GCA REPORT
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NEW DEVELOPMENTS

House Committee Votes to Repeal 3 Percent Withhold Provision

House Small Business Committee members of both political parties March 22 voiced support for repealing a provision of a major 2006 tax bill that will require government agencies to withhold 3 percent of all payments to contractors and vendors beginning in 2011. While the committee members said government contractors have an obligation to pay their taxes, the provision of the Tax Increase Prevention and Reconciliation Act of 2005 requiring the withhold is "a bad idea" that will be particularly harmful to small businesses, resulting in discouraging their participation in government work which will lead to higher prices to the government.

DOD Takes Steps to Tighten Up TINA Waivers

(*Editor's Note. The following two articles indicate the trend getting away from basing contract prices on cost buildups may be coming to a halt.*)

Following a Defense Department report finding that contracting officials awarded over $3.5 billion in commercial procurements for defense items that were not supported by documentation justifying a commercial item procurement, DOD March 28 submitted a legislative proposal to amend the commercial item exemption under the Truth in Negotiations Act (TINA) to allow COs to obtain certified cost or pricing data when (1) commercial sales data for the procurement of sole source items "is insufficient" to allow a CO to determine whether the commercial item is "fair and reasonable" and (2) the contractor business segment has been required to submit certified cost or pricing data in connection with at least one contract award or modification.

Under TINA contractors must provide the government current cost or pricing data where the price of procurement is based on cost. However, TINA provides several exceptions to this requirement where, for example, the contractor claims the product or service being acquired is a commercial item. The proposal follows a September 2006 DOD IG report requesting legislation to narrow the TINA commercial item exception because the FAR definition of commercial item is too broad allowing items to be considered commercial that are "of a type customarily used by the general public or non-governmental entities for purposes other than governmental" or that are "offered for sale." According to the IG, COs use "loopholes" in the broad commercial-item definition or "misapply" it to inappropriately exempt many sole source procurements from TINA requirements to submit cost or pricing data. The IG says the changes are necessary because sole source contractors generally (a) have few, if any, commercial sales to support prices (b) can basically argue any item is commercial (c) refuse to provide commercial sales information and (d) refuse to provide cost information. Representatives of industry have begun to express their opposition to the change, saying the proposed legislation will make requests for cost or pricing data "the government's default position" despite the existence of other sources of information to establish that a price is fair and reasonable.

The government has recently taken other actions to limit the use of the commercial item exception to TINA:

- The Acquisition Advisor Panel created under the Services Acquisition Reform Act (SARA) is calling for the definition of stand-alone commercial services in FAR 2.101 be changed to ensure only those services that are actually sold in substantial quantities be deemed commercial, eliminating the terms "of a type" from the definition.

- The DOD March 23 issued an internal memo stating that waivers to TINA must meet an "extremely high" standard, being used only in "exceptional circumstances" where the "government cannot otherwise obtain the needed product or service without the waiver." For example, if a commercial business offers a non-commercial item "essential to DOD's mission" but unavailable from other sources and the company refuses to accept TINA requirements then a waiver may be granted. The memo, states the waiver should be used "in a judicious manner" and should not be granted (a) to a contractor whose business segments

normally perform government contracts subject to TINA or (b) simply because the waiver could allow the parties to execute the contract at an earlier date than if TINA is applied.

• A DOD March 2 memo states that COs using FAR Part 12 commercial item procedures for acquisitions valued in excess of $1 million must document in writing that the goods or services being acquired meet the definition of commercial item. When such items lack efficient market pricing histories, "additional diligence" must be given to determine that prices are fair and reasonable.

Proposed Definition Revision Expands Use of Cost or Pricing Data

The FAR Council April 23 published a proposed rule affecting the definition of "cost or pricing data" to resolve the "confusion" stemming from a recent case (*SAIC*) that seemed to expand the amount of cost and pricing information contractors must provide the government for them to determine whether a contract price is fair and reasonable. The proposed rules are intended to make clear the CO "should be free to ask" for any information to ensure fair and reasonable prices. Under some circumstances the Truth in Negotiations Act requires that cost or pricing data be certified as accurate, current and complete and provides for a contract price adjustment and potential penalties when the data is "defective." However even when TINA certification does not apply, COs nonetheless may be required to obtain detailed cost or pricing data that is not certified.

