, 2006, was the Evolved Expendable Launch Vehicle (EELV) Program Advance Agreement on Delta IV Buy III Lot Accounting (the "Lot Accounting Advance Agreement"). Like the DSC Advance Agreement, the Lot Accounting Advance Agreement was prepared on or around November 3 and 4, 2006 by government representatives in connection with a Contract Management Board of Review for Advance Agreements attended by a wide range of senior government officials.

83. The Lot Accounting Advance Agreement states, in full:

> This advance agreement is entered into by and between Boeing Launch Services (BLS), and the United States of America, represented by the Division Administrative Contracting Officer (DACO) in accordance with Section 31.109 of the Federal Acquisition Regulation (FAR).
>
> It is agreed that, as of the date indicated below, the undersigned DACO has found Lot Accounting a compliant practice under the Cost Accounting Standards (CAS). This determination is not intended to and does not prevent the revocation, withdrawal, or other reconsideration of this determination if subsequent facts indicate that some aspect of this disclosed practice is noncompliant with CAS or FAR.
>
> The undersigned agree to the terms and conditions of this Advance Agreement.

84. The Lot Accounting Advance Agreement was signed on behalf of the United States by John Caudill, Division Administrative Contracting Officer, DCMA Boeing, Network & Space Systems, Huntington Beach Residency, in a proper exercise of his authority.

3. The Original ELC Contract

85. With the Lot Accounting and DSC Advance Agreements in place, Boeing and the Air Force executed the original ELC Contract (FA8816-06-C-0001) on November 16, 2006. The original ELC Contract was signed by Mark Jensen, Contracting Officer, on behalf of the United States, in a proper exercise of his authority.

86. The original ELC Contract (through Clause SMC-H019) expressly incorporated the DSC Advance Agreement and Lot Accounting Advance Agreement, describing each as an "integral part" of the contract "that was a substantial factor in determining Contract value." Clause SMC-H019 further provided that the DSC and Lot Accounting Advance Agreements would "control the specified cost charging areas for this and any successor Contract."

87. Clause SMC-H029 of the original ELC Contract "establish[ed] the billing practice for deferred support to be implemented under this contract," expressly providing for the recovery of $271,152,672 of DSC through eight annual installments. As required by the DSC Advance Agreement, which it expressly incorporated, the original ELC Contract included fixed-price CLINs (CLINs 1501 and 1502) identifying specific amounts of DSC to be paid in fiscal years 2006 and 2007, totaling $67,788,168 ($28,445,971 in 2006 and $39,342,197 in 2007). Each CLIN provided that "[t]he Contractor shall bill program management and hardware support in accordance with the provisions of SMC-H029, Program Management and Hardware Support Cost Recovery."

88. In subsequent contract modifications, the parties agreed to the addition of two more fixed-price CLINs to the ELC Contract, identifying specific amounts of DSC to be paid in fiscal years 2008 and 2009. CLIN 1503, covering fiscal year 2008, was added to the ELC Contract through Modification P00011 (effective October 1, 2007). CLIN 1503 was incrementally funded through Modifications P00011, P00015 (effective December 19, 2007), and P00017 (effective February 11, 2008). CLIN 1504, covering fiscal year 2009, was added to the ELC Contract through Modification P00024 (effective August 1, 2008). CLIN 1504 was funded through Modification P00043 (effective September 29, 2008).

89. The original ELC Contract also established a mechanism for the government to receive credits related to certain infrastructure costs associated with unlaunched missions under the ILS Contract. This contractual provision was adopted in order to avoid the government paying for the same infrastructure costs twice, once under the ILS Contract and again under the ELC Contract. Specifically, the price of a mission under the ILS Contract already covered all infrastructure costs allocable to that mission, including infrastructure costs that would be reimbursed under the ELC Contract. These costs included both the infrastructure costs that would be incurred after the June 1, 2006 effective date of the ELC Contract and—for unordered missions—the PM&HS costs that had been incurred prior to that date but would be reimbursed as DSC under the ELC Contract.

90. The parties relied on Lot Accounting to determine the infrastructure costs allocable to each particular mission, and that calculation in turn defined the amount of the credits that the government would receive. As a result, a significant portion of the credits for unordered ILS missions (GPS IIF-5, GPS IIF-9, GPS IIF-10, and SBRS-GEO) were attributable to pre-June 1, 2006 PM&HS costs that Boeing would have allocated to those missions under Lot

Accounting. These amounts were included in the credits because the Air Force had agreed to reimburse the costs as DSC under the ELC Contract. Despite reversing its position on Lot Accounting and refusing payment of DSC, however, the Air Force continues to assert its entitlement to the full amount of the credits, including necessarily the portion associated with DSC.

4. Closure Of ULA Transaction And Initiation Of Joint Venture Operations

91. Following execution of the ELC Contract, Boeing and Lockheed Martin closed the ULA transaction with an effective date of December 1, 2006. ULA and ULS began operations on that same date.

92. Boeing novated the original ELC Contract to ULS, as recognized through formal novation agreements and contract modifications executed in March and November 2008, and effective as of December 1, 2006.

5. The Consolidated ELC Contract

93. Approximately three years later, ULS and the Air Force consolidated the infrastructure support requirements for the Delta IV program and the Atlas V program under the Atlas V program's ELC contract (Contract No. FA8816-06-C-0002) (the "consolidated ELC Contract"), through Modification P00149, executed on September 30, 2009. The consolidated ELC Contract was signed on behalf of the United States by Charles J. Briggs, Contracting Officer, in a proper exercise of his authority.

94. Clauses SMC-H043 and SMC-H045 of the consolidated ELC Contract, which were added through Modification P00149, parallel clauses SMC-H019 and SMC-H029 in the original ELC Contract. As a result, like the ELC Contract, the consolidated ELC Contract: (1) expressly incorporated the DSC Advance Agreement and the Lot Accounting Advance Agreement, describing each as an "integral part" of the contract "that was a substantial factor in determining Contract value" (Clause SMC-H043); (2) further provided that the DSC and Lot Accounting Advance Agreements would "control the specified cost charging areas for this and any successor Contract" (Clause SMC-H043); and (3) "establish[ed] the practice for deferred support to be implemented under this contract," expressly providing for the recovery of $271,152,672 of DSC through eight annual installments (Clause SMC-H045).

95. The parties also added CLIN 1505 to the consolidated ELC Contract through Modification P00149, corresponding to the $33,394,084 of DSC owed ULS in fiscal year 2010. CLIN 1505 provided that "[t]he Contractor shall bill Delta program management and hardware support in accordance with the provisions of SMC—H045, Deferred Support Cost Recovery." The government insisted on the further inclusion in the consolidated ELC Contract of a provision (at CLIN 1505) noting that DCAA "is currently auditing the [DSC] that were proposed as the basis of this negotiated fixed price," and stating that "[p]ending Government audit of the [DSC] the Government will withhold payment." The provision also articulated the parties' "wish to maintain the launch capability under this contract which is essential to national security while retaining all rights and defenses that they may have related to [DSC]."

96. The consolidated ELC Contract, like the original ELC Contract, contained a mechanism (at Clause SMC-H030) for the government to receive credits related to certain infrastructure costs associated with unlaunched missions under the ILS Contract. Significant

amounts corresponding to DSC were included in the credits because the Air Force had agreed to reimburse DSC under the original and consolidated ELC Contract. Despite reversing its position on Lot Accounting and refusing payment of DSC, however, the Air Force continues to assert its entitlement to the full amount of the credits, including necessarily the portion associated with DSC.

IV. The Government's Agreement To Pay Deferred Production Costs

A. ULA's Adoption Of APC Accounting And The Segregation Of DPC

97. After the Delta IV contracts and other assets were transferred to ULS in December 2006, ULA continued to follow Boeing's Lot Accounting practice in accumulating and allocating hardware production costs incurred in connection with the Delta IV program (other than the DSC addressed separately in the ELC Contract), as specifically approved by the ELC Contract through the Lot Accounting Advance Agreement.

98. ULA simultaneously continued to rely on Lockheed Martin's legacy accounting practice to accumulate and allocate hardware production costs for the Atlas V program.

99. In July 2007, ULA concluded that Generally Accepted Accounting Practices ("GAAP") required it, as a single accounting entity, to select a single method of financial accounting applicable to both the Delta IV and Atlas V programs.

100. ULA decided to adopt the Annual Production Cycle ("APC") Accounting practice—a variant of a practice Lockheed Martin had followed—as its single method for both financial and government contract cost accounting purposes, applying the practice retroactively to December 1, 2006 (the effective date of the creation of ULA and ULS). APC Accounting

entails the allocation of costs incurred to produce units within an end-item, on an annual basis, to those units in production during the year the cost was incurred.

101. ULA's adoption of APC Accounting created uncertainty regarding the means by which ULA would recover certain non-DSC Delta IV hardware production costs that Boeing had incurred prior to December 1, 2006, and distributed to anticipated but as-yet unordered Lot 1 missions. The parties referred to these costs, which primarily consisted of labor costs and associated overhead and production support costs, as "Deferred Production Costs" ("DPC").

102. Boeing had transferred the costs constituting DPC (along with the costs constituting DSC and other production costs) to ULA as WIP inventory upon ULA's creation. In turn, ULS accounted for the costs as an asset on its own books. ULS expected to recover these remaining costs in the price of the anticipated Lot 1 missions when the government ordered those missions under the ELS Contract. By effectively reallocating a portion of the inventoried costs to missions for which a price had already been established under contract, however, the adoption of APC Accounting risked isolating the costs from their anticipated means of recovery.

