GCA Report

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NEW DEVELOPMENTS

DOD Issues BBP 3.0

The Defense Department issued April 13 its Better Buying Power (BBP) 3.0 program. As opposed to earlier versions of 1.0 and 2.0 that addressed efficiency and productivity, the current reform initiative focuses on innovation to maintain DOD technological superiority with an emphasis on using commercial technology and products. It directs acquisition professionals to improve purchases from commercial companies and sets a Fall 2015 deadline for identifying changes that could ease access to commercial products. Most comments have praised the new emphasis but point out that the current culture of the Pentagon on forcing products to meet inflexible and detailed specifications is in conflict with the commercial world's design of products to appeal to as many customers as possible. While BBP 3.0 emphasizes more acquisitions of commercial items by commercial companies and streamlined procurement procedures, many commentors stress the government's increasing tendencies to narrow the definition of what a commercial item is and for COs to request more and more cost data to ensure they meet the requirements to pay prices that are "fair and reasonable" conflicts with its BBP program. *(Documentation of BBP 3.0 can be googled.*)

GSA Proposed Transaction Pricing Rule Generates Criticism by Industry

We reported last issue that the General Services Administration has proposed requiring vendors on government-wide procurement contracts and Federal Supply Schedule (FSS) contracts to submit transaction pricing data that will largely displace burdensome reporting requirements of the price reductions clause (PRC) at GSAR 52.238-75. Under the proposed rule, GSA would implement a new pilot program whereby contractors would no longer be subject to the "tracking customer" provisions of the PRC. The PRC provisions require contractors to monitor the prices it offers to the customer or category of customers that form the basis of award for a specific contract and then provide the government a corresponding price reduction when the contractor offers lower prices for these customers. Notably, the new rule would retain provisions of the PRC that require price reductions based upon changes to commercial catalogs, schedules or price lists that serve as the basis of award. Rather than rely on "tracking customer" requirements the proposed rule would shift the focus to a comparison of prices the government has paid across agencies and vendors for the same or similar goods and services. To obtain this data, contractors will be required to submit monthly reports through an online centralized GSA portal with transactional details of their sales to the government under FSS or other government-wide contract vehicles. Reports will include such details as unit measures, quantum of items sold, price per unit and total price.

Several critical comments by industry and government groups have been generated. For example, the Coalition for Government Procurement (CGP) says the proposal underestimates the cost contractors will incur in submitting the necessary information where the required monthly information is not readily available so existing information systems would need to be built or customized, written policies prepared, workers trained and vetting of data established. In addition, the saving associated with the PRC is overstated where the government still requires updates on sales to commercial customers. The Council of Defense and Space Associations (CODSIA) and Project on Government Oversight (POGO) state the GSA already possesses much of the data the proposed rule calls for where it already orders against GSA contracts and pays its vendors. The Office of Inspector General of the GSA also is criticizing the proposed rule stating it will generate a "tidal wave" of information without providing much benefit in improving price analysis or validating that prices are fair and reasonable.

FAR Proposed Rule Requires Disclosure of Labor Law Violations

The FAR Council has issued a proposed rule and guidance May 28th to require contractors to disclose violations of labor law when COs are considering responsibility determinations. The proposed rule would create FAR 22.20, Fair Pay and Safe Workplaces and follows a July 2014 Executive Order No. 13673 that required

prospective contractors to disclose violations of labor laws in the last three years and for COs to consider the disclosure when making responsibility determinations. The proposed rule and Labor Dept. guidance will require disclosure of administrative merits determinations, civil judgments or arbitral award or decisions for violation of 14 listed labor laws and executive orders. The rule will apply to contracts worth $500,000 or more, excluding contracts for commercial off-the-shelf items and would make disclosure before a CO responsibility determination is made and twice yearly during contract performance. The proposed rule has a 60 day comment period to determine state laws that are equivalent to the federal laws listed. The prior EO and current proposal are generating criticism from various industry groups asserting they are "absurdly cumbersome and it "robs" contractors of due diligence where allegations are treated as facts and attempts to rewrite legislation through regulations. Other comments are saying that adding additional penalties to ones already prescribed is tantamount to "double jeopardy" and adding them for contractors is a "double standard" (*Fed. Reg. 30575*)