Under the new rule, even when TINA certification is not required, the proposal will allow COs to obtain more data than TINA required which expressly focuses on "facts" to the exclusion of "judgmental" data. The new rules would amend the definitions at FAR 2.101 and add a new term "data other than certified cost or pricing data" which would mean "any data, including cost or pricing data and judgmental information necessary for the contracting officer to determine a fair and reasonable price." The new term would replace the current term "information other than cost or pricing data." COs would be instructed to obtain "data other than certified cost or pricing data" when certification is not required. The definition of "cost or pricing data" would also be revised to remove the reference to certification while an additional definition of "certified cost or pricing data" would be added. According to the FAR Council, the need to distinguish between detailed cost estimates and "cost or pricing data" is that the latter is defined in TINA and they are limited to a subset of information that Table 15-2 requires. So "cost or pricing data" does not include information that is "judgmental" but does include factual information from which the judgment was derived. So another term is required when a CO needs a more complete cost estimate which includes supporting judgments. Also the Council is proposing to revise FAR Subpart 15.4 on contract pricing to clarify the need and authority for COs to obtain detailed cost estimates, including cost or pricing data, where there is no other means to determine fair and reasonable pricing during price analysis even if the cost or pricing data is not certified (*Fed. Reg. 285*).

Efforts to Curb "Pass-Through" Costs Passed

Effective April 26 as an interim rule, Defense contractors that subcontract more than 70 percent of the total cost of work performed under a DOD contract will have to provide information on their indirect costs, profit and value they add to the subcontract work. The new mandate follows assertions by certain members of Congress that so-called "pass through charges" are excessive and provide little value. The rule provides for a solicitation provision and contract clause that prohibit "excessive pass-through charges" and require offerors to identify the percentage of work that will be subcontracted. If the subcontracted costs are more than 70 percent of total cost of the work to be performed the offeror or contractor must provide the information. The contractor must also insert the clause in its subcontracts and provide the same information to the CO for any subcontractor that subcontracts 70 percent of their costs to lower-tier subcontractors.

The contract clause addresses "excessive pass-through charges" with respect to a contractor or subcontractor that adds "no or negligible value to the government." "No or negligible value" means the contractor or subcontractor "cannot demonstrate to the CO its effort added substantive value to the contract or subcontract." Under the rule the CO is to determine whether excessive pass-through charges exist and will have audit access to all contractor records to determine whether such charges have been billed, proposed or claimed. For fixed price contracts subject to the rule the government will be entitled to a price adjustment for the amount of any excessive pass-through charges included in the contract price. The provision will not apply to firm-fixed price contracts awarded on the basis of adequate price competition or fixed-price contracts for commercial items.

It can be expected that industry will strongly challenge the interim rule. In response to earlier similar proposals, the Acquisition Reform Working Group argued the restrictions would drive companies to keep work in-

house rather than subcontracting it out which would not only reduce competition for work but would have a significant impact on small businesses acting as prime contractors. They also expressed concern about the audit provisions (*Fed. Reg. 20759*).

DCAA Issues New Guidance

Reporting Desk Review Results

The Defense Contract Audit Agency April 11 issued guidance to its auditors stating that for desk reviews of low-risk incurred cost submissions a memo to the administrative contracting officer (ACO) instead of a report will be issued to communicate results of the reviews that are not selected for audit. The change from a report to a memo is a based on a determination that it is more consistent with Generally Accepted Government Auditing Standards (GAGAS). The guidance adds that if significant questioned costs are identified during the desk review it should be converted to an audit in which case an audit report will be issued upon completion. The guidance presents a suggested format for the memo and includes an audit program for the desk review.

For low risk contractors (e.g. less than $15 million of auditable costs, no significant questioned costs in the most recent audit), a random sampling picks incurred cost proposals to be audited (about one third of submitted proposals each year) whereas the remaining proposals undergo a desk review. The review steps for a desk review include:

- Ensuring a "Certificate of Indirect Costs" has been executed by the contractor
- Scanning the proposal for unusual items, obvious potential questioned costs and audit leads that need to be followed up
- Scanning the proposal to determine if there are significant changes from the prior year's proposal that need follow up
- Verifying the mathematical accuracy of the proposal
- Determining if the proposal includes significant corporate/home office cost allocations and if so, whether the home office allocations have been audited
- Informing the contractor of the requirement to adjust its provisional billing rates for the year evaluated to match determined rates (07-PPD-011(R).