103. To resolve this issue, the parties agreed that ULS would continue to be able to recover the costs constituting DPC as part of the mission price of post-ILS missions and further agreed on a mechanism for the recovery of those costs.

B. The ELS Contract And The DPC Advance Agreement

104. ULS and the government began discussing the parameters of an advance agreement addressing ULS's recovery of DPC in the early fall of 2007.

105. In December 2007, the Air Force and DCMA agreed in principle to recognize DPC and to complete and implement an "advance agreement to recognize, negotiate, and pay" DPC. The Air Force informed ULA that SMC would take the lead in "defining, coordinating, and negotiating a reasonable cost recovery methodology" for DPC. Under the approach that the Air Force envisioned, the contracting officer would establish a "fair & reasonable payment schedule" for DPC after the "quantum difference between Delta IV lot cost accounting and annual production accounting" had been determined.

106. Consistent with this plan, ULS and the Air Force Contracting Officer (Eddie Upshaw) exchanged initial drafts of an advance agreement addressing DPC in early December 2007. Additional drafts were exchanged in early 2008 at the same time as the Air Force and ULS were finalizing the terms of the ELS Contract. During this period, ULS made presentations to Air Force, DCAA, and DCMA representatives regarding Lot Accounting, APC Accounting, and the computation of DPC.

1. ELS Contract

107. On January 24, 2008, following the government's assurances that it would address the recovery of DPC, Boeing and the Air Force executed the original ELS Contract (Contract No. FA8816-08-C-0005), which was signed by Kathleen E. Scholefield, Contracting Officer, on behalf of the United States, in a proper exercise of her authority. The original ELS Contract established the framework for the government's ordering of launch services for missions under the restructured EELV program and set forth the parties' agreement to not-to-exceed prices for three specific missions (designated NROL-32, NROL-27, and NROL-49). The contract committed the government to negotiate the definitive terms, including prices, of the

missions ordered under the ELS Contract pursuant to FAR 52.216-25 and Defense Federal Acquisition Regulation Supplement ("DFARS") 252.217-7027, and to negotiate the definitive prices pursuant to DFARS 252.243-7001 and the applicable FAR cost principles.

108. The original ELS Contract was expressly interdependent with the original ELC Contract, executed on November 16, 2006. Specifically, Clause SMC-H0003 of the original ELS Contract states: "The Contractor's ability to perform the requirements of this Contract is dependent upon the continuation of the following Contracts/Agreements: … EELV Launch Capability Contract (ELC) FA8816-06-C-0001."

109. The ELS Contract was thus predicated on the continued validity and recognition of the Lot Accounting Advance Agreement. As described above, Clause SMC-H019 of the original ELC Contract (executed on November 16, 2006) expressly incorporated the Lot Accounting Advance Agreement, describing it as an "integral part" of the contract "that was a substantial factor in determining Contract value." Clause SMC-H019 of the original ELC Contract further provided that the "Lot Accounting Advance Agreement … will also be incorporated into the Interdependent EELV Launch Services Contract, if awarded." And Clause SMC-H043 of the consolidated ELC Contract (added on September 30, 2009, more than a year after execution of the ELS Contract) contained language identical to Clause SMC-H019 of the original ELC Contract.

2. DPC Advance Agreement

110. With the ELS Contract in place, ULS and the Air Force moved towards finalization of the DPC Advance Agreement (formally, the "Advance Agreement Between

USAF Space & Missile Systems Center, Launch & Range Systems Wing And United Launch Alliance L.L.C./United Launch Service, L.L.C.").

111. During this final drafting process, the Air Force Contracting Officer (Mr. Upshaw) revised significantly the previous versions of the advance agreement, which resulted in the creation of two documents: the DPC Advance Agreement itself and an accompanying background memorandum.

112. On March 25, 2008, the parties executed the DPC Advance Agreement, which states in full:

> This Advance Agreement between USAF Space & Missile Systems Center, Launch & Range Systems Wing (SMC) and United Launch Alliance L.L.C./United Launch Service, L.L.C. is executed in accordance with Federal Acquisition Regulation (FAR) 31.109, Advance Agreements. SMC and ULA/ULS are referred to herein as the "Parties." This agreement is applicable to Delta IV launch service missions ordered by SMC.
>
> Following audit by DCAA of the proposed costs, the Parties agree to negotiate a fair and reasonable value representing the total Delta IV deferred production costs consisting of production labor, associated burden and appropriate other direct costs under the Delta IV program that were incurred and placed in an inventory account prior to December 1, 2006, but were neither allocable to nor payable under obligations on contracts entered into or performed prior to that date. The DCAA will audit the amount, the allowability and the allocability of the proposed costs.
>
> The Parties agree to allocate the negotiated Delta IV production costs to future Delta IV launch service missions awarded by the SMC EELV program office until the total negotiated value has been liquidated. The parties agree that the Delta IV deferred production costs will be in addition to whatever costs are allocable to, and are allowable costs under such future missions pursuant to the Annual Production Cycle (APC) costing methodology.
>
> The Parties agree the attached clause will be inserted into all SMC Contracts for Delta IV launch service missions for which a firm price for ordered missions has not yet been established.

The attached clause called for by the agreement states, in full:

> SMC-HOXX Recovery of Delta IV Deferred Production Cost
>
> Delta IV deferred production costs of (NTE $268,000,000) shall be recovered using a formula based on the contracted Delta IV launcher end item configuration to include a value per Common Booster Core (CBC) and Upper Stage (US) making up the launcher. Upon definitization of the NTE amount, the CBC and US recovery schedule NTEs will be adjusted accordingly and this sentence removed from this provision.
>
> Mission Order Sequence 1-4: (NTE $5,000,000) per each CBC and US
> Mission Order Sequence 5-9: (NTE $7,500,000) per CBC and US
> Remaining Mission Orders: (NTE $10,000,000) per CBC and US
>
> Deferred production costs shall be recovered as part of each contracted launch service. The contractor shall provide the government an annual report showing the use of CBCs and USs in Delta IV launch service missions.

113. The DPC Advance Agreement was signed on behalf of the United States by Mr. Upshaw as Contracting Officer, USAF Space & Missile Systems Center, Launch & Range Systems Wing, in a proper exercise of his authority.

114. The background memorandum provided by Mr. Upshaw explained that the parties executed the DPC Advance Agreement "to resolve the [DPC] issue and move forward with the EELV program." That background memorandum incorporated and attached the Lot Accounting Advance Agreement and explained: "As documented in the Advance Agreement for Delta IV Lot Accounting signed 11/13/06 (attached), the parties recognize that the prior practice of Lot Accounting was CAS compliant and consequently that reasonable deferred costs were allowable and allocable to future Delta IV missions, subject to CAS and Boeing's disclosed accounting practices."

115. The DPC Advance Agreement (and accompanying background memorandum), together with the interrelated ELS and ELC Contracts and the Lot Accounting Advance Agreement, thus established a set of interrelated contractual commitments obliging the parties

"to negotiate a fair and reasonable value representing the total Delta IV deferred production costs."

V. The Government's Repudiation Of Its Obligations To Pay DSC And To Negotiate The Value Of DPC

116. The Air Force initially complied with its obligation to pay DSC by making over $72 million in payments on invoices under the original ELC Contract; it also engaged in preliminary efforts to quantify DPC. The Air Force's compliance with its various contractual obligations relating to DSC and DPC, however, came to an abrupt halt in 2008, after those obligations became the subject of scrutiny and criticism from elsewhere in the government.

A. Government Scrutiny of DSC

1. July 2008 GAO Report

117. In July 2008, GAO issued a report (GAO-08-857) criticizing DCAA's performance of 14 audits conducted by three West Coast field offices, including DCAA's May 2006 audit of Boeing's revised ELC Contract proposal. That audit had concluded it was a "procurement decision" whether the Air Force would reimburse Boeing for DSC. In addition to criticizing DCAA's audit processes, GAO concluded that Lot Accounting was noncompliant with CAS and suggested that the costs constituting DSC should be characterized as unrecoverable prior-period losses. GAO offered these substantive views even though it acknowledged that it had "not reperform[ed] the audits to validate the completeness and accuracy of DCAA's findings."

118. DCAA dissented from the findings in the GAO report in a detailed response to a draft of the report that DCAA provided to GAO in June 2008 and that was included as an attachment to the final report. In that response, DCAA disagreed that Boeing's revised ELC Contract proposal—which it characterized as the product of "many months of discussion between the Government and [Boeing]"—was noncompliant with CAS. DCAA further explained that the proposal had not "substantively used" Lot Accounting. The response elaborated that, although Boeing had used Lot Accounting to account for costs under the preceding ILS Contract, CAS was not applicable to that contract and Boeing had not proposed Lot Accounting "as a method to account for costs under" the ELC Contract. Rather, DCAA explained, Boeing's ELC Contract proposal relied on Lot Accounting "merely to calculate a proposed amount for reimbursement" based on Boeing's prior accumulation and distribution of PM&HS costs to future missions (i.e., DSC). The response further noted that this was the very approach that the government ultimately adopted by including the CLINs in the ELC Contract.

119. While the DCAA response acknowledged potential shortcomings in its May 2006 audit working paper file documentation, DCAA maintained that, substantively, the final audit opinion "was supported by sufficient audit evidence." More generally, DCAA defended its May 2006 audit in light of the complexities that arose from the EELV transition and explained that "[t]he potential CAS 406 noncompliance … was resolved when DCAA gained a more thorough understanding of lot costing[.]"

