GCA REPORT
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NEW DEVELOPMENTS

FAC 2001-18 Issued

The Federal Acquisition writers December 11, effective January 12, 2004, issued a new Federal Acquisition Circular amending the FAR. Significant changes include:

Depreciation cost principle. Revisions affecting FAR 31.205-11, Depreciation have eliminated all references to tax accounting because it is unnecessary to tie allowable depreciation to depreciation claimed for tax purposes. Next, a change was made that seeks to make the FAR consistent with CAS 409-50(h) by providing that only residual values in excess of 10 percent need be used and that residual value need not be recognized under certain depreciation methods (e.g. declining balance method, class life asset depreciation range system). Lastly, the changes also disallow the effect of depreciation changes when contractors are involved with write-down of assets from carrying value to fair market value as a result of a business combination or asset impairments.

Debriefing rules. A new debriefing rule will require each solicitation for competitive proposals to include a statement prescribing the minimal information that must be disclosed to unsuccessful offerors in post-award debriefing. The required information includes (1) the agency's evaluation of significantly weak or deficient areas in the offeror's proposal (2) the overall evaluated cost or price and technical rating of the successful and debriefed offerors (3) the overall ranking of the offerors when any ranking was developed (4) a summary of the rationale for award and (5) reasonable responses to questions posed by the debriefed offeror. For commercial items, the debriefing must include the make and model of the item to be delivered by the successful offeror.

Insurance and Pension costs. FAR 31.205-6, Personal Service Compensation and FAR 31.205-19, Insurance have been amended to address specific pension cost adjustments when plans are terminated. They will also clarify that Employee Stock Ownership Plan costs are to be measured, assigned and allocated in accordance with the applicable Cost Accounting Standard and that the ESOP contribution limitation has been increased from 15% to 25%.

Excluding debarred and suspended contractors from receiving orders on existing contracts. Extending the FAR prohibitions against awarding new contracts to a debarred or suspended contractor, the FAR has been amended to prohibit such awards against exiting contracts such as placing orders against indefinite-quantity contracts, Federal Supply Schedule contracts, blanket purchase agreements and basic ordering agreements. The prohibition may be waived if there is a written determination by an agency that there is a compelling reason for making an award (Fed. Reg. 69226).

SF 254 and 255 replaced by SF 330. Standard Form 254, "Architect-Engineer and Related Services Questionnaire" and SF 255, "Architect-Engineer and Related Services Questionnaire for Specific Projects" have been eliminated and merged into a single, streamlined document SF 330, "Architect-Engineer Qualifications" that will be used to reflect current architect-engineer disciplines, experience types and technologies that will facilitate electronic usage. Agencies may use the old forms until June 8, 2004.

New Contract-Related Interest Rate Set for Second Half of 2003

The Treasury Secretary has set a rate of 4.00% for the period January 1 through June 30, 2004. The new rate is a decrease from the 3.125% rate applicable in the last six months of 2003. 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). (Fed. Reg. 75317)

Proposed FAR Rule Limits Applicability of Cost Principles, Raises Penalty Threshold and Adds Definition of Fixed-Price Contracts

The FAR Council is proposing to narrow the scope of the FAR Part 31 Contract Cost Principles by indicating they do not apply to the pricing of fixed price contracts if cost or pricing data are not obtained. Currently, the FAR 31 cost principles apply whenever cost analysis is performed, regardless of whether cost or pricing data are obtained.

The modification would also raise the contract dollar threshold from $500,000 to $550,000 for assessing penalties on "covered contracts." FAR 42.709 requires the head of an agency to assess a penalty against a contractor that submits a cost that is "expressly unallowable under FAR Part 31" in its proposal for settlement of a covered contract (e.g. incurred cost proposal).

The Council has also proposed a definition of fixed price contracts, subcontracts and modifications to be added to FAR 31.001. The proposed definition covers those contracts (1) described in FAR 16.202, 16.203 and 16.207 (2) fixed-price incentive contracts where price is not adjusted based on actual costs incurred (3) orders issued under ID/IQ contracts where final payment is not based on incurred costs and (4) the fixed hourly rate portion of time and material and labor hour contracts and subcontracts (Fed. Reg. 66987).

