GCA REPORT
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NEW DEVELOPMENTS

Proposed DOD Rule Governing Contractor Business Systems Generates Widespread Criticism

Stemming from the DOD Task Force on Wartime Contracting report stating, in part, that contractor "business systems" are often deficient and the DOD is not using its payment withhold provisions to get contractors to improve, the DOD published a proposed rule in the Federal Registrar, No. 2457 in January, that defines contractor business systems and calls for COs to withhold payment if contractors' business systems contain deficiencies. The proposed rule defines "business systems" as accounting, estimating, purchasing, earned value management and material management systems. The new rule will add or amend a DFARS clause listing the characteristics of an acceptable system and requiring contractors to maintain such systems. If deficiencies are found, the rules will require ACOs to withhold payment when business systems are found to be deficient. The ACO will request and review a response from the contractor and implement a 10 percent withhold on the contractors' payments after determining a deficiency exists. A separate 10 percent withhold is available for each deficiency found where the proposal caps the withhold at 50 percent but under special circumstances the ACO may withhold 100 percent.

As expected, the proposal is generating considerable criticism. The American Bar Association's Section of Public Contract Law states the proposal fails to adequately define acceptable business systems or provide sufficient guidance for when an ACO should approve a system for which deficiencies are found. The Section states the rule goes "beyond protecting the government's interest and imposes a punitive withholding system" of up to 100 percent of payment without considering the large amount of defenses already available to prevent unallowable or unreasonable costs. The rule incorrectly assumes any deficiency automatically will cause the government to be overcharged which justifies payment withholds. The rule's definition of "deficiency" as merely a failure to maintain an adequate system and then listing only certain elements of such a system invites a great deal of controversy on what constitutes an inadequate system. It further states the rule is vulnerable to legal challenge since it treats nearly all alleged business deficiencies the same and fails to recognize every deficiency presents a unique risk.

The Professional Services Council is equally critical saying the proposed rule would deny payment to contractors "for even minor flaws" and states the rule sets no thresholds for either the size of a contract or a firm and provides no time lines for audit agencies to confirm the identified deficiencies are fixed to allow resumption of payments. The rule would impose significant burdens on small and mid-sized firms. The rule also inappropriately takes away the discretion of the contracting officer to make judgments on the impact of the deficiencies.

FAR Council Proposes Increased Dollar Thresholds

Several acquisition related dollar thresholds in the FAR would be adjusted for inflation in a recently proposed rule. The most "heavily used" thresholds addressed by the proposed rule are:

- $100,000 simplified acquisition threshold at FAR 2.101 increased to $150,000
- $5.5 million ceiling for commercial item test program at FAR 13.500 increased to $6.5 million
- $650,000 cost and pricing data threshold at FAR 15.403-4 (covering Truth and Negotiations Act) would go to $700,000
- the $550,000 floor for prime contractor subcontractor plans would increase to $650,000 under FAR 19.702 (from $1.0 million to $1.5 million for construction subcontracting plans)

The $3,000 micropurchase threshold at FAR 2.101 and the FedBizOpps pre-award and post-award notices in FAR Part 5 would stay the same at $25,000.

DCAA Issues Guidance on Auditing Proposed Intercompany Transfer Prices

DCAA has issued guidance to its auditors on interorganizational transfers (IOT). In accordance with FAR 15.408, Table 15-2 IIA, Materials and Services, prime contractors should support its IOTs as if they are the prime's cost or pricing data. Auditors are reminded the requirements for the prime to conduct cost or pricing analyses are not applicable to IOTs. The scope of audit depends on whether the proposed IOT price is price or cost based.

If the proposed price is based on price then FAR 31.205-26(e) requirements must be met. If the item being proposed is price-based there must be an established practice by the affiliate to price its IOTs at other than cost. The item qualifying for an exemption to cost or pricing requirements must follow FAR 15.403-1(b). If the price is based on adequate competition, then there must be supporting competitive bids and market analysis to ensure the amount proposed is fair and reasonable. If the price is not based on competition (e.g. sole source) then the auditor is told to review the sales data to ensure the price is fair and reasonable. Only sales data to unrelated organizations that are not sold to local, state or federal government apply.