2. Senate Committee Hearing

120. After issuance of the GAO Report, on September 10, 2008, the United States Senate Committee on Homeland Security and Governmental Affairs held a hearing to address

the Air Force's agreement to pay DSC. Members of the Committee raised concerns regarding DCAA's performance that were similar to those identified by GAO in its report, and expressed doubts about Boeing's entitlement to recover DSC.

3. August 31, 2009 DoD OIG Report

121. In July 2008, the Department of Defense Office of Inspector General ("DoD OIG") initiated its own review of the issues raised by the GAO, including the DCAA's May 2006 audit.

122. On October 20, 2008, while the DoD OIG review was ongoing, the DoD's Deputy Inspector General for Policy and Oversight issued a memorandum to the Commander of SMC containing preliminary findings. The memorandum recommended that:

- "SMC take immediate action to withhold further payments to [Boeing/ULS] for [DSC] (the Air Force contractual arrangement provides for up to $271 million in payments to the contractor, of which $101 million [sic] has already been paid);
- "SMC cease negotiations with [Boeing/ULS] on a $114 million proposal for [DPC]; and
- "DCMA reassess the propriety of existing advance agreements involving the EELV program."

123. The DoD OIG's final findings from its review are contained in a report dated August 31, 2009 (Report No. D-2009-6-009). While not purporting to audit Boeing's use of Lot Accounting or its inventorying of costs, the DoD OIG found that DCAA's May 2006 audit was flawed, because it: (i) "failed to demonstrate that the contractor's proposed [DSC] complied with the [FAR]," and (ii) "allowed SMC and DCMA acquisition officials to negotiate a contract and applicable advance agreements free of a violation of CAS 406 and [FAR] 31.205-23, 'Losses on Other Contracts.'"

124. The Air Force submitted formal comments to a draft of the August 31, 2009 Report in which it defended the ELC Contract and its procurement decision to pay deferred costs. Among other things, the Air Force explained that the contract award "was a difficult, first-of-a-kind evaluation" whose "complexity introduced legitimate questions/challenges prior to negotiated award," and pointed out that a Contract Management Board of Review, consisting of "senior representatives from DCMA, DCAA, SMC, and SAF/GC," supported recognition of Lot Accounting and DSC. The Air Force also stated that, "[a]t time of award, the Air Force, DCAA, & DCMA determined [that the] Delta ELC contract was consistent with all Federal Laws, Regulations and Policies, and did not include any reimbursement for past losses (prior bad business decisions)."

B. The Government's Repudiation Of Its Agreement To Pay DSC

1. Air Force Halts Payments Of DSC

125. Following execution of the original ELC Contract and its subsequent transfer to ULS, Boeing (as the formal contractor of record until the novation of the ELC Contract to ULS) submitted invoices in the amounts specified in CLINs 1501 and 1502. The Air Force timely paid those amounts in full.

126. As described above, ¶ 88, when the Air Force required Delta IV launch capability service for FYs 2008 and 2009, the original ELC Contract was modified to cover two additional years of service. In accordance with the original ELC Contract and the DSC Advance Agreement, CLINs 1503 and 1504 were added to authorize payment of the DSC installments for those fiscal years. Also as described above, ¶ 95, CLIN 1505 was added to the consolidated ELC Contract by modification to address FY 2010 Delta IV launch capability services.

127. Boeing (pre-novation) and ULS (post-novation) thereafter submitted invoices for those CLINs. The Air Force, however, paid only part of CLIN 1503 (in the amounts of $16,545,553, invoiced on May 5, 2008, and $7,457,580, invoiced on September 25, 2008).

128. On September 25, 2008, shortly after the Senate committee hearing on DSC, DCAA advised ULS that it would be conducting another audit of Boeing's use of Lot Accounting—DCAA's third such audit.

129. On October 21, 2008, the day after the DoD OIG recommended to the Air Force that it take immediate action to withhold payment of DSC, Judy Parnock, the Air Force Contracting Officer, informed Boeing that "[r]ecent events have raised questions regarding [DSC]" and that she had "requested the Administrative Contracting officer to suspend future payments of [DSC]" pending DCAA's completion of its new audit.

130. On November 7, 2008, the Commander of SMC informed the DoD OIG that "SMC had taken action to suspend further payments [of DSC] and would not conduct further negotiations for [DPC] until the matter was resolved."

131. Neither Boeing (pre-novation) nor ULS (post-novation) has received any payments of DSC since Ms. Parnock's letter of October 21, 2008. Specifically, the Air Force has not paid the remaining balance under CLIN 1503 (in the amount of $9,890,951, invoiced on December 5, 2008) or any portion of the amounts due for CLIN 1504 (in the amount of $33,894,084) or CLIN 1505 (in the amount of $33,394,084), which were invoiced on January 15, 2009 and March 4, 2010 respectively.

2. July 23, 2010 DCAA Report Reversing Its Prior Position On The Application Of CAS To Lot Accounting And The Recoverability Of DSC

132. On January 28, 2010, DCAA issued a draft audit report, finding that Boeing's recovery of DSC was potentially noncompliant with CAS 405 and CAS 406.

133. On March 15, 2010, Boeing submitted a timely response to the draft report, challenging its substantive findings.

134. On July 23, 2010, almost two years after DCAA began the re-audit of Boeing's proposal to recover DSC under the ELC Contract, DCAA issued its third (and final) audit report concerning these inventoried costs. The new report concluded that Boeing's inclusion of DSC in its ELC Contract proposal, and the later billing of the Air Force for those costs pursuant to the fixed-price CLINs included in the ELC Contract, were noncompliant with both CAS 406 and CAS 405.

135. DCAA characterized its "reassess[ment]" of the recoverability of DSC under the ELC Contract as "assisted" by Boeing's "provision" of "new information" during DCAA's audit process.

136. DCAA recommended that DCMA: (a) "require the contractor to reimburse the Government the $72,198,875 that has been billed and received for [DSC] thus far"; (b) "modify [the original ELC Contract] to remove provision SMC-H029 and reverse the allowance to bill [DSC] for FY 2008 through 2010"; (c) "[e]nsure that no further payments are made to the contractor for [DSC]"; (d) unilaterally "rescind" the Lot Accounting Advance Agreement and

"modify" Clause SMC-H019 "to remove reference to this advance agreement"; and (e) "rescind" the DSC Advance Agreement, and "modify" Clause SMC-H019 "to remove reference to this advance agreement."

3. DCMA's Determination And Final Decision (February – June 2011)

137. On February 14, 2011, the DCMA Cognizant Federal Agency Official ("CFAO"), expressly relying on the findings in DCAA's July 23, 2010 audit report, issued a final determination of CAS noncompliance regarding DSC. Consistent with DCAA's findings, the CFAO determined that Boeing's treatment of the costs constituting DSC under its Lot Accounting practice was noncompliant with CAS 405 and 406.

138. The CFAO expressly stated that this determination of CAS noncompliance "did not rely" on any new information available to the government.

139. Also on February 14, 2011, the Divisional Administrative Contracting Officer ("DACO") for DCMA-HB sent a one-sentence letter purporting to rescind the DSC and Lot Accounting Advance Agreements. On June 15, 2011, the same DACO clarified that she was not altering the terms of the original ELC Contract insofar as it incorporated the advance agreements; however, she made clear that, beyond that contract, DCMA "will no longer treat [the advance agreements] as agreements affecting any future determinations regarding the proper treatment of any covered Boeing costs."

140. On April 15, 2011, Boeing submitted a timely response to the CFAO's determination, challenging his substantive findings.

141. On June 16, 2011, the DCMA CFAO issued two formal contracting officer's final decisions finding that Boeing's Lot Accounting practice was noncompliant with CAS 406 and CAS 405 and that the cost impact of the asserted noncompliance was the full amount of DSC ($271,152,672). One final decision was issued to ULS; the other final decision was issued to Boeing.

142. The June 16, 2011 final decision further demanded repayment of $72,198,875 in principal, plus $17,036,292 in interest, for a total of $89,235,167, which was subsequently revised to $89,235,166.70.

143. ULS repaid the requested amount on July 1, 2011, thereby avoiding the accrual of interest penalties pending resolution of the parties' contractual dispute.

4. Negotiation Of Successor To Consolidated ELC Contract (June 2011)

144. ULS and the Air Force executed a successor to the consolidated ELC Contract on June 30, 2011 (Contract No. FA8816-11-C-0002).

145. As the parties had done with previous modifications of the ELC Contract, ULS proposed to include contract clauses implementing the Air Force's obligation to pay DSC under the original and consolidated ELC Contract and the DSC and Lot Accounting Advance Agreements. For the first time, however, the Air Force refused to carry over the relevant terms, including the CLIN corresponding to the annual amount of DSC payable in FY 2011. ULS was thus obliged to reserve its rights under the advance agreements and the original and consolidated ELC Contracts in order to allow operations to continue under the successor ELC Contract without disruption.

