GCA REPORT

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NEW DEVELOPMENTS

Certain Agencies Delay Implementation of the New Contractor Responsibility Regulations

Several agencies including the Departments of Interior, Transportation and Health and Human Resources as well as NASA have joined the General Services Administration in delaying implementation of the government-wide contractor responsibility regulations that took effect January 19. Under the controversial regulation issued as an executive order in the last few days of the Clinton Administration, COs must consider an offeror's record of compliance with various tax, labor, employment, environmental, antitrust and consumer protection laws over the last three years. If a contractor is found to have a history of noncompliance with these laws, it will be deemed ineligible to receive a contract on the grounds it does not meet the "responsibility" criteria of FAR Part 9. Business groups and many congressmen have been highly critical of these so-called "blacklisting regulations."

The changes to the FAR reflecting the new rules were issued as FAC 97-21 while the delays are issued in the form of waivers until many of the controversies and implementation issues are settled. As of this printing, the Defense Department has not issued waivers to the new regulations making compliance mandatory for award of new DOD contracts.

DOD and DCAA Issue Guidance on Other Transactions

(Editor's Note. Other Transaction agreements are being used much more frequently in the Defense Department and other agencies such as NASA. It is not surprising that more guidance is issued on how to treat this relatively new contract device.)

DOD issued *Other Transactions Guide for Prototype Projects* intended to provide guidelines to agency officials on how and when to use OT authority. It defines OTs as instruments other than contracts, grants and cooperative agreements intended to stimulate or support research or acquire a prototype. They are generally not subject to the requirements of acquisition laws and regulations established for contracts intending to provide sufficient flexibility to attract nontraditional firms to broaden the technological and industrial base available to DOD. The guidelines include:

OTs are not to be *used* unless at least one nontraditional defense contractor (defined as a contractor who has not performed a CAS covered contract or has not been awarded a federal agreement exceeding $500,000 to carry out prototype or research projects) will be participating to a significant extent or at least one third of the cost of the OT will be provided by the contractor.

For *accounting systems* and *audits*, when a prototype project is competitively awarded on a fixed price basis, there is no need to be concerned with a contractor's accounting practices or an audit. If a fixed price agreement is not made and the OT calls for payment based on cost then the contractor needs to demonstrate it can record costs on a project basis including an equitable means to allocate indirect costs. If an audit is required, DOD plans to permit audits by outside independent public accountants as well as GCAA.

Allowable costs. OTs for research almost always involve cost sharing arrangements while for prototypes it may or may not. Since FAR 31.205 cost principles do not govern, allowable costs will be considered those costs that a reasonable and prudent person would incur. Costs incurred after beginning of negotiation but prior to the effective date of the OT are allowable. Participants may track their costs as either direct efforts or as part of their independent research and development. IR&D is acceptable as a cost share even if it is reimbursed as an allocation to other government contracts.

Other Matters. OT *disputes* are not subject to the Contract Disputes Act so the OT agreement will need to define how they are resolved. The OT agreement will need to provide recovery rights if a *termination* occurs or a *change* results in increased costs. *Intellectual property* will be a major concern for participants where the normal IP clauses in FAR do not govern. The guidance stresses the OT agreement should address the government's right to use, modify, reproduce, release and disclose relevant technical data and computer software and the government receives the right for technology developed under the agreement.

DCAA Guidance. New guidance incorporated into the DCAA Contract Audit Manual covers OTs for both research projects (Section 2371 OTs) and prototypes (Section 845 OTs). Its is expected that traditional contractors should use the *same accounting practices* for OTs as they do for their other contracts. Citing FAR 31.205-18(e) OT research costs are considered *allowable* (as long as they are allowable had there been no OT) and they should be accounted as either an IR&D project or solely as a direct effort. For *preaward evaluations*, auditors should focus on indirect rates to make sure that the OT work is included as part of the estimated workload. Also, if a contractor estimates an OT as both an IR&D project and a contract then the auditor is to cite the contractor for a CAS 402 noncompliance – inconsistent treatment of like costs. For *billings*, those based on cost should use the contractor's approved overhead rates or if available, final negotiated rates; for billing based on milestones, the auditor has a role to ensure the milestone billed was actually completed. When *cost sharing* is evaluated, the guidance points out that certain types of costs need special attention such as pre-agreement costs, indirect and G&A costs, cost of money, prior IR&D costs and in-kind valuations. The DCAM identifies other areas DCAA may be involved such as accounting changes, compliance with other regulations, consortium-led costs, cost savings, government property, interest, profit, program income, special clauses and terminations and claims.