DFARS Amended

Two significant amendments to the Defense Federal Acquisition Regulation Supplement were issued December 15.

Electronic Invoices and Payments. DFARS Part 232.70, which requires electronic invoices and payments, now requires DOD and contractors to electronically submit and transmit all supporting documents such as receiving reports, certifications and contract modifications. The amendment authorizes submission of scanned documents when such documents are part of a submission using an approved electronic submission form (Fed. Reg. 69628).

Payment withholding for T&M contracts. A final rule was issued to remove the requirements that a contracting officer withhold 5% of the payments due under a time and materials or labor hour contract unless otherwise specified in the contract. The DFARS 232.111(b) permits the CO, but does not require it, to withhold if the CO determines it is in the Government's best interest. The change over an earlier proposed rule includes limiting the withholding to a $50,000 maximum, requiring the ACO to issue a modification before the contractor is required to withhold a specified amount and requiring the ACO to specify a percentage and total amount of the withholding in the modification (Fed. Reg. 69631).

Proposal to Add Relocation Costs to Lump Sum Reimbursement

The FAR Council has issued a proposal to amend the FAR relocation cost principle. Currently FAR 31.205-35 authorizes the government to reimburse contractors for certain employee relocation costs up to the employee's actual costs except that certain miscellaneous costs may be reimbursed on a lump sum basis up to $5,000 (e.g. insurance costs for lost property, auto registration, cutting and fitting drapes and curtains, forfeited utility fees, etc.) The proposed rule adds three tpe of costs to the lump sum reimbursement option – cost to find a new home, travel costs to the new location and temporary lodging expenses (Fed. Reg. 69264).

Vehicle Mileage Increases

The General Services Administration has increased the vehicle mileage reimbursement rates for privately owned vehicles used on official travel from 36.0 cents per mile to 37.5 cents per mile, effective January 1, 2004 (Fed. Reg. 69618).

Air Force Ends Mandatory Inspections on Contracts Less than $250,000

A November 19th Air Force policy memorandum was issued changing policy on source inspections on contracts worth less than $250,000. The memo, replacing an earlier May memo, states that contracting activities will no longer require government contract quality assurance at source for contracts or delivery orders worth less than $250,000 unless it is required by a Defense Department regulation or some other acquiring agency. In addition a source inspection may be required if a CO determines that (1) a contract's technical requirements are significant (2) the product's critical features have been identified and (3) the contract is either awarded to a manufacturer or a non-manufacturer when "specific government verifications have been identified as necessary and feasible to perform."

DCAA Issues Guidance on the Compensation Cost Principle Changes

The Defense Contract Audit Agency issued guidance to its auditors on the August 25, 2003 changes to the FAR compensation cost principle. Of particular interest, the guidance states that "the most significant change made in the cost principle was a clarification that compensation is reasonable if the aggregate of each measurable and allowable element sums to a reasonable total." It states that this change is in contrast to the prior cost principle that stated compensation is reasonable if each allowable element making up the employee's package is reasonable and if the government challenged any individual elements as being excessive the contractor had the right of introducing offsets to other compensation. The guidance says that the new cost principle states that total compensation should be reviewed for reasonableness in total by employee or job class of employee and that "offsets are implied in this concept."

Curiously, the guidance then goes on to state that the "concept of 'review of total compensation reasonableness' should not waive the government's rights to review individual compensation elements in order to determine total compensation reasonableness." The guidance alludes to a statement the FAR Council made in response to comments to the original promulgation and states it is difficult to determine reasonableness of total compensation without reviewing individual elements because reliable surveys of total compensation do not exist. In this light, the guidance states its approach to testing the reasonableness of compensation costs will not change. There will be a modification to the guidance on auditing compensation reasonableness by (1) having the contractor make a preliminary assessment of the aggregate of compensation elements and emphasize that offsets are implied in this "aggregate" concept and (2) contractors will no longer have to propose offsets in order to establish total reasonableness and the "concept of review of total compensation reasonableness does not waive the government's right to review individual compensation elements" (03-PPD-085(R). (*Editor's Note. It seems to us that DCAA's emphasis that their audit approach is "unchanged" and their insistence on the right to continue reviewing individual compensation elements is contrary to the change in the cost principle's focus on total compensation. The guidance seems to stress that continued focus on individual elements of compensation will continue. We shall see how this apparent difference will play out.*)

