

**DEPARTMENT OF ENERGY
BOARD OF CONTRACT APPEALS**

ROCKWELL INTERNATIONAL CORPORATION)	EBCA Nos. C-9509187
)	C-9509220
)	and C-9509221

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DECISION

October 31, 2001

This appeal is taken from deemed denials of three certified claims submitted by Rockwell International Corporation (“Rockwell”) totaling \$10,039,511.¹ The first claim, in the amount of \$1,157,364, is for attorney fees and costs incurred by Rockwell between June 6, 1989, and December 31, 1989. These fees and costs were incurred defending the corporation in the criminal investigation conducted by the United States Government into alleged violations of environmental laws at the Department of Energy’s (“DOE’s”) Rocky Flats Plant. These costs relate only to defending against allegations that never ripened into charges. Rockwell was never charged. The second claim, in the amount of \$3,725,461, is for the costs of providing independent legal representation for present and former employees of Rockwell in connection with the investigation. The third claim, in the amount of \$5,156,686, is for the costs of a computerized litigation database created for Rockwell for its use in the investigation and used for many other legal and business purposes. Only the issue of entitlement is before us. The Board has jurisdiction over this appeal under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613.

¹ “Rockwell,” as used in this appeal, is Rockwell International Corporation as it existed until December 1996, at which time it merged with a subsidiary of the Boeing Company and changed its name to Boeing North America. (JS 1)

FINDINGS OF FACT

Description of the Rocky Flats Plant

1. The Rocky Flats Nuclear Weapons Plant (“Rocky Flats” or the “Plant”) is a Government-owned facility that, from the time it was constructed in the early 1950’s, produced components for nuclear weapons. (JS 4; Tr. 35-36)². The Rocky Flats site covers approximately 6,550 acres and includes more than 100 buildings and other structures. Many of the buildings and structures were constructed by Rockwell’s predecessor contractor. The Plant is located northwest of Denver, Colorado. During the 1980’s, Rockwell employed approximately 5,000 people at the Plant. During this time DOE employed approximately 55 people at the Rocky Flats site. (Tr. 697) The Plant is owned by the United States Government, acting through DOE and DOE’s predecessors, and was so owned at all relevant times. (JS 3-7)
2. The primary mission of Rocky Flats has been to produce plutonium pits, which are small, spherical, plutonium devices used in nuclear weapons to initiate the thermo-nuclear reaction. From the beginning, the Plant has been an integral and vital part of DOE’s distributed complex of nuclear weapons production facilities. Because of the inherent nature of plutonium, the work performed at the Plant was extremely dangerous and necessarily entailed great risks. (Tr. 36-39)

Role of the Management and Operating (“M&O”) Contractor

3. Beginning in World War II with the Manhattan Project, the Government enlisted private industry to design, build, manage and operate the nation’s nuclear weapons facilities. The Government wanted the resources and expertise of established, private industrial firms to produce nuclear weapons, one of the most complex and dangerous industrial processes ever conducted. (Tr. 37-38; AE-8 at 255)
4. At all relevant times, DOE, like its predecessor agencies, contracted with private industry to manage and operate its nuclear weapons facilities through cost-reimbursement, management and operating (M&O) contracts. (Tr. 39-40)
5. Typically, at least at the times relevant here, M&O contracts allocated virtually all operational and financial risks to the United States Government. (AE-4; AE-64; Tr. 40) Limiting contractor risk has always been a prerequisite to engaging suitable companies as contractors. DOE officials recently recognized that “[i]f the Department did not fully indemnify its contractors,...the risks to the contractors would be so great, that the Department would be unable to find
6. qualified contractors willing to run the Department’s facilities.” (AE-1 at 3)

² “JS ___” refers to Joint Stipulation paragraph ___. “Tr. ___” refers to Hearing Transcript at page ___. “AE-___” refers to Appellant’s Exhibit ___. “RE-___” refers to Respondent’s Exhibit ___. “FOF___” refers to Finding of Fact ___.

7. M&O contracts contained provisions which disallowed certain costs including losses and expenses resulting from the willful misconduct or bad faith of the contractor's most senior on-site manager or highest ranking corporate officers or directors. (AE-1 at 3; AE-4; Tr. 40) Typically, other costs were also disallowed such as the specific costs listed in paragraph (e) of DEAR 970.5204-13 ALLOWABLE COSTS AND FIXED-FEE (MANAGEMENT AND OPERATING CONTRACTS). The clauses contained in M&O contracts are largely standardized by inclusion in the Department of Energy Acquisition Regulations (DEAR).
8. M&O contracts typically imposed little financial risk on contractors and, in return, contractors accepted a low profit return compared to that usually earned in a similarly sized and complex undertaking using a different contract type. While contractors did not invest capital into these DOE facilities, these complex facilities required a large investment of contractor's management talent. (Tr. 41-42)

Rockwell's M&O Contracts at Rocky Flats

9. In 1975, Rockwell succeeded the initial Plant contractor, the Dow Corporation, as the M&O contractor at Rocky Flats. (Tr. 43) Rockwell managed and operated the Plant under a series of M&O contracts, the first of which was Contract AT (29-2)-3533, effective June 30, 1975. (JS 5-6).
10. The two M&O contracts in force during events relevant to this appeal are Modification M087 to Contract DE-AC04-76DPO3533, which covers performance from January 1, 1986, through December 31, 1988, (the "1986 Contract") and Modification M124 to Contract DE-AC04-76DPO3533, which covers performance from January 1, 1989, through December 31, 1989, (the "1989 Contract") (together, the "Contracts"). (JS 6)

Contract Clauses³

11. The Contracts include the following relevant provision in the Statement of Work:⁴

³ In this opinion, the following contract clauses are referenced by the following abbreviated names: Subparagraph (c) of the Clause 54 970.5204-13 ALLOWABLE COSTS, BASE FEE AND AWARD FEE is referred to as the "Allowable Cost Clause." Subparagraph (d)(16) of this same Clause is referred to as the "Environment Cost Clause." Subparagraph (e)(12) of this same Clause is referred to as the "Fines and Penalties Clause." Subparagraph (e)(16) of this same Clause is referred to as the "Contesting Actions Clause." Subparagraph J of Appendix A, Part IV is referred to as the "Employee Defense Clause." Clause 67 970.5204-31 LITIGATION AND CLAIMS (DEVIATION) is referred to as the "Litigation and Claims Clause."

⁴ The pertinent provisions in the 1986 and 1989 Contracts are identical except for the Fines and Penalties Clause, Subparagraph (e)(12) of 970.5204-13 ALLOWABLE COSTS, BASE FEE AND AWARD FEE. The differences between the two clauses are minor. See Subparagraph (e)(12) below of 970.5204-13 ALLOWABLE COSTS, BASE FEE AND AWARD FEE (FOF 12)

2. 970.5204-37 STATEMENT OF WORK

(a) Engagement of Contractor – Designation of Facilities

The Government expressly engages the Contractor to manage, operate and maintain the Rocky Flats Plant and to perform the work and services described in this contract including Appendix B, "Scope of Work," and including the utilization of information, material, funds, and other property of DOE, the collection of revenues, and the acquisition, sale or other disposal of property for the DOE, subject to the limitations as hereinafter set forth. Appendix B, by this reference, is hereby incorporated into and made a part of this contract. The Contractor undertakes and promises to manage, operate, and maintain the Rocky Flats Plant and to perform said work and services, upon the terms and conditions herein provided and in accordance with such directions and instructions not inconsistent with this contract which the Contracting Officer may deem necessary and give to the Contractor from time to time. In the absence of applicable directions and instructions from the Contracting Officer, the Contractor shall use its best judgment, skill and care in all matters pertaining to the performance of this contract.

12. In Appendix B, the Contracts contain the following relevant provision in the Scope of Work:

...The Contractor shall, in accordance with the provisions of this contract, use its best efforts to manage, staff, maintain, and operate the Rocky Flats Plant within available funds so as to carry on in an efficient manner all necessary and related services and operations for the purpose of developing and producing (at such rates, and in conformance with such specifications, as the Contracting Officer may direct in writing from time to time) weapons components, assemblies, and ancillary equipment and for performing related services and operations within the time scales requested by the Contracting Officer...

13. The Contracts contain the following relevant cost allowability clauses:

54. 970.5204-13 ALLOWABLE COSTS, BASE FEE AND AWARD FEE⁵

* * *

- (c) Allowable Cost. The allowable cost of performing the work under the contract shall be the costs and expenses that are actually incurred by the Contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) reasonableness, including the exercise of prudent business judgment; (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work; and (3) recognition of all exclusions and limitations set forth in this clause or elsewhere in this

⁵ This clause is Clause 54 in the 1986 Contract and Clause 62 in the 1989 Contract.

contract as to types or amounts of items of cost. Allowable cost shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

- (d) Items of Allowable Cost. Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated:

* * *

- (3) Consulting services (including legal and accounting), and related expenses, as approved by the Contracting Officer, except as made unallowable by Paragraph (e)(16) and (25).
- (4) Litigation expenses, including payment of third-party claims, judgments and reasonable counsel fees, incurred in accordance with the clause of this contract entitled "Litigation and Claims."
- (5) Losses and expenses (including settlements made with the consent of the Contracting Officer) sustained by the Contractor in the performance of this contract and certified in writing by the Contracting Officer to be reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

* * *

- (8) Personnel costs and related expenses incurred in accordance with Appendix A which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that Appendix A sets forth in detail personnel costs and related expense to be allowable under this contract...
- (16) All costs incurred by the Contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties (such as civil sanctions including fines), arising out of, or related to environmental, safety and health activities, including costs incurred with respect to investigation, removal, remedial action, ground and surface water or other clean-up of hazardous, toxic or contaminated material(s), except for those costs that result from conduct identified in subparagraph (e)(17)(ii) of the clause entitled, "Allowable Costs, Base Fee and Award Fee."

- (e) Items of unallowable costs. The following items of cost are unallowable under this contract to the extent indicated:

* * *

- (12) Fines and penalties, including assessed interest, resulting from violations of, or failure of, the Contractor to comply with Federal, state, or local laws or regulations, except when incurred in

accordance with the written approval of the Contracting Officer or as a result of compliance with the provisions of this contract.⁶

* * *

- (16) Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions of [sic]⁷ proposed actions of the United States, and prosecution or defense of patent infringement litigation.
- (17) Losses (including litigation expenses, counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets, including investments, losses on other contracts, including the Contractor's contributed portion under cost-sharing contracts; losses in connection with price reductions to and discount purchases by employees and others from any source; and losses where such losses or expenses:

* * *

- (ii) result from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel, as defined in the clause of this contract entitled, 'Property;'

13. Appendix A, Part IV of the Contracts contains the following clause relating to employee defense:

J. Defense of Employees Involved in Work-Related Claims and Legal Actions

- 1. If a claim or legal action is brought against an employee as the result of the employee's conduct when performing duties under this contract and within the employee's scope of employment, the contractor shall be allowed the cost of defending the employee...; provided, however, that the prior approval of the Contracting Officer and the consent of the employee to be defended shall be obtained before such defense is undertaken.
- 2. The provisions of the contract clause entitled, "Litigation and Claims" shall have the same application to claims and legal actions against employees under this section as it has to those claims and legal actions

⁶ This Subparagraph is in the 1986 Contract. Subparagraph (e)(12) of the 1989 Contract states as follows:

Fines and penalties, including assessed interest, resulting from violations of, or failure of, the Contractor to comply with Federal, state, local or foreign laws or regulations, except when incurred as a result of compliance with the scope of work, specific terms and conditions, or other provisions of the contract or written instructions from the Contracting Officer authorizing in advance such payments.

⁷ The parties agree that this is a long-standing typographical error and that "of" should read "or." In future references to, or quotes of, this phrase, we will use the word "or."

which are brought directly against the Contractor. Before costs of any retained legal counsel may be allowed, the selection of such counsel must have the concurrence of the Contracting Officer.

14. The Contracts contain the following clause relating to Litigation and Claims:

67. 970.5204-31 LITIGATION AND CLAIMS (DEVIATION)⁸

* * *

- b. Defense and Settlement of Claims. The Contractor shall give the Contracting Officer immediate notice in writing (1) of any action, including any proceeding before an administrative agency, filed against the Contractor rising out of the performance of this contract, and (2) of any claim against the contractor, the cost and expense of which is allowable under the clause entitled, "Allowable Costs, Base Fee and Award Fee." Except as otherwise directed by the Contracting Officer, in writing, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may with the Contracting Officer's approval, settle any such action or claim, shall effect at the contracting officer's request an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor, and if required by the Contracting Officer, shall authorize representatives of the Government or settle or defend any such action or claim and to represent the contractor in, or to take charge of any action. If the settlement or defense of an action or claim against the Contractor is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action or a claim against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action or claim in good faith and in such event the defense of the action or claim shall be at the expense of the Government, provided, however, that the Government shall not be liable for such expense to the extent that it would have been compensated by insurance which was required by law or by the written direction of the Contracting Officer, but which the Contractor failed to secure or maintain through its own fault or negligence.

