

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

MASTEC RENEWABLES PUERTO RICO, LLC,

Plaintiff,

v.

MAMMOTH ENERGY SERVICES, INC. and
COBRA ACQUISITIONS, LLC,

Defendants.

Case No. 20-cv-20263-RNS

DECLARATION OF MARK MERRITT

Pursuant to 28 U.S.C. § 1746, I, Mark Merritt, declare as follows:

Background

1. I am a founding partner of DCMC Partners, a crisis management and public safety consulting firm formed in 2015.

2. After graduating from the United States Military Academy at West Point, I served in the United States Army as an Army Paratrooper from 1986 to 1991.

3. From 1993 to 2001 I held several positions at the Federal Emergency Management Agency (“FEMA”), including Deputy Chief of Staff, Team Leader of the Eastern Territorial Closeout Team, and Team Leader of the Chief Financial Officer’s Field Support Team. Among numerous assignments relating to hurricanes, earthquakes, and other natural disasters, in addition to natural disasters I helped lead recovery operations in the wake of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.

4. I left FEMA in 2001 to be a Co-Founder of James Lee Witt Associates (“JLWA”). Mr. Witt, who also co-founded JLWA, had been the Director of FEMA during the Clinton

Administration. At JLWA I provided services to state and local governments in response to numerous disasters, including to the State of Louisiana after Hurricane Katrina.

5. I was responsible for all disaster recovery operations at JLWA until 2013, when the firm completed a merger and was re-named Witt O'Brien's, where I was Senior Vice President of Recovery. I left Witt O'Brien's in 2015 to help found DCMC Partners.

6. I have been working in crisis management and disaster recovery for nearly 30 years. From this experience, I am familiar with the procurement of contractors by and for government agencies to perform recovery and reconstruction work after large-scale disasters. I also have extensive experience with, and knowledge of, FEMA's process for approving projects and obligating funds for those projects. ("Obligating" is a term of art that means FEMA has set aside funds to reimburse an applicant for specific work, and those funds are available in an account to be drawn down.)

7. DCMC Partners was hired in early September 2017 to assist Puerto Rico with its recovery from Hurricane Irma, and I was already in Puerto Rico when Hurricane Maria struck the island on September 20, 2017. Through DCMC, I was hired by the office of the Governor of Puerto Rico, through their office of Emergency Management and Homeland Security "PREMA", to be the *de facto* chief of operations to help organize the immediate response, and soon thereafter was retained as a consultant to Puerto Rico's Central Office for Recovery, Reconstruction and Resiliency ("COR3") to be a senior advisor for the recovery phase of the disaster. Exhibit A is the contract pursuant to which my firm, DCMC Partners, provided services to the Puerto Rico Emergency Management Agency ("PREMA"), and thereafter to COR3.

8. In my role for COR3, I was part of the Unified Command Group ("UCG"), which oversaw the recovery, and included representatives of the Puerto Rico Electric Power Authority

(“PREPA”) and FEMA, as well as Carlos Torres (until May 2018, when he left his position), who was appointed as Power Restoration Coordinator by the Governor of Puerto Rico. Mr. Torres was the individual in charge of the UCG and had ultimate authority over decisions relating to restoration of Puerto Rico’s power grid.

PREPA’s RFP Process

9. One of the first contractors on the island was Cobra Acquisitions, LLC (“Cobra”). Cobra had entered into a contract with PREPA in October 2017, funded through an emergency declaration, to perform work restoring Puerto Rico’s power grid after Hurricane Maria. I became familiar with numerous contractors on the island, including Cobra, and with numerous power utility companies that had deployed resources to assist in the restoration effort, because their representatives regularly attended meetings with members of the UCG.

10. Restoring the power grid in Puerto Rico was uniquely challenging, as the terrain on the island includes steep mountains and triple-canopy jungles, among other obstacles. Transmission restoration work, including potentially the installation of new transmission towers, required helicopters. Cobra, which brought its own helicopters and pilots, was very effective at performing its work under difficult circumstances.

11. Cobra performed excellent work. But it became clear in or around February 2018 that it would be helpful for Puerto Rico to bring additional contracting resources to the island, because the U.S. Army Corps of Engineers was demobilizing, the resources provided by the USACE managed power utility companies were expensive and the USACE resources were needed elsewhere, and it was preferable from a cost and control perspective for PREPA to hire its own contractors directly.