146. The reservation-of-rights clause in the successor to the consolidated ELC Contract (Clause SMC-H045, Reservation of Rights), provides:

> ULS and the Government disagree over ULS's entitlement to charge Delta IV Program Management and Hardware Support costs (also known as deferred support costs or "DSC") against work being acquired under this Contract and the effect and current status of the Advance Agreements related thereto. On June 16, 2011, the DCMA issued a final decision finding that ULS's recovery of DSC is inconsistent with CAS 406 and CAS 405. To date, no request for equitable adjustment or certified claim has been submitted and no Contracting Officer final decision has been rendered. In executing this contract the Parties agree:
>
> (1) The execution of this Contract is not intended to waive, relinquish or impair any rights, claims or defenses that either Party believes it might have related to Delta IV Program Management and Hardware Support costs (and any prior Advance Agreements related thereto) in connection with previously awarded Delta IV ELC contract work.
>
> (2) The execution of this Contract is also not intended to waive, relinquish or impair any rights, claims or defenses that either Party believes it might have related to Delta IV Program Management and Hardware Support costs (and any prior Advance Agreements related thereto) based upon the work being acquired through this Contract.
>
> (3) The Government does not acknowledge [the] validity of any claims or appeals that the Contractor may assert or waive any rights or defenses that the Government may have.
>
> (4) In the event ULS establishes entitlement to DSC and a judgment is determined in ULS's favor then, subject to any rights to appeal the judgment, payment will be made in accordance with the judgment.

147. Like the original and consolidated ELC Contracts, the successor ELC Contract also contained a provision (Clause SMC-H030) establishing a mechanism for the government to receive credits related to certain infrastructure costs associated with unlaunched missions under the ILS Contract. Significant amounts corresponding to DSC were included in the credits because the Air Force had agreed to reimburse DSC under the original and consolidated ELC Contracts. Despite refusing even to negotiate the inclusion of required contract clauses recognizing the permissibility of Lot Accounting and providing for the payment of DSC under

the successor ELC Contract, however, the Air Force continues to assert its entitlement to the full amount of the credits, including necessarily the portion associated with DSC.

C. The Government's Refusal To Negotiate The Amount Of, And Pay, DPC

1. DCAA Audits And DCMA Decisions Regarding DPC

148. On April 15, 2008, ULS submitted to the Air Force a proposal for the recovery of DPC, as contemplated by the DPC Advance Agreement. The proposal quantified the amount of DPC, described the computation methodology, identified the relevant source records, and traced the amount proposed to those records. While ULS had originally estimated the amount of DPC as $268 million, and the NTE amounts in the advance agreement reflect that estimate, ULS recognized in preparing its April 15, 2008 cost submittal that the original estimate included certain non-labor costs that should have been excluded. Correcting for those amounts, the April 15, 2008 proposal identified the total amount of DPC as $114.1 million.

149. Consistent with the terms of the DPC Advance Agreement, the amount of DPC reflected the net difference between the costs allocable under Lot Accounting to the 14 Lot 1 missions that had yet to be ordered as of November 30, 2006 (the day before the date on which ULA's adoption of APC Accounting became effective), and the costs that would have been allocated under APC Accounting to those same 14 missions. This amount was "the actual cost in excess of that relieved from inventory under the heritage Lot Accounting environment," and represented the "remaining value to be recovered across the unsold units" within Lot 1.

150. On November 20, 2008, in parallel with DCAA's third audit of DSC, DCAA's Denver, Colorado field office issued a draft audit report based on its review of the April 15, 2008 DPC proposal. This audit report questioned ULS's entitlement to recover any amount of DPC.

151. On January 12, 2009, ULA submitted a timely response to the draft report, challenging its substantive findings.

152. On March 3, 2011, more than two years later, DCAA issued a second draft of the audit report's "Statement of Conditions and Recommendations," finding that ULA's proposals for the recovery of DPC were noncompliant with CAS 406 and CAS 405.

153. On March 31, 2011, ULS responded to the DCAA's second draft audit report on DPC, challenging its substantive findings.

154. On October 20, 2011, DCAA issued its final report on DPC (Audit Report No. 3151-2008U19200001), finding ULA to be in noncompliance with CAS 406 and CAS 405 because it proposed DPC for reimbursement in the price of missions under the ELS Contract. In similar fashion to the July 23, 2010 audit report on DSC, DCAA's October 20, 2011 report on DPC expressly recommended that the Air Force: (a) "rescind" the DPC Advance Agreement, (b) "[e]nsure that no payments are made" to ULS for DPC, and (c) "modify all ELS Contracts to remove references to the DPC."

155. On December 12, 2011, DCMA sent ULS a finding of potential CAS noncompliance with respect to DPC, attaching DCAA's October 20, 2011 report and inviting ULS to respond within 60 days.

156. On February 10, 2012, ULS submitted a timely response to the October 20, 2011 report, challenging its substantive findings. DCMA has not responded.

2. The Air Force's Refusal To Negotiate DPC Or Incorporate DPC Payment Terms In Post-ILS Mission Orders

157. The Air Force has refused to negotiate any amount of DPC for inclusion in the price of the post-ILS missions.

a) NROL-15 Mission

158. The Air Force first made its categorical refusal to negotiate or pay DPC clear during the parties' negotiations over a launch order for the NROL-15 mission. Although this launch order was an independent contract, and not issued under the ELS Contract, it was subject to the DPC Advance Agreement as a "Delta IV launch service mission[] ordered by SMC." Like the original ELS Contract, the NROL-15 contract committed the government to negotiate the definitive terms, including price, of the NROL-15 mission pursuant to DFARS 252.217-7027, and to negotiate the definitive price pursuant to DFARS 252.243-7001 and the applicable FAR cost principles.

159. In accordance with the DPC Advance Agreement, ULS originally sought to include the SMC-H0XX clause in the contract for the NROL-15 mission as clause SMC-H024. As required by the DPC Advance Agreement, that clause would have specified a separate NTE for the DPC to be recovered under the contract.

160. In a March 23, 2009 letter, Air Force contracting officer Lorraine Lewis-Wilson rejected that approach and stated "the Government's position regarding Delta IV Deferred Production Cost Recovery (DPCR)" as follows:

> a. The Government does not see a need to include a Special Contract Requirement (SCR) clause covering recoupment of Deferred Production Cost Recovery (DPCR) costs on the contemplated letter contract. The 25 March 2008 agreement, including the part about inserting a clause addressing Delta IV DPCR, did not establish the allowability, allocability or reasonableness of any DPCR costs, and simply deferred any negotiation of the treatment of the purported DPCR costs pending audit by the Defense Contract Audit Agency (DCAA). *Therefore, the 25 March 2008 agreement is nothing more than an agreement to defer negotiations.*
>
> b. In order to dispel any further confusion, *the Government hereby rescinds the purported "advance agreement," dated 25 March 2008*, signed by Mr. Kevin Finnell and Mr. Eddie Upshaw, in its entirety.
>
> c. The Government does not intend nor does the Government believe that any Contractor rights are prejudiced by not inserting the requested clause. Without specifying a separate NTE in the clause, the Contractor has the right to include an amount in its overall mission NTE that is certifiable and it believes is properly allocable to this mission for such work.
>
> (Emphases added.)

161. Four days later, on March 27, 2009, a different Air Force contracting officer sent ULS a second letter "to cancel and supersede the [March 23, 2009 Lewis-Wilson] letter." This second letter was identical to the first—including its declaration in subparagraph (c) that "[t]he Government does not intend nor does the Government believe that any Contractor rights are prejudiced by not inserting the [SMC-H0XX clause]"—except that it no longer included subparagraph (b) purporting to rescind the DPC Advance Agreement.

162. That same day, ULS sent a letter dropping its request for inclusion of the SMC-H0XX clause and instead providing an updated NTE estimate for the overall NROL-15 mission that included a $10 million allocation of DPC. This approach was consistent with the Air Force's declaration in its March 27, 2009 letter of ULS's "right to include an amount in its overall mission NTE that is certifiable" and "properly allocable to this mission."

163. On April 6, 2009, ULS and the Air Force entered into an undefinitized letter contract (Contract No. FA8811-09-C-0003) for the launch of the NROL-15 payload (the "NROL-15 Contract"). This contract authorized ULS to begin the work required for a launch in late 2011 pending the negotiation of a definitized contract price. Included in the NTE price that the parties agreed upon was the $10 million for DPC that ULS had proposed in its March 27, 2009 letter.

164. On April 21, 2009, ULS submitted a revised pricing proposal to the Air Force that again included DPC values for the NROL-15, NROL-32, -27, and -49 payloads.

165. The parties ultimately definitized the price of the NROL-15 mission in Modification PZ0001 to the NROL-15 Contract, dated August 17, 2009. Notwithstanding the Air Force's acknowledgement in its March 27, 2009 letter that ULS had "the right to include an amount [for DPC] in its overall mission NTE," and its agreement to the inclusion of $10 million for DPC in the undefinitized NTE, the Air Force ultimately refused to recognize DPC in any amount or to include any element of DPC in the final mission price.

166. Instead, the parties agreed to language preserving ULS's "right to dispute the Government decision not to recognize DPC costs by making a claim for a price increase to this

Contract associated with the Contractor's asserted DPC" up to the specified NTE amounts. The complete reservation clause stated:

> In consideration of the modification agreed to herein as a complete equitable adjustment for the Contractor's proposal to perform launch services for missions NROL-15, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to this modification and the facts and circumstances of performing launch services for NROL-15, except for any claim(s) for Deferred Production Costs (DPC) which the contractor asserts are allowable, allocable, and reasonable to this Contract. The Government acknowledges that it did not find the asserted DPC in the Contractor's 21 April 2009 proposal for NROL-15 to be reasonable, allowable and/or allocable to this Contract, and for that reason those costs were not considered by the Government in determining a fair and reasonable price, for the NROL-15 mission on this Contract. The Contractor's execution of this modification (PZ0001) shall not prejudice the Contractor's right to dispute the Government decision not to recognize DPC costs by making a claim for a price increase to this Contract associated with the Contractor's asserted DPC in an amount up to $9,877,313 for NROL-15. By agreeing to this exception, the Government does not acknowledge validity of any claims or appeals that the Contractor may assert or waive any rights or defenses the Government may have.

