# THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN REDACTED FORM ON JULY 19, 2023

GRANTED IN PART: June 28, 2023

**CBCA 7056** 

#### WASHINGTON RIVER PROTECTION SOLUTIONS LLC,

Appellant,

v.

#### DEPARTMENT OF ENERGY,

Respondent.

Scott Arnold, Luke W. Meier, Robyn N. Burrows, and Amanda C. DeLaPerriere of Blank Rome LLP, Washington, DC; and Michael J. Montalbano of Blank Rome LLP, Philadelphia, PA, counsel for Appellant.

Andrew J. Unsicker and Paul R. Davis, Office of Chief Counsel, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges KULLBERG, ZISCHKAU, and SULLIVAN.

#### **SULLIVAN**, Board Judge.

Washington River Protection Solutions LLC (WRPS) appealed the decision of the Department of Energy (DOE) contracting officer that asserted a demand for repayment of purported unreasonable staff augmentation expenses incurred between 2009 and 2018. We find most of the challenged costs reasonable and grant the appeal in part.

#### Findings of Fact

In May 2008, DOE Office of River Protection awarded to WRPS the Tank Operations Contract (TOC). Exhibit 1 at 1.1 Located at DOE's Hanford Site, there are 177 tanks containing approximately fifty-three million gallons of radioactive and chemical hazardous waste. *Id.* at 27. Pursuant to the TOC, WRPS was to conduct "operations and construction activities necessary to store, retrieve and treat Hanford tank waste, store and dispose of treated waste, and begin to close the Tank Farm waste management areas to protect the Columbia River." *Id.* at 28. This cleanup of the Hanford Site was part of what DOE described as "the world's largest environmental cleanup project." *Id.* at 27. The contract was a cost-plus-award-fee contract, and the expected contract price was more than \$7 billion over ten years of performance, which included a base period of five years and a total of five additional option years. *Id.* at 5, 10. WRPS was obligated to "provide the personnel, equipment, materials, supplies, and services, and do all things necessary for, or incident to, providing its best efforts to perform all requirements of" the contract. *Id.* at 5.

The focus of this dispute is WRPS's use of contracted labor resources (CLRs) in its performance of the contract. CLRs are individuals hired through staff augmentation subcontractors to perform a specific scope of work or to fill in for missing personnel on a temporary basis under the direct supervision of a WRPS employee. Transcript, Vol. 1 at 30. WRPS competes different labor categories among staff augmentation contractors and enters into blanket master agreements (BMAs) that contain labor categories and rates.<sup>2</sup> *Id.* at 79-80. Once BMAs are established, CLRs can be hired quickly, and WRPS does not incur the training or separation costs that it would for a full-time employee, costs estimated to be between \$28,000 and \$38,000. Id. at 78, 80, 188. CLRs also allow WRPS to accomplish tasks when budget funds are available and to downsize quickly without additional cost when budget funds are not available. Id. at 186. It also allowed WRPS to obtain the services of contractors who would not take a full-time position. Exhibit 37 at 20; see also Transcript, Vol. 1 at 189-90. WRPS hired 1224 CLRs in the first ten years of the contract, as compared to the average 4300 full-time WRPS employees. Exhibit 37 at 19; Transcript, Vol. 1 at 183. Very few of these CLRs worked full-time during any given year, and few worked more than five years as a CLR. Exhibit 37 at 16. WRPS spent nine percent of its staffing dollars paying for CLRs. Transcript, Vol. 1 at 183-84. WRPS planned on an annual basis its use of full-time WRPS employees versus CLRs—plans that were shared with DOE. *Id.* at 186.

All exhibits are found in the appeal file, unless otherwise noted.

WRPS also used blanket ordering agreements (BOAs), in which individual CLR positions were competed. Transcript, Vol 1 at 256-57.

#### **Chronology of Dispute**

In February 2020, DOE issued a notice of intent to disallow costs "related to subcontractor backlog audits" through fiscal year 2018. Exhibit 32. DOE intended to disallow \$6 million for "contracted labor time recording (CLTR)" resources. *Id.* at 2. DOE was "particularly concerned about the contractual compliance issues and cost impact due to WRPS's use of preferred candidates to acquire staff augmentation resources" because "WRPS did not perform thorough technical reviews on preferred candidates or incumbents and it has been found that some of these candidates were paid at inappropriately high rates." *Id.* at 4. The amount to be disallowed for these issues was based upon an audit report prepared by the DOE Richland Finance organization (DOE Finance). *Id.* 

In the audit, DOE Finance examined the compensation records for forty-one individuals hired as CLRs by WRPS that it had "judgmentally selected," seeking CLRs that had worked for WRPS for three or more years consecutively. Exhibit 32 at 17; Transcript, Vol. 3 at 37-38. DOE Finance identified numerous concerns with the employment and compensation for thirteen of these individuals, including concerns that WRPS did not have effective controls to ensure that CLRs met minimum qualifications and that several CLRs were paid rates higher than the rates agreed to on the subcontract through which they were hired. Exhibit 32 at 32-33. DOE Finance was also concerned that none of the forty-one CLRs had been subject to a "make versus buy" analysis to determine whether it was less expensive to hire a new WRPS employee rather than filling the requirement with a CLR. *Id.* DOE Finance did not provide a dollar figure that matched the \$6 million amount in the notice of disallowance; instead, DOE Finance recommended a settlement range between \$5.75 million and \$8 million. *Id.* at 8.

In August 2020, WRPS provided a response to both the audit report and an explanation of the reasonableness of the dollars expended for the thirteen individuals that were the focus of the DOE audit. Exhibit 37.

On December 10, 2020, DOE issued a contracting officer's decision in which DOE disallowed \$6,025,069 because the costs were unreasonable. Exhibit 45.<sup>3</sup> DOE calculated this amount by identifying specific costs to be disallowed for thirteen individuals for four different reasons. *Id.* For five individuals, DOE identified a "high" and "low" amount that were disallowed and averaged the figures. *Id.* at 8. The sum of the amounts calculated for

DOE demanded payment within thirty days from the date of the December 10 letter. The contract incorporated by reference the Interest clause, 48 CFR 52.232-17 (2020) (Federal Acquisition Regulation (FAR) 52.232-17). Exhibits 1 at 158, 46 at 196.

the thirteen individuals was \$3,012,534. *Id.* DOE multiplied this figure by two to derive the final amount disallowed. DOE applied this so-called "2x" factor because DOE, in its review, found other instances of the same issues identified for the thirteen individuals, and the factor would account for what DOE believed was "excessive pass-through" of subcontracting costs related to CLRs. *Id.* at 7.

#### Costs That DOE Sought to Disallow

DOE brought challenges to specific costs that can be grouped into four categories:

- 1. The hourly rates paid to seven individuals exceeded the hourly rates that they would have received purportedly as WRPS full-time equivalents (FTE).
- 2. The hourly rates paid to three individuals exceeded the rates set forth in the BMAs competed among the staff augmentation subcontractors.
- 3. Seven individuals purportedly did not meet the qualification requirements set forth in the BMA for their positions.
- 4. The hourly rate paid to two individuals was increased "overnight" with purportedly no reason for the increase.