If the price is based on cost then there must be a breakdown of cost elements in accordance with FAR 15.408, Table 15.2. The auditor should request an assist audit if the affiliate is at another location based on its documented risk assessment.

The guidance also states that the IOT must be considered as a special consideration of the prime's make or buy decisions in accordance with the DCAM 9-405.2. The auditor is to evaluate the prime's practices regarding IOTs and make sure the decision to make the item (the IOT) was made in accordance with the policy and the result is a fair and reasonable price versus another vendor's price. The guidance alludes to FAR 15.407-2(f) that states the CO must establish the make/buy decision was proper before contract award. Finally, the auditor is told that any failure to meet Table 15.2 or cost principle requirements or any other estimating practices should be reported as an estimating system deficiency.

ABA Chimes in on Interim Pass Through Rule

The American Bar Association Section of Public Contract Law has come out against an interim rule passed last year seeking a limit to "excessive" pass through charges by subcontractors or tiers of subcontractors when they add "little to no value." The Section said the following points should be considered when drafting the final rule:

1. To ensure the rule is properly implemented rather than "merely employed to reprice contracts" the FAR should create guidance to COs.

2. The DOD should take risk into account when determining the degree of assessment needed when considering the value added. Such risk factors would include consideration of (1) whether the contract was completed (2) contract type – fixed price or cost reimbursable and (3) urgent requirements.

3. Ensure as much consistency as possible between evaluated proposals and actual performance rather than serving as a basis for disallowing costs after the fact.

4. The requirement for COs to review contractor's subcontract when 70 percent of the work is subcontracted can result in decisions to retain work in-house to avoid the 70 percent trigger despite the fact that contract work can more efficiently be performed by subcontractors.

5. The 70 percent trigger can also hamper the ability to build a "strong team" to best meet government needs if the amount of subcontracting is limited to an arbitrary share of total work effort.

6. The rule may conflict with the requirements of the cost accounting standards where CAS requires that all indirect costs be fully absorbed and allocated to final cost objectives while under the FAR interim rule the CO will determine how much value certain allocable indirect costs add to the contract. For example, G&A costs by their nature are residual and do not permit the assignment of a clear beneficial or causal relationship between the cost incurred and a benefit to any particular final cost objective so there is the potential that the G&A applied to all subcontracts in accordance with a contractor's disclosed practices can nonetheless be deemed excessive and hence unallowable.

Trend Continues to Seek Replacement of Contractor with Government Employees

President Obama's fiscal year 2011 budget proposals call for "significant increases" in the size of the federal government's civilian workforce which would expand to approximately 2.15 million full time equivalent employees over roughly 1.98 FTEs (excluding the US Postal Service). As he has since taking office, the president warned against overreliance on federal

contractors that "undermines the ability of the Federal Government to controls its own operations."

Continuing the trend, the Department of Homeland Security Secretary Janet Napolitano told a senate committee she has asked all agency components to identify particular areas where positions can be brought in-house stating the current level of 200,000 contractor employees is "astounding" and "unsettling." Stating that government "FTEs" generally "cost less" than using contractors, she has started an initiative to (1) take steps that no inherently government functions are performed by contractors (2) putting in place vigorous review procedures to ensure future activities do not increase DHS's reliance on contractors and (3) coordinating assessments to "seek economies and service improvements and reduce" reliance on contractors.

Final Rule Requiring Harmonization of Cost or Pricing Thresholds

The FAR Council March 19 finalized an interim rule requiring harmonization of the thresholds for cost or pricing data. The rule requires alignment of the threshold for cost or pricing data on non-commercial modifications of commercial item contracts with the Truth and Negotiations Act (TINA) threshold for cost or pricing data. The final rule includes text that addresses inquiries about the meaning of "at the time of contract award" verbiage. The commentator inquired about a contract's initial price where subsequent changes based on modifications were made and asked whether the total price "at the time of contract award" include subsequent mods that changed the initial price. The final language made clear that "at the time of contract award" indicates subsequent mods, other than those that meet the TINA triggering thresholds, are not factored into determining when the cost or pricing threshold should be applied. Inquiry was also made about whether the "at the time of contract award" applies to issuance of an IDIQ contract or individual orders under that contract. The Council added that "it is commonly understood that it is the estimated total value of order for the specified period at the time of contract award as well as the individual value of any subsequent discrete orders to which the TINA thresholds apply" (*Fed. Reg. 37414*).

