GCA REPORT
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NEW DEVELOPMENTS

Industry and Government Strike a Compromise on What Is an Accounting Change

(Editor's Note. The Cost Accounting Standards seek to prescribe the methods contractors should and should not use to allocate costs to government contracts. The standards apply, formally, to CAS covered contractors and informally, to non-CAS covered contractors through incorporation of many CAS provisions in the Federal Acquisition Regulation as well as general understanding that CAS defines appropriate cost accounting practices for government contract cost and pricing purposes. Changes in practices can significantly alter how current contracts are billed and future contracts are priced so the CAS Board has expended a great deal of effort defining just what is a change in accounting practice.)

As we have reported in prior issues, the CAS Board has put forth several proposals on what constitutes an accounting change which a broad consensus of contractors and government officials have agreed are largely unworkable. The government, led by the Office of the Director of Defense Procurement, and industry, represented by the National Contract Management Association met several times in December and early January to hammer out the details of a workable "compromise" proposal that will be presented to the CAS Board as an agreed to approach between the Defense Department and industry. The following are the highlights of that compromise:

The 12 page proposal differs significantly from the CAS Board's 42 page proposal. The CAS Board's proposal presents its fundamental opinion that changes made by a contractor that alters the flow of costs to cost objectives for ongoing functions are changes to cost accounting practices. Consistent with that view, the Board's proposal makes it clear that changes in the methods or techniques for cost accumulation – specifically cost combinations, split-outs or transfers of functions between pools – are cost accounting practice changes.

The DOD alternative rejects this categorical view. Though cost accumulation may be the result of applying a method or technique it is not, itself, a method or technique. Consequently, DOD proposes to eliminate cost accumulation as a "method or technique" for purposes of defining a "cost accounting practice". Instead, DOD proposes that the definition of an accounting practice should focus on how a cost is allocated to cost objectives, that is "the methods or techniques used to define the beneficial or causal relationship between costs and benefiting cost objectives." A cost accounting practice will be defined as the method or technique used to determine (1) direct or indirect allocation of cost to an intermediate or final cost objective (2) composition of cost pools (defined in terms of functions or groups of functions such as line inspection, material handling, warehousing, etc.) (3) composition of the allocation base which is defined in terms of the activities being managed or resources being consumed where cited examples include assembly, fabrication and materials and consumable resources include computer services, security and facilities and (4) the selection of the allocation base such as direct labor dollars, hours or material dollars while allocation bases for consumable resources might be computer time, headcount and square footage. Once an accounting practice is defined then a "change to an accounting practice" would mean simply an alteration to a cost accounting practice.

With respect to the CAS Boards insistence about cost pool split outs, combinations and transfers of functions, the DOD proposal states such actions are not a change if (1) the functions of the resulting cost pools are the same or similar (2) the activities of the new bases are the same or similar (3) the base selected to measure the activities does not change and (4) the transfer of a function from one pool to another would not be a change if the pool to which it is being transferred is the same or similar to those being transferred. The DOD proposal provides extensive illustrations of situations where an accounting practice does and does not change.

DOD Proposes to Get Tougher on Exclusive Teaming Arrangements

The Department of Defense is proposing to change the Defense Federal Acquisition Regulations (DFARS) to make clear certain kinds of exclusive teaming arrangements by defense contractors may be evidence of violations of antitrust laws. DFARS will define "exclusive teaming arrangements" to mean "two or more companies, agree, in writing, or other means to team together on a procurement and further agree not to team with any other competitors on that procurement." It will add to DFARS 203.303 the statement that violations of "antitrust law" may exist if efforts to eliminate exclusive arrangements are not successful.

The proposed rule changes the Under Secretary of Defense for Acquisition, Technology and Logistics Jacque Gansler's internal guidance issued last January identifying concerns that teaming arrangements are prohibiting "robust competition" and directed regulatory language be developed. DCAA, in March, issued guidance implementing Gansler's memo instructing auditors to follow procedures similar to suspicions of fraud, corruption or unlawful activity when they encountered exclusive teaming arrangements. Industry strongly objected to DCAA's association of teaming arrangements with fraud and unlawful activity, forcing them to revise their guidance to state when anti-competitive exclusive arrangements cannot be resolved the matter should be turned over to DCAA headquarters general counsel.