167. Despite the Air Force's refusal to include the SMC-H0XX clause required by the DPC Advance Agreement or to incorporate a fixed DPC amount in the definitized price for the NROL-15 mission, the NROL-15 Contract nonetheless reaffirmed the Air Force's contractual commitment to recognize that Lot Accounting is CAS compliant. The definitized NROL-15 Contract (at Clause SMC-H003) makes that contract expressly interdependent with the original ELC Contract, which expressly incorporated the Lot Accounting Advance Agreement as an "integral part" of the ELC contract that would be incorporated into any ELS Contract when awarded, and which made clear that the Lot Accounting Advance Agreement "was a substantial factor in determining Contract value."

b) NROL-32, -27, And -49 Missions

168. As it did when definitizing the NROL-15 mission price, the Air Force refused to negotiate the inclusion of DPC, in any amount, in the prices of the missions for the National Reconnaissance Office covered by Modification PZ0004 to the ELS Contract (missions NROL-32, -27 and -49), and further refused to incorporate in the relevant contracts the SMC-H0XX clause required under the DPC Advance Agreement.

169. On August 17, 2009, the same day the parties definitized the price of the NROL-15 mission, the parties also agreed to similar terms definitizing the prices of the NROL-32, -27 and -49 missions, excluding an amount for DPC but including the following reservation-of-rights provision:

> In consideration of the modification agreed to herein as a complete equitable adjustment for the Contractor's proposal to perform launch services for missions NROL-32, NROL-27, and NROL-49, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to this modification and the facts and circumstances of performing launch services for missions NROL-32, NROL-27, and NROL-49, except for any claim(s) for Deferred Production Costs (DPC) which the contractor asserts are allowable, allocable, and reasonable to this Contract. The Government acknowledges that it did not find the asserted DPC in the Contractor's 21 April 2009 proposal for NROL-32, NROL-27, and NROL-49 to be reasonable, allowable and/or allocable to this Contract, and for that reason those costs were not considered by the Government in determining a fair and reasonable price, and have not been included in the price, for the NROL-32, NROL-27, and NROL-49 missions on this Contract. The Contractor's execution of this modification (PZ0004) shall not prejudice the Contractor's right to dispute the Government decision not to recognize DPC costs by making a claim for a price increase to this Contract associated with the Contractor's asserted DPC in an amount up to $9,877,313 for NROL-32; $4,938,657 for NROL-27; and $9,877,313 for NROL-49. Under the Disputes provision of this Contract and in accordance with the Contracts Disputes Act of 1978, 41 U.S.C. 601, et seq, the Contractor may submit a claim to the Contracting Officer for the Contractor asserted DPC associated with launch services for NROL-32, NROL-27, and NROL-49. By agreeing to this exception, the Government does not acknowledge validity of any claims or appeals that the Contractor may assert or waive any rights or defenses the Government may have.

170. Nonetheless, as with the definitized NROL-15 Contract, Modification PZ0004 reaffirmed the Air Force's contractual commitment to recognize that Lot Accounting is CAS

compliant. That modification (at Clause SMC-H003) makes the order for the NROL-32, -27, and -49 missions expressly interdependent with the original ELC Contract, which expressly incorporated the Lot Accounting Advance Agreement as an "integral part" of the ELC Contract that would be incorporated into any ELS Contract when awarded, and which made clear that the Lot Accounting Advance Agreement "was a substantial factor in determining Contract value."

c) Other Post-ILS Missions On Which DPC Was Due

171. The Air Force continued to refuse to incorporate DPC payment terms in subsequent mission orders under the ELS Contract.

172. The Air Force and ULS entered into Modification P00006 to the ELS Contract, effective December 21, 2009. The purpose of this undefinitized contract action was "to award the WGS-4 Launch Order and to allow the Contractor to commence work associated with WGS-4 Launch Services." The price of the WGS-4 mission was definitized in Modification P00008 to the ELS Contract, effective August 31, 2010.

173. In negotiating Modifications P00006 and P00008, the Air Force refused to negotiate any amount of DPC for inclusion in the NTE amount or price of the WGS-4 mission.

174. Nonetheless, as with the definitized NROL-15 Contract and Modification PZ0004 for the NROL-32, -27, and -49 missions, Modification P00006 reaffirmed the Air Force's contractual commitment to recognize that Lot Accounting is CAS compliant. Modification P00006 (at Clause SMC-H003) makes the WGS-4 mission order expressly interdependent with the original ELC Contract, which expressly incorporated the Lot Accounting Advance Agreement as an "integral part" of the ELC contract that would be incorporated into any ELS

Contract when awarded, and which made clear that the Lot Accounting Advance Agreement "was a substantial factor in determining Contract value."

175. As in the case of the earlier modifications, ULS reserved its right to assert a claim for the DPC otherwise allocable to the WGS-4 mission. The modification included, in relevant part, the following provision:

> The Contractor's execution of this undefinitized Modification P00006 to establish the WGS-4 Mission shall not prejudice the Contractor's right [to] (i) dispute the Government decision not to recognize DPC in the NTE; or (ii) claim entitlement to DPC at the time Modification P00006 is definitized. In the event the final definitized price for the WGS-4 Mission does not include an agreed upon amount for DPC, the Contractor may submit a claim to the Contracting Officer under the Disputes provision of this Contract and in accordance with the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601, *et seq.*, for the DPC associated with launch services for WGS-4 and the original NTS (sic) shall not serve as a limitation on the right to recover the claimed DPC. That claim shall not exceed $6,400,000 plus profit and interest pursuant to the CDA.

176. Modification P00008 also included a reservation-of-rights provision, which stated in relevant part:

> In consideration of the modification agreed to herein as a complete equitable adjustment for the Contractor's proposal to perform launch services for the WGS-4 mission, the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to this modification and the facts and circumstances of performing launch services for the WGS-4 mission, except for any claim(s) for Deferred Production Costs (DPC) which the contractor asserts are allowable, allocable, and reasonable to this Contract. The Government acknowledges that it did not find the asserted DPC in the Contractor's proposal for WGS-4 to be reasonable, allowable and/or allocable to this Contract, and for that reason those costs were not considered by the Government in determining a fair and reasonable price, and have not been included in the price, for the WGS-4 mission on this Contract. The Contractor's execution of this modification (P00008) shall not prejudice the Contractor's right to dispute the Government decision not to recognize DPC costs by making a claim for a price increase to this Contract associated with the Contractor's asserted DPC in an amount up to $6,386,194. Under the Disputes provision of this Contract and in

> accordance with the Contracts Disputes Act of 1978, 41 U.S.C. 601, et seq, the Contractor may submit a claim to the Contracting Officer for the Contractor asserted DPC associated with launch services for WGS-4. By agreeing to this exception, the Government does not acknowledge validity of any claims or appeals that the Contractor may assert or waive any rights or defenses the Government may have.

177. To date, the government has ordered but not yet definitized seven Delta IV missions (NROL-65, WGS-6, WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, and DMSP-20) under a successor to the ELS Contract known as the "ELS-4 Contract" (Contract No. FA8811-11-C-0001). The ELS-4 contract committed the government to negotiate the definitive terms, including prices, of missions ordered under that contract pursuant to FAR 52.216-25 and DFARS 252.217-7027, and to negotiate the definitive price pursuant to DFARS 252.243-7001 and the applicable FAR cost principles.

178. As in the case of the earlier ELS Contract missions, while the government has refused to negotiate an amount of DPC for inclusion in the price of the ELS-4 Contract missions, ULS has reserved its right to assert a claim for the DPC that is allocable to those missions. On January 31, 2012, ULS and the Air Force executed Modification PZ0004, which included Clause H0021, stating that:

> (a) In consideration of the modification agreed to herein as a complete equitable adjustment for the contractor's proposal to perform launch services for missions NROL-65, WGS-6, WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, DMSP-20 and [sic] the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to this modification and the facts and circumstances of performing launch services for missions NROL-65, WGS-6, WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, and DMSP-20 except for any claim(s) for Deferred Production Costs (DPC) which the contractor asserts are allowable, allocable, and reasonable to this contract. The Government acknowledges that it did not find the asserted DPC in the contractor's 1 June 2011 disclosure and firm

> proposals for NROL-65, WGS-6, WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, and DMSP-20 to be reasonable, allowable and/or allocable to this contract, and for that reason those costs were not considered by the Government in determining a fair and reasonable price, and have not been included in the price, for the NROL-65, WGS-6, WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, and DMSP-20 missions on this contract.
>
> (b) The contractor's execution of this modification shall not prejudice the contractor's right to dispute the Government decision not to recognize DPC costs by making a claim for a price increase to this contract associated with the contractor's asserted DPC in an amount up to $12,772,388 for NROL-65; $6,386,194 for WGS-6, $6,386,194 for WGS-5, $6,386,914 for AFSPC-4, $6,386,914 for GPS IIF-10, $6,386,914 for GPS*TBD, and $6,386,914 for DMSP-20. Under the Disputes provision of this Contract and in accordance with the Contracts Disputes Act of 1978, 41 U.S.C. 601, et seq, the contractor may submit a claim to the Contracting Officer for the contractor asserted DPC associated with launch services for NROL-65, WGS-6, WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, DMSP-20.

