

## Final Indirect Rates are Final

Written by Nick Sanders

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With very few exceptions, once a contractor and the cognizant Administrative Contracting Officer execute a final indirect cost rate agreement, the indirect rates are then final. (We wrote about one exception [here](#).) Those agreed-to final rates are to be applied to active contracts and to physically complete contracts, in accordance with the requirements of FAR contract clause 52.216-7.

In a [recent case](#) at the Court of Federal Claims, it seems one contractor wanted a do-over of the final indirect cost rates it had agreed to.

The case goes back to cost-type contracts that were active in the 1980s. Yes, here we are, more than 30 years later, still discussing those cases. Sometimes justice moves slowly. In this case, one of the delays was because Information Systems & Networks (ISN) didn't submit some of its claims to a contracting officer first, so its appeal had to be put on hold while it did so (which then created something that could be appealed.) Anyway ...

In 2004 ISN filed a claim with a contracting officer involving seven assertions associated with its indirect cost rates, as allocated to nineteen contracts. A couple of months later, the contracting officer "issued a final decision on ISN's final indirect cost rates claim, disallowing some costs and determining final fringe and overhead indirect cost rates applicable to 'all Government flexibly price[d] contracts and subcontracts' for FY 1987-1995, as well as interim general and administrative (G&A) indirect cost rates for FY 1987-1995." (As Judge Firestone noted, final G&A rates could not be determined "because those rates were the subject of pending litigation at the time." Subsequently, ISN lost at the Federal Circuit on its appeal of exclusion of the S Corporation's owner's personal income taxes in its G&A rate calculation.)

A bit more than a year later "the ACO addressed ISN's remaining six claims, involving allegedly unpaid contract amounts, costs over contract ceilings, lost profits and unabsorbed overhead, interest, and attorneys' fees. In this decision, the ACO determined that for eleven contracts over which he had authority, the government had *overpaid* ISN by a total of \$280,241." (Internal notes and citations omitted; emphasis in original.) Note the issues listed. Several of them (if not all of them) have little if anything to do with calculations of indirect rates. For example, "costs over contract ceilings" pertains to the application of final direct and indirect costs against estimated cost values or against funded amounts; it does not relate to how indirect rates are calculated. Regardless, ISN filed a claim.

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ISN and the government resolved that claim by agreeing that certain allowances for “office rent and equipment rent” in ISN’s final rates for the years 1987 through 1995. According to the settlement agreement—

ISN also agreed to release: all claims, known or unknown, including all claims for monetary and declaratory relief, against the United States . . . arising out of, set forth, related to, or otherwise involved in Case No. 06-99C, including but not limited to, any claims for costs, expenses, attorney fees, and damages of any sort, with the exception of claims for payment resulting from the Government’s calculation of final indirect cost rates that ISN might present to the agencies with which it contracted.

Subsequently, the government provided ISN the indirect rates calculated in accordance with the settlement agreement in February 2011. Thus, as of February 2011, ISN purportedly had final indirect rates for all years 1987 through 1995, and could then close out physically complete contracts. But not quite, because ISN had filed a separate appeal of the contracting officer’s decision that ISN owed the government \$280K; that matter had been put on hold (but not dismissed) while the first appeal was being worked on.

In the second appeal, ISN challenged the government’s calculation of its indirect rates (the ones it had agreed to in the settlement of the first appeal.) “According to ISN, these calculations contained errors, and as a result, ISN conducted its own indirect cost rate calculations, adding and reallocating costs, as part of its claim for damages in case No. 06-387C.” As part of ISN’s recalculations, it added costs for “Other Compensation” and reallocated corporate allocations. Based on its newly calculated final indirect rates, instead of owing the government \$280K, ISN asserted that the government owed it \$3.7 million.

In deciding the parties’ motions for summary judgment, Judge Firestone decided that ISN’s rates were addressed in the original settlement agreement (except for G&A). She wrote “The plain terms of the settlement agreement preclude ISN from making any claims for additional costs and re-allocations for purposes of calculating the final indirect cost rates for those years. . . . the plain language of the exception does not give ISN the right to challenge, once again, the costs and allocations agreed to by the parties in the settlement agreement.”

There was more to the decision. For instance, ISN argued that its CFO lacked authority to execute final indirect rate agreements for 1996 and 1997. Judge Firestone discussed the doctrine of “apparent authority” and also noted “ISN’s seventeen years of silence after the

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agreements were signed also affirms Mr. Bonuccelli's apparent authority to sign them." In other words, if the CFO didn't have authority to execute the agreements, then waiting 17 years after execution to make that argument was going to support the government's contention that, even if the CFO didn't have the actual authority, he had the apparent authority and the government reasonably relied on that authority.

Judge Firestone found that some issues (including calculations of the final G&A rates) needed to be resolved. However, ISN's chief arguments were not accepted. The company's final indirect rates were indeed its final rates for the years covered by the various agreements.

Speaking more broadly, the time to worry about indirect rates is when the indirect costs are being incurred, to make sure your company is spending money in accordance with budgets (budgets that hopefully tie to the indirect rates you are bidding and billing). The time to worry about indirect rates is when you look at projected year-end costs (and associated rates) and then see what those rates do to your projects' costs, and then see how your projects are going to comply with Limitation of Cost or Limitation of Funds clause requirements (as applicable). The time to worry about indirect rates is when you get a DCAA audit report, and you look at how questioned costs (if any) will impact contract costs. The time to worry about indirect rates is when you execute a final indirect cost rate agreement, and now have to submit interim adjustment vouchers (for active contracts) or final vouchers (for physically completed contracts).

It is too late to worry about indirect rates more than a decade later, when you decide you don't like the results. If you had been looking at the rates and the impacts all along (as suggested above), you would have known the results, whether they were good or ill.