GCA REPORT
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NEW DEVELOPMENTS

DOD Issues Final Rules on Competition Under MACs and Expanding Commercial Item Treatment

The Defense Department October 25 issued a final rule requiring competition when placing orders for services costing more than $100,000 under DOD multiple award contracts (MACs). MACs include multiple award schedules (MAS) programs operated by the General Services Administration as well as multiple award indefinite quantity task and delivery order contracts.

When placing an order for services costing more than $100,000 under MACs contracting officers must now contact as many MAC awardees or FSS schedule holders capable of doing the work as practicable, ensuring at least three responses are received or, alternatively, must contact all schedule holders. If a CO does not receive three responses, a written determination must be submitted saying no additional qualified contractors were identified despite "reasonable" efforts to do so. The CO must

- Provide a fair notice of intent to make a purchase including a description of work and basis for selection
- Afford all contractors responding to the notice a fair opportunity to submit an offer and have it fairly considered
- Keep contractor submission requirements to a minimum
- Allow the use of streamlined procedures, including oral presentations
- Consider price or cost under each order as one of the factors of selection
- Consider past performance on earlier orders under the contract including quality, timeliness and cost control.

The new competition rules govern all orders on or after October 2002 regardless of when the MAC was awarded. In addition, it covers all DOD requirements for services, whether placed by DOD directly or placed on its behalf (Fed. Reg. 65,505).

DOD also issued a final rule on October 25 that would mandate the treatment of performance-based service contracts and task orders as a contract for the procurement of commercial items under certain conditions. Those conditions are (1) it is a fixed price contract (2) has a value of $5 million or less (3) specifies each task to be performed (4) defines each task in measurable, mission-related terms (5) identifies the specific end products or outputs to be achieved and (6) is awarded to a contractor that provides similar services at the same time to the general public under similar terms and conditions as the contract or task order (Fed. Reg. 65,528).

DCAA Issues Guidance on How to Compute Government Share of a Tax Refund

(Editor's Note. The Hercules case we reported on in the July-August issue of the GCA REPORT has become a hot topic generating DCAA guidance and the contractor's attempt to elevate it to the US Supreme Court. The case addressed the proper method of computing how much of a tax refund received by a contractor is due the government and ruled on whether cost accounting standards that are silent on the matter trump FAR cost principles that specify the credit for the government must utilize the same method used to determine the original allocation.)

The Defense Contract Audit Agency issued guidance to its auditors stating, in accordance with the Hercules decision, the government's share of income tax refunds received by the contractor should be "based on the government's original reimbursement of that expense." The guidance reiterated the courts findings, indicating there is no conflict with the relevant FAR cost principles and the Cost Accounting Standards.

To illustrate the point, DCAA provides an example of the "ABC Company" which claimed $1 million in state income tax expense in a G&A expense pool in FY 2000 and then received a $500,000 refund of its 2000 tax in FY 2002. The government's participation in the G&A allocation base for the relevant years was 65 percent in FY 2000, 70 percent in FY 2001 and 55 percent in FY 2002 in which these percentages represent federal contracts containing the FAR 52.216-7, Allowable Cost

and Payment clause. In determining the amount of refund due the government, the auditor should use the percentage representing the government's participation in the G&A base in FY 2000, resulting in the government's share being 65 percent of $500,000 or $325,000 (MRD 02-PAC-079(R).

Industry Groups Comment on Proposed FAR Cost Principles Changes

Two influential industry groups – the Aerospace Industries Association and the National Defense Industrial Association – issued two separate concurrent letters on recent proposals for changes to certain cost principles that we previously reported on.

Selling Cost Principle (FAR 31.205-38). Since most of the proposed changes either affirm allowability or cross reference other cost principles, the Associations propose the selling cost principle be eliminated where only paragraph (c) – pertaining to fees that are allowable only if paid to bona fide employees or selling agencies – be moved to another cost principle. Alternatively, if deleting the cost principle is not accepted, then the current statement "the costs of any selling efforts other than those addressed in this cost principle are unallowable" be changed to "The costs of selling efforts are allowable unless expressly identified as unallowable in this or any other cost principle."