DOD Seeking an Overhaul of Restrictive Intellectual Property Rights

In its concern that many of its regulations on intellectual property act as a disincentive for commercial companies to compete for government business, the Defense Department has issued a second draft of its training guidance for the acquisition community. The latest draft by Undersecretary of Defense (Acquisition, Technology and Logistics) David Oliver follows a January draft that more concretely directs acquisition executives to take a series of steps to better accommodate the IP rights of commercial firms under defense contracts. Oliver says that IP rights – including trade secrets, copyrights, trademarks, patents, technical data, and computer software – are critical considerations to commercial firms and to ensure DOD access to leading edge technology it must be flexible in negotiating IP terms and conditions. The Oliver memo identifies a series of short and long term actions intended to remove IP-related barriers to commercial firm participation in defense prime contracts and subcontracts. The common underpinning of the actions is to encourage reliance on commercial licensing practices, discourage agency personnel from seeking IP rights that exceed its needs, foster a work-together attitude between government and commercial firms to tailor and where necessary to waive requirements that are contrary to good business practices.

Short term actions are to encourage COs to (1) negotiate tailored license rights (2) negotiate flexible patent rights (3) use performance-based or commercial item acquisitions to limit or avoid the need to acquire data or rights in data and (4) acquire only data or rights to data that are truly needed for a given acquisition. DOD is scheduled to publish a layman's IP guide in late March to provide straight forward advise for both COs and contractors to negotiate acceptable IP arrangements. The earlier draft of the guide is available at "http://www.contracts.ogc.oc/old/othernew.html."

FASB Ends Pooling Method and Proposes Impairment Method

In January, the Financial Accounting Standards Board voted to end the use of the pooling of assets method of accounting for mergers and acquisitions and to make the effects more palatable, issued a proposal in February to institute an "impairment-only" treatment of assets. The rules follow the FASB's concerns over how to treat goodwill (i.e. the excess of costs of acquiring an entity over their net value of assets and liabilities assumed) and the closely related question of whether to continue allowing both the pooling-of-interest or purchase methods of accounting or replace it with the purchase method only. The purchase method requires recognizing goodwill and writing it down against earnings over no more than 40 years while the pooling method does not result in any reduction of earnings. Many computer and high tech firms as well as their congressional representatives fought hard against eliminating the pooling method since they, more than other firms, depend on acquisitions for their growth.

In spite of the opposition, FASB nonetheless voted to end the pooling method and impose a cap of 20 years to write down goodwill. Under the new proposal, an impairment approach would be taken to lessen the negative impact to earnings. Under the impairment approach, goodwill would not be amortized to earnings but instead, it would be reviewed for impairment –

written down and expensed only in periods when the recorded value of goodwill exceeds its fair value.

DCAA Issues Guidance on Overdue Final Indirect Cost Proposals

In the light of recent DOD guidance to more aggressively close out old contracts, DCAA has issued guidance intended to eliminate one of the principle impediments to closing out old contracts – receipt and audit of incurred cost proposals. FAR Part 42.7 requires a contractor to submit an adequate final indirect cost rate proposal within six months following the end of its fiscal year. The DCAA guidance recognizes an ACO may permit extensions for exceptional circumstances when the request is in writing and the CO agrees in writing. Without such an extension DCAA auditors are instructed to take the following four steps to encourage timely submittals:

1. Three months after the end of the contractor's fiscal year the auditor is to remind the contractor of its contractual responsibility to submit an adequate proposal.
2. Thirty days after the submission is overdue, auditors are to notify the contractor its submission is past due and reiterate the contractual responsibility.
3. Three months after the submission is overdue, the auditors are to request assistance from the contracting officer. This request should identify the efforts taken to date to obtain the overdue submission.
4. Six months after the submission is overdue, auditors are directed to request the CO exercise his authority under the FAR Part 42 to unilaterally establish indirect cost rates.

