GCA Report

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NEW DEVELOPMENTS

Obama Signs FY 2013 NDAA

President Obama signed the $633 billion FY 2013 National Defense Authorization Act. The NDAA contains several acquisition-related provisions that will affect contractors doing business with the Defense Department. Various industry groups' protests to some highly controversial provisions that passed Senate and House versions of the bill resulted in either removal or watered down versions of requiring DOD to cut contractor and civilian jobs by the same percentage as cuts to military personnel, attempts to lower executive compensation and allowing DCAA access to contractors' internal audit reports. Provisions of interest to contractors include:

1. DCAA access to internal reports (Section 832). Whereas the Senate version gave DCAA unlimited access to the reports where if it refused the contractors' internal system could be deemed inadequate the final NDAA ensures DCAA cannot use contractor internal reports for purposes other than assessing risk and evaluating efficacy of internal controls and associated business systems. Many commentators have been stressing that internal audit reports cannot be used to determine whether costs are allowable, if defective pricing occurred or if there is a violation of the cost accounting standards. The NDAA also states though internal audit reports "may be considered" in assessing a contractors' system of internal controls it shall not be "the sole basis" for finding a system inadequate. Some commentators have asserted the provisions do not give DCAA any right of access to contractors' internal reports but rather only requires DCAA to issue guidance on this topic and certainly places limits on use of these reports. Nonetheless, DCAA will likely but incorrectly state this new NDAA does give it access to the internal audit reports so there is likely to be some as yet unresolved disputes in this area.

2. Limited use of cost type contracts (Section 811). DoD will be prohibited from using cost type contracts for the production of major defense acquisition programs (MDAPs) unless the Undersecretary of Defense for Acquisitions certifies to Congress it was needed to provide a required capability in a timely manner.

3. Contractor profits (Section 804). DOD will be required to review its profit guidelines to ensure a link between contractor performance and profit. The review must consider appropriate levels of profit needed to sustain competition, contractor risk and incentives for superior performance in delivery of quality products and services in a timely and cost effective manner.

4. Contractor employee compensation (Section 804). Senate proposals for a limit of compensation to the level of the Vice President (about $230,000) were rejected in the final bill where now the GAO is required to conduct a study on the effects of reducing the allowable costs of contractor compensation.

5. Small business (Sections 1631-1699). The NDAA contains numerous provisions aimed at increasing small business opportunities that would (1) authorize the Small Business Administration to establish a mentor-protégé program for all small businesses similar to that currently in place for 8(a) companies (2) require that small business prime contractors not expend on subcontractors more than 50 percent of the amount paid under the contract with exceptions for subcontractors that qualify as a "similarly situated entity" (3) require an offeror to notify any potential subcontractor it intends to include in its subcontracting plan and require the SBA to establish a reporting mechanism that allows a subcontractor or potential subcontractor to report "fraudulent activity or bad faith by a contractor with respect to its subcontracting plan" and (4) require the SBA to conduct a study every five years to identify underrepresented small business concerns owned and controlled by women and remove dollar limits that may be subject to women owned small businesses (WOSB). This last effort is viewed as partially correcting limitations of a WOSB program passed in 2011.

New Contract-Related Interest Rate Set for First Half of 2013

The Treasury Secretary has set a rate of 1 3/8% for the period January through June 2013. The new rate is a decrease from the 1.75% rate applicable to the last six

months of 2012 and is the lowest rate ever set. The Secretary of the Treasury semiannually establishes an interest rate that is then applied for several government contract-related purposes. Among other things, the rates apply to (1) what a contractor must pay the government under the "Interest" clause at FAR 52.232-17 and (2) what the government must pay a contractor on either a claim decided in its favor under the Contract Disputes Act or payment delays under the Prompt Payment Act. The rate also applies to cost of money calculations under Cost Accounting Standards 414 and 417 as well as FAR 31.205-10 and when a discount factor is used to calculate the present value of future payments (e.g. deferred compensation).

