GCA REPORT
(A publication of Government Contract Associates)

November - December 2006 Vol 12, No. 6

NEW DEVELOPMENTS

House Democrats Offer Bill to Require "Clean Contracting"

As a glimpse into what may be priorities of the new Democratic majority in Congress, a group of Democrats on the House Government Reform Committee have introduced "clean contracting" legislation in response to what they assert are the Bush Administration's inadequate responses to alleged waste and abuse of Katrina and Iraq-related contracting practices. The bill's provisions would

- limit terms of noncompetitive contracts
- increase competition for orders under IDIQ contracts
- enhance public disclosure of sole-source justifications
- strongly discourage single-award IDIQ contracts over $10 million
- stem use of "tiers" of subcontractors to reduce costs
- call for minimizing use of cost-reimbursement contracts
- limit procurement flexibilities for items that are not fully "commercial" in nature
- curb the use of "other transaction" authority to bypass traditional contracting requirements
- force reforms in use of interagency contracts and in federal agencies' abuse of credit cards
- require agencies to set aside one percent of contract amounts for sound contract administration
- force agencies to disclose alleged contractor overcharges above $1 million
- require greater "transparency" in federal awards
- ensure broad protest rights to enforce the bill's requirements
- close loopholes in the Procurement Integrity Act's limitations on hiring former government officials through the "revolving door" and
- broaden responsibility determinations to include assessment of a contractor's "tax, labor, and employment, environmental, antitrust and consumer protection" record.

Industry representatives are already garnering efforts to oppose the proposed rules.

DOD IG Urges Narrowing Exemption From Certified Cost or Pricing Data

The Defense Department Office of Inspector General is recommending that DOD propose legislation that would provide only those commercial items that are "sold in substantial quantities to the general public" be exempt from requirements for the submission of certified cost or pricing data. Under current law an item qualifies for the commercial item exemption to Truth in Negotiations Act (TINA) requirement to submit certified cost or pricing data merely when being offered for sale to the general public. The DOD IG said that requiring actual sales in substantial quantities would provide an "appropriate basis to establish a fair and reasonable price."

The IG recommendation follows a recent DOD IG report that found that COs of the military services had awarded $3.5 billion in commercial procurements where the commercial nature of the items was not adequately justified. In such cases, representing about 83 percent of the dollar value of the sample selected, the IG concluded the government did not receive the expected benefit of buying truly commercial products while it relinquished protections against excessive pricing that TINA provides. The IG attention follows similar findings echoed by concerns raised by Sen. John McCain (R-Ariz) as well as a recent GAO report concluding that significant increased use of commercial item purchases by the Air Force has not resulted in increased participation by non-traditional contractors - one of the key rationales for using commercial items.

DCMA Affirms Memo Limiting "Rolling Forward" of Contract Costs

(Editor's Note. In the last issues of the GCA REPORT and DIGEST we reported on the government's cessation of its "rolling forward" procedure that allowed unresolved questioned costs to be moved up to subsequent years when their allowability cannot be settled in the current period and industry's near-unanimous rejection of the cessation. The following is the government's recent response to industry's position.)

The Defense Contract Management Agency rejected a recent request by the National Defense Industrial Association (NDIA) that it withdraw a memo discouraging use of the "roll forward." NDIA said it would lead to the cessation of a procedure that effectively establishes final billing rates and would contradict the FAR provisions that encourage quick closeouts, pay forwards and roll forwards that allow for timely closeout of contracts. Rebecca Davies, DCMA's executive director for contract operations said in an undated letter to NDIA that neither the memo nor the accompanying legal opinion precludes use of roll forwards but only those uses that have no support in "recognized cost accounting concepts." She said that DCMA shares their desire to expeditiously establish billing rates and close out contracts and that prior DCMA memos endorsed use of roll forwards when allowability determinations depend on a future event and roll forwards comply with cost accounting standards. She concluded that COs should consider use of quick closeout rates and "other contract closeouts solutions" such as litigation of contested costs.

DCMA's legal opinion referenced by Ms. Davies states that the rationale for rolling forward disputed costs to settle billing rates in a current period, though "superficially appealing, violates CAS because it shifts a cost that is properly assigned to one period to another (and by implication the violation also applies to non-CAS covered contracts since CAS provisions on assigning costs to time periods are mirrored in the FAR). The opinion states there is no basis to roll forward a cost where the contractor's otherwise CAS-compliant cost accounting practices provide a "clear basis" for assigning it to any one specific period. A shift of a cost from one period to another is justified only where "an initial determination of the period for assignment of the cost was found to be erroneous."

OFPP Wants to Fill CAS Board Slots, Outstanding Issues Needing CAS Board Determinations

The newly confirmed administrator of the Office of Federal Procurement Policy, Paul Dennett is moving to fill vacant slots on the Cost Accounting Standards Board by asking various industry groups to suggest candidates to fill the industry representative slots on the five-member board. Other slots are for the OFPP head and representatives for the Defense Department and the General Services Administration. With the resignation of the former CAS Board Chair David Safavian during the Abramoff scandal the CAS Board has been without a chair and hence has been on hiatus for over on year.