In our experience, COs will usually, but not always, arrange a face to face meeting with the contractor's senior financial representative, auditor and audit supervisor to ascertain the reasons for the delay and obtain a commitment on when the submittal(s) will be made. Also, though the CO has the authority to unilaterally establish indirect cost rates it will invariably rely on DCAA's recommendation. The guidance informs auditor's of this responsibility and simply states the recommended rates should ensure potentially unallowable costs are precluded and will be developed on a case-by-case basis depending on risk and availability of historical cost and current billing information. *(Editor's Note. Again, in our experience, unilaterally determined rates are usually quite severe and should be avoided.)* Also, once the submittal is six months old, auditors are instructed to rescind direct billing authority – such a right is contingent on having an adequate billing system and a record of submitting timely incurred cost proposals in accordance with FAR.

DCAA Hammers Contractors with Major System Deficiencies

DCAA has issued guidance on how to handle contractor system deficiencies. The Contract Audit Manual (CAM) 10-408(2) has been revised to require auditors to issue an "inadequate" or "inadequate in part" audit opinion when (1) significant deficiencies are found during an internal control audit and (2) the deficiencies have not been corrected as of the date of the audit report (even though the contractor has submitted a corrective action plan). DCAA's recent quality assurance reviews found inconsistent interpretations of DCAA guidance on determining the appropriate audit opinion when significant deficiencies were found. Previous guidance allowed the auditor to issue an "adequate" opinion when a contractor submitted an action plan that when implemented would alleviate the deficiencies within a reasonable period. The review found numerous instances when an "adequate" opinion was made when it was evident needed corrective action would not be made in a reasonable period of time or corrective action had never been taken. Now an audit opinion must be either "inadequate" or "inadequate in part" when both the following conditions exist: (1) one or more significant deficiencies in a contractor's system of internal controls and (2) at least one of the deficiencies have not been corrected as of the date the report is issued. The existence of a corrective plan will no longer make an "inadequate" system reliable. Rather, the auditor must verify the contractor's implementation of the action before giving an "adequate" opinion and a follow-up review should be performed as soon as possible to ensure the plan has been implemented.

BRIEFLY…

New Mileage Rate Issued

On January 22, the General Services Administration issued a final rule increasing the mileage reimbursement rate to government employees for privately owned vehicles used on official business to 34.5 cents per mile. Many contractors use these rates to reimburse their employees under government contracts. By law, the standard mileage rate cannot exceed IRS rates which are also 34.5 cents per mile as of January 1. For those employees using motorcycles the rate is 27.5 cents and those using their airplanes, 96.5 cents per mile.

DCAA Will Continue to Use DRI Data to Evaluate Escalation Projections

DCAA has announced it has renewed its contract with Standard and Poor's Data Resources Inc. (DRI) for five years to provide data for inflation estimates. Contractors should be aware that DCAA uses this data to evaluate contractor's estimates for cost escalations in the future.

Industry and ABA Ask For Guidelines Limiting Use of Reverse Auctions

In light of recent government uses of "reverse auctions" where they have been praised for reducing acquisition costs, many industry groups and the American Bar Association have been urging the FAR Council to issue guidance limiting their use. The procedure has bidders post their prices on-line at predetermined times where they are notified of the low bid (not the bidder) and to remain in the competition they must bid lower prices until the allotted time is up. The groups warn the technique should be limited to commodity type products otherwise the results will be "shootouts" for higher risk, developmental or technically demanding work where the "winner's curse" results in winners discovering they have gone too far to receive the business in the heat of a competitive auction. *(We intend to detail this new technique in the next issue of the GCA DIGEST).*

DOD Considering Raising Progress Payment Rate

The Defense Department is considering raising from 75 percent to 80 percent the progress payment rate for fixed price contracts. Requiring a change to the Defense Federal Acquisition Regulation Supplement (DFARS) the suggestion will mean that contractors other than small businesses would receive 80 percent of their costs to date instead of the usual 75 percent. DOD's progress payment rates for small and small disadvantaged contractors are 90 percent and 95 percent, respectively. Following a Defense Science Board and DOD Controller recommendation DOD is considering issuing a proposed rule that would be applicable to contracts awarded after October 1, 2000.