Final Rule on Not Displacing Service Workers

A final rule was issued by DOD that states succeeding companies on federal service contracts must now be required to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified. The final rule, which implements a prior executive order and Labor Department regulations, adds a part 22.12 to the FAR and a new clause at FAR 52.222-17. The final rules makes a few changes over the prior rule: (1) limits the power to waive the requirement to an agency's senior procurement executive (2) adds a section addressing circumstances when a successor does not offer employment to all displaced workers but only to the number it believes is necessary to do the work and (3) states the offer of employment qualifies even if it is not for a position similar to the one previously held. The position needs only to be one for which the employee is qualified and can have different employee terms and conditions including pay and benefits. Successors will need to reach out to employees and they must presume that all employees working on the contract in its last month performed suitable work (*Fed. Reg. 75766*).

DOD Issues Single Offer Final Rule

The Defense Department issued a final rule on the procedures to be followed when only one "offer" is received under competitive acquisitions. The procedures are contained in Part 215 of the DFARS where the rule applies to several types of procurements identified throughout the DFARS and is different than an earlier proposed rule. The stated goal is to increase competition where possible but where only one offer is received, to ensure the price is fair and reasonable.

The procedures to follow in the final rule are as follows. The first step is to determine if the procurement allows less than 30 days for a response. If so, DFARS 215.271-2 will apply which requires the contracting officer to consult with the reporting activity as to whether the requirements document should be reviewed in order to promote more competition and re-solicit it, allowing an additional period of at least 30 days. (These less than 30 day procurements usually apply to a limited number of procurements – e.g. task orders under IDIQ contracts, commercial item purchases and Federal Supply Schedule buys.)

For procurements with at least a 30-day response time DFARS 215.371-3 applies. The CO will have to determine if the single offer is a fair and reasonable price base on a cost or pricing analysis. If the CO makes this determination the CO must then persuade a person at one level higher that the determination is valid. If so, adequate competition has been found to exist and award can then be made to the single offeror. If either the CO or higher level official believe the cost or price analysis does not support a determination that the price is fair and reasonable, then the CO must then obtain certified cost or pricing data (unless the procurement is for a commercial item) and use that data to negotiate with the offeror. If the procurement is for a commercial item then the CO is required to obtain uncertified cost or pricing data. In either case, there will likely be an extended period since the CO may want to obtain an audit of the data then analyze audit results before negotiations can begin (*Fed. Reg. 39126*).

Controversy Over Proposed Change to "Commercial Item" Definition Continues

The government is considering changing the definition of "commercial item" to lessen the opportunities to offer prices of items that are exempt from the cost buildup procedures of the Truth in Negotiations Act. Before the Federal Acquisition Streamlining Act (FASA) of 1994 was enacted, commercial items were considered to be products and services sold in substantial quantities to the public. Under FASA and other reforms, commercial item pricing was considered to be the preferred method of acquisition where the definition was expanded to include products and services "of a type" sold to the commercial marketplace. Recently, the Defense Department is widely discussing the need to narrow the definition to existing products or services that are actually sold, leased or licensed in the commercial marketplace which would, in effect, eliminate the "of a type" definition. Supporters of the

change state that once an item is deemed "commercial" the government no longer has access to meaningful cost or pricing disclosures to negotiate a reasonable price even under conditions of sole source or non-competitive circumstances. Opponents of the change state that technology changes so rapidly that products developed for the commercial marketplace become obsolete which under the change would make them noncommercial requiring either expensive adherence to TINA requirements or loss of providers to the government. The opponents cite the example of making minor modifications to commercial items which though they do not significantly change the nongovernmental function of the commercial item would still lose its commercial item status. So far, the proposed change has not yet been codified in the 2013 National Defense Authorization Act.

DCAA Issues Its Annual Audit Plan for 2012 Calling for More ICE Audits

The DCAA audit plan for 2013 states it will now begin audits of incurred cost proposals six months after the end of a contractor's fiscal year as required by FAR 52.216-7. DCAA's goal of being current with ICE proposals is to be accomplished by dedicated incurred cost audit teams where these "virtual" teams will not be limited by geographic area. Comments we have seen state contractors should now expect to see: (1) requests for "data dumps" (all G/L transactions for all expense accounts) in excel format spreadsheets to facilitate recent DCAA guidelines to follow statistical sampling methods for transaction testing (2) auditors to drill down from job cost ledgers to subsidiary ledgers (e.g. labor distribution reports) to source documents like timesheets, payroll registers and cancelled checks. When contractors lack the documentation DCAA believes is needed contractors may face many more questioned costs than they did in the past.

