GCA REPORT
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NEW DEVELOPMENTS

DCAA Issues Guidance on Executive Compensation Cap; Watchdog Group Recommends Expanding Cap to All Employees

The Defense Contract Audit Agency issued guidance alluding to the April 15 Office of Federal Procurement Policy executive compensation cap for calendar fiscal year 2010 at $693,951 (up from $684,181 in 2009). The guidance mentions early DCAA guidelines issued March 4, 2008 that is intended to clarify the proper application of the cap. That memo reminds auditors that the FAR 31.205-6(p) compensation limitation for the top five executives impose a ceiling of allowable compensation paid or accrued in the fiscal year so auditors are told to verify that unallowable costs have first been deducted before applying the compensation cap. Examples of such unallowable costs are stock appreciation rights or bonuses calculated on changes in the price of stock securities or significant amounts of time (50% in the example) spent on unallowable lobbying activities. The guidance also reminds auditors that not all compensation cost elements are subject to the cap but are limited to wages, salary, bonuses, deferred compensation and employer contributions to defined contribution pension plans. Auditors are told to evaluate other compensation cost elements using applicable FAR cost principles where examples include: 401(k) contributions – FAR 31.205-6((j)(4); group medical insurance - 31.205-6(m)(1) and; company autos used for personal expense – 31.205-6(m)(2) (*10-PPD-012(R*).

The influential Project on Government Oversight (POGO) is urging the Obama administration to broaden coverage of FAR limits on amount of executive compensation to cover all contractor employees, not just top executives. The POGO letter summarizes the basic current limits on executive compensation: (1) contractors may pay their employees more than benchmarked amounts but the additional compensation will not be allowable on costs that are reimbursable on government contracts (2) the benchmarked amount is the median (50th percentile) amount over a recent 12 month period for the top five most highly compensated employees in management positions at each home office and each segment of all publically traded companies with annual sales over $50 million (*lower benchmarks will apply at smaller firms*) and (3) the benchmarks apply to defense and civilian agencies and will apply to 2010 and beyond until changed by the Office of Federal Policy and Procurement. The POGO states that in these economic times "it does not make sense to pay employees at a higher level than the benchmarked amount simply because they are not in the top five." (T*he POGO letter to the Office of Management and Budget can be found at "pogp.org/pogo-files/letters/"*

FAR Councils Issue Final Rule on Required Data System

The FAR Councils have issued a final rule to implement the Federal Awardee Performance and Integrity Information System (FAPHS) intended to help the government evaluate business ethics, expected performance of prospective contractors, rule against awarding contracts to nonresponsive contractors and provide safeguards against unauthorized disclosure of contractor sensitive information. The final rule follows a proposed rule in Sept 2009 to require the General Services Administration to establish and maintain a data system containing specific information on the integrity and performance of covered federal agency contractors. The rule will require COs to review the information in FAPHS when making an award above the simplified acquisition threshold (currently $100,000) and document the file to explain how FAPHS information was used. The FAPHS will provide a "one stop access" point for COs to make sure they review the data system and consider other past performance information when making a responsibility determination. COs must also allow offerors to provide additional information demonstrating responsibility before making a non-responsibility determination based on information from FAPHS.

The data is to include (1) non-responsibility determinations (2) contract terminations for default or cause (3) agency defective pricing determinations (4) administrative agreements entered into to resolve suspensions or debarments and (5) contractor self reporting of criminal convictions, civil liability and

adverse administrative actions. Offerors submitting a proposal over $500,000 and having more than $10 million in active contracts at the time of proposal submission must report in FAPHS information pertaining to criminal, civil or administrative proceedings where fault is found and must update this information semi-annually through the life of the contract. The FAPHS will notify contractors whenever the government posts new information to the contractor's record and they will have the opportunity to post comments regarding posted information. The new system is intended to provide more information to COs and is viewed as part of the Obama Administration's effort at increasing transparency in federal contracting (*Fed. Reg. 14059*).

DCAA Issues Guidance on Resolving DCAA and Contractor Disagreements

(Editor's Note. We have been reporting on recent developments around increased pressure on buying commands to generally accept DCAA findings. The following specifies some ground rules for resolving disagreements between DCAA and their buying commands.)