SBA Revises HUBZone Program Rules

The Small Business Administration added the Departments of Commerce, State and Justice to the original ten federal agencies where the Historically Underutilized Business Zone (HUBZONE) program applies and finalized earlier proposed rules. The HUBZone program provides contract preferences to small businesses that locate in and hire at least 35 percent of their workforces from economically distressed urban and rural areas. The final rules (1) clarify that the HUBZone program does not apply to contracts awarded by state and local governments (2) revise the definition of "principal office" to accommodate service and construction firms by continuing to treat it as the location where the greatest number of employees perform their work except for service and construction firms that would exclude the company's employees who perform their work at separate job site locations to fulfill specific contract obligations (3) end eligibility restrictions on allowable affiliations such as other qualified HUBZone small businesses, 8(a) program participants and women-owned businesses and (4) end program restrictions that required non-manufacturers demonstrate it can provide products manufactured by qualified HUBZone small businesses for goods of $25,000 or less.

Final Rule on Required Flowdowns on Contracts for Commercial Items

A FAR final rule was issued amending the FAR 52.244-6 (Subcontracts for Commercial Items) to list the five standard FAR clauses that must be included in subcontracts for commercial items. The required clauses are: (1) FAR 52.219-8 (Utilization of Small Business Concerns), (2) FAR 52.222-26 (Equal Opportunity), (3) FAR 52.222-35 (Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era, (4) FAR 52.222-36 (Affirmative Action for Workers with Disabilities) and (5) FAR 52.247-64 (Preference for Privately Owned U.S.-Flagged Commercial Vessels). Contractors may choose a minimal number of additional clauses necessary to satisfy contractual obligations under subcontracts for commercial items.

Service Contract Act Wages Increase

Following a five year hiatus, DOL has announced it will commence issuing new SCA wage determinations containing wage increases since it has now agreed on what surveys to use. In light of uncertainty for service contract employees and to avoid potential catastrophic impacts on budgets of procuring agencies two limitations will be set: (1) DOL will not reduce existing SCA wage rates and (2) DOL will "cap" annual increases in SCA wage determinations at 15 percent. So, if an existing rate is $10 per hours and the survey data indicates a $14 per hour rate, then this year's new wage rate will increase to $11.50 (15% higher only) while next year's wage rate will likely be $13.23 (15% higher than the previous year's $11.50).

CASES/DECISIONS

Ordering Minimum Amount Precludes Breach of ID/IQ Contract

The GSA's solicitation for bids for travel services stated the award would be an indefinite delivery/indefinite quantity (ID/IQ) contract with a guaranteed minimum revenue of $100. The solicitation advised bidders to base their offers on the previous year's figures for travel management services – about $2.5 million – but stated these figures were for information purposes only and did not represent any guarantee of sales. Prior to receipt of the bids, the GSA received notice that over half the agencies would not be using the contracted travel services but did not notify the bidders of this information. When Travel Centre received gross sales of $500,000 it closed one of the offices required to service the contract, the government terminated the contract, the contractor sued for damages due to the government breaching its duty of good faith and a divided appeals board granted it damages.

The US Court of Appeals reversed the earlier ruling saying the contract clearly stated it was an ID/IQ contract and that Travel Centre was entitled to no more than $100 in revenue. The Court ruled that the minimum quantity provision of ID/IQ contracts "protects the government when its requirements do not materialize" and because the GSA met the legal requirements of its contract the "less than ideal contracting tactics fail to constitute a breach" (Administrator, GSA v. Travel Centre, Fed Cir No 00-1054).

Contractor Entitled to Reimbursement of Post-Performance Insurance Costs

(Editor's Note. The following decision provides a good example of how some unforeseeable costs can be recovered under cost overrun circumstances.)

The contractor covered its worker compensation, liability and auto insurance needs by paying premiums into the National Defense Projects Rating Program (NDPRP) which is a retrospective-rating insurance plan designed to cover insurance needs of certain defense projects. Under the NDPRP, the insured pays a deposit premium at periodic intervals during the policy year to cover expected losses during the year and the premiums are retrospectively adjusted up or down depending on actual losses. Actual losses were significantly higher during the period of its cost type contract and the contractor was charged an additional $16 million after completion of the contract to which it attempted to recover from the government. The government refused citing the Limitation of Cost clause (LOCC) in FAR requiring notification that the contractor was close to spending its authorized funding. The Court sided with the contractor stating "the LOCC does not require clairvoyance." Since the LOCC provides the contractor the opportunity to cease work if additional funds are not authorized, the fact the insurance claims occurred after termination of the contract meant the contractor would have been unable to cease work to avoid further escalation of costs (Johnson Controls World Services Inc. v. United States, Fed.Cl. No 98-626C).