Industry Group Criticizes Proposed Changes to Small Business and 8(a) Proposals

The Small Business Administration last October 28 proposed changing the 8(a) program and small business size regulations dealing with the mentor-protégé programs, requirements for joint ventures, procurement classifications and the non-manufacturer rule. Some of the proposals have generated industry comments. Currently, joint ventures are considered to be affiliated if they submit more than three offers over two years. The proposed change would require three awards rather than three offers over two years. The Professional Services Council is proposing to go further to consider the total value of all awards, even if there are more than three awards. The PCS also favors (1) exempting funds in official retirement accounts from the calculation of net worth if they cannot be withdrawn prior to retirement eligibility without a significant penalty and (2) requiring making 8(a) joint venture profits proportionate to work performed by each participant. The PSC opposes the proposed rule against allowing non-8(a) joint partners on 8(a) sole source contracts to be subcontractors under the joint-venture prime contract because it would negatively impact 8(a) corporations. PSC also opposed the proposal to allow agencies to receive 8(a) credit only for task orders that are exclusively set aside for 8(a) concerns stating the agencies should get credit of 8(a) task orders "regardless" of whether they are set-asides.

End of Mandatory 10 Percent Withhold on A&E Vouchers

The FAR Council has issued a final rule on withholding of payment requirements under FAR 52.232-10, Payment under Fixed Price Architect-Engineer Contracts. Under current rules, COs are required to withhold 10 percent of the amount due on each voucher where the government retains the withheld amount until the CO determines the work is satisfactorily completed. However, payment can be made in full during any month the CO determines performance is satisfactory. Now, effective April 19 the clause will permit COs to use their judgment about the amount of payment withheld to apply under fixed price A&E contracts so that the withheld amount will be applied at the level needed to protect the government's interests (*Fed Reg 13422*).

DOD Ends Price Evaluation Adjustments for Disadvantaged Firms

In light of a recent Federal Circuit opinion the Defense Department issued a class deviation to contracting officers they may no longer use price evaluation for small disadvantaged firms. The *Rothe v Department of Defense case (606 F. Supp; 2d 648 (Fed Cir. 2008)* held that the establishment of a defense contract set-aside "goal" for small businesses owned by "socially

disadvantaged individuals" that allowed for a price evaluation adjustment to help meet those goals violated the Fifth Amendment's equal protection clause. As a result of the court decision DOD issued a memo ceasing all activities relying on the statute that created the goal based on race where DOD will publish FAR and DFARS rules shortly.

Update Mileage Allowances

The Federal Travel Regulation was updated in January to amend mileage reimbursement rates for privately owned autos, motorcycles and airplanes used for official travel. The new per mile rates are .50 cents for autos, .47 cents for motorcycles and $1.29 for airplanes *(Fed Reg 790*).

CASES/DECISIONS

GAO Addresses Accounting Issues for Joint Ventures

The General Accountability Office has recently decided three cases addressing proper accounting treatments of joint ventures.

1. The Department of Transportation (FTA) issued a solicitation for oversight services to monitor and support capital projects and rejected a proposal from MD-JV, a joint venture of two firms asserting (a) there was no assurance it would follow generally accepted accounting standards as required by the FAR (b) MD-JV did not show it was an independent entity that required employees be committed from each company (c) it did not require there be an indirect rate structure unique to the JV and (d) MD-JV did not prepare budgetary forecasts for the entire proposed period. FTA subsequently abandoned many of its arguments for why it believed MD-JV's accounting system was inadequate and pressed one reason – the JV lacked a unique rate which violated CAS 401, requiring estimating costs of a proposal be consistent with its cost accounting practices. Though it was proper for FTA to investigate whether an adequate accounting system exists, the GAO ruled it did not provide a reasonable explanation why MD-JV's practice of using the individual overhead rates of its two partners was not proper. The GAO concluded neither FTA nor DCAA provided any analysis or legal authority as to why the dual overhead rate structure that MD-JV proposed would lead to an inconsistency in the application of cost accounting practices (*McKissack+Delcan JV II, B-401973*).