DCAA has issued guidance on resolving contract audit recommendations when there is a disagreement between the auditor and contracting officer. The guidance is consistent with most of the guidelines issued by Defense Department and the various services. The guidelines reference DOD policy that provides a process for resolving disagreements which apply primarily for forward pricing proposals. The responsibility falls on the CO to discuss "significant disagreements" with the auditor prior to negotiations. If these discussions do not resolve the disagreements, the CO is to document the discussion, identify the basis for its disagreement in the pre-negotiation memo and in a written communication to the auditor (email is acceptable). Next, DCAA may request the DOD Component's management to review the decision where the request must be made within three business days of receiving the CO's written decision. If still not resolved, both the DCAA and DOD policy provide a process for elevating disagreements starting with the branch manager, then the regional director and finally DCAA Headquarters where corresponding higher levels of DOD become involved as the process escalates. All the DCAA, DOD and services memo define "significant disagreement" in the context of forward pricing proposals as when the CO plans on sustaining less than 75 percent of DCAA's questioned costs on a proposal valued at $10 million or more. The DCAA memo emphasizes, in bold, that the DCAA Director may elevate "any" disagreement it believes require DOD attention (e.g. precedent setting or of "high interest") where such disagreement may be elevated within DOD's chain of command (10 PAS-015(R).

GAO Finds Fraud Problems in 8(a) Program and Recommends Changes

The General Accountability Office is recommending tightening 8(a) validation standards after it found 14 ineligible firms had received more than $325 million worth of sole source and set-aside contracts for the 8(a) program. The SBA 8(a) program permits agencies to award sole-source or set-aside contracts to certain small businesses owned by socially and economically disadvantaged individuals who show potential for success. Firms can maintain eligibility for up to nine years, after which the SBA considers them to have graduated from the program. Firms must also abide by subcontracting rules where, for example, an 8(a) firm must perform 50 percent of work on services contracts and 15 percent on general construction. The findings of their review showed 13 of 14 firms underreported adjusted net worth or misrepresented ethnicity of its owners. Examples of mistaking net worth was (1) one firm fraudulently failed to report a down payment on a house or (2) it claimed it had used $236K from the sale of a condo to purchase a new house where it actually transferred the condo to his wife. The latter worked since SBA regulations do not calculate the spouse's assets in calculating the owner's net worth. Other findings were that many of the firms served as pass-throughs where they obtained 8(a) contracts and then subcontracted out more than they were allowed. For example, after graduating from the program, a construction firm used three certified companies as pass-throughs where all four companies were controlled by two men who had never applied to be considered and would not have qualified as disadvantaged. The study also found numerous examples of poor front-end prevention controls for certification and detection of fraud.

The GAO made several recommendations including (1) increased usage of third-party data sources and unannounced visits to verify data reported by firms (2) data-mining techniques and analytical training for business opportunity specialists (3) specify economic disadvantage regarding income and asset levels at times of application and recertification (4) consider including a spouse's assets in calculating net worth (5) limit new firms' participation if an immediate family member is or did participate in the program in the same line of business and (6) implement consistent enforcement strategies such as suspension and debarment for misrepresentation.

DOD Proposes Rule on Award-Fee Payments

The Defense Department is proposing to amend its Defense Acquisition Regulation Supplement to address award fees by revising guidance on use of award fee evaluations and payments. The rule would revise guidance on award fee evaluations where "objective criteria" under cost-plus-incentive fee and fixed price incentive fee contracts will be used as much as possible while recognizing "subjective elements of performance" may be appropriate. Under cost-plus- award fees contracts the award-fee pool is the total available awarded fee for each evaluation period for the life of the contract where the rule would require COs ensure that at least 40 percent of the award fee be held for the final evaluation to ensure better contract performance. Also, with the exception of base-fee payments, the rule would prohibit award-fee payments other than those resulting from the evaluation at the end of an award-fee period. The rating would be conducted within 45 calendar days at the end of the period being evaluated. Finally, the award-fee payment would be consistent with the CO's final evaluation of the contractor's overall performance against the cost, schedule and performance outcomes specified in the award-fee plan (*Fed. Reg. 22728*).

