
GCA REPORT

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NEW DEVELOPMENTS

New Contract-Related Interest Rate Set for First Second Half of 2015

The Treasury Secretary has set a rate of 2 1/8% for the period January through June 2015. The new rate is a slight increase from the 2.0% rate applicable to the last six months of 2014. 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).

Controversial DFARS Proposal on Business Systems is Dropped

A proposed rule we have been reporting on that would have certain contractors annually certify their three business systems audited by DCAA (accounting, estimating and MMAS) and require independent CPA audits of these systems was "closed." No reasons were stated for the action but it is assumed that stiff opposition by various industry groups was a major contributing factor. Though the proposal was dropped, contractors subject to the DFARS Business Systems Clause at 252.242-7005 and other business system clauses are still required to comply with three systems reviewed by the Defense Contract Management Agency (purchasing, EVMS and government property) and the three other systems by DCAA. DCMA is actually accelerating their reviews, especially Purchasing and EVMS where they have dedicated teams conducting these reviews. DCAA will need to decide what resources they will expend in reviewing the three systems under their purview (*acq.osd.mil/dpap/dars/case status*)

DOD Issues Memo on Commercial Pricing Determinations and Reasonable Pricing

Shay Assad, director of defense pricing, wrote a Feb. 2 memo to contracting officers reminding them that they are responsible for making determinations of whether offered goods and services are commercial items and whether the item prices are fair and reasonable. It states that the Defense Department is developing standards on when additional information is needed to determine the reasonableness of commercial item prices where in the meantime this memo should be used as guidance to COs. First, a commercial item determination should be made in a reasonable amount of time, aiming for 10 days after all supporting information is assembled. The key consideration is whether the price is fair and reasonable where in making this determination, the preference is to use market based pricing. If that is not available, then the CO may – but is not required to – use cost based analysis. In cases where there is no or minimal sales history to non-governmental parties, "the contractor should be asked to provide information on why the price it wishes the government to pay is fair and reasonable." The memo reminds COs that FAR 15.403-(1)(c)(3) acknowledges that there are times when "other than cost or pricing data" is needed to determine whether the price is fair and reasonable where such data can "take many forms" including being no different than certified cost or pricing data other than the fact it is not certified. In response to this cost data, the contractor will provide the information in the form it is regularly maintained by the contractor in its business operations. When such data is requested the contract file should be documented showing (1) a justification for why such data was requested (2) a copy of the request for the data and (3) any response to the request including a justification or rationale for not providing such cost information (*acq.osd.mil/dpap/policy/policyvault/US.A007164-14-DPAP*).

CPA Reviews of Contractor Accounting Systems are Gaining Acceptance

Though reviews of contractor accounting systems and proposed indirect cost rates by outside accounting firms have been normal for many years for state and local government contracts as well as reviews of

subcontractor pricing and accounting system adequacy for federal contracts (our firm conducts these audits frequently) federal prime and subcontract system reviews are normally limited to either DCAA pre-award or post award accounting system reviews or similar reviews by non-DOD IG offices. We and many of our colleagues are seeing increasing acceptance by non-DOD federal agencies' use of outside independent CPA evaluations in lieu of DCAA or IG audits. Invitations to obtain outside reviews are being seen in actual solicitations by non-DOD agencies where either DCAA or outside CPA firms "or other qualified independent third party" is mentioned as adequate evidence of having an acceptable accounting system. Though the expenses of such audits must be born by contractors (though they are allowable and allocable to government contracts, usually as part of the overhead or G&A pool) such reviews by independent CPA firms can be preferable to DCAA or IG audits (e.g. done on a more timely basis, no need to pass on opportunities because they do not have a "DCAA approved" system, more confidence of having an acceptable system when DCAA does come). Also, see the article below where NASA may be moving to independent CPA review of incurred cost proposals.

DOD Sustains a Hotline Complaint About DCAA Faulty Audit

(Editor's Note. In responses to DCAA questioned costs we have increasingly been stating that DCAA is in violation of government auditing standards when it questions costs without adequate review of relevant facts and information. The following indicates such an approach may be fruitful.)

