GCA REPORT
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NEW DEVELOPMENTS

Proposed Rule Will Require Reporting to DOD IR&D Costs Over $50K

The Defense Department has issued a proposal to require all contractors with over $50,000 of independent research and development (IR&D) projects to report over a government database their projects to be eligible to charge the IR&D costs to government contracts. As expected, the proposal is already generating significant comments in the government contracts community. Typical of comments are those from Paul Pompeo of Arnold & Porter addressed in the March 22 issue of Federal Contracts where he shows there is a long history of attempts to limit IR&D costs being allocated to government contracts. For example, there used to be ceilings computed until they were ended in the late 90s and several court cases challenged both explicit and implicit IR&D costs that were "required in the performance of a contract" until the recent ATK Thiokol case limited the IR&D prohibition to only research and development costs "specifically required" by a contract. The current proposal is the result of several recent actions by the DOD to gain greater insight into IR&D projects. Mr. Pompeo points out the proposal has significant implications for contractors including (1) wide applicability since the $50,000 threshold is so low (2) the database used to input and report the information is subject to proprietary controls (3) the type of information to be required is not specified and (4) copies of data must be sent to DCAA to support the allowability of the costs where there are questions whether local DCAA auditors have the ability to properly assess the propriety of IR&D projects when making allowability determinations (*Fed. Reg. 11414*).

SBA Issues Small Business Size Standards on Many Professional Service Industries

The Small Business Administration issued a proposed rule to change (mostly increase) small business size standards for 35 industries and one subindustry for companies classified as professional, scientific and technical services in the North American Industry Classification System Sector 54 and one industry in NAICS Sector 81. The SBA establishes small business size standards by NAICS for private sector industries to determine which firms qualify as small business. This proposal is one of a series of proposed size standards being issued by the SBA in their comprehensive review of size standards (*Fed. Reg. 14323*).

FAC 2005-50 Issued

The FAR Council has issued final and interim rule changes to the Federal Acquisition Regulation in the form of FAC 2005-50. Of particular significance to government contractors:

- **Interim Rule Provides Guidance on Cost Reimbursement Contracts**

An interim rule was published in the federal register that is intended to implement sections of the 2009 Defense Authorization bill and a memo by President Obama saying agencies that rely excessively on cost reimbursement and sole source contracts create risk of waste. The rule requires written acquisition plans to discuss a strategy to transition to firm fixed price contracts when each contract and order is contemplated. When establishing requirements during development planning, agencies should consider structuring contract requirements to allow some of the requirements of a contract be awarded on a fixed price basis if the entire contract cannot be a firm fixed price. The interim rule also requires documentation in acquisition plans or contract files showing why a particular contract type was selected. The documentation should include (1) why a contract used meets agency needs (2) risk and burden to mange the contract type (3) resources needed to administer the contract type (4) discuss why a level of effort or price redetermination was included (5) why another contract is appropriate if not fixed price (6) rationale that details facts and circumstances (e.g. uncertain duration, requirements, complexity, technical ability and financial responsibility of the contractor, adequacy of accounting system) (7) adequacy of the government's resources to manage the contract and (8) action plans to minimize non-fixed price actions for future acquisitions.

The FAR is also amended to (1) require a determination of the adequacy of a contractor's accounting system (2) require agencies to perform acquisition planning and to conduct market research to provide the basis for proper selection of contract type (3) require agency heads to prescribe procedures for cost reimbursement type contracts (4) allow COs to use cost reimbursement contracts if circumstances do not allow an agency to define requirements sufficiently to allow for a fixed price type contract and (5) provide that a cost-reimbursable contract may be used when a written acquisition plan has been approved by an official at least one level above the CO.

Several comments have already been issued. Scott Amey of the Project on Government Oversight generally approves of the change but states the government still needs enhanced access to reliable contractor cost or pricing data to better control costs. Roger Waldron of the Coalition for Government Procurement states agencies should focus more on what they need rather than contract type where if you have a good idea what you are buying then firm fixed price contracts make sense but if things are unclear then a more flexible contract needs to be used (*Fed. Reg. 14543*).