OMB Releases Last FAIR Act Inventory List; DOD Issues Guidance on Challenging Lists

The Office of Management and Budget December 30 released the third and final round of lists of federal agency commercial type activities that can potentially be contracted out to the private sector. The list covers 1.3 million federal employees in addition to the 438,000 covered under the first two sets of agency lists. About 58% of the employees covered by these lists do work the agencies consider potentially commercial. The content of the lists are available on-line from each agency and the OMB announcement lists individual agency web sites and contacts.

The lists were issued to comply with the Federal Activities Inventory Reform (FAIR) Act of 1998 which required each agency to publish by June 30 of each year a list of activities that are not "inherently governmental" and can therefore be performed by contractors. The rationale of FAIR is that the federal government ought not compete with the private sector for work the private sector can do. FAIR was intended to put teeth into this policy but it was weakened by not requiring any activity be contracted out but only mandates listing of candidates. Business groups have been critical of the first year FAIR lists citing indecipherable lists, short period to challenge them and to date, no challenges have been sustained.

In a separate action, the Department of Defense, which contains over 250,000 positions, recently issued guidance intended to instruct interested parties on how to challenge the inclusion or exclusion of an activity in DOD's FAIR Act inventory. The guidance allows a challenge to the FAIR inventory within 30 days of its publications, requires a decision by DOD within 28 days of receipt of a challenge and offers the opportunity to appeal the decision to a designated appeals office within ten days of receipt of the decision. "Interested parties" are (a) private companies or associations of companies who are prospective offerors for contracts of outsourced work and (b) officers or employees or labor representatives within an executive agency who are prospective offerors of the work. DOD employees are included in the definition while members of uniformed armed services are not.

Challenges must (1) be in writing (2) hand delivered, mailed or faxed and (3) describe the activity involved so a decision maker can reasonably identify the activity. All decisions must be in writing and must provide the challenger information on the appeals process. More information can be obtained at http:///gravity.imi.org/dodfair.

DCAA Issues Guidance on Unabsorbed Overhead

The Defense Contract Audit Agency has issued revised guidance evaluating contractors' claims for unabsorbed overhead resulting from government suspension or delay of contract performance. The 19 page guidance is intended to address recent court decisions affecting delay damages under the so-called Eichleay formula for calculating unabsorbed overhead and expand on the meaning of "replacement work" that limits contractors' recovery.

Unabsorbed Overhead and Eichleay. The guidance defines "unabsorbed overhead damages" as fixed overhead costs whose allocation to a federal contract has been altered by the reduction in the stream of direct costs caused by the government's delay or suspension of that contract. The Eichleay formula specifies a method to calculate a daily overhead cost to be applied to each day of delay. The Federal Circuit has ruled the Eichleay method is

the exclusive means for calculating unabsorbed overhead on construction contracts and is a widely accepted method on most other contracts.

Entitlement to Unabsorbed Overhead. The revised guidance reflects the *West v. All State Boiler, 146 F.3d 1368 (1998)* case that provides for using the Eichleay formula if a contractor shows (1) a government-caused delay or suspension resulted in a delay of contract performance (2) the government required the contractor to stand during the delay/suspension period (3) it was "impractical" for the contractor to take on other work and (4) the delay prevented the contractor from completing the contract within the original contract performance period as extended by any modifications. Under the ruling, a contractor need no longer show it was "impossible" to take on other work.

The guidance goes on to state the government may rebut the contractor's case by showing (1) it was not impractical for the contractor to obtain a replacement contract during the delay period (2) the contractor's inability to take on other work was not caused by the government's delay or suspension or (3) the contractor was able to reduce fixed overhead expenses during the period of delay/suspension.

The guidance also states that the Eichleay damages are recoverable only for the period by which the overall performance of the contract is extended because of the delay. The only exception is if a contractor can show it (1) intended to complete the contract early (2) had the ability to do so and (3) actually would have completed early but for the government's action. In that case, it can recover damages for the extended period.