Agency Fails to Use Best Value Criteria to Evaluate Proposal

(Editor's Note. The following case illuminates the difference between a "best value" versus a "lowest price, technically acceptable" solicitation with the implication of how a bidder needs to present the technical portion in its proposal.)

Johnson Controls protested the Army Corp of Engineers award of a base operations and maintenance services contract. The RFP stated the award would be made to the "best overall proposal" and that technical evaluation was more important than price. Johnson protested saying the proposal should be evaluated on "best value" criteria where it was inappropriately not given credit for its proposal strength beyond the RFP's minimum requirements. Johnson also stated the awardee's proposal was overrated noting it received the same past performance score even though it had better and more relevant experience. The agency stated it properly evaluated the proposals based on the offeror's ability to satisfy the RFP's minimum requirements because the evaluation factors were "not written in terms of minimum standards that offerors could strive to exceed."

The Comp. Gen. sided with Johnson noting that when the RFP establishes a "best value" evaluation plan, the agency must consider the "degree" to which otherwise technically acceptable proposals exceed the stated minimum requirements or better satisfy the agency's needs. Otherwise, the award would be improperly based on the lowest-priced, technically acceptable proposal. The Comp. Gen. confirmed the solicitation led offerors to reasonably believe they would be rewarded for submitting technically superior proposals. For example, the REF advised that past performance would be evaluated based on offerors' past experience on contracts with similar scope and complexity. Even though the agency had the discretion to determine what work was sufficiently similar to be considered acceptable, it did not have the discretion to give identical scores to offerors when there were significant differences in "relevant" experience. Here the awardee and Johnson had the same past performance rating in spite of significant relevant experience. The Comp. Gen. concluded this was an example of the agency not reasonably evaluating differences in technical merit and thus essentially awarded the contract to the lowest-price, technically acceptable offeror (Johnson Controls World Servs., Inc. Comp. Gen. Dec. B-281287).

Contractor Entitled to Option Year Price Increase for Accrued Sick Leave in Base Year; and Option is Not a New Contract

Penn was awarded an Army contract for laundry and dry cleaning services that contained a base and four option years. The contract was covered by the Service Contract Act which provides the collective bargaining agreement (CBA) covering Penn's employees during the base year would be the appropriate wages and fringe benefits. The CBA allowed employees to accrue unused sick leave but had no provision for paying employees the accrued time. The government exercised the first year option and Penn entered into a new CBA that required it to pay employees for the accrued sick leave beginning on the first anniversary date of the contract. Penn paid its employees the accrued sick leave for over $20,000 and like other SCA covered contracts had the Labor Department issue a revised wage determination reflecting the terms of the new CBA, effective as of the first date of the option period. When Penn sought reimbursement for the $20,000 the CO denied the claim saying the base period of the contract ended before the effective data of the revised wage determination. Penn appealed.

Penn contended it was entitled to the reimbursement because the revised wage determination incorporated the new CBA which required payment of the accrued sick leave during the option year. The payment represented an actual increase in wages and fringe benefits in the option year and hence the government was liable. The government contended their liability applied only to fringe benefits incurred in the option year not those carried over from the base year. Also, the government argued the modification exercising the option period created a new contract making the anniversary date occur after the first option period expired. The Board sided with Penn stating that though FAR 52.222-43 (Fair Labor Standards Act and Service Contract Act-Price Adjustment) limited price adjustments to wage increases during option periods, the modification of the contract incorporating the revised wage determination expressly made the new CBA retroactive to the start of the option period. Thus, Penn was entitled to a price adjustment for the actual wage and fringe benefit increase during the option period. As for the government claim a new contract was created, the Board noted though a new contract may have been created for purposes of inserting a revised wage determination "it does not follow a new contract was created for other purposes" and hence the ambiguity about the anniversary date is wrong. The Army contract was one contract where Penn and the government were obligated to pay the employees for the unused sick leave each anniversary date no matter when the unused sick pay was accrued (Penn Enterprises Inc., ASBCA, No 52234).

