MEMORANDUM FOR DISTRIBUTION

SUBJECT: Allowability of Environmental Remediation Costs

In recent months, reimbursement of a contractor’s environmental remediation costs has received attention as a result of a recent decision by the United States Court of Appeals for the Ninth Circuit (TDY Holdings, LLC; TDY Industries, LLC v. United States (No. 15-56483, October 4, 2017). There, the appeals court stated that a consideration in determining the Federal Government’s appropriate share under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, or the “Superfund Act”) may be the Government willingness to reimburse such remediation costs under its contracts. Contracting Officers are reminded to pay proper attention to ALL pertinent considerations that come into play in assessing the allowability of such costs.

Defense contractors are not infrequent participants in environmental remediation efforts based upon the nature of the efforts undertaken in producing weapons systems and munitions, particularly those operating at sites and facilities put into operation before the enactment of today’s environmental statutes and regulations. The allowability of a contractor’s environmental remediation costs may present quite a number of considerations not encountered in typical cost allowability reviews. Therefore, every contracting officer who approves final rates shall be familiar with Chapter 7, paragraph 7-2120 of the Defense Contract Audit Agency’s (DCAA’s) Contract Audit Manual which identifies many of these considerations including responsible pursuit of insurance or contribution/subrogation recovery, negligence, regulatory or statutory violation in the contamination giving rise to the need for remediation, and the nature of the business and the business customers at the times and for the products generating the substances that resulted in the contamination.

In addition, the Department of the Navy is in the process of seeking a revision to the DCAA Contract Audit Manual to correct an introductory overbroad characterization which indicates that those environmental costs are normal costs of doing business and are generally allowable and, more specifically, the costs incurred to clean up environmental
SUBJECT: Allowability of Environmental Remediation Costs

Contamination are considered to be normal business expenses. This general characterization is misleading to the point of being incorrect. Contracting Officers are expected to pay proper attention to ALL appropriate allowability considerations and to not rely on this introductory overbroad characterization when a contractor seeks reimbursement for such costs, and to ensure that DCMA or DCAA has done so as well, where either agency is involved in reviewing the allowability of such costs for the contracting officer.

My point of contact for legal matters is Mr. Scott Garner (Scott.Garner1@navy.mil) and for all others matters is Ms. Liz Duplantier (Elizabeth.Duplantier@navy.mil).

Elliott B. Branch
Deputy Assistant Secretary of the Navy
(Acquisition and Procurement)