Impact of New Pension Rules on Contract Costs

DCAA also May 1 issued guidance on the impact of the Pension Protection Act of 2006 (PPA) on forward pricing and incurred cost proposals. The guidance acknowledges the PPA, which was enacted to strengthen the federal pension insurance system, is likely to result in increased funding of defined benefit pension plans over what the cost accounting standards and FAR allow primarily because of lower interest rate assumptions (bond rates rather than CAS – required long term average rates of return) and shorter amortization periods (unfunded actuarial liability and gains/losses will be amortized over 7 years rather then the CAS 10-30 years for liability and 15 years for actuarial gains and losses).

The guidance references recent DOD policy that states pension costs priced into contracts will continue to comply with CAS 412 and 413 and COs will not negotiate any increase in contract price or include a re-opener clause that would allow for a later adjustment in anticipation to revisions to CAS 412. Auditors are told to ensure contractors estimate and claim pension costs in accordance with CAS rather than PPA. If pension costs on forward pricing rates increase from prior years, auditors are to investigate why and if proposed costs are in excess of those calculated using CAS 412 or 413 they should be questioned. PPA-required contributions that are made in excess of CAS compliant pension costs are to be considered "prepayment credits" in accordance with CAS 412.50(a)(4) where they are not reimbursed in the period the contributions are made but rather reimbursed in future accounting periods in which the credits are applied to fund the pension costs. Auditors are also instructed to request assist audits of contractors' home office costs if the amount of pension costs allocated from it to the contractor's segment has increased (07-PAC-013(R)

New Guidance to Measure Award Fees

The Defense Department April 24 issued new guidance calling for "objective criteria" to measure contract performance for purposes of determining the amount of award or incentive fees defense contractors should be entitled to. The new guidance is in response to a recent GAO report stating DOD had paid major systems contractors over $8 billion in incentive fees despite significant cost growth and delivery delays and found that the median award fee was over 90 percent. The DOD 2007 authorization act called for DOD to issue guidance on specific circumstances where contractor performance can be judged to merit available award fees based on its ratings. So the following ratings definitions and award fee percentages were established:

- **Unsatisfactory** – the contractor has failed to meet basic contract requirements: 0 percent of the award fee pool

- **Satisfactory** – the contractor has met the minimum essential contract requirements: not more than 50 percent of the award fee pool
- **Good** – the contractor has met the minimum essential contract requirements and at least 50 percent of the award fee criteria established in the award fee plan: 50-75 percent of the award fee pool.
- **Excellent** – the contractor has met the minimum essential contract requirements and at least 75 percent of the award fee criteria established by the award fee plan: 75-90 percent.
- **Outstanding** – the contractor has met the minimum essential contract requirements and at least 90 percent of the award fee criteria: 90-100 percent (www.acq.osd.mil/dpap/policy/policyvault/2007-0197-DPAP/pdf).

DOE Revisits Issue of Reimbursing Pension and Health Benefit Costs for M&O Contractors

The Department of Energy has issued a request for comments addressing how to decrease costs related to employee pension and medical benefits of management and operating (M&O) contractors. Since most M&O and site management contractors provide expensive defined benefit plans that are supplemented by defined contribution and subsidized medical plans, DOE last year announced plans to curb the escalating costs of the benefits. The proposal would continue to pay them for current and retired employees while for new employees, the department would reimburse contractors only for costs of defined contribution plans e.g. 401(k) plans and market-based medical benefit plans. In addition contractors would need to show that value and costs of the pension and medical benefits would not exceed market-based benchmarks by more than 5 percent. Following significant criticism from Democrats in Congress and others, DOE decided to delay implementation of the changes due in June 2006 for one year. Now, rather then announce a policy change that had generated the criticism in the first place, DOE published a request for public comments on how to reduce the costs (*Fed. Reg. 14266*).