179. As with the definitized NROL-15 Contract, Modification PZ0004 of the ELS Contract for the NROL-32, -27, and -49 missions, and Modification P00006 of the ELS Contract for the WGS-4 mission, the ELS-4 Contract once again expressly reaffirmed the Air Force's contractual commitment to recognize that Lot Accounting is CAS compliant. Modification PZ0004 of the ELS-4 Contract (in Clause H0007) makes the NROL-65 and WGS-6 mission orders (as well as the WGS-5, AFSPC-4, GPS IIF-10, GPS*TBD, and DMSP-20 mission orders) expressly interdependent with the original ELC Contract, which expressly incorporated the Lot Accounting Advance Agreement as an "integral part" of the ELC contract that would be incorporated into any ELS Contract when awarded, and which made clear that the Lot Accounting Advance Agreement "was a substantial factor in determining Contract value."

VI. Boeing's And ULS's Performance Under The ELC And ELS Contracts

180. In all respects material to this dispute, Boeing and ULS have performed their obligations under all of the contracts discussed above, including the ILS, ELC, ELS, and NROL-15 Contracts, as well as the DSC, DPC, and Lot Accounting Advance Agreements. Boeing and ULS have performed these obligations notwithstanding the government's refusal to honor its corresponding commitments with respect to the reimbursement of DSC and DPC. These have included the government's commitment—made initially in the Lot Accounting Advance Agreement, and repeatedly reaffirmed in subsequent contracts—to continue to recognize Lot Accounting as a CAS compliant accounting practice.

CLAIMS FOR RELIEF

COUNT I – THE UNITED STATES HAS BREACHED ITS CONTRACTUAL OBLIGATIONS TO REIMBURSE ULS FOR DEFERRED SUPPORT COSTS

181. ULS repeats and re-alleges here the allegations as set forth in paragraphs 1 through 180 above.

182. The government agreed in the DSC Advance Agreement, and therefore the original and consolidated ELC Contracts incorporating that advance agreement, that "the amount of $271,152,672 represents costs for program management and hardware support under the Delta IV program that were incurred and placed in an inventory account prior to June 1, 2006, but were neither allocable to nor payable under obligations on contracts entered into or performed prior to that date." The government further agreed in those contract instruments "on a method by which the contractor may be paid for 1/8 share of such $271,152,672 amount as a fixed-price contract line item in each year of future contracts, if awarded."

183. The government further agreed in the original and consolidated ELC Contracts (SMC-H029 and SMC-H045, respectively) to "establish the billing practice for deferred support to be implemented under this Contract," to Boeing's (and subsequently ULS's) entitlement to recover $271,152,672 of DSC through eight annual installments averaging $33,894,084 per year, and to fixed-price CLINs (CLINs 1501, 1502, 1503, 1504, and 1505) identifying specific amounts of DSC to be paid by the government in fiscal years 2006 through 2010, totaling $169,470,420 over that five-year period.

184. The government further agreed in the original and consolidated ELC Contracts (Clauses SMC-H019 and SMC-H043, respectively) that the Lot Accounting and DSC Advance Agreements shall "control the specified cost charging areas for this and any successor Contract."

185. The government further agreed in the Lot Accounting Advance Agreement, and therefore the original and consolidated ELC Contracts incorporating that advance agreement, that "the undersigned DACO has found Lot Accounting a compliant practice under the Cost Accounting Standards (CAS)," with "revocation, withdrawal, or other reconsideration of this determination" permissible only "if subsequent facts indicate that some aspect of this disclosed practice is noncompliant with CAS or FAR."

186. The government has ratified these commitments by asserting its entitlement to, and accepting, the significant benefits resulting from them. The government's agreement to reimburse DSC secured Boeing's continued participation in the EELV program, and the government has received the benefits of Boeing's (and then ULS's) full performance of its obligations under the ELC, ELS, ELS-4, and NROL-15 Contracts.

187. Moreover, as a direct result of the government's agreement to pay DSC, there was a substantial increase in the amount of the credits that Boeing agreed to provide the government under the original ELC Contract (and its successors) to eliminate a potential double payment. With full knowledge of the dependence of the credit calculation on the reimbursement of DSC, the Air Force has continued to assert its entitlement to the full amount of the credits—including necessarily the portion associated with DSC. The government's position, if accepted, would result in it receiving "credits" for double payment corresponding to a portion of costs that it now refuses to pay. Thus, even as the government has reversed its position on Lot Accounting and denied payment of DSC, it has—through its continued position on the credits—ratified its contractual commitments to reimburse Boeing for DSC and to recognize the permissibility of Lot Accounting.

188. Through its actions, including the June 16, 2011 DCMA final decisions and the May 15, 2012 Air Force final decision with respect to ULS's claim for DSC, the government has breached the original and consolidated ELC Contracts, including the advance agreements incorporated therein, by refusing to pay any of the amounts due under CLINs 1504 and 1505, and a portion of the amount due under CLIN 1503, of those contracts, and by demanding ULS's repayment of amounts already paid under CLINs 1501, 1502, and 1503.

189. The government has breached the original and consolidated ELC Contracts, including the advance agreements incorporated therein, by refusing to agree to the incorporation of the DSC and Lot Accounting Advance Agreements into the successor ELC Contract; by purporting to unilaterally rescind the DSC and Lot Accounting Advance Agreements, which had been incorporated into both the original and consolidated ELC Contracts; and by refusing to

agree to the inclusion in the successor ELC Contract of terms providing for the government's payment of DSC in accordance with the method set forth in the DSC Advance Agreement.

190. The government has anticipatorily repudiated the original and consolidated ELC Contracts, and the advance agreements incorporated therein, by informing ULS in the June 16, 2011 DCMA final decision that DSC "must be excluded from future billings"—including on what would be CLINs 1506, 1507, and 1508—and by otherwise making clear that it no longer intends to pay any amount of DSC or to adhere to the DSC and Lot Accounting Advance Agreements.

191. The government's course of conduct violates the implied duties of good faith, fair dealing, and cooperation.

192. The government is equitably estopped from repudiating its obligation to pay DSC and to recognize Boeing's Lot Accounting as CAS compliant.

193. Boeing and ULS have complied in all respects material to this dispute with their obligations under the original, consolidated, and successor ELC Contracts, the ELS Contract, the ELS-4 Contract, the DSC and Lot Accounting Advance Agreements, and all other contracts discussed herein.

194. Boeing properly allocated the costs constituting DSC in performing under the ILS Contract, and DSC are allowable and recoverable under the ELC Contract and its successor Contracts. Nothing in CAS or federal law or regulations precludes the recovery of DSC. The government has not identified any "subsequent facts that indicate that some aspect of this practices is noncompliant with CAS or FAR," and there are no such facts.

195. The government's conduct with respect to DSC has damaged ULS as follows: (a) in the amount of $77,179,119.00, which is the total DSC amount that ULS has billed the Air Force but the Air Force has declined to pay under CLINs 1503, 1504, and 1505; (b) in the amount of $72,198,875.00 in DSC payments, plus $17,036,291.70 in interest, which is the total amount that the Air Force paid in cash in satisfaction of CLINs 1501 and 1502, and in partial satisfaction of CLIN 1503, but that ULS was directed to and did refund to the Air Force on July 1, 2011 in the amount of $89,235,166.70; (c) in the amount of $33,894,084, which is the amount of DSC due and quantified under what would be CLIN 1506, which the Air Force refused to incorporate into the successor ELC Contract to enable billing and payment for the 2011 contract year; and (d) any other amounts due and payable.

196. ULS is also entitled to a judicial determination that the Air Force is obligated to pay ULS $33,894,084 per year for each of 2012 and 2013, as the conditions triggering the government's payment obligations are satisfied.

197. ULS is also entitled to interest, pursuant to 41 U.S.C. § 7109, on the principal amounts set forth in paragraph 195.

COUNT II – THE UNITED STATES HAS BREACHED ITS CONTRACTUAL OBLIGATIONS BY FAILING TO NEGOTIATE AND PAY DEFERRED PRODUCTION COSTS

198. ULS repeats and re-alleges here the allegations as set forth in paragraphs 1 through 197 above.

199. The government agreed in the original and consolidated ELC Contracts (Clauses SMC-H019 and SMC-H043, respectively) that the "Lot Accounting Advance Agreement . . . will also be incorporated into the Interdependent [ELS] Contract, if awarded."

200. The government further agreed in the DPC Advance Agreement to "negotiate a fair and reasonable value representing the total Delta IV deferred production costs"; "to allocate the negotiated Delta IV production costs to future Delta IV launch service missions awarded by the SMC EELV program office until the total negotiated value has been liquidated"; and to insert a clause establishing that DPC "shall be recovered as part of each contracted launch service," and specifying a schedule for that recovery, in "all SMC Contracts for Delta IV lunch service missions for which a firm price for ordered missions has not yet been established."

201. The government further agreed in the NROL-15 Contract, the ELS Contract, and the ELS-4 Contract to negotiate the definitive terms, including prices, of the missions ordered under those contracts pursuant to either or both FAR 52.216-25 and DFARS 252.217-7027, and to negotiate the definitized prices pursuant to DFARS 252-243-7001 and the applicable FAR cost principles. The applicable FAR cost principles include, but are not limited to, FAR 31.201-1, Composition of total cost, and FAR 31.201-2, Determining allowability. The government further agreed that, in the event the parties were unable to reach agreement on the definitive terms, including prices, of the missions, ULS could dispute the government's determination of the price.