Adjustment of Recovery for Replacement Work. If replacement work is found, it would be able to absorb the overhead. Replacement contracts (either government or commercial) are considered contracts for work that would not have been obtained and performed had there been no delay or suspension. The guidance discusses *Melka Marine v. United States, 187 F.3d 1370 (1999)* where it was ruled if replacement work absorbs the same amount of overhead as the delayed contract, all Eichleay damages are precluded. However, if the replacement work did not fully absorb all of the overhead, Eichleay damages would be limited to the amount of overhead not absorbed by the replacement contracts.

Under *Melka*, the court explained that replacement contracts may differ in size, duration or type and DCAA expands on that to stress auditors should be on the lookout for replacement contracts. The Eichleay damages can be reduced by other substituted work which includes (1) significant work performed out-of-sequence in the delayed contract (*All Seasons Construction & Roofing*) (2) substantial additional or change order work on the delayed contract (*Safeco Credit and Fraley Associates v. United States*) or (3) acceleration of other contract work under manufacturing or supply contracts (*Libby Corp.*).

Other Matters. The guidance stresses that only *fixed costs* should be properly included in the unabsorbed overhead calculation and that variable costs – those that fluctuate either directly or proportionately with some measure of direct costs – should not be included in the calculation. In home office overhead, only fixed costs that benefit all contracts and are hence prorated to all contracts may be included in the calculation.

For *job site or field overhead*, the guidance tells auditors to make sure home office costs that benefit the company as a whole are not included. Job site/field overhead costs can be indirect or direct as long as they are consistent with established accounting practices. Also, following the *M.A. Mortenson Co., ASBCA No 4750 (1997)* case, only one allocation method for recovering job site/field overhead may be used.

The guidance also warns against contractor modification of the Eichleay formula that results in excessive recovery. Examples of such modifications include (1) using the original contact price as opposed to actual contract billings (revenue) when calculating the total fixed overhead allocable to the delayed contract (2) the original or planned days of performance as opposed to the complete performance period, when calculating the daily contract fixed overhead rate and (3) actual delay or suspension days rather than extension days beyond the original or revised completion date.

(For a more detailed discussion of this guidance, see our expanded article in the upcoming GCA DIGEST.)

DOD Waives Disallowance of Indirect Costs Associated With Stepped Up Asset Values

Stating that contractors should not be prevented from recovering their indirect costs because a business combination occurred, Director of Defense Procurement Eleanor Spector approved a deviation from the requirements of FAR 31.203(c) that requires a share of indirect costs allocated to unallowable base costs be disallowed.

The deviation is needed because when a business combination (e.g. acquisition) is made under the "purchase method", the transaction often results in increases ("step up") of asset values over pre-

combination book values. FAR 31.205-52 disallows the stepped up value for purposes of calculating indirect rates while the stepped up value is included in the base since all base costs, whether allowable or not, should be included. FAR 31.203(c) disallows that share of indirect expenses allocated to unallowable base costs ("all items properly included in an indirect cost base should bear a pro rata share of indirect costs irrespective of their acceptance as government contract costs"). Ms. Spector stated contractors should not be prevented from recovering these indirect costs made unallowable by FAR 31.203(c) and hence the deviation. The deviation applies to all future contracts and to indirect rates under open cost-reimbursable contracts provided final rates have not been established as of September 29, 1999.

BRIEFLY...

Mileage Allowance Increased to 32.5 Cents

The General Services Administration issued a final rule, effective January 14, increasing the mileage reimbursement rate for privately-owned automobiles on official travel from 31 to 32.5 cents per mile. The increase follows the Internal Revenue Service change.

New Contract-Related Interest Rate Set for First Half of 2000

The Treasury Secretary has set a rate of 6.75% for the period January 1 through June 30, 2000. The new rate is an increase over the 6.5% applicable in the last six months of 1999. 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 Standard 414 and FAR 31.205-10.