DCAA Changes Its Performance Metric

We recently learned the Defense Contract Audit Agency has changed its metric of performance from "questioned costs sustained" to simply "questioned costs." Whereas the "sustained" part means questioned costs must be agreed to by the ACO, contractor and any litigation before they are recognized as valid the questioned costs are rather assertions made by DCAA only. Comments on the report indicate that not only is the new metric misleading but it will provide an incentive by DCAA to increase the amount of questioned costs no matter how "unfounded" they are.

Venture Capital Backed Firms Qualify for SBIR But Not STTR Awards

The Small Business Administration issued a final rule that makes companies majority owned by multiple venture capital operating companies, hedge funds or private equity firms eligible for Small Business Innovation Research (SBIR) awards but not for Small Business Technology Transfer (STTR) awards. The final rule provides definitions of the three types of entities and states an SBIR contractor must be (a) over 50-percent owned and controlled by US citizens, permanent residents or domestic businesses (b) majority-owned by multiple domestic venture capital operating companies, hedge funds or private equity firms or (c) a joint venture made up of some combination of the above entities. No single domestic venture capital, hedge fund or private equity firm may own more than 50 percent of a SBIR participant. The rule amends SBA rules on affiliation for purposes of SBIR and STTR awards (*Fed. Reg. 76215*).

CRS Provides Summary of Past Performance Evaluations

The Congressional Research Service Feb. 4 issued a report providing a good overview of legal requirements that apply to contractor past performance, including challenges to agency evaluations, award decisions and responsibility determinations. FAR Part 42.15 sets the current procedures agencies must follow in compiling, posting and using past performance evaluations (PPEs). It requires PPE on all contracts worth more than $150,000 ($30K for architect-engineer contracts, $650K for construction) when the contract is completed or on an interim basis in the case of multi-year contracts. Agencies are given broad discretion on the content and are only required to evaluate performance and subcontracting goals though it may consider other factors such as cost controls, schedule delays, record of integrity and ethics and conformance to contract requirements. The report states though agencies were expected to rely almost exclusively on PPE in their source selection decisions, this has not occurred.

The report addresses disputes noting recent cases now view them as potential claims under the Contract Disputes Act but it is still unclear what, if any, relief the courts and appeals boards may be able to grant.

Agencies are prohibited from making awards without a determination of positive responsibility where now PPE is required to be considered as an element of such a

determination. Contractors' ability to challenge responsibility determinations are limited where the GAO will hear protests only if it alleges criteria were not met or the CO failed to consider relevant information or violated a statute whereas courts may consider challenges if they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.".

Recent legislation cited by CRS requires the DOD and FAR Council to ensure PP reports are timely, accurate and complete, give contractors 14 days to rebut or supplement the report, authorizes or prohibits inclusion of certain info of PPEs and increases oversight of PPE issues. The CRS report also addresses recent initiatives to standardize government-wide factors to evaluate PP such as the Contractor Performance Assessment Reporting System. It states increased subjectivity of PPEs are likely to lead to more protests (the report is available at www.fas.org/sgp/crs/misc/R41562.pdf).

DOD May Not Contract With Tax Delinquent or Convicted Contractors

The Defense Department has issued a memo stating it may not use FY 2013 funds to enter into contracts with firms that have unpaid federal taxes or federal felony convictions. Contracting officers are instructed to include provisions to this effect in all solicitations. According to the memo DOD may not contract with corporations (1) that have any unpaid federal tax liability that has been assessed (2) for which all judicial and administrative remedies have been exhausted or lapsed (3) that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability and (4) may not contract with a corporation that was convicted of a federal felony in the preceding 24 months where the awarding agency is aware of the conviction. However, the memo states COs may still make an award if the agency's suspension and debarment official makes a written determination that these actions are in the government's interest.

