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# Annual AGC Meetings on Surety Bonding & Construction Risk Management

Presented by:



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# Presenters

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# I. The \$50 Million Question:

The Morse Diesel Case -  
What It Does and Does Not  
Say About Insurance and  
Bond Premiums Included in  
the Cost of Performing  
Public Work



**It May Be  
A Fixed Price Contract  
But  
It May Not Be  
OK**

## Appreciate the Importance of “Cost”

- Bonds Are Different – Even in a Firm Fixed-Price Contract
- “Cost” – The Key Term in Equitable Adjustments

# Appreciate the Importance of Contemporaneous Disclosure & Documentation

- TINA
- Change Orders
- Billings for Reimbursement of “Costs”

**Appreciate What You Sign**

Certifications Are  
“Government Formalities”

No!!

## Appreciate What You Sign



I hereby certify, to the best of my knowledge and belief, that –

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract.

## Appreciate the Standards of Conduct

- High and Strict Standard on Disclosures (Long Island Bank case)
- Full Disclosure of Facts Related to Price or Costs (TINA)
- Kickbacks – Rebates and Credits

## Appreciate the Environment

- Distrust & Concerns Related to Overreaching
- Incentives to Turn in “Wrongdoers”
- The U.S. Department of Justice (Uncle Sam Wants You!)
- Google – “False Claims;” See What an Unhappy Employee Sees

## II. Framework for Analysis

1. Is it an Allowable COST?
2. Did the Contractor DISCLOSE the COST Accurately?
3. Did the Contractor DISCLOSE the COST DOCUMENTATION?

# III. Questions



## Question 1

- Does the *Morse Diesel* decision or do other related statutes forbid a contractor to accept a refund of some portion of the commissions in the contractor's bond or insurance premiums?

## Question 2

- If the contractor has an interest (majority or minority) in a licensed insurance agency, may the contractor accept and retain the commission embedded in the contractor's bond or insurance premiums?

## Question 3

- In some states it is common for sureties to pay a dividend to a contractor with a high credit rating. Should the contractor pass this credit to the government?

## Question 4

- If a local contractor joint ventures with a strong national contractor to take advantage of the latter's surety program, can the joint venture include an additional fee (a "surety credit enhancement fee") in the bond premiums the joint venture seeks to recover from the government?

## Question 5

- If a contractor's workers compensation, CGL, or other liability rates drop during the course of a project (for any reason), must the contractor pass the financial benefit of that change to the government?

## Question 6

- For loss sensitive programs with a stop loss feature that limits the contractor's risk, may a contractor use its worst case scenario to prepare its bid or to justify a cost for an equitable adjustment?

## Question 7

- May a contractor add a percentage over and above the actual insurance premiums to take into account in-house costs of risk management and safety programs, as well as claims management and legal services?

## Question 8

- If a contractor pays insurance premiums to a single parent or group captive insurance company, can the contractor retain investment income or underwriting profits the captive insurance company earns on the premiums?

## IV. Key Points to Remember

Each and Every Time “Costs”  
and “Certifications” Collide  
During the Life of a Project,  
You Must:

## Key Points

- A. Document the allowability and allocability of all costs and pricing data.
  
- B. Distinguish costs from profit.

## Key Points (continued)

C. Distinguish known factual costs or pricing data from judgmental estimated pricing data.

D. Disclose all data.

## Key Points (continued)

E. Bond prices are different.

F. Distinguish sealed bid fixed-price situations from cost-based matters.

## Key Points (continued)

G. Read, understand, and diligently check the underlying facts and judgments before signing certifications.

**Thank you!**