The Defense Department's Office of Inspector General sustained a hotline allegation that a DCAA field audit office failed to obtain sufficient evidence to question certain costs in violation of generally accepted Government auditing standards. The first issue related to questioned subcontractor costs where the FAO audited a sample of 70 subcontract invoices in a contractor's 2008 incurred cost proposal concluding that all 70 transactions lacked supporting documentation. The working papers showed the contractor provided a rebuttal to each conclusion and provided additional information in many cases but the IG found "no evidence suggesting that the auditor appropriately considered the additional information or explanations included in the rebuttal."

Rather than question \$33 million of the subcontract costs, the audit report questioned only 20 percent of the disputed costs or \$6.6 million saying that "historically, DCAA has applied a 20 percent decrement to total unsupported contract costs (direct and indirect) for any physically completed or active contracts for the

subject fiscal year." The OIG admonished DCAA stating auditors should "normally question all costs when the contractor fails to adequately support those costs in accordance with FAR." The OIG said the DCAA Contract Audit Manual recommends a 20 percent decrement when a contractor does not submit an adequate incurred cost proposal and does not have a relevant audit history – neither of which applied here.

The OIG also found significant errors on DCAA's Form 1, Notice of Contract Costs Suspended and/or Disapproved. The Form 1 included \$3.9 of "qualified costs" even though it was awaiting an assist audit from other DCAA offices and questioned another \$288,000 for 13 non-reimbursable contracts from agencies it was not authorized to audit (DCAA can audit only defense contracts or non-DOD contracts for which it has been granted audit authority.) (DODIG-2015-061).

New Inflation Adjustments Proposed

The FAR Council has issued a proposed rule to make inflation adjustments to acquisition-related dollar thresholds. The proposed FAR changes will be effective October 2015 and include:

The cost or pricing data threshold would increase from \$700,000 to \$750,000. Since the cost accounting standards follow this, the CAS threshold will also increase to \$750,000.

The prime contract subcontracting plan threshold would increase from \$650,000 to \$700,000.

The micropurchase threshold would increase to \$3,500

The simplified acquisition threshold would remain unchanged at \$150,000 but the support contingency operations against nuclear, biological, chemical and radiographic attack would increase to \$350,000 for contracts awarded and performed in the US and \$1.5 million those outside the US.

The threshold for including FAR 52.203-13, Contractor Code of Business Ethics and Conduct would increase from \$5 million to \$5.5 million.

The FedBizOpps preaward and post-award notices threshold would remain unchanged at \$25,000

The commercial items test program ceiling would increase from \$6.5 to \$7 million

The threshold for reporting first-tier subcontract information including executive compensation would increase from \$25,000 to \$30,000 (*Fed. Reg. 70141*).

In a separate development DOD issued a proposed rule to amend the DFARS to make inflation adjustments to simplified acquisition threshold to \$400,000 for contracts awarded and performed outside the US (*Fed. Reg. 73493*)

The American Bar Association Section of Public Contract Law issued an opinion stating that FAR clauses should not include specific dollar thresholds subject to adjustments for information where some do include such dollar amounts but rather the clause should reference the dollar thresholds in the underlying FAR provisions which should make it easier for prime contractors and subcontractors to establish consistent procedures for flowdown clause requirements.

NASA IG Reports on “Unhealthy” Reliance on DCAA and Expediting Contract Close Out Procedures

The NASA Inspector General issued a report saying “NASA contracting officers place an unhealthy reliance on Defense Contract Audit Agency audits to identify unreasonable, allocable and unallowable costs charged on NASA’s cost type contracts, performing little to no additional oversight of costs on the 20 contracts in our sample.” Since 1969 NASA and the Defense Department have had an agreement for DCAA to perform incurred cost audits for NASA noting that of the 19,000 contractor audit proposals awaiting review, some dating to 2008, 1,153 proposals are for NASA where 39% predate 2009. The report notes that in order to reduce its backlog of audits, DCAA has instituted a methodology to select high risk and high dollar proposals to audit where its substantially reduced audits have harmed NASA needs for more audits. Generally NASA has six years from submission of an incurred cost proposal to recover any unallowable costs where NASA’s overreliance on DCAA is “inhibiting its efforts to timely close out awards” which also limits availability of excess funds for other uses. To rectify this overreliance the OIG recommends (1) it revises its NASA Federal Acquisition Regulation supplement to allow independent public accounting firms to supplement DCAA audit coverage (2) improve review of NASA forms and vouchers to allow periodic sampling to validate accuracy and completeness (3) ensure COs conduct compensation reviews for cost reimbursable service contracts valued at over \$500,000 at least every three years and (4) develop a statistical or risk-based methodology to increase oversight of incurred cost proposals that do not meet DCAA’s parameters for audit (*hq.nasa.gov/office/oig/hq/audits/reports/FY15/IG-010*).