CASES/DECISIONS

Six Year Statute of Limitation Starts When ICP is Submitted

(*Editor's Note. The following decision is particularly important due to the large backlog of unaudited incurred cost proposals (ICPs). Under the Contract Disputes Act, the government has six years from the date of accrual to assert a claim against a contractor. FAR 33.201 states that a government claim accrues when the government knows or should know of all events that fix the contractor's alleged liability and courts and boards are barred from hearing disputes from claims that are asserted more than six years after the date of accrual. When this accrual clock starts has been the basis of numerous prior and recent cases where the government has asserted, for example, an ICP must be audited or reviewed before the government knows or should know about the content of submissions. The following case establishes the six year clock starts as of the date of a final ICP submission. This case has generated considerable concern by ACOs and COs where we are now seeing contracting officers' final decision being issued, some hastily and incomplete, to beat the six year clock.*)

DCAA did not challenge Raytheon's compensation plans that were reflected in its 2003 and 2004 ICP submittal but in Sep. 2007 it issued a report questioning several compensation costs for those periods. In Jan 2011, the CO issued a final decision that demanded $20 million as price adjustments and penalty. In a second appeal, DCAA similarly issued a report in July 2008 questioning costs starting in FY 2004 that were deemed to violate the FAR and CAS where in June 2011 the CO issued a final decision demanding $3 million. Raytheon asserted in each case the government asserted claims beyond the six year statute of limitations and hence they were untimely. The Board sided with Raytheon ruling in the first instance the government should have known by Sept 2003 (the date of the FY 2002 ICP submission) about the 2002 unallowable costs where the Sept 2007 was the date DCAA actually knew the 2003 audit was incorrect. The Board similarly ruled in the second instance that the government should have known before Jan 2005 that the 2003 and 2004 were CAS non-compliant. The board also ruled that the government's claims for CY 2005 through 2009 costs were timely because Raytheon submitted its CY 2004 ICP in June 2005, within the six year period of the statute of limitations (*Raytheon Co., ASBCA Nos. 57576, 57679*).

Court to Evaluate "Reasonableness" Criteria

The Court awarded $11 million to KKR on a claim for $41 million for work providing dining facilities in Iraq from 2003 to 2006 asserting the other costs claimed were unreasonable. In a highly unusual step, two industry groups have filed an "amicus brief" arguing the court failed to properly apply the prudent businessperson standard mandated by FAR 31.201-3,

reasonableness. The groups asserted the trial court did not follow the FAR provision that a cost is reasonable if its type and amount do not exceed that which would be incurred by a "prudent person" in the conduct of competitive business where a contractor is entitled to exercise its discretion in incurring costs without a contracting officer second guessing and disallowing those costs. Here, the groups assert, the court is attempting to substitute its judgment for that of the contractor which is essentially "renegotiating" the subcontract KKR forged during its 10 years of working under harsh wartime conditions providing the military urgently needed services. The industry groups are challenging the ruling in the court that stated the contractor's discretion is limited to situations over which it has no control and adds that FAR 31.201-3 does not allow for questioning contractors' decisions that are reasonable when it is made but turns out to be incorrect in retrospect. The brief states if the court's decision is affirmed, the clarity of the prudent person principle will be replaced by "arbitrary ad-hoc analyses of what a court or board would have done if it was the contractor" which will encourage COs to second guess business decisions. (The brief is available at http://www.psco.org/News2/NewsRelease/2013/PSC_files_fiend_of_court_brief_in_government_contracts_case_aspx)

Board Rules Several Costs are Unallowable and Subject to Penalties

The following case addresses allowable employee morale and welfare costs (FAR 31.205-13) versus unallowable entertainment costs (FAR 31.205-14), rental expenses and whether penalties should apply. DCAA and DCMA questioned costs related to a club that provided clay shooting and fishing trips to five of Thomas' executives where Thomas asserted these costs were allowable under the employee morale cost principle for contributing to morale, fitness and team building. DCAA and DCMA also questioned other costs such as a jazz ensemble playing at an otherwise allowable corporate event, flowers for employees' special occasions (births, illness, death, weddings), rent paid by the company for property owned by the owner at less than market rates and a Christmas party that also served as a banquet to recognize employees were also unallowable (they ruled only two of the 26 hours of activities related to corporate activities). The appeals board ruled all the costs were unallowable and subject to FAR 42.709 penalties for being expressly unallowable where it rejected Thomas' assertion that the penalties should be waived since it was a novice contractor (*Thomas Associates Inc., ASBCA No. 57797*).

