

The Missing \$15 Million Incentive Fee Payment

Written by Nick Sanders

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It's not much as Federal funds are measured, but still. \$15 million is not exactly chump change. And [according to the Department of Energy's Inspector General](#), that amount apparently got lost in the mail.

The Department of Energy (DOE) is in the process of spending about \$12 Billion of taxpayer funds at its Hanford, Washington, site. That \$12 Billion is funding the Waste Treatment and Immobilization Plant (WTP), which is a "key element" in DOE's efforts to remediate the site's high-level nuclear waste. (Hanford is where plutonium was processed during the Manhattan Project and Cold War. It's polluted as hell.)

Bechtel National Inc. is the prime contractor managing the WTP program. As part of the WTP activities, Bechtel is building "black cell" waste processing rooms. "Black cells" are sealed compartments that will contain the actual WTP processing vessels and equipment. The black cells are sealed and heavily shielded to protect plant workers "from the intense radiation that will occur during WTP operations." Since there is no "engineered access" to the black cells, there is no practical means of performing maintenance or repair. It's kind of like a satellite in space, if you will. If anything inside the black cell fails, then that's it. Consequently, it is critically important that everything going inside the black cells be of the highest quality and (as is the case with spacecraft) be completely traceable in terms of quality assurance. As the DOE IG wrote—

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The importance of black cells and hard-to-reach components cannot be over stated. Premature failure of these components could potentially impact safety, contaminate large portions of a multi-billion dollar facility and interrupt waste processing for an unknown period of time.

The DOE IG received allegations that not everything in the WTP black cells met quality assurance standards, and investigated. The IG substantiated the allegations, finding that the contractor could not document that it met quality assurance and/or contract requirements. Interestingly, the audit focused on vessels that were “received and installed prior to mid-2005,” because Bechtel hasn’t acquired any similar vessels in the seven years since then. Why it took seven years for the IG to get around to looking at Bechtel’s quality assurance documentation remains a mystery.

But the more interesting finding—or, at least, the one that’s getting the most play in the press—is the finding that DOE cannot account for at least \$15 million in incentive fees that it had demanded Bechtel repay as a penalty for failing to meet QA requirements. The IG reported—

Bechtel was paid \$30 million in incentive fee for the delivery and installation of vessels into WTP facilities. When the Department learned that one of the vessels was nonconforming, it instructed Bechtel to return \$15 million in performance fee. However, neither the Department's Office of River Protection nor Bechtel could provide evidence that the fee was returned to the Department.

In the body of the audit report, the DOE IG provided some more detail surrounding the missing \$15 million. It reported—

The Department did not take aggressive action to retrieve the \$15 million fee payment. ... the Department requested Bechtel return the \$15 million fee payment by February 20, 2004. If not returned by that date, the letter stated that the Department would offset the amount against the next cost invoice submitted by Bechtel. In its response ... Bechtel asserted that it didn't completely agree with many of the assertions of the Department; but concluded that a point-by-point response would not bring closure to the issue. As an alternative, Bechtel expressed its desire to discuss the issue with the Department to find a mutually acceptable resolution. Bechtel then submitted a letter to close out open issues on the vessel dated July 12, 2004. We requested the evidence of the resolution; however, there were no records of the meeting or indications that Bechtel repaid the fee. Department officials confirmed there was no documentation indicating that the fee had been repaid or offset against any subsequent invoices.

The DOE IG also identified *another* \$15 Million incentive fee payment for “nonconforming”

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vessels. But the IG noted that the Department of Energy was unable to recover that second payment, because “at the time we determined the vessel was nonconforming, a different fee criteria applied which denied the Department the ability to recover fee for a nonconforming vessel after it had been installed.” Oops!

We are not going to get into a discussion of patent vs. latent defects here. But we will note for the record that more than six years has passed since the DOE demanded that Bechtel repay the \$15 million. Accordingly, we have to smile a bit at the IG recommendation that the DOE management team “Determine whether the \$15 million performance fee payment for a nonconforming vessel was returned to the Department and, if not, take necessary action to recoup the fee from Bechtel.”

Perhaps the DOE IG might want to read one or two of our articles on the Contract Disputes Act’s Statute of Limitations?