Proposed Rule Requires Offerors to Disclose Tax Convictions

A March 30 FAR proposed rule expands certifications that companies seeking federal contracts must make regarding their compliance with tax laws. The proposed rule would expand the current requirement to certify whether contractors have been convicted of, had a civil judgment rendered against them or are presently indicted or criminally or civilly charged with the commission of tax evasion in the three years preceding an offer. The proposed rule would also require certification regarding whether or not an offeror has, within the preceding three years (a) been convicted or had a civil judgment rendered against it for violating any tax laws or failing to pay any tax (b) been notified of any delinquent taxes for which the liability remains and (c) received notice of a tax lien against them for which the liability remains unsatisfied or the lien has not been released. The rule writers added that the nonpayment of taxes is not restricted to federal taxes but may relate to "any taxing entity." The certification does not necessarily mean they will be deemed non-responsible but that if these conditions exist, the CO may ask for additional information related to the obligation to evaluate a contractor's ability to perform under the contract (*Fed. Reg. 15093*).

Proposal to Extend Subcontract Plans and Reporting

The FAR Secretariat April 16 submitted to the Office of Management and Budget a request to approve an extension of the currently approved information collection requirement for subcontract plans and reporting. FAR 19.702 requires contractors receiving a contract exceeding $550,000 ($1 million for construction) to have small, small disadvantaged, women-owned, HUBZone, veteran-owned, service disabled veteran owned firms participate in the performance of the contract as much as possible. Contractors must submit a subcontracting plan providing maximum practicable opportunities for these small businesses and submit semiannual reports of their progress on Standard Form 294 (*Fed. Reg. 18963*).

DHS Bill Approved by House Committee

In its unanimous approval of a $39.8 billion 2008 authorization bill, the House Homeland Security Committee March 28 set forth some procurement provisions that would (1) direct the secretary to consider past performance of contractors before making an award decision (2) disclose foreign ownership or control defined as 50 percent or more of foreign ownership of the prime contractor or any prospective subcontractor (3) disclose any role played by the offeror or its affiliates in creating a solicitation or statement of work or objectives for the department and (4) certification as to whether the offer is in default for payment of any delinquent tax.

CASES/DECISIONS

Board Denies Reformation of Contract When Offer Failed to Include Use Tax

(*Editor's Note. The following reflects the need of anticipating all taxes when bidding on fixed price work. We find failure to specially anticipate use taxes quite common since more and more states and even local entities are adopting these types of revenue based taxes.)*

When EEG submitted bids for two sole source, fixed price contracts, it was unaware of Mississippi's contractor use tax of 3.5 percent and did not include it in its contract prices. Like most fixed price contracts, the contracts included FAR 52.229-4 which states the contractor's price must include all applicable federal, state and local taxes and duties. When EEG became aware of the tax liability of $216,000 it first sought exemption from the tax and then sought contract reformation from the government asserting the failure to include the tax in its contract price was a result of its own unilateral mistake. The board said to establish a unilateral mistake a contractor must show (1) a mistake in fact occurred prior to contract award (2) the mistake was a clear-cut clerical or mathematical error or a misreading of a spec and not a judgmental error (3) prior to award, the government knew or should have known a mistake was made and hence should have requested bid verification (4) the government did not request bid verification or its request was inadequate and (5) proof of the intended bid is established. The board found that EEG did not satisfy the second element, ruling that the failure to ascertain the nature and extent of taxes was not a clear-cut clerical or math error but was a judgmental error (*Ellis Environmental Group LC, ASBCA 54066*).

Title to Unused Material Under Progress Payment Contracts Passes to Contractor

After C&R's construction was inspected and completed by the Forest Service, the government sought a claim of $30,901 for costs related to materials it delivered to the job site that were retained by the contractor. The government argued that FAR 52.232-5, "Payments under Fixed Price Construction Contracts" prescribed a permanent divestiture of title to any materials other than those that became a part of the work items completed during construction. The board disagreed ruling that G&R was legally entitled to recover the unused materials stating once a federal contractor completes performance under a fixed price construction contract title of materials that were covered by interim progress payments and were delivered to the job site but not incorporated into the finished construction work reverts to the contractor.