Proposals on Pension Costs

The Office of Federal Procurement Policy is asking the FAR Councils to consider a proposed rule that would amend the FAR cost principles to disallow a significant portion of the costs associated with defined pension benefit plans under government contracts. The proposed rule states because the results of investments and management choices are included in calculated pension payment costs, the government suffers from the allocable portion of losses on these investments. The preamble to the draft rule states that the OFPP questions whether the government should continue bearing the costs of these decisions related to pension plans (*investment gains are not addressed at this point*) stating the recent investment losses highlights whether contractors are properly "incentivized to make prudent investment decisions." For this reason the proposed rule is considering paying contractors only for the present discounted value of incremental pension benefits accrued during the year. Currently there is some disagreement about whether the change should be a result of changes to the cost accounting standards or it should occur at the FAR Part 31 cost principles level.

In a separate action the Cost Accounting Standards Board issued a proposed rule on the harmonization of CAS 412 and 413 with the Pension Protection Act of 2006 (PPA) that includes a five year transition period intended to moderate the cost effects of the PPA. The proposed rule also accelerates the assignment of actuarial gains and losing by decreasing the amortization period from 15 to 10 years. The harmonization steps are required in recognition that the requirements to fund pension plans under the new PPA will almost always be higher than what CAS 412 and 413 prescribe for measuring contractor liability in their pension plans. The five year transition period for the phase-in of actuarial liability and minimum normal cost is intended to mitigate the initial increase in cost to allow government agencies time to adjust their budgets for higher contractor pension costs. The 10 year amortization period is intended to limit the immediate effect on pension costs where it explicitly requires the actuarial gain or loss, due to any difference between the expected and actual unfunded actuarial liability, under the PPA will be amortized over a 10 year period which is consistent with other actuarial gain or losses from other sources. (*For those who are affected go to the Fed. Reg. 25982 for more details of the proposed rule.*)

Proposal to Disallow Costs Incurred to Challenge Union Organizing Efforts

The FAR Council issued a proposal to amend the FAR to treat as unallowable contractor costs for activities to persuade employees regarding the exercise of their labor rights. The proposed rule was issued pursuant to Executive Order 13494 which was one of three labor friendly executive orders (the other two covered notification of employee rights under federal labor laws and non-displacement of qualified workers under service contracts with the federal government) issued by President Obama in Jan 2009. The proposed rule covers costs of activities directed at influencing employees of a contractor or other entity regarding whether or how to exercise the right to organize and bargain collectively. Such costs associated with these activities include preparing and distributing materials, hiring or consulting legal counsel or consultants, holding meetings, including paying salaries of attendees and planning or conducting activities by managers, supervisors or union reps during work hours. The proposal states the prohibition of cost recovery is for their activities is not intended to interfere with the ability of contractors to engage in advocacy (*Fed Reg. 19345*).

DOD Issues Final Rule on Quality Assurance and Performance Management Surveillance Plans

DOD issued a final rule amending the DFARS to ensure the requirement for quality assurance surveillance plans

and performance management plans for services be incorporated into contracts. Under the final rule, quality assurance surveillance plans will be prepared for each contract above the simplified acquisition threshold and will be prepared in conjunction with the statement of work or statement of objectives and will be included in both solicitations and contracts. The rule also requires that contracts for services have appropriate performance management or surveillance plans for work being performed about the SAP threshold (*Fed. Reg. 22706*).

CASES/DECISIONS

IR&D Costs are Allocable to the Government

(*Editor's Note. Ever since the controversial Newport News case was issued a couple of years ago we have been reporting on how the courts have been distinguishing between independent research and development costs that can be allocated to all government contracts and research and development costs that must be allocated to only one specific contract. We have also been discussing how contractors need to explicitly establish their practices for making this distinction. The following case, which we will provide a more detailed analysis in the next issue of the GCA DIGEST, provides significant insight into this evolving issue.*)