Agencies Integrate Pro-Net and CCR Database

The Small Business Administration, DOD, Office of Management and Budget and the General Services Administration announced plans to simplify the federal contracting process for small businesses by integrating the existing SBA Pro-Net and DOD's Central Contractor Registration databases. Currently government users go to Pro-Net to access its registered small businesses who are certified as 8(a), HUBZOne or Small Disadvantaged Business firms while firms wanting to do business with the government are required to register on the CCR. The merger of the two databases, touted as creating "one portal for entering and searching small business sources" to help small business market their goods and services to the federal government, will allow companies to register only once at the CCR and procuring officers and COs will now go to the CCR website at www.ccr.gov and click on the "Dynamic Small Business Search" button. All of the search options and information existing in Pro-Net will now be found at the new button. Within the SBA, Pro-Net will be superceded by the Small Business Source System where small businesses will no longer self-certify themselves as small businesses but the new system will perform calculations necessary to determine whether companies are small based on the employment or revenue data information entered into the CCR.

DHS Issues Its Own Acquisition Regulations, Industry Comments on SAFETY Act Rules

The Department of Homeland Security December 4 issued an interim rule establishing the DHS Acquisition Regulation (HSAR) to provide uniform department-level guidance on acquiring supplies and services. It is intended to supplement the FAR. Some highlights include:

1. DHS will be barred from contracting with "corporate expatriates" - U.S. companies that reincorporate abroad in order to avoid paying U.S. taxes - after November 25, 2002. The rule details how to identify such entities and allows the DHS secretary to waive the prohibition HSAR 9.104).

2. Provides streamlined acquisition authority until September 30, 2007. Under HSAR Part 13.7 (a) the simplified acquisition threshold is $200,000 and $300,000 for contracts awarded outside the U.S. (FAR is $100,000) (b) allows the DHS secretary to deem any item or service as a "commercial item" and to apply the designation for

a program up to $7.5 million (FAR is $5 million) (c) designate a micro-purchase threshold – that is, purchase cards - at $7,500 (FAR is $2,500).

3. To encourage unsolicited proposals encouraging "new and innovative ideas," new procedures for receiving, evaluating and timely disposing of unsolicited proposals are encouraged. Now (a) the agency contact point must make an initial review of an unsolicited proposal within seven working days of receipt (b) if the proposal meets requirements of FAR 15.606-1(a) the agency contact point must acknowledge receipt of the proposal within three calendar days after the initial determination and advise the offer of the general timeframe for completing the evaluation (c) if the proposal does not meet the FAR requirements then the agency contact point must return the proposal within three calendar days after initial review and inform offeror in writing of the reasons for the return and (d) comprehensive evaluations should be completed within 60 days after initial review (HSAR Part 15.6).

4. The DHS chief procurement officer is authorized to waive application of the cost accounting standards to individual firm fixed price contracts for commercial items (HSAR 30.201-5).

5. The Department of Transportation appeals board will hear appeals involving DHS contracts (HSAR Part 33).

6. Cost sharing on research and development contracts will be determined on a case-by-case basis (HSAR 35.003).

7. Personal services contracts are explicitly authorized to obtain the personal services of experts and consultants without regard to pay limitations when the services are necessary due to an urgent need. These contract vehicles are to be limited to one year when DHS personnel with necessary skills are unavailable and a non-personnel service contract is not practicable (HSAR 37.104-70).