FAR Rule Incorporates Anti-Bias Mandates Covering Sex and Gender Discrimination

An interim rule is amending the Federal Acquisition Regulation to prohibit federal contractors and subcontractors from employment discrimination based on sexual orientation and gender identify. The FAR revision implements a July 2014 executive order that added sexual orientation and gender identity to the list of classes protected from discrimination under EO 11246. The executive order makes clear the federal government will not do business with anyone who discriminates against lesbian, gay, bisexual or transgender (LGBT) workers. The FAR rules rely on definitions of LGBT used in compliance material developed for the contractor community by the Department of Labor's Office of Federal Contract Compliance Programs (*Fed. Reg. April 10*).

Small, New and Mid-Tier Firms Increase Their Share of Government Contracts

Analyses by Bloomberg Government analysts provide some interesting statistics on government contracting trends.

Despite the drop in DOD budgets during the era of sequestration, the analysts said small businesses increased their share of defense contracts from 2010 through 2014, increasing competitive awards from 20 percent of total awards to almost 35 percent. They said that set asides played an important role, outdistancing dollars awarded in full and open competitions.

Despite budget decreases in the prior four years, 2014 showed an increase of vendors winning their first contracts. The change also showed an increase in new small businesses receiving contracts. Manufacturers contributed to the new business upswing while service firms continued a five year descent. The rise in new small businesses is attributable to the decline in spending on multiple-award contracts that remain in a few companies for several years, small business contracting reforms where agency managers are now directly accountable for meeting small business goals and small business advocates at agencies now have an earlier role in federal procurement planning.

In addition to small businesses gaining at the expense of large businesses, it is surprising to see that mid-tier federal contractors gained market share, even more than small businesses to 28.4 percent of federal contracts in 2014. The Bloomberg Gov study said mid-tier firms are considered those with $25 million to $500 million in annual federal contract dollars. The increase comes even where federal contract spending has shrunk 18 percent and number of vendors have fallen by 21 percent over the last five years. The surge in mid-tier contracting is attributable to mid-sized contractors forming and keeping strong ties with their top customers and leveraging long-standing relationships into adjacent markets. The study showed that about 53 percent of mid-tier companies in 2010 were still mid-tier in 2014 while many large companies slipped to the mid-tier range.

Measures Introduced to Ban Contracts for Inverted Companies

A group of Democrats introduced legislation aimed at preventing federal contracts from going to companies that have undergone a corporate inversion to lower their tax bills. Both the House and Senate have similar versions that would bar contracts for companies that have acquired a smaller, foreign company located in a low-tax jurisdiction and redomiciled their headquarters there. Supporters of the bills state these companies take advantage of our education system, R&D incentives, skilled workers and infrastructure which are all paid by US taxpayers but "when the tax bill comes due they hide overseas." Some pundits have stated the bill is unlikely to move forward as it lacks support from the Republican majorities but others dispute this.

Proposals to Increase Thresholds for Simplified Acquisitions and Micro Purchases

A bill has been introduced that would increase the simplified acquisition procedure (SAP) threshold from $100,000 to $500,000 and the micro-purchase threshold from $3,000 to $5,000. The SAP provides more streamlined procedures for contracting where, for example, documentation for obtaining competitive quotes can be limited to notes in the file while micro-purchases need not be competed.

The EPA Seeks to Clarify Status of Fixed Fee When Orders are Less than Maximum LOE

The Environmental Protection Agency reviewed its EPAAR clause 1552-211-72, Level of Effort Cost Reimbursement Term Contract to clarify its responsibilities when the agency orders less LOE than the maximum LOE specified in the clause. So, if the clause specifies 100,000 hours for a given period of performance but the contractor only provides 70,000 hours how should the fixed fee be treated? The clause provides that a downward adjustment will be made to reduce the fixed fee by the percentage by which the total LOE is less than 100 percent specified in the LOE clause. In other words, the fixed fee amount will be reduced by 30 percent using the same 100,000/70,000 hour example.