Economic Planning (FAR 31.205-12). The proposed wording of the cost principle may have inadvertently narrowed the scope of allowable costs by no longer including "generalized planning of possible divestitures" as economic planning costs. The Associations' proposal substitutes language that would prevent such an interpretation.

Employee Morale (FAR 31.205-13). Paragraph (d) – allowing food and dormitory costs if they meet certain criteria – should be eliminated since this kind of cost is of little risk to the government. Since determination of whether food and dormitory costs are reasonable is subjective, it should be treated on a case-by-case basis under FAR 31.201-3, "determining reasonableness."

Travel Costs (FAR 31.205-46). The Associations propose that specific limitations on per diem requirements be replaced with reimbursement determination being based on what is a "reasonable charge." This change would eliminate the significant inequities in government employees being able to take advantage of lower cost lodging than contractor employees.

GAO Proposes to Revise Bid Protest Rules

The General Accounting Office proposed the first revisions since 1996 to its bid protest rules to clarify new developments since then (e.g. use of alternative disputes resolution (ADR), electronic filings, court decisions affecting rulings on contractor responsibility). The significant proposals are:

FAX and Electronic Filings. Protest and other documents may be filed by fax or other electronic means such as email but makes clear the filing party bears the risk the document will not be timely received by the GAO. Further, the new rule provides that GAO decisions may be transmitted electronically and finally the GAO may, when it chooses, hold hearings by video or other electronic means.

Definitions and Use of ADR. The proposed rule will provide that ADR is among the alternative procedures the GAO may use to promptly and fairly resolve a protest. A new definition would clarify that ADR consists of techniques – like outcome prediction and negotiation assistance – designed for timely resolution without a written opinion.

Comments on GAO Reports. Adds language making clear that protesters must file comments on agency reports within 10 days of receipt of the report unless GAO grants an extension. Fewer than 10 days may be appropriate where the GAO has established a shorter period.

Review of COC Determinations. Unless bad faith is demonstrated, the GAO will not review challenges to Certificate of Competency reviews of small businesses by government officials including alleged failure by the SBA to follow its own regulations.

Determinations of Responsibility. Though current language limits GAO review of determinations of responsibility to limited circumstances, recent cases have stated the GAO should rule on such issues where evidence raises serious concerns whether the contracting office unreasonably failed to consider available relevant information or violated a statute or regulation.

Suspension and Debarment Review. The proposal will add suspension and debarment actions as areas the GAO will not review. Rather, challenges should be at the agency that took the action.

Industry Group Criticizes DCAA Guidance on Developing Unilateral Cost Rates

As we reported in the last issue of the GCA REPORT, recent DCAA guidance calls for unilaterally decrementing contract costs of contractors who are 12 months late in submitting their incurred cost proposals by 20 percent in the absence of recent historical data. The National Defense Industrial Association criticized the guidance in letters to DCAA and other DOD departments. Its major points were:

1. Since smaller companies are usually the offenders, it will fall disproportionately on them.

2. The 20% decrement factor DCAA says is a result of its actual audit experience was incorrectly computed – the decrement factor should have been computed based on the percentage of questioned costs that are ultimately sustained, not simply those costs questioned during an audit.

3. It is inappropriate to apply the 20% decrement to both indirect and direct costs since the vast majority of questioned costs are usually indirect, not direct, costs. Applying the decrement factor to all costs can unfairly result in significant financial harm to contractors.

White House Vows to Reverse Effects of Excess Contract Bundling

The Small Business Administration issued a report detailing the facts that the number and size of bundled contracts has reached a record number and that small businesses are receiving disproportionately smaller shares of the work on these contracts. Bundled contracts are those that combine previously separate requirements within a single contract which often becomes so large that only non-small businesses can bid on.