202. The ELS Contract, the ELS-4 Contract, and the NROL-15 Contract—together with the DPC Advance Agreement and the expressly interdependent original and consolidated ELC Contracts (and therefore the advance agreements incorporated therein)—committed the

government: (i) to negotiate in good faith the prices of definitized missions, which prices would not exclude otherwise allowable costs; (ii) to recognize specifically ULS's entitlement to the reimbursement of DPC as a category of allowable costs; (iii) to continue to recognize Lot Accounting as CAS compliant absent "subsequent facts" indicating to the contrary; and (iv) to negotiate in good faith the amount of DPC allocable to new missions ordered and payment of that amount.

203. The government has ratified these commitments by asserting its entitlement to, and accepting, the significant benefits resulting from them. The government's agreement to reimburse DPC was necessary to secure ULS's continued participation in the EELV program, and the government has received the benefits of ULS's full performance of its obligations under the ELS, ELS-4, and NROL-15 Contracts.

204. The government breached the ELC Contract and consolidated ELC Contract, including the advance agreements incorporated therein, by refusing to agree to the incorporation of the Lot Accounting Advance Agreement into the "interdependent" ELS Contract.

205. The government breached the original and consolidated ELC Contracts, the DPC Advance Agreement, the ELS Contract, the ELS-4 Contract, and the NROL-15 Contract by categorically refusing to negotiate the inclusion of any amount of DPC in the definitized price of any of the Delta IV missions ordered under the ELS, ELS-4, or NROL-15 Contracts. Specifically, DPC is due on the following missions: NROL-15; NROL-32, -27, and -49; WGS-4; NROL-65; WGS-6; WGS-5; AFSPC-4; GPS IIF-10 and GPS*TBD; and DMSP-20.

206. The government's course of conduct violates the implied duties of good faith, fair dealing, and cooperation.

207. The government is equitably estopped from repudiating its obligation to negotiate and pay DPC and to recognize Boeing's Lot Accounting as CAS Compliant.

208. Boeing and ULS have complied in all respects material to this dispute with their obligations under the original, consolidated, and successor ELC Contracts; the ELS and ELS-4 Contracts; the NROL-15 Contract; and the DPC and Lot Accounting Advance Agreements.

209. Boeing properly allocated the costs constituting DPC in performing under the ILS Contract, and DPC are allowable and recoverable in the prices of missions ordered under the NROL-15, ELS, and ELS-4 Contracts. Nothing in CAS or federal law or regulations precludes the recovery of DPC.

210. The government's conduct with respect to DPC has damaged ULS as follows: (a) in the amount of $40,956,790, which is the total amount of DPC due under the post-ILS contract missions (NROL-15, -27, -32, and -49, and WGS-4) that have been ordered and definitized by the Air Force; (b) in the amount of $19,158,582, which is the total amount of DPC due under the post-ILS contract missions (NROL-65 and WGS-6) that had been ordered but not yet definitized as of November 10, 2011, when ULS submitted its certified claim.

211. ULS is also entitled to a judicial determination that the Air Force is obligated to negotiate the balance of DPC due and to pay ULS additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied.

212. ULS is also entitled to interest, pursuant to 41 U.S.C. § 7109, on the principal amounts set forth in paragraph 210.

COUNT III – THE UNITED STATES HAS BREACHED ITS CONTRACTUAL OBLIGATIONS TO CONTINUE TO FIND LOT ACCOUNTING COMPLIANT WITH THE COST ACCOUNTING STANDARDS

213. Boeing and ULS repeat and re-alleges here the allegations as set forth in paragraphs 1 through 212 above.

214. The government agreed in the Lot Accounting Advance Agreement, and therefore the original and consolidated ELC Contracts incorporating that advance agreement, that "the undersigned DACO has found Lot Accounting a compliant practice under the Cost Accounting Standards (CAS)," with "revocation, withdrawal, or other reconsideration of this determination" permissible only "if subsequent facts indicate that some aspect of this disclosed practice is noncompliant with CAS or FAR."

215. The government further agreed in the original and consolidated ELC Contracts (Clauses SMC-H019 and SMC-H043, respectively) that the "Lot Accounting Advance Agreement . . . will also be incorporated into the Interdependent [ELS] Contract, if awarded."

216. The government has ratified these commitments by asserting its entitlement to, and accepting, the significant benefits resulting from them. The government's agreement to treat Lot Accounting as a compliant practice under CAS was necessary to secure Boeing's continued participation in the EELV program, and the government has received the benefits of Boeing's (and then ULS's) full performance of its obligations under the original, consolidated, and successor ELC Contracts, and the ELS, ELS-4, and NROL-15 Contracts.

217. The government has breached the original and consolidated ELC Contracts, including the Lot Accounting Advance Agreement incorporated therein, by discontinuing the

regulatory accounting treatment it had promised and instead reversing position. In the June 16, 2011 DCMA final decisions issued to ULS and Boeing, DCMA found that "Boeing's Lot Accounting practice is noncompliant with [CAS]" and disallowed DSC on that basis. That finding, in combination with the actions of the Air Force, also makes clear that the government is no longer adhering to its commitment to recognize Lot Accounting as compliant with CAS in connection with DPC as well as DSC.

218. Boeing and ULS have complied in all respects material to this dispute with their obligations under the original, consolidated, and successor ELC Contracts, the ELS and ELS-4 Contracts, the DSC and Lot Accounting Advance Agreements, and all other contracts discussed herein.

219. Nothing in the CAS standards bars Lot Accounting.

220. The government's breach of its promise to treat Boeing's Lot Accounting practice as compliant with CAS has damaged ULS as follows: (a) in the amount of $77,179,119.00, which is the total DSC amount that ULS has billed the Air Force but the Air Force has declined to pay under CLINs 1503, 1504, and 1505; (b) in the amount of $72,198,875 in DSC payments, plus $17,036,292 in interest, which is the total amount that the Air Force paid in cash in satisfaction of CLINs 1501 and 1502, and in partial satisfaction of CLIN 1503, but that ULS was directed to and did refund to the Air Force on July 1, 2011 in the amount of $89,235,166.70; (c) in the amount of $33,894,084, which is the amount of DSC due and quantified under what would be CLIN 1506, which the Air Force refused to incorporate into the successor ELC Contract to enable billing and payment for the 2011 contract year; (d) in the amount of $40,956,790, which is the total amount of DPC due under the post-ILS contract missions (NROL-15, -27, -32, and -

49, and WGS-4) that have been ordered and definitized by the Air Force; (e) in the amount of $19,158,582, which is the total amount of DPC due under the post-ILS contract missions (NROL-65 and WGS-6) that had been ordered but not yet definitized as of November 10, 2011, when ULS submitted its certified claim, and (f) any other amounts due and payable.

221. ULS is also entitled to a judicial determination that the June 16, 2011 and May 15, 2012 final decisions be rescinded and declared null and without legal effect.

222. ULS is also entitled to interest, pursuant to 41 U.S.C. § 7109, on the principal amounts set forth in paragraph 220.

223. To the extent this Court considers Boeing to be an appropriate party in interest, Boeing is entitled to a judicial determination that the government has breached its promise to treat Boeing's Lot Accounting practice as CAS compliant; that the government is obligated to pay ULS the amounts of DSC due and payable; and that the Air Force is obligated to negotiate the balance of DPC due and to pay ULS additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied.

COUNT IV – CONTRARY TO LAW AND REGULATION (DSC)

224. Boeing and ULS repeat and re-allege here the allegations as set forth in paragraphs 1 through 223 above.

225. The June 16, 2011 DCMA final decisions issued to ULS and Boeing were contrary to law and regulation. Among other things, those decisions (a) determined that ULS's billing of DSC failed to comply with CAS 405 and 406 and that the cost impact of the purported noncompliance is the full amount of DSC the government had agreed to pay in fixed-price

CLINs under the original ELC and successor contracts ($271,152,672), and (b) demanded repayment of the amounts of DSC already paid under the ELC Contract ($72, 198,875 in principal, plus $17,036,092 in interest).

226. The May 15, 2012 Air Force contracting officer's final decision denying ULS's November 10, 2011 certified claim regarding DSC was contrary to law and regulation. Among other things, that decision concluded that "the PCOs' actions in including CLINs, clauses, and Advance Agreements in the award of [the original and consolidated ELC Contracts] did not create an irrevocable binding contractual obligation to recognize DSC as an allowable cost, or to pay unallowable DSC."

227. Boeing properly allocated the costs constituting DSC in performing under the ILS Contract, and DSC are allowable and recoverable under the ELC Contract and its successor Contracts. Nothing in CAS or federal regulations, including the provisions relied upon in the final decisions referenced in paragraphs [230 and 231], precludes the recovery of DSC.

228. These unlawful determinations have damaged ULS as follows: (a) in the amount of $77,179,119.00, which is the total DSC amount that ULS has billed the Air Force but the Air Force has declined to pay under CLINs 1503, 1504, and 1505; (b) in the amount of $72,198,875.00 in DSC payments, plus $17,036,291.70 in interest, which is the total amount that the Air Force paid in cash in satisfaction of CLINs 1501 and 1502, and in partial satisfaction of CLIN 1503, but that ULS was directed to and did refund to the Air Force on July 1, 2011 in the amount of $89,235,166.70; (c) in the amount of $33,894,084, which is the amount of DSC due and quantified under what would be CLIN 1506, which the Air Force refused to incorporate into

the successor ELC Contract to enable billing and payment for the 2011 contract year; and (d) any other amounts due and payable.

229. ULS is also entitled to a judicial determination that the Air Force is obligated to pay ULS $33,894,084 per year for each of 2012 and 2013, as the conditions triggering the government's payment obligations are satisfied.