Government Continues to Challenge Commercial Item Eligibility

The Defense Department has been implementing rules in a manner that "almost negates the concept as intended when written in 1995." Prime contractors have been experiencing this for the last few years and now DOD is focusing on prime contractor commerciality decisions related to subcontractors. The methodology is to review prime contractor's commerciality decisions which has generated numerous prime/sub disagreements over commercial items. Though many primes disagree with these determinations they nonetheless do not challenge them because the threat of a disapproved purchasing system is not worth the challenge. Much of the threats do not lie in the definition of a commercial item but in subcontractors not providing adequate sales data to substantiate their proposed prices are fair and reasonable.

Industry groups are also raising concerns over the recent BBP 3.0 changes that will revise the definition of the term "commercial item" to eliminate items and services merely offered for sale, lease or license by September 2015. Under the proposed BBP 3.0 an action plan is to be developed to establish pricing centers of expertise to facilitate commercial item determinations. The Professional Services Council states these determinations should be made only by contracting officers and any narrowing of commercial item definitions will "increase barriers to commercial technology and impose yet more unproductive requirements on industry" resulting in withdrawal of technology companies from the government marketplace.

Proposal to Evaluate Joint Venture/ Partnership Participants Separately

The Senate Small Business and Entrepreneurship Committee has issued a bill to ensure small businesses receive proper consideration when joint venturing or teaming in response to bundled, consolidated or multiple-award contracts. The bill would require COs to evaluate qualifications of all team members and joint venture participants rather than rely only on the past performance or financial responsibility of the joint venture or prime contractor. The bill would require COs to certify that the "status" of the small business team or joint venture members is the same each year as it was when the award was made which raises some concerns on the use of this information since current regulations provide that small businesses may experience a change in size or status and still be entitled to perform on the contract.

Employees May be Eligible for FMSA Benefits if They Transfer to Successor Contractors

The Family and Medical Leave Act (FMLA) defines an "eligible employee" as one who has been employed by the employer for at least 12 months and who has worked at least 1,200 hours during the previous 12 month period. The FMLA explicitly covers "successors in interest" employers which courts have traditionally interpreted as applying to employers that acquire or merge with other companies where the length of service includes service with the successor employer and the predecessor employer. An attorney writing in the May 5 edition of the Federal Contract Report states that recent cases have been applying the "successor in interest" test to government contractors that assume a predecessor contractor's employees even though no acquisition or merger has occurred.

DOD Memo on LPTA, Cost type and T&M Contracts

The following is extracts from a recent Department of Defense memo on lowest price, technically acceptable (LPTA) contracts. LPTA is the appropriate source selection process to apply only when there are well-defined requirements, the risk of unsuccessful contract performance is minimal, price is a significant factor and there is neither value, need nor willingness to pay for higher performance. LPTA has a clear but limited place in the source selection "best value" continuum. Used in appropriate circumstances and combined with effective competition and contract type LPTA can drive down costs and provide a best value solution. LPTA can offer a streamlined and simplified source selection approach to rapidly procure commercial and non-complex services and supplies but if not applied appropriately, DOD can miss an opportunity to secure an innovative, cost effective solution while maintaining a technological advantage.

The memo states time and material contracts lack incentives for cost control and labor efficiencies because the fully burdened labor rates are fixed for the skill levels and mix requiring the government to pay the full labor rate despite contractor efforts to reduce their own costs by seeking lower labor rates. On the other hand, cost plus fixed fee labor of effort (CPFF LOE) is well suited for professional and management services because it requires a contractor to perform a set number of hours at the required skill mix and levels over a stated time period to earn a fixed fee. The benefit of CPFF LOE is direct labor rates and other costs are not fixed and therefore if the contractor reduces the skill mix and level lower direct labor rates are generated costing the government less. Unlike firm fixed price and T&M, CPFF LOE contracts allow the government to take advantage of the contractor's ability to create savings by adjusting the skill levels and mix.