- **Final Rule on Commercial Services**

Commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace may still be considered as commercial services covered by FAR Part 12 provisions if they are "of a type" offered and sold competitively in substantial quantities in the commercial marketplace. The services may be considered commercial items only if the CO has determined in writing the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services (*Fed. Reg. 14568*).

- **Final Rule Making the FAR Pension and ESOP Costs Consistent with CAS**

The FAR is amended to align it with the revised CAS standards on CAS 412, Composition and Measurement of Pension Cost and 415, Accounting for the cost of deferred compensation. FAR 31.205-6 provisions that cover pension costs and employee stock ownership plans must now be measured and allocated in accordance with CAS 412 in the case of pension costs and CAS 415 for ESOPs (*Fed. Reg. 14571*).

- **Interim Rule Provides Parity Among 8(a), HUBZone and SDVOSB Programs**

An interim rule is issued clarifying that a contracting officer's ability to use discretion when determining whether an acquisition will be restricted to small businesses participating in the 8(a), Historically Underutilized Business Zone (HUBZone) or service disabled veteran-owned small business (SDVOSB) programs. The interim rule is meant to ensure the FAR clearly reflects the statutory relationship among small business programs and eliminates any confusion on the part of COs. The confusion stems from a previously published proposed rule in 2008 stating there was no order of priority over the three programs when the proposed rule was closed due to GAO and court rulings interpreting the Small Business Act to require acquisitions be set aside for HUBZone small businesses first before setting aside acquisitions for other small business programs. The interim rule states (1) though there is no priority for the three programs if a requirement has been accepted by the SBA under an 8(a) program it will remain there unless the SBA agrees to release it (2) for acquisitions exceeding the simplified acquisition threshold (currently $100K), the CO must consider a set aside or sole source acquisition to a small business under the 8(a), HUBZone or SDVOSB programs before proceeding with a small business set-aside. Interestingly, the rule writers said the interim rule does not address women-owned small businesses and their relationship to the other small business programs *(Fed. Reg. 14566*).

- **Final Rule Requiring Market Research on Acquisitions Over $5 Million**

The FAR will now require agency heads to ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of $5 million for procurement of items other than commercial items engage in market research as necessary before making purchases (*Fed. Reg. 14562*).

DCAA Issues Guidance on Failure to Disclose Unallowable Dependent Health Benefit Costs

Newly issued guidance points out that recent DCAA audits have found that contractors have paid a significant number of medical cost claims for employees' family members who did not qualify as dependents under the contractor's medical/health plans. Common reasons for ineligibility include (1) dependents reached the age they no longer qualified as dependents (2) spouses were divorced (3) dependents were covered under another plan as well as the contractor's plan and failed to notify the government of the double coverage allowing for a reduction in premium. The guidance states failure to remove ineligible dependents are a result of inadequate procedures to ensure dependent health plans were current,

accurate and verified which makes contractors noncompliant with FAR 31.205-6 and CAS 405, if applicable. Earlier guidance stated questioned costs for inflated premium costs and claims for ineligible dependents should be considered "expressly unallowable" in accordance with FAR 31.205-6(m)(1) – subject to penalties – and they should be cited for noncompliance with CAS 405. Such CAS noncompliance requires the contractor to submit a cost impact calculation (FAR 30.605(h)(1) to include all years of noncompliant practice including years that have already been audited and/or closed. If the contractor does not submit this analysis the audit office should develop a rough order of magnitude estimate of the cost impact (ROM) and recommend the ACO pursue remedies outlined in FAR 30.605 and 30.604 (*11-PAC-002(R*).

DCAA Issues Guidance on Limitations on Pass-Through Charges

DCAA recently issued guidance to its auditors on how they are to ensure contractors comply with recent FAR 52.215-23 changes that prohibit any indirect costs and associated profit applicable to subcontract costs that do not provide "added value" when subcontract costs are expected to exceed 70 percent of the total costs of work to be performed. During audits of forward pricing proposals auditors are told to perform certain procedures and to conduct other procedures during incurred cost audits and evaluations of final vouchers.

