



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: September 7, 2017

CBCA 3876

CH2M◆WG IDAHO, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Mark J. Meagher and Phillip R. Seckman of Dentons US LLP, Denver, CO, counsel for Appellant.

Margaret B. Hinman and Terri L. Ackerman, Office of Chief Counsel, Department of Energy, Idaho Falls, ID, counsel for Respondent.

Before Board Judges **SOMERS**, **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

This is an appeal from a Department of Energy (DOE) contracting officer's final decision on a \$41,250,152 claim submitted by appellant CH2M◆WG IDAHO, LLC (CWI) on contract DE-AC07-051D14516. The contract, awarded by DOE, involved clean-up of nuclear sites located in and around Idaho, and was referred to as the Idaho Cleanup Project (ICP contract).

The ICP contract was a cost-plus-incentive-fee (CPIF) contract which also had provisions that allowed the parties to negotiate extra work on a cost-plus-fixed-fee (CPFF) basis. Early in the contract, consistent with the Cost Accounting Standards (CAS), CWI reallocated some general and administrative (G&A) costs negotiated under the CPIF contract into the CPFF portion of the contract. This, and CWI's continued allocation of G&A costs

into the CPFF portions of the contract, allowed it to earn greater fees than DOE anticipated. The parties delayed quantifying the impact of the reallocation of costs during the pendency of the contract. At the end of the contract, when the parties were unable to agree on how the reallocation impact should be quantified, DOE unilaterally modified the contract to reallocate the costs earned under the CPFF part of the contract into the CPIF portion of the contract, thereby effecting a reduction in the incentive fees CWI earned and accomplishing what DOE considered to be an equitable result. CWI disagreed with what it characterizes as DOE's unilateral modification of the contract, arguing that the contract did not allow DOE to unilaterally change the payments provisions of the contract. CWI seeks \$27,359,380 for DOE's unilateral actions and resultant reduction in the incentive fees arising out of the G&A cost allocations.

DOE's action also automatically reduced the payments it owed for safety fees earned to CWI, called safe units, because the amounts earned were dependent on the incentive fees earned. CWI seeks \$5,985,811 for safe units.

Also, during the contract, in order to reduce the Integrated Waste Treatment Unit (IWTU) construction costs, CWI transferred certain costs originally billed to the IWTU capital project line item into the IWTU and Idaho Nuclear Technology and Engineering Center (INTEC) operating expense line items. DOE originally agreed that the cost transfers were proper, but later changed its mind. By DOE's later disagreeing to the cost transfers, CWI was unable to recover those costs because its costs had reached a not-to-exceed cost cap that the parties negotiated on the IWTU construction project. CWI seeks \$7,904,961 for the cost transfers that were disallowed by DOE.

The parties each filed extensive briefs setting forth copious amounts of facts. We fully reviewed the facts each party considered important to its arguments, but found that since we concluded that this matter turned on contract interpretation, and the contract was clear, it was largely unnecessary to recreate an extensive recitation of facts used by the parties in their briefs.

Findings of Fact

1. The request for proposals and CWI's proposal

On July 21, 2004, DOE issued a request for proposals (RFP) for what ultimately was designated contract DE-RP07-0314516. The proposal was for a CPIF contract that included cost and schedule performance incentives for performing work described in the statement of work (SOW). The stated purpose of the RFP was to safely accomplish as much of DOE Office of Environmental Management's (DOE-EM's) mission as possible within available

funding, and the SOW set forth extensive work to be performed through the contract completion date. The work set forth in the SOW was referred to as the “target work.” The selected contractor would be paid its costs to perform the target work, including indirect costs such as G&A costs, as well as an incentive fee, provided certain cost measures were met.¹

The RFP also discussed potential non-target work that might be negotiated and performed under clauses B.5 (which was also referred to as the “B.5 non-target work”) and C.11. The non-target work, if agreed upon by the parties, was to be performed on a CPMF basis. Prospective offerors were informed that the funding profile that DOE-EM provided did not include any contract funding for the CPMF B.5 non-target work and that separate funding would be negotiated post-award if DOE authorized non-target work.

CWI submitted its proposal providing a total cost estimate of \$2.378 billion and a total fee estimate of \$175 million to perform the target work specified in the RFP. As instructed, CWI did not include in its proposal any direct or indirect (including G&A) estimated costs that might apply to any potential non-target work that might later be ordered by DOE. Further, non-target work was not considered by DOE as part of its technical evaluation or cost evaluation of CWI’s proposal.

The ICP contract was awarded to CWI on March 23, 2005.² The agreed upon cost for the specified target work was \$2.378 billion with a potential target fee of \$175 million (7.36% of target cost), and a contract completion date of September 30, 2012, was set.

2. Pertinent contract terms

The contract set forth a payment structure for target work in section B.4 that allowed CWI the possibility of earning thirty cents in incentive fees for every dollar where the total allowable cost was less than the target cost. Conversely, CWI would lose thirty cents for every dollar where the total allowable cost exceeded the target cost. Specifically, section B.4 of the contract provided, in pertinent part:

¹ The target work was also referred to as the “B.4 work” and the “B.4 target work,” because the B.4 INCENTIVE FEE clause in the contract identified the target work as being eligible to earn incentive fees.

² It does not appear that CWI’s proposal was incorporated into the contract.

B.4 INCENTIVE FEE

(a) Cost Incentive

The following cost incentive structure is established in association with a completion date of September 30, 2012:

Target Fee: \$175,000,000 (7.36% of target cost)

Maximum Fee: \$310,000,000 (Maximum Fee must not exceed 15% of target cost)

Minimum Fee: \$0.00

Fee Calculation: The fee payable under this contract shall be the target fee increased by thirty (30) cents for every dollar that the total allowable cost is less than the target cost or decreased by thirty (30) cents for every dollar that the total allowable cost exceeds the target cost as specified in FAR [Federal Acquisition Regulation] 52.216-10 and subject to the maximum fee limitation above.

Clause B.5 of the contract referenced the non-target work which could potentially be added to the contract by mutual agreement of the parties:

B.5 ITEMS NOT INCLUDED IN TARGET COST

The following items are not included in the Target Cost of this contract. These activities are not included in the [DOE-]EM Funding Profile in Section B.2 (as listed in Section C.11). Separate funding will be provided if DOE authorizes such activities.

Clause B.5 then went on to list various items DOE was considering adding to the contract.³

³ Additional non-target work services was also referenced in section C.11 of the contract's SOW. Section C.11 indicated these services were to be provided to DOE-EM and non-DOE-EM entities "as directed by the CO [contracting officer]." Examples of such work were "disposing of waste (hazardous; low level after SDA [subsurface disposal area] closure and mixed low level) off site, on a cost reimbursable basis; performing chemical analysis of TRU [transuranic] waste samples; managing and operating the NRC [Nuclear Regulatory Commission] licensed Three Mile Island-2 ISFSI [Independent Spent Fuel Storage Installation] at INTEC and the NRC-licensed Fort St. Vrain ISFSI in Colorado; transfers of

The contract also included the clause found at FAR 52.216-10 – INCENTIVE FEE (MAR 1997), which provided:

(a) *General.* The Government shall pay the Contractor for performing this contract a fee determined as provided in this contract.

(b) *Target cost and target fee.* The target cost and target fee specified in the Schedule are subject to adjustment if the contract is modified in accordance with paragraph (d) below.

(1) *Target cost,* as used in this contract, means the estimated cost of this contract as initially negotiated, adjusted in accordance with paragraph (d) below.

(2) *Target fee,* as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost initially negotiated, adjusted in accordance with paragraph (d) below.

(c) *Withholding of payment.* Normally, the Government shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee. After payment of 85 percent of the applicable fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the applicable fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of

SNF [spent nuclear fuel] to a future repackaging facility; receipts/transfers of non-[DOE-]EM SNF; receipt and unloading of Foreign Research Reactor and Domestic Research Reactor [frr/drr] SNF; and resolution of litigation, either existing or assigned to the contractor under Section H.11.”

the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(d) *Equitable adjustments.* When the work under this contract is increased or decreased by a modification to this contract or when any equitable adjustment in the target cost is authorized under any other clause, equitable adjustments in the target cost, target fee, minimum fee, and maximum fee, as appropriate, shall be stated in a supplemental agreement to this contract.

(e) *Fee payable.* (1) The fee payable under this contract shall be the target fee increased by ___ [*Contracting Officer insert Contractor's participation*] cents for every dollar that the total allowable cost is less than the target cost or decreased by ___ [*Contracting Officer insert Contractor's participation*] cents for every dollar that the total allowable cost exceeds the target cost. In no event shall the fee be greater than ___ [*Contracting Officer insert percentage*] percent or less than ___ [*Contracting Officer insert percentage*] percent of the target cost.

(2) The fee shall be subject to adjustment, to the extent provided in paragraph (d) above, and within the minimum and maximum fee limitations in subparagraph (1) above, when the total allowable cost is increased or decreased as a consequence of (I) payments made under assignments; or (ii) claims excepted from the release as required by paragraph (h)(2) of the Allowable Cost and Payment clause.

(3) If this contract is terminated in its entirety, the portion of the target fee payable shall not be subject to an increase or decrease as provided in this paragraph. The termination shall be accomplished in accordance with other applicable clauses of this contract.

(4) For the purpose of fee adjustment, total allowable cost shall not include allowable costs arising out of—

(i) Any of the causes covered by the Excusable Delays clause to the extent that they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;

(ii) The taking effect, after negotiating the target cost, of a statute, court decision, written ruling, or regulation that results in the Contractor's being required to pay or bear the burden of any tax or duty or rate increase in a tax or duty;

(iii) Any direct cost attributed to the Contractor's involvement in litigation as required by the Contracting Officer pursuant to a clause of this contract, including furnishing evidence and information requested pursuant to the Notice and Assistance Regarding Patent and Copyright Infringement clause;

(iv) The purchase and maintenance of additional insurance not in the target cost and required by the Contracting Officer, or claims for reimbursement for liabilities to third persons pursuant to the Insurance—Liability to Third Persons clause;

(v) Any claim, loss, or damage resulting from a risk for which the Contractor has been relieved of liability by the Government Property clause; or

(vi) Any claim, loss, or damage resulting from a risk defined in the contract as unusually hazardous or as a nuclear risk and against which the Government has expressly agreed to indemnify the Contractor.

(5) All other allowable costs are included in *total allowable cost* for fee adjustment in accordance with this paragraph (e), unless otherwise specifically provided in this contract.

(f) *Contract modification.* The total allowable cost and the adjusted fee determined as provided in this clause shall be evidenced by a modification to this contract signed by the Contractor and Contracting Officer.

48 CFR 52.216-10.⁴

The contract incorporated the clause found at FAR 52.243-2, CHANGES — COST-REIMBURSEMENT (AUG 1987) ALTERNATE I (APR 1984), to provide, in pertinent part:

⁴ 48 CFR 52.216-10 which was subsequently amended in 2011.

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).
- (3) Place of performance of the services.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or Limitation of Funds clause of this contract.

Clause B.7, FINAL FEE DETERMINATION provided that the contracting officer would calculate the final fee determination, as follows:

The final fee determination will be based on the total actual cost and the schedule variance described in B.4(c) on the completion date of September 30, 2012, excluding any additional work scope added to the contract per Section C.8. The final fee payment will be the difference between the final fee determination amount minus the provisional and earned fee payments made during the contract period as adjusted by conditional payment of fee provisions per Section B.6(d) of the contract.

Section J, attachment B of the contract provided a list of applicable DOE directives, specifically listing DOE Order 413.3A, Program and Project Management for the Acquisition of Capital Assets. This document provides that the total project cost is equal to the sum of total estimated cost and other project costs. The document defines these terms as follows:

Total estimated cost (TEC): project costs incurred after critical decision [CD]-1⁵ such as costs associated with the acquisition of land and land rights; engineering, design, and inspection; direct and indirect construction/fabrication; and the initial equipment necessary to place the plant or installation in operation. Total Estimated Cost may be funded as an operating or capital expense.

Other project costs (OPC): all project costs that are not identified as Total Estimated Cost costs. Generally, Other Project Costs are costs incurred during the Initiation and Definition Phases for planning, conceptual design, research and development, and during the Execution Phase for startup and operation. Other Project Costs are always operating funds.

Total project cost (TPC): The sum of the Total Estimated Cost and Other Project Costs make up the Total Project Cost.

DOE Order 413.3A was revised and reissued as DOE 413.3B and incorporated in the contract through modification 176 on March 23, 2005.⁶

⁵ CDs are project milestones that identify the exit point from one phase of the project and entry into the succeeding phase, and include: CD-0, Approve Mission Need; CD-1, Approve Alternative Selection and Cost Range; CD-2, Approve Performance Baseline; CD-3, Approve Start of Construction; and CD-4, Approve Start of Operations.

⁶ DOE 413.3B amended the terms as follows:

CWI's funding determinations for the contract describes the various funding categories, the process for determining which funding category (determination) is appropriate, and the responsibilities for managing this process. These guidelines state in part:

3.2 Funding Determination Categories

3.2.1 There are three basic Funding Categories: Operations, Capital Construction, and Capital Equipment

A. Operations – The Operations category supports ongoing program operations, maintenance, engineering, decommissioning, repairs and program support activities. These activities do not create new assets for DOE. Most ICP and B.5 work is within this category.

B. Capital Construction – The Capital Construction category includes new or significantly changed constructed real property. Capital Construction must capture all the costs including engineering, design, construction, inspection, and project

Total Estimated Cost (TEC) – All engineering design costs (after conceptual design), facility construction costs and other costs specifically related to those construction efforts. TEC will include, but is not limited to: project, design and construction management; contract modifications (to include equitable adjustments) resulting in changes to these costs; design; construction; contingency; contractor support directly related to design and construction; and equipment rental and refurbishment.

Other Project Costs (OPC) – All other costs related to a project that are not included in the TEC. OPCs will include, but are not limited to: research and development; conceptual design and conceptual design report; startup and commissioning costs; NEPA [National Environmental Policy Act] documentation; PDS [project data sheet] preparation; siting; and permitting requirements.