A comment on this memo by Darrell Oyer in his April 20th newsletter disagrees with the conclusion that CPFF LOE are superior over T&M contracts. He observes that CPFF LOE lack incentives for cost control because an increase in skill levels will result in higher billed costs to the government while the fixed rates under a T&M contract is more suited to professional services because its fixed rates will allow for increased skill levels with no additional cost to the government.

Bills to Require "Yellow Pages" Competitions

Companion bills from the Senate and House would subject any government service for which there is a "Yellow Page" listing to private sector competition. The Freedom From Government Competition Act allows the private sector to compete for government jobs unless the functions are inherently governmental or necessary for national security or prohibited by law. The proposed bill, intended to reduce waste in government spending and encourage more efficient private sector participation in acquiring goods and services, provides for a test that simply states if there are private businesses listed in the Yellow Pages that provide services that the government is also providing then those services should be subject to competition with the private sector.

SBA Proposes Rule to Authorize WOSB Sole-Source Contracts

A proposed rule by the Small Business Administration would authorize contracting officers to award sole source contracts to women-owned small businesses (WOSBs) or economically disadvantaged WOSBs (EDWOSBs). The proposed rule would amend Section 8(m) of the Small Business Act which permits set-asides for WOSBs and EDWOSBs who are "underrepresented." The proposed rule will authorize COs to award a sole source contract – up to $6.5 million for manufacturing and $4 million for other contracts – to a WOSB or EDWOSB in an industry where set-asides are authorized if after conducting market research the CO could not identify two or more WOSBs or EDWOSBs able to perform at a fair and reasonable price. The rule will also revise definitions of "underrepresentation" or "substantial underrepresentation" to refer to a forthcoming SBA study determining the industries in which WOSBs are underrepresented (*Fed. Reg. 24846*).

CASES/DECISIONS

Appeal Board Continues to Erode Statute of Limitation Defense to Claimed Costs

(*Editor's Note. One of the hottest issues recently involves the Contract Disputes Act's (CDA) six year statute of limitations (SOL) which has been invoked to prevent government claims against contractors. The following case shows it will be more difficult for contractors to defense against government claims using SOL grounds. Despite precedents showing a government claim accrues when the government "should have known" the facts giving rise to the claim, recent cases including the one below is requiring something closer to actual knowledge for contractors to establish the government claim is time barred by SOL.***)**

The government claimed Raytheon violated CAS 403 and 415 in claiming certain 401(k) costs. Raytheon moved to dismiss the appeal arguing the government claim was time barred by the SOL because Raytheon's incurred cost proposal was submitted more than six years before the government put forth its claim. Without examining any of the facts, the ASBCA denied Raytheon's motion holding it could not issue a summary decision because "reasonableness and subjective knowledge are facts at issue" where discovery and a hearing is required to ascertain what was known. Criticism of the decision is mounting indicating the ruling will result in a "waste of time and money for contractors and the government." A comment by McKenna Long states the decision is a misreading of the FAR and case law citing cases ruling "the events fixing liability should have been known when they occurred unless it can be reasonably found to either be concealed or inherently unknowable at the time" and that contractors should not need to demonstrate the government had specific, subjective knowledge underlying its claim nor should contractors be required to demonstrate the government understood the significance of contractor disclosures before or during audits (*Raytheon Co., ASBCA 58849*).

Salary That Was Not Paid Was Improperly Billed

(*Editor's Note. The following demonstrates the need to have an established compensation policy clearly in place before a cost is claimed.)*

DCAA questioned $53,000 of claimed salary costs contained in Accurate's FY 2007 incurred cost proposal asserting that the salary costs were unallowable in accordance FAR 52.216-7 because they were never paid to the president. Accurate contended they satisfied the FAR because the president was paid in 2008 with issuance of company stock under a deferred compensation plan. The Board ruled against Accurate ruling the company failed to show that such a plan was in place before or during FY 2007 or that financial records of the company identified such references (*Accurate Automation Corp., ASBCA 59727*).