DOT and SBA Recognize Each Others SDB Certification

The Transportation Department and Small Business Administration November 23 announced it will allow most small businesses that quality for disadvantaged status through one agency's certification to quality for the others without going through another extensive re-certification process. The SBA-DOT agreement is intended to make it easier for thousands of firms to gain access to two distinct government marketplaces – those offered by the federal government and those offered by federally funded state and local projects.

DOE Establishes Mentor-Protégé Program

The Department of Energy is establishing a mentor-protégé program to enhance the opportunities of SDBs, black colleges and universities and other minority firms to obtain more DOE contracts and subcontracts. Under the program, established through changes to Subpart 919.70 of the DOE Acquisition Regulations, prime contractors provide financial, organization, management, technical or engineering assistance to protégé firms (all related costs are reimbursable) and mentor firms are offered certain award fees associated with being a mentor and receive credit toward meeting their subcontracting goals.

DCMC Posts CASB Disclosure Statement Electronically

The Defense Contract Management Command is posting the Cost Accounting Standards Board Disclosure Statement (CASBDS-1) on its homepage at www.dcmc.hg.dla.mil.

Second Edition of Parametric Estimating Handbook Issued

Incorporating the results of studies by 13 product teams of a government task force study group, a second edition of the Joint Industry/Government Parametric Estimating Handbook is now complete. The teams demonstrated that use of parametric estimating techniques for supporting cost proposals can result in better cost estimates, faster contract awards and reduced proposal preparation and evaluation time. For example, voluminous bills of material and grass roots engineering estimates of hours that must be audited can be eliminated by properly calibrated parametric techniques. The new handbook can be found at www.ispa-cost.org/PEIW/newbork.htm.

CASES/DECISIONS

Fraudulent Claim Must Pay for "Review" Costs

(Editor's Note. The following case demonstrates quite a good disincentive against fraudulent claims.)

The contractor submitted a price adjustment claim that was later litigated and proven to be fraudulent. The contractor was found liable not only for the amount of

the fraudulent claim ($223,000) and civil penalty ($10,000) but also $619,900 of "review" costs by the contracting officer, DCAA and the Department of Justice. As is quite common, a CO has no authority to address cases of suspected fraud so they turn it over to the Department of Justice who, in turn, asks for support from DCAA to audit the claim. The Court claimed these "review" costs were not litigation costs and hence the Contractor was liable for them (UMC Electronics Inc., vs United States, Fed. C; (No 93-7096).

Court Rules Litigation of Subcontractor's Suit Benefits the Government

(Editor's Note. We are seeing a lot more rejection of legal and consulting costs on the basis "the government is not receiving benefit" for such costs. The following addresses this assertion.)

When the contractor terminated a subcontract for nonperformance, the subcontractor brought suit and lost. The contractor included the legal costs as a direct cost of the contract and the government questioned them asserting (1) since the prime contractor selected the sub it was liable for the sub's defective performance and (2) it neither contributed to the nonconforming work nor benefited from the defective work. The Board rejected these arguments stating it is reasonable for the contractor to defend itself when a subcontractor's performance is nonconforming and the subcontracting work was clearly part of the contract and hence allocable to it (Information Systems and Networks Corp. ASBCA No. 42659).

(The decision appears to run counter to a recent decision we reported on where Northrup's legal costs related to defending against allegations of improper employee firings were rejected because the government did not benefit from such activities. We intend to explore this issue in the next GCA DIGEST.)

Assertion of Overqualified Personnel Should be Corrected During Discussions

A proposal that was eliminated from the competitive range included several professionals who were exempt from the Services Contract Act. The Navy rejected the bid, which was actually lower in price, because it proposed an overqualified staff, stating "we don't need professionals to turn wrenches". In the protest, the GAO stated the proposal was improperly rejected ruling the contractor's use of the very highly qualified staff was not a deficiency. Even assuming the offeror should have proposed some personnel not exempt from the SCA, the "weakness" could have been corrected through discussions (Nations Inc. GAO B-280048).

