
GCA REPORT

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NEW DEVELOPMENTS

New Contract-Related Interest Rate Set for First Half of 2014

The Treasury Secretary has set a rate of 2.125% for the period January through June 2014. The new rate is a decrease from the 1.75% rate applicable to the last six months of 2013. The Secretary of the Treasury semiannually establishes an interest rate that is then applied for several government contract-related purposes. Among other things, the rates apply to (1) what a contractor must pay the government under the "Interest" clause at FAR 52.232-17 and (2) what the government must pay a contractor on either a claim decided in its favor under the Contract Disputes Act or payment delays under the Prompt Payment Act. The rate also applies to cost of money calculations under Cost Accounting Standards 414 and 417 as well as FAR 31.205-10 and when a discount factor is used to calculate the present value of future payments (e.g. deferred compensation).

DCAA Issues New Guidance on Treatment of Delinquent Final Rate Proposals

DCAA has issued guidance to its auditors Feb 3 addressing late incurred cost submittals (ICEs). The guidance instructs audit teams to discontinue sending late notices except for the 30 day overdue notification letter. Audit teams will continue to (1) educate contractors about their contractual obligations under final indirect rate proposals as part of its ongoing relationship with the contractor (2) support the contracting officer, as necessary, to obtain adequate ICEs by meeting with contractors and (3) support the CO to calculate a unilateral contract cost decrement factor to apply when the CO cannot obtain a proposal. Audit teams will monitor the timely receipt of the ICE. When it is 30 days late without a valid extension, DCAA will continue to immediately prepare a 30-day overdue notice that will be sent to the contractor with a copy to the CO. However, audit teams will no longer be responsible for sending other reminder letters prior to the end of the fiscal year, three month overdue notice

to the CO, five month overdue notice to the contractor and unilateral notice to the CO when relevant history does not exist.

When support to the CO is needed to establish a unilateral final indirect cost rate and contract costs DCAA will provide the CO historical data such as billing history and previous rate negotiation history if it exists. When relevant contract cost history does not exist DCAA will suggest a "total contract cost decrement" factor of 16.2 percent, down from a previous factor of 20 percent. If the decrement factor is used for any fiscal year the 16.2 decrement factor will be applied to the total costs (both direct and indirect) of each flexibly priced contract.

DCAA will also adopt reporting practices for the CO to identify backlogs of delinquent ICEs. For contractors' fiscal year (CFY) 2014, DCAA will provide a list of delinquent ICEs for CFY 2011 and earlier and work with the CO to obtain the ICEs or otherwise settle the rates on a unilateral basis. Starting in CFY 2015, DCAA will provide to the procuring agencies a list of proposals which are six months or more overdue without valid extensions as well as those proposals that are not adequate for audit. Also, DCAA will close open audit assignments within a specific time frame if late proposals have not been received unless an extension has been granted or an initiative is in place to receive the late ICEs (*14-PPD-002(R)*).

IRS Issues Guidelines on Taxable Travel

Following a review showing inconsistent treatment by its executives and management, the Internal Revenue Service issued guidelines intended to help its managers determine when long term overnight travel should be classified as taxable or not. The guidance cites the Internal Revenue Code and Revenue Ruling at 93.863 that states when an IRS employee performs temporary duty travel assignments exceeding one year at a single or principal location the travel reimbursements are subject to income taxation. The Internal Revenue Manual defines overnight long term taxable travel (LTTT) as when travel to a single location is expected to last more than one year or situations in which an employee performs their principle duties the majority

of time in a location away from their official station and where this arrangement is expected to last indefinitely or long enough so that the new location becomes the employee's main work location. In these cases, travel reimbursements are considered wages that are subject to employment taxes. *(The report is available at www.treasury.gov/tigta.)*

NASA and DOE Issue Rules Duplicating DOD Requirements

NASA has adopted a final rule that adds a proposal checklist to its NASA Federal Acquisition Regulation Supplement (NFS) that contractors must complete under solicitations requiring submission of certified cost or pricing data. The new rule mirrors a Defense Department requirement, effective March 28, 2013 to include a similar checklist where the purpose is to "achieve cost savings by improving initial proposal submissions" (Fed. Reg. 10687).

