GCA REPORT

(A publication of Government Contract Associates)

May - June 2011 Vol 17, No. 3

NEW DEVELOPMENTS

New DOD Policy When Only One Offer is Received

The Defense Department has issued a memo intending to increase competition when only one offer is received on a solicitation. The new policy requires that if a solicitation is advertised for less than 30 days and the DOD receives just one offer, the CO must cancel it and re-solicit it for at least 30 days. If a solicitation is advertised for more than 30 days and only one offer is received, the CO must use price or cost analysis to ensure the price is fair and reasonable rather than assume the acquisition is a competitive procurement. The CO may negotiate with the offeror on the basis of certified cost or pricing data or on data other than certified cost or pricing data as appropriate. The DOD states it realizes the policy may increase the workload of the contracting community but the benefits of more competition outweigh the cost (*see the memo at "tinyurl.com/6jgg746"*.)

DOD Will begin Making Accelerated Payments to Small Businesses

The Defense Department has issued an interim rule to apply the accelerated payment provisions of DFARS 232.903 and 906 for disadvantaged small businesses to all small businesses. In making the announcement, the department said the action "is necessary to ensure DOD implements cash flow improvements for small business firms." The cited DFARS provisions state it is DOD policy to assist small disadvantaged business concerns by paying them "as quickly as possible" after receipt of invoices. The section states that in most cases government acceptance or approval of invoices should occur within seven days and that payment should occur within 14 days where there should be no restrictions against earlier payments. However, contractors will not be entitled to interest penalties if the government fails to make early payments (*Fed. Reg. 23505*).

IRS Delays Tax Withholding on Government Contractor Payments to 2013

The Internal Revenue Service issued a final regulation May 5 that would delay implementation of a new 3 percent withholding requirement on payments from government entities to contractors until Jan 1, 2013 and exempt any payment of less than $10,000. The widely criticized withholding requirement, created by the Tax Increase Prevention and Reconciliation Act of 2005, mandates withholding of payments by any federal, state or local entity and was previously set to go into effect Jan 1, 2012. The new $10,000 exemption applies to individual payments over the course of a year but if a contractor issues a series of bills less than $10,000 but is paid in a single lump sum over that amount it is subject to the withhold (*T.D. 9524*).

New IR&D Proposed Rule is Generating Opposition

A highly controversial proposed rule that was submitted by the Defense Department is generating considerable opposition by industry and legal groups. The proposed rule would make independent research and development (IR&D) costs over $50,000 allowable only if a contractor reports the IR&D projects generating the costs on an online input form. Contractors will also need to make the data available to cognizant contract administrative officers and cognizant DCAA auditors to support the allowability of the costs. The purpose of the new rule is to address "a loss of linkage between funding and technological purpose." The proposed rule is already generating significant opposition within industry and the American Bar Association groups where typical comments are the rule lacks clarity, puts contractors' trade secrets and proprietary information at risk where IR&D projects commonly include such information and ACOs and DCAA auditors do not have the technical expertise to properly review IR&D descriptions for making allowability determinations.

Interim Rule Issued on Contractor Business Systems that Reflect Changes

Following earlier proposals that were modified, an interim rule, effective May 18, was passed that aims to improve oversight of contractor business systems by

DCMA and DCAA and allows contracting officers to withhold payments because of significant deficiencies. Under the rule, contractor business systems are defined as accounting systems, estimating systems, purchasing systems, earned value management systems, material management and accounting systems and property management systems. The rule also includes a clause that allows COs to withhold a percentage of payments when contractors' business systems have significant deficiencies.

Several changes over earlier proposals for the rule were incorporated that have been characterized as "modestly better."

1. Payment withholds clarified. No withholds can be made until a CO makes a final determination to disapprove of a business system which must follow a CO's evaluation of a contractor's response to an initial determination. The total percentage of withheld payments for a contract cannot exceed 10 percent and the total percentage withheld for a significant deficiency for one system cannot exceed 5 percent. It also requires a payment withhold be reduced by at least 50 percent if a CO has not determined whether the contractor has corrected significant deficiencies or there is a reasonable expectation that corrective action has been implemented.