Industry groups have been calling for an interim chair in the light of several unresolved "very important initiatives" related to cost accounting and allocation issues on government contracts such as:

(1) finalizing proposed amendments to CAS 412 and CAS 415 concerning recognition of costs of employee stock ownership plans (ESOPs)

(2) revising CAS Disclosure Statement requirement

(3) revising capitalization thresholds and recordkeeping requirement in CAS 403, 404 and 409

(4) amending CAS 410 provisions that relate to transitioning from a cost of sales or sales base to a total cost input base

(5) revising rules and standards regarding calculation of cost impacts when a contractor makes multiple cost accounting changes on the same date

(6) determining the appropriateness of clauses applying CAS to contracts with foreign concerns

(7) exempting time-and-material and labor-hours contracts for the acquisition of commercial items from CAS coverage

(8) resolving conflicts between CAS and FAR regarding definitions of what constitutes catastrophic losses and

(9) addressing pension legislation since enacted that has major implications for pension cost accounting standards in CAS 412 and 413.

FY 2007 Defense Authorization Bill Issued

The John Warner National Defense Authorization Act for Fiscal Year 2007 was passed out of a joint house and senate conference in late September and signed into law October 17. The bill authorizes $463 Billion that includes $84.2 billion in procurement funding, $73 billion for research, development, test and evaluations, $155 billion for operation and maintenance and other programs and $110 billion for military personnel as well as an additional amount of $70 billion for "bridge funding" of operations in Iraq and Afghanistan. Though the earlier House and Senate bills contained several more radical proposals, the final version took a more cautious role, leaving open for the future many key issues.

Technical Data Rights. The final version marked a compromise. The government put forth a proposal to purchase data rights "in full" for major defense systems

so that that government rights over technical data would be preserved while industry objections argued the proposal would disrupt the careful balance between private and government-funded research that allocated rights to the party that has invested in developing the technical data at issue. The compromised version would call on DOD program managers to assess long tem technical data needs and to establish acquisition strategies to ensure available technical data rights for major weapon system is sustained. Specifically, the legislation will require contractors and subcontractors to prove, if challenged, that technical data in major weapons systems were developed at private expense in which case they will be entitled to special protections. There is a pro-government presumption that the government is entitled to the data rights and the contractor must prove it was produced exclusively at private expense.

Berry Amendment. The Berry amendment, first passed in 1941 and extensively modified thereafter, prohibits DOD from purchasing a wide range of foreign-made goods including specialty metals. A new section codifies specialty metals requirements that prohibits DOD from procuring certain end items or components for aircraft, missile and space systems, ships, tank and automotive items, weapons systems and ammunition that contain specialty metals not melted or produced in the US. DOD is prohibited from procuring such metals either itself or though prime contractors. The new section also provides for exceptions to the prohibition based on (1) availability - can not be procured for any prime or subcontract in the US (2) urgent needs outside the US for support of combat or contingency operations (3) when needed to comply with agreements with foreign countries to offset sales made by the US or US firms (4) when items are procured for resale in commissaries or exchanges (5) small purchases in amont below the simplified acquisition threshold and (6) electronic components where the special metal content is immaterial in value compared to the overall values of the component that uses the metal.

Excessive Pass-Through Charges. Responding to various reports criticizing excessive add-ons to pass through charges, GAO is directed to report on pass-through charges on contracts, subcontracts, or task or delivery orders entered into or on behalf of DOD. DOD will also be required to prescribe regulations that will ensure such charges are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. Pass through charges are defined as a charge to the government for overhead or profit on work performed by a lower tier contractor or subcontractor; the definition does not apply to direct costs of managing such lower-tier contracts and subcontracts nor the overhead or profit based on such direct costs.

Link Award Fees to Contractor Performance. In response to various reports decrying unjustified award fees paid for unsatisfactory work, the secretary of defense must issue guidance linking award and incentive fees to acquisition outcomes. The guidance must (1) ensure all new contracts using award fees link them to program cost, schedule and performance outcomes (2) establish standards for determining what level must approve such fees (3) provide guidance on what is considered to be "excellent" or "superior" performance and percentage of available fee to be paid for such performance (4) establish standards for determining what percentage fee, if any, should be paid for "acceptable", "average", "expected", "good" or "satisfactory" (5) ensure no fee is paid for less than satisfactory or does not meet contract requirements and (6) provide specific direction on circumstances when an award fee not earned in one period can be rolled over to another.

A provision that would have prevented contractors from winning a public-private competition to perform Defense Department work if the only cost savings they offered came from a failure to provide retirement benefits equivalent to those of federal employees was stripped from the 2007 Defense Appropriations measure. The amendment, sponsored by Sens. Kennedy (D-Mass) and Orrin Hatch (R-Utah), did not dictate what retirement benefits contractors should provide or require they change existing practices but rather it would have required DOD to exclude retirement costs from the public-private cost comparison conducted under OMB Circular A-76. However, despite Bush administrations opposition to the policy, the FY 2007 spending measure does continue for another year the requirement that contractors' health care coverage be taken into account when they are competing against in-house employees for DOD work. The provision is intended to ensure they do not receive a competitive edge by providing less comprehensive benefits than those offered by in-house government employees.