ATK, which manufactures rocket motors for commercial and government buyers, held a commercial contract with Mitsubishi to provide motors in Japan's space program. ATK incurred some costs to upgrade its motor where the upgrade work was seen to benefit multiple contracts in the future and was charged as IR&D. ATK's written practices was that unless a particular contract specifically required ATK to incur costs, the contract paid for the cost or the cost had no reasonable benefit to more than one cost objective ATK's practice was to treat research and development costs as indirect costs. The government disagreed stating the development effort was a cost of the Japanese contract and hence was disallowed as IR&D costs. The Court ruled in ATK's favor stating the development costs were properly IR&D costs. According to the court, the controlling issue was the correct treatment under CAS 418 of indirect costs "required in the performance of the contract." The Court said the costs in dispute were not specifically required by a particular contract and that ATK's disclosed practice provided a basis to charge the costs indirectly. The Court added that bid and proposal (B&P) costs are also addressed in CAS 418 where IR&D/B&P costs are lumped together. Where B&P costs benefit all the contractor's business rather than a specific contract they should be charged indirectly so IR&D costs should be given the same meaning as B&P costs (*ATK Thiokol, vs. US, Fed. Cir. No 2009-5036*).

DOD Document Release on QA and Manufacturing Processes is Improper

(*Editor's Note. In prior REPORTs we have addressed the issue of whether disclosure of certain proposed pricing and cost information should be exempt under the Freedom of Information Act. The following addresses whether other information may be exempt from FOIA disclosure.)*

Reporters submitted FOIA requests to DOD seeking information on UTC's safety measures and quality control procedures in its manufacturing of helicopters whereas UTC asserted the documents should be protected from release under the FOIA Exemption 4 that excludes disclosure when they would cause substantial competitive harm. The District Court ruled revelation of safety and QA measure did not fall under Exemption 4 where on appeal the court said UTC would need to show specific harm from disclosure. UTC argued the documents contained sensitive proprietary information about their quality control processes and their competitors would use the documents to discredit UTC in the eyes of their customers while the government asserted the QA processes were redacted (blacked out). The appeals Court ruled against the government saying in spite of the redactions, the documents still revealed details about proprietary manufacturing and QA processes and the documents described how UTC firms built and inspected helicopters and engines concluding competitors could have used that information to improve their own systems (*United Technologies Corp, vs. DOD, DC Cir. No 08-5435*).

FASA Bars Contractor's Delivery Order Protest

DataMill was an incumbent contractor providing logistics and supply database management support on the C-RAM program where the C-RAM office decided to replace DataMill's software with the COLTS program. DataMill filed a protest asserting the change was made without competition or any attempt to compare cost which violated the Competition in Contracting Act (CICA). The government moved to dismiss the protest stating the change was in connection with the issuance of a delivery order where protesting a delivery or task order is prohibited by the Federal Acquisition Streamlining Act (FASA). FASA forbids protests in connection with issuance or proposed issuance of a task or delivery order except on grounds

(1) the order increased the scope, period or maximum value of the contract under which the order was issued or (2) the order was valued in excess of $10 million. The Court sided with the government ruling it did not have jurisdiction over the protest because the decision to acquire the COLTS software had a direct and causal relationship with the issuance of a delivery order. Since FASA encompasses protests of delivery orders that have or have not been issued, FASA therefore prohibits an agency's underlying decision to conduct a noncompetitive procurement via a delivery order. In addition, the Army's sole source procurement commenced with that underlying decision so each subsequent action in furtherance of the decision was part of that same procurement process (*DataMill Inc. v US, Fed. Cl., No -9-872*).

No Violation of Anti-Retaliation Provisions of FSLA for Job Applicant

(Editor's Note. Though it's clear that employees are protected from retaliation from labor complaints here the decision addresses whether prospective employees are similarly protected.)

Dellinger worked on various government contracts as an administrative assistant when she was an employee at CACI. She filed a claim against CACI for it violating minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) while at the same time she was applying for a job at SAIC. SAIC offered her a position that was contingent on completion of a drug test and successful verification of her security clearance including the submission of a Standard From 86 used for national security positions. Dellinger listed on the SF 86 the law suit against CACI where after she had passed her drug test, SAIC withdrew the offer of employment. She filed an action against SAIC alleging the failure to employ her was a retaliatory action in response to the lawsuit. The Court ruled against Dellinger because she was never an "employee" of SAIC within the meaning of the FLSA where the definition of "employee" is "any individual employed by an employer." The Court also pointed to two other cases where non-employee job applicants are not covered by the FSLA's anti-retaliatory provisions (*Dellinger v Science Applications International Corp., E.D. Va, No 1:10-cv-25*).