The June 6, 1989, FBI Raid on the Plant

15. In 1987, the FBI, the Environmental Protection Agency ("EPA") and the United States Attorney's Office in Denver began a secret investigation of environmental practices at Rocky Flats after an EPA special agent brought to their attention a DOE memorandum that casually referred to "patently illegal" environmental practices at Rocky Flats. Over the course of the next 18 months, the investigators

⁸ This clause is Clause 67 in the 1986 Contract and Clause 76 in the 1989 Contract.

- attempted to gather evidence covertly, including taking infrared videotape in secret flights over the Plant. By late 1988, the investigation team, which by then included the Department of Justice (“DOJ”), came to believe that a host of significant, willful environmental crimes were being committed at Rocky Flats. On that basis, the team decided to seek a search warrant for the Plant. (AE-28 at 6-9)
16. On June 6, 1989, pursuant to a search warrant, Federal investigative agencies conducted a surprise raid on the Plant seeking evidence of alleged environmental violations. (JS 13; Tr. 107)
 17. On the morning of June 6, 1989, between 70 and 100 officers of the FBI, EPA and possibly other enforcement agencies arrived at the Plant, accompanied by a caravan of TV trucks. The officers demanded access to the Plant pursuant to a search warrant. DOJ, DOE, and EPA had previously entered into a Secretary-level memorandum of understanding that provided that DOE would ensure that the security force at the Plant would not stop the raiding officials. Upon entering the Plant, the raiding officers fanned out and immediately began commandeering files, barring people from their offices and searching for employees to be taken into private spots and interviewed. Rockwell had no advance warning of the raid. (Tr. 107-108)

The Affidavit Supporting the Search Warrant

18. The 100-plus-page affidavit supporting the search warrant was originally filed under seal. Nonetheless, portions of the affidavit were obtained by the press. Within a few days of the raid, DOJ caused the affidavit to be made public in conjunction with a news conference by the U.S. Attorney in Colorado. (Tr. 243-246)
19. The affidavit contained a series of sensational and alarming allegations of environmental crimes. (AE-27) The affidavit alleged that in December 1988 the incinerator used in plutonium recovery operations in Building 771 was being operated at night, even though DOE and Rockwell had publicly announced in November 1988 that Building 771 operations had been shut down. (JS 16) Early press reports suggested that radioactive dust was possibly being carried over the metropolitan Denver area. (Tr. 244)
20. The affidavit alleged that in November 1988 various chemicals were discharged into Walnut Creek and suggested that those chemicals were medical waste originating from a research laboratory or pharmacy. (JS 18) The charge that medical wastes were being flushed into streams that fed drinking water supplies of neighboring communities created great concern in the Denver area. (Tr. 255)
21. The affidavit alleged that in December 1988, Rockwell transferred water from Solar Ponds 207B and 207C to Solar Pond 207A, when EPA had earlier denied

- permission for such transfers. It also alleged that there were discharges from the Rocky Flats' sewage treatment plant directly into Woman Creek. (JS 20, 22)
22. The affidavit further alleged that Rockwell and DOE made a false certification in November 1985 that Rocky Flats was in compliance with all applicable Resource Conservation and Recovery Act of 1976 ("RCRA") groundwater-monitoring requirements. (JS 24)
 23. The raid on the Plant and the sensational search-warrant allegations were highly publicized across the country. Many Colorado politicians, including the Governor, two members of the United States House of Representatives and a United States Senator, held press conferences. (Tr. 244-245; AE-438-51) The publicity surrounding the raid generated an atmosphere of fear and anxiety. (Tr. 110-112)
 24. Rockwell, through the efforts of its legal counsel, was able to discredit the allegations contained in the search-warrant affidavit. None of the conduct alleged in the search-warrant affidavit was ever the basis of charges or convictions against Rockwell or any of its employees. (Tr. 110; AE-28 at 17)

Prosecutors Change of Course

25. Until at least the spring of 1990, the investigation centered almost exclusively on the allegations contained in the search-warrant affidavit. Even late in that year, the Grand Jury was issuing subpoenas addressing the search-warrant affidavit allegations. (Tr. 270-73, 307)
26. By mid-1990, it was clear that the allegations behind the search warrant, of willful, egregious criminal acts, could not be supported. It was also clear that the FBI, DOJ and the other investigative agencies had expended a great deal of manpower and money pursuing these allegations. (Tr. 307-08)
27. Beginning well into 1990, the criminal prosecutors began to turn their attention away from the allegations in the search-warrant affidavit. Instead, the prosecutors focused on other evidence of environmental wrongdoing. (Tr. 307-08, 408)
28. The investigation turned to very different allegations – technical and permit violations of RCRA and the Clean Water Act ("CWA"). (Tr. 307-08, 593-94) Given the state of environmental conditions at all of DOE's facilities, it was practically a foregone conclusion that violations of environmental laws would be found at Rocky Flats. DOE's own "Tiger Teams" sent from headquarters to all the facilities around this time period found environmental violations at nearly every location. (Tr. 492-503) It was in 1990 that the Grand Jury first subpoenaed documents relating to these new allegations. (Tr. 308-09) Most of these violations had been previously addressed administratively by the EPA and the Colorado Department of Health ("CDH").

The Plea Agreement Negotiations

29. Beginning in early 1991, after the investigation began to change course away from the initial, search-warrant allegations, Rockwell and DOJ began discussing settlement. (Tr. 350-51)
30. A primary consideration driving DOJ was the concern that, if the Government were eventually able to establish some liability, Rockwell could be reimbursed by DOE under its Contracts for any resulting fines or penalties and related costs. (Tr. 351-52) If this were to occur, “the whole prosecution [would] look like a pointless and expensive academic exercise.” (AE-28 at 42) Therefore, DOJ insisted throughout the plea negotiations that Rockwell agree not to seek reimbursement for any criminal fines paid or the cost of defending against whatever charges ended up in a plea agreement. (Tr. 352)
31. Both parties recognized that it would be administratively difficult to segregate the corporation’s defense costs for Charged versus Uncharged Conduct. At the same time, they understood that the early stages of the investigation related almost exclusively to Uncharged Conduct found in the search-warrant affidavit. Rockwell, therefore, proposed a bright-line date of May 1, 1990, for dividing Charged from Uncharged Conduct. After further negotiations, the parties agreed to move the bright-line date back to January 1, 1990. Costs incurred for defending the corporation prior to that date would be deemed related to Uncharged Conduct, and costs after that date would be deemed related to Charged Conduct. Rockwell would be free to seek costs incurred in defending the corporation for Uncharged Conduct, but not seek such costs for Charged Conduct. In this way, the parties would achieve an administratively simple means of preserving DOJ’s condition that Rockwell would not seek reimbursement for defending the corporation against Charged Conduct. (Tr. 352-70)
32. During the course of plea negotiations, Rockwell also sought to preserve its contract right to seek reimbursement from DOE for (1) the costs of the litigation database, and (2) the attorney fees and related costs incurred in representing current and former employees. (Tr. 352-70)
33. Rockwell negotiated into the Plea Agreement a provision whereby certain costs would not be made unallowable by virtue of the Major Frauds Act. (Tr. 372-74; AE-400)

The Plea Agreement Terms

34. Rockwell and DOJ reached a negotiated settlement. The terms are contained in a Plea Agreement signed by Rockwell and the Department of Justice on March 26, 1992. This “Plea Agreement” was filed in the United States District Court,

District of Colorado in March 1992 along with a “Plea Agreement and Statement of Factual Basis” and entered by the Court on June 1, 1992. (Rule 4, Tab 4)

35. In the Plea Agreement, Rockwell agreed to plead guilty to four felony violations of RCRA and one felony and five misdemeanor violations under the CWA. Rockwell agreed to an \$18.5 million fine. In return, DOJ provided Rockwell with a release for itself and its present and former employees.
36. In the Plea Agreement, Rockwell also agreed to forego its right to seek reimbursement from DOE under the Contracts of the \$18.5 million fine. The Government agreed that Rockwell could seek reimbursement from DOE of (a) attorney fees and costs incurred by Rockwell for representation of the corporation through December 31, 1989 (but not thereafter), (b) attorney fees and costs incurred by Rockwell for providing legal representation for present and former Rockwell employees, and (c) the costs of a computerized database that was also used in Rocky Flats civil litigation.
37. Specifically, paragraph six of the Plea Agreement provides that Rockwell would “not seek to recover, pursuant to indemnification provisions in Rockwell’s contracts with [DOE] or otherwise...the criminal fines....”
38. Paragraph seven of the Plea Agreement provides:

Except as provided in Paragraph 8, Rockwell will not seek to recover, pursuant to indemnification provisions in Rockwell’s contracts with DOE or otherwise, and will not recover from DOE, the attorney’s fees and costs incurred by Rockwell in defending or preparing to defend the Rocky Flats criminal investigation and prosecution (including this disposition and sentencing), concerning the following subjects: (a) the manufacture, storage, treatment, disposal or other management of pondcrete and saltcrete; (b) the use of the 207 solar ponds to receive, treat or store hazardous or mixed wastes; (c) the manufacture, storage, treatment or other management of vacuum filter sludge; (d) the operation and management of the sewage treatment plant (including its influent and effluent); (e) spray irrigation; (f) Rocky Flats’ violation of the biological oxygen demand and fecal coliform limits in its NPDES permit; and/or (g) the chromic acid spill in February-March 1989.

These seven subjects comprised the charges to which Rockwell pled guilty.

39. Paragraph eight of the Plea Agreement provides:

As authorized by 41 U.S.C. § 256(c) (the Major Frauds Act) and 10 C.F.R. § 970.3102-20(c), Rockwell may seek to recover from DOE (and subject to DOE’s review and approval in accordance with the relevant contract(s) and applicable law and regulations): (a) attorneys, fees and costs incurred by Rockwell (on behalf of the corporation) prior to January 1, 1990 (but not thereafter); (b) attorneys, fees and costs incurred by Rockwell in providing legal representation to past and

present Rockwell employees; and (c) costs concerning a computer system which is also used in Rocky Flats-related civil litigation.

40. Paragraph nine of the Plea Agreement provides:

...nothing in this agreement shall be construed as an admission by Rockwell, or a determination by the Department of Justice, of “willful misconduct or lack of good faith” by Rockwell’s managerial personnel,” as such terms are used or defined in [the Contract]...