In a separate report, the IG stated NASA had a backlog of over 15,000 expired awards awaiting closeout. It said

NASA agencies varied to the extent is used a NASA contractor for closeout services stating recent guidance requires COs to use the agency-wide closeout contractor and sets deadlines for COs and contract specialists to transfer expired contracts to the closeout contractor. The OIG recommended that NASA standardize its award closeout processes and set deadlines for all expired contracts – 30 days for contracts using simplified acquisition procedures, 60 days for expired firm fixed price contracts using other procedures and 90 days for expired contracts requiring settlement of indirect cost rates where the guidance applies to all contracts including purchase orders and task/delivery orders (*ig.nasa.gov/office/procurement/regs/pic14-07*).

Government to Award More Large Multiple Award Contracts

The government is planning two large contracts for professional and technological services. The first is the Army’s Responsive Strategic Sourcing for Services (RS3) multiple award contract (MAC), an IDIQ contract that may generate as much as \$37.4 billion over the next decade. The contract will provide a broad range of knowledge-based support services for requirements with Command, Controls, Communications, Computers, Intelligence, Surveillance and Reconnaissance related needs where the services will fall into five broad categories: engineering; research, development, test and evaluation (RDT&E); logistics; acquisition and strategic planning; and training and education. The MAC will provide two primary task order types – firm fixed price and cost reimbursement. The RS3 will replace at least five large MACs that expire in the next couple of years – Strategic Sourcing (S3), Rapid Response Third Generation (R2-3G), Warrior Enable Broad Sensor (WEBS). Technical Information Engineering Services (TIES), which has not been awarded yet and Technical Administrative and Operation Support Services (TAOSS) where these five MACs have generated more than \$18 billion in task orders to date.

A second opportunity is the Professional Services Schedule (PSS) which is expected to generate at least \$2 billion annually and which will replace eight existing schedules. The contract will overhaul government-wide procurement of services and involve financial, business, engineering and logistics services. The two new contracts are part of a trend to consolidate contracts where more and more services will flow through fewer but larger vehicles where the two will join the General Services Administration’s OASIS and the Navy SeaPort-Enhanced contracts.

A Final FAR Rule Adjusts the Definition of Uncompensated Overtime

The existing definitions of “uncompensated overtime” and “uncompensated overtime rate” at FAR 52.237-10(a) have been incorporated at FAR 37.101 with the defined phrase “uncompensated overtime rate” changing to “adjusted hourly rate (including uncompensated overtime”. Additionally, the definition of the new phrase has been clarified to mean that the proposed hours per week include uncompensated overtime hours beyond the standard 40-hour week. The clause at FAR 52.237-10 is further amended to clarify the application of the adjusted hourly rate and categorization of proposed hours subject to the adjusted hourly rate.

CASES/DECISIONS

Two Recent Cases Shed Light on “Hours Worked” Definitions

A recent article in the Federal Contracts Report by Ken Weckstein and Shlomo Katz of Brown Rudnick LLP reported on two recent cases outside the government contractor arena that nonetheless are relevant to the meaning of “hours worked” that can be billed to the government. The first, *Integrity Staffing Solutions, Inc. v Busk* (Case No. 13-433), the Supreme Court was asked whether hourly warehouse employees who retrieve products from the warehouse and package them for Amazon deliveries must be paid under the Fair Labor Standards Act (FLSA) for time they spent undergoing security screening before leaving the warehouse each day. The Court ruled the time was not compensable under the FLSA reasoning that “preliminary” or “postliminary” activities done before and after the workday that are not part of the employee’s “principal activity” are not compensable (punching a timecard would be an example). The Court said “principal activity” embraces “all activities which are integral and indispensable part of the principle activities.” It cited as an example cleaning fire trucks after extinguishing a fire. Here the screenings were not principle activities because Amazon employed them to retrieve and package products not undergo screenings.