Unit Pricing Rather Than Termination Costing Should Determine Entitlement

(Editor's Note. The following provides insight into how to quantify a request for an equitable adjustment under circumstances when a contract is terminated, a common occurrence during a termination settlement process.)

On its fixed price contract to design, supply and test equipment and construct power lines in Iraq additional work was required that entitled Symbion to adjust the contract price upward whereas shortly after it submitted a requested for equitable adjustment the contract was terminated for convenience (T of C). The parties agreed that Symbion was entitled to a price adjustment but could not agree on the method for quantifying it. Symbion claimed it was entitled to be paid based on the unit prices in the contract whereas the government argued that Symbion's equitable adjustment claim was "merged" into the pricing provisions of a T of C that essentially converts a fixed price contract into a cost reimbursable one where it is entitled only to costs incurred. The Board rejected the government's position and sided with Symbion stating first Symbion is seeking a contract price increase and secondly is basing the price increase on established unit prices in the contract where after the change there is changes only to the quantities to be used. Nonetheless, the Board subsequently added that Symbion should not be entitled to recover the full amount of the increased price for the extra work but the maximum amount should be governed by the maximum amount it would be entitled to under the T of C pricing provisions (*Symbion Ozdil Joint Venture, ASBCA 56713*).

Pay-As-You-Go Post Retirement Plans are Not Covered by CAS 413

GE's post retirement benefit plans were offered to eligible employees at two of its business segments – GE Aerospace (GEA) and GE Machinery Apparatus Operations (MAO). Unlike most of its pension plans, GE reserved the right to modify or terminate the PRB plans at its option and unlike its accrual accounting on its other pension plans GE accounted for the costs on a pay as you go (PAYG) basis – recognize the cost for government reimbursement purposes when the company pays the benefit to the employee. When it sold the GEA and MAO segments GE retained the PRB obligations owed to GEA and MAO employees who retired before the sale and continued to pay the costs for these employees and charge the expenses to its general overhead pools. When GE claimed the PAYG PRB costs as part of its 413 segment closing adjustment the government disagreed stating GE misunderstood CAS 413 and the purpose of a segment closing adjustment. CAS 413 provides a means to sort out actuarial gains and losses where it does not apply where there is no such gains and losses. Here, PAYG plans that do not have compellable benefits have not been allocated to contracts on actuarial calculations so there is no "previously determined costs" that need to be adjusted when a segment closing occurs (*General Electric v US, Fed. Cl. No. 99-172(C)*.

NEW/SMALL CONTRACTORS

Financing Your Contracts

(*Editor's Note. A recent April 6 memo by the Defense Procurement and Acquisition Policy Director Shay Assad is emphasizing the expanded need for all contract financing due largely to the current state of the economy. The memo states COs should consider using advance payments in "appropriate circumstances," particularly when making small business awards. Though we have discussed the issue of contract financing in the past, we thought the increased emphasis on government help in financing government contracts offers a good opportunity to briefly revisit this area. Though of great importance to those who qualify, we will omit a discussion of progress payments (FAR 32.5) and financing commercial item acquisitions (FAR 32.2) here due to lack of space and their limited applicability to our readers.)*

Few companies either can or want to finance longer term projects from their own resources when they must deliver supplies and services and wait months or years for payment. Recognizing this, the government offers an array of financing options designed to minimize cash flow drain. FAR Part 32 identifies a variety of financing techniques and describes the policies and procedures appropriate for each. We will focus on performance-based payments since those have become a focus of considerable discussion lately, advanced payments for non-commercial supplies and services and touch on loan guarantees.

Performance-Based Payments Clause

Performance-base payments are addressed in FAR 32.1003. Instead of basing payments on costs and a pre-set payment rate, a performance-based payment schedule identifies mutually agreed-to payment amounts based on meeting contract events or criteria. Events must represent integral and meaningful aspects of contract performance and should signify true progress in completing the contract effort. Events or criteria may be either "severable or cumulative." The successful completion of a severable event or criterion is independent of accomplishment of any other event while if cumulative, the successful accomplishment of an event or criterion is dependent on the previous accomplishment of another event.

