

SUBCONTRACTOR COSTS: CAN THE PRIME BILL FOR VACATION COSTS, EVEN IF INVOICED SEPARATELY?

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Is a prime contractor entitled to bill for vacation costs incurred by and owed to its subcontractor on a time and materials contract, even if they were invoiced separately from the subcontractor's salary cost? The Armed Services Board of Contract Appeals ("ASBCA") answered "yes," explaining that the application of the clause at Federal Acquisition Regulation ("FAR") 52.232-7, "Payments Under Time and Materials and Labor Hour Contracts" so mandates. *Access Personnel Servs, Inc.*, ASBCA No. 59900, September 7, 2017.

Access used a subcontractor to perform a portion of its Navy contract for personnel support services. The subcontractor, Professional Services of America, invoiced Access separately for its personnel's vacation pay, instead of incorporating the vacation pay into the hourly rates that it billed Access. Access advised the government that vacation pay of its subcontractor had been billed separately, but the contracting officer refused to pay for the vacation pay. An audit by the Defense Contract Audit Agency ("DCAA") had identified these separate vacation costs as "unallowable." In responding to Access's claim, the CO stated that "indirect costs such as vacation or holiday pay should have been built into the direct labor rate."

The ASBCA held the subcontractor costs for vacation pay were allowable, even if invoiced separately and not included within a single direct labor rate. The Board noted that even the CO had acknowledged that the hourly rates that Professional used in its billing should have included vacation pay, and were allowable. The Board stated that there is no language in FAR 52.232-7 mandating that a prime contractor develop a single hourly labor rate covering all of its subcontract costs used in billing the government. There *is* language in FAR 52.232-7 that requires the prime contractor to use a "built-up" hourly rate, including all direct, fringe benefits, overhead and profit when billing for the *prime* contractor's employees time. The clause plainly states that contractors will be reimbursed for subcontract costs, and no built-up hourly rate for the subcontractor is required.

While it is probably a good idea for a prime to invoice the government for all subcontractor's time costs using a single consolidated rate, it is not mandatory. Indeed, Access instructed its subcontractor to bill that way—but Professional made a mistake in its billing. That mistake does not preclude Access from recovering its subcontract costs, just because they were included in two separate invoices to the government.

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