The guidance reminds auditors that FAR 52.215-22 requires contractors to identify in its proposal the total cost of work to be performed by the offeror and by each subcontractor. When the 70 percent threshold is reached, this clause requires contractors to (1) identify its indirect costs and profit applicable to the work to be performed by the subcontractors and (2) to provide a description of the "added value" it will provide related to the work performed by the subcontractors. FAR 52.215-23 defines "added value" to be subcontract management functions (either direct or indirect) that are of benefit to the government (e.g. processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, performing quality assurance functions). Further, the clause provides the government will not pay indirect costs or profit (pass through charges) on work performed by a lower tier subcontractor to which the higher tier contractor cannot provide sufficient evidence of added value.

Generally the determination of whether "added value" exists is made at the time of contract award where then the clauses are incorporated into the contract stating the CO *has* determined there are no excess charges. In those instances where the amount of subcontract effort or the subcontractor changes the amount of lower-tier subcontractor effort *after* contract award a reporting requirement is imposed by FAR 52.215-23(c) where the contractor must notify the CO in writing of the revised subcontract effort and include verification that "added value" has occurred. If these procedures in FAR 215-23(c) are not followed, the auditor is told to consider citing the contractor for an accounting and/or purchasing system deficiency.

For incurred cost proposals, auditors are told to use Schedule H of the ICE form to identify subcontracts that may be subject to the rules and based on this, auditors should test compliance with the FAR rules. For evaluations of final vouchers, auditors are to determine whether the 70 percent threshold is reached and if so, to determine whether the contractor performed its added value functions as asserted in its initial proposal evaluation. If the contractor cannot demonstrate its "added value" then the indirect costs and profit added to the subcontractor work should be questioned as excess pass through charges (*11-PSP003(R).*

GAO Issues Follow-Up Report on DCAA Problems

We have frequently reported on several highly critical reports issued by the General Accounting Office in the last two years that have significantly affected DCAA practices. The GAO issued a follow on report in February noting several corrective actions DCAA has taken to its original reports such as revising its mission statements, appointing a new Director and Western Regional Director, establishing internal reviews and training on audit standards and a hotline. Most alarming, the report recommends that DCAA be given (1) IG protections including a presidentially appointed director who could be removed only for cause (2) independent legal counsel (3) its own budget and (4) the same level of access to records and personnel as currently available to Inspector General offices.

Recent Testimony Points to Increased Fraud Prosecutions and Pre and Post Award Audits

Recent testimonies before Congress indicate there is likely to be increased fraud prosecutions and post award audits to avoid defective pricing and failure to use the lowest commercial price in GSA acquisitions. Recent testimony by Lanny Breuer of the Department of Justice to the Judiciary Committee states it will be "vigorously

prosecuting fraud in Government procurement programs." They cited numerous examples of the government receiving large fines on fraud cases where the ranking member Sen. Chuck Grassley (R-Iowa) stated "given the current fiscal condition of the Federal Government, combating fraud has become more important than ever." Members of the Committee praised recent changes in the False Claims Act that "overturned a number of court decisions that limited the scope and applicability of the FCA."

Citing several examples of large settlements following allegations of defective pricing and failure of the government to receive the most favored commercial price from contractors, the GSA's Inspector General Brian Miller praised the merits of conducting post award contract audits during separate testimony to several Senate subcommittees. Defective pricing audits revealed several instances of fraudulent activities (e.g. inaccurate pricing disclosures, obtaining improper information from COs, kickbacks from systems integrators for using company products) while audits of price reduction clauses (PRC) allow reductions in price if it is determined that federal purchasers did not receive the price paid by its most favored commercial customers.

New Actions on TO/DOs

A new proposal and a rule covering delivery and task orders under ID/IQ contracts have been issued. A House Oversight Panel has voted to clear a bill to extend GAO authority to hear protests of TO/DO orders over $10 million. The pilot program has already been extended for DOD contracts where now the rule is intended to affect all government TO/DOs over $10 million. Bid protest authority for TO/DOs is viewed as a means to promote competition and transparency and avoiding litigation where the pilot nature of the program is intended to determine whether bid protests would disrupt performance of the orders.