2. The definition of "significant deficiency" has been revised to be "a shortcoming in the system that materially affects the ability of officials of the DOD to rely upon information produced by the system that is needed for management purposes." Commentators have expressed approval of this attempt to introduce a materiality factor but still DCAA audit guidance is inconsistent with the rule's definition.

3. The interim rule now applies only to contracts that are subject to cost accounting standards which exempt all small businesses.

4. Other changes now (a) require that no significant deficiencies remain before a system is approved (b) provide in writing a description of each significant deficiency to allow a contractor to understand the problem and (c) allow for a timeframe approved by the CO for completion on an initial earned value management system validation.

Final Rule Issued on Contract Close Out Procedures

The FAR Council issued May 31 a final rule amending the FAR procedures for closing out contract files that include clearing final patent reports, changing criteria for using quick closeout procedures and descriptions of what is an adequate final indirect cost rate proposal and supporting data. The final changes, incorporating subsequent changes from the original proposal, are:

1. FAR 4.804-5. Setting forth the time frame for clearing a required final patent report.

2. FAR 42.705. Requiring the cognizant auditor to determine the adequacy of the contractor's incurred cost proposal referencing FAR 52.216. Subsequent changes to the interim rule clarifies the role of the auditor as performing reviews of the proposal for adequacy and provides findings of inadequacy to the contractor and CO and also prepares an advisory audit report after the proposal has been deemed to be adequate.

3. FAR 52.216-7. Describe what data must be submitted in an adequate final indirect cost rate proposal and what supplemental data (required for audit) may be submitted. (*Editor's Note. This section effectively establishes in the FAR that the DCAA ICE model is the required format for the incurred cost submittal rather than only a recommended format as in the past.*)

4. FAR 52.216-8, 9 and 10. Requires the CO to withhold fixed fees, fixed fees on construction and incentive fees, respectively, to protect the government's interest and encourage timely submittals of incurred cost proposals.

A significant change was made to FAR 42.708(a)(2) to lower the percentage limitation in the existing quick-closeout criteria to $1 million instead of $4 million in the original proposed rule. The limitation allows use of quick closeout procedures on specific contracts if the total indirect costs allocated to any one contract does not exceed the $1 million amount (*Fed. Reg. 31403*).

DOD Issues Final Rules on Commercial T&M Services

The Defense Department has adopted as final, with minor edits, an interim rule published in July 2009 specifying when time-and-material and labor-hour contracts may be used for the acquisition of commercial items. The final rule adds a new section under Part 212 of the DFARS saying DOD may use T&M and LH contracts for the acquisition of commercial items only for services acquired in support of a commercial item, emergency repair services and "other commercial services" if the contracting officer determines certain criteria have been met. These criteria include (1) the services being acquired are commercial and "commonly sold to the general public through use of" T&M and LH contracts and (2) use of such contracts are in the government's interest (*Fed. Reg. 12810*).

In a separate move, the DOD has issued a final rule on commercial services that are not sold competitively in substantial quantities to the commercial marketplace (the most common type of commercial services). If they are "of a type" sold to the commercial marketplace they may be considered commercial items only if the CO determines, in writing, the offeror has submitted sufficient information to evaluate price reasonableness. If price reasonableness cannot be determined on prices for similar items, the CO will need to determine such reasonableness by requesting "relevant cost or pricing data from the contractor" (*Fed. Reg. 14568*)

DCAA Issues Audit Guidance

♦ Discontinuation of Financial Condition Audits

DCAA has issued audit guidance on its role in conducting financial risk assessments and financial capability audits. Effective immediately, DCAA will no longer initiate annual financial conditions risk assessments or financial capability audits as separate audit assignments. The guidance alludes to regulatory requirements for the contracting officer to make a determination of financial responsibility of contractors where the Defense Contract Management Agency has established a Financial Capability Group to perform all financial analysis for DOD. When performing its audit risk assessments of contractors, auditors will contact the CO to obtain financial condition information and if the CO does not have the information DCAA should request the CO to contact the DCMA Group to obtain such information.