2. A joint venture between two large companies – Northrop and Missile Sys - was established to perform on three contracts for the Joint Tactical Light Vehicle. The proposal indicated that 100 percent of the contract costs would be accounted for by subcontracts with the two JV members, apportioned equally. Protesters argued the JV proposal was unacceptable because the JV had not submitted a CAS disclosure statement which is conditioned on a CAS-covered contract worth over $50 million. The GAO sought advice from DCAA who stated (a) the JV is composed of two or more contractors who may have already filed disclosure statements so the JV should be reviewed for whether it meets the definition of a CAS business segment and (b) the need for a disclosure statement should be based on the characteristics of the JV which is to be decided on a case-by-case basis – if it is an entity actually performing the contract, has responsibility for profit and/producing a product or service and has certain characteristics of ownership and control then a D/S is required but if the JV merely unites the efforts of two contractors performing separate and distinct portions of the contract with little or no technical interface then separate D/Ss are not required. If doubt exists, then discuss with the CO. DCAA concluded a D/S should not be required since all JV costs were proposed to be incurred and accounted for by the two separate members who had already submitted D/Ss. The GAO found DCAA's advice persuasive and ruled a D/S is not required because (a) the proposal included the D/Ss of the two members (b) all costs to be billed would be incurred and accounted for by the JV members with no allowance for any costs incurred at the JV level and (c) the proposal delineated the overall share in cost performance and specific roles (*Northrop Grumman Space & Missile Sys. Corp., B-400837*).

3. PMO-JV, a joint venture, submitted a proposal for an FTA ID/IQ contract containing multiple cost reimbursement awards. The proposal identified direct labor rates for required personnel broken down by venture partner and indirect cost rates based on a weighted average of the partners' individual overhead rates. An audit of the proposal concluded the cost/pricing data was inadequate because (a) a budget should have been developed for the partnership entity and projected indirect rates should have been calculated for the JV entity from the budget and (b) CAS 401 was violated. The GAO ruled FTA failed to properly consider the "weighted average" overhead rate and since the PMO-JV qualified as a small business, CAS 401 did not apply (*PMO P'ship Joint Venture, B-401973*).

Contractor Gets a Lump Sum for its In-House Labor Costs

(*Editor's Note. The following decision shows how to treat normally G&A costs as a direct charge for a claim.*)

In its performance at a naval base, there were many changes to its contract work where unilateral contract modifications were issued for which SRC submitted cost proposals. SRC submitted a proposal for $44,848 to recover its total preparation costs for the cost proposals that included 600 hours of in-house SRC labor, legal fees and accounting fees. The Navy asserted that the costs were unallowable because they were incurred for prosecution of a claim, its in-house labor costs were not proved and its G&A costs were incorrectly computed. The Board ruled that the numerous meetings between SRC and the Navy to resolve outstanding unilateral contract modifications and its cost proposals constituted contract administration efforts and hence were allowable. However, it disallowed SRC's legal and accounting fees because SRC did not explain the basis for its prorated allocation of the costs as direct to the claim – legal and accounting fees are normally in the G&A pool and recovered in its home office overhead rate but did not properly transfer these normally G&A costs as direct costs of the claim, agreeing with DCAA that they represented double recovery. As a result of accepting the contract administration purpose of the costs but rejecting the method of computation of entitlement the Board gave SRC $5,000 (*States Roofing Corp., ASBCA No. 55504*).