The Board's specific findings regarding the reasonableness of the dollars paid to each of these individuals are detailed in appendix A to this opinion. The Board sets forth below its findings regarding these categories of deductions and some pertinent findings regarding individuals.<sup>4</sup>

#### CLR Rates Above WRPS FTE Rates

In 2019, the WRPS internal audit (WRPS-IA) organization performed an audit in which the hourly rates of CLRs were compared to the hourly rates they would have been paid as WRPS employees based upon their years of experience. The auditor did not compare the rates of specific positions or job classifications; instead, the auditor used the seniority-based WRPS pay bands. Transcript, Vol. 1 at 132. While the rates paid to CLRs were both greater and less than the rates paid to WRPS employees for years of experience, the auditor found that, on average, the rates paid to CLRs were approximately three percent higher than the

The Board expects that appendix A will require extensive redaction before this decision is released to the public. Individuals are identified below by a "sample" number assigned by DOE Finance. The sample numbers are matched with the individual's name in appendix A.

rates paid to WRPS employees. *Id.* at 134. The auditor examined only rates paid in 2018. *Id.* at 139.

Ten of the rates paid to CLRs exceeded the WRPS rates because the WRPS rates were capped at twelve years of experience, and some CLRs had more than thirty years of experience. Transcript, Vol. 1 at 132. The auditor compared these rates to comparable rates, determined by years of experience and job title, in a database maintained by the General Services Administration (GSA) and found the rates to be very similar and, therefore, reasonable. *Id.* at 136-37; Exhibit 721.

For seven individuals, DOE Finance purportedly used WRPS-IA's analysis to calculate the "excess" that these six individuals were paid between 2009 and 2018 on their contracts. However, the percentages that DOE-Finance used are not found on the WRPS-IA auditor's worksheet. *Compare* Exhibit 45 *with* Exhibit 721. The percentages used by DOE Finance are lower in four instances and higher in two. *Id.* The seventh individual does not appear on the WRPS-IA worksheet (sample 27). *Id.* In addition, DOE Finance used the percentages across the eleven years of the contract, although WRPS-IA only examined the rates in 2018. *Id.* Using these percentages purportedly derived by WRPS-IA, DOE Finance totaled the costs paid to these individuals in the period 2009-2018 and then multiplied the percentage "excess" to derive the difference between what the individual was paid and the amount that supposedly would have been paid to a full-time WRPS employee.

DOE's challenge to these costs appears to be rooted in the overarching concern that WRPS was not conducting a "make versus buy" analysis for CLRs, meaning that it was not looking at whether it was more cost effective to hire these individuals as full-time WRPS employees or to contract with them as CLRs. The DOE auditor conceded that he could not quantify that concern directly. Transcript, Vol. 3 at 249-50. This calculation of the "excess" cost does not compare the number of hours worked by the individuals to the number of hours that a full-time employee would work. None of these individuals worked more than 2000 hours per year consistently across the years. Exhibit 45 at 10-21.

WRPS put forth evidence to demonstrate how the rates paid to each of the seven individuals was reasonable. Six of the seven individuals possessed specific technical skills and experience with the tank farm operations that WRPS needed for performance of the contract. For example, two of the seven were work planners, a skill that was in short supply and necessary for the planning of all work conducted on the contract. *See*, *e.g.*, Exhibit 627; Transcript, Vol. 1 at 142. Five of the seven were paid at the BMA rates, which are rates that are determined by competition (samples 5, 6, 13, 24, and 29).

#### Rates That Exceeded BMA Caps

For three individuals, DOE seeks repayment of amounts paid at labor rates that exceeded the contract rates in the negotiated BMAs on which the individuals were hired. DOE Finance did not consider the roles these individuals were hired to fill when challenging these rates.

All three individuals were preferred candidates, requested by name by the WRPS personnel performing the contract work ("the field") because the individuals possessed needed experience or skills to accomplish the scope of work. Sample 4 was a subject matter expert in computer applications needed for tank farm operations. Transcript, Vol. 1 at 177-78. Sample 27 was hired to assist WRPS because of his knowledge of the waste treatment facility and its construction. *Id.*, Vol. 2 at 32; Exhibit 707. Sample 30 had more than thirty years of experience and specific Hanford experience sought by WRPS. Exhibits 123, 125.

WRPS established that the rates paid to these individuals were reasonable through comparison to historical prices or comparison to list prices, such as the GSA rates. The rate paid to sample 4 initially was compared to GSA rates for electrical engineers with both a bachelors and masters degree in engineering and ten-to-fifteen years of experience. The subsequent rates were deemed reasonable because they were in line with the rates paid on previous contracts. The rates paid to sample 27 were determined to be reasonable because they were in line with rates paid to the individual on prior contracts. The rate on the first contract with sample 27 was determined through competition and found to be reasonable through comparison to other similar positions at Hanford. The rates paid to sample 30 were deemed reasonable based upon a comparison of his rate to two different GSA rates for comparable engineers and another contract at WRPS. Exhibit 693. A WRPS executive testified that WRPS could not have obtained the services of these individuals at the BMA rates. Transcript, Vol. 1 at 246, Vol. 2 at 47.

#### Purportedly Unqualified CLRs

DOE deemed amounts paid to seven individuals to be unreasonable because the individual did not meet the degree requirements set forth in the BMA statement of work on which they were hired. DOE reasoned that, if the individual is not qualified for a position with a corresponding rate, he or she is not worth that rate. *See* Transcript, Vol. 3 at 17.

Several of the individuals were "preferred candidates," sought by WRPS managers doing the work in the field because of their specific expertise or knowledge of the scope of work. Transcript, Vol. 1 at 199-200. Four of these individuals were subject matter experts

in their respective fields with numerous years of experience at Hanford or dealing with DOE-specific procedures or issues (samples 4, 5, 12, and 23). Sample 4 wrote the DOE guidance on safety system software reports, and sample 5 developed DOE nuclear waste surveillance programs. *Id.* at 237-38, 253. Sample 12 was an expert in safety analysis, and sample 23 had extensive experience in instrument and control engineering and was qualified to work in the area where the tanks were located. *Id.* at 14, 284-85. Samples 6 and 18 were work planners, a specialty that was in short supply and critical to the safe execution of the contract work. *Id.* at 236. Both of these individuals had extensive experience, including specific experience at Hanford. *Id.* at 326, 330; Exhibit 467. While the BMA statement of work may have required a college degree, in most cases the specific position description against which the individuals were hired either stated that no degree was required or provided an equivalent number of years of experience to satisfy the degree requirement. *See, e.g.*, Exhibit 519 (sample 12).