In response to this and other similar reports the Office of Management and Budget is unveiling a nine-point action plan to combat bundling by federal agencies to better enable small businesses to compete for the $230 billion the government spends annually on contracts. Some of the steps include:

- Implementing reporting requirements on bundling actions
- Modifying SBA and the FAR to require contract bundling reviews of proposed acquisitions over agency specific dollar thresholds ($2-$7 million, depending on the agency) and requiring the agencies to identify alternative strategies to involve less bundling
- Mitigate necessary contract bundling by increasing subcontracting opportunities for small businesses and encouraging the creation of small business teams to compete
- Create a best practices plan to collect and disseminate examples of successful strategies that maximize prime and subcontract opportunities for small businesses.

DCAA Guidance on Contractors' Accounting System

The Defense Contract Audit Agency issued guidance indicating prior opinions on the adequacy of contractors' accounting systems may need to be revised. Specifically:

1. Opinion that a contractor's accounting system was adequate based on proposed but not yet completed corrections of "significant internal control deficiency." Prior guidance before January 31, 2001 permitted auditors to opine that a contractor's accounting system was adequate when a contractor proposed but had not completed correction of a significant internal control deficiency. After that date, the DCAA guidance changed, requiring auditors to opine that the accounting system was either "inadequate" or "inadequate in part" until they could verify the contractor's action was completed and in fact corrected the deficiencies.

2. Opinion the non-major contractors' accounting and billing controls were adequate after following DCAA's accounting and billing system audit program. Reviews of DCAA's work found that after completing a cursory "Preaward Accounting System Survey," usually conducted at small and mid-sized contractors, DCAA erroneously issued an audit report using a pro-forma or boilerplate audit report (called report shell) purporting to express an opinion on the results of a full-scale accounting and billing internal control audit usually reserved for large contractors.

In response to this disconnect of audit effort and audit report, DCAA issued a new audit program intended to evaluate non-majors' accounting and billing system along with a new shell report expressing an opinion. *(Editor's Note. Since this new audit program is intended to identify audit steps DCAA will take in evaluating most contractors, we intend to discuss it in some depth in an upcoming issue of the GCA DIGEST.)*

3. Failure to complete MMAS audits every 2 to 4 years at major contractors. Opinions based on prior management and accounting systems reviews at major contractors

completed longer than 4 years ago are not to be relied upon (MRD-02-PQA-077(R).

SBA Revises SBIR Program Policy Directive

The Small Business Administration revised its policy directive for the Small Business Innovation Program to reflect legislative changes accompanying the recent extension of the program through 2008. The purpose of the SBIR program is to strengthen the role of small business concerns (SBCs) in receiving federally funded research and development resources. The widely-used SBIRs include three phases: Phase I is a feasibility study to evaluate scientific and technical merit of an idea where awards are for a period up to six months in amounts up to $100,000; Phase II expands on the results of Phase 1 where awards are up to two years and amounts up to $750,000 and; Phase III is for commercialization of the results of Phase II and usually requires the use of private sector or non-SBIR federal funding.

The statute extending the SBIR program included other requirements such as:

- Requires the SBA to clarify that rights to data generated during the performance of an SBIR award apply to all SBIR awards, including Phase I, II, and III awards;
- Requires establishment of an SBIR program government-accessible database as well as a public-accessible database;
- Requires that application for a Phase II award contain a succinct commercialization plan;
- Requires agencies to report to the SBA all instances where the agency pursues research, development or production of a technology developed by an SBIR Phase I or II awardee and determined that it was not practicable to enter into a follow-on Phase III award with that awardee;
- Clarifies when a Phase III award can be issued;
- Establishes the Federal and State Technology (FAST) Partnership Program to strengthen the technological competitiveness of SBCs.

In response to numerous comments, the final policy directive clarified (1) the SBIR applies only to small businesses (2) "Other Transactions" are not a type of award allowable under the SBIR program and (3) each member of a joint venture must be a small business concern where the principle investigator must have their primary employment with the SBD at the time of a Phase I or Phase II award. The policy directive is in the Federal Register NO. 60,072 where there is a section-by-section analysis explaining the changes.