Total Project Cost (TPC) – All costs between CD-0 and CD-4 specific to a project incurred through the startup of a facility, but prior to the operation of the facility. Thus, TPC includes TEC plus OPC.

management necessary to build the new item. Within Capital Construction, two sub-categorizations – Total Estimated Cost (TEC) and Other Project Cost (OPC) have been defined by DOE to distinguish between asset value (TEC) and the operating costs needed to complete the project (OPC)

. . . .

D. Capital Equipment – Capital Equipment funding category defines the acquisition of any unique stand-alone personal property item; that is not construction in nature. Per DOE Accounting Handbook, these items must have a useful life of greater than 2 years and cost more than \$50,000. Grouping smaller integrated property items into a single asset also constitutes an item of Capital Equipment

. . . .

3.4 DOE Guidelines for Project Management of Capital Construction Projects:

All Capital Construction Projects (GPP [general plant projects] or line item) with a Total Project Cost (TPC) estimated to exceed \$10 Million (beginning FY 2010) must be managed with full compliance to requirements of DOE Order 413.3A.

3. Post-award contract performance – March 2005 to late 2007

Immediately after contract award, the parties began discussing how to get some of the B.5 non-target work started. Since the non-target work was not included in CWI's proposal, there was no pricing structure for it set forth in the contract. Both parties understood that there was B.5 non-target work that needed to be negotiated and performed. For purposes of its proposal, CWI treated the target work as clear and distinct from the non-target work. Robert Nagel, CWI's original contract manager, testified that "the CPIF [portion of the contract with] the target cost and the target fee and all the incentive provisions are on one side, one clear and distinct, and then separate and distinct was the B.5 work scope, if any, that the government might order. So those two were always very separate and distinct during the proposal stage." According to Mr. Nagel, the non-target work had to be separate from the target work because it was "separately funded, separately estimated, separately scoped, and separately negotiated."

On April 21, 2005, DOE contracting officer (CO) Elaine Richardson sent a letter to CWI stating that the B.5 non-target work was “to be planned and managed outside Target Cost” for which “CWI would be responsible . . . starting May 1, 2005.” These items included independent spent fuel storage installation operations and maintenance, receipt and unloading of foreign research reactor spent nuclear fuel casks, and cost-reimbursable waste disposal services.

On August 2, 2005, CO Bauer sent an email message to Paul Keele, DOE Idaho Operations Office’s (DOE-ID’s) chief financial officer and a contracting officer’s representative (COR) regarding the B.5 non-target work. CO Bauer wrote: “This CWI scope was intentionally omitted from the contract target cost but intended to be covered by the contract.” Both DOE and CWI understood that work performed under clauses B.5 and C.11 was not included in the target cost and was specifically excluded from the Section B Target Cost and Fee provisions.

Contract section H.1(b)(1) required CWI to submit a life cycle baseline (LCB or baseline) for the project with a detailed development of the scope, costs, and schedule for the scope identified in the SOW. The contract was capable of tracking multiple target and non-target activities within the contract baseline. The baseline included an estimate for non-target work of approximately \$51 million in direct costs, and an estimated amount of \$39,288,999 in G&A costs that would be allocated to that work. The non-target work estimated in the baseline did not include estimates for several sub-projects that were contemplated as part of the time and material (TM) projects.⁷ Because a number of B.5 non-target work projects had not yet been estimated when the baseline was developed, the \$51 million estimate of direct non-target work costs and the estimated allocation of G&A costs to that work did not reflect the total value of the potential B.5 non-target work or the total estimated indirect costs that might be allocated to such B.5 non-target work.⁸ CWI informed DOE that because it

⁷ These were sub-projects applicable to various scopes of B.5 non-target work contained in the contract, e.g., TM01 – Navy Fuel Transfers, TM02 – Nuclear Regulatory Commission (NRC) facilities, TM03 – Long Term Spent Fuel Disposition, TM04 – Foreign Research Reactor and Domestic Research Reactor Spent Nuclear Fuel Receipts, TM05 – EAR [environmental assessment report] II Fuel Transfers, and TM06 – Disposition Epoxy Bonded Fuel. The project description also recognized that additional work outside of target could be ordered “as directed by the CO.”

⁸ The LCB was mandated in contract section H.1(b)(1) which provided:

The contractor shall develop and submit an Idaho Cleanup Project (ICP) life cycle baseline (LCB) consistent with the terms and conditions of this contract

maintained only a single G&A pool it was reallocating \$39,288,999 of G&A out of the target work into the non-target work to cover the B.5 non-target work G&A costs.

During the early years of the contract, FY 2005, FY 2006, and FY 2007, DOE ordered more than \$44 million of B.5 non-target work from CWI. This work was ordered through a series of bilateral contract modifications containing the B.5 non-target work scope and pricing for the relevant work. The actual estimate of G&A allocable to any particular DOE ordered non-target work was developed by CWI each year as B.5 non-target work was authorized, separately negotiated, and separately funded. CWI applied agreed upon forward pricing rates for purposes of estimating its G&A expenses. The rates used were compliant with the regulatory requirements of the CAS, incorporated into the contract, and consistent with CWI's established and disclosed accounting practices. This work was ordered and priced on a CPFF basis, based on full application of G&A costs to that work.

As both target and non-target work was ordered and performed, CWI incurred actual direct and indirect costs. Based on that actual cost experience, and consistent with CAS and CWI's disclosed accounting practices, CWI's G&A costs were allocated to its direct costs, including its B.5 non-target work.

On or about December 19, 2006, DOE and CWI attended a meeting and discussed a "fee matrix" which identified the different types of non-target work and an appropriate fee for each type of work. The fee matrix was informally agreed to but never formalized into a bilateral modification, in part because as of January 6, 2010, DOE believed it needed to be "looked at" again because the non-target work was exceeding what DOE had initially

and its proposal within six months after contract award date. The baseline shall be developed in accordance with DOE Order 413.3 and include the entire LCB (to complete [DOE-]EM cleanup at the Idaho National Laboratory) with a detailed development of the scope, cost, and schedule for the scope identified in this Statement of Work (SOW). The baseline shall include key performance measures as defined in Section L, Attachment 9. The detailed LCB must match the SOW in Section C and align with the Target Cost and Fee funding profile in Section B.2 (as adjusted by any request for equitable adjustment stemming from differences in actual status of work completed at takeover date versus the projected status of work established in the RFP, per Section B.10).

When CWI submitted its LCB, the contract had an already-established target cost of \$2.378 billion and target fee of \$175 million. DOE contends that both the LCB and section B.3(a) of the contract identify the same numbers, and that baseline identifies the details that make up section B.3(a) of the ICP contract.

anticipated. However, the parties used the matrix to order and price work reflected in subsequent modifications.

Beginning in 2007, until DOE issued modification 260 in October 2013, the parties executed twenty-three modifications that increased the target cost for the target work of the contract. For each of these modifications, with the exception of modification 260, the target cost was negotiated and bilaterally adjusted as the target work was changed.

In late 2007, DOE advised CWI of its concern that as additional work was being added to the contract under section B.5, the effect would be the additional allocation of G&A costs from target work to non-target work. The phrases “B.5 G&A allocation issue” and “B.5 G&A off-load issue” were used by the parties to describe CWI’s allocations of G&A expenses out of the target work pool into the non-target work pool. For purposes of consistency in this decision we will refer to this issue as the B.5 G&A allocation issue.

4. Identification of G&A issues from late 2007 through mid-2008

It is unclear when it first occurred to DOE that it was paying more in incentive fees to CWI than it originally anticipated, and that the B.5 G&A allocation issue might be the cause. DOE’s Mr. Keele and CO Bauer posit that they were aware of the issue “early in the contract.” On November 8, 2007, Jeffrey Miller, a DOE budget analyst, contacted DOE personnel to outline certain “issues related to CWI fee and G&A allocations.” Mr. Miller wrote that a “\$300M increase in pool cost” is “now being spread over a larger base, which includes B.5 work . . . effectively shift[ing] cost from the CPIF ‘target cost’ to CPFF ‘out of target cost.’” He also noted that CWI’s G&A costs allocated to B.5 non-target work “are a reduction of ‘target cost,’ but not a reduction in total contract costs,” and that “CWI is earning two types of fees (fixed and incentive) on the same costs.” These statements are the first written reference within DOE as to the primary issue before the Board, the B.5 G&A allocation issue. The issue involves a DOE concern that allocation of G&A costs to work outside target cost should not provide CWI a basis for claiming greater incentive fees on the target work.

In his e-mail message, Mr. Miller identified an additional question related to indirect G&A costs and their effect on incentive fee. According to Mr. Miller, CWI’s requests for equitable adjustments (REAs) to “‘target costs’ should only affect ‘target costs’ by the impacted direct scope’s cost. If the scope is direct funded, only the direct cost and any incremental indirect costs should be used as the basis for adjusting ‘target cost’ up or down.” This statement subsequently evolved into what became referred to by the parties as the “target cost REA issue” or the “incremental G&A issue.” The target cost REA issue, CWI posits, relates to DOE’s view that any equitable adjustment to target costs resulting from DOE changes to target work should not include an estimated G&A expense that was

otherwise allocable to the direct cost of the equitable adjustment unless CWI could demonstrate that DOE's change would cause CWI to incur incrementally more G&A expense. DOE and CWI personnel regularly discussed the B.5 allocation and the target cost REA issues set forth in Mr. Miller's November 8 letter from the end of 2007 through the first few months of 2008. While acknowledging that the shifting of G&A costs from the target pool to the non-target pool was CAS compliant, DOE worried that the shift of the costs allowed CWI to show greater cost savings for target work (because fewer G&A costs were attributed to the target work).

5. DOE's first attempt to address the G&A issues in a modification

It appears that DOE contracting personnel may have combined the B.5 G&A allocation and the incremental G&A issues in their attempts to consider and address the issues. On November 30, 2007, CO Bauer transmitted a jointly drafted modification 53 to CWI for consideration. The cover letter transmitting the modification stated: "This modification is subject to adjustment associated with determination of the appropriate incremental G&A costs to contract target cost due to the addition of this work scope. In addition, this modification provides an equitable adjustment for settlement of impacts as negotiated."⁹ However, the text of bilateral modification 53 itself does not contain this language. When Mr. Robert Nagel, CWI's contract manager, asked CO Bauer what this language meant, CO Bauer purportedly was unable to explain it, referring to the language as something that individuals within DOE's finance division wanted to include. However, at hearing CO Bauer testified that the language was "putting CWI on notice that [DOE] believe[d] there's a G&A issue" and that "we didn't know what the change should be at the time." CO Bauer testified:

I tried the best I could to develop language that would protect both parties, if and when a change would be made or a decision would be made or what the impact was to G&A as a result of the G&A issue. And until I left it carried. No decision had been made. And I assumed that decision would be made at the final fee determination.

CO Bauer testified at hearing that she was surprised CWI was now taking the position that it was seeking to recover incentive fees related to the G&A allocation issue:

⁹ The "appropriate incremental G&A costs" language quoted by DOE in its cover letter referred to the target cost REA issue. Modification 53 included a \$2.7 million equitable adjustment for changes to target work as well as a \$1.1 million order of B.5 work.

I thought we had an agreement. It was discussed amongst DOE[,] mostly the business side [of DOE]. I had weekly meetings with Rob[ert] Nagel. I talked to Ron[ald] Slottke [CWI's senior vice president]. I was never of the mind set that CWI would literally shift costs from target to B.5 [non-target] and claim a cost savings. I would never believe it in a minute.

I had a really close relationship with CWI. I put reservation language in the mods, in the cover letters, that I thought preserved the right of both parties and that the actions would be repriced if and when we ever determined what the answer was or what the contract change should be. . . . It could be it was a potential issue that could happen, but I never imagined that's what the claim is for.

6. The parties engage in regular discussions about the G&A allocation issue

According to Mr. Adams, he and CO Bauer discussed the G&A allocation issue extensively with Mr. Nagel, who never disagreed that there was a G&A allocation issue that the parties needed to resolve. DOE and CWI personnel regularly discussed the B.5 G&A allocation issue and the target cost REA issues outlined in Mr. Miller's November 8, 2007, email message during weekly contract meetings from the end of 2007 through the first few months of 2008. But Mr. Nagel from CWI considered these discussions as "touching on G&A, incremental G&A, disclosed practices and what CWI was doing in terms of accounting," and being between the finance and accounting personnel, as opposed to the contracting personnel, within each's respective organization. Mr. Nagel took the position during the hearing that he did not propose a solution to the G&A allocation issue during these discussions because he "fundamentally disagreed with the issue, and therefore had no solution under the contract" to offer.

On February 1, 2008, Dennis Betcher, CWI's finance manager, sent an email message to DOE's Mr. Keele, a slide with attachments attempting to capture potential solutions for a future discussion of the B.5 allocation issue. The slides acknowledge several issues, including the statement "reduction of costs on the ICP not due directly to CWI's efforts should result in a reduction to the ICP target cost [and] [d]oing B.5 work reduces the allocation of G&A to the ICP." Mr. Betcher acknowledged that the "B.5 work scope should not cause CWI to make more fee on the ICP than was planned [and] [d]ecide what is equitable." An additional stated objective was to "Change the B.5 fee matrix and practice if necessary for an equitable fee on that work." Mr. Betcher attached some preliminary recommendations including acknowledging the "double fee impact issue,"¹⁰ adjusting "the

¹⁰ This was another way the parties referred to the B.5 G&A allocation issue.

ICP target for calculated benefit,” and contractually documenting the process agreed upon. Mr. Betcher’s slides were edited and then forwarded to DOE’s accountants, Bruce Grover and Cort McCammon, on March 6, 2008. The slides were changed to state:

Basic Issues

Some in DOE consider CWI G&A a “fixed” cost

Much of CWI G&A is “fixed” but some is “variable”

Doing B.5 work reduces the allocation of G&A to the ICP that MAY have been higher – not provable

CWI G&A costs commingle cost savings, additional costs per changes, right sizing to support B.5, etc.