One individual challenged by DOE does not fit this mold. DOE challenged the qualifications of sample 29, an individual who was hired to work as a computer-aided design (CAD) drafter. The first contract required one year of experience and a technical school certificate or degree. The second contract did not specify required years of experience but required a certificate or degree. The third contract required certifications in AutoCAD and 3-D modeling packages and five to nine years of related experience. A WRPS executive testified that WRPS determined that sample 29 did have a technical degree after his qualifications were challenged by DOE, Transcript, Vol. 2 at 50, but it is not clear when that degree was awarded or that he was qualified at the time he was given the three contracts.

#### Overnight Rate Increases

DOE deemed costs for two individuals unreasonable because the hourly rates for the individuals increased from one contract to another without an explanation as to why the rates increased.

WRPS explained the reasons for the rate increases. For sample 4, the rate increase was \$8.51 per hour in fiscal year 2018. Exhibit 45 at 9. The individual's job responsibilities increased in fiscal year 2018 and included management duties, thereby justifying the increase. Exhibit 365; Transcript, Vol. 1 at 248-49. The rate for sample 21 increased by \$61.50 in fiscal year 2018, from \$101.47 to \$162.97 per hour, although the individual was performing the same function and responsibilities. Exhibit 45 at 15. Sample 21 had been the owner of her own company and was able to provide her services with very little overhead. Transcript, Vol. 2 at 8; Exhibit 37 at 99. In fiscal year 2018, the individual disbanded her company, and WRPS hired her through another staff augmentation subcontractor.

Transcript, Vol. 2 at 8; Exhibit 685. Both individuals were paid at the BMA rates that were established through competition during the periods challenged by DOE. Exhibits 363, 685.

#### DOE's 2x Factor

The specific amounts that DOE challenged for the thirteen individuals totaled \$3 million. Because DOE had identified other individuals with qualifications or other issues, DOE doubled the amount sought to capture them. DOE sought to be conservative in applying this 2x factor. Exhibit 45 at 7. As the DOE auditor explained, it was not proper to extrapolate because DOE had selected the original forty-one individuals to be audited based upon tenure rather than sampling the entire pool. Transcript, Vol. 3 at 74, 248. DOE sought to capture other issues, like excessive pass-through, which the DOE auditor acknowledged had not been quantified. *Id.* at 247.

#### **Discussion**

DOE challenges WRPS's staff augmentation costs as unreasonable. Regulation assigns the burden to WRPS to prove the reasonableness of the costs. "If an initial review of the facts results in a challenge to the specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." FAR 31.201-3(a). "Cost reasonableness is a question of fact." *Kellogg Brown & Root Services, Inc. v. United States*, 742 F.3d 967, 970 (Fed. Cir. 2014). Costs must be reasonable to be allowable. FAR 31.201-2(a)(1).

Cost reasonableness is determined by considering "if, in its nature and amount, [a cost] does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR 31.201-3(a). Whether a cost "is reasonable depends upon a variety of considerations and circumstances." FAR 31.201-3 (b); see Kellogg Brown & Root Services, Inc. v. United States, 728 F.3d 1348, 1360 (Fed. Cir. 2013), opinion corrected on denial of reh'g, 563 F. App'x 769 (Fed. Cir. 2014) ("The standard for assessing reasonableness is flexible, allowing [consideration of] . . . many fact-intensive and context-specific factors."). The regulation identifies four factors to be considered:

- (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
- (2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;

- (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and
- (4) Any significant deviations from the contractor's established practices.

FAR 31.201-3(b).

When reviewing for reasonableness, the Board is not "limited to considering the audit findings on which [the government] based its . . . claim . . . . A contractor may bolster its case at the Board with 'evidence to show that it acted reasonably' in incurring costs, even if such evidence is adduced only in or for the litigation." *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 22-1 BCA ¶ 38,181, at 185,432 (citing *Fluor Intercontinental Inc.*, ASBCA 62550, 22-1 BCA ¶ 38,105, at 185,101), *clarified and motion for reconsideration denied*, 22-1 BCA ¶ 38,210. However, because it bears the burden of proof for reasonableness, the contractor must provide something in the record about the reasonableness of the challenged costs. *Mission Support Alliance, LLC*, 22-1 BCA at 185,432. Weak or circumstantial evidence that a contractor acted reasonably will not be enough for the contractor to meet its burden of proof. *Mission Support Alliance, LLC*, 22-1 BCA at 185,561.

The parties agree that the standard in FAR 15.404-1, which prescribes the proposal analysis techniques for contracting officers to evaluate the reasonableness of offered price proposals in negotiated procurements, also provides guidance for assessing the reasonableness of the challenged costs. Pursuant to FAR 15.404-1(b)(2), "[t]he Government may use various price analysis techniques and procedures to ensure a fair and reasonable price," including: (i) price competition; (ii) historical prices; (iii) parametric estimating methods; (iv) competitive published price lists; (v) independent Government cost estimates; (vi) prices obtained through market research of same or similar items; and (vii) other data other than certified cost or pricing data provided by the offeror. According to regulation, the first two methods at FAR 15.404-1(b)(2) are the "preferred techniques. However, . . . the contracting officer may use any of the remaining techniques appropriate to the circumstances applicable to the acquisition." FAR 15.404-1(b)(3). The designation of "preferred techniques" has been interpreted to be "a suggestion, not a strict hierarchy." DynCorp International, LLC v. United States, 10 F.4th 1300, 1311 (Fed. Cir. 2021). "The yardstick by which sufficiency is measured here is not some specific rule, formula, calculation, or detailed fact-finding. Rather, it is the reasonable-discretion-informed appropriateness of the technique under the circumstances." Id. at 1312.

WRPS has established that the costs challenged by DOE were reasonable. WRPS sought to fill specialized requirements with individuals with extensive experience in the

difficult world of nuclear waste management. In the periods challenged by DOE, WRPS paid ten of the thirteen individuals at the rates set in the BMAs, rates that are established through competition, a proper method to determine reasonable prices. *See* FAR 15.404-1(b)(2)(i). For the three individuals that were paid above the BMA rate, those costs were incurred to obtain experts in areas that WRPS needed to perform the contract, a cost that would be incurred by a prudent person in the conduct of this challenging contract. FAR 31.201-3(a). WRPS established that the higher rates that it incurred were reasonable through comparison to historical pricing and competitive price lists (GSA rates), again accepted methods to prove reasonableness. FAR 15.404-1(b)(2)(ii), (iv).

We find no merit in DOE's challenge based upon what the individuals would have been paid if hired as full-time WRPS employees. The problems with DOE's analysis on this point are myriad—the analysis fails to account for the hours these individuals worked, is based upon an analysis of 2018 rates, but applied across all years of the contract, and fails to account for the years of experience that many of these individuals possessed. To address DOE's larger concern about the need for a "make versus buy" analysis, WRPS has established that these individuals were hired on an as-needed basis and that it would have incurred additional costs if these individuals had been hired as full-time employees.

We find the overnight rate increases reasonable. For one, the rate increase was tied to an increase in responsibility. For the other, although the functions were the same, the rate paid was the BMA rate obtained through competition.