However, the guidance does point to some circumstances where DCAA may be involved. DCAA will conduct financial capability audits "when requested by the CO" or when there are "unique circumstances." DCAA may get involved based on CO requests from non-DOD agencies when DCMA has not performed a financial capability audit. Also when information about a contractor's financial condition is not available from the CO the auditor, "at a minimum," will perform trend analysis of key financial statement elements (e.g. profit/loss, sales, cashflow, operating activities, working capital). Finally, DCAA is tasked with completing all in-process audits (*11-PPD-077(R*).

♦ Voucher Audits at DHS

DCAA has issued a memo stating it will be responsible for conducting interim public voucher audits of Department of Homeland Security contracts. The memo provides guidance similar to public voucher audits it conducts for the Defense Department and other agencies it contracts with. Highlights include: (1) all vouchers in excess of $1 million and all first vouchers under a DHS contract or delivery order will be audited (2) if there is not direct billing, DCAA will sample remaining vouchers using DCAA sampling techniques (3) if there is direct billing, those invoices should be included in the universe of vouchers it will select for audits and (4) a CO may request a review of any specific voucher. The guidance also states that if an auditor identifies a concern (e.g. inaccuracies, questionable or unsupported costs) the auditor should notify the DHS CO in writing where disapproved costs are identified and a recommendation is that the amount questioned be deducted from the next available voucher (*11-PPD-006(R*).

♦ Cost Savings from Operations Audits Expanded to Six Years

DCAA has expanded the period used for estimation of cost savings resulting from its operations audits from one year to a maximum of six years. DCAA conducts what it calls operations audits, usually at large contractors, in a variety of areas it believes contractors can save money if certain recommendations made by DCAA are implemented (e.g. energy conservation, IT improvements). An estimate of annual cost savings are made where those annual savings can be multiplied by a certain number of years which under the current guidance can now be six years. These "cost savings" are added to other yearly statistics of costs questioned to help DCAA demonstrate its value to the tax payer. DCAA often asserts these future cost savings estimates should be factored into estimates of future costs for proposals and rate projections, lowering appropriate estimated costs put forward by contractors. So, for example, an estimate of $1 million in energy conservation savings each year would result in DCAA looking for a $1 million reduction in estimated utility costs for relevant years (*11-OTS-024('R*).

New Proposed Rules on Conflict of Interest Rules

A much anticipated proposal has been issued on FAR standard organizational conflict of interest (OCI) clauses and contracting officers' responsibilities associated with OCIs arising out of task and delivery order contracts. The proposed rule, applicable to all buying agencies, takes a different approach than that of the Defense Department's final OCI rules published last December. Here, an analysis on the risks posed by OCIs is presented and two types of harm are posed – harm to the integrity of the competitive acquisition system and harm to the government's business interests. The risk of harm to the acquisition system from OCI's must be substantially reduced or eliminated while the risk of harm to the government's business interests "may sometimes be assessed as an acceptable performance risk."

The proposed rule (1) refines the definition of OCI to reflect the two types of situations giving rise to concerns in this area (2) moves coverage of OCIs from FAR subpart 9.5 to a new subpart 3.1206 (3) consolidates in a new section of FAR 3.1206 the treatment of CO's responsibilities including the steps they must take during the different phases of an acquisition and (4) protection of nonpublic information to which contractors have access separately from OCIs.

In expanding on the fourth section, the proposed rule states contractors should be contractually obligated to protect all nonpublic information they obtain when performing (whether from the government or third parties) with certain exceptions such as already possessing it. They also propose that contractors should require all employees with access to nonpublic information to sign nondisclosure agreements where obligations from these agreements will be enforceable by the government and third parties. The proposal adds that inclusion of an "access" clause to protect information disclosed to a contractor and a "release" clause to notify third-party information owners of their rights when information is improperly used or disclosed should provide "thorough protection while eliminating the need for many interconnecting nondisclosure agreements." Early comments we have seen are largely positive about the changes. (*Fed. Reg. 23237*).