Government Can Force Use of a Subcontractor to Complete Contract

LB&B held a maintenance and repair contract with the Navy that included handling hazardous materials and waste. Due to contract deficiencies, the Navy informed LB&B that it was prepared to terminate the hazardous waste portion of the contract unless LB&B hired an approved subcontractor to do the work. LB&B hired the subcontractor and submitted a claim for $208K for the increased cost and a second claim to recover excess costs associated with additional site supervision directed by the Navy. The Court cited FAR 49.402-4 that allows a contractor to continue work by means of a subcontractor as an alternative to a termination for default and found the government's requirement that it hire a subcontractor was not impermissible in lieu of a termination if LB&B failed to fulfill its contractual obligations. However, the Court concluded that the claim for additional costs for the added site supervision was acceptable because it found no evidence showing the staffing LB&B used had failed to manage the total work effort associated with its services and was hence entitled to additional costs (*LB&B Associates v US, Fed, Cl. No 08-430*).

Release of Contract Line Item Pricing Violates FOIA Exemption

After losing the award to Fidelity, Essex submitted a Freedom of Information Act (FOIA) request for the award document along with the contract line item pricing. Fidelity objected to the release of the unit pricing information claiming it was proprietary and its release would reveal its business strategy and cost structure. The Army told Essex that the unit prices were properly withheld under Exemption 4 of FOIA and Essex filed a lawsuit. The Court sided with the Army's refusal to release the unit prices stating that Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential" explaining information is confidential if its disclosure is likely to impair the government's ability to obtain necessary information in the future or is likely to harm the competitive position of the person. The Court added harm need not be demonstrated only evidence supporting the existence of potential competitive injury or economic harm needs to shown. The Court rejected Essex assertions that harm was highly speculative and that FAR 15.506 mandates disclosure, finding the disclosure would reveal Fidelity's business strategy and cost structure and the FAR citation contains an exception that debriefing shall not reveal any information exempt from release under FOIA (*Essex Electro Engrs, Inc. v US, Sec of Army, DDC, NO. 09-372*).

Court Decision Fuels Controversy Over HUBZone Set-Aside Preferences

(*Editor's Note. The following decision addresses the on-going controversy over whether HUBZone status receives priority consideration for small business contract set-asides over other status like 8(a), women or veteran owned, etc. Two previous court cases ruled HUBZone firms should be given priority while the Department of Justice recently issued rules no such priority should be given, stating there should be parity.*)

After the Army awarded an IT contract to Copper River, a Alaska Native 8(a) company, the incumbent MCS, who is both an 8(a) and qualified HUBZone small business, filed a protest. The Army decided to give a sole source contract to Cooper River while MCS asserted the Army should have competed the contract among HUBZone companies. The Army said that due to an opinion issued by the Justice Department saying

HUBZone companies do not quality for priority set-aside status, the Court stated the issue here is whether statutory language provides for the prioritization of the HUBZone program over others like 8(a) or whether they provide parity between the programs. The Court ruled that the plain meaning of the HUBZone statute – "shall be awarded" – requires that the contract be set aside for qualified HUBZone concerns if the "rule of two" (two qualified competitors) is met. This language contrasts with the 8(a) statute which affords discretion to the SBA in deciding whether to place a contract in the 8(a) program. The Court concluded the statutory language of the HUBZone program required the contract be awarded on the basis of competition between qualified HUBZone small business concerns (*Mission Critical Solutions vs US, Fed. Cl. No 09-864*).

Board Says Army Provided Defective Specs and Withheld Vital Information

Under its munitions contract, AO presented a claim of $3.3 million stating it incurred additional costs due to defective contract specifications and the government withheld superior knowledge regarding the specs including the need to use a particular production method. The government responded that it was AO's chosen manufacturing methods and inability to control process variables that caused the difficulties and under its fixed price contract it assumed the risk of itncreased costs of performance and associated delays. The Board sided with AO stating the acceptable ammunition could not be produced by following the contract specs and the government did not show that AO's manufacturing process was deficient or caused problems. The Board also found the government allowed AO to enter into the delivery order and begin performance without disclosing exclusive knowledge essential to production. That information was not contained in the contract otherwise provided to AO so it had no duty to inquire about it. The Board concluded AO was misled into believing the contract could be readily performed and the government breached its implied duties of cooperation and noninterference by failing to do what was reasonably necessary to enable AO to perform (*American Ordnance LLC, ASBCA No. 54718*).

