

## APPEAL PANEL DECISION FORM

### I. CLAIMANT AND CLAIM INFORMATION

<b>Claimant Name</b>	Last/Name of Business ████████████████████ ██████████	First ██████████	Middle ██████████
<b>Claimant ID</b>	██████████	<b>Claim ID</b>	██████████
<b>Claim Type</b>	Business Economic Loss		
<b>Law Firm</b>	████████████████████		

### II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> <b>BP's Final Proposal</b>	<b>Compensation Amount</b>	<b>\$0</b>
	<b>Risk Transfer Premium</b>	<b>.25</b>
	<b>Prior Payment Offset</b>	<b>\$0</b>
<input type="checkbox"/> <b>Claimant's Final Proposal</b>	<b>Compensation Amount</b>	<b>\$106,297.68</b>
	<b>Risk Transfer Premium</b>	<b>.25</b>
	<b>Prior Payment Offset</b>	<b>\$0</b>
<input checked="" type="checkbox"/> <b>Remand to Claims Administrator</b>		

### III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

**Comment** *(optional)*:

See Decision Comment uploaded.

Claim No. [REDACTED] – [REDACTED]

The Appeal Panel members fully appreciate the burdens and delays imposed by any order of remand, and they elect that option only as a last resort. This appeal panelist, with great reluctance, must order a remand of this appeal, for the following reasons, and for the following purpose:

BP seeks remand based on the information developed in the appeal that raises real questions about whether Claimant [REDACTED] is excluded from the Economic Class as a Defense Contractor or Subcontractor. Section 2.2.4.6 of the Settlement Agreement excludes from Class membership, “Defense Contractors/Subcontractors, including firms which derive in excess of at least 50% of their annual revenue from contracts with the United States Department of Defense . . . .” Exhibit 18 to the Settlement Agreement includes in its introductory paragraph the statement that “For Defense Contractors . . . the applicability of the exclusion will be determined by the Claims Administrator based upon his review of (a) the claimant’s 2010 tax return, (b) 2010 business permits or license(s), and/or (c) other evidence of the relevant business’s or individual’s activities necessary for the Claims Administrator to determine whether the exclusion applies.” At the end of that exhibit appears Section V, reading, “**Defense Contractors and Their Sub-Contractors and Suppliers:** Claims from businesses and their employees for which at least 50% of annual revenue is generated from contracts with the United States Department of Defense will be considered defense contractors.” (There is an inconsistency between Section 2.2.4.6, requiring revenue “in excess of at least 50% . . . .” and Section V of Exhibit 18 requiring only “at least 50%.” That slight difference might come into play in this appeal, given the extreme closeness to 50% of the revenue percentage ICFP itself calculates, as hereafter discussed.) Finally, the Claims Administrator has adopted Policy 465 addressing this exclusion. It is four pages long, and only certain pertinent provisions are worth noting here. Under Section II.A.3, a large number of named entities and organizations are subsumed within the umbrella term “Department of Defense.” Under Section II.A.5, the term “Excluded Defense Contractor” includes any “Subcontractor,” which, in turn, is defined in Section II.A.10 as “An Entity or Natural Person named as ‘Sub awardee’ by the DOD.” Thus, whereas a broader reading of the SA Section 2.2.4.6 phrase “derive . . . from contracts with the [DOD]” and the Exhibit 18, Section V phrase “generated from” such contracts, might otherwise be entertained, so as to include revenue received by a claimant as subcontractor of a prime contractor having a direct contract with the DOD, without the claimant itself having a contractual relationship with the DOD, the Policy 465, II.A.3.10 definition of Subcontractor includes only an entity “named as a ‘sub awardee’ by the DOD.” Section D of the policy states, in pertinent part, “The Claims Administrator will identify any Entity with any one or more of the following attributes as subject to further analysis as a Potentially Excluded Defense Contractor: . . . **DOD Contracts:** An Entity that provides documents indicating a DOD Contract, or indicating revenue received from the DOD, including descriptions of business activity performed for or on any base, air station, barracks, or other installation used or owned by the United States Army, Navy, Air Force, or Marine Corps.”

BP initially sought a remand because [REDACTED]’s website stated that 70% of its business derived from “government related projects” and listed among its customers numerous ones that

were either DOD entities or DOD contractors, and numerous DOD projects. Even though the “Current/Last Review” section of the record reflects that the Claims Administrator consulted that website to determine the most appropriate NAICS code to assign, nowhere else in that section, or anywhere in the Contract Notes Report, or in any other portion of the record is there any indication that the Claims Administrator ever considered ██████’s potential status as a defense contractor. Responding to BP’s request for a remand, ██████ filed its Final Proposal in which it reported that it had “sorted the 2010 revenue by customer . . . and then classified each customer according to its business type,” with the result that it calculated that its “governmental revenue derived from DOD contracts” in 2010 represented 49% of its total revenue for the year. Attached to ██████’s Final Proposal as Exhibit B are seven pages of customer/project listings totaling approximately 480 entries. For each, ██████ has assigned a category description, including “GOV-DOD,” “Government,” “Industrial” and “Commercial.” ██████ apparently has excluded from its calculation of the 49% DOD contract revenue, all customers to which it elected not to assign the “GOV DOD” label, although, as BP points out in its Supplemental Memorandum (Doc. ID ██████), a number of those customers list on their respective company websites extensive work for DOD entities. Inclusion of even a small amount of revenue derived from those contracts, as being DOD generated, could tip the scales from the 49% ██████ calculates to the 50% level which Exhibit 18 and Policy 465 define as the trigger for Defense Contractor classification. It is clear that the customer listing and contract classification information ██████ has supplied as part of its Final Proposal were not available to the Claims Administrator personnel during their claim review, and therefore they were not alerted to the possibility that ██████ might be a potentially excluded defense contractor. Section E of Policy 465 states, “If the Claims Administrator identifies an Entity as a Potential Defense Contractor, the Claims Administrator will compile publicly available information available on [www.usaspending.gov](http://www.usaspending.gov), on all DOD Contracts awarded to the Entity from which the Entity derived revenue in 2010. The Claims Administrator will include all DOD prime contracts and subcontracts completed by the Entity on or after January 1, 2010, or executed by the Entity on or before December 31, 2010.” Section F directs that “[t]he Claims Administrator will determine the dollar amount of all revenues derived by the Entity from DOD Contracts completed or executed during 2010. If the Claims Administrator determines that the Entity derived 50% or more of its 2010 revenue from DOD Contracts, the Entity is an Excluded Defense Contractor. If the Claims Administrator determines that the Entity derived less than 50% of its 2010 revenue from DOD Contracts, the Entity is not an Excluded Defense Contractor and all its revenues from any source will be considered in reviewing the claim.” Given the implications for Defense Contractor analysis of the new information placed in the record subsequent to the completion of review by the Claims Administrator, the panelist deems a remand necessary in order for the Claims Administrator to perform that analysis based on that information and, per Section I of Policy 465, “other evidence of the relevant business’s . . . activities necessary for the Claims Administrator to determine whether the exclusion applies.” Remand is so ordered for that purpose.