Purchases Using Simplified Acquisition Procedures Differ from FAR Part 15 Negotiated Procurements

(Editor's Note. The following two decisions illustrate the differences in procurement requirements conducted under FAR Part 15 "Acquisitions by Negotiations" and FAR Part 13 and Part 8 simplified acquisition procedures.)

The government solicited bids for a Bell Helicopter under the simplified acquisition procedures covering commercial items under $5 million. The protester (manufacturer of another helicopter) to the award asserted that restriction to competition for only Bell helicopters violated the Competition in Contracting Act requiring full and open competition. The Comp. Gen. denied the protest finding the Bell Helicopter better suited the government's needs even though the competing helicopter was "fine" and that the FAR's simplified acquisition procedures are exempt from requirements to obtain full and open competition but only require the promotion of competition to the "maximum extent practicable" (Corbin Superior Composites, Comp. Gen. Dec. B-242394).

The Department of Health and Human Services negotiated purchase of several items off the General Service Administration's Federal Supply Schedule (FSS). The protester alleged the use of negotiation procedures resulted in violation of FAR Part 15 requirements to fully state award criteria. The Court ruled otherwise stating in spite of using negotiation procedures under FAR Part 15, FSS purchases fall under FAR Part 8 simplified acquisition procedures that provides for overturning an award only when the agency lacked a rational and reasonable basis for its selection decision (Ellsworth Assocs. Inc vs US, 1999 WL 1097003).

Government's Failure to Comply with Time Limits Precludes Claim

The government entered into a one year with four option years requirements contract to supply an estimated 104,000 meals per year which was broken down into quarterly amounts. The contract provided that price adjustments would be made "each calendar quarter" for actual quantities served outside the estimated range. The number of meals fell substantially below the estimates for almost all quarters over the five years. Contractor twice notified the CO about the shortfalls but was told they would be addressed if they became a problem. At the end of the five years, the government pressed for a price adjustment of $192,000 for the shortfall and explained that quarterly price adjustments were not taken

because they were "missed". The Appeals Board sided with the contractor saying the government could not reduce the contract amount at the end of the contract because the contract required the government to exercise its right for price adjustment at the end of each quarter (M&C Cumberland, DOTBCA 3014).

Government Sets Acceptable Criteria for Exercising an Option

Contractor was awarded an indefinite delivery/indefinite quantify (IDIQ) roofing service contract that specified an estimate of potential orders. When the government exercised an option a protester asserted the option was improper because quantities ordered were less than originally ordered and no adequate market survey was performed to determine if the agency could have obtained better prices. The agency defended its action on the grounds (1) the awardee's price was the lowest on the original competition (2) the awardee's most recent price increase was lower than the Consumer Price Index and (3) a need of continuity of operations existed. The GAO decided it was reasonable for the agency to exercise the option and set the following criteria for exercising options: the agency needed to establish (1) better pricing would not be produced by a new solicitation (2) the option price is shown to be lower after performing an informal market survey or (3) the time elapsed between contract award and exercise of an option is short enough and the market is stable enough that the option price is the most advantageous (Alice Roofing & Sheet Metal Works Inc., GAO, B-283153).

SMALL & NEW CONTRACTORS

Further Developments in Past Performance Evaluation - Part One

Contractor's past performance has become the single most important nonprice evaluation factor in award decisions. We have described the regulations covering past performance from time to time in other articles but subsequent guidelines by various agencies as well as numerous decisions are filling in the blanks of this evolving area. In this first of two articles we will present some of the current policies and practices in the light of recent changes and decisions and in the second we address ways to challenge evaluations and identify some practical strategies to maximize your ratings. We have relied on numerous articles and our own experience and are particularly grateful to an article in the September 1999 issue of Briefing Papers by Joseph West and Robert Wagman of the law firm of Arnold & Porter.

OPFF Policy. The Office of Federal Procurement Policy encourages agencies to make sure contractors' past performance is "meaningly considered" in the award of all contracts except sealed bids. This translates into at least 25% of noncost or price evaluation factors and in most negotiated procurements, past performance and price are the only evaluation factors. OFPP believes reliance on past performance will (1) encourage contractors to perform better if they know today's performance will affect their ability to obtain contracts later (2) eliminate poorly performing contractors and (3) put less reliance on analyzing elaborate technical proposals. Numerous reports by government indicate widespread satisfaction with using past performance while industry is less enthusiastic where surveys show over 50% dissatisfaction levels.