In contrast to the above Supreme Court case, the California Supreme Court in *Mendola v CPS Security Solutions* (Case S212704) ruled that California law requires certain types of workers to be paid for all hours worked they are “subject to an employer’s control.” This means that certain workers in California are subject to a more favorable law than those outside of California who are

subject to the “principal activity” provisions described above. The authors state the lessons from these cases is that there are multiple laws or even union contracts that may apply to their employees so contractors need to be familiar with what laws and contracts their employees are covered by (e.g. Service Contract Act, Davis Bacon Act). Also, to avoid disputes in the future, contractors should specify in written policies and their cost proposals what their hours worked are.

GAO Reverses CO’s Determination of Responsibility

(Editor’s Note. The following case provides insight into opportunities to challenge assertions of non-responsibility and as a bonus, alerts contractors to opportunities to challenge allegations of wrongdoings of affiliates when a proposal is being considered.)

Before award of a contract, the contracting officer must make an affirmative determination of responsibility for a prospective contractor that includes it has adequate financial resources, is able to meet schedule requirements, has a satisfactory performance record and a satisfactory record of integrity and business ethics. Generally, the GAO will not consider a protest against a responsibility determination because it is largely committed to the CO’s ability to use its discretion. There are exceptions where one is that the CO unreasonably failed to consider available relevant information.

Approximately six months after receipt of proposals but before the award decision the Dept of Justice announced it was intervening in a qui tam law suit under the False Claims Act against USIS PDS’s parent company USIS LLC alleging the company fraudulently failed to perform quality control reviews in connection with background investigations. FCI protested the award to USIS PDS invoking the above exception alleging the CO unreasonably failed to consider available relevant information before its award of a \$210 million contract. During the GAO hearing the CO testified it was aware of the allegations of fraud by USIS through media reports but did not read DOJ’s complaint nor either asked for or received information from USIS PSD or LLC. FCI asserted though USIS PSD is a wholly owned subsidiary of USIS LLC the latter would be closely involved in the functioning and performance of the contract where the CO erred in failing to consider or give sufficient weight to the alleged fraud. The GAO sided with the protester ruling the CO lacked sufficient facts to make a proper decision and failed to adequately consider the specific allegations and thus its determination of responsibility of USIS PSD was invalid. As for protecting a company from allegations related to its parent or other affiliates

commentators have stressed that meeting with the government officials to discuss steps to be taken to distance themselves from suspect affiliates should be taken ASAP (*FCI Federal Inc., B-408558*).

SOL Clocks Starts When GDM is Submitted, Not the Disclosure Statement

(Editor's Note. Statute of Limitations cases continue to mount addressing when the SOL clock starts in determining whether the 6 year time limit is exceeded. The following case continues to define it.)

Boeing combined two business units that necessitated a change to its accounting practices. The CO repeatedly requested the contractor inform the government of the cost impact of the changes. Though Boeing submitted disclosure statements identifying the changes, it failed to provide the general dollar magnitude (GDM) of the changes as required by FAR 52.230-6. Boeing argued the government had access to its accounting records which would enable it to compute the GDM and asserted the government's claim was barred by the statute of limitations rule where it submitted its disclosure statement more than six years before the CO's final decision. The Board sided with the government saying it is not the government's role to pursue cost impact information where the FAR clearly places that burden on the contractor and that the claim accrued on the date that the GDM was submitted which was less than six years before the CO's final decision (*Boeing Co., ASBCA 58660*).

Successor CO Can't Reverse Predecessor's Favorable Decision

(Editor's Note. The following is good news for fear that replacement contracting officers may change a favorable decision made by the prior CO.)