Proposed Rule on Service Contracting Data Reporting

A proposed rule, with a follow-on clarifying rule, was made to specify the information contractors must submit for inclusion in civilian agencies' annual inventories of service contracts. Required data will include (1) contract number and as applicable, task or delivery order number (2) total dollar amount invoiced for services performed during the previous fiscal year under the contract (3) the number of contractor direct labor hours expended on the services performed during the previous fiscal year and (4) data reported by subcontractors, which applies only to first-tier subcontractors that will include (a) subcontract number and, if available, DUNS number and (b) number of first-tier direct labor hours expended on services.

To help contractors manage the "significant" challenges of the requirements it is imposing phased-in thresholds for the new reporting requirements over four years as $5 million in FY 2011, $2.5 Million in FY 2012, $1 Million in 2013 and $500,000 in FY 2014 and afterwards. The follow-on clarification states the reporting requirements will apply to new fixed price contracts for indefinite-delivery contracts such as IDIQ, Federal Supply Schedule and multi-agency contracts. The correction also makes clear that for cost reimbursable and T&M and Labor Hour contracts the simplified acquisition threshold (currently $100,000) will apply. The inventories of service contracts are intended to help agencies better understand how contracted services are helping support its missions (*Fed. Reg. 22070 and 24443*).

CASES/DECISIONS

Cost Decreases Must be Offset Against Cost Increases for Voluntary Accounting Changes

In 2004 Raytheon implemented a voluntary change in its accounting practices for measuring pension costs which shifted costs to future accounting periods. DCAA determined that the accounting change resulted in a $57 million decrease in costs allocable to flexibly priced CAS-covered contracts and $41 million decrease in costs to CAS-covered fixed price contracts. DCAA and the CO asserted the $41 million represented a windfall profit for Raytheon (the price on the fixed price contracts were based on projections of higher costs) as well as double charging since the costs in the fixed price work would be deferred to a later period when they would again be charged to the government. DCAA asserted the $57 million decrease in costs to cost type contracts should not be factored in since the decrease in costs will eventually be offset against higher future pension costs charged to cost type work.

The Board ruled against the government stating the CAS Board regulation "requires a price adjustment for an accounting change only when the government pays increased costs 'in the aggregate' considering all contracts affected by the change." It rejected the government's assertion that Raytheon realized a windfall profit as a result of the change since the unanticipated windfall of $41 million on the fixed price work is exceeded by the $57 million "windfall reduction" in costs to the government that was not anticipated. As for the argument about double charging in the future, the Board stated that was "entirely speculative." The Board ruled the accounting change did not result in any increased costs in the aggregate (*Raytheon Co. ASBCA 56701*).

Court Denies Damages For Unabsorbed Overhead Costs

The Air Force awarded Redlands a contract to resurface a parking area where a work suspension order delayed the start of performance for nearly four years. Redlands put forth a claim for $699,000 that included computation of unabsorbed overhead (amount of indirect costs for the business as a whole that would have been allocated to the contract during performance) using the so-called Eichleay formula (computing a daily overhead amount applicable to the contract multiplied by number of days). Though the court found there were constructive changes to the contract entitling Redlands to cost recovery it rejected the part of the claim asking for unabsorbed overhead. To receive Eichleay damages, which is the exclusive method for calculating unabsorbed overhead during a government caused delay, a contractor must prove (1) there was a government-caused delay (2) the delay occurred after the start of performance thus either extending the period of performance or contractor finished on time but would have finished sooner and (3) the delay required the contractor to remain on standby during the period of suspension. Here, Redlands had not begun performance before the suspension order was issued hence it could not recover Eichleay damages. Also the Court ruled the suspension did not require Redlands to remain on standby during the four year suspension period (*Redlands Co. v US, Fed. Cl No. 08-606*).