DCAA to Assess SEC Required Changes to Contractors' Financial Statements

A Securities and Exchange Commission order issued in the wake of recent high-profile bankruptcy filings may cause some federal contractors to amend their financial statements. Recent guidance from DCAA asks its auditors to carefully examine any resulting changes to assure prior audit results remain "appropriate." The guidance further states the new SEC rules require CEO and CFOs to "attest" to the accuracy of the financial statements or file a statement, referred to as "Other", describing the facts and circumstances preventing the attestation.

Auditors are to determine if contractors are included in the SEC's list of 945 companies subject to the order (found at www.sec. gov/rules/extra/ceocfo.htm). They are to examine any adjustments to financial statements and reexamine any audit effort that relied on those statements e.g. financial condition risk assessment, financial capability audits. Also, if a contractor is required to file the sworn affidavits and has not done so, auditors are to use the SEC website to determine when the contractor will submit and then revisit it after that date.

FAR Writers Considering More Changes to Relocation Costs

Federal Regulation Acquisition writers are asking contractors to weigh in on whether the government-wide cost principle on relocation costs should be revised to expand use of reimbursement of such costs on a lump sum basis. Currently, FAR 31.205-35 permits the government to reimburse contractors for relocations costs – with the exception of miscellaneous costs – up to the employee's actual expenses. For miscellaneous costs, the government may reimburse the contractor a flat or lump- sum amount up to $5,000 (recently increased from $1,000) in lieu of actual costs. The writers are considering revising the cost principle to give contractors the option to claim relocation costs based on actual costs, a lump sum basis or a combination of the two approaches. While receipts are not required with a lump sum approach, contractors would still have to show the amount paid are reasonable and appropriate under the circumstances. Writers want to reduce the administrative costs for contractors and improve employee morale while making sure that permitting lump sum payments in lieu of actual costs do not increase costs to the government.

SBA Finalizes Small Business Monetary Size Standards

The Small Business Administration finalized on October 24 (Fed Reg. 65285) an interim rule adjusting the SBA's monetary based size standards to account for a 15.8% increase in inflation since 1991. A table that accompanies the earlier interim rule lists by North American Industry Classification System code those industries affected by the new size standards (Fed. Reg. 3041, 1/23/02).

TRAVEL…

New 2003 Per Diem Rates Issued. The General Services Administration (GSA) has issued new per diem rates for FY 2003, effective October 1, 2002. The FY 2003 changes provide an increase to M&IE allowances in many areas and adds a new M&IE tier of $50. The standard CONUS per diem rates are expected to remain unchanged until September 30, 2003 as GSA awaits recommendations from the Government-wide Per Diem Advisory Board that is reviewing the current per diem rate setting process and methodology. Per diem rates can be found at "www.dtic.mil/perdiem".

Whether an assignment is a permanent change of station (PCS) or temporary duty (TDY) is a factual matter of where the employee expects to spend most their time rather than a "paper trail". Alfred, a DOD employee, received travel orders from January through March 1995 to go to the Columbus regional office of his agency. He stayed at the office until 1998 where he periodically requested PCS orders be issued but no decision or orders were given. When Alfred requested three years of TDY per diem expenses DOD refused and Alfred appealed. The Board ruled against him stating though DOD should have not delayed the orders so long, Columbus should be considered the PCS even without official orders. The Board referenced a prior GAO decision that ruled less importance should be placed on a "paper trail" and more emphasis should be placed on the "facts establishing where the employee expected to spend the greater part of his or her time performing official duties" (GSBCA 15763-TRAV).

Distinguishing between "commuting" and "local travel" is not always easy. A DOD employee, Arthur, was authorized for one training session in Langley, VA and 5 sessions in Vienna, VA. Arthur drove in his car to Langley form his home in Severn, MD and for the others he (1) drove his car from his home to the train station in Odenton, MD (2) boarded a train to Union Station in Washington DC and (3) transferred to the Washington Metro and rode to Vienna while reversing these steps on his return home. Arthur submitted a voucher for $93 based on his mileage, parking and other expenses incurred on leaving his home while his agency authorized only $50, explaining he was entitled only to the added expenses of traveling to the training site from his permanent duty station which was close to the sites.