Baseline submitted in August assumes \$39 [million] of CWI G&I [sic] would be allocated to B.5 (both types)

CWI Objective

B.5 work scope should not cause CWI to make more fee on the ICP than was planned

Mutually decide what is equitable

Continue to support . . . other non-DOE customers at no fee

Options for discussion

1. Do not change the current practice
2. Calculate an equitable G&A impact and change ICP target

CWI’s slides concluded, “Too much uncertainty to do anything but the current practice, or Implement Option 2 via a comprehensive MOU [memorandum of understanding] between CWI and DOE and initiate a tracking system.” CWI made clear to DOE during the discussions related to the slides that it preferred to follow the first option.

CWI and DOE personnel continued to engage in discussions related to resolution of the B.5 G&A allocation issue in FY 2008. These discussions involved various internal and external communications between and among DOE and CWI personnel, including CWI’s

Messrs. Betcher and Slottke, and DOE's Messrs Grover, McCammon, and Keele, and CO Bauer, among others. The parties also discussed position papers on the B.5 G&A allocation issue and the target cost REA issue authored by DOE finance personnel.

7. Negotiations on the REA target cost issue

On March 26, 2008, DOE's Mr. McCammon circulated a draft letter to CWI and others in DOE referencing "the issue of determining appropriate target cost adjustments" associated with REAs. Referencing the draft letter, CO Bauer wrote to CWI's Mr. Nagel and Patrick Timbes, another CWI contracts manager who ultimately replaced Mr. Nagel, stating: "I think DOE is going to conclude we process REAs in accordance with the contract and we may not need to send a letter. We're just a little slow, but I have hope." Mr. Nagel responded:

CWI would like to have the letter to avoid future miscommunication and the propensity of folks to confuse our CPIF contract with an M&O [management and operating contract]. The letter should add the below underlined elements: "cost and fee adjustments, and hence funding, for indirect support activities will be determined in accordance with FAR principles for CPIF contracts, based on the actual indirect costs associated with the REA and their overall effect on total contract target cost and fee.

CWI's Mr. Betcher sent an email message to DOE's Messrs. Grover and McCammon, referencing the draft letter and saying, in part:

We've had a number of meetings on this. . . . Here are the issues:

1. This letter addresses the impact of G&A on setting ICP Target Cost and Target Fee.
2. However, the letter must address the related issue of the ICP Baseline (BCWS) kept by DOE-ID and the ICP Funding changes that would be required. It is important that the BCWS and Funding changes that DOE-ID must make are based on the Fully Burdened amount of the change, but the ICP Target Cost and Target Fee would only increase in total by the Direct Cost amount.

The April 8, 2008, draft letter evolved. An April 15 draft, for CO Bauer's signature, was circulated discussing both the B.5 G&A allocation issue and the target cost REA issue. Regarding the target cost REA issue, the draft letter reaffirmed DOE's willingness to

consider incremental G&A when the additional direct work included in an REA required additional indirect work activities. As for the B.5 allocation issue, DOE concluded:

Consistent with its disclosure statement, CWI applies G&A to all work including B.5 at the same provisional rate. As a result, the base upon which CWI's G&A is applied is increased, the G&A rate [is] lowered and the ICP Target portion of the G&A cost is reduced. The reduced Target share of the G&A cost benefits CWI under the CPIF Contract terms improving its variance. CWI contends that this benefit is inherent in the contract structure and no adjustment is necessary. DOE believes CWI is being unfairly rewarded under the G&A structure and is proposing a reduction in the final ICP Target fee earnings to account for the fee attributable to the B.5 G&A application above that included in the LCB.

In anticipation of leaving CWI, Mr. Nagel held an "integration meeting" with CWI personnel to ensure that CWI's planning, finance, and contract departments all had a common understanding of the issues and the questions that CWI had been discussing with DOE, and to discuss future strategies. On April 15, 2008, Mr. Nagel sent an outline of the meeting results to the attendees, listing various issues and what he considered to be the discussion related to each issue. For the B.5 G&A allocation issue, Mr. Nagel stated the question as: "Is there a deduct/credit from Target Cost or Fee as a result of application of G&A costs to B.5 above the LCB amount?" He notes the discussions touched on:

- There should be no adjustment to Target Cost resulting from B.5 work.
- There is an incremental cost of doing B.5 work that cannot be captured to satisfy DOE but it is there.
- Unless DOE agree[s] to a cost effective and efficient means of the incremental G&A for both Target and B.5, we cannot agree to a Target Cost adjustment/fee offset.
- As an alternative, it may be prudent to agree to a reduced or flat fee for B.5 work (4% vs. 7.36%) to avoid the complexity and bad will of a Target cost offset.

The "subject to adjustment" language first set forth in DOE's cover letter to modification 53 was contained in modification 67, executed on May 7, 2008.¹¹ Specifically,

¹¹ Modification 67 increased the target cost by \$1,006,490, from \$2,380,628,717 to \$2,381,635,207, and target fee by \$74,078, from \$175,193,474 to \$175,267,552.

modification 67 included a sentence in the “Contractor’s Statement of Release” section of the modification, stating: “This modification is subject to adjustment associated with determination of the appropriate incremental G&A costs to contract target cost due to the addition of this work scope.”¹² This language later became integral to the dispute between the parties because CWI took the position that the language was only addressing the target cost REA issue whereas DOE considered the language to be broader, and to also encompass the G&A allocation issue.

8. The “subject to adjustment” language in modification 67

Modification 67 was the only modification to the contract that included the “subject to adjustment” language.¹³ DOE’s Mr. Grover testified that he believed that the reservation of rights language, which he helped draft, “put CWI on notice that [DOE] had a concern relative to [the G&A allocation issue] and [DOE was] reserving that relative to adjustment at some later date . . . if we weren’t able to resolve it ahead of then.” CWI’s Mr. Slotke testified that he considered the “subject to adjustment” language to resolve the target cost REA issue by CWI accommodating DOE’s request to not apply G&A to the target changes unless CWI could substantiate it with the actual incremental increase . . . to the G&A.”¹⁴ According to Mr. Slotke, the “subject to adjustment” language allowed the parties to adjust the modification pricing once the target cost REA issue was resolved. Modification 67 was issued in mid-December 2007, ordering over \$32 million of B.5 non-target work.

Later in the spring and summer of 2008, DOE’s finance personnel provided revised versions of their March 4, 2008, position papers to CWI addressing both the B.5 G&A allocation issue and the target cost REA issue. In the revised version of the “Application of G&A Rate on Non-ICP Work Scope” paper on the B.5 G&A allocation issue, DOE finance personnel recognized that, in addition to CWI’s potential fee benefits, “DOE-ID clearly gains

Modification 67 did not involve any B.5 work.

¹² DOE’s price negotiation memorandum for modification 67 notes that “CWI elected to accept the negotiated position without G&A costs for these four REAs. Once an agreement is reached between DOE and CWI on the application of G&A or ‘incremental’ G&A on REAs, the pricing of this modification may be revisited.”

¹³ A number of modifications for other B.5 non-target work ordered in the 2008 and 2009 time frame (modifications 71, 90, 97, and 104) did not include the “subject to adjustment” language.

¹⁴ Mr. Slotke testified that this agreement had been reached earlier in discussions.

benefits as a result of CWI performing this non-ICP work.” DOE-ID proposed “that a ceiling of \$50M be established for G&A cost allocations to non-ICP work.” This ceiling would be used to determine target fee and would be subject to adjustment with DOE approval. In the revised target cost REA position paper, “Application of G&A Rate on Requests for Equitable Adjustments,” the DOE finance personnel recommended that “no G&A cost . . . be allowed on direct work REAs unless it is adequately supported and substantiated by CWI and approved by DOE.” Discussions ensued on the B.5 allocation issue and the target cost REA issue throughout the summer of 2008.

In the summer of 2008, CWI prepared a undated paper that Mr. Slottke provided to DOE’s Mr. Keele summarizing outstanding issues. In this paper, CWI considered a number of alternatives, including “doing nothing” or foregoing some percentage of fee on B.5 work. CWI’s position was that there should be “no adjustment to target cost or fee – not an acceptable solution.”

CWI’s Mr. Betcher sent an email message to DOE’s Mr. Grover on July 16, 2008, regarding the B.5 G&A allocation issue and DOE’s proposal to establish a ceiling on G&A costs allocable to B.5 work. Included in the message was a handout that laid out various DOE proposals, including: “(a) Discount the ICP earned fee if G&A is allocated to Non-ICP at a greater amount than in the LCB (or an adjusted ‘ceiling’)”; “(b) set a ‘ceiling’ for G&A that can be allocated to Non-ICP. Set this based on level spending through FY 12”; and “(c) make a calculation at the end of the contract.” The handout also listed three CWI proposals, including : “1. Continue with the current contractual relationships . . .”; “2. Lower B.5 Fixed Fee % to recognize the double impact on Fee earned . . .”; and “3. Accept DOE-ID’s proposal to set a ‘Ceiling’ on the appropriate level of G&A that could be allocated to Non-ICP work.” Mr. Betcher noted that “the \$50M ceiling looks way to [sic] low if it is to include work for REA and other non-DOE funded work But Bob Iotti [CWI’s president and chief executive officer] is now amenable to your proposal, assuming everything really stays the same on a day-to-day basis and that the ‘ceiling’ gets periodically reviewed We can discuss this more or we can just put this in a file somewhere to review again in a few years. Let me know what you think the next step will be (I guess it’s in Contracts’ hands).”

The status of both the target cost REA issue and the B.5 G&A allocation issue is reflected in August 2008 minutes of meetings between the parties and shared with DOE’s contracting officer. Specifically, the relevant text of these and subsequent minutes reads as follows: “Keele Request-G&A on REAs; G&A on B.5, Target Cost Adjustment-Agreement reached on both (Only incremental G&A on REAs, no change to current B.5 practice).” The parties did not reach agreement on how and when the G&A allocation issue would be resolved during this period.

9. American Reinvestment and Recovery Act work and subsequent modifications

On February 17, 2009, President Barack Obama signed the American Reinvestment and Recovery Act, Pub. L. No. 111-5, 123 Stat. 115 (2009) (ARRA), into law. Beginning in 2009, ARRA-funded work was added, through bilateral modifications, to target and non-target work. From 2009 through 2012, approximately \$423 million in additional funds was obligated to the contract: \$287 million for B.5 non-target work (plus \$18.5 million for fee) and \$110 million (plus \$8 million for fee) for target work. This work was authorized initially via undefinitized contract modifications allowing CWI to begin the ARRA work immediately with an original ARRA funding obligation of \$362 million.¹⁵

Section B.11 was added to the contract on April 15, 2009, via modification 97, to include changes to the contract to accommodate a potential increase in funding due to ARRA. Regarding modification 97, DOE CO Maria Mitchell-Williams¹⁶ included with the modification a letter to CWI's Mr. Slotke stating that CWI "should assume the same funding profile as identified in Section B.2 of the contract, plus those funds identified from the ARRA in the contract modification." The letter instructed: "CWI should immediately obtain the necessary resources to proceed with the work described," including "acceleration of decontamination and decommissioning of excess facilities and other work scopes in Section B.5 of the undefinitized modification." The letter further stated that "[t]he target cost, fee, and funding, in addition to B.5 activity, is being changed as a result of this undefinitized modification, and will be completely adjusted when the final impact is assessed and negotiated. The contract completion date remains at September 30, 2012. However, work related to the Recovery Act must be completed by September 30, 2011."

CWI executed modification 97, and in its April 19 cover letter returning the executed modification wrote, "CWI's signature on the enclosed modification is only acknowledging the new Recovery Act clauses and, as such, CWI does reserve the right under the 'Changes' clause to assert its right at a later date if CWI determines it has been impacted as a result of the subject contract modification being consummated as a bilateral agreement." The ARRA work added via modification 97 was later definitized in a series of bilaterally executed modifications (modifications 97, 107, 111, 117, 121, 126, and 128).

¹⁵ Work that was planned to be done after the term of the contract was accelerated and incorporated into section B.5 of the contract through bilateral modifications.

¹⁶ Ms. Mitchell-Williams assumed the role of contracting officer on the contract after CO Bauer left to administer another project. While administering this contract, CO Mitchell-Williams became married and changed her name. For purposes of clarity we have consistently referred to her in this decision as CO Mitchell-Williams.

On April 22, 2009, Mr. Adams corresponded with Mr. Slottke, noting that the “Request for Equitable Adjustment proposals and other cost impact proposals will not include G&A costs unless these costs can be substantiated as incremental. This process maintains the current agreement between DOE-ID and CWI on this matter.”¹⁷

10. Confusion between the B.5 allocation issue and the incremental G&A issue

In August 2009 CWI discussed potential approaches to settling certain pending requests for equitable adjustment in the contract, including the B.5 allocation issue. CWI noted that a relevant consideration to settling the requests for equitable adjustment would be that “DOE-ID would provide a CO letter to finally put to rest their growing but unresolved issue of a downward adjustment to target cost to offset the G&A being spread to B.5 work.”

On December 1, 2009, CO Mitchell-Williams wrote Messrs. Keele and Adams to request they review correspondence she intended to send to CWI. In that correspondence CO Mitchell-Williams wrote that the letter was “changing the way CWI submits their estimates for B.5 [work]. No more G&A rate, but incremental G&A cost only when calculating the fee.” Mr. Adams replied on December 28, 2009, “I think we should support the position of only calculating fee on the incremental portion of G&A for B.5 work. [L]ets [sic] do it and move on. I know there will be some folks that won’t like it, but we need to do something, and this is the most reasonable approach I can support.” CO Mitchell-Williams sent an internal DOE email message on January 6, 2010, stating that “[w]hile there has been a lot of discussion on whether to include the G&A rate in the fee calculation or to reduce the fee percentage overall, this has yet to be resolved. We would like to begin negotiations on Monday, however I need concurrence on this issue. Please resolve and let me know the path forward.” The message was forwarded within DOE and in addressing the incremental G&A issue, Mark Searle, DOE’s director of the budget division, responded: “[DOE-]ID and the contractor has [sic] already agreed to not include G&A on increased target work for fee calculation. I’m not sure why we aren’t consistent with these small B.5 tasks as well. Again, I’m not opposed to paying fee on incremental G&A, but I don’t believe any of the attached work scopes cause an increase to G&A.” Addressing the G&A allocation issue, Mr. Searle opined that “because the B.5 [work] has grown beyond the original estimate . . . [the issue] needs to be reconsidered. One option is to open the contract and re-negotiate; the other option is to simply adjust the fee amount based on only incremental costs, both direct and G&A. I believe the latter is simpler.” Mr. Searle proposed another option to calculate CWI’s fixed fee amount for B.5 non-target work based on direct costs and would include G&A only if it was shown that G&A had incrementally increased because of the DOE order of B.5

¹⁷ Ultimately, according to Mr. Nagel, CWI decided not to track incremental costs and did not seek payment from DOE for any incremental G&A costs.

non-target work. Mr. Keele responded to Mr. Searle: “The 3rd option is to adjust the fee % earned on B.5 ARRA work or some variation of that.”

