

## **FAILURE TO GIVE NOTICE OF COST OVERRUN IN TIME & MATERIALS CONTRACT**

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The Department of Health and Human Services (“HHS”) issued Caduceus Healthcare, Inc. (“CHI”) a task order under a schedule contract for Surge Support Emergency Response Operations (involving quarantines). The order listed the contract line item number (“CLIN”) for each service provided along with a ceiling price and description. The Contracting Officer denied payment of \$147,000 for services rendered because CHI exceeded the contract’s T&M ceiling price without giving required advance notice to the Government, and CHI appealed the denial. *Caduceus Healthcare, Inc. vs. HHS*. CBCA 8422, Sept. 16, 2025.

The Federal Acquisition Regulation (“FAR”) does not specifically identify Time & Materials (“T&M”) contracts or orders as “cost-type contracts,” rather, it places them in their own category, in FAR subpart 16.6. The FAR further explains that they are *not* fixed priced contracts, and may only be used when “it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.” FAR 16.601(c). Because a T&M contract provides no positive incentive to a contractor for cost control or labor efficiency, appropriate methods are required to assume there is cost control or labor efficiency. FAR 16.601(c)(1). Further, a T&M contract or order must include a ceiling price that the contractor “exceeds at its own risk.” FAR 16.601(d)(2). And finally, a T&M solicitation, order or contract must include the clause at FAR 52.232-7(a)(7), Time-and-Materials and Labor-Hours Contracts. See FAR 32.111(a)(7).

FAR 52.232-7(d) &(e) state:

(d) *Total cost*. It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule, and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during performing this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performing this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(e) *Ceiling price*. The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance

under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

CHI failed to notify HHS that it was at risk of exceeding the ceiling price for CLIN 2001, and failed to provide a “revised estimate of the total price for performing this contract.” CHI made general references to HHS to working within budget constraints, but never mentioned that it was at risk of exceeding the cost ceiling for that CLIN.

The Board held that CHI could not recover the costs because it failed to notify HHS that it was at risk of exceeding the ceiling price. Further, CHI continued to perform costs in excess of the ceiling price for CLIN 2001 without express authorization from the contracting officer. The Board noted that a contractor that performs work in excess of a cost ceiling without express authorization from the contracting officer does so at its own risk, unless it can demonstrate the applicability of an exception to the rule, or that the contracting officer has abused the discretion not to fund the overrun. Exceptions include: (1) change in contract work; (2) contractor had no reason to know of and could not have known of the imminent overrun; or (3) some conduct on the part of the government entitles the contractor to recover the overruns.

CHI could not demonstrate that an exception applied:

- HHS did not change the contract work, constructively or otherwise
- CHI had pre-existing knowledge of an overrun, foreseeing that it would likely exceed the ceiling, yet continued to perform without express authorization that HHS would fund the overruns
- Nothing in the record supported CHI’s assertion that HHS knew or should have known that CHI was approaching and might exceed the ceiling price for CLIN 2001.

The Board also rejected CHI’s assertions that it was entitled to full payment because the government had been unjustly enriched or that the government had waived or was estopped from enforcing the contract. HHS simply followed the written contract and there was no waiver or estoppel because there was no indication that HHS knew of the possible overrun.

The Board ruled that CHI’s actions had accepted the risk and liability of the costs it incurred, and denied the appeal.

Takeaway. This is an example of how carefully a contractor must read and comply with *all* of the clauses in its contract. Had CHI provided notice to HHS, and had CHI followed the requirements in the clauses, the result here most likely would have been more favorable to CHI.

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