Increased Vendor Prices Did Not Excuse Failure to Deliver

(*Editor's Note. The following illustrates the need to negotiate an Economic Price Adjustment clause when possible in certain contracts.*)

New Era received a fixed-price contract for a variety of items where the government would submit delivery orders for the items. When the government issued three DOs for fuel pumps New Era requested cancellation of them when it learned that a manufacturer had changed its discount policy ending New Era's status as a discount recipient. The government terminated the three DOs for default where New Era appealed the terminations. The Board explained that its failure to perform establishes a case for default termination where New Era has the burden to demonstrate its failure to perform is excusable. New Era argued its refusal to perform was excusable under FAR 52.249-8(d) because the price increase did not occur as a result of its own fault or negligence. The Board sided with the government stating prior cases said a contractor alone is responsible for the deficiencies of its suppliers and subcontractors absent a show of impossibility. Here New Era failed to perform solely because of the fuel pumps' cost increase resulting in the company's failure to honor its agreed to price and delivery. The Board said a contractor accepts the risk of increased costs as well as possible benefit of decreased costs under a firm fixed price contract. The Board concluded the government could have borne the risk of increased costs if it agreed to include an economic price adjustment clause in the contract which was not the case here (*New Era Contract Sales, ASBCA NO. 56661, etc.*)

Costs Incurred in Anticipation of Contract Performance are Recoverable Under Terminations

After the government terminated a contract for providing the Navy a fixed price commercial vessel, Red River sought costs for interest, insurance and other expenses incurred both before and after the vessel was delivered. An appeals board sided with the government citing FAR 52.212-5(I) stating Red River was entitled to recover only costs incurred after a contract is terminated and not costs incurred in preparation for contract performance. The Federal Circuit reversed the board's ruling stating prior case interpretations of FAR 52.212-5(I) allow payment of reasonable charges resulting from the termination, which included costs reasonably incurred in anticipation of performing the entire contract. The court explained that the cited FAR section establishes the presumption that a commercial item contractor will receive a percentage of the contract price reflecting the percentage of work it performed before the notice of termination. But further, the provision gives contractors an opportunity to demonstrate entitlement to other reasonable expenses following a termination. So the court held FAR 52.212-4(I) references to reasonable charges did not preclude Red River from receiving costs it incurred solely for contract performance or anticipation of performance where here the contractor should receive settlement costs incurred in anticipation of contract performance provided they are not included in the percentage-of-work-performed payment and provided the contractor could not reasonably have avoided it (*Red River Holdings v US. D. Md. No. 8:10*).

Several Incurred Costs Considered for Unallowability and Subject to Penalties

(*Editor's Note. The following case is unique because it illustrates allowability of several types of costs and whether they are "expressly unallowable" and subject to penalties.*

In its incurred cost submittal DCAA questioned and the ACO agreed that several costs were unallowable and subject to penalty provisions under FAR 42.709-1. The questioned costs and resolution are identified below:

1. Insurance premium of $2,400 on a $1 million life insurance policy on the sole owner. This disallowance was sustained because FAR 31.205-19(e)(2)(v) allows the costs of insurance on officers' lives only when they represent additional compensation. The premium costs were not identified as a portion of compensation so they were unallowable. Since the FAR expressly identifies the condition for allowability, it was upheld to be expressly unallowable.

2. Jeep worth $23,000 provided to an employee and considered part of the fringe benefit pool. The costs was allowed because it was considered to be compensation subject to FICA withholding.

3. Several other costs were held to be expressly unallowable such as $6,080 for employee morale, $776 boat title taxes and $3,866 for a business meeting. As for whether these expressly unallowable costs were subject to penalty the board turned to FAR 42.709-1 that discusses three bases for waiving the penalty: (a) contractor withdraws the proposal before audits begin (b) the amount of the unallowable costs that are allocable to the relevant contracts are $10,000 or less or was inadvertently included in the proposal or (c) where the contractor demonstrates to the CO its has established policies and training and an internal control and review system to assure unallowable costs are screened. All these unallowable costs above did not meet the $10K threshold and hence were not subject to penalties.

4. Related party office rent of $28,000 which is expressly unallowable and does not meet any of the waiver conditions (*Thomas Associates, ASBCA No 57126*).

