In 1999, the National Nuclear Security Administration (NNSA) awarded a complex and potentially very large contract to a company that subsequently became CB&I Areva MOX Services, LLC ("MOX Services"). The contract directed MOX Services to design and build a Mixed Oxide Fuel Fabrication Facility ("MFFF") at the Department of Energy's Savannah River site, located near Aiken, South Carolina. The MFFF project was created to satisfy the nuclear non-proliferation agreement between the Russian Federation and the USA. When operational, the MOX facility will convert Russian legacy weapons-grade plutonium into fuel suitable for commercial power reactors. The NNSA awarded the contract's Option 1 to MOX Services on a cost reimbursement basis, with MOX Services eligible to earn various types of fee or profit, including incentive fee. The contract included the standard FAR "changes" contract clause for cost-reimbursement contracts, 52.243-2.

Importantly, in order to more accurately estimate the costs of construction, the parties apportioned the risks. The NNSA took on certain risks that were expressly excluded from the contract's scope of work. In particular, the NNSA accepted risks related to the amount and timing of project funding, and agreed to process appropriate contract changes if the risk materialized. In addition, the contract specifically and broadly excluded risks "related to" the Russian parallel project requirements from its scope. Since the NNSA accepted these risks, they were beyond the scope of the contract, and their potential impacts on the project were not included in the MFFF cost or schedule estimates. Unsurprisingly, Congressional funding uncertainty and delays in the Russian project significantly impacted cost and schedule.

Stuff happens. What are you going to do?

One of the aspects of the MFFF construction contract was awarded on a cost-plus incentive fee (CPIF) basis. The available incentive fee was either 6.75% of estimated costs or 7.0% of estimated costs, depending on whether NNSA ordered a "hot start." According to MOX Services, NNSA ordered a "hot start" and thus MOX Services was entitled to the 7.0% incentive fee band. However, the NNSA Contracting Officer used the 6.75% incentive fee band, a decision which led to a dispute. Further adding fuel to the dispute fire, NNSA suspended the quarterly incentive fee payments after making 12 payments (equaling $29.1 million). From February 2011 forward, MOX Services was not being paid the incentive fees to which it believed it was entitled.

Just to make matters more interesting, most of the incentive fees were "provisional" in nature, meaning that they "vested" in accordance with a contract schedule. "For at least the first year

after MOX Services invoices for quarterly incentive fees, the entire incentive fee is provisional. For as long as MOX Services' performance has remained within the cost and schedule parameters during the previous four quarters, 50% of the provisional incentive fee payment becomes final, and cannot be reclassified or taken back by NNSA. The other half of each quarter's incentive fee remains provisional." If MOX Services didn't make sufficient construction progress within cost and schedule parameters, then it could lose its provisional incentive fees. At the point at which NNSA suspended the quarterly incentive fee payments, MOX Services had "vested" in about $7.5 million of the total payments, leaving about $21.6 million in "provisional" incentive fee payments.

MOX Services filed a certified claim for about $53 million, related to incentive fees it had allegedly been denied. Not only did the Contracting Officer reject the claim, they demanded immediate repayment of all provisional incentive fees MOX Services had received. MOX Services **appealed** the decision to the Court of Federal Claims.

Judge Wheeler described the dispute as follows:

On September 29, 2016, MOX Services submitted a certified claim to NNSA for approximately $53 million in suspended incentive fee, representing the incentive fee amounts from fiscal years 2011 to 2015 that NNSA has not paid. In responding to the certified claim on December 7, 2016, the contracting officer issued two final decisions in a single letter. Not only did the contracting officer deny the certified claim for $53 million, but he demanded MOX Services to refund all of the provisional incentive fee payments previously made. As relevant here, the contracting officer directed MOX Services to return $21.6 million in provisional incentive fee in MOX Services' possession. Through a combination of direct payments and reduced NNSA payments of MOX Services' invoices, MOX Services has satisfied NNSA's demand for repayment of the provisional incentive fee plus interest.