We find that all but one of the individuals was qualified for the position and rates at which they were paid based upon the years of experience that they possessed. The exception is sample 29. We agree that the costs identified by DOE based upon sample 29's lack of qualifications were unreasonable. While we found that sample 29 did earn a degree, the record is silent as to when that degree was earned, so we do not know whether sample 29 was qualified at the time of his first contract. Also, the third contract required five-to-nine years of experience and a more specialized degree. WRPS has not shown that sample 29 met these qualifications. Accordingly, WRPS has not shown that the costs incurred for sample 29 in the amount of \$80,275, are reasonable.

Although we find that WRPS has failed to establish the reasonableness for the costs of sample 29 due to a lack of qualifications, we decline to apply DOE's "2x factor" to this amount. While we appreciate that DOE was attempting to approximate the costs of other problems it identified with its application of the "2x factor," this approach does not comport with the FAR requirement that the contracting officer identify a "specific cost" that was challenged on reasonableness. FAR 31.201-3.

### **Decision**

The appeal is **GRANTED IN PART**. WRPS shall repay DOE \$80,275, plus interest calculated in accordance with FAR 52.232-17.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Jonathan D. Zischkau JONATHAN D. ZISCHKAU Board Judge

#### Appendix A - Findings Regarding Thirteen Individuals

DOE's challenge to reasonableness of the contract labor resource (CLR) costs for thirteen individuals is grouped into four categories: (1) CLR rate that exceeded the blanket master agreement (BMA) rate; (2) CLR rate which exceeded the full-time-equivalent (FTE) rate of a WRPS employee; (3) CLRs who lacked the qualifications for the contracted rate; and (4) overnight rate increases, two instances in which a CLR's rate increased from one contract to the next. Exhibit 45 at 6-21. Set forth below are the Board's findings regarding the thirteen individuals.

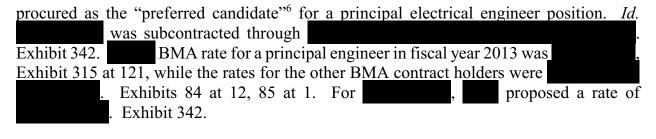
# 1. **(Sample 4)**

DOE disallowed \$213,325.79 paid to in fiscal years 2013–2018; \$177,438.52 in fiscal years 2013–2015 because rate exceeded the rate on the BMA on which he was hired; \$19,103 in fiscal years 2016 and 2017 because did not have a computer science degree and purportedly did not meet the qualification requirements for the BMA; and \$16,784.27 in fiscal year 2018 because rate increased purportedly without a change in responsibilities. Exhibit 45 at 9.

was an electrical engineer with a Bachelor of Science (B.S.) and a Master of Science (M.S.) degree in electrical engineering. Exhibit 167 at 3. had over twenty years of experience as an electrical engineer, including Hanford-specific experience. Exhibit 167 at 3-6. Doug Siron, who worked for WRPS as the assistant business manager to the CFO and business manager, testified that was someone with "extensive experience and was regarded [as] a subject matter expert as it related to computer applications for the tank farms and for the DOE complex for the tank farm operations." Transcript, Vol. 1 at 177-78. also held several patents in techniques for monitoring tank farms and was a participating author of DOE guidance on safety system software reports. *Id.* at 237-38. During the period at issue, was hired on four CLR subcontract releases: 49910-15, 49909-55, 59057, and 61834-6.

The first release (49910-15) had a period of performance from November 26, 2012, to May 31, 2013. Exhibit 343. DOE disallowed costs because the BMA rates. Under the statement of work, was to revise, enhance, and support software used in plant safety. Exhibit 333.

<sup>&</sup>lt;sup>5</sup> CLRs were hired on "releases" issued under the BMAs. Transcript, Vol. 1 at 38.



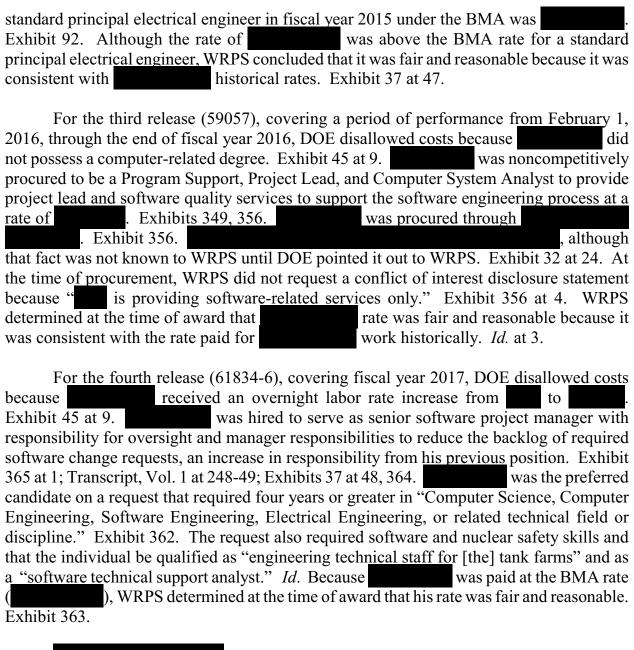
To determine the reasonableness of the proposed rate, WRPS examined two published price lists through GSA Advantage, which is an online shopping and ordering system with numerous GSA schedule contracts. Exhibit 342. Contract GS-23F-0345K listed a rate of \$137.95/hour for an Electrical Engineer IV, which had qualifications of a B.S. and M.S. in electrical engineering and 10–15 years of minimum experience. Exhibit 340. Contract GS-10F-0281K listed a rate of \$133.16/hour for a Principal Engineer. Exhibit 341. Based upon resume, experience, and comparative price lists, WRPS found labor rate to be fair and reasonable at the time of award. Exhibit 342. After receiving DOE's notice of disallowance, WRPS's further analysis confirmed that was a fair and reasonable rate. Exhibit 37 at 47.

For the second release (49909-55), covering October 1 to December 31, 2015, DOE disallowed costs because, in addition to his rate exceeding the BMA rate, and did not meet the BMA requirement that the hired individual possess a computer-related degree. was contracted through at a rate of to be a principal electrical engineer. Exhibit 37 at 47. The labor rates for fiscal year 2016 are not included in the rate sheet that is in the record, but the

Preferred candidates were individuals who were requested by "the field," or the WRPS personnel who were working to clear the tanks. Transcript, Vol. 1 at 13, 89-90, 199-200.