In a separate action, the Department of Energy has proposed April 1 to amend its Acquisition Regulations Supplement (DEAR) to subject certain DOE contracts to business systems criteria and penalties for failure to maintain adequate internal controls over these systems. The amendments make official DOE's promise to implement regulations that would mirror those passed by the Defense Department. The stated purpose is to strengthen the internal controls where "weak control systems increase the risk of unallowable and unreasonable costs" charged to government contracts. Unlike the DOD rules covering six systems, the DOE rule would cover five (property management, accounting system administration, estimating, Earned Value Management and Purchasing) where material management and accounting system is eliminated for now. The new rules would apply generally to contracts exceeding \$50 million awarded to large businesses and contracting officers would be authorized to withhold amounts from invoices if significant deficiencies are found until they have been corrected. The proposed rule indicated "future clarifications" will be needed such as whether the rules will apply to fixed price contracts awarded on a competitive basis or whether only CAS covered contracts will be covered by the rule.

A comment about the proposal by the law firm of McKenna, Long and Alridge focuses on the DOE provision that would require DOE contractors to provide the government with written documentation that each of the business systems meet relevant system criteria within 60 days of contract award. The commentary speculates that this self-assessment feature

will also soon apply to DOD contractors, referring to a DFARS change DOD is now preparing which the DOE proposal adopted.

President Obama Signs Two More Orders Targeting Contractor Pay

On April 8 President Obama signed an Executive Order and Presidential Memorandum directing the Dept. of Labor to propose two new regulations that would (1) prohibit federal contractors from discriminating against employees for inquiring, discussing and disclosing their compensation or the compensation of other employees and (2) require federal employees to disclose summary data to the DOL on compensation paid to their employees.

The first executive order amends EO 11246 of Sept. 24, 1965 that prohibits federal contractors and subcontractors doing over \$10,000 in government business annually from discriminating in employment decisions on the basis or race, color, religion, sex or national origin. The new rule would prohibit federal contractors from discharging "or in any other manner" discriminating against any employee or applicant for employment because they have "inquired about, discussed or disclosed the compensation of the employee or application." The President also signed a Presidential Memorandum directing DOL to adopt a rule "that would require federal contractors and subcontractors to submit to DOL summary data on the compensation paid to their employees, including data by sex and race." The new rule does not presume that the data must be consistent with data contractors are required to submit such as incurred cost proposals where the President requested the rule to avoid "new record-keeping requirements." Commentators on the new rules suggest contractors or firms wishing to bid on government work conduct an audit of its employee practices to see, for example, if there are significant deficiencies between male and female pay before DOL issues new rules.

Contract Awards Are Decreasing; Contractors Initiate Reactions

Pentagon contracts shrank 48% in February 2014 and 11% in March compared to the same two months in 2013. Commentaries on these statistics include military officials are "sending a clear message they are going to curtail military spending" and "when they do spend, they're going to do so with a very close eye on price." Reasons range from "migrating away from hardware to paying benefits," "failure to pass spending bills", snow

storms in January and February along with lower 2015 budget requests, sequestration, Ryan-Murray budget deal, end of Iraq and Afghanistan conflicts have all converged to create what is being called a “new normal,” away from the discretionary expenditures and contracting dollars of the 2000s.

Contractor reactions to the new environment run the gamut from looking overseas for opportunities, focusing on protected markets to cutting costs. The BGOV newsletter of Bloomberg March 7 addressed strategies that are being pursued that include:

Shifting to international markets. As sales growth declines the obvious choice is to look to foreign governments to help pick up some of the slack. The opportunities seem to be in the Middle East, North Africa along with the Asia-Pacific in the context of the administration’s “Asia pivot.”

Turning commercial. Contractors are shifting their focus from the US government to commercial markets, reversing the trend in recent years for commercial companies going after government business. Selling to the government requires different skill sets than selling to the commercial market (proposals, client contacts) while other companies are trying to stay strong in both markets, looking for growth niches (e.g. cybersecurity).

Finding and securing protected markets. Companies in key protected areas like health care, health IT and cybersecurity are doing better than those with strong positions in areas that are less of a priority to the government. Large weapons systems will be protected, particularly for large contractors, where forging supplier relationships with those large firms are extremely valuable.