11. Both the incremental G&A and the G&A allocation issues remain unresolved

In February 2010, DOE and CWI continued discussing the language to reserve rights regarding the B.5 fee issues associated with the non-target work. CO Mitchell-Williams testified that the reservation of rights language that was to be applied to the non-target work was discussed between her and CWI’s Mr. Timbes and that she understood the reservation language to include a reservation of rights as to the B.5 allocation issue. Mr. Timbes testified that discussions of the issues associated with the B.5 fee were held in 2009 and 2010, and confirmed that during the time that work was being negotiated, DOE took the position that CWI should not get fee on indirect dollars associated with B.5 work scope. Mr. Timbes testified that the reservation language was included to allow the B5 allocation issue to be resolved in the future.

As discussed earlier, beginning with modification 128, certain modifications adding non-target work provided that the modification was “subject to adjustment upon the determination whether or not to include G&A costs in the B.5 Out of Target Work Scope fee calculation.” DOE’s Mr. Adams wrote internally to other DOE personnel on January 7, 2010: “Adjusting the fee is an option, but fee is meant to be allocated on the risk of the work being performed. We don’t seem to be any closer to solving this than we were in 2007. The B.5 work needs to be negotiated next week.” He concluded, “Unless someone is willing to give a little, or can come up with a new solution, we plan on negotiating this work using the traditional approach.” Mr. Keele responded: “The [back-up] option to me is to document internally and send a letter to CWI saying we see this as an issue that will need to be negotiated at contract close out or before, we will be keeping track of the numbers, it’s an ever changing circumstance – put them on notice.” There is no evidence that such a letter was sent to CWI.

Modification 128 was issued on March 31, 2010, adding B.5 non-target work. By the language of modification 128, the parties agreed that, for purposes of establishing the fixed fee that CWI would earn for non-target work, the fee would be negotiated based on a total estimated cost of the non-target work that excluded estimated G&A costs allocable to that non-target work. CWI’s fixed fee on the B.5 work was subject to adjustment based on the determination of whether the G&A costs would be included in the calculation of CWI’s fixed fee. DOE believed that the reservation of rights language in modification 128 allowed for partial settlement of the direct costs of the negotiated non-target work, and enabled the parties to definitize the direct costs of the non-target work, leaving the G&A allocation issue to be resolved at a later date. Both CWI and DOE understood that the G&A allocation issue

remained unresolved. The modification stated that the B.5 work items “are not included in the Target Cost of this contract and are not included in the [DOE-]EM Funding Profile in Section B.2 (as listed in Section C.11).”

The following day, the parties entered into modification 129 to definitize certain B.5 non-target work funded under ARRA. Modification 129 provided that “this modification is subject to adjustment upon the determination whether or not to include G&A costs in the B.5 Out of Target Work Scope fee calculation.” This language was included in the section of the modification titled “Contractor Statement of Release.” In DOE’s price negotiation memorandum for the modification, DOE wrote: “Although CWI proposed escalation and G&A costs, these costs are not being included in the final negotiation. This modification is subject to adjustment upon the determination whether or not to include incremental G&A costs in the B.5 Out of Target Work Scope fee calculation.”

The parties subsequently entered into a number of B.5 non-target work modifications. Several of those modifications (modifications 136, 138, 147, 169, 192, and 214) contained the same reservation language as modifications 128 and 129, providing that “[t]his modification is subject to adjustment upon the determination whether or not to include G&A costs in the B.5 Out of Target Work Scope fee calculation.”¹⁸

On December 12, 2012, CWI sought payment of the fixed fee for the estimated G&A costs allocated to B.5 non-target work. The letter stated: “Beginning with Modification 129 in April 2010, CWI and DOE-ID agreed to defer the resolution of the application of fixed fee to the G&A element of cost applied to costs for authorized C.11 scopes of work as detailed in B.5 Items Not Included in Target Cost.”

12. The parties’ 2011 and 2012 discussions

In early 2011, the parties also engaged in discussions to extend CWI’s contract by three years. CWI’s Mr. Timbes wrote CO Mitchell-Williams that CWI was still proposing calculating fee on G&A for B.5 work “because that issue hasn’t been closed yet. We are accepting the B.5 mod[ifications] with the fee calculated in the direct costs only and including the caveat that it may be revisited. At least that is how I am currently remembering it.” Internally, CWI was aware that the B.5 allocation issue was still outstanding and was looking for ways to resolve the issue so it did not become part of the project closeout negotiations.

¹⁸

Other B.5 non-target work modifications lacked the reservation language.

In the spring and summer of 2011, Mr. Michael Ebben, who at the time was CWI's senior vice president of administration and chief finance officer (CFO), made some representations internal to CWI that the B.5 G&A allocation issue was resolved.¹⁹ Mr. Ebben testified that he based this conclusion on an agreement he had with Mr. Adams that DOE would "follow the contract." However, in the late summer of 2011, with approximately one year remaining on the contract, the parties resumed discussions on the B.5 G&A allocation issue. Mr. Betcher, representing that he was working on contract closeout and extension issues, contacted his finance counterparts at DOE, Messrs. Grover and McCammon, on August 2, 2011, with a proposed "advance understanding" regarding the B.5 G&A allocation issue so that CWI could finalize the fee it earned. The proposed advance understanding contained recitations of DOE's and CWI's respective concerns and positions on the G&A allocation issue and concluded:

DOE-ID and CWI approval of this Advance Understanding of Cost establishes an agreement that the G&A allocation process, when done in compliance with approved accounting procedures, will not be a basis for a cost adjustment during [the] final ICP Fee negotiations at project close-out. CWI also agrees to continue its current process of excluding G&A from ICP Target Fee calculation resulting from REAs, and from B.5 fixed fee negotiations. Also, if a change to this agreement is required in the future, it will be documented and implemented prior to final ICP closeout negotiations.

DOE's Mr. Grover forwarded the information internally within DOE, noting that CWI's proposal would "need some in depth review and discussion of the Government's position on whether final contract cost should or should not be reduced due to allocation of

¹⁹ At the May 2011 CWI board of directors meeting, Mr. Ebben indicated that the B.5 G&A issue represented an opportunity for CWI in terms of reducing its estimate at completion, and therefore increasing the amount of incentive fee. In August, Mr. Ebben represented to the CWI board of directors and to persons within CWI that the "longstanding G&A offload issue had been resolved." It was widely understood within CWI that Mr. Ebben claimed he had reached agreement with DOE on the B.5 allocation issue. However, whatever agreement Mr. Ebben thought he had with Mr. Adams, it was never reduced to writing. Mr. Ebben testified later that he thought he had reached an agreement with Mr. Adams because Mr. Adams had said to him that DOE would "follow the contract." Mr. Ebben also testified that based on his exchanges with Mr. Adams, he did not anticipate that DOE would later unilaterally reduce the target cost to remove G&A expenses. Mr. Adams remembers he and Mr. Ebben agreeing to follow the terms of the contract, but did not take this to mean that DOE was agreeing to a resolution of the G&A allocation issue, observing: "This could have been the biggest disconnect in our discussion."

G&A costs to the significant increase of B.5 work scope and costs compared to the original contract estimate of this non-target work scope.” On August 17, 2011, Mr. Adams wrote to several DOE personnel, stating: “Is there any reason why we should not have CWI transmit this agreement to us formally, and get this resolved by year-end?” Mr. Grover replied: “We tried to work this issue out a couple of years ago and ran into a stalemate. The decision at the time was this would be one of the final contract negotiation items that resulted in it being tabled In my opinion, their draft proposal is miles away from what the government position should be on this I would recommend that CWI needs to demonstration [sic] why the increase in B.5 work caused a linear increase in indirect costs consistent with their indirect cost % of total cost.” Mr. Adams responded: “I am aware of the history, but since CWI sent this over in draft, they obviously were hoping for some feedback from us. I am not sure if that feedback [has] been provided to them.” Mr. Adams also stated that “[t]his has dragged on for 5 years, and somehow we need to bring it to a conclusion. We need one final position from DOE on this matter.” Mr. Grover responded: “We provided feedback to CWI that we are not disputing the need to allocate G&A costs consistently for all work they perform but instead are concerned with the cost incentive fee implications for a cost shift of G&A from target work to B.5 work and that the results of the issue paper did not adequately address this issue We didn’t get too detailed in the discussion since we are not CORs or COs.”

Mr. Adams relayed to DOE personnel an August 17, 2011, conversation he had with CWI’s Mr. Ebben, stating that the “information provided by CWI around on August 2nd will not be the approach being proposed by CWI. They are formulating an alternative position on the B.5 G&A allocation issue resolution which should be more acceptable by all.” Mr. Ebben wrote to Mr. Adams on August 23, 2011, that he had “tried to draft some notes on our discussion from last week,” and asked: “If I were to send them to you in an e-mail would you be opposed to offering your acknowledgment? I am looking for something to keep my troops at bay and moving forward in the right direction.”

Messrs. Ebben and Adams continued to work together to finalize a proposal for resolving the B.5 allocation issue. Mr. Ebben wrote Mr. Adams on August 24, 2011, with an email message “re-capping our conversation” from August 18, 2011. This email message included a proposal for addressing the B.5 G&A allocation issue, and asked for Mr. Adams’ concurrence or thoughts. The email message also noted that a December 2006 meeting between the parties established “informal guidelines” that, for B.5 non-target work, “full G&A application would be made and based on the type (risk profile) of work, fee would be added on the total cost of the change.” Target work “would also have full G&A application and the Target Fee rate of 7.36% would be applied” but this “was never memorialized.” The email message also noted that the parties “have agreed that since early in 2010 all change

orders adding scope in the B.5 category have excluded the application of any fee to G&A costs pending a future determination on the applicability of such fee.”

In August 2011, Mr. Ebben again represented to CWI’s board and other persons at CWI that the “G&A offload issue had been resolved” by him and Mr. Adams. Mr. Ebben transmitted a draft final fee determination to Mr. Adams on September 20, 2011. The draft fee determination did not show any adjustment for the B.5 G&A allocation issue.

13. More DOE review of the B.5 allocation issue

In October 2011, DOE conducted another internal review of the B.5 G&A allocation issue. DOE’s Mr. Adams provided to CWI a draft DOE response to Mr. Ebben’s letter of September 14, on November 16, 2011. DOE stated in this letter that the B.5 G&A allocation issue was not a CAS-issue, but instead related to whether CWI is “fairly and properly compensated for reducing cost in accordance with the contract cost incentive.” According to DOE, the parties’ overall intention “is that the accounting treatment would result in an equitable means of measuring cost performance and result in fairly rewarding CWI for intentional management decisions resulting in cost savings in accordance with the . . . cost share incentive.” The letter also stated DOE’s view that neither CWI nor DOE intended that the G&A cost allocations would cause CWI to earn additional incentive fee when those costs were reimbursed by DOE. On January 17, 2012, CO Mitchell-Williams further responded to CWI stating that while the CAS require consistent cost allocation, “[they do] not direct how fee should be calculated and/or paid.” CO Mitchell-Williams wrote, “DOE will not pay cost incentive fee for simple cost allocation actions when no cost savings occurred.” CWI wrote back, stating that it disagreed with DOE’s assessment on the fee allocation issue but was willing to discuss the matter further to reach agreement on all outstanding issues.

On March 6, 2012, CWI presented its analysis of the final fee determination to DOE. The analysis noted that the “target scope received an ‘economy of scale’ cost benefit (sharing the G&A/pension costs with the B.5 workload). This economy of scale benefit provided to DOE-ID is reflective of CWI performance.”

DOE provided an analysis of its draft final fee determination on March 13, 2012. The analysis addressed only the B.5 allocation issue, with DOE contending that:

While appropriate [CAS] allocations have been made to non-target activities, no corresponding target cost reduction has been made to the contract for this allocation of G&A costs. This results in an “overstated” target cost.

....

In order to make an accurate final fee determination in accordance with Section B.7, the target costs must be adjusted accordingly.

DOE's analysis showed the costs of B.5 activities not being identified as excluded from total allowable cost and cited to paragraph (e) of the contact's Incentive Fee clause (FAR 52.216-10) as support of its position that a reduction to CWI's incentive fee was warranted. DOE also claimed in its analysis that G&A was being "double counted" in target and non-target work calculations. DOE further stated that it is "CWI's responsibility to demonstrate and quantify . . . efficiencies" that caused DOE to realize a benefit. DOE proposed a \$9.7 million downward adjustment to CWI's asserted fee on the target work.

The discussions continued in 2012, with DOE becoming increasingly concerned that a "windfall" to CWI would occur unless some reduction was made in the target costs area. On May 7, 2012, DOE's Mr. Searle opined to CO Mitchell-Williams that "[e]ach time the government modified the B.5 table, DOE-ID should have decreased the Target Cost and Target Fee by the proposed G&A amount that would be shifted from target work to B.5 work. Then the mod[ification] would need to recognize the full amount of B.5 proposal, including B.5."