Charging Salaried Employees at Their Established Hourly Rate for Hours Worked Is Proper

The contracting officer denied payment to GaN for employee labor it asserted was improperly billed for certain employees, withholding $72,378. Though GaN never asserted it actually paid its salaried employees for each hour billed, the government asserts that evidence of actual payments under the payments clause meant GaN could only charge for hourly costs actually incurred and paid where if salaried employees were not paid for working extra hours, GaN could not charge the government for those extra hours. The Board disagreed with the government's interpretation of the payments clause finding the contract clearly provided that employees would receive a firm fixed price computed by multiplying appropriate hourly rates by the number of hours worked. It added other contract provisions relied upon by the government did not prohibit GaN from collecting its hourly rates for work performed by salaried employees (*GaN Corp., ASBCA No 57834).*

Legal Costs Related to Fraud Allegations are Allowable Costs if the Company is Not Found Liable

(*Editor's Note. The following case underscores the provision that the outcome of a fraud case determines the allowability or unallowability of the related legal costs.*)

Under its operations contracts at the Rocky Flats nuclear weapons plant, James Stone brought a qui tam suit under the False Claims Act (FCA) alleging Rockwell misrepresented or failed to disclose certain environmental problems. A jury award of $4.1 million was made to Mr. Stone but the Supreme Court found the court lacked jurisdiction since Mr. Stone was not an "original source" for the information. Rockwell sought reimbursement for legal costs of defending the Stone lawsuit and the appeals board sided with Boeing, who was the successor to Rockwell, asserting that from the time Stone brought the lawsuit in 1989 to the time the government took it over in 1995, Boeing was entitled to recover the defense costs since legal costs for litigation expenses for which it is not found liable are allowable. Both parties appealed where the court stated the appeals board correctly determined that costs relating to fraud claims where the government was successful are unallowable whereas costs related to Rockwell were allowable since it was successful (*Chu v Boeing Co., Fed. Cir. No. 2011-1304-1317*).

SMALL/NEW CONTRACTORS

Knowledge of Retention Period Rules May Preclude Paying Some Disallowed Costs

(*Editor's Note. The extensive delays for DCAA to audit long closed out contracts has led to frequent questions by our subscribers on how long must they retain documents. We have addressed this issue over the years but recent FAR changes and court cases have led us to revisit this issue. This article is based on an article in the January 2013 issue of the CP&A Report by Karen Manos.)*

DCAA has a current backlog of nearly 25,000 incurred cost proposals totaling $573 billion where in FY 2011 it completed only 349 incurred cost audits, not to mention new proposals submitted each year. At this rate, it has been estimated DCAA could take 70 years to work through its ICP backlog. So that raises the issues of whether contractors are really required to retain supporting documents until DCAA get around to auditing them and if such documents are not retained beyond specified periods can the government disallow costs for inadequate support under FAR 31.201-2(d).

FAR Subpart 4.7 prescribes policies and procedure for contractor records retention. This section applies to contracts that contain one of the Audit and Records clauses which covers sealed bid contracts for which certified cost or pricing data is required, negotiated contracts in excess of the simplified acquisition threshold and specified categories of contracts and subcontracts.

FAR 4.703 requires contractors to make available records and other supporting evidence to satisfy contract negotiation, administration or audit requirements for three years after final payment or the period specific in FAR 4.705 (discussed below). There are two significant exceptions: (1) if a contract clause specifies a longer period then that period applies or (2) if the contractor fails to meet the original due date for ICP submission (i.e. six months following the end of its fiscal year) then the retention period is automatically extended one day for each day the proposal is late. FAR 52.215-2, which is a mandatory flow down clause to subcontractors, requires contractors to make available records, material and other evidence until 3 years after payment or for either shorter periods specified in Subpart 4.7 or longer period required by statute or other clauses. In addition two provisions of the clause extends the period for terminations, claims, disputes or appeals until they are settled.

Though some of the clauses applicable to flexibly priced contracts specify some of the records required none extend the period beyond FAR 4.7 provisions. For example, FAR 52.232-7 for T&M and Labor Hour contracts require contractors to substantiate vouchers with evidence of actual payment, individual timesheets, records verifying employees met labor qualification requirements but reference FAR 4.7 for periods prescribed.