Definition of PPI. Despite its importance, past performance information (PPI) is poorly defined in the FAR. FAR 42.1501 uses vague, open-ended phrases like "reasonable and cooperative behavior" and "business-like concern for interest of customers". OFPP and DOD have attempted to develop clearer guidelines. For example OPFF recommends the following elements:

a) Quality of Product or Service – looks to contractors' compliance with contract requirements, accuracy of reports, appropriateness of personnel and technical excellence.
b) Cost Control – operates within budget, submits current accurate and complete billing, and considers the relationship between negotiated costs to actual costs.
c) Timeliness of Performance – interim milestones are met, reliable and responsive to technical direction, completes contracts on time including wrap-up and contract administration.
d) Business Relations – effective management, business-like correspondence, prompt notification of problems, is reasonable-cooperative-flexible and proactive.

DOD has recommended similar factors and has organized its activities into four business sectors – systems services, services, information technology and operations support. As broad as these appear, they are considered only suggestive for agencies and components of DOD. A recent protest asserting DOD guidelines were not followed was rejected on grounds they are only internal matters not subject to protest.

Use of PPI Depends on Type of Procurement

1. *Contracting by Negotiation*. After January 1, 1999 all

acquisitions expected to exceed $100,000 must evaluate past performance unless the CO documents the reason it is not an appropriate evaluation factor (e.g. lowest price-technically acceptable procurement). Solicitations are supposed to (a) describe the approach for evaluating past performance (including offerors with no relevant past performance) (b) provide offerors the opportunity to identify past or current contracts (public or private) and (c) authorize offerors to provide information on problems encountered and corrective action taken. The evaluation should also take into account predecessor companies, key personnel and subcontractors having a major role.

2. *Sealed Bidding.* There are no special requirements for using PPI in sealed bidding where OFPP guidelines encourages agencies to use PPI on all but sealed bids. However, FAR requires a satisfactory performance on all contracts.

3. *Simplified Acquisition Procedures.* Evaluations under these procurements need not be as formal and can be based on a CO's knowledge and personal experience with the offeror or "any other reasonable basis" (a term likely to be litigated in the future).

4. *Commercial Items.* Like most other government requirements covering commercial items, PPI use is more relaxed. Still, the FAR provides that past performance should be "an important element of every evaluation and contract award for commercial items".

PPI Collection. PPI is collected actively and passively.

Active Collection. An agency may solicit PPI from any source, even if it is not listed as a reference. It can include nearly anything a CO deems relevant that is consistent with the solicitation. Also, evaluation need not be provided by any specific person as long as they have specific knowledge of the contract. A protest was rejected where a project engineer, rather than the referenced individual in the proposal, asserted unfavorable and subjective comments. The GAO ruled not only was it sufficient the agency contacted a person with specific knowledge of the contract but also there was no duty to conduct further investigation.

Passive Collection. FAR 42.15 specifies agencies must prepare an evaluation of contract performance for each contract in excess of $100,000 at the time work is completed. Interim evaluations are also called for when periods of performance exceed one year. The FAR, however, does not specify what factors of performance must be evaluated or what information collected, leaving past performance evaluation to the complete discretion of each agency. The most recent guidance from DOD seeks consistent information but it fails to set forth a required format.

The only exception to this broad discretion are construction and architecture/engineering contracts. For construction, past performance evaluation are prepared using Standard Form 1420 for contracts exceeding $500,000 which evaluates quality of work, timely performance, effectiveness of management and compliance with labor and safety standards. For A&E contracts over $25,000, SF1421 is used to evaluate accuracy, completeness, cooperation, coordination, management, meeting schedules, personnel abilities and work quality.