In a separate action, an interim rule intended to implement requirements of the 2009 defense authorization act was published to increase competition for orders under multiple award contracts. The rule requires that for each purchase of supplies or services in excess of the simplified acquisition threshold there is to be (1) fair notice of intent to make the purchases provided to all contractors offering the items under multiple award contracts (2) fair opportunity for all contractors responding to the notice to make an offer and to have that offer fairly considered (not all contractors need be notified as long as the notice is provided to "as many…as practicable") (3) offers were received from at least three qualified contractors or (4) a CO determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so (*Fed. Reg. 14548*).

Proposal Rule Will Require Contractors to Display DOD IG Fraud Hotline Posters

Under a proposed rule contractors will be required to prominently display Defense Department Inspector General fraud hotline posters in common work areas. The proposed rule would eliminate an exemption that currently allows contractors to avoid displaying DOD posters if they put up their own. The change is to eliminate the potential for the DOD hotline program to be less effective as a means to diminish fraud, waste and abuse which can be reported under protection of federal whistleblower protection laws. Many commentators are saying the new proposal is unnecessary since employees who want to report problems can easily find contact information recognizing there needs to be "a balance here" where if the government wants competition it must realize the more requirements put in place the more it deters companies from participating (*Fed Reg. 13327*).

CASES/DECISIONS

Air Force Must Pay $1.2 Million for Failing to Protect Contractor's Information

(*Editor's Note. Inappropriate disclosure of contractors' proprietary information is quite common. The following provides guidance on how to compute damages when such disclosure is found.*)

The Air Force and Spectrum entered into a cooperative research and development agreement (CRADA) to provide a vehicle for improving munitions assembly conveyor (MAC) lines to improve bomb making that included provisions to ensure proper use of Spectrum's proprietary information. Unbeknownst to Spectrum, the Air Force decided to compete a procurement to provide an upgraded MAC where the draft RFP revealed Spectrum's proprietary information. After awarding the contract to D&D, Spectrum filed its complaint asserting the Air Force breached its CRADA by failing to protect Spectrum's proprietary information. The Court ruled for Spectrum stating it was foreseeable that a breach of the CRADA would decrease the value of Spectrum's information and harm the firm. The Court explained that damages for breach of a contract are recoverable

where (1) damages were reasonably foreseeable by the breaching party at the time of contracting (2) the breach is a substantial causal factor in the damages and (3) the damages are shown with reasonable certainty. In determining the amount of damages, Spectrum claimed it should be equal to the value of the lost proprietary information while the Air Force asserted it should be equal only to the lost profit under the CRADA. The Court again sided with Spectrum stating limiting Spectrum's recovery only to profits from the CRADA and not accounting for profit-making use of its proprietary information in other ventures would leave the company empty handed even where the government appropriated significant benefits for itself. It concluded the first two criteria for damages were met where by using the information to develop specs for the improved MAC and sharing it with Spectrum's competitors, harm was inflicted on Spectrum. The element of reasonable certainty was met when Spectrum presented calculation factors such as number of units sold, sales price, delivery schedules and profit margins in calculating the $1.2 million (*Spectrum Sciences and Software v US, Fed. Cl. No. 04-1366(C*).

New Tax Does Not Warrant Contract Reformation

In its proposal and contract to provide national logistics support in Iraq AECOM's subsidiary performing the contract did not calculate FICA taxes on its proposed labor rates because offshore subsidiaries were not subject to FICA taxes. Six month's after award a new law imposed FICA taxes on offshore subsidiaries of US companies and AECOM requested an equitable adjustment of $2 million for FICA taxes arguing reformation of the contract based on a mutual mistake was proper. The appeals board disagreed stating reformation of a contract for mutual mistake is "an extraordinary remedy" where a mistake is "an erroneous belief as to an existing fact. If the existence of a fact is not known to the contracting parties, they cannot have a belief concerning that fact; therefore there can be no mistake." The board stated a party's prediction or judgment about future events, even if erroneous, is not a "mistake" as the word is defined above. Because the act imposing FICA taxes was passed six months after award, the fact was not existent at award and hence the parties could not have been mistaken about it. The Board concluded AECOM could have negotiated contract terms to protect itself from changes to offshore subsidiaries' tax status (*AECOM Gov't Svcs, Inc., ASBCA 56861*).