Generally, FAR retention periods are calculated from the end of the contractors' fiscal year in which there is cost entry or allocations to the contract. There are three exceptions: (1) if a record contains a series of entries the retention period starts as of the year for the final entry (2) if a latter contract relies on certified cost and pricing data for an earlier contract then the retention period runs from the latter contract and (3) if two or more records are interfiled and it is impractical to screen records for disposal then the entire record series must be retained for the longest period prescribed for the category of cost.

Three subsections of FAR 4.705 specify retention periods for three broad categories of records – financial and cost accounting records, pay administration records and acquisition and supply records. Each category has numerous subcategories. Note that records are identified in terms of their purpose or use and not by specific name. Specific retention periods for most financial and accounting records is four years. So with the exception of labor-related costs, records for most costs within an ICP is four years. Retention period for timesheets and evidence of payment is two years while the retention period for payroll sheets, registers of salaries and wages paid to individual and tax withholding statements is four years.

♦ Case Law Interpretation

In *JANA Inc. vs. US (936 F.2d 1265*), DCAA began the audit after the two year retention period required for keeping time cards but before the four year retention period for payroll sheets and salary registers. The Federal Circuit Appeals Court began its analysis stating the issue was how long was JANA required to maintain the records that supported its invoiced labor charges. The Court sided with the government in its assertion that the labor recap sheets should have been classified as the type of records subject to the four year retention

period. While a shorter retention period is required for voluminous records like individual time cards a longer period is required for records of a more summary nature like the labor recap records. Consequently, it ruled the government was entitled to recoup apparent overcharges on the two time and material contracts because the contractor failed to retain labor recap sheets supporting the number of hours for the four-year records retention period. Similarly, in *Analytical Assessment Corp., (ASBCA 52354*) the appeals board held the government could recoup amounts provisionally paid to a contractor for subcontract costs because neither the contractor nor subcontractor retained any records supporting the costs for the specified retention period.

On the other hand several cases have ruled that though the contractor failed to retain specific records the government could not disallow the costs for inadequate documentation. In *BearingPoint, Inc. (ASBCA 55354*) the contractor relied on testimonial evidence and corroborating documentation to support labor charges in the absence of time cards that were lost or destroyed where the Board states "the contract clauses do not impose the stringent requirements of either 'nice neat little files' that the CO sought…or contemporaneous records' the government argues is required." In a similar case in *Lockheed-California Co. (ASBCA 28618*) the board rejected the government assertion that Lockheed had failed to comply with the express condition of the Audit and Records clause by failing to provide various records the clause states are required where the board found that other documentation to prove the claimed costs was "sufficient to reflect properly" the expense.

The author concludes that if DCAA conducts an audit after the specified retention periods have expired, the contractors' costs cannot be disallowed based solely on the failure to retain adequate documentation in accordance with FAR 31.201-2(d). At the very least, contractors may rely on alternative evidence. In the absence of supporting or challenging the costs, the costs' allowability will likely depend on which party bears the burden of proof. In alluding to the six-year Statute of Limitation issue that if exceeded precludes recovery of disallowed costs on backlogged audits (see the Raytheon case discussed above), audits depending on documentation that is outside the retention period may also preclude recovery of disallowed costs.

QUESTIONS & ANSWERS

Q. Our price analyst questioned some costs in our proposal that were never questioned by DCAA where his report became the basis of the negotiator's offered price which was well below our costs. Two examples of over ten questionable items were (1) we had to remove 60% of our sales costs in the G&A pool to the G&A base because they had little to do with the government business we were engaged in and (2) we could not include fringe benefit costs in the base.

A. You describe a trend we are seeing lately where proposals that used to be audited by DCAA are now being reviewed by DCMA price analysts where many of our clients are saying they never thought they would be thrilled to have DCAA back in the picture. Many price analysts are either unfamiliar with cost accounting issues and become very "creative" in questioning allowable costs or they are foxes where they purposely put forth "creative" positions that form the basis of their initial negotiating position and then go from there. Many negotiators, with even less knowledge of accounting issues, are simply rubber stamping these price analysts' positions. You need to effectively challenge the price analysts' position point by point so either they or the negotiator will have a justification for realizing the initial position may be wrong where then the likely result will be to offer a more reasonable bottom line negotiated price. By the way, both positions you cite are wrong – regulations, court decisions, etc. have clearly established that sales expenses are a legitimate G&A expense whether or not they directly benefit one type of contract as long as they contribute to increasing the overall business base and contractors are free to establish a direct labor plus fringe benefit overhead base.