12. Dr. Ahsha Tribble, who served as FEMA's Energy Sector Chief and its point person for power restoration in Puerto Rico after Hurricane Maria, along with the other members of the UCG, agreed that PREPA should issue an RFP in early 2018 to solicit additional contractors to come to the island to aid in the work Cobra was doing. Exhibit B, dated April 26, 2018, which is an e-mail from Dr. Tribble to Walter Higgins, then-CEO of PREPA, myself, and several others, in which Dr. Tribble expresses concerns that PREPA's RFP process is still not complete, reflects Dr. Tribble's efforts to bring in additional contractors. Exhibit C, dated May 16, 2018, is an e-mail from Dr. Tribble to, among others, Omar Marrero (then head of COR3), myself, Todd Filsinger (a PREPA consultant), Walter Higgins (PREPA CEO), and Mike Byrne (FEMA's Federal Coordinating Officer and Dr. Tribble's direct superior), noting PREPA's significant and unexplained delays in procuring additional contractors to work in Puerto Rico, and identifying one additional contractor, which I understand to be MasTec, that had "300 resources that could have been on the island by now." It is my understanding that Dr. Tribble was also in regular contact with MasTec's Chief Operating Officer, Mr. Robert Apple, in trying to bring MasTec to Puerto Rico and to secure federal funding for MasTec's work.

13. Keith Ellison, who was then President of Cobra, also consistently pushed for additional contractors to be assigned work in Puerto Rico during calls and meetings for which I was present. Mr. Ellison repeatedly made the point that there was more work to do in Puerto Rico than a single contractor could perform. Mr. Ellison's presence at meetings with members of the UCG did not strike me as out of the ordinary—it was useful to obtain information directly from PREPA's contractor, and we often met with representatives of other island contractors.

14. I understand there have been accusations that Mr. Ellison's priority in Puerto Rico was to obtain payment for Cobra, and that the dire situation of the people in Puerto Rico was

secondary. That is inconsistent with my experience. Mr Ellison's on site management of his resources and equipment enhanced Cobra's ability to complete their mission by limiting the time needed to make decisions that impacted Cobra's resources or contractual authorities. PREPA would often find reasons not to pay Cobra—by, for instance, delaying their own inspections of completed work—even though Cobra's PW was obligated and funds were awaiting draw-down by PREPA. Like many of us in the private sector that support governmental entities in disasters one often wears multiple hats. On one hand you play a significant operational role in the delivery of contractual services and on the other hand you must wear the hat of the company principle responsible for the financial success of the company so it is common to participate at both the operational and executive level on any given day. Many of us choose to lead from the front. Nonetheless, I never observed Cobra slowing or ceasing its work based on lack of payment. On the contrary, I witnessed Cobra working at considerable financial risk not knowing if and when they were going to get paid by their client, PREPA, even though the funding had been made available by FEMA.

15. I worked and communicated on a daily basis with Dr. Tribble. She was a tireless advocate for Puerto Rico and for restoring and strengthening its power grid, and I feel comfortable saying that without her efforts it is likely the lights would have been out for much longer in Puerto Rico than they were.

16. Responsibility for approving and hiring contractors rested entirely with PREPA, including identifying contractors, issuing Requests for Proposals (“RFP”s), soliciting bids, and entering into contracts. Neither Dr. Tribble nor anyone else at FEMA had any role in this process. Nonetheless, because PREPA's significant delays in paying contractors—particularly Cobra—for work they already had performed endangered the progress of the restoration work in Puerto Rico,

Dr. Tribble pressed PREPA to pay Cobra what it owed. For instance, in Exhibit D, an e-mail dated January 27, 2018 from Dr. Tribble, Dr. Tribble pressed PREPA consultants to make payment to Cobra in order to maintain a timeline of restoring power to Puerto Rico.