As a separate issue, there have been extensive comments on the recently DHS passed SAFETY Act - Support Antiterrorism by Fostering Effective Technologies Act of 2002 – intended to "ensure U.S. companies will be able to develop and provide vital anti-terrorism technologies…without the threat of crippling lawsuits." In sum, the act provides two levels of protection for sellers: the first level provides that once the DHS designates a technology as "qualified anti-terrorism technology" (a) lawsuits arising from deployment may be brought only against the sellers and only in federal court (b) the seller's liability is limited to the amount of liability insurance coverage to be specified by DHS (c) a seller can be liable only for that percentage of non-economic damages which is proportionate to its responsibility for the harm (d) punitive damages and prejudgment interest are barred and (e) a plaintiff's recovery will be reduced by any amounts received from collateral sources such as insurance or government benefits. The second level is when DHS "certifies" a technology and places it on an "approved product list" in which case the first level of protections also apply but, in addition, the government contractor defense is presumed to apply.

Though all commentators have praised the interim rules for its improvements over previous proposals, most have alluded to certain shortcomings. The following shortcomings enumerated by David Bodenheimer in the November 4 issue of Federal Contracts is illustrative of many responses to this hot issue:

1. *Automatic Termination of Rights.* The rule provides that if the designated qualified technology is significantly changed or altered the designation will have "no further force or effect." This is excessively draconian and creates great uncertainty.

2. *Duration of Protect.* The limitation of a designation for a term of five to eight years is excessively short for many technologies and violates the intention of the SAFETY Act where unconditional and unlimited protection was envisioned.

3. *Confidentiality of Data.* The interim regulations contemplates "electronic submission" of applications for qualified technologies to be covered by the Act's protection but the "Application Kit" calls for highly sensitive information (e.g. business plans, sales projections, unique technological qualities, etc.) which can be breached by hacking.

4. *Finality of Agency Decision.* To preempt external scrutiny, the Act states the DHS's decisions on what approvals and rejections of qualified technologies should not be subject to review. Improper rejections of Sellers' applications should be subject to external review.

5. *Insurance Coverage and Data.* Two quite troubling questions relate to (1) the amount of required insurance where there is no guidance on how much insurance is enough and (2) some types of data required are not known such as "per unit amount or percentage of such price" when the seller must guess its sales volume for technologies with no sales or claim history.

6. *Application Burden.* The Department's estimate of "36 to 180 hours per application" is significantly underestimated where, for example, a major industry association concluded that the application would consume 1,000 hours. In addition the SAFETY Act Application kit containing 35 pages is really overkill, resulting in discouraging the type of firms the Act intends to attract.

7. *Certification Requirements.* The voluminous amount of data being asked for (e.g. financial information, engineering details, risk assessments, testing information) includes a certification requirement that all statements and information are true, correct and complete "under penalty of perjury." Such a widespread burden on "all statements and information" is unprecedented where "not only verifiable facts but also estimates, judgments and speculations" are also subject to the certification requirements, making any submission subject to penalties that reliable managers would be reluctant to expose their firms to.

CASES/DECISIONS

Best Value Decisions Overturned

A few cases involving "best value" (tradeoffs between technical merit and price) were decided lately. The agency's award to a higher priced, higher past performance rated offeror was rejected because the agency failed to documents in its record why it was worth paying 25% more since there was no evidence the unsuccessful offeror's price was unreasonable nor was incapable of performing the work (*Beautify Prof. Servs. Corp., Comp.Gen. Dec. B-291954*). In a "mirror image" decision, an agency's "best value" award to the lowest price over technical merit was rejected because the agency failed to "meaningfully" explain why the protestor's higher technically rated proposal was not worth the additional cost (*Preferred Systems Solutions Inc., Comp. Gen. Dec. B-292322*). After the successful protest demonstrated mathematical error in computing technical merit's scores the same Agency's personnel conducted a reevaluation using the corrected technical scores and still awarded the contract to the original winner. The GAO stated it doubted the "objectivity" of the new decision because the same personnel did the evaluation which was performed "in the heat of an adversarial process" and hence limited the agency's "fair and considered opinion" It called for a reevaluation using personnel not involved in the original source selection (*ManTech Environmental Res. Servs. Corp., Comp. Gen. Dec. B-292602*).