41. In addition, DOJ agreed in the Plea Agreement that, among other things, (1) it would not bring other environmental criminal charges against Rockwell and (2) it would not bring charges against any present or former Rockwell officers, directors or employees.
42. The prosecutors, in the Plea Agreement, acknowledged that no hazardous or mixed wastes were burned in the Building 771 incinerator during October 1988 to January 1989, or at any time in the Building 776 fluidized bed incinerator. They also acknowledged that none of the conduct to which Rockwell pled guilty resulted in substantial physiological harm, or the imminent threat thereof, to members of the public residing and working outside Rocky Flats’ boundaries. (Rule 4, Tab 4; JS 17 and 41)
43. None of the ten counts agreed to in the Plea Agreement (the Charged Conduct) were based upon the allegations in the search-warrant affidavit (the Uncharged Conduct) (AE-27; AE-28 at 10, 17; Rule 4, Tab 4)
44. In virtually all instances, the Charged Conduct was conduct known to state and Federal regulators prior to the impaneling of the Grand Jury and was being handled administratively. (Tr. 90-92, 95-96, 152-56, 162, 170-173, 618-22, 624-27; AE-47)

Rockwell Retained Legal Counsel for the Corporation

45. Upon learning of the FBI raid, Rockwell immediately took efforts to retain legal counsel in the Denver area. The Denver law firm of Haddon, Morgan & Foreman (“HM&F”) was recommended as the most capable criminal defense firm in Colorado. Based on these recommendations, Rockwell retained HM&F. HM&F was Rockwell’s primary outside counsel in connection with the criminal investigation at Rocky Flats. (Tr. 112-13)
46. In addition to HM&F, Rockwell retained two other law firms to assist it in connection with the criminal investigation. The firm of Holland & Hart was retained to provide environmental law expertise, and the firm of Sherman & Howard, which had been the principal local counsel to Rockwell for Plant matters for many years, was retained to assist in reconstructing the history of environmental compliance issues at the Plant. (Tr. 114-16)

47. These three firms (with the bulk of the work being performed by HM&F) represented the corporation, and investigated and responded to the search-warrant allegations. DOE was made aware from the beginning that Rockwell retained outside counsel. (Tr. 115-16, 674, 675)
48. During the period from June 6 through December 31, 1989, Rockwell relied on the search-warrant affidavit for understanding the charges being made against it. (Tr. 246)
49. Given the nature of the allegations, it was imperative that Rockwell promptly determine whether or not the allegations against it were true. For each allegation, HM&F, with assistance as needed from the two other firms, conducted an investigation into the validity of the allegations. They identified and interviewed people who would be knowledgeable about the subject matter of the allegations, identified and reviewed documents relevant to the allegations, and retained experts and investigators to assist in the investigation. (Tr. 250-63)
50. The efforts of Rockwell's outside counsel showed that each and every allegation contained in the search-warrant affidavit was not supportable, either legally or factually. (AE-28 at 17-18; Tr. 110) The efforts of Rockwell's counsel in discrediting the search-warrant affidavit allegations, which implicated DOE as well as Rockwell, benefited both DOE and Rockwell.
51. The services provided by these three law firms through December 31, 1989, the costs of which are at issue in this appeal, were all performed in connection with the Uncharged Conduct. (AE-434-436) These three firms invoiced Rockwell \$1,157,364 for their services. The invoices were determined by Rockwell to be reasonable in nature and amount, and Rockwell paid the full amount of the invoices. (JS 29; Tr. 116-18)
52. Rockwell did not provide written notice to the DOE Contracting Officer of the Grand Jury's actions against it, nor did it obtain the written approval of the DOE Contracting Officer to proceed with its defense against the Grand Jury actions.
53. On or about September 16, 1992, Rockwell submitted Voucher No. 31 to DOE seeking reimbursement of \$1,157,364 for the costs that Rockwell incurred in providing defense counsel for Rockwell in connection with the investigation from June 6, 1989, through December 31, 1989.
54. From the beginning, DOE was aware of the FBI raid, and the Grand Jury's focus on Rockwell and DOE. It was also aware that Rockwell had engaged counsel to represent it. (Tr. 674-675)

Rockwell Retained Legal Counsel for Current and Former Employees

55. Rockwell understood very quickly that individual Rockwell employees would need legal representation. Over the course of the federal investigation, approximately 100 employees underwent questioning by federal agents. (Tr. 121-23, 319)
56. Two Rockwell employees, Ms. Brever and Ms. Pitts, told federal investigators that the Building 771 incinerator was being operated when it should not have been. The incinerator ran 3 shifts per day. It required 15 to 20 employees, per shift. If Ms. Brever and Ms. Pitts had been correct, up to 60 Rockwell employees would have been implicated in criminal conduct.
57. In some instances, federal investigators intimidated Rockwell employees during the interrogation process. Some employees were accused of lying when they failed to support the allegations of Ms. Brever and Ms. Pitts. (Tr. 267-69; AE-12) Rockwell believed that some of its employees could be subject to prosecution under the false statement or obstruction statutes. (Tr. 232, 318-19)
58. About 50 Rockwell employees received Grand Jury subpoenas. (Tr. 322-23) A witness subpoenaed before a Grand Jury needs legal counsel to prepare testimony, protect constitutional privileges and, possibly, negotiate what use may be made of the testimony.
59. About 50 Rockwell employees negotiated immunity agreements with the prosecutors. Immunity agreements can be crafted in different ways and it is advisable to have legal representation when negotiating immunity agreements. (Tr. 323-25)
60. A target of a criminal investigation is a person likely to be indicted. The U.S. Attorney's Manual provides that persons likely to be indicted should receive "target letters" advising them of their status. Eight Rockwell employees received target letters. The target letters suggested that the recipients retain counsel. (Tr. 325-28; AE-252-259)
61. Dominick Sanchini, the Rocky Flats Plant Manager, was also a target of the criminal investigation. Mr. Sanchini did not receive a target letter because he died in late 1990, and the target letters were issued in April 1991.
62. Because of the low threshold for felony violations of environmental laws, such as RCRA and the CWA, individual employees were vulnerable to criminal liability.
63. It was not feasible for Rockwell to determine which employees were in actual jeopardy. DOJ investigated a wide range of Rockwell employees and considered pursuing indictments against a number of individuals, including lower-level employees. (AE-28 at 52-54) Indeed, prosecutors considered their strongest

- cases to be against low-level employees (AE-28 at 53) Moreover, DOJ used the threat of prosecution of individuals as leverage against Rockwell, even though some of the prosecutors considered the cases against them to be marginal. (AE-28 at 23; AE-52-54)
64. As late as September 26, 1991, DOJ was still considering the possibility of indictments of individuals, including some lower-level employees. (AE-28 at 53)
 65. As part of its responsibility to its employees, Rockwell retained and paid for legal representation for its employees who became involved with the Federal investigation. (Tr. 121-23)
 66. DOE's witness, Mr. Currier, acknowledged that after the FBI raid, DOE employees who had been engaged in waste management and RCRA compliance at Rocky Flats were concerned that they might be subjects of the criminal investigation. (Tr. 783)
 67. DOE presented no evidence suggesting that it was unreasonable for Rockwell to provide counsel for any employee in connection with the federal investigation or that any employee for whom counsel was provided was not potentially implicated in the criminal investigation.
 68. In some instances, HM&F also represented Rockwell employees in connection with the criminal investigation. Where necessary, however, such as where a real or potential conflict of interest arose, independent counsel was required for certain employees. In those instances, Rockwell paid for the costs of independent legal counsel for the employees. (Tr. 125-27) In some instances, the prosecutors demanded that employees have counsel separate from HM&F. (Tr. 332-35)
 69. HM&F and counsel for a significant number of employees entered into joint defense agreements for the purpose of sharing information without waiving privileges. These agreements are common and have been recognized in the Tenth Circuit, the circuit with jurisdiction over the District Court of Colorado. (Tr. 335-36) The joint defense agreements allowed HM&F, who had been collecting and studying documents and information since June 1989, to share that data with counsel for the employees without waiving privileges. This enabled counsel for the employees to become thoroughly prepared in an expeditious and cost-effective manner.
 70. Counsel representing present and former Rockwell employees invoiced Rockwell \$3,725,461 for their services. After determining that those invoices were reasonable in nature and amount, Rockwell paid those invoices. (AE-414-433; Tr. 132-35) On or about August 25, 1992, Rockwell submitted voucher No. 30 to DOE seeking reimbursement of these costs. (JS 28)

71. By letter dated July 14, 1989, approximately 5 weeks after the start of the raid, and no more than 2 weeks after impanelment of the Grand Jury, Rockwell informed the Contracting Officer that it was engaging counsel for employees that desired counsel, and that it had incurred \$8,000 in costs therefor during the month of June. (AE-383; JS 14) It requested his approval pursuant to the provisions of Appendix A of the 1989 Contract (“Appendix A”).
72. The Contracting Officer denied approval. He stated that paragraph J of Appendix A (“the Employee Defense Provision”) related to situations where “a claim or legal action is brought against an employee as a result of the employee’s conduct when performing duties under the contract and within the employee’s scope of employment.” He indicated that he was not aware of any such claim or legal action being brought against an employee. (AE-384)
73. Rockwell replied that the Contracting Officer had placed an “unduly restrictive and unintended interpretation upon the [cited] wording.” It requested reconsideration and a meeting. (AE-385) The Contracting Officer responded that the Employee Defense Provision “addresses this matter and is clear that the legal expenses for which you seek approval are not within its terms” and that the “general principals [sic] of cost allowability are not pertinent.” (AE-386)
74. In this correspondence, DOE never suggested that it would not reimburse the costs because they were incurred in defending actions or proposed actions of the United States (Tr. 128-32), a defense now asserted by DOE.
75. No Rockwell employee or former employee was ever indicted in connection with the criminal investigation. (Tr. 315)

Rockwell Developed and Maintained a Computerized Database

76. Rockwell incurred costs of developing and maintaining a computerized database for use in the Federal criminal investigation and related civil actions. Rockwell, DOE, and successor contractors at Rocky Flats have also used the database in criminal and civil litigation and in carrying out day-to-day administrative projects and tasks.
77. From the start of the Federal investigation, it was evident that a very large number of documents would be involved. Hundreds of thousands of pages of records were seized by Government agents in the initial FBI raid. The Grand Jury almost immediately began subpoenaing documents from DOE and Rockwell. (Tr. 341-42, 406)
78. Many of the documents seized or subpoenaed were necessary for the ongoing operation of the plant and needed to be tracked and quickly retrieved. (Tr. 241) In light of the investigation’s widespread publicity, Rockwell knew that even if the criminal investigation ended, there could very well be additional civil

- enforcement proceedings, civil *qui tam* actions or other collateral civil actions that would require access to and use of the seized and subpoenaed documents. (Tr. 137)
79. Rockwell decided that a system was needed to organize, track, search, and retrieve the hundreds of thousands of pages of documents that would be involved. The only feasible method to accomplish these tasks was to set up a computerized database. (Tr. 410-11)
 80. Rockwell first looked into developing a computerized system internally, but concluded that developing the system internally was not realistic given the short time requirements and its limited resources. (Tr. 412)
 81. After a search for qualified firms, Rockwell retained Lawyer's Edge, which later became LSI Corporation ("LSI"), to create, develop and maintain a computerized database. (Tr. 411-12)
 82. LSI developed a computerized litigation database that was able to search, track and sort the documents seized during the raid. Rockwell used the database to respond to Grand Jury subpoenas. EG&G, Rockwell's successor as DOE's M&O contractor at Rocky Flats, and DOE also used the database in responding to their subpoenas. (Tr. 410-11, 422)
 83. Rockwell and EG&G leased computer terminals for inputting document information into the database and hired people to input that information. (Tr. 415-16)
 84. DOE paid for (1) the copying of the seized and subpoenaed documents that went into the computerized database, (2) the leases of the computer terminals at the Plant used for inputting documents into the database, and (3) the salaries of all the individuals at the Plant who managed and performed the data entry. (Tr. 415-16)
 85. Over a million pages of documents were eventually coded into the database. It contained numerous searchable data fields (such as document's author, recipient, data, subject matter, etc.) and also had full images of the documents that could be viewed on a computer screen. (Tr. 428-30; 434-35)
 86. In addition to this original database, which Rockwell called the "Rocky" database, LSI created a separate database for the class actions called the "Flats" database. It also created and maintained a smaller database for the Stone case ("Stone") and the Brever and Pitts case ("Pitts"). LSI also created and maintained an "EG&G" database which was used by Rockwell and EG&G employees in document control activities for the civil cases. (Rule 4, Tab 15) All the databases together constitute the electronic database system.

87. After Rockwell's contract with LSI to develop and maintain the database ended on June 30, 1993, EG&G hired former LSI employees to continue the maintenance of the Plant's copy of the database so that DOE and EG&G could continue to use it. EG&G was reimbursed these costs by DOE. (AE-38; Tr. 452-53)
88. A copy of the database was in the office of the law firm that represented Mr. Sanchini, Rockwell's Plant Manager, who was a target of the criminal investigation. Two systems were located in Denver at the Hadden, Morgan & Foreman law offices. There was a system at the Plant. Shea and Gardner had a system set up while representing Rockwell in civil litigation and Dow Chemical's attorneys had a system in their offices. (Tr. 438-40)
89. Pursuant to an agreement among DOE, Rockwell, and EG&G, dated December 29, 1989, responsibility for managing and operating the Plant was transferred to EG&G, effective January 1, 1990, (the "Three Party Transfer Agreement"). Under that agreement, DOE agreed to pay all allowable costs of Rockwell's closeout and transfer activities, including "all actions necessary for the protection of Rockwell's continuing rights and interests and those of its employees and former employees...." Also under the agreement, Rockwell was obligated to support EG&G in EG&G's effort to respond to Grand Jury subpoenas, and other document requests. (AE-106 at 2; Tr. 426)
90. The Three Party Transfer Agreement provided in part that Rockwell shall:
- To the extent that it can be provided with the resources described in Paragraph 1c below, provide EG&G with support to respond to subpoenas or other document requests served upon EG&G in connection with any investigation, litigation, proceeding or inquiry related to any activity of the RFP [Rocky Flats Plant].
- (AE-106 at 2)
91. It also provided that:
- DOE agrees that all of the foregoing activities to be performed by Rockwell may be properly carried on pursuant to the M&O Contract and the costs thereof, subject to the allowable cost provisions of the M&O Contract, are allowable.
- (*Id.* at 16)
92. The database was used both by Rockwell's counsel and by counsel for the individual Rockwell employees in connection with the criminal investigation. (Tr. 350, 438-39) Rockwell used the database in connection with its defense against both Charged and Uncharged Conduct.