The Project Worksheet Process

17. In this disaster, before FEMA could fund contractor work for all applicants in the response phase, PREPA had to provide an approved, fully-executed contract, which had to be reviewed by various authorities, including FEMA’s Office of Chief Counsel (OCC), Procurement Disaster Assistance Team (“PDAT”) and the Office of Management and Budget (“OMB”). Once the contract was deemed compliant with procurement guidelines, and otherwise approved, it could be amended so long as the category of work—emergency work versus permanent work—did not change.

18. To clarify, in connection with the recovery in Puerto Rico, the term “emergency work” referred to work considered immediately necessary to preserve lives, such as initial restoration of power to, for example, residences, hospitals, and water supply facilities. “Permanent work,” also referred to as “reconstruction,” generally involved returning Puerto Rico’s power-related facilities, such as generators and transmission and distribution lines, to their pre disaster condition taking into consideration current codes, standards and any eligible mitigation measures that would make the facilities more resilient.

19. After a contract was approved, the intended funds recipient (Puerto Rico), or intended sub-recipient (PREPA), had to provide information sufficient for FEMA to prepare, and obtain approval for, a Project Worksheet (“PW”). FEMA could not obligate funds—meaning essentially approve funding for work—without a PW. This is FEMA’s process in every disaster where an applicant requests funds from FEMA.

20. The process of drafting, submitting, and approving a PW is complicated, and can typically take two to three months. The primary responsibility of the sub-applicant—here, PREPA—is to identify the damage in a Damage Description and Dimensions document (“DDD”), and to provide information FEMA can use to determine if the proposed work is eligible for funding and the proposed cost is reasonable.

21. FEMA’s information requirements were stringent at the relevant time. For instance, with respect to Essential Elements of Information (“EEI”), which is information FEMA requires prior to obligating funds for a particular PW, and something I address with my own clients on a regular basis, it was the sub-applicant’s responsibility to provide answers for every single EEI that FEMA requested. I am not surprised by FEMA’s conclusion in Exhibit E, a January 21, 2021 Determination Memo, that FEMA was not able to obligate funds for MasTec’s work under its contract with PREPA, because PREPA had provided FEMA with only four of the 28 required EEI for MasTec’s PW.

22. A Project Worksheet must pass through numerous FEMA reviews, including an engineering review, environmental review, and historical preservation review before FEMA is able to commit funds. If the amount sought exceeds \$1 million—which it did here—the PW would also have to be reviewed at FEMA headquarters and by the Office of Management and Budget in Washington, D.C. At any stage in the process, a reviewer or department can reject the PW and/or demand more information. Even if it passes these stages, a PW for substantial funds must be presented and acknowledged by the Senate Appropriations Committee. Only then can FEMA obligate the PW. Dr. Tribble had a comparatively small direct role in the PW approval process and in my opinion worked tirelessly with all of the approval authorities to facilitate and expedite their approval process

23. Once approved, PWs likewise can be amended to include additional work, as long as the category of work itself—emergency work versus permanent work—does not change. It was not uncommon for a PW to be amended multiple times.

The Project Worksheet Process and MasTec

24. After PREPA put out the RFP for Puerto Rico restoration work in early 2018, it awarded a contract to MasTec. The contract was a Master Services Agreement under which work could be assigned by PREPA.

25. I am aware that PREPA issued a Notice to Proceed to MasTec in early June 2018 without coordination with any of the members of the UCG, and two days later instructed MasTec to cease mobilization. It is my understanding that PREPA told MasTec to suspend its mobilization, because once the UCG was made aware of the mobilization notice it was communicated to both PREPA and Mastec that a PW had not been obligated that would be Mastek able to pay them for their services and that they would be mobilizing at great financial risk to both PREPA and Mastec. I am not aware of anyone from FEMA or COR3 directed PREPA to suspend the mobilization because it was not within their power to do so. However, I am aware of how it was made perfectly clear to PREPA that they would be incurring a significant financial liability with no guarantee of federal funding. PREPA had failed to provide a scope of work that would enable FEMA to approve and fund a PW, and without that approved PW, FEMA could not obligate funds for MasTec.

26. As discussed in Exhibit F, an e-mail from Dr. Tribble dated June 8, 2018, despite the lack of an approved MasTec PW, and the UCG's collective lack of confidence that one would be ready anytime soon, we learned that MasTec was mobilizing. COR3, represented by myself, agreed with the UCG that it did not make sense for MasTec to begin emergency work this late in

the restoration period, and that it would be more appropriate for MasTec to be assigned permanent work once a PW for permanent work could be written.