230. ULS is also entitled to a judicial determination that the June 16, 2011 and May 15, 2012 final decisions be rescinded and declared null and without legal effect.

231. ULS is also entitled to interest, pursuant to 41 U.S.C. § 7109, on the principal amounts set forth in paragraph 228.

232. To the extent this Court considers Boeing to be an appropriate party in interest, Boeing is entitled to a judicial determination that the government has breached its promise to treat Boeing's Lot Accounting practice as CAS compliant; that the government is obligated to pay ULS the amounts of DSC due and payable; and that the Air Force is obligated to negotiate the balance of DPC due and to pay ULS additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied.

COUNT V – CONTRARY TO LAW AND REGULATION (DPC)

233. ULS repeats and re-alleges here the allegations as set forth in paragraphs 1 through 232 above.

234. The May 15, 2012 Air Force contracting officer's final decision denying ULS's November 10, 2011 certified claim regarding DPC was contrary to law and regulation. Among

other things, that decision concluded that the government's actions "did not create any contractual obligation to recognize the allowability of DPC costs."

235. Boeing properly allocated the costs constituting DPC in performing under the ILS Contract, and DPC are allowable and recoverable in the prices of missions ordered under the NROL-15, ELS, and ELS-4 Contracts. Nothing in CAS or federal law or regulations preclude the recovery of DPC.

236. This unlawful determination with respect to DPC has damaged ULS as follows: (a) in the amount of $40,956,790, which is the total amount of DPC due under the post-ILS contract missions (NROL-15, -27, -32, and -49, and WGS-4) that have been ordered and definitized by the Air Force; and (b) in the amount of $19,158,582, which is the total amount of DPC due under the post-ILS contract missions (NROL-65 and WGS-6) that had been ordered but not yet definitized as of November 10, 2011, when ULS submitted its certified claim.

237. ULS is also entitled to a judicial determination that the Air Force is obligated to negotiate the balance of DPC due and to pay ULS additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied.

238. ULS is also entitled to a judicial determination that the May 15, 2012 final decision be rescinded and declared null and without legal effect.

239. ULS is also entitled to interest, pursuant to 41 U.S.C. § 7109, on the principal amounts set forth in paragraph 236.

COUNT VI – ENTITLEMENT TO DPC

240. ULS repeats and re-alleges here the allegations as set forth in paragraphs 1 through 239 above.

241. Boeing's Lot Accounting practice complied with all applicable financial and cost accounting standards.

242. Under the applicable FAR principles incorporated into the NROL-15, ELS and ELS-4 Contracts—including but not limited to FAR 31.201-1, Composition of total cost, and FAR 31.201-2, Determining allowability—allowable costs, including those constituting DPC, are recoverable in the prices of missions ordered under those Contracts..

243. The government's refusal to negotiate the inclusion of DPC in the prices of missions ordered under the NROL-15, ELS and ELS-4 Contracts is therefore contrary to law and regulation, as incorporated into the parties' contractual agreements.

244. This unlawful action has damaged ULS as follows: (a) in the amount of $40,956,790, which is the total amount of DPC due under the post-ILS contract missions (NROL-15, -27, -32, and -49, and WGS-4) that have been ordered and definitized by the Air Force; and (b) in the amount of $19,158,582, which is the total amount of DPC due under the post-ILS contract missions (NROL-65 and WGS-6) that had been ordered and not yet definitized as of November 10, 2011, when ULS submitted its certified claim.

245. ULS is also entitled to a judicial determination that the Air Force is obligated to negotiate the balance of DPC due and to pay ULS additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied.

246. ULS is also entitled to interest, pursuant to 41 U.S.C. § 7109, on the principal amounts set forth in paragraph 244.

COUNT VII – NON-MONETARY RELIEF

247. ULS repeats and re-alleges here the allegations as set forth in paragraphs 1 through 246 above.

248. ULS is entitled to a declaratory judgment that the Air Force is obligated to pay (a) the amount of $77,179,119, which is the total DSC amount that ULS has billed the Air Force but the Air Force has declined to pay under CLINs 1503, 1504, and 1505; (b) the amount of $72,198,875 in DSC payments, plus $17,036,291.70 in interest, which is the total amount that the Air Force paid in cash in satisfaction of CLINs 1501 and 1502, and in partial satisfaction of CLIN 1503, but that ULS was directed to and did refund to the Air Force on July 1, 2011 in the amount of $89,235,166.70; (c) the amount of $33,894,084, which is the amount of DSC due and quantified under what would be CLIN 1506, which the Air Force refused to incorporate into the successor ELC Contract to enable billing and payment for the 2011 contract year; and (d) any other amounts due and payable.

249. ULS is entitled to a declaratory judgment that the Air Force is obligated to pay ULS $33,894,084 per year for each of 2012 and 2013, as the conditions triggering the government's payment obligations are satisfied.

250. ULS is entitled to a declaratory judgment that the Air Force is obligated to pay (a) the amount of $40,956,790, which is the total amount of DPC due under the post-ILS contract missions (NROL-15, -27, -32, and -49, and WGS-4) that have been ordered and definitized by

the Air Force; and (b) the amount of $19,158,582, which is the total amount of DPC due under the post-ILS contract missions (NROL-65 and WGS-6) that had been ordered but not yet definitized as of November 10, 2011, when ULS submitted its certified claim.

251. ULS is entitled to a declaratory judgment that the Air Force is obligated to negotiate in good faith the amount of DPC allocable to missions ordered after the submission of ULS's certified claim and payment of that amount.

252. ULS is entitled to a declaratory judgment that the Air Force is obligated to treat the use of Lot Accounting as a compliant practice under CAS. ULS is further entitled to a declaratory judgment that the Air Force must compensate ULS for any costs deemed unallowable because of the government's refusal to provide those costs the regulatory treatment to which the government contractually committed itself in the original and consolidated ELC Contracts and the Lot Accounting Advance Agreement they expressly incorporated.

COUNT VIII – THE CONTRACTING OFFICER'S JUNE 16, 2011 FINAL DECISION ISSUED TO BOEING SHOULD BE VACATED

253. Boeing repeats and re-alleges here the allegations as set forth in paragraphs 1 through 252 above.

254. The final decision issued to Boeing by Shawn R. Mapel, Administrative Contracting Officer for the DCMA, on June 16, 2011, purports to decide Boeing's compliance with CAS with respect to work performed under the original and consolidated ELC Contracts.

255. In a formal novation agreement executed on April 18, 2008, the government recognized ULS as the successor-in-interest to Boeing's EELV program contracts, "including but

not limited to claims arising out of or related to the Contracts arising prior to the date of [the novation agreement] (which claims are not waived or otherwise altered by any term of [the novation agreement])."

256. Accordingly, Mr. Mapel's June 16, 2011 final decision issued to Boeing should be vacated, as Boeing's interests under the relevant contracts were novated to ULS.

257. To the extent this Court considers Boeing to be an appropriate party in interest, Boeing is entitled to a judicial determination that the government has breached its promise to treat Boeing's Lot Accounting practice as CAS compliant; that the government is obligated to pay ULS the amounts of DSC due and payable; and that the Air Force is obligated to negotiate the balance of DPC due and to pay ULS additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied.

PRAYER FOR RELIEF

WHEREFORE, ULS and Boeing respectfully request that the Court enter judgment in their favor and against the United States as follows:

(1) On Count I: $200,308,369.70 in damages, plus interest, and a judicial determination that the Air Force is obligated to pay additional amounts of DSC as the conditions triggering the government's payment obligations are satisfied;

(2) On Count II: $60,115,372 in damages, plus interest, and a judicial determination that the Air Force is obligated to negotiate and pay additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied;

(3) On Count III: $260,423,741.70 in damages, plus interest;

(4) On Count IV: $200,308,369.70 in damages, plus interest, and a judicial determination that the Air Force is obligated to pay additional amounts of DSC as the conditions triggering the government's payment obligations are satisfied;

(5) On Count V: $60,115,372 in damages, plus interest, and a judicial determination that the Air Force is obligated to negotiate and pay additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied;

(6) On Count VI: $60,115,372 in damages, plus interest, and a judicial determination that the Air Force is obligated to negotiate and pay additional amounts of DPC as the conditions triggering the government's payment obligations are satisfied;

(7) On Count VII: a declaratory judgment that the Air Force is obligated to: (a) pay ULS $200,308,369.70 in DSC; (b) pay ULS 33,894,084 per year for 2012 and 2013 as the conditions for payment are satisfied; (c) pay ULS $60,115,372 in DPC; (d) negotiate in good faith the amount of DPC allocable to missions ordered after the submission of ULS's certified claim and payment of that amount.; and (e) treat Boeing's use of Lot Accounting as CAS compliant.

(8) On Count VIII: Vacatur of the June 16, 2011 final decision issued to Boeing.

(9) Such other and further relief as this Court may deem proper.

Respectfully submitted,

CARL NICHOLS, *Counsel of Record*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
Email: carl.nichols@wilmerhale.com

CHRISTOPHER E. BABBITT, *Of Counsel*
ELISEBETH COLLINS COOK, *Of Counsel*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
Email: christopher.babbitt@wilmerhale.com
elisebeth.cook@wilmerhale.com

GREGORY A. SMITH, *Of Counsel*
SMITH PACHTER MCWHORTER PLC
8000 Towers Crescent Drive, Suite 900
Vienna, Virginia 22182
Telephone: (703) 847-6300
Facsimile: (703) 847-6312
Email: gsmith@smithpachter.com

Attorneys for Plaintiffs, United Launch Services, LLC and The Boeing Company

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