Automated Collection. To permit more efficient sharing of PPI across agencies, some are automating their PPI which results in standardized formats for collection to the extent different agencies use the same system. The Contractor Performance System (CPS) of the National Institute of Health has evolved into a shared file system now being used by 42 agencies including HHS, Agriculture, Commerce, Justice, Treasury, AID, EPA and the NRC. The CPS collects numerical ratings (0-5) and supportive narratives addressing quality, cost control, timeliness, business practice, subcontracting goals and performance, key personnel and commitment to customer service. DOD is also now developing a system designed to link its various departments and services.

Performance Evaluation. Under DOD's rating system, meeting contract performance (e.g. doing what is promised) will only yield the third highest out of a possible five ratings. The five ratings include (1) Exceptional – meets requirements and exceeds many (2) Very Good – meets and exceeds some (3) Satisfactory – meets requirements (4) Marginal – does not meet some and (5) Unsatisfactory – does not meet most. The ratings correspond to risk assessments (i.e. exceptional rating means "very low performance risk" while satisfactory means "moderate performance risk" and unsatisfactory means "very high performance risk"). OFPP currently uses a five point scale ("0" being unsatisfactory) with a sixth "plus" exceeding excellent but they have signaled they will adopt DOD's rating method.

Offerors with No Past Performance. A key policy of OFPP is that newly established firms not be prevented from competing for lack of past performance. Such policy is codified in FAR 13.305 where an offeror with no past performance "may not be evaluated favorably or unfavorably." Agencies have generally implemented this policy by assigning such contractors a middle rating such as "three", "good" or "satisfactory/green". Interestingly, this is the same ratings a DOD contractor

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P.O. Box 1235
Alamo, CA 94507

would receive if it "met" every requirement of every contract it performed. If a contractor has no past performance, the agency must perform a cost/technical tradeoff if it intends to award the contract to a higher priced vendor. The GAO sustained a protest where an order was placed with a higher priced offeror solely because the protestor had no performance history (exceptions were allowed when, for example, timely delivery was critical).

Noting the likelihood of more and more offerors with no past performance, DOD and OFPP have revised their practices by indicating offerors with no past performance be an "unknown performance risk, having no positive or negative evaluative significance." In addition, even new contractors will propose key personnel with relevant experience and hence agencies are urged to include evaluation of proposed key personnel on relevant contracts as part of their evaluation of past performance.

QUESTIONS & ANSWERS

Q. In your last issue, you said the CAS threshold has increased from $25 million to $50 million and that the trigger contract is now $7.5 million. What do you mean by "trigger" contract.

A. The trigger contract concept is an old one that has not been in use in recent years but has been brought to life by the new legislation. It means that no contract is CAS-covered until one CAS-covered contract in excess of $7.5 million is awarded. Once this occurs then each contract over $500,000 that is not otherwise exempt is covered by CAS.

Q. We record labor by actual direct cost of employees and bid labor rates by labor categories (engineers, technical specialists, etc.) using average rates of individuals in that category. We are bidding on a fixed price contract where we intend to use highly skilled engineers and find if we use the average rate we would be underbidding the people expected to do the work. Can we create other categories? Would we violate CAS 401 which requires consistency in estimating and costing?

A. It is not uncommon to create either more categories (e.g. Senior Engineer, Principle Engineer) or subcategories (Engineer 1, Engineer ll) based on some discriminator such as years of experience, education, etc. The only requirement is these categories need to be "homogeneous". You may not keep changing your categories so care should be taken to determine whether your limited categories work to your advantage in the future (e.g. usage of lower paid engineers on certain contracts). As for violation of CAS 401, I do not see a CAS noncompliance since CAS 401 allows estimates to be in less detail (labor by category) than for cost reporting (costs by individual labor rates).

Q. *(The following comes from our colleagues at Contract Pricing Advisor).* We travel to numerous sites and cannot always take advantage of lowest airfare prices (e.g. two weeks in advance, Saturday night stays). When we estimate and bid, we need to project the full fare (Y Class) but most websites only quote the lowest fares.

A. At least two websites provide both low and higher fares. These include:
Expedia at http://expedia.msn.com and
Travelocity at http://www2.travelocity.com.

Subscription: $125 for one year, $225 for two years.