SMALL/NEW CONTRACTORS

Clarification of "Transparency" Disclosure Requirements

(*Editor's Note. We frequently receive questions pertaining to recent disclosure requirements issued in the new push for "transparency." We found a good article that addresses both these new requirements and the their possible implications for those contractors disclosing the information in the March 2011 Contracts Management issue written by Tom Marcinko of Aronson, LLC.)*

Recent efforts to expand "transparency" in government – Federal Funding Accountability Act of 2006, Government Funding Transparency Act of 2008 – has expanded requirements to disclose certain information in a variety of databases. These include:

Subcontractor Data. Prime contractors must report information on first-tier subcontract awards by the end of the month following the month of award of a first tier subcontract with a value of $25,000 or more. The information will be reported at www.fsrs.gov, that contains reporting instructions and it must be updated any time a subcontract modification changes any previously reported data. It is similar to information contained in the Central Contractor Registration. If prime contractors have less than $300,000 in gross revenue during the previous year they do not have to report..

Prime Contractor Executive Compensation. Prime contractor executive compensation reporting is required if the prime contractor (1) received 80 percent of its revenue from government sources in the last fiscal year (2) received $25 million in revenue from government sources and (3) the public does not already have access to executive compensation information via the SEC or IRS. If these conditions are met, prime contractors must report the names and total compensation of each of the five most highly compensated executives for the contractor's preceding fiscal year by the end of the month following the month of contract award and annually thereafter and reported at www.ccr.gov.

"Executive" is defined as officers, managing partners or any other employees in management positions. "Total compensation" includes the cash and non-cash dollar value earned during the preceding fiscal year and includes (1) salary and bonus (2) award of stock options and stock appreciation rights (use the dollar amount recognized for financial reporting purposes in accordance with FASB No. 123) (3) earnings for services under non-equity incentive plans (this does not include group life, health, hospitalization, medical reimbursement plans that do not discriminate in favor of executives) (4) change in pension value (present value of defined benefit and actuarial pension plans (5) above-market earnings on deferred compensation which is not tax qualified and (6) other compensation if the aggregate value of such other compensation exceeds $10,000 (e.g. severance, termination payment, value of life insurance paid on behalf of employee, perquisites or property). *Note this definition of "executive compensation" differs from that applying to executive compensation defined in FAR 31.205-6.*

Subcontractor Executive Compensation. The prime contractor is required to report subcontractor executive compensation if in the subcontractor's last fiscal year, the subcontractor meets the same 80 percent, $25 million and not otherwise available criteria established for prime contractors. If these conditions are met, the prime contractor shall report the names and total compensation of the five most highly compensated subcontractor executives by the end of the month following the month of a first-tier subcontract award with a value of $25,000 or more and annually thereafter at www.fsrs.gov. It appears as if the reporting is not required if the prime contractor has less than $300,000 in gross revenue in the previous year.

Information Regarding Responsibility Matters. To ensure prospective contractors have a satisfactory record of integrity and ethics FAR 52.207-7 will be included in solicitations if the resulting contract is expected to exceed $500,000. This clause provision requires offerors who have more than $10 million of current federal contracts to populate the Federal Awardee Performance & Integrity Information System (FAPIIS) with information pertaining to criminal, civil, administrative proceedings related to federal contracts or grants through which a determination of fault was made. There is a five year reach back period where the disclosure requirements apply to both contractors and "principals" (officer, director, owner, partner or person having primary management or supervisory responsibilities within a business entity). An update clause at FAR 52.209-8 requires the winning contractor to update the FAPIIS semiannually. Reportable information is whether the contractor or a principle has been the subject of a proceeding at the federal or state level resulting in any of the following dispositions (1) criminal proceeding in a conviction (2) in a civil proceeding, a finding of fault or liability that results in the payment of a monetary fine, penalty, reimbursement, restitution or damages of $5,000 or more (3) in an administrative proceeding, a finding of fault or liability that results in a monetary fine or penalty of $5,000 or more or the payment of a reimbursement, restitution or damages exceeding $100,000 or (4) in a criminal, civil or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgement of a fault by the contractor if the proceeding could have led to any of the outcomes specified above.