The Defense Department has issued, which is frequently revised, the "Users Guide to Performance Based Payments." It states that events to be selected must be clearly and precisely defined so their accomplishment can be factually determined. The guide offers several examples but stresses the parties themselves must arrive at clear definitions of events. Though performance-based payments may "feel" like payment for work completed, performance-based payments are contract financing payments and hence are not subject to interest penalties under the Prompt Payment Act.

The salient elements of the performance based FAR section include:

- Availability of performance-based payments depends on contract price.
- If the clause is included in the solicitation then a bid stating payments will be sought does not affect the validity of the bid; however, the regulations are unclear about whether a bid conditioned on receipt of performance based payments when the clause is not included makes the bid nonresponsive.
- There is no official government-wide form that must be used though DOD has a standard form in Appendix E attached to its "Users Guide" that it "strongly encourages" contractors to use. (*Editor's Note. Performance based payments are based on predetermined events, not costs. Hence though you are not required to explain your incurred costs, in practice, many agencies still ask for incurred cost information because it is sometimes difficult to depart from familiar requirements.*)
- COs may reduce or suspend performance based payments under certain circumstances (e.g. failure to comply with significant contract requirements, performance is endangered, delinquent payments to subcontractors).
- Same flow down requirements for subcontractors if the prime contractor is receiving performance-based payments.

Noncommercial Advance Payments

Advanced payments are covered in FAR 32.1. While progress payments and performance-based payments are the preferred methods of providing contract financing for noncommercial purchases, advance payments are the least preferred method used by the government and is supposed to be used "sparingly." Unlike the two others, the availability of advanced payments are not keyed to performance though the contract price serves as the ceiling for the advance payments. They are unique payments made to a prime contractor only "before, in anticipation or for the purpose of complete performance under one or more contracts." In the normal course of events, advance payments are liquidated from payment due the contractor for completed performance.

Restrictions. Generally government agencies are prohibited from paying for goods and services in advance of their

receipt. However both military and civilian statues authorize advanced payments where (1) the contractor provides adequate security (2) such payment do not exceed the unpaid contract price and (3) the head of the agency or designate determines, in writing, either before award or during performance that such payment facilitates the national interest. Certain restrictions apply such as: (a) advanced payments may not exceed interim cash flow needs (b) such payments must be necessary to supplement other funds or credit available to you (c) the CO must find that you otherwise qualify as a "responsible" contractor (d) the government must obtain some type of prospective benefit from such payments and (e) the contract to be financed must fall within categories discussed below.

Who qualifies? The FAR identifies certain contracts as potential candidates for advanced payment based on the subject matter of the contract and legal status of the contractor. For example, contracts for experimental research or development work at nonprofit educational or research institutions are appropriate as well as with small business concerns, management and operations at government-owned facilities and classified contractors whose sensitive subject matter bars more traditional financing vehicles. In addition, FAR recognizes a number of factual situations such as where commercial financing is, as a practical matter, unavailable such as where commercial interest rates are excessive, a financial institution refuses to carry a portion of the risk under a guaranteed loan or where the remote location of contract performance precludes effective administration of a guaranteed loan. Other "exceptional circumstances" might include where urgent supply schedules and delivery delays exist. Additionally, advanced payments may be authorized in conjunction with progress payments when, for example, you are having trouble arranging financing. If one or more of these conditions exist the CO "shall generally recommend" the advance payments be authorized.

Application. Your request for advanced payments, whether sought before or during contract performance, must be submitted in writing to the CO. The application must include a reference to the solicitation or contract, a cash flow forecast for the contract period, total amount of advance payment sought, name of financial institution designated to hold such payments and a statement of your efforts to obtain alternative financing. Though not required you may want to include in your application any additional information such as that having a bearing on your overall financial condition, your ability to perform the contract without loss to the government and any anticipated financial safeguards to protect the government's interests.