The Appeals Board mostly sided with Arthur. It stated though the Federal Travel Regulations (301-70:102) provide flexibility to agencies to set their own rules concerning transportation expense around their duty station, DOD's rules have been set forth in C2401 of the JTR and provides that travel from home to another place of business not their duty station allows for (1) local public transportation (2) taxicab fares and related tips and (3) parking fees. Also, when an employee is authorized to drive their own car to an alternative worksite in the local area, DOD must pay mileage for distances exceeding the employee's normal commuting distance. Hence, in this case, Arthur is entitled to (1) mileage costs exceeding his normal commuting distance for the Langely training and (2) mileage to the Odenton train station, cost of the train and metro ride and parking fees (GSBCA 15802-TRL).

CASES/DECISIONS

Can Release Awardees Contract Prices But Only to All Rebidder's

(Editor's Note. What bidding information can and cannot be released is often confusing and the following case helps.)

Flamman was awarded a base year with four one-year options for maintenance services where during the first year the government decided to re-solicit the first year option period. When one of the offerors submitted a Freedom of Information Act (FOIA) request for a copy of the current contract including the cost schedule, Flamman objected but the Army chose to release Flamman's unit prices for the base and option years.

Flamman appealed to prevent release of the information arguing the pricing data was confidential under the Trade Secrets Exemption of FOIA. The Court rejected Flamman's position stating unit prices are not protected because (1) sealed bids become publicly available upon bid opening and (2) unit prices do not divulge such confidential information as overhead, profit margin and cost multipliers. Nonetheless, the Court ruled disclosure to one bidder rather than all was improper because it provided a competitive advantage

to one bidder in the re-solicitation. Flamman's unit prices should be disseminated to all bidders and Flamman should receive comparable prices of the other bidders (*R&W Flamman GmbH vs. U.S. Fed. Cl. NO 02-800C*).

Obligations of ID/IQ Contract Do Not Stop After Minimum Quantity Ordered

CCI had an indefinite quantity contract which promised the contractor $50,000 worth of business and included a clause stating each multiple award vendor would have "a fair opportunity to be considered for each task order." CCI received numerous orders far surpassing the $50,000 minimum but at some point believed the government stopped considering it for more task orders. CCI filed a claim saying it should be considered for some orders and the government denied it, arguing it had done all it needed to do because it had ordered the guaranteed minimum. The Board agreed with CCI stating there is a distinction between the government's obligation to buy the minimum amount and its obligation to consider the company for additional awards. While the government met its purchasing obligation, "it does not constitute the outer limit of all of the government's legal obligations under an indefinite quantity award" (*Community Consulting International, ASBCA No. 53489*).

No Timely Inspections And Inclusion of Detailed Specs Preclude Rejecting Commercial Items

The Veterans Administration failed to inspect an electro-physiology system it purchased as a commercial item within the 30 day window provided in the contract and then used it continually for more than one year. After a year the VA claimed the system did not meet its detailed specification requirements and hence terminated the contract for cause and sought repayment of the $301,000 it paid plus $137,000 for acquiring a replacement system.

The Appeals Board sided against the VA ruling (1) the agency was wring in saying its failure to inspect the system did not constitute acceptance (2) it is appropriate to turn to the Uniform Commercial Code since the government contract is a commercial item contract where the UCC states the customer (i.e. VA) should assert its post-acceptance rights "within a reasonable time" and (3) inclusion of a detailed technical performance specification in a commercial item contract is inappropriate because the clause for a commercial contract – FAR 52.212-4(a) – reflects the notion that the government has already determined a commercial product meets its needs and hence should rely on the contractor's quality assurance program as is customary in the commercial marketplace. As for the last point, though FAR Part 12 allows tailoring of commercial item provisions if the CO determines such tailoring is necessary to meet government needs, incorporation of performance specifications does not appear to be consistent with commercial practices and there is no evidence the VA obtained or even contemplated a waiver to impose such conditions (*Fischer Imaging Corp., VABCA, No. 6125-6127*).