The board reasoned that under FAR 52.232-16, "Progress Payments" title for parts, materials and work in process first vests with the government then passes to the contractor when it completes all obligations under the contract. For this reason the board refused to read the "sole property of the government" language in FAR 52.232-5 as prescribing a permanent divestiture of property. To interpret the Payments clause any other way would result in "an unjustified windfall for the government" (*G&R Service Co. Inc. v Dept of Agriculture, CBCA, No. 121*).

Cost Sharing Percentage Does Not Apply in a Termination

Jacobs held a contract to design and build a coal-gasification improvement facility that included a cost sharing provision allocating 80 percent of the performance costs to the Energy Department and 20 percent to Jacobs. Under the contract, Jacobs was to receive certain patent rights but no fee for performance. After the government terminated the contract, Jacobs presented a termination settlement for 100 percent of its reimbursable costs plus a fee. A lower court ruled Jacobs was entitled to only 80 percent of the reimbursable costs and the no-fee provision in the contract precluded payment for the fee. In an appeal, the higher court reversed the decision ruling Jacobs was entitled to 100 percent of the costs because the termination for convenience clause of 52.249-6 clearly stated the terminated contractor was entitled to "all costs reimbursable." The Court reasoned that cost sharing contracts are used when the contractor agrees to absorb a portion of costs in expectation of substantial compensating benefits. Here, receipt of 80 percent of costs would create a substantial loss whereas the benefits of patent rights were foreclosed due to the termination and to deny recovery of Jacobs's full costs "seems unfair." As for the fee, the court ruled against Jacobs stating termination does not require "abrogating the no-fee provision" because FAR 52.249-6)f)(4) provides for payment of a portion of the "fee payable under the contract" and Jacob's contract expressly provided no fee would be paid so the amount of fee payable "is zero" (*Jacobs Engrg. Group, Inc. v US, 75 Fed. Cl. 752*).

Team Member Authorized to Bring CDA Action

(*Editor's Note. We have often reported on the difficulties subcontractors have in obtaining a hearing from the government*

on a contract dispute since only the prime contractor, not subcontractor, is "in privity" with the government. The following shows that teaming arrangements can often overcome that limitation.)

The Commerce Department sought to use Federal Supply Schedule contracts to lease and possibly purchase computer equipment stating if a contractor's FSS contract did not include appropriate leasing terms it must enter into a FSS Contractor Teaming Arrangement (CTA) with another company having a FSS contract meeting the government's needs. The solicitation referred offerors to a GSA Website for information about CTAs where the website stated that unlike a prime/subcontractor relationship, under a CTA the parties have privity of contract with the government. Despite these instructions, when James River and Key submitted their CTA offer, Commerce awarded the contract to James River as the prime and Key as a subcontractor. When a dispute occurred following a termination and Key submitted a claim Commerce dismissed its claim asserting it lacked jurisdiction because Key was not a contractor. The Board disagreed, stating that including a reference to the website Commerce had incorporated its provisions into the solicitation. On that basis, a "special relationship was created" going beyond a normal structure where the government deals only with a contractor and that contractor deals with its subcontractors. Here, the board ruled Key was in privity with Commerce and consequently was a contractor within the meaning of the Contract Disputes Act (*Key Federal Finance v GSA, CBCA 411*)

Unilateral Change in Proposal is Improper

Global protested an award made to ITE on the grounds that it and other offerors were not advised that pricing or other material aspects of their proposals could be revised after oral presentations nor were they given the same opportunity to submit revised proposals that ITE was given. During the oral exchange between ITE and the Agriculture Department, the agency pointed out the absence of a pricing spreadsheet in its oral presentation materials. Subsequently ITE did not merely confirm its option year pricing that was in its initial proposal but it also reduced the escalation rate it initially proposed. Since option year pricing was evaluated for award purposes, the GAO sided with Global ruling this constituted a material change in its proposal and was prejudicial to Global. It also ruled that the decision to evaluate only Global's proposal under this unstated solicitation evaluation factor amounted to disparate treatment of proposals (*Global Analytic Information Technology, GAO, B-298840*).