Commercial Item T of C Clause Entitled Contractor To Payment for Work in Progress

The government terminated TriRAD's commercial item contract for delivery of 10 simulators after the delivery of its first rejected simulator. TriRAD cited FAR 52.212-4 that provides for two prongs for recovery under terminations of commercial item contracts, arguing the first prong entitled it to be paid according to a percentage of completion of each of the 10 simulators, multiplied by the contract price and the second prong entitled it to other unavoidable costs resulting from the termination less any amounts paid upon delivery of the first simulator where costs would be documented using its "standard record keeping system" rather than complying with CAS or FAR cost principles. The Air Force argued since TriRAD had delivered only one simulator, which was rejected, it was not entitled to anything under the first prong and since its standard record keeping was minimal to nonexistent is had failed to demonstrate an amount for reasonable charges. The Board ruled in favor of TriRAD stating that when an item is manufactured on a production line items will be in various percentages of completion at termination where the percentage required under the first prong is both the items delivered and accepted and the items remaining in the production line. The Board stated the only reasonable interpretation of a "percentage of contract price reflecting the percentage of work performed prior to termination" is that it applies to all work performed including partially completed items on the production line. As for the second prong the Board rejected the Air Force's argument that TriRAD must produce the type of data required in FAR Part 49 which "the termination clause specifically states is not required" (*TriRAD Techs Inc., ASBCA No. 58855*).

GAO Sustains Protest of Flawed Price Realism Analysis

The RFP called for a fixed price contract to provide custodial services for 23 buildings and awarded the contract to RDB because it had the highest overall technical rating and the second lowest price where it viewed Alcazar's proposal as unrealistic and unreasonable in its price realism analysis. In its protest, the GAO ruled in favor of Alcazar stating the government evaluated price realism without taking into account that Alcazar's price was based on a unique staffing approach which proposed a permanent staff that was significantly smaller than the agency's estimate. The GAO ruled the government made its determination based only on a comparison of Alcazar's overall price to a government estimate and prices from the most highly rated offerors. GAO's comments stated evaluators should not punish contractors who propose a new lower-priced staffing solution by deeming its price is unrealistic without first "drilling deeper into its proposal" *(Alcazar Trades Inc., GAO No. B-410001*).

FAR Delay Exception Requires Disruption at Agency Location

The Defense Commissary Agency issued a solicitation for the supply of fresh pork products with a submission deadline of 3 PM on April 30 at the DeCA headquarters in Fort Lee. Global tendered its proposal to Fed Ex on April 29 where widespread flooding and infrastructure damage from extreme weather did not allow the proposal to be put on a Fed. Ex airplane requiring delivery of the package to be delayed. Realizing there would be a delay Global arranged for Kinko's in Virginia to print, prepare and hand deliver the proposal to DcCA in Fort lee where it did not arrive until 3:40 on April 30, 40 minutes late and DeCA refused acceptance. Providing extensive documentation highlighting the damage from the storm, Global asserted the delay of delivery was caused by the government's restriction of aircraft travel due to extreme weather and its lateness should be excused as a disruption of normal government processes under FAR 52.212-1(f)(4) which creates an exception to the general rule that a late offer will not be considered by the government. The Court rejected Global's position stating the clear meaning of the cited FAR provision permits acceptance of late proposal where "an emergency or unanticipated events interrupts normal government processes so that offers cannot be received at the government office designated for receipt of offers." Here, normal government operations were not interrupted at Fort Lee, the designated location for receipt of offers and hence Global is not entitled to consideration of its proposal under the FAR 52.212-1 (*Global Mil. Mktg. Inc. v. US, 2014 WL 4824488*).

Kickbacks Constitute Material Breach of Contract

(Editor's Note. The following addresses whether a contractor can be held liable when its employees commit fraud.)

Under its environmental remedial contract LLC received 16 cost reimbursable task orders for work in Iraq. After an investigation into kickbacks, LLC's project manager and COO plead guilty to accepting kickbacks from its subcontractors where it instructed its subcontractors to submit inflated invoices and agree to receive lesser amounts so the employees could pocket the excess. DCAA began auditing LLC's costs where it disapproved $17.8 million in subcontract costs and soon after rejected LLC vouchers totaling $3.04 million where LCC brought action against the government asserting it had breached its contract by refusing to pay LCC where the government asserted LCC had breached its contract first when its principle officers solicited and accepted kickbacks.