93. Rockwell's database was also used by DOE and EG&G in connection with the criminal investigation. EG&G employees used the database extensively to respond to Grand Jury subpoenas issued to both DOE and EG&G. (Tr. 422-24) DOE received approximately 16 subpoenas, and EG&G received approximately 56. Rockwell received about 18 subpoenas. (AE-268-361)
94. Beginning on January 1, 1990, Rockwell used the database in civil litigation, including the Cook, Brever and Pitts, Building Trades, and Stone litigations. (Tr. 102, 430-31, 440-41; AE-38) EG&G used Rockwell's database on DOE's behalf to assist in civil litigation involving the Plant filed against EG&G, DOE and other parties. (Tr. 430-31, 435-43; AE-38) The Department of Justice used the database after intervening in the Stone case against Rockwell. (Tr. 441-43)
95. DOE has regularly used the Rockwell database in numerous other matters in addition to the criminal investigation and civil litigations. (Tr. 443-52; AE-260) DOE, through its follow-on M&O contractors, EG&G and Kaiser Hill, used the Rockwell database for major studies and projects beginning as early as 1990, including: (1) a historical release report, supporting an inter-agency agreement to document spills at the Plant since the 1950's, (2) the Dose-Neutron Reconstruction Report, (3) efforts to identify wastes that were shipped to DOE's Idaho National Engineering Laboratory, (4) support for DOE in responding to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 104(e) requests, (5) assistance to DOE in responding to FOIA requests, and (6) assistance to employees at the Plant in connection with their daily job duties. (Tr. 443-51)
96. The Rockwell database remains a valuable resource at the Plant. At the time of the hearing, DOE's current contractor at the Plant, and DOJ, were using it. (AE-260)
97. LSI invoiced Rockwell \$5,156,686 for its services in connection with the database. Rockwell submitted Invoice No. 56 to DOE seeking this amount and DOE refused payment. Previously, DOE had paid Rockwell \$416,311.59 for LSI's database development and maintenance services under an earlier voucher. (JS 31)

DOE's Indemnification Policy for M&O Contractors

98. For decades, the policy of DOE and its predecessor agencies has been to provide its M&O nuclear weapons contractors with virtually complete indemnification in the sense of reimbursing them for their expenses including losses, incurred in the performance of the contract work, that are necessary or incident thereto, with only narrow, defined exceptions. (AE-1 through AE-4; AE-64; Tr-40)

99. DOE viewed its reimbursement policy as an integral part of a rational, overall strategy to retain private industry to manage and operate the country's nuclear weapons production facilities at a reasonable price. (AE-1 at 2-3)
100. Rockwell entered into the Contracts knowing and relying on DOE's reimbursement policies and practices, and DOE knew that M&O contractors relied on those policies. (Tr. 47-48; AE-64 at 1)
101. In a change to the DEAR published as a final rule on January 4, 1987, DOE reiterated DOE's reimbursement policy:

It is DOE policy to reimburse management and operating contractors for fines and penalties that are incurred in the performance of their contracts. Any such reimbursement for fines and penalties incurred under the contract will be made as long as such fines and penalties are not the result of the willful misconduct or lack of good faith on the part of the contractor's corporate officers, directors or supervising representatives.

(AE-3 at 20)

102. The official comments accompanying the final rule stated:

Also, a new cost principle has been added at DEAR 970.3102-21, Fines and Penalties, to reaffirm DOE's policy concerning the reimbursement of fines and penalties incurred by M&O contractors. The new cost principle reflects the special contractual relationship established between M&O contractors and DOE. M&O contractors are expected to follow DOE's general contract guidelines, as well as specific orders, guidelines, etc., regarding performance and utilize DOE's financial resources to assure, among other things, health, safety, and protection of the environment. In carrying out these functions under the broad cost-reimbursement nature of M&O contracts, it is contemplated that M&O contractors will not assume significant financial risks.

(AE-3 at 13)

103. The above cited DEAR policy and cost principle remained in effect during the terms of the Contracts.
104. The DOE Inspector General, in a report dated September 1989, summed up DOE's reimbursement policy:

The Department's fundamental policy is, with few exceptions, to completely indemnify its M&O contractors, bear substantially all risks, both nuclear and non-nuclear, and pay all costs associated with running its facilities. These costs include fines, penalties, liabilities, claims, losses, and damages. The major exceptions to total indemnification are costs that have been specifically identified in the contract as unallowable, losses or expenses that result from the willful misconduct or lack of good faith on the part of a few, key contractor personnel, and

finances and penalties incurred on activities outside the scope of work or without contracting officer approval.

(AE-1 at 2-3)

105. In that same report, the DOE Inspector General reported further that the Department had reaffirmed its policy in a memorandum dated October 9, 1985:

The memorandum, a statement of policy supported by the Assistant Secretary for Management and Administration, the General Counsel, and the Director of Procurement and Assistance Management, announced that the Under Secretary reaffirmed that the Department would indemnify its management and operating contractors for liabilities incurred in the performance of their contracts “as long as such costs or liabilities are not the result of the willful misconduct or lack of good faith on the part of the contractor’s officers, directors or supervising representatives.” It also states that “fines and penalties are unallowable costs unless incurred with the written approval of the contracting officer, or as a result of compliance with the provisions of the contract.” (Stated another way, fines and penalties are allowable when incurred as a result of compliance with the scope of work, specific terms and conditions or other provisions of the contract, or when approved in writing by the contracting officer.)

(AE-1 at 12)

106. DOE’s General Counsel acknowledged, and communicated to others within DOE, that DOE contractors, in entering into M&O contracts, relied on very broad reimbursement clauses covering virtually all conceivable claims:

In the negotiation of our contracts, the M&O contractors expect no degree of financial exposure or risk in connection with their activities on behalf of DOE; rather, they have been led to believe that virtually all contract costs will be reimbursed. In general, this expectation is shared by DOE and is reflected in the terms of the contracts.

(AE-64 at 1)

The Environmental Cost Provision

107. In the mid-1980’s, Rockwell had concerns about the increasing application of environmental laws to DOE facilities such as Rocky Flats following DOE’s initial opposition to the application of these laws. Rockwell worried that at some point EPA or state regulators would lash out at some DOE facility in the face of ever-increasing community and political activism directed at DOE facilities. DOE’s continued resistance to accepting RCRA regulation at its facilities fed hostility in the enforcement agencies. (Tr. 60)
108. Rockwell was worried that Rocky Flats would be a lightning rod because the Plant was located in the state with probably the most activist environmental

community. Rocky Flats was often the target of anti-nuclear protests in the late 1970's and early 1980's. (Tr. 60-61)

109. Rockwell was concerned that it and DOE might be subject to environmental fines and penalties for activities at the Plant. (Tr. 61)
110. The "Environmental Cost Provision" was negotiated for Rockwell's 1986 Contract providing for reimbursement of costs arising out of or relating to environmental activities at the Plant. It provides:

(16) All cost incurred by the Contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties (such as civil sanctions including fines), arising out of, or related to environmental, safety and health activities, including costs incurred with respect to investigation, removal, remedial action, ground and surface water or other clean-up of hazardous, toxic or contaminated material(s), except for those costs that result from conduct identified in subparagraph (e)(17)(ii) of the clause entitled, "Allowable Costs, Base Fee and Award Fee."

(See FOF 12, Subparagraph (d)(16))

111. The Environmental Cost Provision was consistent with DOE's decades-old indemnification policies. (AE-1 at 11-12) DOE's Albuquerque Operations Office endorsed the Environmental Cost Provision with the concurrence of the DOE Office of General Counsel. (AE-40 at 6) Similar language appears in a number of other DOE M&O contracts (AE-1 at 12)
112. The sole exception to the allowability of covered costs within the Environmental Cost Provision is where the losses or expenses "result from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel, as defined in the clause of this contract entitled, 'Property'." (See FOF 12, Subparagraph (e)(17)(ii).)
113. The Record of Negotiated Procurement Action documenting the negotiation for the contract changes states that the Environmental Cost Clause was added to cover the contractor against fines and penalties arising out of, or related to environmental safety and health activities. (AE-40 at 6)

**DOE Reimbursed the Costs of Resolving EPA Charges Under the
Federal Toxic Substances Control Act ("TSCA")**

114. In 1986 and 1988, the EPA, an Agency of the United States, issued complaints to Rockwell alleging environmental violations of TSCA regarding activities at Rocky Flats. These allegations were resolved by consent agreement that included Rockwell's payment to EPA of \$47,500. DOE reimbursed Rockwell the \$47,500 as an allowable cost under the Contract. (Tr. 73-76; AE-42) DOE fully reimbursed Rockwell the costs of retaining counsel. (Tr. 77)

115. In the course of that EPA civil action, DOE prepared several affidavits and memoranda setting forth its position on the respective roles of Rockwell and DOE, including who bore the risk of any fines or penalties levied by EPA. One such memorandum provided:

Unlike typical industrial firms operating in the private sector, Rockwell exercises no control over decisions which are fundamental for the typical private business enterprise. These fundamental decisions – what to produce, what shall be the product specifications, what quantities shall be produced under what schedules, what raw materials shall be used, what shall be the disposition (market) of the product, and what capital shall be used to fund the operation – are all decisions made solely by the DOE upon whom responsibility for such decisions has been imposed by Congress.⁹

(AE-460 at 6-7)

116. Mr. Currier, DOE’s counsel at Rocky Flats, testified that he did not consider the Contesting Actions Clause when he recommended that the costs be reimbursed. (Tr. 664) In addition, the DOE Rocky Flats Area Office Manager made a determination that any civil penalty assessed in this EPA proceeding would be an allowable cost under the M&O Contract: “This finding was based on my determination that the alleged violations were not the result of any ‘willful misconduct or lack of good faith on the part of the Contractor’s corporate officers, directors, or supervising representatives’” (AE-461 at 12) The DOE manager also referred specifically to Section 54(e)(12), Fines and Penalties Clause, of the 1986 contract. He never referred to the Contesting Actions Clause, Section 54 (e)(16). There is no evidence that DOE ever suggested that the Contesting Actions Clause applied to disallow costs incurred contesting actions or proposed actions of the EPA, even though the EPA is an Agency of the United States.

DOE Reimbursed the Costs of Resolving Alleged Violations of the Federal Resource Conservation and Recovery Act of 1976 (“RCRA”)

117. On June 7, 1989, under authority delegated by the EPA, an action was brought by the Colorado Department of Health (“CDH”) against Rockwell and DOE for 25 alleged environmental violations of RCRA at the Plant. These allegations were based for the most part on findings made by CDH based upon its inspections of the Plant in 1987 and 1988. (Tr. 82-83, 85-86; AE-459; AE-47)
118. Those allegations were resolved in a June 1989 Settlement Agreement as to both Rockwell and DOE by payment of \$95,800 by DOE. Rockwell incurred costs in defending against the RCRA allegations. DOE reimbursed Rockwell for all of its defense costs. (Tr. 87-88)

⁹ While this memorandum was never filed in that proceeding, DOE counsel at Rocky Flats at that time testified that he participated in the drafting of the document and vouched for the accuracy of its contents. (Tr. 702)

119. DOE has consistently reimbursed its M&O contractors for the fines and penalties imposed by Federal and state agencies. It has also reimbursed all related legal costs incurred by the M&O contractors in contesting the Federal and state actions. (AE-23 at 20; AE-48 DOE's response to Interrogatory No. 49)

Rockwell's Contract Disputes Act Claim

120. On June 22, 1995, Rockwell sent a claim in writing to the Contract's Contracting Officer seeking reimbursement of the unpaid costs included in Vouchers Nos. 30, 31, and 56. (JS 42)
121. The June 22, 1995, claim converted the unpaid costs under Vouchers Nos. 30, 31, and 56 into a Contract Disputes Act claim. John R. Stocker, Rockwell's Vice President-Law, certified the claim. The Contracting Officer received the claim on June 23, 1995 (JS 43).
122. Within 60 days of receipt of Rockwell's claim, the Contracting Officer neither issued a decision nor notified Rockwell of the time within which a decision would be issued. (JS 44)
123. After the 60-day period had expired, DOE sent Rockwell a letter advising that DOE needed more information to determine whether the requested costs were allowable. (Rule 4, Tab 6)
124. This action is brought under the Contract Disputes Act on Rockwell's June 22, 1995, claim and is an appeal of the Contracting Officer's deemed denial of Rockwell's claim. (JS 45)

OPINION

The Plea Agreement adopted by the United States District Court of Colorado in *United States v. Rockwell*, 92-CR-107 (1992) permits Rockwell to seek recovery of (a) attorney fees and costs incurred (on behalf of the corporation) "prior to January 1, 1990, (but not thereafter)," (b) attorney fees and costs incurred in providing legal representation to past and present Rockwell employees, and (c) costs concerning a computer system created by Rockwell for use in its defense. The Plea Agreement refers to the Major Frauds Act as the authority that allows Rockwell to seek this recovery. In our *Ruling Denying Respondent's Motion for Summary Judgment*, 97-1 BCA ¶ 28,814, we found that the District Court of Colorado had accepted the Plea Agreement as part of its judgment and that we were bound by that judgment. Accordingly, we held that the Major Frauds Act was not a bar to recovery of otherwise allowable costs incurred under the Contracts before January 1, 1990.¹⁰

¹⁰Respondent acknowledges that the Major Frauds Act does not apply to this appeal. Respondent's Post-Trial Brief (Res. Br.) at 54.