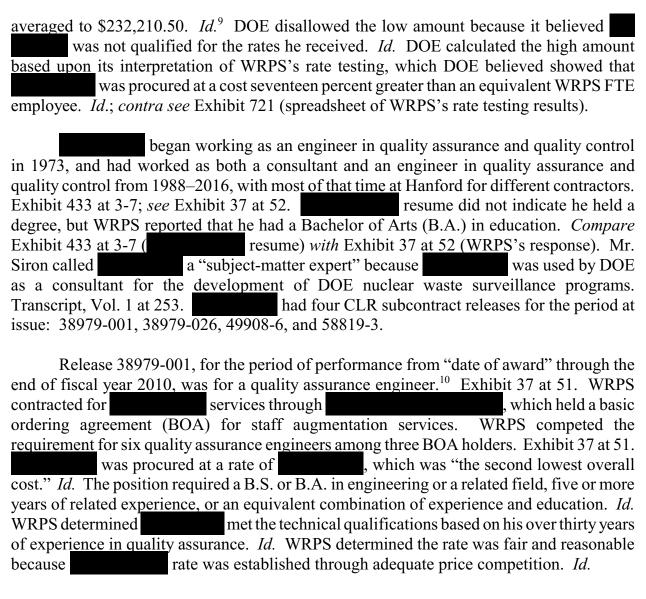
Exhibit 37 is WRPS's response to the notice to disallow costs and was created on August 6, 2020, after all of the contested CLR releases. Throughout this appendix, Exhibit 37 is often cited because either there is no contemporaneous documentation, or Exhibit 37 contains information that is not in the contemporaneous documentation.

The procurement files for this release (49909-55) were not included in the appeal file. According to WRPS, the procurement files for this release and other releases (38979-001, 38979-026, 38794-114, 49583-17, 37650-3, 39682-37, 39665-15, 49909-56, and 58818-23) were not included in the appeal file because DOE did not challenge them in the final decision. Demonstrative 2 at 1 n.1. The information regarding these releases is gleaned from WRPS's August 6, 2020, letter to the contracting officer. *See* Exhibit 37.



# 2. (Sample 5)

For five CLRs, DOE calculated two different estimated disallowance amounts based upon different challenges and averaged those estimates to determine the amount to be disallowed. *See, e.g.*, Exhibit 45 at 8 (contracting officer disallowance of costs). For DOE calculated the low amount to be \$179,625.05 for fiscal years 2013–2018, and the high amount to be \$284,796.06 for fiscal years 2009–2018, which

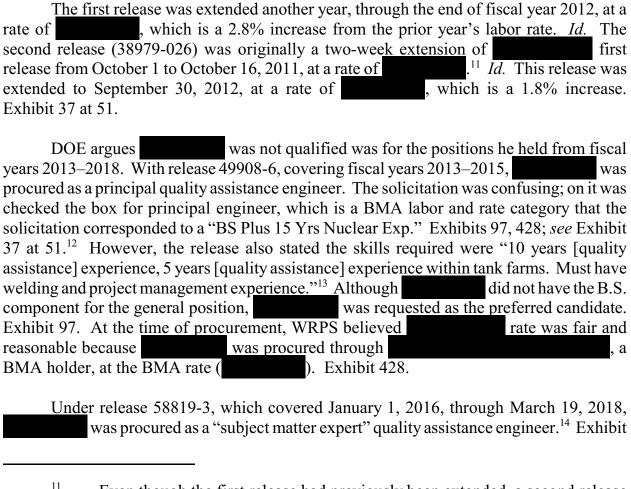


DOE did not calculate average disallowance amounts for individuals. Across the five contested CLRs with two different amounts of costs disallowed, DOE produced a low and high disallowance amount for the entire group, added these amounts together, and divided by two to obtain an average. The math is the same whether the average is applied at the group or individual level.

It is unclear when this release was awarded, but it could not have been earlier than fiscal year 2009, because DOE only challenged costs from fiscal years 2009–2018. *See* Exhibit 45 at 8.

#### REDACTED VERSION

CBCA 7056



Even though the first release had previously been extended, a second release was created because "the prior Release was funded by the Recovery Act and separate accounting was needed for reporting purposes." Exhibit 37 at 51.

Although the staff augmentation and file summary memorandum show the period of performance ending in fiscal year 2013, WRPS's response indicates this release was extended through fiscal year 2015. *Compare* Exhibit 97 (staff augmentation document) *and* Exhibit 428 (file summary memorandum) *with* Exhibit 37 at 51 (WRPS's response).

This method of checking a box that corresponded to a BMA rate and generalized degree and experience requirements but then further writing requirements in the comments, some of which contradicted the generalized degree and experience requirements, was how WRPS would write specialized job requirements for specific releases.

The subcontract release and file summary memorandum, which WRPS failed to document at the time of contract agreement and was documented two months after the beginning of performance, puts

#### REDACTED VERSION

**CBCA 7056** 17 434. services were procured through , a BMA holder, at the in fiscal year 2016, in fiscal year 2017, and BMA rate of in fiscal year 2018. Exhibits 37 at 52, 434. WRPS believed rate to be fair and reasonable at the time of award because he was paid at the BMA rate. Exhibit 434. DOE calculated a deduction for the amount DOE believed was paid above the FTE rate for fiscal years 2009–2018. This amount was based upon DOE's interpretation of WRPS's rate analysis, which was done to determine if CLR rates were substantially higher than equivalent WRPS FTE rates. See Exhibit 721 (WRPS-IA rate analysis). DOE believes this rate analysis showed rate was seventeen percent greater than an equivalent WRPS FTE. Exhibit 45 at 10. rate for fiscal year 2018 was . *Id*. According to DOE's reasoning, should have been paid no more than that year. also worked more than 2000 hours in only two of those ten years. Id. 3. (Sample 6) , DOE disallowed \$78,565.81, which was the average of the low amount of \$76,222.71, based on a challenge of amounts paid to in fiscal years 2010–2018 in excess of an equivalent WRPS FTE, and the high amount of \$80,908.81, based on a challenge of amounts paid to in fiscal years 2010–2012, during which DOE argues he was not qualified for the rate he received. Exhibit 45 at 8. was a work planner with more than seventeen years of experience and had worked at the Hanford site since 1999. Exhibit 467. possessed a B.A. in criminal law and justice. *Id*. As a work planner, was responsible for planning how the projects to clean up the tank farm would proceed and was "instrumental" in ensuring work would actually be performed. Transcript, Vol. 1 at 267; Exhibit 467. Five subcontract releases are at issue: 38794-87, 38794-129, 49583-16, 49583-125, and 62218-09. Release one (38794-87), for a performance period of June 7, 2010, through the end of fiscal year 2010, was for a senior production control and work planner. Exhibits 69, 442. An option to extend the release for an additional year, through fiscal year 2011 at a three percent escalation, was exercised. Exhibits 69, 442. was paid at a rate of in fiscal year 2010 and in fiscal year 2011. Exhibit 45 at 11. The