The Appeals Board said in resolving disputes between parties who each claim the other party breached the contract the courts "often impose liability on the party that committed the first material breach." The actions of the two employees, acting under the contract and within the scope of their employment, can properly be imputed to LCC. In every contract there is a covenant of good faith and fair dealing where a failure to fulfill this duty breached the contract where here the criminal acts of its employees, imputed to LCC, meant LCC breach its duty to perform in good faith. In addition, since LCC's vouchers to the government were inflated to include payment of the kickbacks the vouchers did not reflect allowable and reimbursable performance costs which breached the allowable cost and payment clause in the contract. The Board ruled these acts constituted the first material breach that excused the government's obligation to pay LCC's invoices (*Laguna Constr. Co., ASBCA 58324*).

NEW/SMALL CONTRACTORS

A Few Methods to Expedite Government Payments

We frequently are asked about ways to increase payments due from the government so we thought we would review some of the most common available options. Though sometimes slow, the government is notable for its reliability as a paying customer. In recent years changes to the FAR have been designed to speed up payments, particularly through direct submission of vouchers, rate variances, profit retainage recovery and quick closeout procedures.

- **Direct Voucher Submission**

Contractors can now submit their public vouchers directly to payment offices and online, bypassing the historical process of first submitting them to the Defense Contract Audit Agency for review. To be eligible for direct submission, contractors must (1) have an approved billing system (2) maintain approved billing rates (3) revise billing rates to reflect actual rates at year end that are adjusted for historical disallowances and (4) submit timely indirect cost rate proposals (due six months after year end).

The government is undoubtedly pairing the incentive of faster payment with the implied penalty of contractors not complying with closing out contracts faster and submitting their incurred cost submittals on time. Before, there was virtually no penalty for failing to submit incurred cost proposals on time; now, failure to do so means direct billing may be prohibited.

- **Payment of Rate Variances**

FAR 42.704(e) has been revised to encourage contractors to revise the provisional rates they have been using to reflect proposed final indirect cost rates. The former practice of waiting sometimes years for an incurred cost audit to adjust rates and bill for the variances has been replaced with contractors requests to adjust their provisional rates for the year with revised actual rates adjusted for historical disallowed costs resulting from audits. The elimination of old so-called "M" funds that allowed a virtual indefinite timeframe to collect the variances has resulted in limited funds to pay these variances, often resulting in failure to collect. By revising their billing rates, contractors can collect from more current funds, even their open contracts, while the government has fewer "surprises" chasing limited funding in later years.

Another incentive for revising provisional rates is you can increase cashflow and have the opportunity to expand the originally funding level as you approach the original limits of the contract. One word of caution: the tactic of revising provisional rates to reflect actual costs is a good idea when contractors have underbilled (which is more and more common due, in part, to the need to bid low to win awards), but it may not be such a good idea when contractors have overbilled (provisional rates above actual).

- **Collecting Retainages**

Retainage refers to the government's withhold of 15% of fee, up to $100,000 on cost-type contracts as well as construction and incentive contracts. Historically retainages have not been collected until contract closeout which can take several years. The clause FAR 52.216-8 (Fixed Fee) has been revised to require the CO to release 75% of the fee retainage and permits up to 90% if the contractor has a good record of submitting and settling its incurred cost proposals. Release of the retainage requires (1) the contract be physically complete (2) the contractor has submitted its certified incurred cost proposal for the year of physical completion of the contract (3) the contractor is in compliance with all terms of the contract and (4) the contractor is not delinquent in submitting final invoices.

The last condition has been tightened by changes to FAR 52.216-7 (Allowable Cost and Payment) that require final invoices be submitted within 120 days of settlement of the indirect rates for the last year of contract performance. Previously there was no regulatory period for the submission of final invoices and there was certainly no incentive when the contractor owed the government money.