Moving to adjacent markets. Some contractors are finding success moving into adjacent markets or selling products and services to other government agencies. A good source of information to mine is budget requests of government agencies to see which programs the government wants to fund.

Streamlining operations. Many companies are trying to maintain profitability to streamline operations by, for example, divesting low profit operations, reversing earlier trends of acquiring companies. The proposed rule is a “solution looking for a problem” that hardly exists.

New DOD Policy Will Likely Discourage Use of Federal Supply Schedules

DOD recently issued a memo saying that for purchases using Federal Supply Schedules (FSSs) contracting

officers must make their own fair and reasonable pricing determinations. The memo establishes a class deviation from FAR 8.404(d) where the FAR section states a separate price determination will not be required for individual orders, blank purchase agreements and orders under these agreements. The FSS offers a wide range of products and services whose prices are presumed to be fair and reasonable where traditionally, agencies could rely on GSA pricing without having to do a second fair and reasonable price analysis. However, the memo issued by Defense Procurement and Acquisition Director, Richard Ginman changes that where now “the complexity and circumstances of each acquisition should determine the level of detail of the analysis required.” Comments about the controversial move state it may result in a significant decline in the use of FSSs where the already harried GSA workforce will make using the FSSs harder.

DOD Finalizes Rule on Using Performance Based Payments

The Defense Department issued a new rule in the March 31 federal register providing guidance to contracting officers on calculating performance based payments (PBPs) for fixed price contracts. The rule instructs COs to agree on price using customary payment prior to negotiating PBPs. The PBP analysis tool set out in the rule is a cash flow model for evaluating alternative financing arrangements that must be used by COs who are considering using PBPs for fixed price contracts. When contractors propose PBP schedules they must include all PBP events, completion criteria, event values and expected expenditure profiles. The final rule incorporates two changes over earlier proposed rules that include (1) COs are to consider the adequacy of contractors’ accounting system before agreeing to use PBP and (2) contractors must provide access to records necessary to administer the new PBP approach.

PBP contracting allows contractors to receive payments based on performance where it can speed up cash flow that will hopefully result in lower costs to the government. It also allows for collection of 100 percent of costs compared to only 80 percent allowed under progress payment arrangements. Despite the benefits, comments we have seen are critical of the new rule. The criticism states it will discourage use of PBPs because they will require compliant business systems, less experienced contractors will have to upgrade their accounting systems, more data disclosure requirements to be paid can result in misuse of the data where, for example, auditors often do not understand the distinction between cost and price where divulging

of cost information on fixed price contracts can lead to assertions that the price was not fair and reasonable.

Proposal on Personal Conflicts of Interest Generate Opposition

A proposed rule in the April 2 federal register would expand requirements for contractors to avoid personal conflicts of interest (PCIs). Under the proposed rule PCIs would apply to contractor employees who provide agency acquisition functions and to those performing any functions “closely associated with” inherently government functions, contracts for personal services and contracts for staff augmentation services. The proposed rule purports to implement the 2013 National Defense Acquisition Act (NDAA) which required the Defense Department to review PCI requirements to see whether they should be extended. The new rule would not apply to commercial items or to acquisitions below the simplified acquisition threshold. The new rule builds on a November 2011 change to the FAR that placed a greater onus on contractors to screen employees to prevent PCIs where the screening process can include burdensome disclosures and reviews of their financial interests and other relationships. Employees covered by the current rules are those performing acquisition functions such as planning acquisitions, determining what supplies or services are to be acquired by the government, developing or approving contract documents, awarding, administering or terminating contracts, evaluating proposals or determining whether contract costs are reasonable, allocable and allowable.