A SDB That Inflated Bid Loses Out When Price Preference Is Removed

An Army solicitation included the FAR clause "Notice of Price Evaluation Adjustment for SDB Concerns" that provides that bids of all non-small disadvantaged businesses were to have their bids evaluated at a price 10 percent higher than the actual bid. Anticipating it would receive a 10 percent price preference Si-Nor, an SDB, increased its price 10 percent. After receiving bids the Army concluded it had mistakenly included the price preference clause and informed bidders their bids would be evaluated without any 10 percent SDB preference. Si-Nor protested arguing it would have "sharpened our pencil" and bid a lower price had it known the preference would not be applied. The GAO ruled against Si-Nor stating they were not prejudiced (e.g. hurt) by the Army decision since not only large and small non-SDB businesses were bidding but also other SDB businesses were competing (in fact another SDB won). The GAO concluded that Si-Nor took a risk and cannot now assert the preference rather than its own judgment was the cause of its failure to submit the low bid (SiNor Inc., GAO, B-286910).

SMALL/NEW CONTRACTORS

Basic Procurement Laws

(Editor's Note. Though the GCA REPORT and GCA DIGEST commonly address new or hot developments of interest to the highly experienced professional, we find it a good idea to occasionally review some of the basics. Since certain procurement laws are frequently referenced in items coming across our desks

(contracts, solicitations, correspondences, literature, etc.) the following provides a good overview of the most frequently referenced procurement laws that should be useful to people new to the field and, hopefully, a good refresher to veterans. We have relied on an article by Brian Speer, Contract Specialist at NASA, in the October 2000 issue of Contract Management and, when appropriate, identified relevant sections of the FAR that incorporate the laws.)

The Antideficiency Act, United States Code (USC):31 USC 1341. States that no officer or employee of the government may create or authorize an obligation in excess of funds available or in advance of appropriations unless otherwise authorized by law (FAR 32.702, Contract Funding).

The Antikickback Act of 1986, 41 USC 51058. Seeks to deter subcontractors from making payments and to inhibit contractors from accepting payments for the purpose of improperly rewarding or obtaining favorable treatment in connection with a prime contract or subcontract (FAR 3.502-2, Subcontractor Kickbacks).

Buy American Act. Requires that only domestic end products be acquired for public use except articles, materials and supplies (1) intended for use outside the US (2) for which cost would be unreasonable in accordance with FAR 25.105) (3) an agency head determines domestic preference would be inconsistent with the public interest (4) are not mined or produced in the US in sufficient supply to be reasonably available or (5) that are purchased specifically for commissary resale (FAR 25-102, Buy American Act).

The Clinger-Cohen Amendment, Public Law 104-106. Was the second wave of acquisition reform (after FASA discussed below) that accomplished the following objectives: (1) adopted commercial buying practices (simplified buys up to $5 million) (2) reduced contractor burdens while balancing government protection (3) sought awards based on best value (4) reformed bid protests (5) provided efficient competition and streamlined competitive range (6) simplified procurement integrity and (7) repealed the Brooks Act.

The Contract Dispute Act of 1978, 41 USC 601-613. Established procedures and requirements for asserting and resolving claims subject to the act (FAR 33.202, Contract Disputes Act of 1978).

The Contract Work Hours and Safety Standards Act, 40 USC 327-333. Requires that certain contracts contain a clause specifying that no laborer or mechanic shall be required or permitted to work more than 40 hours in any week without being paid overtime at least one and a half times the basic pay rate (FAR 22.301, Statutory Requirement).

The Davis-Bacon Act, 40 USC 276a-276a-7. Provides that contracts in excess of $2,000 for construction, alteration or repair of public building shall contain a clause that no laborer or mechanic employed directly on the site of work will receive less than the prevailing wage rates determined by the Department of Labor (FAR 22-403-1, Davis Bacon Act).

The Defense Production Act of 1950, Title 1. Authorizes the president to require contracts in support of national defense to be accepted and performed on a priority basis (FAR 11.602, Priorities and Allocations, General).