Delivery Order with DOD is a Valid Contract

(Editor's Note. Increasing use of interagency purchasing agreements are highlighting the status of those purchases.)

The Department of Energy and Ameresco entered into an ID/IQ contract to provide energy savings services where DOE and the Defense Department then entered into a memorandum of understanding (MOU) to allow DOE and DOD to award delivery orders for the services. DOD entered into an energy savings delivery order after which it was terminated for convenience and the CO granted $20 million in termination costs but denied another $7 million and Ameresco appealed. In its motion to dismiss the government argued only the ASBCA had jurisdiction from DOD contracting officer decisions for DOD contracts but since the contract was issued by DOE the defense appeals board had no authority to decide appeals under a non-DOD contract. The appeals board disagreed concluding that the DOD delivery order was a discrete contract between DOD and Ameresco. Citing FAR 2.101, the definition of a contract includes all types of commitments that obligate the government to an expenditure of funds where the FAR definition includes delivery orders. The delivery order described itself as a contract award and there was a mutuality of contract as indicated by the order signed by the DOD CO and Ameresco's VP where Ameresco promise to deliver supplies and DOD promise to pay constituted necessary contract consideration (*Ameresco Solutions Inc., ASBCA No. 56824*).

"Sum Certain" Does Not Require Information for the CO to Know How the Claim Was Derived

In responding to a claim asserting the government had delayed and disrupted performance of a contract entitling it to reimbursement, the government sought a dismissal of the claim asserting it failed to state a sum certain. Though the claim did demand a sum certain amount, the government asserted it could not ascertain how the contractor had arrived at the amount. The Board sided with the contractor saying the claim met the requirements related to a sum certain expressed in FAR 2.101 ruling the contractor's failure to provide the CO with sufficient detail in the claim so it can ascertain exactly how the sum certain was arrived at is not necessary for the Board to be able to rule (*Utility Constr. Co., ASBCA 57224*).

Standby Letter of Credit Costs to Guarantee Long Term Bonds are Allowable

(*Editor's Note. We find both contractors and auditors commonly mistake costs related to short term liabilities is equivalent to costs related to long term liabilities. The following case makes the distinction.*)

SRI is a non-profit scientific institute that performs research and development for various agencies. The California Infrastructure and Economic Development Bank (a state agency used for economic development) issued $25 million in bonds for SRI to renovate two buildings on its campus where as a condition for issuing the bonds, SRI was to deliver a standby Letter of Credit (LOC) to guarantee its ability to repay the 25-year bonds. SRI tapped its revolving line of credit with Wells Fargo bank to provide a LOC subfeature that provided an acceptable credit facility to guarantee payment of the bonds. For financial reporting purposes SRI treated the LOC as a current liability since it was subject to an annual renewal and the bonds as short term since they were subject to an optional and mandatory sinking fund redemption. The government argued that $609,000 of LOC costs included in its incurred cost proposals were unallowable under FAR 31.205-20 as costs of financing long term capital while SRI argued the costs were allowable administrative costs of short term borrowing under FAR 31.205-27(a)(3).

The Board sided with SRI finding FAR 31.205-20 inapplicable because "SRI's financing is treated not as long term liabilities but as part of short-term liabilities." It argued that (1) treating the bonds as current liabilities was not shown to be inappropriate (2) paying an annual fee for LOC costs for a one-year bank LOC to guarantee the full payment on the bonds qualifies as administrative costs for short-term borrowing for working capital under 31.205-27(a)(3) and (3) the LOC costs in dispute are not fixed and upfront costs and are therefore different in kind from typical costs of financing (*SRI International, ASBCA No. 56353*).

Board Finds a Defective Certification Was Correctable

WPD submitted a request for an equitable adjustment for $128K on its refuse collection and disposal contract due to increased dumping fee costs, illegal dumping and increased fuel costs along with an unsigned "Certificate of Current Cost or Pricing Data." The Government denied the claim and asserted the Board could not rule on a defective claim. The Board stated that if a certification's clauses were so significant as to not be correctable then it had no basis to make a judgment but since, here, all it lacked was a correct signature the Board stated it did not reach that level of significance, ruling WPD's document was defective but correctable (*Western Plains Disposal, ASBCA No. 56986*)

QUESTIONS AND ANSWERS

(*Editor's Note. We have omitted our usual feature article in this issue because we wanted to catch up on some of the high volume of questions we have been responding to.)*

Q. Many of our salaried employees work overtime so how do we identify overtime hours say when they work 10 hours – do we identify it in the first four hours or the last six hours?

