Homine imperito nunquam quidquid injustius,
Qui nisi quod ipse facit nihil rectum putat.

IMPORTANT NOTE: THE FOLLOWING IS FICTION. IT IS OUR INTERPRETATION OF A DISPUTE BETWEEN GOVERNMENT AND CONTRACTOR. IT IS NOT INTENDED TO BE AN ACCURATE REPORT OF ACTUAL EVENTS.

The NASA Contracting Officer's Story:

On December 21, 2007, I awarded a small business contractor named L&M Technologies (L&M) a huge contract for logistics support services at the Johnson Space Center (JSC), in Houston, Texas. The contract contemplated up to 10 Contract Years of performance and included a combination of CPFF, CPAF, and Award Term options. L&M used a Calendar Year for its fiscal year, but the Contract Years were not calendar years. They were both abbreviated CY though. In hindsight, this may have caused some confusion. To keep things simple, I'm going to use FY to indicate the contractor's Fiscal Year and CY to indicate the Contract Year.

To further make things clear: CY1 ran from March 1, 2008 through February 28, 2009 and CY2 ran from March 1, 2009 through February 28, 2010.

In April, 2008, L&M informed me that DCAA had approved its FY2008 provisional billing rates. Those provisional billing rates covered most—but not all—of CY 1. I still needed DCAA-approved provisional billing rates for January and February, 2009.

Why didn't I let the contractor bill its fiscal year rates for the months of performance for which it had approved rates? In hindsight, perhaps I should have considered that approach. Regardless, that's not the approach I took.

For some reason, L&M was slow to submit a provisional billing rate proposal to DCAA for its FY2009. It wasn't until May, 2009, that the proposal was submitted. That's on L&M, not on me.

Anyway, right after they submitted their 2009 provisional billing rates to DCAA, they called me and asked to process indirect rate adjustment invoices for CY 1. I assumed they were going to bill everything at the approved FY2008 rates but for some reason they billed FY2008 costs at FY2008 rates and FY2009 (January and February) costs at FY2009 provisional billing rates—even though DCAA had not yet approved those FY2009 rates. Naturally, I rejected the invoice.

But then DCAA told me that the contractor could bill me at the submitted rates prior to DCAA approving them. That part surprised me—though in hindsight I could have read the Allowable Cost and Payment clause (52.216-7) in the contract and seen that provisional billing rates were supposed to be as close to estimated final rates as possible, and then I might have taken a different tack. But that's what hindsight is for, I guess.

L&M submitted NASA Form 533, as required by the contract. But there was some confusion, because Form 533 requires reporting of "actual costs incurred" and "estimated cost to complete" but L&M seemed to be reporting its costs as billed rather than as incurred. More confusion was caused because L&M was reporting costs at its FY2008 DCAA-approved provisional billing rates and was not reporting costs at the FY2009 rates because—*get this*—they said we had directed them not to use those rates. They sent me a letter that said "In … June … we were directed to remove 2009 rate true-ups from our 533. Since then we understood from a number of conversations that the rate adjustments would be dealt with after the REA was resolved." So now somehow this was all my fault, when of course the contractor is responsible for accurate reporting, not me. *Can you believe it?*

I told L&M in no uncertain terms that this situation needed to be corrected. I wrote them and said—

L&M's 2009 provisional rates were not even approved by DCAA at the time of May 2009 (Invoice 67 dated 5/14/09 and 70 dated 5/18/09) yet L&M attempted to bill them and include them in the REA and I took exception to that. So do you concur that you are reporting on the 533 and invoicing for provisional rates ('08) just not '09 rates? What are L&M's '09 provisional rates?

Not much happened for a few months. We finalized the REA and then, in September, 2010, L&M submitted a "contract-to-date adjusting invoice for the period of 03/01/2008 – 08/27/2010"

in the amount of $433,839. According to the letter of transmittal, L&M was now billing its FY2009 costs at DCAA-approved FY2009 provisional billing rates.

Then I found out that DCAA has a disagreement with L&M over its indirect cost allocation bases, and that if L&M were to invoice at the rates DCAA wanted them to use, then it would blow through some contract "cost gates" and would result in some negative incentives. L&M told me it wanted to establish contract indirect cost rate ceilings that would prevent this from happening. So even if L&M's rates went up over the ceilings, the resulting costs would be unallowable for the contract.