During performance of a contract Dynamic submitted five proposed change orders where the contracting officer issued a final decision approving all five. Two months later the CO's superior who was also a CO issued a final decision that revised the first decision, approving two change orders but denying two others and reducing the fifth. The Appeals Board ruled the second CO's final decision was invalid to the extent it purported to amend or supersede the previous CO's decision. It ruled that under the "doctrine of finality" the government is bound by the conduct of its authorized agent when they are acting within the scope of their authority, even if their decision is prejudicial to the government. Absent exceptional circumstances, even allegations that a CO

exercised poor judgment or made a bad bargain are insufficient to revoke the CO's decision (*Dynamic Corp., DCCAB No. D-1365*).

NEW/SMALL CONTRACTORS

New Guidance By DCAA Addressing Expressly Unallowable Costs

We have decided to focus on two recent DCAA issued guidelines affecting penalties on unallowable costs since DCAA is now recommending imposition of penalties on more and more costs it is questioning and contracting officers are now being pressured to impose penalties when DCAA recommends them resulting in some very expensive demands for payment. The likelihood of a questioned cost being considered "expressly unallowable" and hence subject to penalties should affect whether a contractor wants to be conservative when deciding to claim a particular cost and when it may decide to take a chance and leave it.

On Dec 18, 2014 DCAA issued a Memorandum for Regional Directors posting what DCAA believes are the FAR and DFARS "cost principles that identify expressly unallowable costs" (we plan to summarize these costs in the next issue of the GCA DIGEST.) This memo has already begun to generate considerable criticism from industry asserting that DCAA is "overreaching" where its definitions of expressly unallowable costs "are contrary" to definitions of these costs established by case law. In anticipation of significant push back, DCAA issued a follow on Memo for Regional Directors on Jan 7, 2015 intended to "enhance" the earlier guidance. This latter guidance, addressed here, sets forth a few general principles on what makes an unallowable cost expressly unallowable and provides numerous examples of what types of unallowable costs do not meet the condition to be expressly unallowable.

General Principles

The new guidance states that for an unallowable cost to be expressly unallowable "the Government must show that it was unreasonable under all circumstances for a person in the contractor's position to conclude the costs were allowable." The guidance puts forth two conditions that make a questioned cost expressly unallowable: (1) "it states in direct terms that the costs are unallowable or leaves little room for difference of opinions to whether

the particular cost meets the allowability criteria and (2) it identifies the specific cost or type of costs in a way that leaves little room for interpretation.”

Meaning of “Direct Terms”

In those situations where the cost principle states in direct terms that the cost is unallowable or not allowable, it is easy to determine whether the cost is expressly unallowable because there is no doubt whether the cost principle makes the questioned costs expressly unallowable. However, “in many situations” DCAA may question costs based on cost principles where the principles do not state “in direct terms” whether the cost is expressly unallowable. In those numerous circumstances a determination “becomes more of a challenge.”

The guidance states first that the mere fact the cost principle does not include the word unallowable or a phrase not allowable does not mean the costs questioned on that cost principle are not expressly unallowable. The guidance alludes to the *Emerson Electric Co., ASBCA No. 300090* case which concluded the word “expressly” was to be understood in the “broad dictionary sense” where the unallowability of a cost item must be expressed in either “direct or unmistakable terms.” So, for example, though the regulation does not state foreign selling expenses are unallowable “the only logical interpretation of the language was that they were expressly unallowable.” (*Interestingly, this Emerson Electric case is frequently cited by attorneys who are opposing imposition of penalties as establishing strict requirements to make an unallowable cost expressly unallowable* where the case law alludes to language such as “unmistakable” and “clear beyond cavil.” We guess that future cases will need to rule whether the language in the Emerson case will be used to support government assertions of expressly unallowable or can be used to challenge those assertions.)

The guidance alludes to two other cases – *General Dynamics, ASBCA No. 49732* and *Rumsfeld v General Dynamics Corp., 365 F. 3d 1380* – where they established that the standard for whether a cost is expressly unallowable is “objective” and the government bears the burden of proof in assessing a penalty. The DCAA guidance states the Board ruled the government should not assess a penalty where “there are reasonable differences of opinion about the allowability of costs and the government must show it was ‘unreasonable under all circumstances’ for a person in the contractor’s position to conclude that the costs were unreasonable.” So in situations where it is not directly stated in a cost principle, in order for a cost to be expressly unallowable the cost principle must identify it clearly enough “that

there is little difference of opinion as to whether a particular cost meets the criteria.” In those situations where the cost principle does not specifically state that the applicable cost is unallowable or not allowable the audit team must “employ critical thinking” to determine whether the cost principle “identifies a cost or type of cost clearly enough that there cannot be a reasonable difference of opinion” whether the questioned cost is expressly unallowable.