Prime Contractors are Not Always Liable for Their Subcontractors' Illegal Acts

Transfair had a contract to deliver humanitarian supplies to Eritrea which included regulations prohibiting doing business with Iran. When the British subcontractor hired an Iranian company to deliver the supplies, the US government refused to pay Transfair asserting the illegal business with Iran made the contract unenforceable and illegal and since Transfair was liable for its subcontractor's acts, the prime forfeited its right to payment under the contract.

The Court sided with Transfair distinguishing cases where the prime contractor was liable where some analysis showed the prime was either at fault or negligent. Rather, here, the contractor neither had knowledge or involvement in the subcontractor's illegal performance. The Court concluded it must be asked what Transfair "knew and when it knew it" before holding the prime contractor responsible for their subcontractors' acts and since there was no evidence Transfair knew of the illegal act, Transfair's performance was not illegal and hence was entitled to payment (*Transfair Intl. Inc. v. U.S. 2002 Wl 31113428*).

May Consider Partners of New Joint Venture for Past Performance Evaluation

Though the solicitation said offerors with no performance history were to receive a neutral rating, the agency provided a positive rating to a new joint venture on the grounds the individual joint venture partners had positive past performance ratings. The GAO sided with the agency's rating in a protest, noting that FAR 15.305(a)(2)(iii) direct agencies to take into account past performance information regarding predecessor companies, key personnel and major contractors when such information is relevant to an acquisition. GAO said an agency properly can consider the relevant experience of the individual joint venture partners so long as is it not expressly prohibited in the request for proposal (*MVM Inc. GAO, B-290726*).

NEW/SMALL CONTRACTORS

Current Rules on Exemptions From Cost-Based Pricing

Though there has been much ado about converting the acquisition process from cost-based pricing to "commercial practices", we are still seeing a great deal of contract pricing being based on cost data at both the prime and subcontract level. The regulations and subsequent court decisions have definitely expanded opportunities of commercial pricing which are generally more advantageous to contractors (e.g. higher prices, less audit scrutiny, streamlined administration). Though you may not be able to control initial attempts to base prices on cost buildup requests, a good understanding of the rules allowing exemptions from such pricing will provide a basis to challenge such efforts from the government and prime contractors and a good factual base for subcontracting to other firms.

The Federal Acquisition Streamlining Act of 1994 (FASA) changed both the traditional exemptions from requirements of submitting cost or pricing data found in FAR 15.403-1 and added two new commercial item exemptions. The Clinger-Cohen Act of 1996 further changed the exemption by combining the catalog or market price exceptions with the commercial item exception. In the past, exceptions were discretionary where now they are mandatory – cost or pricing data will not be obtained if one of the exceptions applies. Exceptions from cost based pricing include:

Adequate Price Competition (FAR 15-403-1(b)(1). Price competition is adequate if at least two responsible offerors, competing independently, submit priced bids that satisfy the government's expressed needs and if (1) the award will be made to the offeror whose proposals represents the best value where price is a substantial factor and (2) there is no finding that the price of the otherwise successful offeror is unreasonable.

Price competition will be considered adequate if only one offer has been received when it could be reasonable to conclude there was the expectation of competition. For example, if the offeror believed at least one other bidder was capable of submitting a meaningful offer and the offeror had no reason to believe other bidders did not intend to submit one.

Price competition will also be considered if price analysis clearly demonstrates the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in the market, economic conditions, quantities or terms and conditions under contracts that resulted from adequate competition.

Price set by law or regulation FAR 15.403-1(b)(2). This includes pronouncements in the form of periodic rulings, review or similar actions of a government body or that are embodied in laws that are sufficient to set a price.