Modification of IDIQ to Lower Prices is OK Once Minimum is Satisfied

Abatement's IDIQ contract to remove asbestos from the U.S. Naval Academy was divided into several separate line items where there was a guaranteed maximum of $50,000 for all services under the contract. One of the line items involved encapsulating loose asbestos where the line item price was set at $5 per square foot. After the Navy ordered the services equaling the guaranteed amount it sought a modification covering asbestos encapsulation that would exceed the original quantity but it insisted on obtaining a lower per square foot price. Though it eventually agreed to a lower price and signed the modification Abatement later filed a claim to recover its costs for the additional work. It asserted it was entitled to recover at the contract unit price for the additional work and that the lower-priced modification was void because the Navy's threats to award the work to others under the IDIQ contract constituted economic duress. The Court rejected Abatement's arguments noting that under an IDIQ contract the government is only obligated to order the contract's guaranteed minimum and once that occurs, its legal obligations are satisfied. Here, the minimum was ordered and because there was no minimum on the encapsulation line item the government was authorized to place orders for additional work with other contractors and was also free to contract with Abatement at a lower square foot price. As for duress, that defense requires wrongdoing by the government and since there was no further obligation to order encapsulation services threatening to order from another contractor was not improper (*Abatement Contracting Corp. v. U.S., 58 Fed. Cl. 594*).

Reserving the Right for Equitable Adjustments Does Not Disqualify a Proposal

(Editor's Note. Many offerors wish to indicate in their proposals the need for potential contract price adjustments for unanticipated costs. The following shows how such needs may be expressed without disqualifying a proposal.)

Call Henry stated in its proposal that if its health costs increased "we would ask the government to consider this extra cost" and it also conditioned its proposed staffing levels on its interpretation of the contract's scope. Jantec protested the award to Call Henry arguing its statements regarding health care costs improperly qualified its proposal and by claiming a right to a request

for an equitable adjustment gave it an unfair "competitive advantage." Also, by conditioning its proposal based on its interpretation of the scope of work, a similar unfair competitive advantage resulted if the actual work exceeded the government's estimate. Jantec asserted the statements were part of a plan for receiving more payments for additional employees. The GAO rejected Jantec's arguments stating that reserving the right to seek an equitable adjustment – a request that might be declined by the government – was not equivalent to reserving the right to receive such an equitable adjustment. Similarly, Call Henry's statement concerning its proposed staffing did not reserve it the right to a contract price adjustment if the actual workload was exceeded and there was no evidence that Call Henry's statements were part of a plan to secure payments from the government for additional employees (*Jantec Inc. Comp. Gen. Dec. B-292668*).

Despite Estimating Error in Scope of Work, the Government Can't be Taken to the Cleaners

Olympia contracted with the Army to provide custodial services where the fixed price contract price was computed on the basis of Olympia's "per square meter" line item unit price multiplied by the total square meters specified in the solicitation. During contract performance Olympia's invoices were based on the unit prices multiplied by the square meters specified in the contract. During the second option period the government discovered the estimated square meters in the contract were significantly exaggerated and in accordance with the Changes clause (FAR 52.243, "Changes-Fixed Price") issued a unilateral deductive change order that reduced the contract amount and sought reimbursement for the overpayment because Olympia cleaned less that estimated. Olympia disagreed, stating the government was not entitled to the deductive change because its had accepted and paid for the work and also its bid was based on the project as a whole not on estimated meters.

The Appeals Board sided with the government. First, it said the government was not barred from the claim even though it accepted and paid for the work – the claim was within the Contract Disputes Act's six year limitation period and other cases (e.g. *Maxima Corp.*) had established the right for the government to claim a retroactive price adjustment even after contract completion unless the contract expressly provided otherwise. As for the amount of entitlement the Board referred to the "Payments" clause that stated contractors may be paid for "services rendered" and ruled the price for those services was based on the square meters estimated by the government – nothing in the contract guaranteed Olympia a lump sum payment. The Board further noted that its interpretation was consistent with the parties' course of conduct when, for example, contract modifications during the performance period were based on unit prices used to calculate the price for added or deleted work. The Board concluded it was "evident" Olympia performed "substantially less" work than it was paid to perform and added that because deductive change orders are "most typically" based on the cost savings to the contractor to perform less work the government was entitled to seek reimbursement for that amount (*Olympiareinigung GmbH, ASBCA 53643*).