Many comments on the proposed rule are critical. First, it goes beyond the NDAA where it will apply to all agencies, not just DOD. Though the rule applies to “functions closely associated with inherently governmental functions” the term is not defined. Though there is a list of functions in FAR 7.503(d) which in themselves are ambiguous, the new rule does not refer to this section but rather to FAR 7.5 which is vague so there is no guidance as to what “closely associated” means. Comments on this absence of a definition state it will create confusion, will be interpreted differently by different agencies that will likely result in the most conservative interpretation (i.e. broadest application). Other comments stress that the benefit is minimal while cost of compliance will be high where the

Final Rule on Non-DOD Service Contract Reporting

A final rule amending the FAR was passed that will require service contractors to report by Oct. 31 each year, for each contract and order above the threshold (1) the total dollar amount for services invoiced for the fiscal year (2) the number of contractor direct hours expended in performing those services and (3) and number of first-tier subcontractor direct hours expended. Contracts and orders that are entirely funded by the Defense Department are excluded from the requirement since the information is already required in completing an annual service contract inventory. The reporting requirement applies to both commercial and non-commercial item contracts but not classified contracts and the information will be publicly available. Contractors will now be required to report on all cost reimbursable, time-and-material, labor hour contracts and orders above the simplified acquisition threshold. For fixed price definite delivery order contracts, reporting is required if the contract value is at or above \$2.5 million in FY 2014, \$1 million in FY 2015 and \$500,000 in FY 2016 and beyond. For indefinite contracts (e.g. ID/IQ, Federal Supply Schedule, etc.) the above dollar thresholds will apply at the order level. First tier subcontracts must use the above dollar thresholds. The final rule adds two new clauses applicable to indefinite delivery contracts (Fed. Reg. 80369)

OMB Issues Uniform Positions Covering OMB Circulars

The Office of Management and Budget has issued final guidance titled “Uniform Administrative Requirements, Cost Principles and Audit Requirement for Federal Awards” which supersedes eight OMB circulars. The final guidance is located in 2 CFR part 200 which completes its goal of co-locating all related OMB guidance into Title 2. The final guidance retains the list – formerly found in OMB Circular A-122 – of all non-profit organizations exempt from the cost principles where other organizations will be added from time to time. The final guidance allows entities that have never received a negotiated indirect cost rate to charge a *de minimus* rate of 10 percent of modified total direct costs which can be used indefinitely. The change also increases to \$50 million the threshold for submitting a CAS Disclosure Statements for institutions of higher learning. The guidance states that for all federal awards covered by 2 CFR, “all administrative requirements, program manuals, handbooks and other non-regulatory materials that are inconsistent with the requirements of this part must be superseded.” The eight OMB

circulars that have been superseded include A-21, cost principles of education institutions, A-87, State, Local and Indian tribes, A-89, A-102, grants and cooperative agreements with state and local governments, A-110, A-122, non-profits and A-133,

OFPP Will No Longer Escalate Executive Compensation Cap

In our report on executive compensation in the Nov-Dec 2013 issue of the Report, we neglected to say that the ceiling the Office of Federal Procurement Policy is supposed to establish each year, which it did for FY 2014, will no longer be escalated by them.

CASES/DECISIONS

Not Considering Affiliates Past Performance Unduly Restricted Competition

In the RFP to design, build and repair various utility corridor systems for the Army Corp. of Engineers it stated offerors must demonstrate relevant experience on similar projects and past performance only by the submitting firm where the requirements would not be met by the experience of offerors' parents, affiliates or separate divisions. Iyabak protested arguing the RFP's experience and past performance limitations were unduly restrictive of competition and information about affiliates should be allowed if they made a firm commitment to meaningfully participate in contract performance. The Corp argued that historically when agencies had allowed for affiliate history more concerns were raised where, for example, affiliates would give general statements about how resources could be moved from the affiliate with no concrete plan to do or proposals would rely on experience and past performance for affiliates no longer in existence. The Comp. Gen. ruled that the RFP was unduly restrictive of competition where it distinguished the Corp's concerns with those of Iyabak because the examples put forth did not address the contractor's argument that is unreasonable to refuse consideration where there are firm commitments for meaningful affiliate participation (*Iyabak Constr., Comp. Gen. B-409196*).