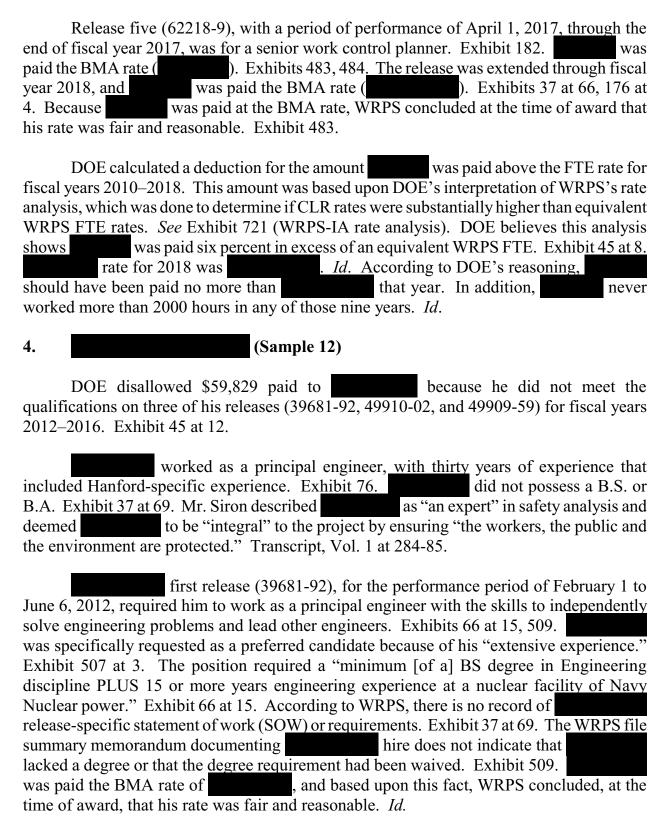
fiscal year 2016. Exhibits 434, 435. WRPS's response indicates the contract was extended into fiscal years 2017 and 2018. Exhibit 37 at 52.

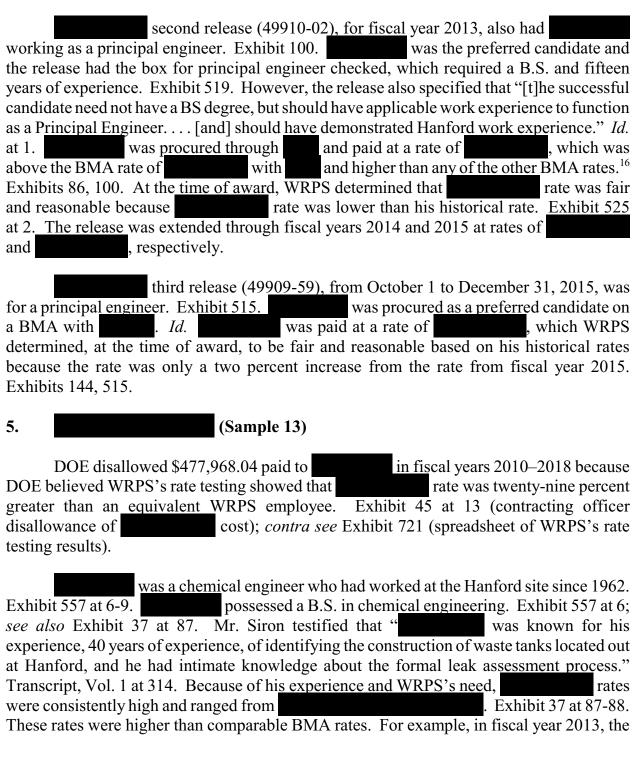
position required a "Bachelors Degree in Engineering, Business, or related field, and ten or more years of experience Hanford Project work planning." Exhibit 436 at 3. WRPS solicited candidates from five BOA holders, Exhibit 442 at 2-3, and was procured through a BOA with Exhibit 37 at 65. Exhibit 37 at 65. Exhibits 68, 442. WRPS determined at the time of award that rate was fair and reasonable because the BOA was competed among five BOA holders and his labor rate was comparable to his previous labor rate. Exhibit 442 at 2.

Release two (37894-129), for performance in fiscal year 2012, was issued under the same BOA with for a senior mechanical production control and work planner. Exhibits 37 at 66, 450. This procurement was not competed; instead, by the project. Exhibit 450. labor rate was labor rate was which was a 1.7% increase from his labor rate in fiscal year 2011 under the first release. *Id.* at 2. This release had the same education and experience requirements. Exhibit 72; *see also* Exhibit 37. Based on his historical prices, WRPS determined at the time of award that and reasonable. Exhibit 450 at 2.

Release three (49583-16), for performance in fiscal year 2013, was for a senior production control and work planner. Exhibit 454. was paid the rate agreed upon in the BMA between and WRPS on which was hired. *Id.* This release was extended through fiscal year 2014 at the BMA rate ( ), Exhibit 117, and again through fiscal year 2015 at the BMA rate ( ). Exhibits 131, 132. WRPS determined at the time of award that rates were fair and reasonable because he was paid at the BMA rates. Exhibits 117, 131, 454.

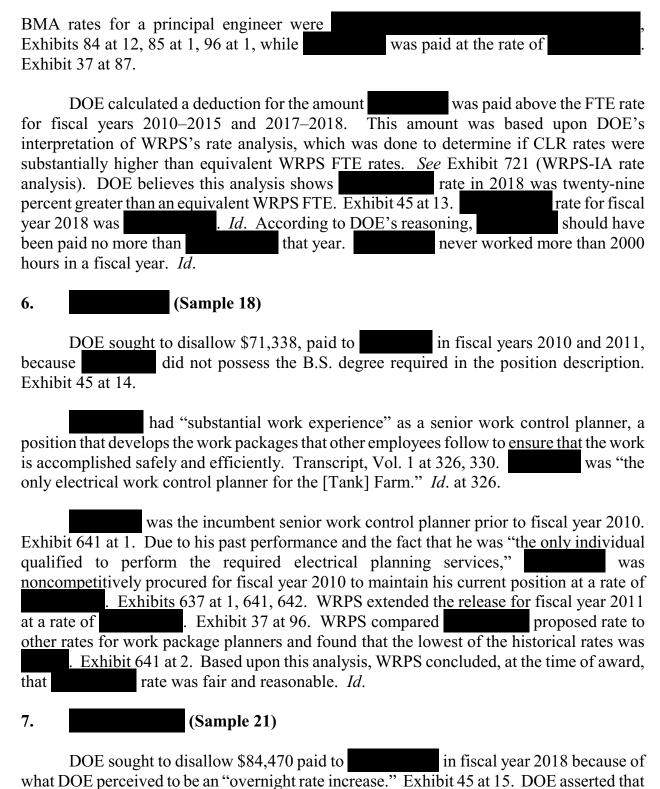
Release four (49583-125), for performance from November 30, 2015, through the end of fiscal year 2016, was for a senior mechanical production control and work planner. Exhibits 457, 459. WRPS requested as a preferred candidate for the position of preparing, coordinating, and facilitating work packages to support the tank farms and supporting structures. Exhibit 457 at 2. As "Minimum Qualifications," the position listed "[a] Bachelor's Degree in Engineering, Business or related field and eight or more years related experience or a combination of education and experience." *Id.* was paid the BMA rate, WRPS concluded at the time of award that his rate was fair and reasonable. *Id.* 