The remaining portion of the guidance provides examples of cost principles that state in direct terms, other examples of where there are not direct terms but are nonetheless interpreted to be expressly unallowable and others that are deemed not to be expressly unallowable.

- **Examples of “Direct Term” Cost Principle**

FAR 31.205-8 contributions or donations and 31.205-51, costs of alcoholic beverages.

- **Examples of Not Stated Direct Terms That Are Nonetheless Expressly Unallowable**

The guidance refers to two cost principles where though the terms unallowable or not allowable are not used the costs are nonetheless expressly unallowable if the conditions specified in the cost principle are met. FAR 31.205-13(d)(1), allowability of food and dormitory losses states if the intention of operating food or dormitory operations is to break even then “the logical interpretation” is that unallowable costs under those conditions would be expressly unallowable. Similarly, FAR 31.205-19(e)(2)(v), cost of insurance on the lives of officers, partners, proprietors or employees are allowable only to the extent the insurance represents additional compensation. Here it is a “logical interpretation” that if the insurance costs do not meet this criterion (e.g. additional compensation) it is expressly unallowable.

- **Examples of Costs Principles that are Not Expressly Unallowable**

The guidance provides several examples of unallowable costs that are not expressly unallowable. So from the examples below, unallowable costs may not be expressly unallowable if there are legitimate differences of opinion, are not reasonable, consistent with contract terms or allocable (eliminating non-compliance with CAS), are direct costs, depend on references outside of the cost principle, there are not clear criteria for unallowability and sometimes when the cost principle does not explicitly say the cost is “unallowable” or “not allowable.”

A major basis is that there are legitimate differences of opinion on whether the costs are allowable. For example, FAR 31.201-2 states a cost is allowable only if it is reasonable (a)(1), allocable (a)(2) and consistent with terms of the contract (a)(4). Even though the cost principles require the costs be reasonable, allocable and consistent with contract terms, there is room for differences of opinion on what is reasonable, whether a cost is allocable and whether it is consistent with the terms of the contract. Therefore, they are not expressly unallowable. Another example is FAR 31.205-18(c), IR&D and B&P which makes costs allowable indirect costs if they are allocable and reasonable. Since “allocable” and “reasonable” are subject to reasonable differences of opinion, the questioned costs would not be expressly unallowable.

The guidance provides other examples where “differences of opinion” preclude assertions the unallowable costs are expressly unallowable. For example FAR 31.205-6(a)(2), compensation costs must be reasonable for work performed, FAR 31.205-6(a)(3), consistency with established compensation plans and FAR 31.205-43(c) which provides that the following meeting types of costs are allowable – when the principal purpose of a meeting, convention, conference, symposium or seminar is the dissemination of trade, business, technical or professional business information or the stimulation of production or improved productivity. In these examples there is room for differences of opinion (e.g. reasonableness of work performed, whether costs are consistent with a plan or agreement or whether the attendance of the individual is “essential”).

In addition to differences of opinion the guidance adds other reasons why certain unallowable costs are not expressly unallowable.

1. FAR 42.709-1(a)(1), which states penalties apply to *indirect* costs stating “penalties only apply to unallowable indirect costs” the guidance concludes that *direct* costs that are questioned are nonetheless not expressly unallowable.
2. FAR 31.205-6(a)(1), compensation must be for personal services for work performed by the employee in the current year and must not represent a retroactive adjustment of prior years’ salaries or wages. DCAA says these costs are not expressly unallowable because there are “broad exceptions where there are no clear or objective standards.”
3. FAR 31.205-52(a), tangible assets acquired when the purchase method of accounting for a business

combination is used, the allowable depreciation and cost of money will be based on the capitalized asset values measured and assigned by CAS 404-50(d) whether or not the contract or subcontract is subject to CAS. Here, if these costs are questioned they are not expressly unallowable since (1) the provision does not state in direct terms the cost is unallowable if it does not meet the criteria and (2) the allowability criteria requires us to apply a standard outside the cost principle (CAS 404) where that standard has additional criteria and requirements that can “result in issues themselves.”

