Some Federal government contracts contain requirements and directives regarding who can, and who cannot, charge reimbursable labor hours/dollars to them.

Did we say *some*? We meant to say *all*.

All of them do.

Whether you know it or not, every single Federal government contract that will be reimbursing your company for direct labor dollars (or direct labor hours) contains a statement or two (or more) delineating what labor will be reimbursed. If you don't meet the contractual qualifications, your labor is not reimbursable.

(To be clear: you can always charge the labor to the contract; and in many circumstances you *must*
charge the labor to the contract. However, the contract terms and conditions determine whether or not that labor will be reimbursed by the government customer.)

What happens if you bill labor to the customer that doesn't meet the contractual definitions of reimbursable labor? Well, sometimes you might get away with it, but it's likely that—sooner or later—you are going to get caught and then you may end up with an allegation of overbilling. That allegation may well be connected with an allegation that you violated the False Claims Act.

Some contract qualifications are very clear and expressly stated. Perhaps the most obvious example is a contract statement that all employees working on the project must hold the requisite security clearances. If they do not hold those clearances, then their labor is not reimbursable. This situation, of course, often leads to the question about where employees should charge time while awaiting their clearances. The answer to that question often depends on company policy or established practice. However, regardless of what that policy or practice is, that time cannot be billed as reimbursable labor—because it is non-compliant with contract terms and conditions.

The issue of employee labor qualifications is obvious when dealing with Time & Materials (T&M) contract types. In such contracts, each hourly billing rate is essentially a fixed price per labor hour, and a separate hourly billing rate is established for various categories of labor, as defined by the contract. Thus, the contract defines the qualifications associated with each hourly billing rate. For example, there may be separate hourly billing rates for senior engineers, mid-level engineers, and junior engineers. The differences between those three engineering levels will be defined by the contract, typically by parameters such as years of experience, education, and/or responsibility. Often, the contractor proposes its hourly billing rates in accordance with qualifying parameters defined by the Request for Proposals (RFP), and then has to “map” its employees to each hourly billing rate it is proposing.

That’s well and good—but what happens if, during contract performance, an individual employee gains sufficient experience or responsibility (or education) to then map to a higher labor category and associated higher hourly billing rate? The answer is (again) going to depend on what the contract says. Sometimes the contractor can simply remap that employee and bill at the higher rate without notification and without customer permission; but other times the contractor will need to notify the customer (at a minimum) and may even need a formal contract modification.

In other instances, the contractor will miss the opportunity to bill its employee at the higher rate, because nobody is monitoring the employees for such changes. Nobody is looking for the impact of promotions or additional years of experience. *Oops!* Opportunity missed.

Why are opportunities missed? Because nobody is looking. Nobody is looking because nobody has that responsibility. Is it the Program Manager’s job? Probably not, because most PMs have too many other things to worry about. Is it Accounting’s job? Probably not. If you work at a savvy contractor, you probably set forth the employee qualifications one time, at the beginning of performance, and document the qualifications and/or mapping in the Contract Brief. But many contractors don’t even do that. So how would Accounting know to change the employee mapping? You’re right; they wouldn’t know unless somebody tells them.

Maybe it’s Contracts’ job. Maybe the Contract Administrator or Contract Manager or whatever you call those folks have a responsibility to monitor employees to ensure that they are meeting contractual requirements. But I bet if you asked them, they would say “Not my job. That’s HR’s job.” And indeed, that may be the case—but if that is the case then HR needs to know what the contract qualifications are, and they need to know who’s working on that contract, and they need to know whom to inform when things change. In our experience, HR is busy doing other things (such overseeing the annual performance review process) and they are not likely to be

thinking about how to partner with operations in the required area.

So we are left with the thought that it may be the job of Compliance to ensure that employee labor for which government reimbursement is being sought meets the contractual qualifications for doing so. It would seem that any robust compliance program ought to be testing to see whether billed labor meets contractual requirements. You test for cost allowability, why wouldn't you test for labor allowability?

And if you did robust labor allowability testing you might identify opportunities to bill employees' time at a higher hourly billing rate! Hopefully, though, you would (at a minimum) catch employees who didn't meet contractual labor qualifications. You could then recommend that any non-compliant labor dollars be credited from customer billings and recorded as being unallowable direct labor.

That would be nice, wouldn't it?

In order to accomplish that task, you would probably need some additional Compliance resources. Often, adding Compliance resources is a difficult conversation to have with your management team, because Compliance is seen as a necessary evil whose cost must be minimized to the lowest level possible.

One argument you might advance in support of your request is that government auditors are being trained to look for billed labor that doesn't meet contractual qualifications. Several DCAA audit programs now include this area; and it's relatively easy for them to identify non-compliant labor once they obtain resumes and other HR information. Employee interviews are a quick way to have employees confirm whether they have what the resume says they have. So you might consider telling your management team that DCAA is going to be looking for this, sooner or later, and it would be beneficial to the company if it looked first. Plus—maybe identify opportunities to bill at higher rates! (Now Compliance is a profit center.)

Another argument you might advance in support of your request to add more Compliance resources to look at this area is "what happens if we have been mis-billing for years, and we didn't know it?" To answer that question, you should produce **this press release** from the Department of Justice.

In that press release, DoJ announced that it had reached a $6.4 million settlement with CH2M Hill, a large engineering services firm, “to resolve allegations that CH2M Hill overbilled the U.S. Air Force for environmental consulting work.” What was the nature of the overbilling?

According to the announcement, “CH2M Hill admits that it billed under the government contract for employees who did not meet the educational and work experience qualifications in the contract.” The subheadline of the press release is very clear: “**CH2M Hill overbilled U.S. Air Force for work done by unqualified staff**
.”

Yeah, that’s not a good headline. More to the point, how many new Compliance resources could CH2M Hill have deployed for $6.4 million? We’re guessing quite a few.

But what makes this announcement interesting (to us) is that the $6.4 million settlement resolved the False Claims Act exposure but the settlement came after CH2M Hill had already refunded to the Air Force $10.5 million. (We believe that prior invoice credit was made pursuant to the mandatory disclosure requirement found in the contract clause 52.203-13.) Thus, this was not a $6.4 million issue; it was actually a $16.9 million issue.

And that value excludes the undoubtedly millions of unallowable dollars paid to attorneys to negotiate the settlement.

Now how many new Compliance resources would you add to mitigate that risk?

One more point. The DoJ announcement went out of its way to allege that CH2M Hill delayed reporting the overbilling for several years. According to the announcement, “CH2M Hill knew of the overpayment as early as 2011, but attempted to keep the information secret by claiming that an audit of its labor practices was privileged information” before finally self-reporting the issue (and refunding the non-compliant labor dollars plus interest on the associated overpayments) in 2017.

Those of you who have to contend with Legal Departments that insist that all internal compliance investigations must be undertaken under Attorney-Client Privilege may want to keep this settlement in mind. We're just saying….

Employee labor qualifications. Easy to detect problems during an external audit; harder to manage during ongoing contract performance. Thus, an area of high risk to which government contractors should devote resources.

If their management permits them to do so.