As part of its consideration of the B.5 G&A allocation issue, CWI retained the accounting firm Ernst & Young LLP to provide a review of the incentive fee calculation and assess how the parties' interpretations of the B.5 G&A allocation issue compared with the terms of the contract. Ernst & Young reviewed CWI's March 6, 2012, and DOE's March 13, 2012, analyses of the final fee determination and compared them to the contract terms and conditions, disclosed accounting practices, and provisions of the FAR and CAS. Ernst & Young's June 11, 2012, report stated: "Our results indicated the DOE Target Cost Adjustment of \$132.0 million was not found in the ICP basic contract or any of the contract modifications up through Modification 207." Furthermore, Ernst & Young "did not find in the ICP contract a provision for using an amount different than the ICP contract Target Cost when calculating incentive fee" under the applicable contract clauses. The report also noted that "CWI and DOE-ID had earlier agreed that the Target Cost in the ICP contract did not include costs of work under ICP contract items C.11 POTENTIAL WORK OUTSIDE OF TARGET COST and B.5 ITEMS NOT INCLUDED IN TARGET COST." Ernst & Young's report concluded by recommending that "[t]he ICP incentive fee should be calculated using Target Cost as defined in the ICP contract consistent with FAR 52.216-10 INCENTIVE FEE (MAR 1997), B.3 TOTAL CONTRACT TARGET COST, B.4 INCENTIVE FEE, B.5 ITEMS NOT INCLUDED IN TARGET COST, B.7 FINAL FEE DETERMINATION, and C.11 POTENTIAL WORK OUTSIDE OF TARGET COST."

On December 12, 2012, Mr. Ebben sent a letter to CO Mitchell-Williams seeking DOE's payment of the fixed fee for the estimated G&A costs allocated to the B.5 work. He

wrote: “As you are aware, beginning with Modification 129 in April 2010, CWI and DOE-ID agreed to defer the resolution of the application of fixed fee to the G&A element of cost applied to costs for authorized C.11 scopes of work as detailed in B.5 Items not Included in Target Cost.”

DOE approved CD-4 (start of operations) on April 11, 2012. On December 13, 2012, Mr. Ebben sent a letter to CO Mitchell-Williams noting that CWI completed the contract work scope from May 1, 2005, through September 30, 2012, and was submitting a declaration of physical completion. The letter requested DOE’s approval for CWI to invoice the final amount of \$119,188,489. CO Mitchell-Williams acknowledged the request and responded on January 14, 2013: “After a thorough analysis of [CWI’s] fee request and upon completion of the cost incentive audit being conducted by the [DOE-OIG], DOE-ID will make its final fee determination. This will include resolution of fee being applied to G&A on B.5 and target scopes of work.” On March 19, 2013, Jeffrey Kerridge, CWI’s vice president for administration and CFO, wrote a letter to CO Mitchell-Williams requesting a final fee determination and noting the completion of CWI’s work and submissions. Mr. Kerridge also provided a spreadsheet detailing the CWI calculation of \$4,790,066 in fixed fee for the G&A costs allocable to B.5 non-target work that CWI claimed DOE had not paid in connection with the B.5 G&A fixed fee issue. CWI asserted that payment of the fixed fee was justified because the G&A cost pool is not “fixed” as asserted by DOE, because B.5 work “carried its level of required G&A support,” and because personnel in the G&A pool were retained to support this new work. DOE responded, indicating that it would issue a final fee determination shortly.

On April 30, 2013, Mr. Adams provided CWI with a document summarizing DOE’s contractual basis for its forthcoming final fee calculation. That document provided, “[T]he contract is clear that the B.5 items are not excluded from total allowable cost for fee adjustment purposes.” DOE cited paragraphs (e)(4) and (e)(5) of the contract’s Incentive Fee clause (FAR 52.216-10) as support of DOE’s position that the costs of B.5 non-target work should be included in “total allowable costs” for incentive fee calculation purposes, and relied on the reservation language contained in certain B.5 non-target work modifications beginning with modification 128.

Michael McKelvy, chairman of CWI’s board of directors and president of CH2M Hill’s²⁰ Government, Environmental, and Infrastructure Division, wrote to Mr. Adams on May 2, 2013, to outline CWI’s position on the DOE’s plan for the incentive fee calculation, including a detailed analysis of the separate treatment of the target work and B.5 non-target work.

²⁰ CH2M Hill is CWI’s parent company.

CO Mitchell-Williams sent a letter on May 7, 2013, authorizing CWI to submit a fee invoice:

In accordance with Contract Clause I.22 52.216.-10 Incentive Fee (MAR 1997), [DOE-ID] has received the final cost incurred audit completed with KPMG. Because the report did not identify any unallowable costs and final indirect rates have been approved, DOE-ID authorizes [CWI] to submit a fee invoice of \$4,086,945, as requested in the referenced letter.

14. The problem related to the IWTU construction project going over budget

As far back as late 2009, the forecasts for construction of the IWTU showed that there was a risk of exceeding the capital project line item appropriation ceiling for the construction project.²¹ The IWTU construction was funded through a capital project line item of \$533,393,000.^{22, 23} CWI was responsible for making appropriate charging decisions consistent with its obligations under the contract and government contract cost accounting principles. During performance of the contract, CWI incurred costs associated with the IWTU construction and invoiced those costs to DOE against the capital project line item for the IWTU construction. Pertinent to this appeal, CWI initially charged three cost items to the capital project line item for the IWTU construction: (1) costs for conducting pilot plant testing of a mineralized waste form; (2) costs for constructing a waste transfer line and tie-in;

²¹ A part of the contract required CWI to dispose of approximately 900,000 gallons of liquid sodium bearing waste (SBW) located in storage tanks at the INTEC site. As part of the disposition effort, CWI was required to design and construct a SBW treatment, storage, and packaging facility, which came to be referred to as the IWTU [Integrated Waste Treatment Unit]. Construction of the IWTU was part of the target work and subject to the CPIF provisions of the contract.

²² For purposes of clarity, the IWTU construction project was funded out of a capital project line item. Other funding mechanisms (line items) were available to pay for certain non-construction ITWU costs, e.g., operating costs and capital equipment. The IWTU operating expense line item was the source for work scope involving on-going operations, maintenance, engineering, repairs, and program support for the IWTU.

²³ “In appropriations language . . . a line item is an appropriation that is dedicated for a specific purpose, rather than an amount within a lump-sum appropriation.” Government Accountability Office, Principles of Federal Appropriations Law (the “GAO Redbook”), vol. I at 2-26.

and (3) costs for portable restrooms. CWI was reimbursed for those costs out of the IWTU capital line item appropriation.²⁴

Post-award, CWI was instructed to take steps to examine an alternate design for the IWTU facility, and significant costly contract changes were needed to implement the design changes. In late 2009, forecasts for the IWTU construction showed that there was a risk of exceeding the capital project line item ceiling for the project. In November 2009, DOE requested that CWI review the costs that it had previously charged to the capital project line item in an effort to keep the IWTU costs below the congressional line item limit for the project. Once the funding limit was reached, the parties understood that DOE would have to ask Congress for additional funding, and neither CWI nor DOE wanted the IWTU project to be delayed or stopped while DOE's funding request was pending.

CWI and DOE-ID worked together to identify cost items that had previously been charged to the capital project line item and could be moved to other funding mechanisms, such as operating costs, thereby freeing up more money to continue the construction of the IWTU. There were brainstorming sessions in which CWI and DOE would try identify different areas to explore as "candidates for cost reductions or movement off the [IWTU construction] line item." DOE and CWI developed a list of items that might be transferred out of the IWTU capital project line item. In March 2010, DOE's Richard Provencher, DOE's Idaho National Laboratory's site manager and another COR, wrote CWI stating: "We need to more creatively find scope to pull off the line and fund as operations project or descope altogether," referring to the effort to move costs off the IWTU project line item. Mr. Provencher acknowledged that asking for more funding for the IWTU construction from Congress was "not in the cards." DOE-ID conducted its own detailed review of the IWTU funding determinations in 2010. Eight funding determinations, totaling \$13,100,000 previously charged to the IWTU capital project line item, were identified as appropriate for transfer to other funding mechanisms. Relevant to this appeal, CWI identified three cost items to be moved from the IWTU capital project line item to INTEC operating expenses: (1) the mineralization study (\$4 million), (2) the waste transfer line and tie-in (\$3.8 million), and (3) the portable restroom facilities (\$107,000).

²⁴ At the time these costs were initially charged to the IWTU capital project line item, CWI did not have a formal process in place for conducting funding determinations. CWI's project management team for the IWTU had charged those costs to the IWTU capital line item project, but that funding determination had not previously been reviewed by CWI's finance team.

15. Modification 134

On May 5, 2010, the parties entered into modification 134, increasing the target cost by an additional \$46 million, in addition to the \$94 million that had been added to the target cost in modification 64. Modification 134 also increased the target fee by \$10,304,000. Modification 134 split the target cost of the contract contained in contract section B.4(a) into two items: (1) the IWTU project at \$316,000,000, and 2) the balance of the contract work at \$2,216,451,262. The target fee for the contract was similarly split into a target fee for the sodium bearing waste fee of \$23,257,600 and a target fee for the balance of the target work at \$163,065,854. Modification 134 also modified contract section B.4(a) to establish a cap on the incentive fee that CWI could lose as a result of delays, or cost increases, to the IWTU project. It specifically established a maximum fee loss ranging from \$38 million to \$60 million, depending on whether CWI was able to complete CD-4 of the IWTU at or below the IWTU's total project cost as well as when CWI was able to complete CD-4 for the remainder of the target work.

16. DOE approves the cost transfers subject to final close-out audit

CWI asked outside counsel, Brown Rudnick LLP, to review the eight funding determinations it made associated with the IWTU, and on January 14, 2011, Brown Rudnick concluded that, with certain caveats, the eight funding determinations CWI made appeared to be compliant with CWI's governing documents. Three of the caveats noted in Brown Rudnick's report related to the costs for the mineralization study, the waste transfer line and tie-in, and the portable restrooms. The report put CWI on notice that certain conditions had to be met in order for the cost transfers to be appropriate.

On February 17, 2011, Mr. Ebben informed CO Mitchell-Williams that CWI had "acquired outside counsel and consultant support to assure that our determinations comply with [CAS], Appropriation Law, and DOE Orders and Guidelines," and concluded that "all IWTU cost actions taken to-date are appropriate and in compliance with all contract and legal requirements."²⁵ Regarding the cost cap on the IWTU, Mr. Ebben also wrote: "CWI has agreed to continue project work and never invoice DOE in the future for the costs incurred above the ceiling unless the ceiling is adjusted in compliance with the 'major changes' provision, and has assured DOE that they will never be invoiced to any other government project."

²⁵ CWI notes: "'Funding Determination' is the procedure used by CWI to identify the correct source of funding for a particular/unique scope of work."

CO Mitchell-Williams responded on February 24, 2011, acknowledging that “[t]he efforts undertaken by CWI to validate and support its funding determinations are commendable,” and concluded:

Based on the above, DOE-ID supports the conclusions reached by CWI that its actions are proper and in compliance with Appropriations Laws and [CAS principles]. Should the CWI internal audit that is planned for June 2011 reveal anything to the contrary, this matter must be brought to the attention of DOE-ID, and may be reconsidered. Otherwise, this matter is considered closed, pending the receipt of a final close-out audit.

17. Modification 163 capping the costs on the IWTU

In late November 2010, the parties started discussing establishing a cap on the reimbursement of IWTU costs as a way of limiting the costs associated with IWTU capital project line item. Mr. Ebben provided changes to a DOE draft cost cap modification via a December 11, 2010, email message. Mr. Ebben asked that the cost cap modification be used to address “the G&A issue that remains open concerning [the] Final Fee Determination,” and included some proposed language in which DOE agreed it would not make any adjustments to the target cost or the actual cost of work performed as a result of G&A cost allocation to items not included in target cost. CWI’s proposal also addressed the incremental G&A issue with CWI waiving “all rights to any fee increase.” While Mr. Adams stated he was agreeable to the modification, he indicated that he was “not willing to take on the [G&A] matter now.”

Internal to CWI, Mr. Ebben wrote that he planned to begin a “full court press” on the B.5 G&A allocation issue post-modification. On October 19, 2010, DOE’s Mr. McCammon wrote John Wall, an employee in the DOE chief financial officer’s office: “I want to affirm with you that, based upon our review activities and interactions with the contractor, we did not identify any clear violations of accounting guidelines/principles, there were not any issues of cost allowability, and there was nothing that would cause the Department/CFO to direct the contractor to change its approach/proposal.”

The parties entered into modification 163 on December 22, 2010, which: (1) limited the total reimbursement of costs for construction of the IWTU facility to \$533,393,000; (2) extended the completion date for beginning IWTU operations to November 30, 2011; and (3) provided additional incentive to complete CD-4 on or before November 30, 2011. In pertinent part, modification 163 states the following:

The contractor agrees to complete CD-4 by June 30, 2012 at a total project cost to the Government not to exceed \$533,393,000. The limit to cost reimbursement to the contractor for this project through CD-4 is \$533,393,000.

If a major equipment failure and/or a major design change event occurs that prevents initiation or execution of the Corporate or Federal Operational Readiness Review (ORR), the \$533,393,000 may be adjusted accordingly. Should this adjustment be necessary, any allowable costs that are incurred over the \$533,393,000 will be included in the cost incentive calculation at the end of the contract, i.e., incentive fee will be reduced by \$0.30 for every dollar that costs on this project exceed \$533,393,000.

Transmitting modification 163, CO Mitchell-Williams wrote on December 22, 2010:

Enclosed for your approval is Modification 163, which addresses the following:

- Limits the total reimbursement of costs for construction of the [IWTU] facility to \$533,393,000;
- extends the completion date for beginning IWTU operations (i.e., CD-4) to November 30, 2011; and
- provides additional incentive to complete CD-4 on or before the November 30, 2011, date.

There are a number of issues surrounding these contract changes which could affect this agreement, and [DOE] is executing this modification based upon representations made by [CWI] regarding CWI funding contributions to the project and cost accounting, the details of which DOE is not presently fully informed. The issues include, but are not limited to, the appropriateness of cost adjustments made by CWI, potential accounting practice changes, and any corporate support provided by CWI and the impact on total project costs.

We realize that CWI is in the process of having all potential risk issues reviewed by independent outside counsel that has expertise and experience in these matters. Additionally, we understand that CWI is in the process of having all costs and transactions reviewed by CH2M Hill Corporate Audit and will coordinate results with CH2M HILL Corporate External Auditors (KPMG). Finally, it is our understanding that CWI will commission similar reviews of actions by URS [CWI's subcontractor] in the performance of the construction related activities as they are the primary performer of the work in the construction phase.