The Federal Acquisition Streamlining Act (FASA) Public Law 103-355. Repealed 225 existing acquisition laws and regulations primarily related to under $100,000 acquisitions and (1) increased emphasis on market research (2) added reform of specifications and standards for commercial buying (3) expanded debriefings with reduced protest encouragement (4) expanded use of purchase cards (5) reduced demands for cost and pricing data and (5) increased electronic commerce.

The Freedom of Information Act (FOIA), 5 USC 552. Specifies how agencies will make records available on public request, imposes strict time standards for agency responses and exempts certain records from public disclosure (FAR 24.203, Freedom of Information Act, Policy).

The Miller Act, 40 USC 270a-f. Requires performance or payment bonds for any construction contract exceeding $100,000 with CO exemptions for work outside the US or is impractical (FAR 28.102, Bonds and Other Financial Protection).

Preventing "Wage Busting" for Professionals, OFFP Policy Letter No 78-2 provides policies and procedures to use in negotiated service contracts exceeding $500,000 that involve significant numbers of professional employees (FAR 22.1101, Professional Employee Compensation).

The Service Contract Act of 1965 (SCA). Requires service contracts exceeding $2,500 to contain mandatory minimum wages and fringe benefits provisions equivalent to federal employee classifications and wage rates and notification of minimum allowable compensation to employees (FAR 22.1002-1, Service Contract Act of 1965).

The Truth in Negotiations Act (TINA), Public Law 87-653. Requires contractors to certify their submitted cost and pricing data is accurate, complete and current as of the date of agreement on price and gives the government the right to audit proposed costs (FAR 15.4, Contract Pricing).

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QUESTION & ANSWER

Q. We are a subsidiary of a large company and believe extensive referencing of our parent's resources will help us win a contract we are pursuing. Our parent company is quite willing (even anxious) to participate in the contract but refuses to sign anything that would commit itself to the government. Can we still reference the resources or should we not discuss them since our parent refuses to formally commit itself?

A. Discussing how your parent's resources will enhance contract performance provides a powerful competitive advantage and we have seen many subsidiaries win contracts largely based on their parent's competencies. An agency does have the discretion to ask for a formal agreement from a parent but, in our experience, such a request is quite rare. An agency is pleased to see considerable resources used to help make a procurement successful and understands that it is usually in both the subsidiary and parent's interest to help meet the objectives of the contract without having to unnecessarily complicate the procurement with formal agreements and other such red tape.

We have been reading a discussion of a relevant case in an article written by Professor John Cibinic in The Nash & Cibinic Report. A subsidiary of Hallmark (Ensemble) extensively referenced Hallmark's technical, manufacturing, systems and financial strengths in a successful competition. A bidder protesting the award stated the agency should have obtained a formal written notice from Hallmark that would back up its commitments to help Ensemble perform the contract. The court rejected the protest stating it is quite proper for an agency to consider a parent's resources in performing the contract with or without a formal agreement. The Court cited with approval numerous cases where agencies were found to have properly used parents' resources in evaluating the capability of subsidiaries without requiring formal agreements. This green light to consider parent resources without agreements indicates agencies will be unlikely to ask or expect an agreement from the parent.

Q. Our prime contractor keeps asking us for "DCAA approved rates." What are they?

A. Its not clear what they mean. Large and even some smaller contractors used to submit yearly or multiple-year proposals to establish forward pricing rates to be used on proposals for that year. These rates were based upon budgeted or projected data for the period and DCAA would usually conduct a detailed review of the budgeted data and underlying assumptions and once completed, issue a rate letter approving the "audit-determined" rates for proposal purposes. This practice is now rare. Now, DCAA will usually audit the first proposal (these days usually limited to direct labor and indirect labor rates) ensuring there is reasonable budget data if new rates are proposed or if prior year actuals are used, there are no significant changes. The results of the audit of the first proposal become the "audited rates" cited when government agency requestors ask about proposed rates used on subsequent proposals. These "audited rates" are the closest thing to "DCAA approved rates" these days. If an audit of proposed rates has not been conducted recently or if proposed rates differ significantly from the result of the latest audit then the closest thing to "approved rates" would be the provisional rates provided to DCAA for billing cost type work. They will usually send a letter approving these rates for billing purposes so you may want to assert these are your "approved rates."