In stating the "information will not report itself" the author recommends assigning reporting responsibilities within the company. Subcontractors should be asked during the preaward stage whether their gross revenue is less than $300k and if it is whether they meet the 80 percent/$25 million thresholds so the prime will know whether it needs to report the subcontractor and compensation data. The subcontractors will need to be notified the information is to be made public and a designate in the organization should be made responsible for collecting and reporting the information (e.g. purchasing). Gathering the executive compensation information should fall on another person (e.g. CFO). A separate tracking system needs to be established to update information on subcontractors' subcontract activity and compensation. Though required information in the CCR may suffice for the prime contractor the subcontractor information will need to be provided by them. Finally, contractors with more than $10 million of current federal contracts should begin preparing to report any applicable criminal, civil or administrative findings of fault (e.g. legal). It should be emphasized that misdeeds committed by principals within the last five years (even when they did not work for the contractor) have the most chances of not being detected where standard criminal background checks may not be sufficient.

Though the call for full transparency is dictating current disclosure requirements the author states there may be unintended consequences that may undermine the enthusiastic benefits being touted. For example, disclosure of subcontractor information will show how winning teams were structured. Disclosure of executive compensation may be very sensitive (e.g. create poor morale when employees see differences in pay, demands by executives of other companies for higher pay, neighbors knowing their neighbors' pay) causing some firms to choose to withdraw from government contracting. Also, listing of misdeeds with little explanation may result in defacto debarments by COs and prime contractors or focus on individuals may lead them to seek work in other industries.

QUESTIONS AND ANSWERS

Q. I thought you had reported that proposed forward pricing rates will no longer be audited by DCAA. Why are they auditing our proposed rates for our cost type contracts?

A. Yes we also were quite surprised to see actual increases of audits of provisional billing rate proposals and put the question to our auditor friends. They are saying they make a distinction between forward pricing rate agreement proposals and forward pricing contract proposals and provisional billing rates applicable to cost type contracts. The auditors indicate that they are no longer auditing either FPRA proposals or fixed price

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proposals under $10 million or cost type proposals under $100 million (where they tell us many DCAA auditors are transferring to the Defense Contract Management Agency to conduct their audits) but that they are auditing provisional billing rates. As we have indicated before, not only are provisional billing rates being audited but they are being audited in much greater detail than we have ever seen.

Q. We have a CPFF job as a subcontractor to the Navy. One of the positions we are filling involves an ongoing recruiting fee of $5/hr to an outside recruiting firm. Since there are no ODC's allowed, is there a way for us to recover our cost?

A. It really depends on what your established practices are. Many companies' established practice is to charge all recruiting fees to overhead (or G&A if for G&A labor) even if a particular fee is identifiable with one contract. If its a new type of expense, you can always establish a practice going forward.

Q. We are submitting a proposal this year on a small business set aside contract to be awarded next year. Using the three year average, we would still be considered a small business this year since our three year average revenue for our NAICS code would still be below the small business size threshold but because of increased business we would no longer be a small business next year since our three year average would put us above the small business threshold. What year, the year of proposal or award, would apply and are we vulnerable to other offerors protesting the award.

A. The FAR states that to be eligible for award as a small business, an offeror must "represent in good faith that it is a small business at the time of its written representation." This would indicate the date of submission of the proposal, in 2011, would be the time to figure out whether you are a small business so it appears as if you can claim small business status this year when you submit your proposal.

However, the FAR also provides that the "contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a small business unless (1) another offeror or interested party challenges the concern's small business representation or (2) the contracting officer has reason to question the representation." This could happen in 2012 where another bidder or even government official may cry "foul" and challenge your representation. If that is the case, somebody can assert you are not a small business as of 2012 and hence could jeopardize your ability to be awarded a contract as a small business in 2012.

Also be aware that an offeror's representation that it is a small business is not binding on the Small Business Administration. If an offeror's small business status is challenged, the SBA will evaluate the status of the concern and make a determination, which will be binding on the contracting officer, as to whether the offeror is a small business.

Q. Can we burden our subcontractor costs with G&A if those costs include subcontractor profit?

A. My read of the FAR requirements is you can burden your "subcontractor costs." The billings from the subcontractor are your costs regardless of whether those billings are costs or fees to the subcontractor. Two possible exceptions come to mind: (1) if the subcontractor is affiliated with you in which case you may burden only the transferred costs not the fee and (2) if the subcontract costs represent over 70 percent of your contract costs then recent rules limiting subcontract pass-through costs may apply (see our last GCA REPORT)..