27. PREPA had great difficulty supplying the basic information that was necessary in connection with MasTec's proposed work in Puerto Rico. For example, I attended, in person, a July 8, 2018 meeting called by FEMA to clarify processes. Dr. Tribble's statement in her meeting notes, attached as Exhibit G, that Walter Higgins said at the meeting that PREPA was "still working [on] it" with respect to allocating assignments and information necessary to prepare a PW for MasTec, and in particular as to what permanent work PREPA would want to perform, is consistent with my recollection of that meeting.

28. To my knowledge, PREPA never provided the information necessary to get a MasTec PW approved. I understand from Carlos Rodriguez Lozano, another FEMA employee who was Dr. Tribble's point person with PREPA, that she generally deferred to him in connection with the PW process, and that he was responsible for trying to obtain from PREPA the information needed to complete MasTec's PW. Mr. Rodriguez repeatedly expressed his frustration to me and others with this process. In fact, I do not recall a MasTec Statement of Work ever being transmitted to COR3—which would have happened had PREPA provided information sufficient to prepare a PW that could be approved by FEMA.

29. While PREPA was having difficulties with the MasTec PW, FEMA was able to obligate funds for Cobra to perform emergency work at the same time under a new Project Worksheet, PW-466. Allocating further emergency work to Cobra under a new Project Worksheet was the most efficient and cost-effective step. By May 2018, Cobra was reaching the maximum value and expiration on its original contract, and so allocating time and effort to preparing a PW for MasTec and mobilizing MasTec to perform emergency work might have meant idling or even

demobilizing Cobra, the contractor that was already in place. It would also take potentially two to three months before approval of an emergency PW for MasTec. Had PREPA completed its RFP process more quickly and selected contractors before May 2018, Cobra could have continued working while MasTec's PW was prepared for MasTec to perform emergency work. But due to the lengthy RFP process, it would not have made sense to go through the steps necessary to authorize MasTec to perform emergency work.

30. The information FEMA required to approve and obligate a PW for permanent work, including eligibility and cost information, differed substantially from the information required to approve and obligate a PW for emergency work. As far as I am aware, no Project Worksheets were approved for permanent work during my time in Puerto Rico. The failure to provide information sufficient for FEMA approve and obligate Project Worksheets for permanent work was unfortunate because there was plenty of permanent work available for Cobra, MasTec, and numerous other contractors to perform.

31. PREPA's failure to conduct a timely RFP process in early 2018 made it very difficult for PREPA to assign work to MasTec for an additional reason: by the middle of 2018, the period of time during which the federal government would reimburse 100% of the cost of restoration work was coming to an end, because the emergency period in Puerto Rico was also coming to an end, given that most power to the island would soon be restored. Because of this, it also made the most economic sense to assign emergency work to Cobra, rather than wait until MasTec had an approved contract for emergency work (which it did not have) and an approved PW for emergency work, which could well have been after the time when the 100% cost share period had expired.

32. I never observed Dr. Tribble obstructing funding for MasTec's PW throughout the time I worked with her. At essentially every UCG meeting we attended together—through at least

September or October of 2018—Dr. Tribble asked for the status of MasTec’s contract with PREPA, and pressed PREPA for the information necessary to prepare a PW for MasTec so that FEMA could fund it, and asked the UCG, and in particular representatives of PREPA, to identify work that MasTec could perform. Dr. Tribble and the UCG both expressed the need for more crews to work on the island, and the difficulties with assigning an even greater share of that work to Cobra, which was already stretched thin. Keith Ellison also asked when additional resources from other contractors would be deployed to Puerto Rico, telling us that Cobra was stretched thin and needed more support to finish turning the lights on in Puerto Rico and to prepare Puerto Rico’s power grid for the next storm.

33. Dr. Tribble and the UCG pressed for the hiring of additional contractors also because directly hired contractors were the best and most cost-effective way to complete work on the island. The U.S. Army Corps of Engineers, whose mission was solely the completion of emergency work, was extremely expensive. Utilities from around the country provided resources under Mutual Aid agreements, but they too were expensive and could reasonably spend only limited time away from their home states. The UCG, including Dr. Tribble, indicated that the best way to have control over the restoration and reconstruction process was for PREPA to hire its own prime contractors, and kept pressing PREPA to do so.