A. If you don't record total time, you should prorate either the hours or labor dollars paid to the projects so if four hours are spent on Project A and six hours on project B then you need to prorate 40% of 8 hours (3.2 hours or 40% of the pay) to Project A and 60% of 8 hours (4.8 hours or 60% of the pay) to Project B. If uncompensated hours are considered to be more than insignificant, which appears to be the case with you, the auditors will likely solve your problem by "highly recommending" (meaning require you) to record total time worked.

Q. We charge rent, phone and office equipment costs to our overhead pool and our DCAA auditor tells us they should be charged to our G&A pool. That would increase our G&A rate ten points which would jeopardize our pricing strategy. Do you agree with DCAA?

A. No. Though we have seen those facility related costs charged to G&A (which may be the experience of your auditor) it is more commonly charged either to overhead or split between overhead and G&A. Most contractors who charge all to overhead justify it on the basis that most facilities related costs benefit primarily direct contract efforts as well as indirect support personnel while an insignificant amount benefit G&A personnel (e.g. CEO, CFO). Alternatively, you may choose to lump all facilities related costs and allocate those costs to overhead and G&A based on either a headcount (direct labor plus overhead support personnel are considered overhead) or a space utilization basis. Unless the underlying assumptions are clearly wrong, we have not seen this approach challenged.

Q. We have recently submitted our forward pricing rate proposal for 2011 and are confused about who will be auditing it and the scope of such an audit which has increased substantially in recent years.

A. Yes, unlike the past, we are seeing extensive audits of forward pricing rate proposals, treating them as if they were incurred cost proposals rather than simply provisional billing rates. In response to inquiries into such increased scopes of audits, DCAA tells us since they are so far behind on auditing incurred cost audits they are using audits of provisional billing rates as opportunities to examine risky costs now rather than wait years after they were incurred.

As for who is supposed to audit the rates, things have changed substantially lately. As part of its Jan 4 memo delineating DCMA vs. DCAA roles, DCMA will now be the single agency responsible for issuing forward pricing rate agreements and forward pricing rate recommendations if DCMA is the contractor's cognizant contract administration office. However, in those cases where DCAA has completed an audit of the contractor's rates, DCMA will adopt the DCAA recommended rates as DOD forward pricing rate agreements. DCMA issued further guidance Jan 11 on forward pricing rate recommendations (FPRR) directing that if DCAA has completed an audit of a contractor's forward pricing rate proposal, DCMA must adopt the DCAA recommended rates as the DOD's FPRR where ACOs are instructed to issue a FPRR within five working days after receipt of a provisional billing audit report. The Jan 11 memo does provide a limited opportunity to disagree with DCAA where it notes "in those rare opportunities when the ACO notes significant deficiencies in the audit report" it shall immediately contact DCAA to coordinate a revision to the recommended rates. If the issue cannot be resolved at the local level, the issues may be elevated to the Contract Management Board of Review. Also, if a contractor submits an updated forward pricing rate proposal with significant changes requiring a new audit, the ACO must develop and issue a FPRR pending receipt of the audit report. See DCMA Information Memorandum No. 11-1-8.

Q. We just received a final report from DCAA saying our accounting system is inadequate. So, what do we do now?

A. The inadequate opinion can definitely cause considerable harm. If any new work requires demonstration of an adequate accounting system (e.g. cost reimbursable, T&M, certain fixed price) then you will likely not be awarded new contract work or even new delivery or task orders under existing contracts. ACOs may decide your cost data is unreliable so they may suspend payments or partial payments (pay only direct costs). So, you need to "bite the bullet" and fix everything DCAA cites as deficiencies as well as other things that may stand out if another auditor comes back. Once things are fixed and you can demonstrate accurate cost data, you need to ensure DCAA comes back for a follow-up audit. It is often problematic to get DCAA to come out on a timely basis. After the fixes are in place and you can demonstrate a reasonable period of reliable cost data, you may have to bug them to come out, including frequent requests to your ACO and even CO.