Navy Discussions Were Proper

The Navy issued a RFP for boatyard products and services where all offerors invited to participate in discussions were to be advised of deficiencies and allowed to resolve them. Following discussions with Lyon the Navy said it should carefully review its price proposal which was significantly higher than the Navy's estimate. Lyon did not change its price and the award went to Marine Hydraulics because its technical and past performance ratings were the same as Lyon but its price was lower. Lyon filed a protest asserting the Navy violated FAR 15.306(d) by failing to conduct meaningful discussions about its price proposal where once the Navy determined its price was "excessive" and "more difficult to justify as reasonable" the Navy was required to reopen discussions. The Court disagreed with Lyon asserting the Navy is not required to discuss every weakness in a price proposal but is obligated to discuss an offeror's price only if it would preclude award. The Court ruled the FAR section referenced by Lyon does not require a CO to discuss a proposed price that is not considered to be a significant weakness where here there was no requirement to reopen discussions since Lyon's price was "arguably reasonable." The Court stated Lyon made a business decision not to adjust its price and it should not complain if the decision backfired. The Court added that reopening discussions is not required where a proposal weakness not addressed during discussions but subsequently becomes a determining factor between two closely ranked proposals (*Lyon Shipyard Inc. v US, Fed. Cl. No. 13-508(C)*).

Contractor Assumed Risk of Inaccurate Price Guide

Lakeshore was awarded an ID/IQ contract for engineering services where for each delivery order it was to submit a detailed cost estimate based on unit prices in a Universal Unit Price Book (UUPB) which then the parties would negotiate work requirements. Lakeshore subsequently sought an equitable price adjustment of nearly \$2 million for losses it allegedly suffered by being forced to use the UUPB which it stated the price guide did not accurately reflect then prevailing local prices for labor, material and equipment. In its denial of the claim, the Court ruled Lakeshore should have known it bore the risk of prices in the UUPB being too low or inflation being higher than anticipated. It noted contract language did not promise accurate prices in the UUPB and the solicitation called attention to a mechanism a contractor should use in its bid to account for potential error in the pricing (*Lakeshore Engrg Svcs vs US, BL 101482, Fed. Cl. No. 2013-5094*).

Government's Cost Claim Against Joint Venture Partner is Dismissed as a Legal Nullity

WPII was a partner in two Iraqi joint ventures – PIVG and IPAJV – where an administrative contracting officer issued a final decision against WPII for amounts due because of a CAS noncompliance. The Board ruled against the government asserting that a cost accounting standards noncompliance claim against a joint venture partner is improper (is a “legal nullity”) because the joint venture was the named contractor, not its partners. In responding to the government contention that the partners are responsible where the joint venture is merely an agent of its partners the Board said a “joint venture is an association of partners established by contract to carry out a single business activity for joint profit” where when it contracts with a joint venture, “the joint venture is the entity with whom the government is in privity of contract, not its partners.” Concluding the Government did not show WPII was the contractor on the contract the Board ruled the government attempt to pursue a claim against WPII under the PIVG contract was not a claim against a contractor relating to a contract and therefore was “a nullity” under the Contract Disputes Act (*WorleyParsons Int'l, ASBCA No. 57930*).

Appeal Court's Rules KBR's Subcontract Costs are Still Unreasonable and a Result of Gross Negligence

There have been several decisions ruling that KBR's fixed price subcontract costs under its cost reimbursable task orders in Iraq were unreasonable. Addressing Form 1 questioned costs by DCAA, KBR argued that the standard of reasonableness under a cost reimbursable contract is different than other types of contracts where the requirements of FAR 31.201-3, reasonableness were met by showing (1) it incurred the costs in connection with performance of the task order (2) the prices were the results of its best efforts to perform under wartime circumstances and (3) the prices were not the result of management gross disregard or willful misconduct. The lower court disagreed saying FAR 31.201-3 provides the standard for determining reasonableness of all costs – the price did not exceed what would have been incurred “by a prudent person in the conduct of competitive business.” Here the prudent person test was not met and hence the subcontract costs were unreasonable because the subcontract administrator did not adequately negotiate the price, his price negotiation memo was flawed and there was no “reliable contemporaneous benchmark” to compare the prices (*Kellogg Brown & Root Svcs v US, 728 F.3d 1348*).

