

# Prince, Ramish and Johnson in The Government Contractor: The Most Important Cost Cases Of 2024

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Haynes Boone Partners [Zach Prince](#), [Dan Ramish](#) and Senior Counsel [Richard Johnson](#) authored an article for *The Government Contractor* discussing noteworthy decisions of the Armed Services Board of Contract Appeals, U.S. Court of Federal Claims, and U.S. Court of Appeals for the Federal Circuit over the past year regarding cost and pricing issues. The decisions address the Limitations of Costs restrictions, the statute of limitations for Government cost claims, the rules regarding waiver of unallowable cost penalties and challenges to regulations as inconsistent with statute.

Read an excerpt below.

***Reliability and Performance Techs., LLC v. U.S., 2024 WL 2478320 (Fed. Cl. May 23, 2024)***—In this decision, the COFC, in denying the Government’s motion for summary judgment, addressed a familiar area of cost-reimbursement contracting, but with some interesting twists occasioned by the court’s belief that it needed to distinguish the 1997 Federal Circuit decision in *Advanced Materials v. Perry*, 108 F.3d 307 (Fed. Cir. 1997); 39 GC ¶ 167. The courts and boards have long tempered the strict cost-reimbursement limitations of the Limitation of Cost and Limitation of Funds clauses where the contractor can establish that without its fault it could not foresee incurrence of costs in excess of the limitation, or where Government fault prevented the contractor from providing the notice. See Cibinic, et al., *Cost Reimbursement Contracting*, 4th Ed. 2014 (hereinafter “Cost Reimbursement Contracting”), at 772, 780 (cases of Government fault would also seem to require at least a fair measure of unforeseeability on the part of the contractor). Cases favorable to the contractor, while limited in number, have typically involved unforeseen increases in indirect cost. *Reliability and Performance* was just such a case.

Reliability and Performance performed a five-year cost-reimbursement technical support contract for the Naval Sea Systems Command. During performance it submitted annual final indirect rate proposals, none of which the Government audited and negotiated in a timely manner. The contractor’s final indirect costs for 2012 and 2013 were higher than the respective billing rates, leaving a sizable balance owed by the Government. The Navy refused to pay, and issued a final decision to that effect, asserting that the costs were not recoverable because the costs exceeded the contract funding amount under the Limitation of Funds clause. Reliability and Performance appealed to the COFC, asserting that its failure to provide notification of the additional costs was unforeseeable. The Navy disputed the assertion, placing its principal reliance on the Federal Circuit decision in *Advanced Materials*. The Navy also claimed the amounts involved had been released, which the court disposed of in summary fashion.

In *Advanced Materials*, 108 F.3d at 308–09, a contractor subject to the provisions of the Limitation of Cost clause (functionally identical to the Limitation of Funds clause) exceeded funding for both direct and indirect costs. Upon the Government’s refusal to fund the extra amounts, the contractor appealed to the ASBCA, arguing “that the cost limitation provision was unenforceable because it had no reason to foresee the overrun.” *Id.* at 309. However, the ASBCA held that “the company ‘knew or had reason to know’ its year-to-date direct and G&A ... costs as it was performing [the]

contract ... and that no unforeseen event prevented” the contractor from complying with the clause. Id. at 310. The contractor’s assertion that it was entitled to the benefit of the unforeseeability exception to the Limitation of Cost clause was thus squarely refuted by the Board’s factual finding that the overrun was foreseeable. Id. at 311. Nothing in *Advanced Materials*, therefore, altered prior established law with respect to application of the Limitation of Costs and Funds clauses. See, e.g., *Gen. Elec. Co. v. U.S.*, 440 F.2d 420 (Ct. Cl. 1971). Nevertheless, the COFC in *Reliability and Performance* believed it was necessary to distinguish *Advanced Materials*.

First, the court pointed to the difference between a contract for a specific product (such as the contract at issue in *Advanced Materials*) and one for a level of effort over a specified period (such as the contract at issue in *Reliability and Performance*). As the court explained, the former case presented the contractor “all the relevant information and control over the cost and schedule of completing the specified work since the contract specified all of the work that needed to be done upfront,” and the contractor thus sought to recover for a “classic ‘overrun.’ ” 2024 WL 478320, at 6. Conversely, under the latter type of contract, the contractor could not reasonably be expected to know what work the Government would require and thus could not foresee the prospective costs and provide the Government notice. Id.

Second, the COFC further distinguished *Advanced Materials*, pointing out the alleged breach by the Navy of Federal Acquisition Regulation 52.216-7, the Allowable Cost and Payment Clause, based on the Navy “not promptly negotiating final indirect rates” and “not adjusting the billing rates sufficiently to avoid the variance between the incurred costs and the final indirect rates.” 2024 WL 2478320, at 5–6. This argument thus invoked the second branch of the judicial rule excusing compliance with the limitation clauses, which is invoked in the case of Government fault. While the rule does not require Government breach, if a contractor could establish a **prior** Government breach, this case suggests without quite establishing that such a breach would excuse further contractor performance of the Limitation of Costs/Funds clauses. The court here only invoked Government fault as an independent reason potentially justifying non-enforcement without further analysis.

Because compliance with the Allowable Cost and Payment clause as well as foreseeability of the indirect cost overrun were disputed, the COFC cited them as a basis for denial of the Navy’s summary judgment motion. Whether any of the issues discussed above will attract the court’s attention in further proceedings remains to be seen.

To read the full article from *The Government Contractor*, click [here](#).