Agency Allowed Awardee But Not Protester Chance to Revise Quote

The General Services Admin., on behalf of the Air Force, issued a request for quotations for a best value acquisition of various support services. When SAIC won the award TAG protested asserting the agency allowed SAIC to revise its quotations but not TAG which hurt it because the GSA identified several weaknesses in its quote that could have been addressed in discussions. TAG also argued the awarded task order posed an impaired objectivity organizational conflict of interest because SAIC sold the same products and services it was contracted with the Air Force to provide information about which would unduly influence the Air Force in its acquisition decisions. The GAO agreed with TAG on both issues ordering the agency to give TAG a similar opportunity to participate in discussions and determine if an OCI exists and what can be done to avoid or mitigate it (*The Analysis Group LLC, GAO B-401726*).

SMALL/NEW CONTRACTORS

New DCAA Guidance on Criteria for an Adequate Pricing Proposal

(*Editor's Note. DCAA has become more strict in requiring the proposals it examines – incurred cost or forward pricing – adhere to content and format requirements. A determination that the proposal is inadequate can not only adversely affect the award process but in an era when DCAA is focusing on system adequacies – estimating, accounting, purchasing, etc. – inadequate proposals are often considered leading indicators that the system itself is deficient. The following article summarizes new guidelines DCAA issued in September 2009 on "Criteria for Adequate Contract Pricing Proposals." We find it particularly helpful since the items listed are largely DCAA's interpretation of FAR 15.408, Table 15-2 requirements so this article provides information covering new DCAA guidance as well as a useful review of FAR requirements.)*

The stated purpose of the guidance is to provide criteria for what constitutes an adequate proposal so as to reduce the effort needed for auditor review and to facilitate negotiations. "No", "Yes" and "N/A" responses for each item is called for. Auditing pricing proposals (called "demand audits") are the number one priority of DCAA audit schedule. Proposals are to be evaluated for adequacy within seven days of receipt where the following questions are intended to expedite this evaluation. "NO" answers are usually used as a basis to assert deficiencies where such a determination can result in auditors recommending to the PCO/ACO the proposal be returned to the offeror without an audit.

General Criteria

1. The first page of the proposal is in a summary format specified by the solicitation.
2. An index referencing all cost or pricing data or other information.

3. A summary of total cost by element cross referenced to supporting data in the proposal.
4. An identification of cost or pricing data that is verifiable and an explanation of the estimating process. These should include any judgmental factors or other methods such as projecting from known data and the nature and amount of contingencies.
5. Identification of any incurred costs for work performed.
6. Identification of use of any agreements such as forward pricing rates
7. Point of contact information for cost or pricing data that may not be included in the proposal.
8. Disclosure of known activity that could significantly affect costs such as excess material, reorganizations, new technologies, union discussions, etc.

Materials and Services

1. A consolidated priced summary of individual material quantities broken down by task or delivery orders or CLINS and the basis for the pricing such as vendor quotes or invoice prices. Items to be shown should include raw materials, parts, components, assemblies and services to be produced in-house or by others. For all items proposed, the offer must identify the item and show the source, quantity and price. The auditor is told to determine whether a bill of material is needed depending on estimating techniques used.
2. Price analyses of all subcontractor proposals and cost analyses for all subcontracts where cost or pricing data is submitted. The offer must obtain cost or pricing data from the source if the dollar thresholds in FAR 15.403-4 are met or not otherwise exempt by 14.403-1(b). The bidder must provide a summary of the cost analysis and a copy of the cost or pricing data in support of each of its subcontracts.

Interorganizational Transfers

If the proposed transfers are based on cost, then the bidder's cost analysis must be provided. If the proposed transfer is based on other than cost (e.g. commercial item), an explanation of the pricing method must be included. (*See new DCAA guidance above.*)

Direct Labor

A time-phased (i.e. monthly, quarterly, etc.) breakdown of labor rates and hours by labor category must be included with an explanation of the basis for the rates and hours (e.g. historical experience, engineering estimates, learning curve analysis). If labor is the allocation base for indirect costs, the labor cost must be summarized in order for the overhead rates to be applied to direct labor.