The parties have stipulated that all the costs sought by Rockwell in this appeal “belong to the three categories of costs identified” in the Plea Agreement. (JS 39) Hereinafter, we refer to the three categories respectively as “Corporate Defense Costs,” “Employee Defense Costs,” and “Database Costs.” The issues of entitlement and quantum have been bifurcated. We decide only the issue of entitlement here.

The issues before us are allowability issues. Rockwell contends that all the costs it seeks are within the scope of the Contracts, were incurred in performance of the work under the Contracts, were necessary or incidental thereto, and are allowable under certain specific provisions of the Contracts. It contends that the Contracts included an obligation on the part of DOE to “indemnify” it for virtually all its costs, expenses, and losses incurred in the performance of the Contract or incident thereto, with the only material exception being the “willful misconduct exception.”¹¹ It alleges that these costs are not rendered unallowable by any specific disallowance provision or by the absence of notice or approval.

DOE agrees that it is required to reimburse Rockwell for virtually all its costs and expenses, but argues that “virtually” all does not mean all and that there are specific contract terms that govern the allowability of costs. (Pre-hearing Conference dated May 18, 1999, Tr. 88) It contends that the Contracts render these costs unallowable as costs of “contesting actions or proposed actions of the United States” under the Contesting Actions Clause, or because notice and approval requirements were not met under the Litigation and Claims Clause.¹² (Res. Br. at 34 and 57)

Rockwell managed and operated the Rocky Flats Nuclear Weapons Plant under Contracts with DOE beginning in 1975 to December 31, 1989. It is important to note that the system of “Management and Operating” (M&O) contracts that DOE has used and still uses to manage its National Laboratories and its nuclear R&D and production facilities is a unique system. The M&O Contract concept evolved from the Manhattan Project that was developed to engage the cream of American industry to apply their best management methods in the effort to produce the atomic bomb. The inherently dangerous nature of radioactive materials and nuclear weapons, along with national security concerns, mandated Government control of the research, design, development and production of nuclear weapons. Practicality and a shortage of Government employees with the requisite skills forced dependence on the private sector – a dependence that was evident in the operation of the Rocky Flats Plant. Security, safety, and a huge resource requirement led to Government-controlled and contractor-operated research, design, development, testing and production facilities.¹³ All together, mission, urgency,

¹¹ Respondent takes exception to Appellant’s use of the word “indemnify.” For purposes of this appeal, however, Respondent’s distinction between an obligation to reimburse and an obligation to indemnify is one that has no bearing on the outcome of the case. See also AE-1 at 11-12 in this regard.

¹² For ease of reference, we have given short titles to those Contract clauses, such as the Contesting Actions Clause and the Litigation and Claims clause, that are relevant in this appeal. These short titles are listed in Footnote 3.

¹³ A document prepared by DOE for filing in an EPA case brought against Rockwell stated:

practicality and policy led to a unique contractual relationship of interdependence between the Government and a number of the largest corporations in America.

The Atomic Energy Act of 1954, 42 U.S.C. ¶ 2011 *et seq.* conferred upon the Atomic Energy Commission unique contracting authority to develop appropriate contracting mechanisms that continued without substantial change to the time the Contracts were executed. See e.g., AE-58 at 62-65. The Government/M&O contractor relationships under these contracts varied according to mission, location, and history. However, common elements of this relationship, which are evident in part 970 of the DEAR, distinguish this method of contracting from other methods of Federal contracting.

Corporate Defense Costs

Rockwell claims entitlement to its corporate defense costs incurred prior to January 1, 1990. All of these claimed attorney fees and costs incurred by Rockwell relate to Rockwell's defense against the suspected criminal activity that was the basis for the search warrant and the raid on Rockwell's Plant on June 6, 1989.¹⁴ The United States Department of Justice never substantiated this suspected criminal activity and Rockwell was never charged, let alone convicted, of any of this suspected criminal activity. No Rockwell employee was ever charged or convicted of any crime. (FOF 24)

The parties have stipulated that the costs sought here do not include costs incurred in Rockwell's defense against charges to which it ultimately pled guilty and was convicted. (JS 30) Rather, these costs were incurred in successfully defending against suspected criminal activity that formed the basis for the affidavit supporting the search warrant. This conduct is referred to as "Uncharged Conduct" to distinguish it from "Charged Conduct," the conduct to which Appellant pled guilty.

The crimes of which Appellant was ultimately convicted were not of the same character as those set forth in the search warrant affidavit. They resulted from a second round of investigations that was essentially a separate investigation initiated when the first phase failed to produce evidence of the suspected crimes. Accordingly, we see no "spill-over taint" from the second phase of the investigation to the first, since the conduct underlying the convictions in the second phase was independent of the conduct upon which the first phase focused.

Rockwell and DOE operate so interdependently at Rocky Flats Plant and that DOE maintains sufficient authority over management of the facility that the identities of the two entities have essentially merged for purposes of assessing responsibilities for discharging the statutory defense mission involved at this facility.

(AE-460 at 12-13) This document was never filed in the EPA case. However, the preceding quote was read at the hearing and DOE Counsel at Rocky Flats who assisted in drafting the document confirmed that the statement was accurate. (Tr. 706-07)

¹⁴ This alleged activity was the basis of the affidavit upon which the search warrant for the raid was authorized, and was the focus of the Grand Jury investigation until long after January 1, 1990.

Opinion

Rockwell argues that DOE assumed virtually all risk related to performance of the Contracts. It contends that DOE's assumption of such risk included an obligation to "indemnify" it for virtually all its costs, expenses, and losses incurred in the performance of the contract or incident thereto, with the only material exception being the "willful misconduct" exception. More specifically, it argues that its costs incurred before January 1, 1990, in defending itself against the Uncharged Conduct are reimbursable under the terms of the Contracts. Rockwell contends that the General Allowability Clause, the Environmental Cost Clause, and the Fines and Penalties Clause all make these costs allowable.¹⁵

DOE counters that none of these clauses, together or alone, is determinative because the Contesting Actions Clause specifically makes these costs unallowable.¹⁶ DOE further argues that the Litigation and Claims Clause, in any event, bars recovery because Rockwell allegedly did not provide the required notice or obtain the required approval prior to expending such costs.

Rockwell argues that the Environmental Cost Clause was specifically negotiated for the Contracts and that, as a later-in-time and as a specifically negotiated provision, it prevails over the Contesting Actions Clause under well established rules of contract interpretation. Conversely, it maintains that the Contesting Actions Clause is a boilerplate relic that had long since been forgotten by DOE, had never been enforced by DOE, and was discovered and asserted by DOE only after this litigation was well underway.¹⁷

Rockwell maintains that the Contesting Actions Clause must be read in conjunction with the Fines and Penalties Clause, and, that when so read, the corporate defense costs are plainly allowable. Rockwell avers that DOE's interpretation of the Contesting Actions Clause is inconsistent with the stated policies and practices of DOE. Lastly, Rockwell maintains that the Litigation and Claims Clause does not apply, and that, even if it did apply, failure to provide notice, or to obtain approval, under this clause, is not a valid defense to its claim.

We first look to the General Allowability Clause. This Clause makes allowable "costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c)." (FOF 12) Subparagraph (c)

¹⁵ See Footnote 3 of Findings of Fact.

¹⁶ The parties do not dispute that the investigation and the Grand Jury proceedings were actions of the United States. Further, it is DOE's position that Rockwell's culpability regarding the alleged environmental crimes at the Rocky Flats Plant that formed the basis of the search warrant is immaterial to the application of the Contesting Actions Clause. According to the DOE, it makes no difference whether the contractor was successful in contesting the action of the United States.

¹⁷ DOE has not disputed Rockwell's assertion that the Contesting Actions Clause has never before been enforced against an M&O contractor for environmental violations.

states that the allowability determination will be based upon reasonableness, including the exercise of prudent business judgment, the application of generally accepted accounting principles and the recognition of exclusions and limitations set forth in the Contracts.

In this case there is little doubt that the defense costs incurred in defending against the allegations contained in the search warrant were costs incurred within the scope of the Contracts and were necessary or incident thereto. These defense costs arose from Rockwell's need to defend itself against baseless allegations that Rockwell was violating various environmental laws under its Contracts. Such a decision was well within the performance envisioned by the Statement of Work and the Scope of Work. The expense to which the contractor was put in defending its performance could not have arisen but for the Contracts. In addition, the Environmental Cost Clause, addressed below, was specifically negotiated to cover all costs arising out of or related to environmental activities, except for those caused by the willful misconduct of senior management. This clause further supports the inclusion of these claimed costs within the scope of the contract work. There is no dispute that the defense costs were reasonable in nature and incurred in the exercise of a prudent business decision.¹⁸ Accordingly, the General Allowability Clause is met for entitlement purposes unless a contract exclusion applies. DOE asserts that the Contesting Actions Clause constitutes such an exclusion. We now examine the relevant contract provisions governing cost allowability to determine whether that exclusion applies here. We begin by examining the Environmental Cost Clause.

The Environmental Cost Clause is listed as an item of allowable cost under the Allowable Cost Clause. This clause was specifically negotiated between DOE and Rockwell for Rockwell's 1986 contract. It was negotiated at a time when local activists were pushing for actions to be taken against Rockwell. The negotiation memorandum specifically mentions reimbursing "fines and penalties" as being the reason for the inclusion of the clause. (FOF 113) The language used is broad in scope and reflects the intent that Rockwell be reimbursed to the maximum extent possible for costs incurred in the performance of contract work related to environmental, health and safety activities. This clause specifically states that "[a]ll cost incurred by the contractor with respect to any and all liabilities, claims, demands, damage costs or penalties (such as civil sanctions including fines) arising out of, or related to environmental, safety and health activities" are allowable. The lone exception to "all cost" found in this clause is for willful misconduct or lack of good faith on the part of the Contractor's managerial personnel. The fact that only one specific exception to the allowability of costs is cited emphasizes the encompassing nature of this clause. Surely, the drafters were trying to make their intent clear. The only contract work (relating to environmental, health and safety activities) that would be excluded from coverage was in the very unusual circumstance where work was tainted by managerial bad faith or misconduct. This

¹⁸ The issue of quantum is not before us in this appeal. Consequently, the reasonableness of the amount of the defense costs incurred is not in issue.

expansive interpretation comports with other evidence showing that this kind of coverage has long been DOE's practice and policy under M&O contracts. DOE believed that M&O contractors should not face any financial risks for performing the uniquely hazardous and technical work required by these contracts.