I didn't go for it; and why should I have? Instead, we submitted a draft Clause B.8 that would allow L&M to bill at rates less than DCAA calculated as the correct rates. It said—

For contract years 1 through 5 that the Contractor invoiced at indirect rates below the provisional billing rates approved by the DCAA, the Contractor shall assume all costs in excess of the indirect rates in the table below. Any costs incurred above these amounts shall be unallowable costs and shall not be billed to the Government under this or any other Government contract.

Pretty good, huh?

In hindsight, I might have wondered how the agreement would affect the Form 533 reporting. Would L&M report at actual indirect rates, or at the provisional billing rates, or at the contract ceiling rates? I've got to be honest here and tell you nobody asked those questions at the time.

In any case, all was seemingly fine for years, until December, 2016, when L&M and DCAA entered into a final indirect cost rate agreement for L&M's FY2009. A few months later—in January, 2017, L&M submitted *another* series of rate adjustment invoices for costs incurred in its FY2009, and this time they wanted an additional $683,739! Naturally, I rejected those invoices because the rates agreed-to between DCAA and L&M were in excess of the rates established by contract clause B.8—which was the clause that L&M had asked for in the first place. *Can you believe the nerve of those guys?*

L&M argued that the clause only applied if they invoiced at “indirect rates below the provisional billing rates approved by DCAA,” and if they billed at DCAA-approved provisional billing rates then the clause was not applicable. That was clearly not the intent of my clause, and I told them so.

L&M filed a certified claim for the $683,739, which I denied. Then they appealed to the ASBCA.

Great; more work for me. But I know I’m right on this.

L&M Technologies’ Story:

There’s always a balance between telling the customer it is wrong and giving in on a point in the name of customer relations. In this case, we gave in and it cost us a ton of lost cash flow. As a small business, that really hurt us.

The CO kept insisting that we needed DCAA-approved provisional billing rates. Even when DCAA told the CO that we could bill without a DCAA approval, the CO didn’t budge. As a result, we kept billing at FY2008 rates even though we knew that FY2009 rates were higher.

In hindsight, we should have done a better job of helping the CO to understand how the lifecycle of billing rates under 52.216-7 works. We should have explained that the rates were going to be trued-up eventually, and it was in both parties’ best interests to make sure they were trued-up as the work was performed and costs were incurred. We didn’t do a great job there, and it cost us—not only in lost cash flow but also in unallowable legal fees as we appealed that CO’s final decision denying our rightful costs. But what do you expect from us? We’re a small business. We don’t know everything like the big contractors do.

What was that? No, we didn’t really think too much about the Form 533. We made sure it accurately reported the costs we had billed. The Form was as accurate as we could make it. When NASA told us to keep billing at FY2008 provisional billing rates, we kept reporting at FY2008 provisional billing rates on the Form. I told you, it was accurate. We did our job.

What do you mean that there's a difference between actual cost rates and provisional billing rates? I told you we should have done a better job with the 52.216-7 clause. Maybe we should have made sure we fully understood it, as well. But we can't be expected to know everything: I told you, we are a small business.

Those contract "cost gates" were really important and so when DCAA recalculated our rates higher based on a change in allocation base, we had a problem. We had to keep our rates low; that was an investment we needed to make to retain the contract work.

What do you mean we didn't need anybody's approval to bill at rates below the ones that DCAA calculated? The CO wouldn't let us bill at anything other than DCAA-approved rates, and we needed to stay below those rates. What do you mean, we could have self-disallowed the costs rather than dealing with a contract mod? Well, now you tell us. At the time, we didn't think of that. I told you, we are a small business.

Anyway, we know we are right on this and we're appealing the decision.

The Armed Services Board of Contract Appeals' Story:

Clause B.8 is silent about when the contractor's invoice must be submitted, 'For contract years 1 through 5 that the Contractor invoiced at indirect rates below the provisional billing rates approved by the DCAA' (finding 15). Nothing in the clause directs us to consider the invoices itemized in the NF 533s (finding 8) to take precedence over Invoice No. 200 that bills at the higher 2009 rates and was paid by NASA (finding 12). Taking into consideration that it was NASA's direction that prevented L&M from invoicing at the 2009 rates earlier, we hold that Invoice No. 200 satisfies the B.8 requirement that L&M invoice at the approved provisional rate[s] listed in the clause in order to receive any increase in rates when DCAA approve[d] the final indirect rates. For that reason we conclude that the rate cap in Clause B.8 does not apply and L&M may recover any increase in its final rates over approved provisional rates.

In accordance with the above, L&M's appeal is sustained. The matter is remanded to the parties to determine quantum.

For those interested in the decision that sparked this fictional story, here is **a link** .