By executing this modification, DOE and CWI recognize and acknowledge that additional contract modifications may be necessary as a result of the reviews above, or as a result of DOE's own review of the appropriateness of the actions effected by the modification.

DOE recognizes that, in order to complete the IWTU project in accordance with the modified schedule and without additional costs to the government in excess of the total amount identified in the modification, CWI and its corporate affiliates may be contributing to the costs of the project from corporate or other non-governmental funds.

DOE shares CWI's commitment to complete the project by the agreed to cost, within all applicable laws and regulations. It is our assumption that these preventative measures will document and validate the corporate decision associated with cost augmentation, segmentation, and allocation reviewed. If in the course of completing the actions identified above, CWI determines that any action it has undertaken is improper, it must notify me immediately.

Mr. Ebben confirmed CWI's understanding that it was "bound by the cost reimbursement limit of \$533,393,000 unless the condition for readjustment defined in Mod[ification] 163 occurs." In DOE internal discussions following the cost cap modification, DOE recognized that it had "achieved a substantial breakthrough by negotiating a cap to limit the [IWTU project] cost liability at \$533M, and causing CWI to expend its fee from the balance of the contract to complete [the IWTU project]."

18. Other DOE entities get involved in the IWTU cost transfer issue

While DOE-ID was negotiating the cost cap on the IWTU with CWI, other DOE entities were reviewing the IWTU cost transfers and CWI's proposed funding determinations to determine their appropriateness. The DOE Office of Inspector General (DOE-OIG) became involved in the IWTU cost transfer issue after the contracting officer sent CWI the letter of February 24, 2011. Also, DOE's Office of Engineering and Construction Management (DOE-OECM) would not concur in DOE-ID's efforts to close the matter. Paul Bosco, the director of DOE-OECM, wrote that "the reallocation of previously expended costs is contrary to project management best practices and improperly transfers base lined scope and costs . . . without proper change control." DOE-OECM was unwilling to close the issue until the issue was coordinated by DOE-EM through DOE's Headquarters Chief Financial Officer (DOE-HQCFO).

DOE-EM followed-up with the DOE-HQCFO and the DOE's Office of General Counsel seeking concurrence with the actions it had taken. DOE-HQCFO responded to

DOE-EM on November 16, 2011, that there was no need for formal DOE-HQCFO concurrence on the action because it had already been reviewed by the contracting officer. DOE-HQCFO “recommend[ed]” however, that DOE-EM “request an expedited audit by an outside audit organization” to assess whether the IWTU costs were correctly transferred.”

The DOE-OIG issued the audit report, “Cost Incentives for the Department’s Cleanup Contract in Idaho,” on May 13, 2013. DOE-OIG did not identify any concerns with CWI’s allocation of G&A expense to its non-target work and concluded that the allocation appeared to comply with the terms of the contract and was consistent with the CAS and CWI’s disclosure statement regarding how CWI manages indirect costs. The audit report went on to state that:

Based on the totality of the information we reviewed, we concluded that the contract modifications accepted by CWI disclosed that its fee earning potential in this area was undefinitized. While the Department did not act to definitize the contract promptly, it asserted that it preserved its right to do so by including instructions regarding fee determination in the modification to the contract that provided Recovery Act funding.

19. DOE’s proposed modification to address the B.5 allocation issue

On July 2, 2013, CO Mitchell-Williams submitted a proposed bilateral modification to CWI, which included a downward adjustment to CWI’s target cost and target fee for target work based on the G&A costs allocated to B.5 non-target work. DOE proposed to reduce CWI’s target costs by \$85,229,025 and target fee by \$6,272,856 based on the G&A costs allocated to B.5 non-target work. Citing the contract’s Changes clause (FAR 52.243-2) and the Incentive Fee clause (FAR 52.216-10) as authority for its proposed adjustment, DOE warned that it “would issue a unilateral modification, followed by a final fee determination” if CWI failed to agree to the bilateral adjustment. DOE also sought to reduce CWI’s target cost and target fee based on certain fringe costs allocated to B.5 non-target work.²⁶ CWI responded to DOE’s letter on July 8, 2013, disagreeing with DOE’s position and refusing to execute the proposed modification.

²⁶ CWI posits that DOE did not raise or attempt to address in any contract modification the issue that CWI’s fringe cost allocations to B.5 non-target work required a reduction to CWI’s incentive fee until after the end of the contract period of performance on September 30, 2012.

20. DOE's report on the IWTU cost transfers

The DOE-OIG released another report, titled "Cost Transfers at the Department's Sodium Bearing Waste Treatment Facility Construction Project," on August 8, 2013. The DOE-OIG reviewed seven funding determinations and found that four of the seven funding determinations and associated cost transfers were for activities that were not direct IWTU project costs and had been appropriately shared with other projects, and thus had been appropriately transferred from the IWTU capital project line item. The DOE-OIG found that three cost transfers, totaling \$7.9 million, represented direct costs of the construction phase of the IWTU project and had not been appropriately transferred. The three cost transfers identified as inappropriate were (1) the mineralization testing costs; (2) the costs for a waste transfer line and tie-in; and (3) the costs for portable bathroom facilities. These were the same three cost transfers identified by CWI's consultant as involving potential problems.

21. The final fee determination and modification 260

On October 31, 2013, CO Mitchell-Williams transmitted to CWI unilateral contract modification 260 containing DOE's final fee determination. Modification 260 unilaterally reduced CWI's target cost and target fee based on certain G&A costs that were allocated to B.5 non-target work. Modification 260 provided: "In accordance with Contract Clause I.81, 52-243-2 CHANGES - COST REIMBURSEMENT (AUG 1987) and ALTERNATE 1 (APR 1984) and Contract Clause I.22, 52.216-10 INCENTIVE FEE (MAR 1997), this modification incorporates a target cost (\$80,282,437) and target fee (\$5,908,788) downward adjustment under Section B.3, Total Contract Target Cost, Fee and Completion Date for General and Administrative (G&A) proposed costs allocated from target to non-target work scope under Section B.5, Items Not Included in Target Cost (referred to as B.5)." In addition, DOE-ID recognized that "CWI is entitled to a fixed fee for the G&A costs estimated as part of target cost (B.3) but allocated by CWI to non-target work done under B.5 in accordance with CWI's Disclosure Statement." Attached to modification 260 was CO Mitchell-Williams' final fee determination, which broke out the final fee determination into the balance of the ICP contract and the IWTU construction project.

a. The B.5 G&A allocation issue

Addressing the B.5 G&A allocation issue, the final fee determination provided:

Because the various changes to the description of the non-target services to be performed under the contract affected the work being performed under the contract, the CO is required to make an equitable adjustment and modify the contract accordingly. Here, the G&A and fringe costs would cause: (1) an inappropriately overstated target cost which results in an improper calculation

of the incentive fee; and (2) an inappropriate double fee payment of target fee and non-target fixed fee.

When the ARRA funds were added to the contract in April of 2009, there were uncertainties in how CWI's allocations of G&A from B.3 [sic] to B.5 work would affect the incentive fee calculation. The parties included reservation language in the modifications to adjust the fee at a later date. This reservation language was as follows: "This modification is subject to adjustment upon the determination whether or not to include G&A costs in the B.5 Out of Target Work Scope fee calculation." The inclusion of this language was requested by CWI. While the target cost and fee could have been adjusted downward at the time the work was negotiated in accordance with FAR 52.216-10(d)[,] those adjustments were not made. Consequently, DOE-ID made the adjustments to target cost and target fee to address the contract changes in Modification 260.

Following the same methodology, a similar target cost adjustment was made to account for fringe costs allocated from the target to non-target work scope. This is a separate action because the G&A and Fringe have distinct pools. The majority of non-target work scope included additional fringe costs above the target fringe pool. Therefore, this adjustment only includes work that was identified in the original C.11 Statement of Work (non-target), but which was negotiated after contract award. [Examples omitted]

In accordance with the contract, and to accurately reflect the G&A and fringe costs allocation impacts upon target costs, DOE must reduce the target cost by \$80,282,437 for G&A, and \$4,437,776 for fringe. The target fee is commensurately reduced by \$5,908,788 for G&A and \$326,620 for fringe (7.36% of the target cost).

In addition to the appropriate target cost and fee adjustments, DOE recognizes that CWI is entitled to an increase to the fixed fee for the G&A costs estimated to non-target work (B.5). Modification 260 recognized this and increased the fixed fee by \$4,790,066. Because DOE has already paid a portion of this fee, this final fee determination includes the fixed-fee balance of \$4,790,066.

b. Safe Units

The final fee determination also impacted the safe units DOE owed to CWI under CWI's employee incentive compensation program. The purpose of the employee incentive compensation program was to "encourage employee commitment to the safe and accelerated accomplishment of the Idaho Cleanup Project." There were two primary elements of this

program: (1) cash paid out annually to employees based on the overall performance of the company; and (2) safe units payable to employees based on CWI's project performance at completion of the project. A safe unit is a unit of value distributed to CWI's employees to provide incentive for safe and effective performance on the contract. The value of each safe unit is calculated based on the amount of incentive fee that CWI receives for target work. CWI's safe units compensation plan established the concept of and the methodology for CWI employees to earn safe units, and was approved by CO Bauer on March 13, 2006. Both CWI and DOE agreed to contribute to fund the safe units under the employee incentive compensation program.

The final fee determination recognized that the safe unit calculation "is a component of the final fee calculation. Based on this final fee determination, the final [safe unit] calculation is \$17,495,136." On March 16, 2013, DOE authorized CWI to invoice the majority of the safe unit payment for its employees, with the remaining balance to be determined with the final fee determination. DOE received an invoice for \$14,516,301 for the safe units on March 14, 2013, and approved payment on March 18, 2013. With the downward adjustment, CO Mitchell-Williams calculated that the remaining balance due for the safe units was \$2,978,835, and authorized CWI to invoice for that amount.

c. The IWTU cost transfers

In the final fee determination relating to the IWTU cost transfers, CO Mitchell-Williams reclassified the \$7.9 million associated with the three IWTU cost transfers in issue, relying in part on the DOE-OIG's report concluding that the three cost transfers were improper because they were direct costs of the IWTU construction phase. By reclassifying the IWTU costs as costs applicable to the construction phase of the IWTU project, CWI was unable to collect the costs in excess of the cap on the IWTU project agreed-to in modification 163.

22. The certified claim and final decision

CWI submitted a certified claim on March 6, 2014. CWI sought a payment of \$40,128,230, based on DOE's failure to pay CWI the proper incentive fee (\$27,840,765); safe units (\$4,382,504); and IWTU cost transfers (\$7,904,961).

CO Mitchell-Williams issued a final decision on May 5, 2014, "rejecting CWI's claims that the DOE Final Fee Determination is not reasonable or equitable." DOE acknowledged that "CWI is entitled to an increase to the fixed fee for the [G&A] costs estimated to no-target work (B.5)." CO Mitchell-Williams also agreed to CWI submitting a "B.5 fee invoice for the remaining balance of the original contract period" in the amount of \$4,790,066.

CO Mitchell-Williams included an enclosure, with references to what she considered to be pertinent documents, as part of her final decision that explained the basis of her decision. CO Mitchell-Williams concluded there was no merit to CWI's claim that DOE breached the contract by making the downward adjustment of target cost and target fee in modification 260 to account for G&A and fringe costs, and that "DOE has not breached the contract or taken any action inconsistent with the terms of the contract." "Modification 260 was the closure of prior modifications, which were undefinitized to the extent that these modifications did not resolve the ongoing dispute between DOE and CWI concerning the allocations of G&A costs to B.5 work." "Modification 260 represents the final resolution of this issue, and is a closure of the prior modifications which clearly were under the purview of the Changes clause." As for the safe units claim, the CO concluded: "DOE's portion of the safe units is based upon a predetermined formula related to CWI's final fee earned under the contract. Because CWI's final fee remains unchanged from the Final Fee Determination, this portion of CWI's claim is denied." DOE's reclassification of these costs resulted in them being disallowed because CWI had exceeded the \$533,393,000 funding cap on the IWTU project agreed to in modification 163. Citing to the DOE-OIG audit, CO Mitchell-Williams determined that CWI's challenge to "DOE's reclassification of the ICP operating costs to the [IWTU] project costs is without merit [and that] reclassification of the cost appropriate and done in accordance with the FAR, CAS, DOE Order 413.3A, CWI's own CAS Disclosure Statement, and CWI's Funding Determinations and Capital Assets Guidelines."

CWI timely appealed the contracting officer's final decision to this Board, where it was docketed as CBCA 3876. All totaled, CWI seeks a judgment from the Board awarding it damages in the amount of \$41,250,152. More specifically, CWI seeks (1) \$27,359,380 for incentive fees; (2) \$5,985,811 associated with the payment of safe units; and (3) \$7,904,961 in costs which DOE reclassified on the IWTU project. CWI's calculation of this amount is contained in its schedule of costs. DOE is largely in agreement on amounts CWI seeks should CWI prevail on its claim.

Discussion

1. The B-5 allocation issue

Both parties seemed to acknowledge that the G&A allocation issue existed in the early stages of contract performance and agreed that something needed to be done to balance any inequity that could occur by the reallocation of what was originally shown as target work G&A costs into non-target work. The addition of work because of ARRA served to compound the problem. Notwithstanding, the parties seemed more intent on adding the work

to the contract than on addressing this perceived problem.²⁷ As the additional work was added, other outstanding G&A issues, such as incremental G&A rates for the B.5 non-target work, arose and were resolved. However, the G&A allocation issue remained outstanding during the contract. CWI personnel originally seemed to recognize that some inequity resulted from the G&A allocation issue, and various individuals from CWI and DOE discussed possible resolutions up until the end of the contract. It is unclear what, if any, consensus was being reached during the discussions of the G&A allocation issue, but it does not appear that CWI took the position that no adjustment was appropriate until after DOE issued modification 260 and the final fee determination.