Commercial Items. The definition is at FAR 2.101 and covered by FAR Part 12. Commercial items used to be considered supplies or services regularly used for other than government purposes and sold or traded to the general public in the course of normal business. Now, the commercial item exception includes catalog or market priced items including federal supply schedules and has been significantly expanded by both FASA, Clinger-Cohen and evolving board and court decisions. Now a commercial items means any item other than real property that is a type customarily used for non-government purposes and that:

1. has been sold, leased or licensed to the general public;
2. has been offered for sale, lease or license to the general public;
3. has evolved from a commercial item that is sold or offered for sale as a result of technological advancement (even if it is not yet available);
4. requires either modifications of a type that is customarily available in the commercial marketplace or minor modifications for unique government purposes;
5. or any combination of the above.

The definition has evolved in the last few years to now include items with the potential to be offered for sale to the public (e.g. an item in the development stage) if the item evolved from a commercial item and if it will be available in the commercial marketplace in time to satisfy government delivery needs. The definition now also encompasses modifications if they are minor or customary in the marketplace and ancillary services, like installation, training or technical support and updates. Services that are sold based on hourly rates without an established catalog or market price for specific services are not considered commercial items but contracts depending on employee hours that do not specify hours are. The item may also meet the definition of a commercial item if a modification that is unique

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to the government is made to a commercial item, if the modification is minor. Also non-developmental items developed exclusively at contractor's expense and sold competitively to multiple state and local governments also qualify for commercial item status. In general, the trend is for CO's to "stretch" the definition in order to give the government access to companies that otherwise would not compete for work in the government sector.

Modification of contracts for commercial items (FAR 15.403-1(b)(5). This applies when a noncommercial item contract is modified for commercial items. The standards discussed above for determining a commercial item apply for modifications.

Waivers (FAR 15.403-1(b)(4). This is a catchall that authorizes a waiver if another exception does not apply but the CO can determine the price is fair and reasonable. Only the head of a contracting activity may grant a waiver. An example of when a waiver may apply is when a previous production buy included cost or pricing data and the CO considers it is sufficient when combined with updated information. When a prime contractor or upper tier subcontractor is granted a waiver, the waiver does not apply to a subcontract unless the prime contract explicitly states it does.

QUESTIONS & ANSWERS

(Editor's Note. We recently received a question about entitlement for a price adjustment based on a spec change and we sent the following exchange because it was relevant to the issue. We found the original Q&A so interesting we decided to reproduce it here.)

Q. Contractor won a fixed-price contract to produce 4,370 two-way radios at $404.00 per unit. The price included a subcontract price for the same sized battery cases used in a prior contract. The average quote received for the case was $13.92 and the offered price in the proposal was $12.48 with the expectation of negotiating a lower price. After contract award but before award of a subcontract, Contractor sent out the specifications identified in the new contract and received a $7.52 quote at which time it learned that the contract specs called for a larger case than it had previously used. When the Army learned the large case would not fit, it issued a change order to make smaller battery cases and Contractor negotiated a unit price of $11.63. Is Contractor entitled to an increased adjustment to its contracted price and if so, how much?

A. Yes, $4.11, based on the difference between $11.63 for the case as changed and the quote of $7.52 as previously specified. In the decision on which the question is based (Admiral Corp., ASBCA 8634), the appeals board stated the $4.11 is consistent with the rule that a "proper equitable adjustment derives from the difference between what it would have reasonably cost to perform as originally required ($7.52) and the reasonable cost to perform the contract as changed ($11.63)" (parenthesis added). Admiral would have been able to get the cases for $7.52 if the Army had not changed the contract while the change increased the cost to $11.63.

Q. I am on TDY and am renting an apartment. I have been taking some leave time so how should I be computing my daily costs for per diem purposes.

A. A new addition to section U4125 of the Joint Federal Travel Regulations addressed this point. When leave is taken daily lodging cost is computed by dividing the total lodging cost by the number of days the traveler is entitled to the lodging portion of per diem.

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