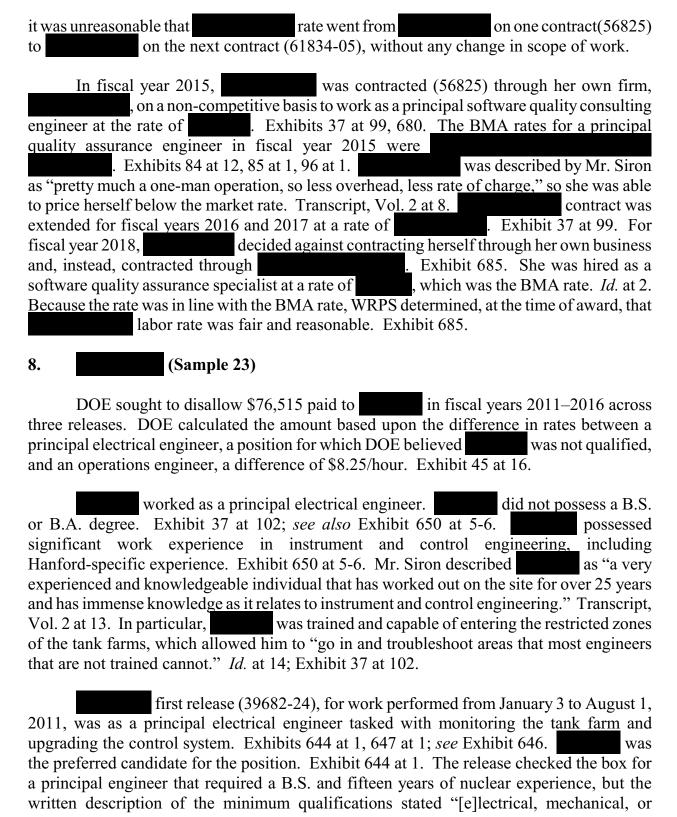


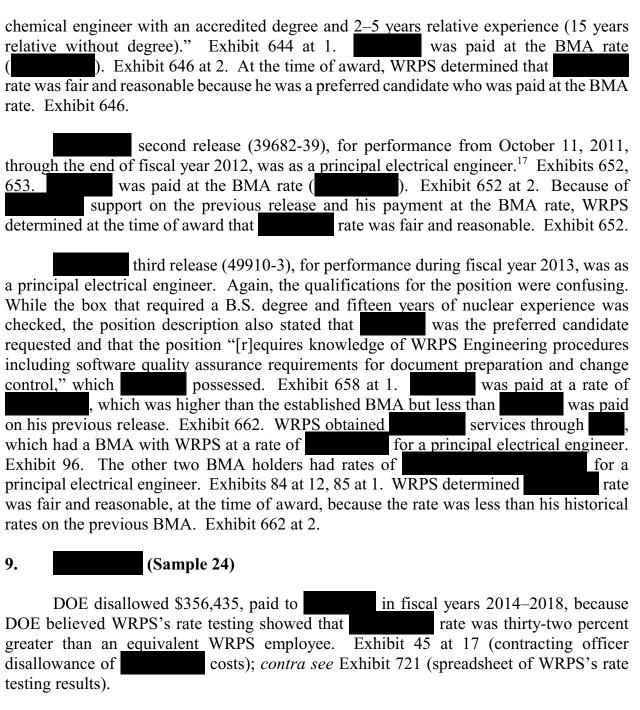


The other two BMA holders had rates at principal electrical engineer. Exhibits 84 at 12, 85 at 1.