Throughout contract performance, various DOE offices responsible for analyzing the G&A allocation issue (DOE-ID, DOE budget, and DOE finance) seemed to be consistently revisiting the issue but unable to reach any DOE consensus about what to do about it. Instead of timely negotiating a solution to the G&A allocation issue, DOE-ID decided to defer the issue until the end of performance. Ultimately, it appears that DOE-ID was pushed, albeit reluctantly, into pursuing the G&A allocation issue by other DOE entities. It was only when the final fee determination became imminent that all the DOE players finally seemed to agree that DOE should make some type of monetary adjustment based on the G&A allocation issue.

It was not until October 31, 2013, when she transmitted the draft final fee determination to CWI, that CO Mitchell-Williams formally told CWI what DOE believed was an equitable solution for the G&A allocation issue. When CWI balked at DOE's proposed contract adjustment, DOE used the final fee determination process and modification 260 to definitively, but unilaterally, address the issue and to calculate a contract adjustment.

DOE essentially argues that it should be able to take unilaterally, via the final fee determination process and modification 260, what it considers a correct equitable amount, by adjusting the target cost and target fee. DOE raises three theories to support the adjustment taken:

²⁷ Contemporaneously, DOE and CWI were having back-and-forth negotiations about whether G&A should be included in the non-target work modifications as well as how any G&A should be included in those modifications. The issue giving rise to those negotiations has been referred to as "the target cost REA issue." CWI asserts that its treatment of the discussions and correspondence relating to the G&A allocation issue was distinct from the target cost REA issue, whereas DOE seems to indicate that it did not separate the two issues and referred to the two issues interchangeably.

CWI is improperly attempting to shift the burden of proof, there was no deductive change or re-writing of the contract, the burden of proof lies with CWI because there is only its contractor claim before the Board;

Modification 260 and the final fee determination were authorized by the ICP contract itself and by precedent; and

The amount of the adjustment made in modification 260 is appropriate and equitable under the circumstances.

Respondent's Post-Hearing Brief at v-vi.

CWI argues that the Board should award it \$27,359,380 based on DOE's improper reduction in the final fee determination and modification 260, positing that:

DOE's final fee determination unilaterally reducing CWI's incentive fee was not permitted under the ICP contract;

DOE's unilateral reduction to CWI's target cost and target fee was not equitable; and

DOE's alternative arguments to support its incentive fee reduction are unsupported.

Appellant's Post-Hearing Brief at i-ii.

The central issue in this appeal involves a question of contract interpretation. The dispute before us revolves around whether the contract terms allow DOE to unilaterally change the contract's payment terms by shifting the costs paid for non-target work into target work. In resolving such a dispute, we turn to the "time-honored rules" of contract interpretation:

The starting point for contract interpretation is the language of the written agreement. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as to not render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. *Hercules, Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002); *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983). The nature of the contract is determined by an objective reading of its language, not by one party's characterization of the

instrument. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,061.

Champion Business Services v. General Services Administration, CBCA 1735, et al., 10-2 BCA ¶ 34,539, at 170,345, *modified on reconsideration*, 10-2 BCA ¶ 34,598.

“The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created.” *600 Second Street Holdings LLC v. Securities & Exchange Commission*, CBCA 3228, 13 BCA ¶ 35,396, at 173,666 (citing *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987); *Glidersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 06-2 BCA ¶ 33,320). “The language of the agreement ‘must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances.’” *Id.* (quoting *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)). “[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.” *Hol-Gar*, 351 F.2d at 979. Moreover, the conduct of the parties prior to the dispute is especially strong evidence of the contract’s true meaning. *See Blinderman Construction Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982) (“It is a familiar principle of contract law that the parties’ contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation.”) Applying these principles to the contract before us, we reject DOE’s interpretation.

a. The Changes clause does not provide DOE the right to unilaterally change the contract to correct the B.5 allocation issue

As previously noted, the contract incorporated the clause found at FAR 52.243-2, CHANGES—COST-REIMBURSEMENT (AUG 1987) ALTERNATE I (APR 1984). This clause states that the contracting officer may at any time, by written order, make changes within the general scope of this contract in the description of services to be performed, the time of performance (i.e., hours of the day, days of the week, etc.), and the place of performance of the services provided. “If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the contract accordingly.”

DOE cites *Northrop Grumman Corp. v. United States*, 41 Fed. Cl. 645 (1998); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, 13 BCA ¶ 35,290 (2013); and *Aerojet-General Corp.*, ASBCA 13548, 70-1 BCA ¶ 8245,²⁸ for the proposition that “DOE properly issued Modification 260, a unilateral modification at the end of the contract period, under the Changes Clause.” Respondent’s Brief at 158. These cases address the Government’s ability to unilaterally add or delete work from contracts that are not definitized or contain provisions for incentive fees; however, each case contains facts that distinguish it from the case before us.

Northrop Grumman involved a CPIF contract in which the contractor submitted a cost proposal for a deductive change, which the Government considered unreasonably low for the work to be deleted. 41 Fed. Cl. at 650. When negotiations failed, the Government unilaterally modified the contract, including a downward adjustment in the target cost and fee, citing the Changes and Incentive Fee clauses set forth in the contract. The Government’s first argument to support its deductive change order was that the contracting officer followed the Changes clause by altering the contract specifications, pursuant to FAR 52.243-2(a)(1). *Id.* at 654. Without specifically addressing whether the Government’s actions to alter the contract specifications by deleting work were properly taken pursuant to the contract, the Court of Federal Claims moved directly to address the downward equitable adjustment outlined in the Changes clause and concluded that “by adjusting the contract’s estimated cost, the contracting officer was permitted to adjust the target cost on which [the contractor’s] fee was based.” *Id.* The court ultimately held that the unilateral modification/deductive change fell “well within the compass of the Changes and Incentive Fee clauses.” *Id.* at 656.

Northrop Grumman is not the controlling case that DOE seems to believe. Decisions of the Court of Federal Claims are not binding on us, as the court merely has coordinate jurisdiction to our own. *Greenlee Construction, Inc.*, 07-1 BCA at 166,064 n.7 (cited for

²⁸ While DOE cites *Aerojet-General Corp.* as “recognizing the government’s issuance of undefinitized change orders and agreements in a fixed price-incentive fee contract, reserving determination of Target Cost, Target Profit, and Target Price for later resolution,” we do not agree that this was a holding in the case. A reading of this 1970 case (pre-Contract Disputes Act and pre-Federal Acquisition Regulation) reveals that this was a “fixed-price incentive type contract, with firm target, containing cost, performance and schedule incentives.” 70-1 BCA at 38,317. The Armed Services Board of Contract Appeals noted that the contract provided “[e]quitable adjustments in the contract price, such as for contract changes and additions, if made before the total final price was established, were to be reflected in the total target cost and the ‘maximum dollar limit’ (or ceiling price), and ‘may be made in the total target profit.’” *Id.*

authority in *AFR & Associates, Inc. v. Department of Housing and Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226 at 169,169). The Changes clause used in Northrop Grumman's CPIF contract, FAR 52.243-2(a)(1), was the same as the Changes clause currently before us. That clause clearly contemplates that a contracting officer may at any time, by written order, make changes within the general scope of the contract in the description of services to be performed. In *Northrop Grumman*, the contracting officer changed the description of the services to be performed by deleting some work in the contract along with the corresponding costs associated with that work. The unilateral change taken by the contracting officer in the case before us was not the type of change made in *Northrop Grumman* because the unilateral change taken here did not involve a change in the general scope of the contract and services performed, time of performance, or place of performance. The unilateral change taken by DOE impacted the contract's payment provisions, which are not part of the general scope of work under the contract. The unilateral change made by DOE is beyond the general scope and cannot be "regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." *Freund v. United States*, 260 U.S. 60 (1922). As structured and administered, with the target and non-target work separate – contractually distinct, independently funded, authorized, tracked, and performed – it is inconceivable that DOE would unilaterally transfer costs from non-target to target work. Certainly such unilateral action on the part of DOE would not have been anticipated by either party when the contract was entered into.

In *Turner Construction Co.*, the parties executed a modification adding additional undefinitized funding for construction of a project.²⁹ The parties ultimately disagreed as to the final contract price. The contractor asserted that the parties failed to negotiate a final fixed-price contract, thus breaching the contract requirements, and that it was entitled to a reasonable price for the work that remained undefinitized. The Government argued that the parties agreed on a total price, established by contract modifications, which established a not-to-exceed contract price. The Board took into account the language of the modifications as well as email message exchanges between the parties and concluded that the parties had left some components of the final contract price undefinitized:

In our view, it is clear that the parties failed to agree on a "definitized contract amount," at least as to certain portions of the contract. They never came to a meeting of the minds on the final contract price What is the significance of this fact? [The contractor] urges that the [Government's] failure to definitize a final price for construction services constitutes a breach of the

²⁹ While the Board issued several decisions in *Turner Construction*, the contract between Turner and the Smithsonian Institution was not subject to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), and did not contain the clauses mandated by the FAR.

contract. We disagree. The contract requires only that the parties “negotiate a definitized contract amount.” This provision does not obligate the [Government] to accept a proposed definitized contract amount – it mandates merely that the parties try to come to agreement.

13 BCA at 173,259.

The Board in *Turner Construction* concluded, based upon an examination of the record, that the contractor “could not have been clearer in its actions and correspondence throughout the process that it believed that the parties had not agreed on a price,” and the “parties’ actions subsequent to the issuance of [a modification] and, in particular, the terms agreed to in [a subsequent modification] illustrate that the parties never reached final agreement on the contract amount.”³⁰ 13 BCA at 173,260. *Turner Construction*, a non-CDA case, that did not contain the FAR clauses present in the contract before us, is difficult to apply the holding to this case.

In our case, while the documents alluded to an outstanding G&A allocation issue, the contract price was not left undefinitized. As work was added, that work and the agreed upon costs for the new work were definitized through bilateral modifications. Various individuals within DOE sent different messages to CWI regarding whether DOE intended to pursue an equitable adjustment regarding the G&A allocation issue. While DOE provided CWI mixed messages as to the G&A allocation issue, the language in the modifications did not clearly establish that DOE was attempting to reserve a perceived right it had to adjust contract payments based on the G&A allocation issue. On the whole, DOE was equivocal about the G&A allocation issue, and not until the very end of the contract did DOE make clear that it actually was going to pursue a significant contract adjustment via the contract’s payment provisions.

We conclude that DOE, at its own peril, waited too long to resolve the G&A allocation issue with CWI, both because it was not an issue DOE was contractually allowed to address unilaterally, and because, by the time DOE decided to address the issue, CWI’s position on an equitable adjustment for the G&A allocation issue had changed. We find more compelling a line of cases which holds that the Changes clause does not provide an agency an unfettered right to change any and every clause in a contract. Longstanding case law establishes that an agency is not entitled to unilaterally change the terms and conditions

³⁰ The Board recently issued a decision addressing the amounts to which Turner was entitled in *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 17-1 BCA ¶ 36,739.

of a contract, including the payment terms. *B.F. Carvin Construction Co.*, VABCA 3224, 92-1 BCA ¶ 24,481; *Welbilt Construction, Inc.*, GSBCA 2530, 68-1 BCA ¶ 7031.

In *Welbilt Construction*, where the Government attempted to unilaterally modify the payment terms of the contract, the General Services Board of Contract Appeals (GSBCA) noted that:

When the Government acts in the capacity of a contractor instead of in its capacity as a sovereign, it is bound by the terms of a contract in the same manner as the other party to the contract is bound to comply with the terms and conditions of the contract. If the Government breaches the contract and the breach causes damages to the other party to the contract, and if the contract does not contain any provisions setting forth a method for settling a claim for such damages, the other party has the right to seek recovery of damages for such breach in a court of competent jurisdiction in the same manner as damages could be sought by a private party to a contract. In this case, it may well be that the Contracting Officer erred in his judgment as to the amount of funds to be withheld from the Appellant pending the resolution of the complaints of alleged labor wage irregularities. The Contracting Officer may also have erred when he failed to promptly notify the Appellant in writing of the reasons why the funds were being withheld. It may well be also that the Government failed to act within a reasonable time in making a final determination concerning the complaints of alleged labor wage irregularities. Finally, it may well be that the Appellant is correct in its claim that it suffered financial losses or damages as the result of the actions of the Government and its agents. However, the contract involved in the appeal does not include any provisions which authorize an adjustment in the contract price to cover losses or damages from such causes.

68-1 BCA at 32,507.³¹

The Department of Veterans Affairs Board of Contract Appeals (VABCA) in *B.F. Carvin Construction*, concluded that the agency lacked the authority to unilaterally modify the payment terms of the contract:

³¹ The GSBCA went on to note that it had no jurisdiction or authority to settle claims against the Government for breach of contractual obligations where the parties have not included in the contract a specific provision authorizing such a settlement. This jurisdictional bar was remedied by passage of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (now codified at 41 U.S.C. §§ 7101-7109 (2012)).

[T]he VA had no basis to withhold payment of the full price of contract, including the price for the maintenance portion of the elevator warranty. Consequently, the VA's action amounted to an attempt to unilaterally modify the payment provisions of the Contract. Any such modification would be under the authority of the Contract CHANGES clause. The scope of the unilateral right to modify the Contract in the CHANGES clause does not include the right to modify general provisions of the contract. Since the payment provisions in the Contract are part of the general provisions, the VA was without authority to unilaterally modify the payment terms. *BMY-A Division of Harsco Corp.*, ASBCA 36926, 91-1 BCA ¶ 23,565 [(1990)]; *Welbilt Construction, Inc.*, GSBICA 2530, 68-1 BCA ¶ 7031.

92-1 BCA at 122,187-88.