Contractor Can't Link Government Withholding to Excusable Delay

(*Editor's Note. Since cash flow is so important, the government's right to withhold progress payments and interrupt cash flow can cause serious harm. However, the following demonstrates the contractor is not defenseless in the face of government withholds. First, the contractor can prove to the CO that too much is being withheld by presenting persuasive data. Second, if the withholding issue gets dragged out and not resolved quickly, a contractor can ask the CO to release some of the withheld money.)*

After employees complained about Davis-Bacon Act wage violations, the Forest Service withheld $37,000 from Copeland to ensure employees were paid the required prevailing wages. The projects got behind schedule and eventually the contract was terminated for default where six years later, the Labor Department concluded the DBA violation amounted to only $3,900. Armed with this injustice, the contractor appealed the default claiming there was an excusable delay because of poor cash flow resulting from the excessive withhold. The appeals court ruled the amount was not excessive, reasoning that 100 percent accuracy is not required but that withholdings are proper as long as the amount withheld depended on a reasonable judgment of the contracting officer. The court asked what information the CO had and found the contractor had given the CO "only the sketchiest of data." The Appeals Board also asserted the contractor did not do enough to help itself through its bad cash flow times because it did not ask the CO, as was its right, to release some of the withheld money when the issues got dragged out and unresolved (*Bill J. Copeland v. Secretary of Agriculture, U.S. Court of Appeals for the Federal Circuit No. 03-1326*).

NEW/SMALL CONTRACTORS

Charging Non-Employees at Direct Labor Rates on T&M Contracts

Sometimes we are asked whether contractors can bill out non-employees such as consultants and subcontractors at contracted hourly rates on time and material and labor hour type contracts. The question is becoming more relevant these days as contractors increasingly use non-traditional employees on their T&M and labor hour contracts. The reasons for this change vary – reluctance to keep a full staff employed full time, need to use individual individuals with specialized skills, increasing use of "variable" employees and temps to decrease the amount of fringe benefits paid, etc. The issue was recently raised in a dialogue between Professors Vern Edwards and Ralph Nash in the November issue of The Nash & Cibinic Report and we thought we would present their views.

Professor Edwards raised the issue by asking what was the proper interpretation of the payment clause for T&M contracts, "Payments Under Time-and-Material and Labor-Hour Contracts" found at FAR 52.232-7. Paragraph (a) says the government will pay the contractor amounts computed by multiplying the appropriate hourly rates prescribed in the contract schedule by the number of direct labor hours performed. Assuming that a "direct labor hour is an hour devoted to the work of the contract" then that direct labor hour could be performed by either the contractor's employees or their consultants or subcontractors. However, paragraph (b)(3) of the FAR clause says the government will "reimburse" the contractor for services "purchased directly for the contract." In determining whether subcontractors can be reimbursed at the contracted hourly rate, Professor Edwards says that he interviewed numerous knowledgeable contracting professionals and searched for Board decisions and concluded the responses he received were quite different, leaving the issue unsettled.

Professor Nash said the FAR 52.232-7 was more clear than Edwards indicated. He indicated that the pertinent provisions are section (a) referenced above and section 2(b) under the title "materials and subcontracts" where "the government will limit reimbursable costs in connection with subcontracts to the amounts paid for supplies and services purchased direct for the contract." Professor Nash maintains that the only proper interpretation is that "direct labor hours" are only those incurred by contractors' employees.

Though the payments clause is clear, the way that non-employees may be reimbursed on an hourly rate is where the contracting parties "contract around" this payment clause. So in *Software Research Associates* (ASBCA 33578), the Board ruled that consultant hours should be paid at the contractual hourly rates because under the special provisions of the contract the consultants "performed the specified services" called for by the contract and their work was essential to the contract performance – not "incidental" to it. The Board alluded to special provisions of the contract where "direct labor" was defined as "all effort expended in performance of Orders under this contract" whereas "subcontract items" were defined as services "incidental" to the engineering services.

In the only other case addressing this issue, *Compliance Corp*. (ASBCA 35317), the subcontract labor hours should be treated as direct labor hours because the special provisions of the contract stipulated that "payments for subcontracts, whose purpose is to provide labor categories of services…to the contract" should be paid as direct labor hours.

Thus in spite of the general confusion among contracting professionals, Professor Nash concluded the "Payments" clause is relatively clear. He advises contractors to insist on special contract language when they intend to charge non-employee hours as direct labor. Also, he advises that when this is the case, is would be wise to enter into a labor-hour contract with the consultant or subcontractor – rather than a firm-fixed price contract – to ensure there is no loss on those hours to be billed.

QUESTIONS AND ANSWERS

Q. We are negotiating a large contract (for us, at least) that represents a different type of product and would use one of our facilities full time. Since we apply G&A on all costs, we have been told if we apply our G&A rate to our Other Direct Costs we would not be able to receive the award. Can we create a separate company to use lower overhead and G&A rates?

A. We see no reason why you could not create a separate company assuming the conditions you mention are

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accurate (e.g. separate product, distinct facilities). There are also two other alternatives that come to mind: (1) you could agree to lower your G&A rate on certain or all costs of the new contract as a "management concession" provided your other contracts are not charged for the amount not allocated to the new contract or (2) you could compute a "special allocation" on the grounds that the new contract would utilize a different amount of the G&A costs. If you select the second option, make sure you negotiate a forward agreement with your cognizant ACO.

Q. We are bidding on a $2 million contract that does not meet any of the standard exemptions so it will be covered by the Truth and Negotiation Act that requires submission of certified cost and pricing data. However, a major component of the contract could qualify as a commercial item (i.e. the proposed price is consistent with prices charged to commercial clients) so do we need to submit cost or pricing data on that item?

A. The issue of whether there can be a TINA waiver for part of a proposed price was addressed by Professor Nash in the same November issue of the Nash and Cibinic Report referenced above. After concluding that the FAR 15.403-1 and any other FAR references are unclear on the matter, he refers to a Memorandum issued by the Director Procurement & Acquisition Policy on February 11, 2003 (found at www.abm.rda.hq.navy.mil/tinamemo.pdf) where the Director stated "a TINA waiver may be made applicable to part of a contractor's proposed price when it is possible to clearly identify that part of a contractor's cost proposal to which the waiver applies." Professor ash concludes this memo made it clear that waivers can by applied to elements of a contract though the memo mentions that some Inspector General and DCAA auditors may disagree.

Q. I read your survey on Uncompensated Overtime in the last issue of the GCA REPORT and was wondering if I can bill the government for 45 hours a salaried employee worked on a direct contract. We pay him a salary with the expectation he will work 40 hours a week and hence the extra five hours he is not paid for.

A. Yes, assuming you record total time on your timesheets, you may charge all hours worked to the contracts or indirect projects the employee worked. The issue is not so much hours charged but what is the hourly rate you charge for those extra five hours. For exempt employees (e.g. salaried employees exempt from the Fair Labor Standards Act), the government prefers (though does not require) that you use an "effective" rate by adjusting the hourly rate charged by dividing weekly salary by hours worked. You may also charge the contract for the 45 hours at the standard rate (weekly salary divided by 40 hours) and credit the excess dollars charged to the contract and amount paid to the employee to overhead. You can adopt this second option certainly under one and possibly under two circumstances. One of the three acceptable methods DCAA has established for treating uncompensated overtime is you may use a "standard" rate if that rate is based on projected hours worked for a year (say 2,080) divided into annual salary. Then any variance between salary paid and amount distributed is charged or credited to overhead. Even if you do not compute a standard hourly rate based upon estimated annual hours, you may still charge the contract at a standard hourly rate and charge or credit overhead if you can demonstrate that this practice causes no adverse impact to the government (e.g. uncompensated hours are immaterial, excess hours charged over time are evenly distributed to all contracts, the amount charged or credited to overhead is fairly distributed to all contracts). Approval under this second circumstance is made on a case-by-case basis and often varies widely by individual DCAA office.