Next, we look at the Fines and Penalties Clause. This clause, listed under the unallowable cost items, disallows fines and penalties incurred for violations of Federal, state, or local laws or regulations, except where those fines and penalties were incurred by the contractor because it was performing work contracted for by DOE.¹⁹ In other words, under the exception, if the performance of work required or authorized under the contract violates a particular law, and the contractor is found liable and receives a fine, those fines will not be disallowed by this clause. This certainly seems fair and reasonable when the contractor is performing work that DOE contracted or authorized it to do. Indeed, it has long been the policy of DOE to allow fines and penalties incurred in the performance of M&O contracts. In 1987, DOE modified the DEAR to include a new cost principle, DEAR 970.3102-21, Fines and Penalties. This principle stated unequivocally that DOE's policy was to reimburse management and operating contractors for fines and penalties that are incurred in the performance of their contracts. It further stated that any such reimbursement would be made as long as such fines and penalties were not the result of the willful misconduct or lack of good faith on the part of the contractor's corporate officers, directors, or supervising representatives. The official comments accompanying this rule made clear that this was a continuation of existing policy. (FOF 102)

DOE has traditionally interpreted the Fines and Penalties Clause as specifically covering all defense costs. At the hearing on this appeal, Counsel for DOE stated:

Subparagraph (e) talks about the unallowability of fines and penalties. In the cases we know of in the DOE complex including the two under this contract those fines and penalties were determined by the Government to be allowable. Either in terms of the contractor complying specifically with the terms and conditions of the contract or at the direction of the contracting officer. If the costs are allowable in terms of fines and penalties, then traditional interpretation of DOE's contracts are that the expenses follow the fine or the penalty. [underling added]

(Tr. 25)

This policy of paying for defense costs relating to allowable fines and penalties apparently predates the Contracts in issue. On October 9, 1985, J. Michael Farrell, DOE's General Counsel, and Martha O. Messe, Assistant Secretary, Management and Administration, seemingly endorsed this policy when they signed a joint memorandum stating:

As a result of consistent recommendations made by the Assistant Secretary for Management and Administration, the General Counsel, and the Director, Procurement and

¹⁹ The differences between the 1986 and 1989 versions of the Fines and Penalties clauses are not significant to this case.

Assistance Management, the Under Secretary reaffirmed the Department's policy that fines and penalties are unallowable costs unless incurred with the written approval of the contracting officer, or as a result of compliance with the provisions of the contract. He also reaffirmed the policy and practice that the Department will indemnify its management and operating contractors for liabilities incurred in the performance of their contracts. Any such indemnification for liabilities incurred under the contract will be made as long as such costs or liabilities are not the result of willful misconduct or lack of good faith on the part of the contractor's officers, directors or supervising representatives.

(AE-75)

Although this memorandum does not specifically refer to defense costs as liabilities, it clearly seems to address those costs. The memo covers only two categories: (1) the allowance of fines and penalties when incurred due to contract performance, and (2) liabilities incurred due to contract performance. Since defense costs are such liabilities and do not fall within the sole exception ("willful misconduct" exception) set forth, the inference is that this memorandum was intended to cover such costs. Indeed, the DOE Inspector General reasserted this policy, in a September 1989 report to the Secretary of Energy as follows:

The Department's fundamental policy is, with few exceptions, to completely indemnify its M&O contractors, bear substantially all the risks, both nuclear and non-nuclear, and pay all costs associated with running its facilities. These costs include fines, penalties, liabilities, claims, losses and damages. The major exceptions to total indemnification are costs that have been specifically identified in the contract as unallowable, losses or expenses that result from the willful misconduct or lack of good faith on the part of a few, key contractor personnel, and fines and penalties incurred on activities outside the scope of work or without contracting officer approval.

(AE-1 at 2-3)

With this well established and longstanding policy of DOE of allowing the costs of defending against fines and penalties when those fines and penalties were incurred due to contract performance, the Board finds that this interpretation of the Fines and Penalties Clause is the proper interpretation under these Contracts. This interpretation is reasonable since it would make little sense to reimburse contractors under the Fines and Penalties Clause for fines and penalties incurred because of the performance of contract work and at the same time not allow the contractor the costs of defending against the imposition of those same fines or penalties. If the fines or penalties were allowable and the cost of defense were not allowable, there would be no incentive for the contractor to expend any funds defending itself against any alleged environmental violation. It follows that, in situations such as here, where the contractor successfully defends against the alleged violations, and no charges are brought and no fines are imposed, the defense costs would still be allowable under the exception stated in this provision.²⁰

²⁰ Since the evidence shows that the allegations supporting the search warrant were unsubstantiated, the nature of the allegations (i.e., whether civil or criminal) is irrelevant. Rockwell's costs to defend itself against baseless allegations of violations of environmental law would be allowable under the Contracts, regardless of the nature of the allegations. It would make no sense to find the costs of defending against

This interpretation also fits squarely within the provisions of the Environmental Cost Clause discussed above. Both of these clauses, together and separately, make allowable the costs of defending against the imposition of fines and penalties associated with the contract work. The only issue left to be decided then is, “Does the Contesting Actions Clause disallow these kinds of defense costs, and, if so, does it take precedence over the Environmental Cost Clause and the Fines and Penalties Clause?”

The Contesting Actions Clause disallows: “Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions of [sic] proposed actions of the United States, and prosecution or defense of patent infringement litigation.” (underlining added)

Respondent focuses on the “contesting actions” phrase in this clause as the basis for denying Rockwell’s corporate defense costs. On its face this clause seems clear. It could be interpreted to cover all actions brought by the United States, as DOE argues. Certainly, the kinds of actions by the United States that are not covered by this clause, if any, are not specifically set forth within the wording of the clause. However, despite DOE’s earlier argument that the wording was clear, DOE has since admitted that at least one exception does exist. DOE has admitted in its brief that when the interests of DOE and M&O contractors are not in conflict, costs incurred in contesting actions of the United States can be paid.²¹ (Res.Br. 66) Certainly then, DOE has admitted that the Contesting Actions Clause does not cover all actions of the United States.

Furthermore, it has been DOE’s practice for some time to pay the costs associated with contesting certain actions of the United States. DOE admits that it paid the defense costs in the Toxic Substances Control Act (“TSCA”) cases where DOE reimbursed Rockwell \$47,500 to settle a compliance action. These costs

baseless civil allegations allowable and at the same time to find that the cost of defending against baseless criminal allegations unallowable.

²¹ The DOE’s position here is not clear. It alleges that an exception exists to the Contesting Actions Clause when no conflict of interest exists between DOE and the contractor. In other words, DOE maintains that when the contractor is contesting an action of the United States, the DOE can pay the costs of the contractor’s defense when there is no conflict of interest between DOE and the contractor. DOE, however, fails to explain where the conflict is in this case and why none existed in other cases where DOE reimbursed defense costs. DOE simply asserts: “Rockwell’s hotly contested defense of the Government’s action which commenced with the FBI raid and continued on through the Grand Jury proceeding and resulted in Rockwell’s agreeing to plead guilty to six felonies and four misdemeanors and pay an \$18.5 million fine, is the ultimate example of a conflict of interest between the Government and a contractor.” (Res. Br. at 68) This explanation leaves much to be desired. Is DOE claiming that Rockwell’s defense created the conflict? If so, why didn’t its defense in other cases, where defense costs were paid, create a conflict? Is DOE claiming that the raid, the Grand Jury proceeding, or the guilty plea created the conflict here? We know of no reason why that would be true. DOE has simply failed to adequately explain its position on this point.

were incurred by Rockwell in contesting an action of the EPA, an Agency of the United States.²² Also, DOE reimbursed Rockwell for defense costs incurred in the Resource Conservation Recovery Act (“RCRA”) cases. These cases were brought by the Colorado Department of Health under state hazardous waste laws pursuant to the authority delegated to it under Federal Law (42 U.S.C. § 6926) to enforce RCRA within the state of Colorado. At the hearing, Counsel for DOE admitted “that DOE had a history in the mid to late ‘80’s and the early ‘90’s of reimbursing costs associated with enforcement actions brought by the United States Environmental Protection Agency.” (Tr. 25)²³

When the legal action of the United States could or did result in a fine or penalty being levied, and when the conduct that led to the violation was conduct required by the contract, it has been DOE’s stated policy to allow the costs incurred, including defense costs. It seems then that DOE finds itself in the rather awkward position now of arguing that the Contesting Actions Clause should be interpreted as disallowing all costs incurred contesting actions of the United States while at the same time admitting: (1) that exceptions exist to its current interpretation, (2) that it has not interpreted the Contesting Actions Clause as a bar to payment of such costs in the past, and (3) that it has, in fact, paid such costs despite the Contesting Actions Clause.

Under well-settled rules of contract interpretation, the pre-dispute interpretation of a clause carries great weight in deciding the proper interpretation of that clause. In *SIPCO Services and Marine, Inc. v. United States*, 41 Fed. Cl. 196, 213 (1998), the United States Court of Federal Claims stated:

“A principle of contract interpretation is that the contract must be interpreted in accordance with the parties’ understanding as shown by their conduct before the controversy.” *Julius Goldman’s Egg City v. United States*, 697 F.2d 1051, 1058 (Fed. Cir.) cert.denied, 464 U.S. 814, 104 S.Ct. 68, 78 L.Ed 2d 83 (1983) quoted in *Acacia Villa v. United States*, 36 Fed. Cl. 277, 282 (1996). Thus, in its interpretation of the contract, the court will give weight to what the parties initially believed their respective obligations to be prior to any dispute.

“Only the action of the parties ‘before a controversy arises is highly relevant in determining what the parties intended.’” *Dynamics Corporation v. United States*,

²² See Res. Br. at 65. In this instance, DOE did not even take into consideration the Contesting Actions Clause when it paid Rockwell its defense costs. DOE apparently took the position that there was nothing in the contract that prohibited the payment of these costs that were otherwise properly payable. Mr. Currier, DOE Counsel at Rocky Flats at the time, testified that he did not consider the Contesting Actions Clause when he recommended that these costs be reimbursed. (FOF 116)

²³ By the time that DOE wrote its brief, it had changed its position and alleged that since the action was brought by the state of Colorado it was not an action of the United States. However, the statute specifically states at 42 U.S.C. § 6926 (d): “ Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as an action taken by the Administrator under this subchapter.” Since the Administrator referred to is the Administrator of the Environmental Protection Agency, the action by the state is the same as an action by the United States.

182 Ct. Cl. 62, 73; 389 F.2d 424, 430 (1968), quoting *Northbridge Electronics, Inc. v. United States*, 175 Ct. Cl. 426, 438, n. 8 (1966).

The Contesting Actions Clause cannot be read as DOE's eleventh hour interpretation would have us read it. As we have indicated, DOE has for some time interpreted the Contesting Actions Clause as containing an exception for the costs incurred defending actions of the United States when the conduct giving rise to the action was work performed under the contract or directed by the contracting officer.²⁴ Under this interpretation of the Contesting Actions Clause there is no conflict between the Contesting Actions Clause and the Fines and Penalties Clause and the Environmental Cost Clause.

Both the Fines and Penalties Clause and Environmental Cost Clause allow the costs incurred defending actions of the United States when the conduct giving rise to the action was within the purview of the work required under the contract or directed by the Contracting Officer. If we read the Contesting Actions Clause as DOE now wants it read, it would result in parts of those clauses being read out of the Contracts. Standard rules of contract interpretation prevent us from doing this, unless there is no other reasonable interpretation. Contracts must be interpreted as a whole, giving meaning to all provisions wherever possible.

[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. (Citations omitted)

Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972, 979 (Ct. Cl.1965). “[I]t is elementary that the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.” *Id.* at 975.

Since the Environmental Cost and the Fines and Penalties Clauses allow such costs, the only reading of the Contesting Actions Clause that is consistent with the other relevant clauses is that it does not apply to actions brought by the United States which are based upon work performed under the contract or directed by the Contracting Officer, as was the case here. Indeed, there is little question that both parties interpreted this contract in this manner during contract performance. It was only late in the litigation process, after the answer was filed, that DOE even came up with this interpretation and argument for unallowability. Such an interpretation

²⁴ There is some evidence in the record that DOE either did not realize that the Contesting Actions Clause was in the contract or simply ignored it. (Res. Br. at 66) In either event, DOE cannot now legitimately claim that it in the past did not except from the coverage of this clause costs incurred defending against actions of the United States when the conduct that initiated the action was work under the contract.

cannot prevail.²⁵ The Contesting Actions Clause does not make the claimed defense costs unallowable.

DOE further argues that corporate defense costs are unallowable because the Litigation and Claims Clause requires Rockwell to provide written notice to, and obtain approval from, the Contracting Officer prior to incurring corporate defense costs. It contends that without written notice and prior approval such costs are not allowable. DOE asserts that the only written notice it received of any kind was a letter dated August 30, 1991, almost two years after Rockwell engaged its counsel and initiated its defense. It does not deny that it had actual notice at the time that Rockwell had retained counsel to represent it.

Rockwell, on the other hand, argues that the Litigation and Claims Clause does not apply here. It contends that the Contracting Officer had no choice but to approve the costs because the Environmental Cost Clause makes such costs specifically allowable, and that the Environmental Cost Clause does not require prior notice and approval. Rockwell also argues that, in any event, DOE had actual notice that Rockwell was incurring corporate defense costs, and that actual notice is sufficient. Finally, Rockwell argues that DOE suffered no prejudice from the lack of written notice, and that without prejudice lack of written notice is no defense.