Q. We are switching to a new computer system. The problem with this system is the job cost ledger does not allow us to burden direct subcontract costs and ODCs with our G&A rate. We can, of course, invoice for the burden on these costs by adding burden sets to the applicable cost elements but the burden isn't visible in the job cost reports. I am very concerned that this will be an issue for DCAA because these costs aren't applied in the job cost ledger. We use the job cost ledger to bill on contracts so how can we say our system is adequate for billing purposes if these costs can't be seen?

A. Though some contractors choose to burden all costs in the job cost records, most simply track direct costs only and then add indirect on their invoices. So there should be no problem with not burdening direct costs in your job cost records. DCAA is concerned that you have the capability of identifying indirect costs and that you monitor them through the year.

Q. We scan all of our vendor records but a DCAA auditor has told us they may not be acceptable as source documents unless certain conditions are met. What do the regulations say about this?

A. The regulation is short and sweet. FAR 4.703(d) states three conditions must be met: (1) scanned records must preserve accurate images including signatures and graphics (2) an effective index system is in place to permit timely and convenient access to scanned documents and (3) original records are retained for one year after imaging to permit periodic validation of the imaging system. However, be aware that DCAA auditors may and often do seek to impose additional "internal control" requirements (e.g. written procedures, periodic internal and external audits, easy access to records during an audit) to accept a scanning system. We usually recommend meeting with DCAA to determine objections ASAP.

Q. We realized we should not have used the IRS 179 provisions in our provisional billing rate and incurred cost submittals for 2010 and 2011. (*179 treatment allows certain companies to write off the entire amount of otherwise capitalized assets in the year purchased for tax purposes.*) DCAA has stated some of our ICE submittals have some minor deficiencies so we are in the process of fixing them – should we change our overhead costs to eliminate the 179 treatment?

A. Yes, you are right to change the overhead rate to account for capitalizing the assets and charging depreciation over their useful life – we are seeing DCAA not only question Section 179 treatment of those costs but also recommending imposition of penalties. It appears as if the overhead rates are overstated in the year you used the entire 179 cost but understated in out years where now you will charge depreciation on those assets where none were charged before. To avoid potential questioned costs and possible penalties, I would withdraw the earlier 2010 and 2011 ICE submittals since an audit has not yet begun and resubmit revised ones using the proper method of accounting for the assets along with a cover letter explaining the basis for the resubmittal.

Q. I was relocated last year but am having trouble selling my old home. What do the Federal Travel Regs. say about how long I have to sell it and still claim my real estate reimbursement expenses?

A. For transfers with a reporting date of Aug 2011 or later, you have two years. The government will pay claims up to one year of settlement date where the employee may apply for a one year extension. Previously, employees were given four years, two years within a settlement and a two year extension.

Q. We want to keep personnel during a rough time but it will increase our overhead too much. We are preparing ICEs as well as fixed price proposals and not sure how to handle the costs.

A. For cost type ICEs, submit actuals for these allowable costs and then you'll have the choice of going after underbilled amounts or not later. For fixed price work, offer a lump sum "management concession" not lower rates or lower amounts on costs you are entitled to. By a "management concession" I mean identify all of your actual or projected costs and then offer a credit or gross amount to be deducted from your actual costs for a particular contract. That is preferable to not including all entitled costs in an indirect cost pool since the concession can be an offset against any questioned costs while a lower rate is the starting point for an audit where questioned costs are then deducted from there.

Q. We have a 5 year IDIQ CAS covered prime contract that was awarded prior to the CAS exemption threshold being increased to $700K. For any subcontracts awarded after the new threshold's effective date, should our subs use the $700K new threshold or the $650K old threshold to figure out if CAS applies at the sub level?

A. What threshold to apply depends on the date the individual task or delivery orders are issued. So under an IDIQ contract, various thresholds could apply to the awarded task orders.

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