In an appeal of the decisions, the court addressed a situation where a change order wanted to increase the size of a facility to accommodate double the number of troops where the proposed subcontract price was triple the price over the original contract. KBR argued their failure to negotiate a more reasonable price was a mistake caused largely by the pressure of war, the Court disagreed saying “though circumstances surrounding negotiations are relevant” the failure to engage in arms length negotiations was gross negligence. Many commentators have criticized the harshness of the government characterization of the actions as “gross negligence” and have stated the Court all but ignored the wartime conditions faced by KBR where the Court ruled “business judgment must still be exercised in a rational manner, even in wartime” (*Kellogg Brown & Root v US, WL 350072 (Fed. Cir.)*).

Protester Was not Treated Equally

(Editor's Note. We like this decision because in one case it addresses many grounds for pursuing a successful protest.)

The Navy received three proposals where after discussions and final proposal revisions, Raytheon was selected and BAE protested alleging, in part, (1) the Navy performed an unreasonable technical evaluation (2) applied more lenient standards to Raytheon (3) failed to evaluate the proposal against the RFP's evaluation criteria (4) unequally evaluated the proposals under a corporate experience factor and (5) failed to conduct meaningful discussions with BAE. The Comp. Gen. sustained BAE's protest. As for technical risk the government stated it could not evaluate risk until some of the work was completed but the Board stated the RFP required a “technical risk” be conducted for proposal evaluation where deferral of technical risk analysis was improper. The Comp Gen. determined the Navy failed to adequately document its resolution of weakness and risks in its technical evaluation where it noted an agency is not required to retain every document but its “evaluation must be sufficiently documented to allow the Comp. Gen. to review the merits of a protest.” The Comp Gen. also sustained BAE's protest of the Navy's evaluation of one of the five corporate experience subfactors after the Navy acknowledged it did not properly credit BAE's experience in this area while it did so with Raytheon (*Raytheon (BAE Sys. Info and Elec Sys. Integration, Inc., Comp. Gen. B-408565)*).

SMALL/NEW CONTRACTORS

Amount of Fixed Fee Contractor is Entitled to Depends on What “Form” It Is

(Editor’s Note. We first considered reporting on this case in our Decision/Cases section but since we have been receiving several questions related to entitlements of fixed fees on cost reimbursable contracts and many contractors are only collecting partial negotiated fees we thought it would illustrate some important issues related to fixed fees.)

The case arose out of an incrementally funded cost-plus-fixed-fee (CPFF) task order where the government rejected an invoice for the full fixed fee specified in the task order, asserting Teledyne was entitled only to a percent of the fee corresponding to the percentage of funding actually allocated to the contract.

The issue here revolves around whether the order was a “completed form” or “term form” cost plus fixed fee (CPFF) contract vehicle. The completion form CPFF contract “describes the scope of work by stating a definite goal or target and specifying an end product” (FAR 16.306(d)(1)). A completion form CPFF contract generally requires the contractor to complete and deliver the specified end product (e.g. a final report of research activity) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. The term form CPFF “describes the scope in general terms and obligates the contractor to devote a specified level of effort for a stated time period” (FAR 16.306(d)(2)). Under the term form CPFF contract, if the government finds the contractor’s work satisfactory, the fixed fee is payable at the end of the agreed time period “upon the contractor statement that the level of effort specified in the contract has been expended in performing the work.” The FAR also specifies the completion form is preferable over the term form when the work, or specific milestones for the work, can be defined well enough to permit estimates within which the contractor can be expected to complete the work (FAR 16.306(d)(3)). In addition, the FAR prohibits use of the term form unless a specific level of effort within a definite time frame can be identified (FAR 13.306(d)(4)). The following case shows application of these principles can be tricky.

In the case the Army refused to pay Teledyne its full fixed fee of \$823,045 where it paid it only 50.6% of the fee or \$416,480 asserting because it was only funded for 50.6% of the cost ceiling thereby entitling Teledyne

to only that amount of the fee. The Army asserted the contract was a term form CPFF contract where Teledyne would be entitled to the entire fixed fee only if it performed the agreed-upon level of effort for the agreed-upon time period but here the effort was never fully funded. Teledyne argued it was entitled to the entire amount of the fixed fee since it had completed all work under the contract.