Indirect Costs

In the absence an any forward pricing rate agreements, the bidder must show how the indirect rates were computed and applied. Support for the indirect costs identified in the computations must consist of cost breakdowns, trend analysis and use of budgetary data.

Other Costs

Identification of all other costs by category needs to be described along with the basis for the estimates.

Royalties and License Fees

If royalties exceed $1,500 the proposal must provide information.

Facilities Capital Cost of Money

When claiming facilities capital cost of money, the offeror must submit it in the format of CASB-CMF and show the calculation.

Other

The remaining portion addresses proposals for change orders, modifications or claims, reminding contractors to follow the same FAR 15.408, Table 15-2 III.B sections and price revisions or redeterminations following the III.C section of Table 15.2. Finally the checklist states that inadequacies need to be identified in a separate section indicating when additional information was requested. Other items may be added if requested by the contracting officer.

QUESTIONS & ANSWERS

Q. We are creating a separate subsidiary to do government work. We currently have several cost type contracts lasting no more than a year and intend to transfer them to our subsidiary. When transferred, do we need to apply the new subsidiary indirect rates or the prior ones? Also, will we be required to submit two incurred cost proposals at the end of the year?

A. Without a lot of new information I would say you need to apply the subsidiary rates to the transferred contracts. Be advised, that many contract terms (usually in the transferring documents) will prohibit charging rates that result in increased costs to the government

GCA REPORT
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over what they would have been had there been no transfer. As for two incurred cost proposals, yes that would be necessary if you are applying two sets of indirect rates. Since the duration of the contracts are short and there may be significant administrative requirements for the transfer (e.g. novation or name changes, etc.) I would suggest continuing the current contracts in the original business segment and bid only new contracts out of the new subsidiary.

Q. When is it necessary to complete the scrub of proposed costs for purposes of complying with the Truth in Negotiations Act? I heard it was after contract award.

A. You heard wrong. The scrubbing of costs needs to be effective after price agreement but before contract award (sometimes a short period before award).

Q. Are trademark expenses allowable or unallowable? Can you give me a FAR reference. If we break our government R&D group into its own entity (corporation), are the reorganizational expenses allowable. I thought reorganizational expenses are unallowable.

A. As for trademark expenses, they are most closely related to patent expenses so take a look at FAR 31.205-30 that identifies conditions for allowability. As for the R&D group, the government does make a distinction between external and internal restructuring costs. The latter involve organization effort intended to bring about economies and efficiencies which are allowable. It sounds like the R&D group reorganization may qualify for internal restructuring costs.

Q. I just transferred jobs and my first action was to subscribe to your newsletter. As in the past, I would like to ask you a question about cost pools. Our company is currently using one company-wide overhead pool. We are bidding competitively on an upcoming procurement where competition is, to say the least, "ferocious." I thought about establishing an offsite pool, which will attract less cost in terms of Fringes (a certain percentage of the work force will be "temporary labor") and other cost items normally charged to the numerator of the pool like rent. The new pool will have in its base all direct labor pertaining to the new effort, separate and distinct from the direct labor of all other contracts. There will be benefits to the company wide pool, because some of the management supervision will be charged to the new pool, thereby reducing cost in the other one. My overall position is that the Government will benefit from this action. Based on your experience, will DCAA ask me to perform a cost-impact analysis and should we be awarded the contract, do I have to submit a new disclosure statement?

A. Thanks for signing up. It seems like your approach appears sound - creating a separate rate for offsite labor that will include and exclude relevant costs to that labor and the base to include the new labor. If you are creating a new offsite rate make sure it will apply to all offsite labor in the company. As long as the base and pool costs are not duplicated, it sounds OK to me. It would likely be considered an accounting change. So yes, you would need to amend your disclosure statement and likely provide some cost impact analysis. I would guess alternatively, you could treat the temporary labor as ODCs (e.g. consultants, subcontractors) in which case you could charge their costs direct and create a new rate like G&A or subcontract handling where those rates would be added to those costs. Such an alternative would also be considered a change. Adopting something which would not be a change is to charge the temp labor as an ODC and simply either add overhead if they are in the base or not add anything other than either fee or a negotiated amount.