Here's what we now know:

Item One: The Government cannot unilaterally impose an arbitrary decrement factor on a contractor that fails to submit its annual proposal to establish final billing rates, even if DCAA recommends that factor, unless it can support that factor. The Government has the burden of proof to show why any decrement factor is reasonably related to its risks that the contractor has overbilled its indirect cost rates.

Item Two: When dealing with Time & Materials (T&M) contract types, any DCAA-recommended decrement factor—no matter how calculated or supported—can only apply to indirect cost rates. Those indirect cost rates are applied to the reimbursable ("M") side of the T&M contract costs. That factor simply cannot apply to the contractor's fixed labor billings, the "T" side of contract costs. Nope. Can't do it—those rates are fixed by contract terms and are simply not affected by any changes to allowable indirect cost rates.

Item Three: The Allowable Cost and Payment clause (52.216-7) applies to T&M contracts whether or not the clause is found in the contract at hand. Yes, readers: the clause will be read into the contract by operation of the Christian Doctrine.

Now, how do we know the foregoing?

We know about this stuff because Allard Nazarian Group, Inc., dba Granite State Manufacturing, appealed a contracting officer's final decision to the ASBCA and Judge Stinson (writing for the Board) made **those determinations** in July, 2023.

A short history:

Scandia Manufacturing Company, Inc. (Scandia), had several government contracts—including three ID/IQ contracts that permitted issuance of only T&M task orders. In 2008, Allard purchased Scandia and all its contracts. A Novation Agreement was prepared and signed by an Administrative Contracting Officer. So far, so good.

In 2009, Allard was awarded a fourth contract of a similar nature: ID/IQ with T&M task orders. Unlike the other three, this contract incorporated clause 52.216-7 (“Allowable Cost and Payment”). Because T&M Task Orders were contemplated by the parties, all four contracts contained clause 52.232-7 (“Payments under Time-and-Material and Labor-Hour Contracts”). Okay so far?

Now it gets weird.

Apparently, Allard never submitted the annual proposals to establish final indirect billing rates (popularly but incorrectly called an “incurred cost submission”). Did it have to? Arguably, nothing in the three contracts it acquired from Scandia required the contractor to do so. With respect to the fourth contract—the one it entered into on its own—yes. Absolutely. 52.216-7 requires submission of a proposal to establish final billing rates.

If one contract requires submission, then that pretty much means you have to prepare a submission for the entire business entity. You’ve got to calculate final pools and bases; you’ve got claim (and certify) indirect costs. You’ve got to fill out the myriad Schedules we’ve all come to know and love. You signed the contract and so you have to submit the proposal and support it through audit.

But Allard never did.

Finally, the government lost patience.

By letter dated November 27, 2019, the Defense Contract Management Agency (DCMA) issued a contracting officer’s final decision and demand for payment of debt ‘resulting from Allard’s/Scandia’s failure to submit indirect cost rate proposals for Fiscal Years 2007-2009,’ stating that the ‘[d]ecision is applicable to all flexibly-priced contracts and subcontracts performed by Scandia/Allard during Fiscal Years 2007-2009’. According to the contracting officer ‘all reasonable efforts have been exhausted to obtain the subject matter final indirect cost rate proposals,’ and, therefore, the government had ‘unilaterally established . . . final indirect rates for Allard/Scandia fiscal years ending 31 December 2007, 31 December 2008, and 31 December 2009’.

(Internal citations omitted.)

In unilaterally establishing the Scandia/Allard final billing rates for FYs 2007, 2008, and 2009, the contracting officer applied a 20% decrement factor, as recommended by DCAA-Baltimore. With respect to the more current years (FYs 2010 through 2014), the contracting officer applied a decrement factor of 16.4%.

Importantly, the contracting officer's unilateral rate determination did not limit application of the decrement to just appellant's indirect costs, but rather applied the decrement factor against *all* invoiced amounts, including appellant's direct, fixed rate labor costs.

Yeah, that's gonna hurt.

Allard appealed. The company didn't try to claim that it had actually submitted the required proposals; instead, it argued that the application of the unilateral decrement factor was flawed. That was the case in front of the Board, the case on which it ruled in a Partial Summary Judgment.

As part of pre-trial motion practice, the parties agreed to drop FYs 2007 and 2008 from the appeal. We're thinking that was done because, to be honest, nothing in any Scandia/Allard contract required submission of a proposal to establish final billing rates. Whatever the parties intended, you couldn't find it in the contract terms. So, at the end, the Board's decision only covered FYs 2009 through 2014.

What did the Board rule?

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When a government contracting officer unilaterally establishes a contractor's final indirect billing rates (which, to be clear, is a thing that can be done), then those rate determinations are considered to be a government claim. Because they are a government claim against

the contractor, the government has the burden of proof—and it must show its decrement factor is reasonable. “FAR 42.703-2 allows the government to set a unilateral rate aimed at ensuring the government does not reimburse a contractor for unallowable costs. Specifically, FAR 42.703-2(c) provides that any unilateral rate ‘should be - (i) [b]ased on audited historical data or other available data as long as unallowable costs are excluded; and (ii) [s]et low enough to ensure that unallowable costs will not be reimbursed.’ FAR 42.703-2(c)(2).

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“… the government applied a decrement to appellant’s *direct labor rate* costs based upon appellant’s alleged failure to submit auditable *indirect cost rate* proposals. FAR 52.216-7(g) does not provide a proper justification, or regulatory authority, for the government’s actions taken here.” (Emphasis in original.) “The government’s imposition of an indirect cost rate decrement upon appellant’s fixed labor costs is unreasonable as not supported by the regulatory authorities cited by the government and contrary to the traditional demarcation between direct and indirect costs and the separate treatment of those costs.”

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“… pursuant to the *Christian* doctrine, FAR 52.216-7 - as a mandatory time and materials contract clause specified in FAR 16.307(a) - is considered inserted into the contract by operation of law.”

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“The express language of FAR 16.307(a)(1) dictates that FAR 52.216-7 applies ‘only to the portion of the contract that provides for reimbursement of materials (as defined in the clause at 52.232-7) at actual cost’.”

The Board also noted that submission of a proposal to establish final billing rates was not needed to evaluate the propriety of Allard’s direct labor billings. The contract clause 52.232-7 already gave the government audit rights in that area. It did not appear that the government

availed itself of its contractual rights before deciding to apply its decrement factors.

So, readers, that’s how we know what we know.