Court Rules Lack of Good Faith in Denying Meritorious Claims to Gain Negotiation Advantage

(*Editor's Note. The following demonstrates the limitations imposed on the government's common practice of leveraging one claim or proposal against another.)*

The Court ruled the Department of Veterans Affairs had breached its covenant of good faith and fair dealing when a contracting officer denied two claims he believed was meritorious in order to gain leverage in negotiating a global resolution of other claims. The Court ruled contractors have an obligation to certify their claims are made in good faith, supporting data is accurate and complete and the amount requested accurately reflects the amount of price adjustment due. The government, in turn, has a reciprocal obligation to act in good faith, to avoid "any appearance of coercion" (*Moreland Corp. v US, 2007 WL 1180489*).

NEW/SMALL CONTRACTORS

Closing out Those Contracts

Several critical reports by the GAO have cited delays in closing out contracts and have generated a lot of attention. In that light, we thought we would indicate why timely contract close outs is important and provide some updated information on one the most important tools available for this task – quick close out provisions.

Why is attention to contract close outs important? First, it's always a good idea to get old contracts "off the books." Not only for contractors, but contracting officers are frequently criticized for not closing out contracts fast enough. Second, cost type contracts usually contain the clause FAR 52.216-8, "Fixed fee" and time-and-materials or labor hours contracts contain 52.232-7, "Payments under T&M and Labor Hour Contracts" which require, if not waived, contractors to withhold 15 percent of fixed fees on cost type contracts when they reach 85 percent of their fixed fee and a withhold of 5 percent of amounts due for labor up to $50,000 on T&M and LH contracts. These withholds represent a significant cash flow drain. Unless you are able to get these contract clauses waived early after or before contract award (contractors commonly do not accomplish this critical step) you may be stuck for many years until the contract is closed out. Finally, following the audit process, many contractors will wait months and even years before they submit a final

invoice, again delaying cash flow if they are entitled to additional funds.

- **Quick Close-Out Procedures**

Increased pressure on contracting officers to close out old contracts has accelerated use of tools to close out contracts faster including a technique that most contractors favor – quick close out procedures. The final period of performance under a contract is generally less than a full fiscal year and many contracts will, in fact, be completed early in the year. Following normal procedures a determination of the amount of indirect and direct costs incurred on that contract may take a considerable amount of time – the incurred cost proposal may not be submitted until six months after the end of the contractor's fiscal year, the submittal may take another twelve months or more to be audited and then an additional six months more to settle not to mention the time to submit and process the closeout documentation. An expeditious settlement of direct and indirect costs and a prompt closeout of physically completed contracts have considerable appeal to both contractors and the government.

FAR 42.708 provides for quick close procedures. They allow COs to negotiate a settlement of indirect costs for a specific contract in advance of final settlement of the incurred cost proposal. The procedures can be applied not only to the final fiscal year of a contract but also to all other open fiscal years with unsettled indirect cost rates as long as the criteria contained in FAR 42.708 are met. Use of the quick close out procedures for a specific contract will be binding on that contract and no adjustment will be made to other contracts for the over or under recovery of costs that may result from the agreement on that quick closed out contract. Likewise, using the quick close out procedures will not be considered as a precedent when establishing final indirect rates for other contracts.

Where a contract is to be closed using the quick close out procedures, an agreement should be reached by the contractor and contracting officer which often but not always includes the auditor as to what indirect costs will be allocated to the contract. There are three methods commonly used: (1) final indirect rates agreed upon for the immediately preceding fiscal year (2) the provisional billing rates for the current year or (3) estimated rates based on the contractors actual data usually reflected in its incurred cost proposal which is adjusted for a decrement based upon prior years' historical disallowances. The contractor should take the initiative in proposing one of the methods keeping in mind the ACO may ask for an opinion by DCAA.

To encourage greater use of the procedures, the FAR 42.708 was revised in 1996 to *require* the contracting officer to negotiate settlement of indirect costs for a specific contract in advance of the final indirect rate if certain criteria are met. The criteria of requiring application of the procedures are: (1) the contract is physically complete (2) the total unsettled indirect costs allocable to any one contract does not exceed $1 million (3) the cumulative unsettled indirect costs to be allocated to one or more contracts in a single fiscal year do not exceed 15 percent of the estimated, total unsettled indirect costs allocable to cost type contracts for that fiscal year and (4) agreement can be reached on a reasonable estimate of allocable dollars. Many industry groups have criticized the quick close out rules for being too "restrictive" and have advocated the $1 million cap be raised to $10 million and the 15 percentage limitation be raised to 50 percent. No action has been taken thus far.