Security. In addition to a priority lien on your special bank account the government is further secured by a paramount lien on all materials, supplies, equipment and other things acquired for the contract. You will be required to identify and segregate all such equipment and supplies subject to the lien. The government may, at its discretion, seek supplemental security in the form of personal or corporate endorsements or guarantees, pledges of collateral, subordination of other debts or limitations on, for example, profit distributions, salaries, bonuses and capital expenditures. In rare cases, a bond may be sought.

Interest. You will be required to pay interest on the daily unliquidated balance of all advanced payments at the higher of (1) the published prime rate at the bank where your advanced payments are deposited or (2) the federal rate established by the Treasury Department. Interest will be computed monthly and will be adjusted for prime rate variations. The government has the authority to exempt interest charges and remember, interest payments are unallowable costs on contracts.

Loan Guarantees

Federal loan guarantee are the last method under the FAR Part 32.3 to finance noncommercial contracts. Loan guarantees are available only to borrowers performing contracts related to "the national defense" – "military, atomic energy production or construction, military assistance to any foreign nation, stockpiling or space."

Procedure. Under the regulations a contractor does not receive a guaranteed loan directly from the government nor a loan guaranteed at the request of the contractor. Instead, a contractor or subcontractor or supplier requiring operating funds to perform applies to a financial institution for a loan and then the institution applies to the Federal Reserve Bank in its district.

Eligibility. The FAR generally warns COs that the contract financing methods should only apply to finance working capital, not expansion or capital assets but in the case of loan guarantees it may be used for expansion of a contractor's permanent facilities. Contractor eligibility is determined by COs at the request of the agency's financing office or other interested agency.

QUESTIONS AND ANSWERS

Q. Our controller insists that business class and first class must be disallowed under all circumstances. Is he right?

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A. Not really. Of course a company may create its own policies to disallow any costs including premium seating. However, the Federal Travel Regulations at Part 301-10.125 provides many examples of circumstances where either business class or first class seating may be appropriate. Examples of such circumstances include: no coach class is reasonably available, medical disability, exceptional security circumstances, inadequate sanitation on a foreign flight, additional costs are avoided (e.g. overtime pay, subsistence expenses for layovers) and scheduled time exceeds 14 hours.

Q. We use an overhead rate (based on direct labor dollars) and a G&A rate (based on total costs). I was reviewing some articles and sample calculations for indirect rates for government reporting and came across the attached. In this calculation the author reduces the G&A base by the overhead on B&P. Also, his calculation of the G&A base includes several unallowables. Finally, he includes overhead on B&P in his overhead pool. Are these proper practices for us?

A. The first two seem right but the third is questionable. Normally, B&P costs are in the G&A pool so if they are in the G&A base B&P costs and associated overhead should be removed. Also, the G&A base should include unallowable overhead costs, either from the overhead pool or base. B&P labor should normally be included in the overhead base when commuting an overhead rate but not included in the overhead pool.

Q. I noticed that the results you provided from the Grant Thorton survey have a very narrow band of results that often differ from our experience e.g. 6-7% profit on CPFF contracts. Does that affect the reliability of the survey?

A. Your observations coincide with ours. For example, we commonly see a wide variation of profit rates on CPFF contracts, from 4-10% rather than the narrow band of 6-7%. It underscores the inherent weaknesses of all surveys, no matter how excellent they may be. The extent of your reliance on any particular survey must be a judgment call – their use must be carefully considered but they do provide, at least, interesting rough comparisons.

Q. When we purchase equipment on a cost plus contract we are only able to
use it on that contract and the Government retains ownership. We are contemplating leasing some new equipment (computers included) and then "renting" it out to our various contracts on a monthly basis.

A. I see nothing wrong with your renting out plan but it probably needs approval on a contract by contract basis. The rental amount would likely need to be based on a cost of ownership rather than market based rental amounts (unless that is your business) since it's less than arms length.

Q. (*The following question posed to us is similar to one we found in the Oyer Newsletter No. 250.*) During the negotiation phase of my IDIQ contract, I had to certify the costs used to establish billing rates on T&M task orders. Why do I have to certify costs on individual task order proposals.

A. You should not have to certify the costs associated with the billing *rates*. However, you may be required to certify your estimates of *hours* as well as other direct costs associated with that task order.

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