Q. We include only allowable costs in our G&A total cost input base which is consistent with our notion that G&A should apply only to our allowable costs. This approach was never questioned by auditors in the past but our new, rather inexperienced auditor is telling us the G&A base should include unallowable costs. What do you think?

A. I agree with your more inexperienced auditor. The basic rule is that a total cost input base should include all non-G&A costs in the base, whether or not they are unallowable. The idea for this is that G&A activity supports all costs whether or not they are allowable or unallowable for government costing purposes.

Q. I am now working with a very large government contractor who applies a decrement factor to their G&A and overhead pool costs to account for prior questioned costs found by auditors which they believe protects them if an auditor questions some costs. Does this make sense to you?

A. It appear awfully conservative to me. Also, unless there is a clear written agreement, the decrement does not protect them from auditors questioning additional costs found that equal less than the decremented amount – auditors may simply accept the amount claimed and then question additional amounts found from there. However, such a conservative approach may not be unwise – it may very well be worth giving up some costs to avoid having unallowable costs being publicized in the media.

Q. I have been reading FAR 31.205-35, relocation costs and am now familiar with what are allowable and unallowable relocation costs but it does not tell us whether we can charge those costs as direct for an employee being hired to work on one contract for two years. What do you think?

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A. It's really a case-by-case situation. Of course if the contract allows for direct pricing you are home free but otherwise it's iffy. It would help if your written policies provide for direct charging of relocation costs in which case you can point to an established practice that allows for direct charging if an employee is dedicated to one contract.

Q. We are about to embark on contracting with the federal government for cost type contracts and wondering whether you can provide training for our accounting personnel?

A. Yes, we or others can provide training but I would suggest considering, as an alternative, having someone experienced working with auditors do an evaluation of your practices to report on strengths and weaknesses and recommend fixes before an auditor comes in. This would usually be less costly than training and more targeted to your specific practices. After that, training may or may not be a good idea.

Q. Is it correct that the company can bill for all T&M hours worked in excess of 80 hours during our two week pay period whether or not the salaried employee is paid for the extra hours?

A. Yes it is correct but you need to be a little careful. When you proposed T&M rates you supposedly assumed an 80 hour period so if it turns out that the unpaid extra hours are significant, it would raise a red flag, possibly generating a defective pricing audit. However, if you did not know about the extra hours at the time you proposed your rates, you should be OK.

Q. We have several research and development contracts where we travel to the Government customer at the beginning and end of each contract. We send either the President of the company or the Director of Engineering to each of these meetings in addition to the lead scientist or engineer on the project. The role of the lead scientist or engineer is to present the results of the work – clearly a direct charge. The role of the president or Dir. of Engineering in these meetings is two fold - they are there to support the lead scientist or engineer as well as try to promote our company to those in attendance. How should we charge the time of the President or Dir of Engineering – directly to the contract or as a G&A or overhead charge? I would prefer splitting the time 50/50 but I am worried about justifying the split. What is your advice?

A. It's really a judgment call on your part. All options are available and defensible. For the Pres and Dir. of Engrg all their time can be charged direct to the project or since they are doing technical support and/or marketing, all charged indirect is also defensible. If you want to split their time that could be defended but auditors in that case would likely ask for documentation on the basis for the different amounts which might raise questions if not supportable.

Q. We are trying to figure out if we are fully or modified CAS covered. Our auditor tells us that the CAS threshold applies only to firm fixed price contracts in which case we would be modified covered. Do you agree?

A. No. Whether or not a contract or subcontract should be included in the threshold calculation does not hinge on whether it is fixed price. A simple criteria would be whether "price" is based on "projected" or "actual" costs which would cover not only fixed price work but also time-and-material and cost reimbursable work. You need to be familiar with the exceptions from CAS coverage (e.g. competitive awards, commercial items, less than $650K, etc.) where those contracts and subcontracts would be excluded while all others would be included.

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