In addition, NNSA refused to reimburse MOX Services for more than $2 million expended in outside legal fees and consultants associated with submitting a Request for Equitable Adjustment (REA) to adjust the contract's cost and schedule parameters for the impacts associated with funding and Russian performance.

So there were two issues before Judge Wheeler: (1) Did NNSA have the contractual authority to demand refund of the $21.6 million in provisional incentive fees before construction had been completed? and (2) did the CO have a valid basis for rejection of MOX Services' invoice for

REA preparation fees?

With respect to issue (1), Judge Wheeler wrote:

The NNSA's attempt to claw back $21.6 million in provisional incentive fees is premised on the assertion that MOX Services has hopelessly exceeded the estimated project cost, has no chance of meeting the project schedule parameter, and thus will not be able to show entitlement to any incentive fees at project completion. In opposition, MOX Services maintains that the estimated project cost and schedule must be adjusted under the changes clause, FAR 52.243-2, because MOX Services is not responsible for the increased costs and schedule delays incurred to date. These contentions present factual issues that will be resolved in the other claims that MOX Services has submitted to the Court. It remains to be seen whether the estimated cost and schedule will require adjustment.

If that were the end of the opinion, we wouldn't have bothered to write about it. Nope. Judge Wheeler had more to say, and what he had to say is important for those considering pushing a dispute with their government customers. He wrote—

Regardless of which party is responsible for the increased costs and schedule delays, none of the contract provisions permits the NNSA to claw back provisional incentive fees before the completion of the MFFF. *What is most troubling here is that the contracting officer used the denial of MOX Services' certified claim, and demand for refund of $21.6 million, as a way to gain leverage over MOX Services through baseless retaliation.* The law requires contractors to certify that their claims are 'made in good faith,' that all 'supporting data are accurate and complete to the best of the contractor's knowledge and belief,' and that the amount requested 'accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable.' Surely, a reciprocal obligation to act in good faith applies to the government. See *Moreland Corp. v. United States*, 76 Fed. Cl. 268, 292 (2007) ('Under the Contract Disputes Act, a contracting officer's review of certified claims submitted in good faith is not intended to be a negotiating game where the agency may deny meritorious claims to gain leverage over the contractor.') The same reasoning applies where the contracting officer conjures up a baseless claim to demand immediate refund of provisional incentive fees.

[Emphasis added. Internal footnotes/citations omitted.]

Judge Wheeler directed NNSA to return the $21.6 million in had inappropriately taken from MOX Services upon receipt of an invoice for that amount.

With respect to Item (2), Judge Wheeler noted that NNSA Counsel had agreed with MOX Services that the CO lacked a valid rationale for denying payment of the more than $2 million it had expended in preparing its REA. Thus, MOX Services was entitled to reimbursement for those costs.

Judge Wheeler's opinion also deals with other government arguments, which are worth reading. But we were struck by the part(s) we wrote about above.

One more thought: the original contractor, back in 1999, was Duke Cogema, Stone & Webster, LLC. Stone & Webster was a prestigious engineering company with a long pedigree. The company played a significant role in World War II industrial mobilization and production—including performing as a key contractor for the Manhattan Project. Unfortunately, by the late 1990's, the company wasn't operating at the same historic levels. It was acquired by The Shaw Group in the early 2000's. In 2012, The Shaw Group sold it in two major pieces—and the nuclear power piece ended-up at Chicago Bridge & Iron Company (CB&I), who subsequently sold it to Westinghouse Electric Company, which was owned by Toshiba. In 2017, Westinghouse filed for Chapter 11 bankruptcy protection, citing losses from nuclear reactor construction projects.

We will never know how the NNSA Contracting Officer's decisions, discussed in this article, which cost its contractor nearly $25 million in lost cash flow and an untold amount of unallowable legal fees pursuing its appeals, impacted the corporate financial situations related in the foregoing paragraph. Who knows what might have happened, had the CO dealt fairly with the contractor?