34. I never witnessed anything that made me suspect that Dr. Tribble was trying to prevent the deployment of additional resources to Puerto Rico. The suggestion that Dr. Tribble could have deliberately and single-handedly prevented a PREPA contractor from obtaining work that was otherwise available is not consistent with my experience with, or observation of, the process through which FEMA obligated funds for work. Given the number of people involved in the process of deploying resources to Puerto Rico, I do not believe, based on my experience, that

Dr. Tribble could have obstructed PREPA from obtaining FEMA funding, for months and months, without either myself, or other senior personnel, becoming aware that she was attempting to do so. In addition, Congress, PDAT, FOMB, and other local organizations would have protested vehemently if they had any sense of deliberate obstruction. And I myself never saw anything that FEMA did to delay matters related to MasTec. Had I seen any signs of a breach of policy or ethics, I would have raised it because that was my job to act as an advocate for Puerto Rico and to ensure that FEMA and the other federal agencies did everything within their power to assist Puerto Rico respond to and recover from the aftermath of Hurricane Maria. My understanding was that PREPA had failed to provide appropriate information for a PW that could be used to fund permanent work, and was continuing not to do what it needed to do.

35. Any claim that Dr. Tribble had attempted to block MasTec from obtaining funding is inconsistent with her communications—for months on end—in which she was trying to coordinate deployment of more contractors and more funding for Puerto Rico, were fabricated and insincere. Dr. Tribble made daily requests for the status of additional contractors and information she could use to obligate funds for those contractors.

36. Nothing I observed Dr. Tribble ever say or do indicated to me that she was working to prevent MasTec from assisting in the recovery efforts.

37. Similarly, that FEMA's provision of funds to Cobra, and PREPA's allocation of work to Cobra, suggests favoritism or other unethical conduct is also not consistent with my experience. The entire UCG favored allocation of work to Cobra because Cobra was the most effective, and often the only available, resource.

PREPA Personnel

38. I am familiar with an individual named Mireya Rodriguez, who worked for PREPA. Various individuals who attended meetings of the UCG, including Carlos Torres, Dr. Tribble, myself, and Todd Filsinger, regularly discussed concerns about her work performance, including that she frequently caused delays in the assignment of work to contractors.

39. It is my understanding that at some point Ms. Rodriguez's position at PREPA changed, and that it resulted from complaints and concerns raised by several individuals, including Carlos Torres, Dr. Tribble, and other individuals who planned transmission restoration work.

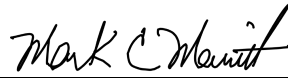
40. I also understand that there has been testimony in the course of this case that Dr. Tribble was disrespectful toward PREPA employees at meetings, and at one such meeting threw a laptop computer. Based on my experience, the early months of power restoration were extremely difficult and frustrating, resulting in a high stress environment, and there were occasions when PREPA's inability to respond accurately, and in a timely manner, to the needs of the UCG added to an already extremely difficult working environment. Nonetheless, despite attending numerous and regular meetings with Dr. Tribble, I never witnessed her launch a personal attack on anyone, or throw anything in a meeting.

Vieques and Culebra

41. The UCG tried to take the opportunity of having contractors working in Puerto Rico to repair Vieques and Culebra. Cobra had tools and engineers available to help repair those islands' substandard power grid. Vieques and Culebra, because they were separate from the main island, were more difficult to support and assist in the event of a storm. The UCG therefore wanted to devote resources to hardening the power grid on those two islands, meaning work that would protect elements of the power grid from being damaged or destroyed in future disasters. PREPA

disagreed with the UCG, among others, as to the scope of work. I never witnessed, nor do I have any reason to believe, Dr. Tribble identified Vieques and Culebra as a project because she wished to allocate more work to Cobra. The entire UCG favored repairing the power grid on those islands, which, after all, are also part of Puerto Rico and home for many of Puerto Rico's people.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and that this Declaration was executed on April 10, 2021.



Mark Merritt