The Department of Transportation Board of Contract Appeals (DOT BCA) similarly concluded in *TEM Associates, Inc.*, DOT BCA 2556, 93-2 BCA ¶ 25,759, that a contracting officer administering a CPFF contract may not unilaterally decrease the funding in the contract to a level below the total incurred costs after all costs are incurred and performance has ceased, thereby creating a cost overrun, even when the contractor failed in its obligations under the contract's Limitation of Costs clause to notify the Government it had reached the contract ceiling and cease work. *Id.* at 128,179. The DOT BCA noted that the Limitation of Costs clause did not impose a penalty on the contractor for failing to give notice and the contractor is not barred from subsequently obtaining reimbursement for cost overruns. *Id.*

The Armed Services Board of Contract Appeals (ASBCA) summed up the limits of the Changes clause in *BMY-A Division of Harsco Corp.*:

As a general rule, the Changes clause gives the Government the unilateral right to order changes in certain listed contract provisions during the course of performance, in exchange for adjusting the contract price or delivery schedule. However, when the term of the contract that the Government wishes to change is omitted from the list in the Changes clause, the Government has no right to change the term unilaterally and any change must be bilateral. *Coastal States Petroleum Company*, ASBCA 31059, 88-1 BCA ¶ 20,468. The Changes clause in this contract sets forth the items in the contract that the contracting officer is permitted to unilaterally change. One of those items is the specifications, when the supplies ". . . are to be specially manufactured for the Government in accordance with the . . . specifications." Merely examining this portion of the Changes clause leads one to the conclusion that the warranty is not part of the specifications. That is so because the contracting officer's unilateral right applies only to the documents (specifications) that the supplies

are to be manufactured in accordance with. It is clear that the supplies in this contract were not to be manufactured in accordance with the warranty provision.

91-1 BCA at 118,136.

The Changes clause applicable to this contract does not provide DOE the right to unilaterally change the contract to adjust payments between the target and non-target work as a means of correcting the B.5 G&A allocation issue. DOE may issue unilateral changes only for the contract's description of services to be performed, time of performance (i.e., hours of the day, days of the week, etc.), and place of performance of the services. In the case before us, DOE's action in unilaterally issuing modification 260 and the final fee determination totally disregards the contract's payment provisions and falls outside the terms and scope of the Changes clause.

b. The Incentive Fee clause does not provide DOE the right to unilaterally change the contract to correct the B.5 allocation issue

In addition to the Changes clause, DOE relies on the Incentive Fee clause, FAR 52.216-10, to support the adjustment it unilaterally took via modification 260 and the final fee determination. The contract's Incentive Fee clause states in paragraph (b), "The target cost and target fee specified in the schedule are subject to adjustment if the contract is modified in accordance with paragraph (d) [of the clause]." Paragraph (d) provides:

When the work under this contract is increased or decreased by a modification to this contract or when any equitable adjustment in the target cost is authorized under any other clause, equitable adjustments in the target cost, target fee, minimum fee, and maximum fee, as appropriate, shall be stated in a supplemental agreement to this contract.

The Court of Federal Claims in *Northrop Grumman* made clear that the Incentive Fee clause requires the government to demonstrate that "work under the contract was [increased or] decreased." 41 Fed. Cl. at 654-55 ("[b]ecause the deletion or relaxation of certain requirements did reduce the work required, the Incentive Fee clause was applied properly to reduce plaintiff's fee"). In the case before us work was not decreased. *Northrop* was a very different case from the case before us, where the Government is using the Incentive Fee clause to argue that CWI's incentive fee must be reduced despite the fact that CWI's work obligations under the contract had not been increased or decreased by a modification.

A plain reading of the clause allows a contracting officer to adjust the target cost and target fee when work under the contract is increased or decreased by modification. The

Incentive Fee clause we are interpreting here does not allow a contracting officer to *unilaterally* move costs from one category of work (non-target work) to another (target work) to affect what DOE views as an inequity resulting from CWI's allocation of G&A from target work to non-target work. Furthermore, the contract's Incentive Fee clause, upon which DOE relies, does not apply to the non-target work from which DOE seeks to shift costs. In particular here, the target cost and target fee adjustments permitted in FAR 52.216-10 apply only to the "target cost and target fee specified in the Schedule." *See* 48 CFR 52.216-10(b).

Section B.3 of the contract schedule established the contract's target cost and target fee of \$2.378 billion and \$175 million, respectively. The target cost and target fee specified in the schedule were established entirely independently from and without consideration of the B.5 non-target work, at DOE direction and by DOE design. The FAR 52.216-10 clause permits adjustments to the target cost and target fee "specified in the Schedule" and, accordingly, does not permit adjustments for either the addition or deletion of B.5 non-target work that was never included in the schedule's target cost and target fee per the parties' agreement. DOE's decision to order, or not to order, non-target work did not change CWI's existing obligations associated with the separate and distinct target work and cannot serve as a basis to unilaterally reprice the target work.

That the Incentive Fee clause only applies to the target work – and not the B.5 non-target work – is demonstrated by section B.4 in the contract, which specifically references the target work. Section B.4 specifies that the "fee payable under this contract shall be the target fee increased by thirty (30) cents for every dollar that the total allowable cost is less than the target cost or decreased by thirty (30) cents for every dollar that the total allowable cost exceeds the target cost as specified in FAR 52.216-10 and subject to the maximum fee limitation above." Section B.4's reference to FAR 52.216-10 logically establishes that this FAR clause relates specifically to the target work and to the incentive fee for that work, not the non-target work. Section C.11 of the contract further clarifies that the incentive clauses in Section B, including FAR 52.216-10, do not apply to the non-target work.

c. Reservation language in several modifications does not provide DOE the right to unilaterally change the contract to correct the B.5 allocation issue

Throughout the contract, DOE and CWI executed many bilateral modifications that were authorized under the Changes clause. The bilateral modifications primarily addressed increased scope of both target and non-target work, but none of these modifications specifically addressed the G&A allocation issue.

DOE takes the position that the reservation language in certain modifications preserved its right to unilaterally adjust the contract to remedy the G&A allocation issue through the final fee determination and modification 260. We disagree. While DOE sought

to reserve the G&A allocation issue for some potential but unarticulated action later in the contract, the reservation language DOE cites created no new rights that did not exist under the contract. As there was no unilateral right in the contract to adjust the payments except for the reasons stated in the Changes clause, and the Changes clause was not affected by the reservation language, the reservation language that was inserted into certain modifications created no additional rights for DOE.

Without going through an exhaustive parsing of each modification and which ones contained the reservation language upon which DOE relies, we conclude that there was no language in any of the bilateral modifications that created for DOE a unilateral right to adjust the contract payments the way it ultimately attempted to do via the final fee determination and modification 260, to “correct” the inequities DOE perceived were associated with the G&A allocation issue. While we believe that CWI considered the G&A allocation issue to be an open issue that may need to be revisited, the language referenced in the modifications does not create a unilateral right for DOE to resolve the G&A allocation issue by disregarding the contract’s payment provisions.

d. Concluding comments on the B.5 allocation issue

Throughout the contract, it seems that various individuals representing several DOE entities sent different messages to each other and to CWI about whether or how DOE was going to pursue the G&A allocation issue. It appears from the record that DOE-ID hoped the issue would simply resolve itself, but other DOE entities persisted in revisiting the G&A allocation issue. The record is devoid of any consistent DOE analysis on the issue, and it seems that DOE-ID was content in deferring until the very end of the contract the decision of whether and how a contract adjustment might be calculated. When ultimately the final fee determination and modification 260 were issued, CWI disagreed on the adjustment and took a hard line, arguing that DOE was not entitled to the unilateral adjustment under the terms of the contract.

DOE, while presenting equitable arguments, has provided no compelling legal basis to support its unilateral actions. To the extent that various other arguments were made by the parties in relation to the B.5 allocation issue including, but not limited to the impact of the LCB and severability, we did not find them to be sufficiently compelling to merit detailed discussion. CWI is entitled to recover \$27,359,380 in incentive fees for the target work it performed.

2. The Safe Units

Both CWI and DOE agreed to fund an employee incentive compensation program in which they each contributed to fund safe units. Safe units were cash paid out annually to CWI employees based on the overall performance of the company and paid out at completion of the project based on CWI's project performance. DOE's issuance of the final fee determination and modification 260 resulted in a \$5,985,811 reduction of DOE's portion of the safe units. CWI asserts it is entitled to an additional sum for DOE's share of safe units if we find that it is entitled to the incentive fees it has claimed. CWI posits that DOE owes it \$5,985,811 for additional safe units, based on its entitlement to the additional \$27,359,380 in incentive fees.

The calculation of the payment of safe units flows from the amount of additional incentive fees we determine that DOE owes. DOE failed to make compelling argument that these safe units should not be paid. Since we find that the additional \$27,359,380 in incentive fees is owed to CWI, we also find that CWI is entitled to \$5,985,811 for DOE's share of the safe units.

3. The Cost Transfers

CWI also asserts it is entitled to an additional \$7,904,961 based on DOE's reclassification of certain IWTU cost transfers. These costs transfers consist of the following: \$4,004,927 for the mineralization waste form pilot plant testing costs; \$3,792,626 for the waste transfer line and tie-in costs; and \$107,408 for the portable bathroom costs. By reclassifying the IWTU costs as costs applicable to the construction phase of the IWTU project, CWI was unable to collect the costs in excess of the cap on the IWTU project agreed-to in modification 163.

CWI posits that DOE breached the implied covenant of good faith and fair dealing by improperly reclassifying and disallowing the IWTU cost transfers which were consistent with applicable financial requirements supporting CWI's classification of the costs.

DOE takes the position that "the potential for changes to the cap itself was limited by the language in modification 163." DOE also posits that during negotiations on the cap there were extensive discussions on the nature of events that would need to happen to trigger an adjustment of the cap and the cost transfers were not included as a triggering event.

The IWTU was a cost plus fixed fee construction project that was funded by a specific capital project line item of \$533,393,000. Due to changes in the project, the cost limitation set by the appropriation was in danger of being reached, and the parties looked to move costs previously charged to the capital project line item into other accounts. Pursuant to federal

appropriation law, for the limitation on the capital project line item to be increased, DOE would be required to approach Congress. Such an action would likely delay or shut down the project, something neither DOE nor CWI wanted to see occur.

As we mentioned in the facts, CWI identified some work scope that had previously been charged to the IWTU capital project line item that it believed could be reclassified as INTEC and IWTU operating costs. DOE-ID agreed with CWI's proposed reclassifications, but left the door open to revisiting the issue pending an audit.

Close to that time, the parties also discussed modifying the contract to place a cap on the IWTU construction project. Modification 163 was entered into, fixing a \$533,393,000 cap on the IWTU construction project. The cap gave CWI the opportunity to earn greater fees if it could build the project for less than the \$533,393,000, while ensuring that DOE would not have to approach Congress for additional funding if the construction costs went over the \$533,393,000 cap. The language of the modification itself identified "a major equipment failure and/or a major design change event . . . that prevents initiation or execution of the Corporate or Federal Operational Readiness Review (ORR)" as the only circumstances in which the cap could be adjusted.

Long after modification 163 setting the cap was executed, DOE-OIG issued a report concluding that three of the seven cost transfers, totaling \$7.9 million, represented direct costs of the construction phase of the IWTU project, and had not been appropriately transferred. The three cost transfers identified as inappropriate were (1) the mineralization testing costs; (2) the costs for a waste transfer line and tie-in; and (3) the costs for portable bathroom facilities. CO Mitchell-Williams took the position that the three cost transfers were inappropriate when she issued the final fee determination and modification 260.

We agree with DOE that costs associated with the mineralization testing, waste transfer line and tie-in, and portable bathroom facilities were direct costs attributable to the IWTU capital project line item. The contract required that the IWTU capital project line item "must capture all the costs including engineering, design, construction, inspection, and project management necessary to build the [project]." The three cost items in issue were direct capital costs.

According to the GAO Redbook, vol. I at 2-21 through -23:

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation, which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation

to make it available in addition to the specific appropriation. In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally established spending limits.

The cases illustrating this rule are legion. Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a “back-up.”

. . . .

[I]n the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Using the more general appropriation would be an unauthorized transfer . . . and would improperly augment the specific appropriation. [Footnotes and case law omitted.]

While it appears that the parties were working together to get the IWTU built, and DOE-ID originally agreed to the reclassification of the three cost items, there is no indication in the record that CWI wished to make modification 163 in any way contingent on the reclassified cost transfers remaining intact. In fact, when the modification was executed in December 2011, CWI was still going through a review of the cost transfers with its outside counsel. Correspondence from the contracting officer indicated that she was comfortable with the cost transfers, but was reserving a right to have them audited. It was only after other DOE entities became involved that questions regarding the appropriateness of the cost transfers became an issue.

We also looked to the language of modification 163 to determine what relief might be available to CWI. In relying on the plain language of the modification in *Jane Mobley Associates, Inc. v. General Services Administration*, 16-1 BCA ¶ 36,285, at 176,955, we concluded: “The task order modification was a bilateral modification and represents the intent of the parties. ‘In the realm of Government contracts, absent mistake or duress not present here, few things signify knowing and intentional conduct more than does the execution of a bilateral modification.’” *Id.* at 176,955 (quoting *Eslin Co.*, ASBCA 34029, 87-2 BCA ¶ 19,854, at 100,454); *see also CB&I AREVA MOX Services v. Department of*

Energy, CBCA 5395, 17-1 BCA ¶ 36,697, at 178,711; *USD Technologies, Inc.*, ASBCA 31305, 87-2 BCA ¶ 19,680.

The plain language of modification 163 limits the cost reimbursement on the IWTU (through CD-4) to \$533,393,000, and provides that if a “major equipment failure and/or a major design change event occurs that prevents initiation or execution of the Corporate or Federal Operational Readiness Review (ORR), the \$533,393,000 may be adjusted accordingly.” The cost transfer issue does not involve a major equipment failure or major design change event and therefore is not cause to adjust the \$533,393,000 cap.

The Board has reviewed the record and correspondence between DOE and CWI after execution of modification 163, and we find no indication that modification 163 was in any way contingent on the outcome of the cost transfers. There is no compelling reason for us to ignore the plain language of modification 163 and revisit the cap agreed to for the IWTU project. CWI’s claim for \$7,904,961 associated with certain cost transfers is denied.

Decision

Accordingly, the appeal is **GRANTED IN PART**. DOE shall pay CWI \$27,359,380 for incentive fees and \$5,985,811 for safe units, plus interest pursuant to the Contract Disputes Act, 41 U.S.C. § 7109 (2012), from March 6, 2014, until the date of payment..

PATRICIA J. SHERIDAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge