
GCA REPORT

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NEW DEVELOPMENTS

DOD Outlines Ways to Reduce DCAA and DCMA Overlap

The Defense Department issued a memo Jan 4 outlining steps it has taken in recent months to reduce “overlap” of work performed by the Defense Contract Audit Agency and the Defense Contract Management Agency. The memo is in response to a September 10 memo by Ashton Carter, DOD undersecretary for acquisition, technology and logistics that highlighted blurred boundaries on the critical functions between DCAA and DCMA along with industry criticisms that overlapping roles between the two agencies were resulting in a duplication of data requests to contractors. The memo highlighted a policy which went into effect Sep 2010 that says DCAA will not perform field pricing audits on cost type prime contract proposals less than \$100 million or prime fixed price proposals less than \$10 million. The memo outlined four additional steps taken to eliminate the overlap:

1. DCMA will issue all forward pricing rate agreements and forward pricing rate recommendations for contractors when DCMA is the cognizant contract administration office.
2. DCAA will not perform financial capability reviews and audits.
3. DCAA will not perform regularly scheduled purchasing system audits.
4. Revised policy will be issued addressing business system assessments to determine the responsibility between DCAA and DCMA with respect to assessing contractors’ accounting, estimating, earned value management, material management and accounting, purchasing and property management systems.

Comments are already surfacing where most are favorable, indicating it is a good move to eliminate duplication of effort and the transfer of audit scrutiny away from DCAA of the above areas is a good thing.

New DCAA Guidelines

The Defense Contract Audit Agency has recently published several significant guidelines to its auditors. These include:

◆ Audit Guidance on Notification Letters

(Editor’s Note. This new requirement should be quite helpful to contractors to be able to better plan for upcoming audits.)

DCAA has issued guidance to its auditors to provide notification letters to contractors for all new audits and those in the planning phase. Whereas DCAA used to provide communications during the planning phase to their requestors/ACOs and provide verbal communications with contractors only during the entrance conference, DCAA will now provide regular information in a notification letter to contractors during the planning phase. This notification will not replace entrance conference communications but will be added. The change is a result of criticisms by the DODIG that DCAA was not complying with the Generally Accepted Government Auditing Standards (GAGAS) 6.07 that requires auditors to communicate certain information. The guidance includes examples of proforma letters that will be used in its communications with contractors (10-PAS-035R).

◆ New Guidance on Sampling

(Editor’s Note. Since the new guidance below is recommending extensive training of auditors, you can be assured that most auditors will be following their new mandate. Consequently, you will likely see a significant reduction in judgmental sampling with a correspondingly increase in the number of transaction tests. Since they will be encouraged to project results of a sample to the entire universe of costs being sampled, you will also likely see more questioned costs than a judgmental sample generates.)

DCAA in January issued a rather detailed policy on “Variable Sampling” (10-OTS-001(R) that follows a less detailed policy on “Attribute Sampling” issued in October 2010 (10-OTS-069(R)). (Variable sampling is used to quantify dollars – e.g. questioned costs in a given account – while attribute sampling is typically used to determine “yes” or “no” answers - e.g. were timesheets signed by supervisors and hence how many timesheets are inadequate.) The new policies follow a DOD IG

report citing DCAA deficiencies in its sampling application.

The Variable sampling guidance replaces an earlier identical one where the only difference is the earlier one was considered non-releasable while the new one is releasable to the public. The new guidance provides significant revisions to earlier DCAA policy for variable sampling (both statistical and non-statistical) in three areas: established sample size, evaluation of sample results and reporting sample results in audit reports. A definition of sampling put forth is “examining less than the entire body of data to express a conclusion about the entire body of data.” The policy states it applies only to variable sampling and does not apply to tests defined as judgmental sampling. The policy applies to both statistical and nonstatistical sampling where the former is considered to use statistical formulas to measure sampling risk and hence justification for projecting sample results to the universe being sampled whereas nonstatistical sampling does not use such formulas. The results of statistical sampling are expressed as probabilities which are defined as “precision” and “confidence” levels.

In establishing sample size, the sample plan will be based upon a 90% confidence level. The guidance provides a table of how many samples to test when the universe exceeds 250 items. The table is based on achieving this 90% confidence level and identifies a range of samples from 47 to 145 depending on how high an error rate is to be tolerated (low, moderate and high) and how high is your toleration for misstatements (low, moderate and high). When the universe is between 50-250 items at least 20% should be selected with a minimum of 30 items. The guidance states the actual sample size should consider tolerable limits where, for example, a less risky cost type proposal may use a smaller sample size than an equal dollar value fixed price proposal. Some commentators have said DCAA will likely be conservative and chose samples sizes on the high end of the comfort zone.

The less detailed attribute sampling guidance, effective Nov. 30, 2010, addresses sample size and reporting results. The same 90% confidence level is to be used where auditors will use DCAA’s E-Z Quant software to determine sample size. The policy provides an example where a universe of 2,798 labor corrections and labor transfer transactions are tested where the confidence level is set at 90% and the critical error rate is 5%. After calculating a sample size of 45, it found 10 or 22% of the transactions did not have an explanation for the entry where the findings had a 90%

confidence level and had a 5% chance it would be more. This 22% deficiency rate was projected to the entire universe.

All audit reports that use sampling will now state whether statistical or nonstatistical sampling was used, the sample universe, sample methodology used, sampling unit, confidence level and whether the sample was projected to the universe and if not, why not.

◆ **Impact of Codification of GAAP**

DCAA has issued guidance on the impact of the Financial Accounting Standards Board (FASB) incorporating all prior Generally Accepted Accounting Principles (GAAP) into one single authoritative codification call the FASB Accounting Standards Codification (ASC), effective September 15, 2009. Prior to the codification what passed for GAAP was included in several pronouncements in such documents as FASB Statements, Accounting Research Bulletins and Account Principles’ Board of Opinion. The objective was to integrate and combine all the GAAP pronouncements, not to create new ones. All other accounting literature that was considered authoritative (e.g. FASB Concept Statements, American Institute of CPAs Issues Papers) are now nonauthoritative. You can register free at “<https://www.fasb.org/Store/subscriptions/fasb/registered>”. The DCAA guidance describes the ASC. It also pointed out specific FAR sections associated with GAAP are now referenced to FASB ASC such as rental costs (FAR 31.205-36) and depreciation costs (FAR 31.205-11) are now addressed in Part 840 of FASB ASC while post retirement benefits (FAR 31.205-6) is now in section 715 of ASC (10-PAC-034(R)).

◆ **Rough Order of Magnitude (ROM) Calculation for Unresolved CAS Impact Issues**

As part of a joint DCMA and DCAA cost recovery initiative (CRI), the analysis identified significant numbers of CAS cost impact issues resulting from either accounting changes or CAS noncompliance that have not been resolved. DCAA will now be tasked with developing a ROM for affected contractors. The guidance distinguishes a ROM from a general dollar magnitude (GDM) or a detailed cost impact (DCI) where the latter two are the responsibilities of the contractor. DCAA will now be working to identify all outstanding CAS noncompliances and accounting change assignments that have not been resolved and then will develop a high level estimate of the cost impact of these issues. The results will be used by the ACO to implement 10% withholds authorized by FAR 30.604 and 605 and/or issuing a final decision and unilaterally

adjusting affected contract costs. The computation of a ROM is outside the usual attestation functions of auditors where it will be considered a non-audit service to the ACO. Auditors will also be asked to determine whether any GDM or DCIs submitted by the contractor provide sufficient basis to withhold funds or unilaterally adjust contract amounts.

New Contract-Related Interest Rate Set for First Six Months off 2011

The Treasury Secretary has set a rate of 2 5/8% for the period January through June 2011. The new rate is an increase from the 3.125% rate applicable in the last six months of 2010. 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 52.232-1 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).

Survey Says Contractors are Losing Employees to Insourcing Efforts

The recently released annual Grant Thornton LLP survey found that nearly half the government contractor respondents said they lost employees due to the government's recent switch from outsourcing non-inherently government work to private companies to insourcing such work. *(Editor's Note. As we have done for the last few years, we will summarize the results of this excellent survey oriented to professional services companies in the next issue of the GCA DIGEST.)*

2011 Defense Authorization Bill is Now Law

President Obama Jan 7 signed the 2011 defense authorization bill into law which authorizes \$725 billion of spending. Items of direct interest to government contractors include:

- Placing a "high priority" on best value acquisitions rather than "pushing money out the door to meet arbitrary benchmarks for spending."
- Provide independent legal resources for the Defense Contract Audit Agency.

- Authorize auditors to compel production of necessary audit documentation by withholding payment to contractors.
- Create guidance regarding technical data rights to ensure the government has the option to compete contracts and does not "pay more than once for the same technical data."
- DOD must initiate a program to improve contractor business systems "to ensure such systems provide timely, reliable information" where the business systems can be approved or disapproved of and provide remedial actions.
- Expand the definition of the industrial base to include services and information technology.
- Require the director of small business programs to identify and eliminate barriers to defense contracting.

Hot Topics of Interest to Contractors

Industry criticism and commentary of certain proposed and final rules have been surfacing lately. Significant ones include:

◆ Industry Criticizes DOD's Contract Business System Proposed Rule

Criticisms of the Defense Department's proposed rule on contractor business systems continue to mount. DOD Dec 3, 2010 issued a revised proposed rule that would amend the DFARS to define standards for contractor business systems and allow contracting officers to withhold portions of payments when business systems were found to be deficient. The Council of Defense and Space Industry Associations (CODSIA) said though the revised rule does a better job at identifying system attributes and linking systems to elements of risk to the government it still has concerns related to attributes of the system and the withhold process.

For attributes the revised proposal defines requirements for contractor business systems in six categories: accounting systems, estimating systems, purchasing systems, earned value management systems, material and accounting systems and property management systems. CODSIA found the proposal was subjective and set forth overly broad criteria for evaluating system acceptability. For example, for estimating systems the proposed rule requires an acceptable system to "utilize sound estimating techniques and good judgment" or for purchasing systems, the contractor must apply a consistent make-or-buy policy in the government's best interest and it must enforce adequate policies regarding conflicts of interests, gifts and gratuities.

For withholding payments for deficient systems, CODSIA said the rule should exempt withholdings from fixed price and performance-based contracts since payments under these contracts are based on contract terms not costs incurred. CODSIA also said the rule should include a process for government officials to review with DCMA and DCAA contemplated withholdings or system withdrawals to “ensure all stakeholders are in agreement.” CODSIA also stressed that DCAA often makes untimely reviews or none at all to verify contractors’ corrective actions are implemented. Because of these delays, CODSIA says that COs should be allowed to provide a 90 day transition period during which a contractor can take corrective action without payment withholdings. In addition, CODSIA says DCAA should provide an “in process” identification of areas requiring remediation where contractors should be encouraged to implement corrections to preliminary audit findings before the audits are completed. Finally, CODSIA said DOD should consider allowing contractors to use third-party auditors.

◆ **Reaction to Organization Conflict of Interest Rule**

A final rule was issued by DOD on organizational conflicts of interest. The final rule revises the Defense Federal Acquisition Regulation Supplement to provide “uniform guidance and tighten existing requirements” for such conflicts by contractors. It provides for limited exceptions to ensure DOD has continued access to objective and unbiased advice on systems architecture and system engineering matters from highly qualified contractors who may pose OCIs when they go, for example, after production contracts. The final rule significantly scales back earlier proposals for applicability to most procurements and commercial item purchases to where now it applies to procurements of major defense acquisitions only. It also omits earlier preferences for mitigation as a means of resolving OCIs, leaving resolution up to the CO’s discretion.

The Professional Services Council praises the new rule saying it preserves opportunities for professional and technical services companies to “aggressively compete” for work supporting DOD’s war fighting missions while still addressing DOD’s needs. It said the rule’s focus on only major systems avoids the “one size fits all” approach to all defense procurements. PSC praised the placement of OCI coverage in DFARS Part 209 rather than in an earlier proposed section addressing improper business practices and also praised the elimination of the preferred mitigation approach allowing skilled contractors the flexibility to eliminate OCIs in the best way it can. However other comments are concerned that eliminating

the preferred mitigation approach provides little guidance to COs to craft an effective resolution.

◆ **Opposition Mounts to 3% Withhold as Due Date Approaches**

In response to his recent efforts to identify regulations that will potentially harm the economy and cost jobs, a coalition of contractor groups Jan 28 wrote to Rep. Darrell Issa (R-Cal) strongly criticizing a law that mandates a 3-percent withholding of contract payments. The 116 member Government Withholding Relief Coalition’s letter said “it will cost jobs and waste significant amounts of time and money for companies as well as governments to implement.” The withhold, due to take effect Jan 1, 2012, was enacted as part of the Tax Prevention and Reconciliation Act of 2005, will require federal, state and local governments to withhold 3 percent of almost all contract payments, Medicare payments, farm payments and certain grants.

CASES/DECISIONS

Upward Adjustment to Price Proposal Was Unreasonable

The Navy issued a request for proposal for a multi-ship, multi-option contract to have 10-ship “availabilities” for maintenance and repair of ships. The offerors submitted proposals for work packages and labor-hour estimates where the Navy multiplied the result by 10 for the 10 availabilities and made the award on a best value basis. MH protested the award to another contractor arguing the Navy improperly increased its proposed cost by 3,780 hours to account for security guard service costs for the ship’s force parking. Where the RFP provided for the estimate, MH proposed a deviation where in spite of billing this item as a direct cost in prior contracts it now could avoid the security costs because it had acquired a street dividing the two parcels of land where it could join the two parcels and place a security perimeter around the entire facility. The Comp. Gen. found the adjustment unreasonable, noting MH proposed providing the security at no direct cost to the government and fully explained the basis for it (*Marine Hydraulics Int’l Inc., Comp. Gen. Dec. B-403386*).

Agency Did Not Conduct Meaningful Discussions; Unreasonably Considered Subcontractor Data

In its proposal evaluation for providing Medicare administrative services, the government upwardly

adjusted CIGNA's proposed costs for what it believed were printing and postage costs that were "significantly understated" when compared to other offerors. Though the government conducted three rounds of discussions with competitive range offerors, CIGNA asserted it had not addressed its concerns regarding the printing and postage costs. The government argued its concerns did not arise when proposals were compared and that its cost adjustment was minor thus making the weakness not significant enough to warrant renewed discussions. Citing FAR 15.306(d)(3) the GAO said the CO must discuss deficiencies and significant weaknesses identified in each competitive range firm's proposal. The GAO sided with CIGNA finding the adjustment could not reasonably be characterized as "minor." In addition, CIGNA argued the government's past performance evaluation for the awardee was unreasonable because it favorably looked on a subcontractor that did not perform a significant amount of the work. The GAO agreed with CIGNA noting the subcontractor's minor involvement in the project and the government's frequent positive mention of the subcontractor indicated it excessively weighted the subcontractor (*CIGNA Gov't Svcs, Comp. Gen. Dec. B-401062*).

Board Finds Prime Contractor Overcharged By Billing Subcontract Labor at Incorrect Rates

(Editor's Note. Note the following case hinges on FAR 52.232-7, Payments Under T&M and LH Contracts prior to changes made in Feb 2007 where significantly greater flexibility on the practice of charging subcontractor labor hours was provided (e.g. using prime contract labor rates, "blended" rates, treat as an ODC,, etc under different circumstances – see our articles in GCA DIGEST Vol. 10, Nos. 2 and 4). The case underscores the need to establish billing practices for subcontract costs early.)

Serco held a labor hour contract for engineering services that incorporated the above mentioned FAR clause which stated the contracting officer would determine costs and direct materials in accordance with FAR 31.2. A DCAA audit concluded Serco had billed the government for subcontractors at higher rates applicable to only Serco's own employees and the hourly billing rates of its subcontractors were less than Serco's direct hourly billing rates to the government. The CO directed Serco to reimburse the government for improper payments where Serco asserted it had billed correctly because the subcontractor employees were rightfully treated as "temporary or permanent" employees, saying they were performing the same contract work under the same supervision as its employees and it intended to hire them as regular employees at a future time. The

Board ruled it was a matter of "pure contract interpretation" that in spite of "clever nomenclature" the employees in question were subcontractor employees and hence the government was overcharged by billing them at Serco's direct employee rates (*Serco Inc v Pension Benefit Guaranty Corp., CBCA No. 1695*).

Protester Did Not Demonstrate "Bait and Switch" Occurred

One of the assertions Fulcra made in its protest of a contract for strategic communication management services was that the awardee misrepresented the availability of its key personnel otherwise known as a "bait and switch." The Court stated that in order to demonstrate a bait and switch had occurred a protester must show: (1) the awardee represented in its proposal that it would rely on certain personnel in performing services (2) the agency relied on this representation in evaluating the proposal (3) it was foreseeable that the individuals named in the proposal would not be available to perform and (4) personnel other than those proposed actually performed the services. The court ruled that Fulcra failed to demonstrate the third element. In particular, the Court said the awardee had reasonably believed key personnel would be able to perform the contract (*Fulcra Worldwide LLC v US, Fed. Cl. No. 10-725C*).

Litigation Defense Costs for Claims Resulting in Any Liability Are Unallowable

(Editor's Note. When a contractor is found liable under the False Claims Act it is clear that legal related costs and settlement expenses are unallowable while if found not liable such costs are allowable. What about when some claims are liable and others not?)

Boeing, as a successor-in-interest to Rockwell after purchasing the firm, was found liable on some claims brought by the government and not liable for other claims where the original board asserted Rockwell was entitled to defense costs of the claims where it was found not liable. However, the Board made no ruling on common costs e.g. costs Rockwell had incurred in defending itself where the result was that it was both liable and not liable. Rockwell argued since it prevailed overwhelmingly it was entitled to recover all its defense costs or alternatively, referring to the Equal Access to Justice Act (EAJA), it would be entitled to an apportioned amount of legal costs between 80 and 90 percent. The Board disagreed saying EAJA was not an analogous situation but rather clause (e)(32) in the parties' contract was relevant, which was identical to

the DOD authorization act of 1986 that provided costs incurred in defense of a civil fraud proceeding brought by the government where the contractor is found liable are unallowable. The Board said it was unreasonable to interpret this clause or underlying statute as intending to set up a situation where some defense costs could be recovered even though a contractor was found liable. To rule otherwise would result in the government being deterred from bringing a charge or claim because it might have to pay attorney fees if it does not completely prevail (*The Boeing Co., CBCA No. 337*)

Contractor Entitled to Price Adjustment Related to Change Clause

(Editor's Note. The following case illustrates how much a contractor is due when a wage determination shows it underpaid certain employees.)

Yates was awarded a construction contract covered by the Davis-Bacon Act where following a routine audit the GSA found that its pay to electricians was under the Labor Department's revised determination pay and as a result the CO was told to modify the contract to incorporate the proper wages both retroactively and in the future. When it disagreed about the amount, Yates argued the Changes clause governing wage rate modifications under FAR 52.243-4 allowed for a price adjustment calculated on actual labor hours worked that should include profit and overhead. GSA argued that FAR 22.404-12 should govern where the four options provided did not allow for additional profit on the costs computed. The Board agreed with Yates saying the 22.404-12 clause applied only to the exercise of an option which was not the case here where a contract modification was sought. Rather the Changes clause applied which provides that costs associated with profit and overhead are routinely added to actual costs incurred to make the contractor whole (*W.G. Yates and Sons Construction Co., CBCA No. 1495*).

SMALL/NEW CONTRACTORS

What Does a Continuing Resolution and Government Shutdown Mean for Contractors

(Editor's Note. As of this writing, a new continuing resolution was issued for two weeks where pundits are predicting a government shutdown appears more and more likely. In this environment, many contractors are wondering how this will affect their contract

work and ability to be paid. We have come across two pertinent articles in the contracting press that are instructive – the first one describes a CR and its implications for contractors written in the Feb 15 edition of Federal Contract Report by Jim Schweiter and Herb Fenster of McKenna, Long and Aldridge LLP and the second one addressing the effect of a government shutdown was written by Darrel Oyer in the DJ Newsletter.)

Continuing Resolutions

Ordinarily, Executive Branch departments and agencies are funded each year by the enactment of 12 regular appropriation acts. In the last few decades, with increasing frequency, Congress has not managed to pass appropriation acts in time for the beginning of the federal government's fiscal year. Conflicts between the President and Congress over major budget priorities, usually triggered by increased deficits, have increased difficulties in reaching agreements resulting in Congress passing short term continuing resolutions in order to keep the government running. These CRs appropriate funds at levels commensurate with the level of the preceding year's appropriations act where such CRs typically have a short duration of days or weeks. There is considerable legal and even constitutional authority for such acts but interestingly, the FAR and other procurement regulations provide incomplete and often obscure guidelines. The authors offer several "practical considerations" for contractors:

1. It is quite common for both contractors and their government counterparts to simply "bide time" until full year funding is in place. However, this can be a risky practice for contractors and for government agents, may be illegal. The authors recommend direct communications with your CO and document them.
2. No new contract may be awarded which is dependent on new fiscal year appropriations.
3. Contract award exercises, such as options, that are limited in time (e.g. tied to the first month of a new fiscal year) and therefore dependent on new money may expire as a matter of law if new funds are not appropriated and then can be renewed only by mutual consent evidenced by a contract mod.
4. Contracts that are incrementally funded or partially funded (or otherwise subject to limitation of cost, limitation of funds, limitation of government obligation type clauses) where the next increment of funding must be funded by a particular date and where such funding passes during the CR period will experience a "funding gap." When this occurs the government's right to fund the additional increment of work expires and may not

be renewed without mutual consent. Continued performance puts contractors at risk.

5. Many government contracts need “support elements” that are necessary to perform such as government furnished property or equipment, information, inspection, engineering, transportation, etc. When such elements are expected to be funded in the next year the use of CRs may delay them, resulting in a breach of contract that may be due an adjustment in contract price.

Government Shutdown

Mr. Oyer offers some useful insights if a shutdown of government occurs.

Federal Employees. Most agencies have not publicly released shutdown plans where what services will be continued and which employees will be furloughed, placing both contractor and government employees in limbo. For federal employees, each agency will put forth their own plans where most likely few jobs would be exempt from stopping during the shutdown. Only those jobs related to public safety (e.g. protection of government property) and health (e.g. Social Security, Medicare and Medicaid) will likely remain. Mr. Oyer informs us that the Defense Finance and Accounting Services – DFAS – will probably keep operating as it has during prior shutdowns so as to make sure military personnel (along with contractors) continue to be paid. This is permitted because apparently DFAS is funded by an industrial or working capital fund rather than from direct appropriations needing congressional approval.

Federal Contracts Using non FY 2011 funds. Contracts paid with FY 2010 and earlier funding are still in operation. One exception to this is if contractor employees are working at government facilities likely to be closed. Mr. Oyer states labor costs might still be recoverable under cost type contracts based on a case - *Raytheon STX Corp. v Dept of Commerce, Oct 28, 1999*. That case ruled the Sovereign Acts doctrine made costs of idle workers and other related costs incurred at government facilities reimbursable on at least cost type contracts.

Federal Contractors Using FY 2011 Funds. The government is banned from accepting voluntary work so contractor employees cannot be permitted to work if funds do not exist. In this case, contractors will likely need to shift employees to avoid working on non-funded projects. However, if the work has already been funded with FY 2011 funds before the shutdown or receives money through revolving funds the work can continue.

Fixed Price Contracts. Most fixed price contracts are funded at the time the contract is formed. In addition agencies may continue to contract out work for its priority functions (e.g. needed food, fuel and medical supplies, social security, emergencies to protect life and property) if federal employees are still working.

What to Do? Make plans in case a shutdown occurs. Contractors should decide what to do with their employees while they wait for the government to resume. Notwithstanding the case discussed above, there is no guarantee that a contractor will be reimbursed for its expenses. A survey cited by Mr. Oyer indicates 50% of the DC area contractors intend to keep employees working on their projects, 35% intend to find other projects for their employees and 15% are planning furloughs.

QUESTIONS AND ANSWERS

Q. What are the essential written policies we should have in place.

A. Individual auditors may have their own preferences for what they consider essential since there is no firm audit guidance on the topic. Upcoming audits will help determine what are essential - accounting system, invoice audits, estimating system or large proposals, purchasing system audits will dictate what written policies are needed to demonstrate adequate internal controls in these areas. For newer contractor clients we usually strongly recommend four essential written policies be in place: timekeeping, expense reporting, screening unallowable costs and a general government contract accounting policy addressing such topics as distinguishing between direct and indirect costs, examples of each, how employees know what projects to charge, how indirect rates are computed (e.g. what costs are in each pool and base with examples) and how indirect rates are monitored during the year. Also high dollar costs claimed that are likely to be reviewed should also be addressed in written policies such as bonus program, intercompany transfers, severance pay, employee morale and legitimate business expenses versus entertainment costs and how appropriate base salaries are benchmarked with comparable firms (e.g. surveys used).

Q. We received a poor past performance rating that we believe is dead wrong and it is adversely affecting our ability to win awards. What can we do to challenge this evaluation?

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A. We hear this all the time and found a good article by J. Hatcher Graham of GATE 6 in the January 2011 issue of Contracts Management that addresses possible courses of action.

First, check out all contractor performance assessment reports (CPARs) to make sure they are fair. Common mistakes are assertions of delaying a project when the government was slow in approvals, micromanaged the project, changed its contract administration, etc. or quality problems when the cause was defective specs.

Second, if the rating is wrong object in writing to the CO and specify where you believe the mistake was made and what you think is a correct rating. Be tactful because contracting personnel may not like being proven wrong which can hurt you later.

Third, if not satisfied by the CO, appeal to proper authorities within the agency by going up the command ladder.

Fourth, after exhausting these administrative avenues, make sure you have a proper Contract Disputes Act claim submitted even if you are unsure you want to pursue a judicial appeal. You should submit a formal letter to the CO detailing your position and requesting a “contracting officer’s final decision” (sometimes this forces a decision where we have seen positive results). The CO has 60 days to rule on a final decision and if nothing is received consider it a “deemed denial” and prepare for a US Claims Court appeal if that’s the direction you want to go. (The article does not address less litigious choices such as alternative disputes resolution options so that may be worth looking into.)

Fifth, file a thorough complaint detailing why the evaluation is not accurate. The Courts used to not hear claims that did not include a “sum certain” amount but

that has recently changed. The Court may not revise the performance report totally as you request even if it agrees with you because the court does not have the jurisdiction to do so. However, if a subsequent proposal is downgraded due to the performance report you will be able to provide during a protest documentation to show the GAO the court disapproved of the evaluation.

Q. The government is attempting to take our most talented employees by offering them government jobs with fabulous benefits e.g. lifetime health insurance, secure job, etc. and then insourcing the work. What can we do?

A. You can always point out to those employees that this may not be the best time to be joining the government ranks due to the huge budget deficit for a long time to come which is likely to hit government civilian employees and their benefits disproportionately hard. Also, you can tell the people trying to steal your employees they are violating recently informally announced policy that the insourcing trends we saw in the last couple years have been discredited (e.g. see our recent REPORT Sep-Oct 2010 article showing Secretary of Defense William Gates encouraging the cessation of insourcing certain tasks as of FY 2011). If those do not work you can use allowable compensation lures to keep key employees. For example, pay increases, promotions, improved fringe benefits, deferred benefit plans (incurring cost this year and paying out proceeds in following years) and retainer bonuses if they stay for a certain period of time (e.g. the government allows a bonuses for its highly valued employees up to 100% of salary paid out in 25% increments each year) are a few of many options to consider.