In the case there were considerable disagreements over the basic facts of the contract where the parties could not even agree on which form of CPFF applied to the contract. Apparently, as is common, the Teledyne contract did not identify which type of contract it was and which clauses applied. The problem was exacerbated by the fact the contract contained elements of both forms where, on the one hand, a specified level of effort for a stated period which would indicate the term form but also the parties agreed in a contract mod that Teledyne would produce 360 armor plates by a specified date making it appear to be the completion form. Since there was so much dispute about the facts, the board refused to make a summary judgment arguing more facts and documents had to be found to make a ruling (*Teledyne Brown Engrg., ASBCA No. 58636*).

(Editor’s Note. A word to the wise – make sure it is clear at the beginning what form of CPFF contract you have signed up for.)

QUESTIONS & ANSWERS

Q. We are a subcontractor (sole source) where the prime contractor, who received their award based on price competition, is nonetheless insisting our proposal must be based on certified cost and pricing data (CCPD). I examined FAR 15-403 but could not find anything addressing CCPD requirements on subcontracts if the prime contract is not subject to the Truth and Negotiations Act. I would think we are exempt. What do you think? Can you cite anything that would help prevent me from submitting the certified data?

A. Yes, I also reviewed FAR 15-403 and did not see anything addressing CCPD requirements on subcontracts if the prime contract is not subject to TINA. I have always assumed the status of the prime contract does not necessarily affect the subcontract. I did a little research in my texts where one of my favorite (Bender) states “Waivers of TINA requirements for submittal of prime contractor cost or pricing data do not automatically waive requirements for subcontractors to submit cost or pricing data” where FAR 15.403-1 is

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cited. I also checked out DCAA guidance where in the DCAA Contract Audit Manual, Chapter 14-108(f) it states "Therefore, although the prime contract would not be subject to TINA, any lower-tier subcontract expected to exceed the cost or pricing data threshold is required to submit cost or pricing data unless an exception at 15.403-1 applies." It is such an obvious question you would think some regulation would address it but like you, I can't find it. However, the commentary and DCAA guidance indicates CCPD may apply even though CCPD is not required on the prime.

According to DCAM, Part 14.108(b), if the prime did require CCPD, then they are required to submit CCPD on any subcontracts if (1) it is estimated to be \$11.5 million or more (2) more than 10% of the prime proposed price or (3) the CO considers it necessary. It would seem to me you might be able to either assert one of the exemptions in FAR 15.403-1 apply to you (unlikely if its sole source), you do not meet the first two thresholds identified above or you may be able to negotiate a compromise where you provide *noncertified* cost or pricing data. However, short of that, you may have to submit CCPD.

Q. Our financial auditors require us to book an adjustment for deferred rent which increases our rent expense over what was actually paid in the year. Is this an allowable expense? I can find no mention of it in the FAR.

A. Its not always clear cut. It depends on what the adjustment was for. The definition of a "cost" is the expense you "incurred" so if the adjustment is made to make you more consistent with GAAP that may be OK. Having said that DCAA auditors normally look at actual expenses paid to make a determination.

Q. We are a subcontractor on most of our business. Due to sequestration and other cutbacks, our volume fell dramatically. The silver lining in this is that as of January 1, we are a small business again. Our plan is to leverage that and hopefully win some prime contracts. If we do, and we use subcontractors, what cost can we add to the subcontractors' costs. We do not plan to apply G&A. Should we establish a subcontractor management cost adder and then apply the cost plus fee? How common is it to have this subcontract handling fee.

A. Going forward, yes you can establish a subcontract management cost rate where the pool would be indirect costs associated with supporting subcontract costs (e.g. QA, purchasing, subcontract management) and the base would be direct subcontract costs. Based on the latest Grant Thornton Survey we report on each year, 24 percent of the surveyed professional services firms use a subcontract handling fee.

Q. During the recent snowstorms, many of our employees were not able to come to work but they nonetheless worked on both direct and indirect projects at home. Will we have problems with this.

A. There are no regulations we are aware of but it is clear that many government agencies including DCAA have work-at-home policies that allow them to work at home. To be safe, it is advisable to prepare written policies that provide for work-at-home. DCAA does provide audit steps for work-at-home employees during a floorcheck (e.g. obtain evidence, interview supervisor, communicate by phone with employee, verify existence of employee to payroll and HR records) but some comments we have seen indicate DCAA may apply these steps to incurred cost or invoice audits to allow for the costs.