Many contractors and government officials believe that if these conditions are not met quick closeout procedures may not be used. This is not true. These criteria are often lifted. For example, the contracting officer may (and frequently does) wave the 15 percent restriction. The conditions for waiving this are to be based on a "risk assessment" that considers such factors as a contractor's accounting, estimating and purchasing systems as well as other concerns cognizant auditors may have or other pertinent information.

- **When is a Contract Physically Complete**

Per FAR 4.804-4, a contract is considered physically complete when (1) the contractor has completed the required deliveries and the government has inspected and accepted the supplies (2) the contractor has performed all services and the government has accepted them and (3) all option provisions have expired or the government has provided notice of complete termination. In the case of cost type or T&M/LH contracts where the Limitation of Cost/Funds clauses specify the contractor does not have to continue performance once its costs equal the established cost ceilings of the contract, the contract is considered closed if the government has not provided additional money and the cost ceiling is reached.

Though physically complete, other factors may delay a closeout. For example, a claim by a contractor or government may delay determining the final amount of the contract. In this light, a contract may not be closed until it is physically complete, the amount owed to the contractor has been finally determined and all claims regarding the contract have been resolved.

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QUESTIONS & ANSWERS

Q. Our prime contractor is planning on charging several items direct to the contract such as computer usage, vehicles, telephone, reproduction, etc. and is telling us we have to do the same. However, we do not normally charge or book these costs directly but rather they are included in either our overhead or G&A pools. What should we do?

A. The proper treatment for you should be based on your accounting practices, not the prime's. The key word in your question is "normally." If your disclosed or customary accounting practices are to always charge them indirectly then you should be consistent with that practice. However, if your accounting practices provides for "sometimes direct and sometimes indirect" (wording in the CAS disclosure statement) then you may charge them direct if the criteria for direct charging is met.

Q. I frequently hear the term "multiplier" – is that the same thing as burdened rate?

A. The word "multiplier" is a term commonly used in the commercial arena while "burdened rate" is commonly used in the government arena. The burdened rate refers to the resulting labor rate after all relevant indirect costs and profit are added to the base labor rate while the multiplier refers to the amount that you must multiply the base unburdened labor rate by to equal the burdened rate. For example, a $30 dollar base labor rate, 90 percent overhead, 20 percent G&A rate and 10 percent profit would generate a fully burden rate of $75.24 by multiplying the $30 base rate times 1.9 (overhead) times 1.2 (G&A) times 1.1 (profit). Dividing the resulting burdened rate by the base dollar rate yields a 2.51 figure so the firm has a 2.51 multiplier.

Q. The contracting officer is asking me to provide certified cost and pricing data for my proposal but I think the award will be competitively awarded and I do not have to provide the data. I don't want to appear to be unresponsive but hate to provide the data and be exposed to defective pricing allegations. What do you recommend?

A. You are correct about the requirements – FAR 15.403-4(a)(1) clearly states the CO should not require submission or certification of cost or pricing data when the contract qualifies for one of the exceptions (e.g. adequate price competition, acquisition of a commercial item, prices set by law or regulation, waiver granted). Nonetheless, it is still quite common for COs and even auditors to continue to request certified cost and pricing data in these situations and when it is provided, the defective pricing clause is triggered. It can be a tough call and the trade off between protecting yourself and not wanting to appear uncooperative requires careful thought. Because of the FAR, contractors have the right to refuse providing certified cost or pricing data until the government can show the procurement was not based on adequate price competition at which point the contractor does need to comply with the Truth in Negotiations Act. Some of the government's needs to have cost data (e.g. to conduct a cost realism analysis) can be accomplished by submitting non-certified cost or pricing data where we have frequently seen COs drop the request for certification. Even if you do decide to give them what they ask, you should be aware that a fairly recently enacted FAR 15.403-4(c) provides if cost or pricing data is requested and submitted but an exception is later found to apply the data "shall not be considered cost or pricing data."

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