DOE's position here plainly lacks merit. The Litigation and Claims Clause was never intended to apply to the situation that Rockwell found itself facing at the time it hired its attorneys. The raid was, in effect, a surprise attack on the Plant. After the raid there was a tremendous amount of uncertainty regarding Rockwell's possible criminal liability, the potential criminal liability of its officers, directors and employees, and also the liability of DOE and its employees. Rockwell was under extreme pressure to act fast. The hiring of attorneys at that time was the only prudent thing for Rockwell to do. Where a contractor is the focus of a formal criminal investigation, there is little question of the legitimate business need for counsel. *See Commissioner v. Tellier*, 383 U.S. 687, 694-695 (1986). In addition, there can be no doubt that DOE was acutely aware that Rockwell had hired attorneys to protect Rockwell's own interests. It simply was not known at the time whether some or all of those interests diverged from those of DOE.

The Litigation and Claims Clause requires contractors to provide notice of claims to enable DOE to make decisions regarding those claims and thereby manage and control the costs for which it would ultimately be liable. Theoretically then, with notice, DOE would be able to evaluate the merits of the claim and decide whether it would be prudent to permit the contractor to hire attorneys, or have some other influence over the process. However, in this case there were no decisions for DOE to make. Had Rockwell immediately notified DOE in writing, DOE could not have prevented Rockwell from hiring attorneys for its own defense, or exerted control over the process in any way.

²⁵ We need not dwell on the DOE's order of precedence argument. The Contesting Actions Clause and the Fines and Penalties Clause are the same section of the contracts (54(e), in the 1986 Contract and 62 (e), in the 1989 Contract). Thus, there is no precedential hierarchy between these two clauses.

Notice and approval in this situation would have served no purpose. This clause simply does not apply under these circumstances.

Assuming, *arguendo*, that the Litigation and Claims Clause is applicable, the consequences of a failure to provide written notice or to obtain prior approval would not be the automatic disallowance of the costs incurred if they are otherwise allowable. The Government would have to show that it was prejudiced by the lack of written notice and approval before the costs would be disallowed. *See Chimera Corporation, Inc.*, ASBCA No. 18690, 76-1 BCA ¶11,901; *International Terminal Operating Co., Inc.*, and *Universal Maritime Service Corp.*, ASBCA Nos. 41530 and 41531, 92-1 BCA ¶24,406 (1991). Additionally, the law abhors a forfeiture. In the absence of prejudice to the Government, disallowance of costs incurred and otherwise allowable is nothing less than a forfeiture. *See, All South Properties, Inc.*, HUD BCA Nos. 92-G-7604C-12, 93-G-C5, 97-2 BCA ¶ 29,329 (law abhors a forfeiture and the Board will not lightly ascribe such an intention).

Here, DOE has offered no evidence that it was prejudiced. It was aware that Rockwell had engaged counsel to defend it. The Chief Counsel from DOE's Albuquerque Operations Office engaged in discussions with Rockwell's private counsel almost from the very beginning. While DOE alleges that the only written notice received was almost two years late, it was, in fact, on actual notice. It is difficult to see from the facts of record what actions DOE would have changed had written notice been provided. In any event, DOE has not demonstrated that it suffered any prejudice. We do not strictly enforce the notice requirements under the 20 and 30-day limitations of the Changes Clause when the Government has actual or imputed knowledge of the facts giving rise to a claim, or where notice would be useless. *Pittsburgh-Des Moines Corp.*, EBCA No. 314-3-84, 89-2 BCA ¶ 21,739 at 109,369-70. We hold that this same principle would apply here, since DOE had actual knowledge of the facts.

Similarly, these same principles would be applicable to the alleged approval requirement. Prejudice to DOE flowing from Rockwell's failure to obtain approval must be shown. *See Fred A. Arnold, Inc.*, ASBCA No. 18,915, 75-2 BCA ¶ 11,496 (1975). None has been shown. In fact, the record establishes that DOE benefited from Rockwell's defense.

We hold Rockwell's Corporate Defense Costs are allowable under the Contracts. They are not rendered unallowable by Appellant's failure to provide written notice or failure to obtain approval. Further, we hold that the Contesting Actions Clause does not render Rockwell's Corporate Defense Costs unallowable. Thus, in accordance with the Plea Agreement, Rockwell is entitled to reimbursement of its Corporate Defense Costs incurred prior to January 1, 1990.

Employee Defense Costs

Rockwell seeks \$3,725,461 incurred in providing counsel to its employees during the FBI raid and Federal Grand Jury investigation. It contends that the costs incurred in their defense are properly allowable under the General Allowability Clause and the

Employee Defense Provision of the Contracts. It also contends that these costs are allowable because the corporation laws of the state of Delaware, the state in which it was incorporated, required it to reimburse the legal defense costs of employees. Rockwell further alleges that these costs are not unallowable under the Contesting Actions Clause, or for failure to comply with the notice and approval provisions of the Litigation and Claims Clause.

DOE, on the contrary, contends that the employee defense costs are not allowable under the Employee Defense Provision because there were no “claims or legal actions” brought against any of Rockwell’s employees. Further, DOE contends that, even if there were claims or legal actions brought against employees, defense costs would not be allowable because Rockwell failed to comply with the notice and approval requirements set forth in Appendix A, and because the Contesting Actions Clause specifically makes such costs unallowable.

Opinion

It is beyond question that Rockwell employees were in dire need of legal representation. A large number of Rockwell’s employees were at criminal risk as a result of the raid and Grand Jury investigation. Employees were in jeopardy from the outset of the investigation until at least the time the Plea Agreement was reached. The prosecutors considered their best cases to be against lower level operating personnel. Federal agents interviewed hundreds of Rockwell employees in connection with the raid and investigation. Fifty employees received Grand Jury subpoenas. A minimum of eight employees ultimately received “Target Letters.” Some employees were threatened with perjury and false statement charges if they did not answer questions “properly.” If the allegations in the search-warrant affidavit regarding the incineration of plutonium at the Plant had been established, up to 100 employees might have been guilty of environmental crimes. It was not possible for Rockwell to identify which employees were in jeopardy for various reasons including the nature of the suspected environmental crimes, the absence of the need for criminal intent for many of these crimes, and the large number of employees connected with the plutonium, and plant waste, operations. The prosecutors did not give Rockwell the names of persons they intended to indict. There is no doubt that a large number of employees were in potential jeopardy. In the end, no employees were indicted, much less convicted.

Appellant decided early on to provide independent counsel to employees that desired counsel. Under the corporation laws of Delaware, the state in which it was incorporated, Appellant was required to pay for the reasonable expenses of a successful defense against actual and potential civil and criminal charges.²⁶ This employee right is “absolute.” *Winco Corp. v. Beekhuis*, 38 F.3d 682, 691 (3rd Cir. 1994).

²⁶ Section 145(c) of the Delaware General Corporation Law (Title 8 of the Delaware Code Annotated (1989)) states:

To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in the defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in the defense of any claim, issue

By letter dated July 14, 1989, approximately five weeks after the start of the raid and no more than two weeks after the Grand Jury was impaneled, Rockwell informed the DOE Contracting Officer that it was engaging counsel for employees that desired counsel, and that it had incurred \$8,000 in costs therefor during the month of June. It requested his approval pursuant to the provisions of Appendix A of the 1989 Contract (“Appendix A”).

The Contracting Officer responded that approval was not warranted, and that paragraph J of Appendix A (“the Employee Defense Provision”) related to situations where “a claim or legal action is brought against an employee as a result of the employee’s conduct when performing duties under the contract and within the employee’s scope of employment.” (FOF 72) He indicated that he was aware of no such claim or legal action being brought against any employee. In subsequent correspondence, he indicated that the Employee Defense Provision addressed this matter and it was clear that the claimed legal expenses were not covered within its terms, and further, that the “general principals [sic] of cost allowability are not pertinent.” (FOF 73). The positions of the parties, laid out in this correspondence, have not significantly changed.

Paragraph (d) of 970.5204-13 Allowable Costs, Base Fee and Award identifies certain costs that are allowable under the Contracts. One of the types of costs listed is personnel costs:

- (8) Personnel costs and related expenses incurred in accordance with Appendix A which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that Appendix A sets forth in detail personnel costs and related expense to be allowable under this contract. . . .

The only personnel costs set forth in Appendix A and cited to us as relevant are those in paragraph J, the Employee Defense Provision. The provision is as follows:

1. If a claim or legal action is brought against an employee as the result of the employee’s conduct when performing duties under this contract and within the employee’s scope of employment the contractor shall be allowed the cost of defending the employee. . . .; provided, however, that the prior approval of the Contracting Officer and the consent of the employee to be defended shall be obtained before such defense is undertaken.
2. The provisions of the contract clause entitled, “Litigation and Claims” shall have the same application to claims and legal actions against employees under this section as

or matter therein, he shall be indemnified against expenses (including attorneys’ fees) actually and reasonably incurred by him in connection therewith.

The statute also declares that proceedings referred to in subsections (a) and (b) include:

“...any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative . . . by reason of the fact that the person is or was a director, officer, employee or agent of the corporation.”

it has to those claims and legal actions which are brought directly against the Contractor. Before costs of any retained legal counsel may be allowed, the selection of such counsel must have the concurrence of the Contracting Officer.

The Employee Defense Provision makes allowable the costs of defending employees when “claims or legal actions” are brought against them as a result of their performing duties under the contract. There is no dispute that the employees were performing duties under the Contracts. DOE’s interpretation that “claims or legal actions” consist only of those actions formally filed against the individual is simply too restrictive an interpretation. In this case, the Government conducted a surprise raid on Rockwell at the Rocky Flats Plant. Then it convened a Special Grand Jury to conduct an investigation. The prosecutors issued subpoenas and interviewed employees. Intimidation tactics were used, such as accusing employees of lying when their answers did not support allegations. Threats to indict employees were also used to secure a plea on terms favorable to the Government. This court-ordered investigation was a “legal action” within the meaning of the Employee Defense Provision.

Respondent admits that the actions against the corporation were legal actions, but argues that these same actions against individual employees were not legal actions without explaining the difference.²⁷ The evidence shows that the actions of the investigators and the Grand Jury were against individuals just as much as they were against the corporation. The fact that there were no designated or announced individuals against whom these proceedings were directed does not diminish the fact that these actions were legal actions against the employees. The search warrant allegations were based upon alleged conduct that had to be done by someone within the Rockwell organization. Anyone within the scope of these allegations was an employee against whom a “legal action” was brought. Potential “targets” apparently were revealed only as a negotiating tool. Rockwell was forced to assume that virtually every employee connected with its plutonium operations or plant waste operations was in jeopardy. Under the facts of this case, we find that the employees to whom Appellant provided counsel were employees against whom “legal actions” had been brought within the meaning of the Employee Defense Provision. Likewise, the costs of providing counsel were within the scope of costs categorically allowable under that provision. Consequently, they are allowable under subparagraph (d)(8) of the Allowable Cost Clause.

As to Respondent’s argument that the notice and approval requirements of the Employee Defense Provision were not met, we disagree. Respondent argues that under the Litigation and Claims Clause the contractor was required to give “immediate” notice of claims or legal actions, and did not do so. However, paragraph 2 of the Employee Defense Clause states that the Litigation and Claims Clause shall have the same application to legal actions against employees as it has to actions brought directly against the contractor. In our opinion on Rockwell’s Corporate Defense Costs, we held that the Litigation and Claims Clause did not apply against the contractor under these circumstances. In any event, *assuming arguendo* that it does apply, we find that Rockwell’s July 14, 1989, notice met the requirement for “immediate” notice under that

²⁷ DOE argues that Rockwell’s cost of defending itself in the investigation and grand jury proceeding is an unallowable cost under the Contesting Actions Clause.

provision. Whether notice is “immediate” must be judged under the circumstances and within the context of the action being taken against the employee. Where there is a formal filing, “immediate” could mean “the same day as the receipt of the notice of the filing”, or it could mean “within a few days”, depending on the circumstances.