- **Quick Closeouts**

FAR 42.708 allows for contracts to be closed out in advance of settlements using proposed incurred cost rates. Utilizing this underused tool allows contractors to collect their rate variances and fee retentions quickly, eliminating any surprises resulting from audit adjustments later. Quick closeout may be used if (1) the amount of unsettled indirect costs for any one contract does not exceed $1 million and (2) the total indirect costs closed out this way are less than 15% of the total unsettled indirect costs. This 15 percent rule can be waived by the CO if the company has strong internal controls and relatively little historical cost disallowances. Also, the 15 percent rule applies to all outstanding costs so when DCAA has several outstanding years, you can quickly settle a lot of dollars.

QUESTIONS & ANSWERS

Q. We are a company barely starting out and interested in going after a cost reimbursable type contract where the RFP says the winning contractor must have its accounting system approved by a government auditing agency. I understand that the contractor can not just call DCAA to come and audit its books but how do we get a government sponsorship for the CO to request an audit on the our behalf?

A. When you are a strong contender for an award the agency will usually ask DCAA to conduct an audit of your accounting system. Sometimes if they are in a hurry to award the contract, they will request an accounting system review soon after the award. Either way, you usually have to have an audit opinion saying your system is "adequate" to be able to continue performing.

Q. We were acquired by a larger defense contractor last week and are now a wholly owned subsidiary. Are we required to file two incurred cost submissions for 2015- one beginning with the sale date and another for costs / rates prior to the sale? Where can I find references to this situation?

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A. FAR 31.203(g) and CAS 406 covers what is considered to be contractors' fiscal periods. CAS 406 is one of the four standards that apply to modified CAS covered contracts. As for incurred cost submission requirements you would seem to have some flexibility. If there are no cost accounting changes then you could use the regular fiscal year. For example, if the only material difference is now your subsidiary receives a home office allocation from the large defense contractor that is considered to be a new cost where no accounting change has occurred. The FAR allows for a "different period" other than the normal 12 months while CAS 406 is more restrictive, allowing for a period less than one year (no less than 5 months) or a period more than one year, up to 15 months. So, for example, you could have an ICE for the previous fiscal year plus up to three more months in the new year (FY 2014-215), or a short period this year before the sale (up to five months) and another short period for the rest of FY 2015. If none of your contracts are CAS covered then you might be able to negotiate even different terms. Keep your eye out for any new accounting changes - they will need to be disclosed in the ICE submittal.

Q. I remember from a previous life that the FAR requires contractors to obtain competitive quotes for any material/ODC purchases that exceeded $1,000. Does this apply to both direct and indirect purchases?

A. This is the first time I have heard anything about a $1,000 threshold for quotes. The FAR does not directly address this about individual cost components. It does state that for procurements under the Simplified Acquisition Procedure (under $100K) contractors can take more abbreviated steps to show effort to obtain competitive quotes (e.g. notes in the file). Auditors will likely look to see whether there are written policies addressing obtaining competitive quotes and then see if the contractor followed them. If there are no policies and procedures in place to ensure procurements are competitive, you may be hit with an "inadequate" policies and procedures

Q. We are a small, Department of Defense contractor and sell various defense products. Among other items, we provide compounds to several customers. In some cases, our compounds are our own, and in others, the formulation is made by various contractors, including ourselves. We often have contracts over the TINA threshold and we would like to create a price list that could be used to substantiate our compound prices, rather than have to justify the components of each compound every time we submit a quote. Will you please tell me how we might go about doing that?

A. You have a few ways to go on this. Yes, a price list will help establish your items are commercial items which will allow you to charge the government at those prices. Remember the closer the price list is to a catalog price list (think Sears) as opposed to an internal price list the easier it is to establish the items are commercial items. You may also want to provide documentation of the items being sold to non-federal customers to further establish your commercial item status. Alternatively (or in addition), you may want to establish a General Services Administration (GSA) price schedule that will then be used by most federal, state and local agencies. Once you have a GSA Federal Supply Schedule in place you can use those prices.

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