4. FAR 31.205-6(a)(o)(2)(ii)(B)(ii). Postretirement benefits and other pensions (PRB), to be allowable, must in addition to other conditions, be amortized over 15 years. However, there is nothing in this section that states if the contractor does not comply the cost is unallowable.

5. DFARS 231.205-19(e). In addition to the limitations of FAR 31.205-19(e) self insurance and purchased insurance that is discussed above, insurance costs are also subject to requirements at 252.217-7012 where in section (b)(6) it states “the Contractor will bear the first \$50,000 of loss or damage from each occurrence or incident, the risk of which the government would have assumed under the provisions of this paragraph.” Since this adds to the cost limitations in the FAR cost principle these costs are also subject to the DFARS provisions on liability and insurance. However, it does not state in direct terms if a cost does not comply with those requirements it is unallowable nor is there a description of criteria for allowability. Hence no unallowable costs would be subject to penalties.

QUESTIONS & ANSWERS

Q. When allocating overhead, fringe benefits and G&A to jobs, what rates should I use. Current month? Trailing last 12 months?

A. From a government accounting perspective, you should be using the annualized rate you think best reflects your actual or projected costs for the fiscal year. Those are often the provisional rates you established at the beginning of the year which are supposed to be adjusted for significant actual experience or changes in projected costs. Such rates used to cost your work should be consistent with rates used for billing cost type government work or proposed work – if not, you would be vulnerable to assertions that you are not properly adjusting rates to reflect more current information

January - February 2015

GCA REPORT

which could lead to opinions of inadequate billing and estimating practices.

Q. DCAA is rejecting several of our vouchers because we did not withhold 15% of our fee as required by FAR 52.216-8. I examined the contract and found no mention of withholding the fee. What do you think?

A. First, though the old version of FAR 52.216-8 did require the withhold, subsequent changes do not require a withhold but says up to 15% or \$100,000, whichever is less, "may" be withheld after 85% of the fee has been paid. Secondly, the details of how the withhold will be withheld is up to the PCO or their designate, the ACO to add "a schedule or any special instructions." The burden of establishing these details falls on the government and if there are no details, I do not see how DCAA's position can be justified.

Q. A DCAA auditor contacted me today regarding a proposal we submitted that he is reviewing. He stated that he could not accept our proposal because we used our provisional billing rates. I can see where we should prepare new indirect rates for a huge proposal that may have a significant impact on our company's rates but it seems impractical and onerous to develop new indirect rates every time a company prepares a cost proposal.

A. Unfortunately, what the DCAA auditor is telling you is the normal procedures currently in use. Small to mid-sized companies usually submit provisional billing rates to be used for invoicing purposes on cost type contracts for the year (they are sometimes audited, sometimes not) and they expect to see separate forward pricing rates for individual proposals. The only exception is for either large contractors and sometimes smaller ones

with significant amounts of proposals where forward pricing rate proposals are submitted to establish a forward pricing rate agreement to be used for proposals in a given year.

Q. We have a few employees who travel to support specific contracts who also choose to split their travel costs 50/50 between the direct projects and G&A. Is this a problem?

A. A blanket 50/50 split would likely be questioned without documenting the nature of the work (e.g. on a timesheet, timelog, diary of activities) so such documentation is necessary. In addition, there should be some clear differences in the efforts that can be explained to the auditor (e.g. conversations with project personnel for direct costs and meeting with consultant to plan marketing strategies for the firm for the G&A charges).

Q. Our goal as a newly re-claimed small business is to go after small business prime contracts where we will utilize several subcontractors. How do we price out subcontractors? We currently do not have a cost pool specifically for managing subcontractors. Can we assign an arbitrary markup, i.e. 5% or 10% or some other modest percentage?

A. It depends what rates are applied to what direct costs. For example, if you use a total cost input base for your G&A rates, then you should be able to apply your G&A rate. If you don't, then you'll have to change the G&A rate, establish a subcontract handling rate and/or negotiate desirable "fees" to direct subcontract costs.