Because the FBI raid was a surprise, Rockwell was forced to deal with a number of complex legal issues within a short period of time. It had to find corporate counsel for itself, in addition to finding counsel for approximately 90 employees who were requesting counsel at different times. It had to address issues with DOE, monitor document requests, answer questions and respond to subpoenas. Rockwell’s written notice was sent only 5 weeks after the raid and the raid was only the start of the “actions” against the employees.²⁸ Further, the letter was sent within 2 weeks of the impanelment of the Grand Jury. Thus, we find that the written notice and request for approval of employee defense costs submitted on July 14, 1989, satisfied the requirement for “immediate” notice. In any event, Respondent has not shown it was prejudiced from the alleged lateness of written notice, and thus, its notice defense again fails. In this regard, see our discussion on the role of prejudice in enforcing notice provisions contained in our earlier opinion on Corporate Defense Costs.²⁹

DOE also seems to be arguing that Rockwell did not receive approval to incur the costs of the legal defense for its employees, and that, consequently, Rockwell is not entitled to recover these costs. This argument is without merit. The Contracting Officer does not have the authority to unreasonably withhold his approval when notice has been properly provided and the circumstances warrant legal representation. Here the Contracting Officer unreasonably withheld his approval. His failure to grant approval under these circumstances cannot be a valid basis for the disallowance of the legal defense costs of the employees. *See Hoel-Stefen Construction Co. v. United States*, 684 F.2d 843, 850 (Ct. Cl. 1982) (overturning Contracting Officer denial of approval because Contracting Officer disapproval “was unreasonable”); *Century Concrete Services, Inc.*, ASBCA No. 48137, 97-1 BCA ¶ 28,889 at 144,052 (1997).

Lastly, with regard to the Contesting Actions Clause, this clause does not apply to employees contesting actions of the United States. It applies to the corporation (Rockwell) contesting actions of the United States. Subparagraph (e) (16) makes the following costs unallowable:

Legal, accounting and consulting services and related costs incurred in connection with the preparation and issuance of stock rights, organization or reorganization, prosecution of defense of antitrust suits, prosecution of claims against the United States, contesting actions

²⁸ The fact that the Contract requires immediate notice does not mean that all costs incurred after the receipt of written notice, even if not “immediate,” should be disallowed. At best, only the costs incurred prior to the receipt of written notice might be disallowed, and prejudice would still have to be established.

²⁹ Mr. Stout, DOE’s Albuquerque General Counsel, testified that at a very early stage he discussed with Rockwell’s corporate counsel the handling of the legal defense for Rockwell’s employees because DOE’s employees were also coming to him asking that DOE find lawyers for them. (AE-58 at 83-4) At that time, there appeared to be no issue regarding timeliness.

or proposed actions of the United States, and prosecution or defense of patent infringement litigation.

It would make little sense to argue that the categories of costs specified are anything but costs incurred by the corporation for corporate activities. Stock rights, organization and reorganization, prosecution of claims against the United States all relate to corporate activities. The same is true of contesting actions or proposed actions of the United States. It applies only to the corporation contesting an action or proposed action of the United States, not an individual employee.

Employee defense costs are allowable, and are not prohibited by the terms of the Plea Agreement.

Database Costs

Rockwell seeks an award of \$5,156,686 for the costs of developing and maintaining an electronic document database system. This amount represents the costs that Rockwell incurred under its contract with LSI (formerly Lawyers Edge, Inc.) to create, develop and maintain this database that have not been reimbursed. DOE had reimbursed Rockwell \$416,311.59 for database costs prior to this claim.

Rockwell claims that all of the database development and maintenance costs under its contract with LSI are allowable under the terms of its DOE Contracts and the Three-Party Transfer Agreement. It contends that the database was needed to defend against the criminal investigation and the civil actions, and that it served numerous other purposes that benefited not only Rockwell, but also DOE. Rockwell contends that these costs are allowable especially since DOE needed and used the system extensively for its own legal and business purposes.

DOE agrees that the database costs incurred by Rockwell in the defense of civil actions such as the Cook case and the Building Trades case (the class actions cases) are allowable and should be reimbursed. (Res. Pre-hearing Memo at 16) DOE contends, however, that the costs associated with the criminal investigation and the Stone case are not allowable. DOE contends that the costs are unallowable because Rockwell failed to give written notice and obtain prior approval under the Litigation and Claims Clause of the Contracts, and also because the Contesting Actions Clause disallows such costs.

For the reasons set forth below, we hold that the cost of developing and maintaining the database system are recoverable, except for those costs incurred solely for the purpose of defending Rockwell in the criminal investigation after December 31, 1989. We make no decision on the allowability of database costs associated solely with the Stone case, as those costs are not in issue before us.

Opinion

After the FBI raid, Rockwell established the electronic document database system to record and track documents seized by the FBI and to respond to the numerous document

requests from its attorneys. These requests included requests to respond to the many subpoenas issued by the Special Federal Grand Jury to Rockwell and DOE.³⁰ Rockwell considered developing the database in-house, but quickly realized that it did not have the resources to do so. It entered into a contract with LSI, Inc. to create, develop and maintain the database. The initial phase of data entry began in July 1989 and was completed in late October 1989. Although the system was initially created in response to the allegations in the search-warrant affidavit (Uncharged Conduct), it was later used for numerous other purposes by both Rockwell and DOE. It was maintained and used in the criminal investigation into the Charged Conduct, and later updated so that it could be used in the civil actions: the Cook, Building Trades, and Brever and Pitts cases. These cases overlapped in time and the database was constantly being maintained and updated for use in these cases. It was also used in the Stone case, which was a case brought against Rockwell under the *qui tam* provisions of the False Claims Act.

In addition to this original database, which Rockwell calls the “Rocky” database, LSI created a separate database for the class actions called the “Flats” database. It also created and maintained a number of smaller databases. All the databases together constitute the electronic database system.

Rockwell’s contract with LSI ended on June 30, 1993. Before Rockwell’s M&O Contract with DOE ended on December 31, 1989, Rockwell employees performed the database searches in response to subpoenas sent to both Rockwell and DOE. After EG&G took over as M&O contractor, EG&G employees performed the necessary searches. DOE paid for the searches made by both Rockwell and EG&G employees working at the Plant under the respective M&O contracts. Under the Three Party Transfer Agreement between DOE, Rockwell and EG&G, Rockwell was required to provide support to EG&G after December 31, 1989, in responding to subpoenas and other document requests in connection with any investigation, litigation proceeding or inquiry. (FOF 89-91) DOE paid Rockwell for this support except for costs associated with Rockwell’s contract with LSI.

In addition to its use in litigation, the electronic database system was used by DOE in compiling information for the Historical Release Report for the EPA, and for responding to EPA’s CERCLA information requests. It was used for the Dose-Neutron Reconstruction Report for the Colorado Department of Health. It was also used to respond to numerous FOIA requests and for numerous other information requests.

There is no dispute that Rockwell needed to establish a database system for document control and accountability at the time of the FBI raid. Rockwell also needed it to defend itself against the search-warrant affidavit allegations and to respond to subpoenas. It was reasonable for Rockwell to contract out such work because of time constraints and its limited in-house resources. In this regard, the costs incurred to create the system, input documents and maintain the system, prior to January 1, 1990, are a part of the Corporate Defense Costs incurred for defending against Uncharged Conduct. We

³⁰ About one hundred and fifty thousand documents (almost one million pages) were seized by the FBI and placed in the database.

have already addressed the issues regarding Corporate Defense Costs for Uncharged Conduct prior to January 1, 1990, and found those costs to be allowable. We conclude the costs needed to create, update and maintain the database prior to January 1, 1990, are allowable for the same reasons. This conclusion is further supported by the fact that DOE also needed and used the database to respond to Grand Jury subpoenas served upon it relating to the Uncharged Conduct.³¹ As to Respondent's argument that these costs are unallowable under the Contesting Actions Clause, we concluded in our decision on claimed Corporate Defense Costs that the Contesting Actions Clause did not apply. For the same reasons, the Contesting Actions Clause does not apply here. This leaves only the allowability of database costs incurred after December 31, 1989, in issue.

Under the terms of the Plea Agreement, Rockwell agreed not to seek the costs it incurred in defending against the Charged Conduct, or the costs incurred defending the corporation after December 31, 1989.³² This category includes any cost Rockwell incurred in creating and maintaining a computer system to assist in defending itself against the Charged Conduct. Thus, to the extent that the computer system was created or maintained solely for Rockwell's defense in the criminal investigation after December 31, 1989, such costs would not be recoverable because of the terms of the Plea Agreement.³³

In order for the database creation and maintenance costs to be barred by the Plea Agreement, we must find that these costs were incurred after December 31, 1989 and were incurred defending the corporation in the criminal investigation, and for no other purpose. If these costs were incurred for multiple purposes, some of which alone would make the costs allowable, then the costs are still allowable regardless of the Plea Agreement.

There is no dispute that the database was used in the criminal investigation on or after January 1, 1990, to defend against Charged Conduct. The decision to create the system under the LSI contract, however, was made long before the focus of the investigation turned to the issues relating to the Charged Conduct. Consequently, it cannot be reasonably argued that the system was created to defend against the Charged Conduct. We are unable to determine, on the evidence presented, what part, if any, of the

³¹ We addressed the defenses of notice and prior approval raised by Respondent in our opinion on Corporate Defense Costs. Again, the Litigation and Claims Clause does not apply under the circumstances presented in this case. In any event, DOE was aware of the database, used it to respond to subpoenas, and even paid EG&G its costs associated with inputting and retrieving documents in the system.

³² All of the costs of defending against the Charged Conduct are included within the costs incurred defending the corporation after December 31, 1989.

³³ Use of the database is a matter different from the creation and maintenance. The searches were performed by Rockwell and EG&G employees under the M&O contracts, and there appears to be no dispute about the allowability of the costs incurred for any searches. DOE has reimbursed Rockwell and EG&G for these costs. If there are use costs incurred after December 31, 1989 that pertain only to the Charged Conduct and no other purpose, those costs are barred from recovery by the Plea Agreement.

costs of updating or maintaining the system were incurred solely for the purpose of defending Rockwell in the criminal investigation after December 31, 1989.

It is clear that after this system was created to assist DOE and Rockwell in the criminal investigation, it became an extremely useful tool which was a benefit to DOE, Rockwell and EG&G for numerous other legal as well as business purposes. Such a system needed to be maintained for Rockwell to comply with the terms of the Three Party Transfer Agreement, and to defend against the civil actions. It had to be maintained (1) for use in the Cook, Building Trades, Brever and Pitts civil cases, (2) for use in responding to FOIA requests, (3) for use in constructing various reports, and (4) for use in many other legitimate business matters.³⁴ If the costs of the maintenance of the database system are allowable because of its use in the civil cases and for other legitimate purposes, these same maintenance costs can not be deemed unallowable simply because the database was also used in the criminal investigation. Regardless of the existence of the criminal investigation after December 31, 1989, and regardless of the Charged Conduct, the system would still have been perpetuated and the maintenance costs would still have been incurred. However, to the extent that any part of the database system was created and maintained solely for the purpose of Rockwell's criminal defense after December 31, 1989, those costs would not be recoverable because of Rockwell's agreement not to seek corporate defense costs after December 31, 1989.

Further, the Board is somewhat perplexed at DOE's position here. DOE has reimbursed Rockwell and EG&G for the costs incurred due to employees of Rockwell and EG&G indexing documents and inputting data into the system from the beginning. It has also reimbursed Rockwell and EG&G for all costs incurred for using the system to perform all searches, including searches in Rockwell's defense in the criminal investigation. It also has reimbursed EG&G for maintaining the system after the LSI contract expired, long after the criminal investigation ended. Here, DOE is contesting the payment of the costs of creating and maintaining the database system under the LSI contract, if those costs relate to the criminal investigation. It is not, however, disputing the LSI contract costs that have already been reimbursed. Moreover, DOE has not explained to the Board why it paid its M&O contractors for costs incurred to "use" the database but, at the same time, refuses to pay the maintenance costs needed for the system to be "usable." The only difference that the Board can perceive is that some of the work was contracted out and some was performed in-house. The fact that Rockwell did not have the capability to perform such work in-house should not be a reason for DOE to hold Rockwell responsible for the costs of that needed work.

We turn to the database costs that were incurred by Rockwell solely by reason of its defense in *United States ex rel. Stone v. Rockwell*, No. 89-M-1154 (D. Colo.) ("Stone"). Plainly, these costs are independent from the costs incurred by Rockwell in *United States v. Rockwell*, 92-CR-107 (1992). In this appeal before the Board, the parties have stipulated that all the costs at issue belong only to the three categories of costs identified in paragraph eight of the Plea Agreement in *United States v. Rockwell*. (JS 38 & 39) The costs incurred in the Stone case were not identified in that paragraph.

³⁴ The database was still being used on a regular basis in June of 1999 at the time of the hearing in this case.

Accordingly, the costs incurred in the Stone case are not in issue in this appeal. Thus, we make no decision on the allowability of those costs.

CONCLUSION

The Appeal is sustained to the extent indicated in the above opinions.

R. Anthony McCann
Administrative Judge

I concur:

Beryl S. Gilmore
Administrative Judge