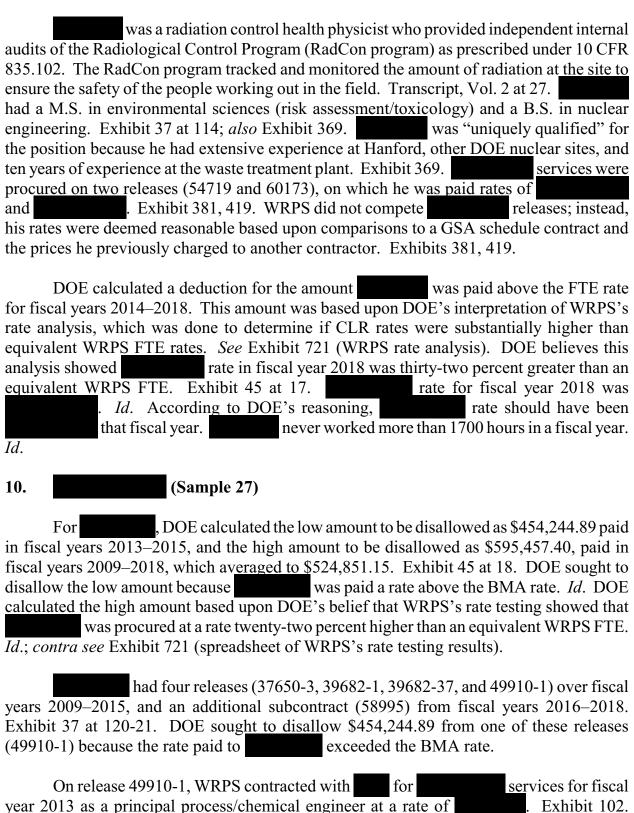
for a

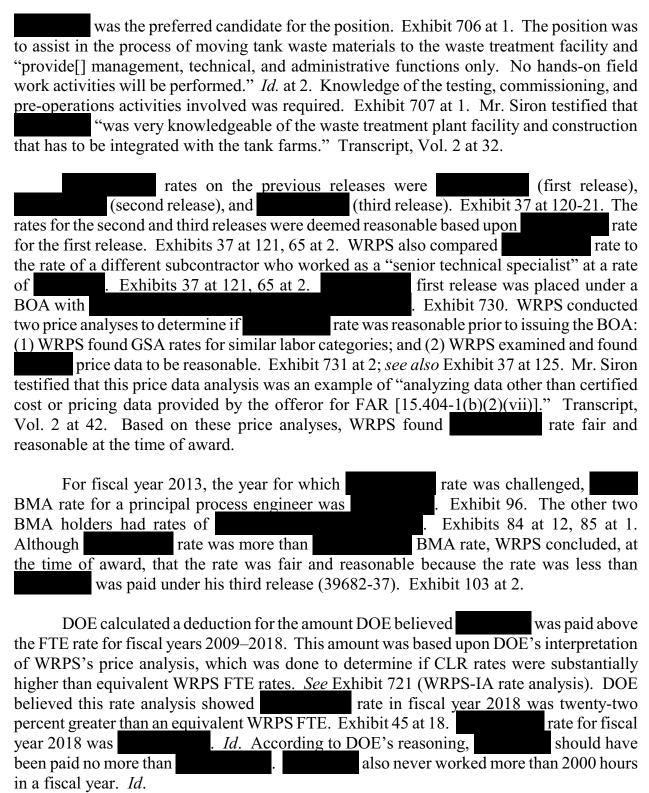




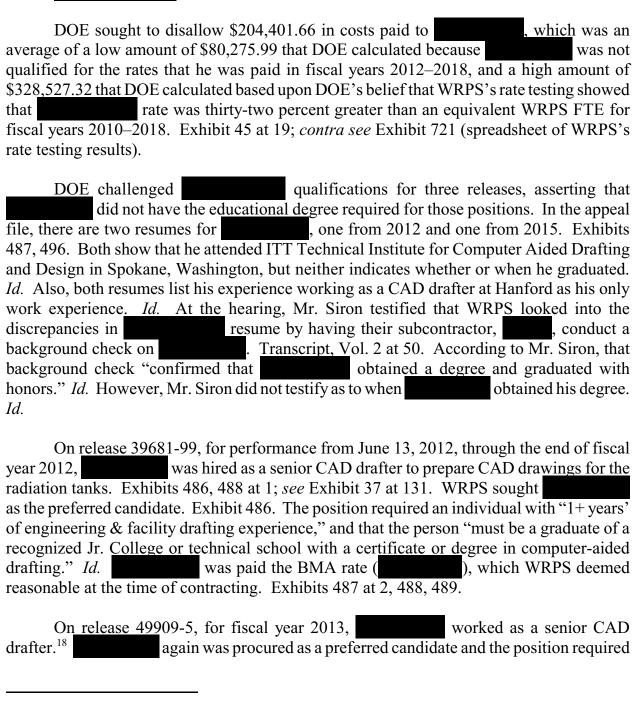


This release was awarded non-competitively because it continued services from the prior fiscal year but required a new release due to a different funding mechanism. Exhibit 652 at 1.





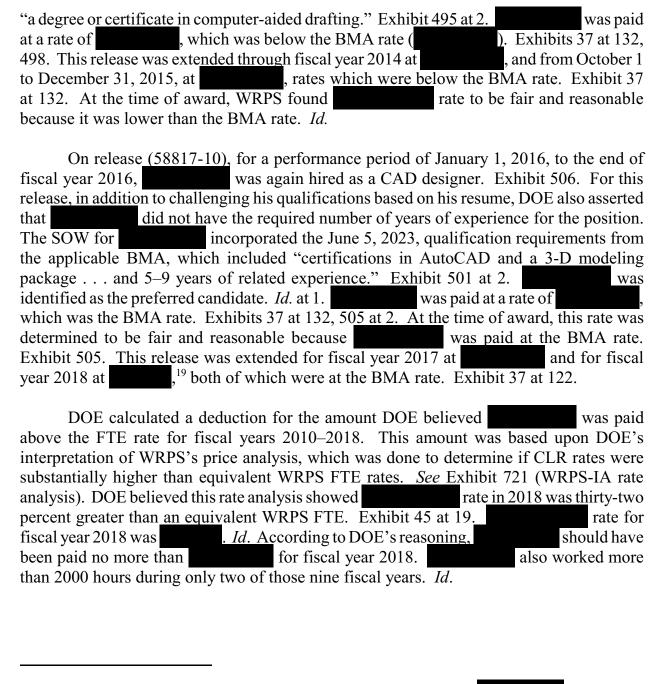
# 11. (Sample 29)



On releases there is inconsistency in the documentation about his exact job titles. For example, the release specific SOW, Exhibit 495 at 1, put his job title as "Senior CAD Drafter Engineering," but checked a box labeled "Senior Drafter" while the subcontract release, Exhibit 498, put his title as "CAD Designer," and the file summary

#### REDACTED VERSION

CBCA 7056 27



memorandum, Exhibit 497, also lists the title as "CAD Designer." was paid at a rate that would indicate he was a senior CAD drafter.

Both the BMA rate and rate for 2018 were revised to to accommodate a new state law requiring paid sick leave for non-exempt employees. Exhibit 37 at 132.

# 12. (Sample 30)

DOE sought to disallow \$198,565, for amounts paid to above the applicable BMA rates in fiscal years 2014 and 2015.

earned a B.S. in chemistry and an M.S. in chemical engineering. Exhibit 123. possessed over thirty years of experience, including Hanford-specific experience, and held three separate patents relating to nuclear safety processes. *Id.* WRPS procured because he had "specialized skills needed by the field . . . [and] no other candidates were determined technically acceptable." Exhibit 125 at 2.

For release 49910-30, covering April 7, 2014, through the end of fiscal year 2014, was procured through as a principal process engineer at a rate of Exhibit 125. It appears that this release was extended, and was paid the same rate in 2015. Exhibit 45 at 20. The qualifications for the position were a B.S. degree and fifteen years of nuclear experience. Exhibit 687. The specific statement of work required someone with experience in software design, development, and testing to support the process control system simulator model. *Id.* was the preferred candidate. Exhibit 693.

At the time of release, BMA rate was the other Exhibits 84 at 12, 85 at 1, 96. two BMA holders had rates of proposed to provide services, but at higher rates than the BMA rates, WRPS procurement requested offers from all of the engineering staff augmentation subcontractors. Exhibit 693. The field determined that none of the responding candidates would meet its requirements. *Id.* was again requested as a preferred candidate because of the need for his specialized skills. Id. At hearing, Mr. Siron confirmed that WRPS "resorted" to and his higher rate because amongst the BMA holders at the BMA rate "[t]here was [sic] no technically qualified individuals." Transcript, Vol. 2 at 60.

Because rate was above the BMA rate, WRPS conducted a price analysis in which it compared rate to four different rates, two different GSA Schedule contracts, and the rates of two different WRPS subcontracts. Exhibit 693 at 2. The GSA Schedule contracts that were compared are contract GS-10F-0370T for a principal and contract GS-35F-0092U for a senior principal process process engineer at . *Id*. The two WRPS subcontracts are 49910-1 release engineer at for his work as a principal process chemical engineer at a rate of and "definitized rates" from for principal process chemical engineer at Id. Based upon this analysis, WRPS found rate to be fair and reasonable at the award of the release. Exhibit 125.

## 13. (Sample 32)

DOE produced two amounts for amount disallowed because lacked the qualifications for the position in fiscal year 2013; the high amount of \$531,255.05, calculated based upon DOE's belief that WRPS's rate testing showed that hourly rate was thirty-four percent greater than an equivalent WRPS FTE employee for fiscal years 2013–2018. Exhibit 45 at 21 (contracting officer disallowance of costs); contra see Exhibit 721 (spreadsheet of WRPS's rate testing results). In November 2019, WRPS agreed to pay back \$336,865 because did not have the qualifications to be billed at the rate of a project manager rather than a principal process engineer. Exhibits 37 at 148, 45 at 21.

DOE calculated a deduction for the amount was paid above the FTE rate for fiscal years 2013–2018. Exhibit 45 at 10. This amount was based upon DOE's interpretation of WRPS's rate analysis, which was done to determine if CLR rates were substantially higher than equivalent WRPS FTE rates. See Exhibit 721 (WRPS's rate analysis). DOE believes this analysis showed rate in 2018 was thirty-four percent greater than an equivalent WRPS FTE. Exhibit 45 at 21. rate for fiscal year 2018 was . *Id*. According to DOE's reasoning, rate that year. should have been never worked more than 2000 hours in any of those six fiscal years. *Id*.