FAC 2005-13 Issued

The FAR Council issued Federal Acquisition Circular 2005-13 September 28 amending the FAR. Though several more changes were made, the most significant to our readers address increased thresholds for inflation where the most important are:

- Micro-purchase threshold at FAR 2.101 - $3,000
- Federal Procurement Data System threshold at FAR 4-602(c) - $3,000
- Commercial item test program ceiling at FAR 13.500 - $5,500,000
- Prime contractor subcontracting plan at FAR 19.702 - $550,000 ($1,000,000 for construction)
- Truth in Negotiations Act cost and pricing data at FAR 15.403, 15.403-4, 42.7 - $650,000

The rule writers noted that many thresholds were considered but not adjusted because the inflation was insufficient to overcome rounding requirements such as thresholds of $1,000, $10,000, $100,000 and $1,000,000.

NASA Says COs Often Fail to Document Adequacy of Contractors' Business Systems

(Editor's Note. The recent NASA IG report indicates that contractors doing business with NASA can expect increased scrutiny of their government estimating and accounting practices.)

During a review of use of DCAA services for the National Aeronautical and Space Administration the NASA Inspector General found that contracting officers often failed to document the adequacy of contractors "business systems." Under FAR 15-406-3 and NASA FAR Supplement 1815.406, COs must assess relevant systems such as purchasing, estimating, accounting and compensation and document their adequacy in the contract file before negotiating a contract. The report, issued September 25 said COs failed to meet these requirement in half the contract actions reviewed noting failure to do so jeopardizes NASA's ability to make sure prices are reasonable and that such business systems are essential to allow the government to validate contractor cost estimates, accounting records and allowability and allocation of incurred costs.

New Private-Sector Web Site Tracks Recipients of Federal Contracts and Grants

OMB Watch, financed by a grant from the Sunlight Foundation, both groups dedicated to increasing government "transparency", established a web site at "fedspending.org." that allows a variety of searches from congressional districts to contractor to awarding agency. Some supporters indicate the new site will provide a model for similar efforts being sought by the federal government that has mandated such a site be established by January 1. 2008. The site is based on two major federal databases - the Federal Procurement Data System (FPDS), which tracks federal contracts and the Federal Assistance Awards Data System (FAADS), which tracks grants, loans, insurance and direct subsidies like Social Security. Some critics have raised questions about the reliability and completeness of some of the information due to limitations in the way the government collects data.

Senator Wants Large IT Set-Aside for HUBZone Firms

(Editor's Note. The following indicates that more federal funds may be flowing to HUBZone companies and that decisions on business locations should consider this fact.)

Sen. Olympia Snowe (R-Maine), in an October 25 letter to the General Services Administration, requested the agency reconsider its decision to place a $500 million global information technology acquisition with the Small Business Administration's 8(a) program and instead limit competition to small businesses operating in Historically Underutilized Business (HUB) zones. Snowe pointed out the GSA poor record with HUBZone set-asides and argued the law requires the agency to first offer this contract to HUBZone firms. HUBZOne limits competition to small businesses located in "historically underutilized" zones that Snowe describes as low income, high unemployment areas but do not have ownership requirements along race, sex or other designations.

GSA Announces Official Launch for New Civilian Board of Contract Appeals

The General Services Administration Nov 8 published official notification of the creation of a new consolidated board of contract appeals, which takes effect Jan. 6, 2007 that will hear contract appeals for all federal government civilian agencies. The new board consolidates existing boards of contract appeals for the GSA and departments of Agriculture, Energy, Housing and Urban Development, Interior, Transportation and Veterans Affairs. Board judges and other personnel will transfer to the new Civilian Board. Supporter say the consolidation will make procedures easier by providing a single set of rules of all Contract Disputes Act appeals involving civilian agencies while some critics warn it may result in the erosion of existing subject matter expertise (Fed. Reg. 65825).

TRAVEL…

Can't Charge the Government For Hotel Costs the Airlines Were Responsible For

On his last training day Denath was to fly home to Boston but the flight was cancelled due to mechanical difficulties and went to the customer service counter. Other flights were also cancelled so the line was extremely long and after waiting a substantial amount of line, he "despaired of reaching the front of the line within a reasonable time" and booked a hotel to spend the night and departed the next day. The government refused to reimburse him for the hotel stating the airline should have paid the cost because his trip had been cancelled and the Board agreed stating that Denath's "contract" (terms of the airfare) with the airline clearly noted that passengers are entitled to one night's lodging when their flight is delayed due to a reason within the control of the airline. Here mechanical difficulties and delay of departure were obviously a situation within the control of the airline and hence it was obligated to pay so their failure to do so did not shift that responsibility to the government (Denath O. Traegde, GSBCA 16842-TRAV)

Retired Employee Must Repay Transfer Costs

Dale was advised by the Drug Enforcement Administration (DEA) that he was going to be transferred to a new duty station where shortly after he signed a service agreement requiring him to remain with the government for 12 months after relocation or if not, obligated him to repay the total costs of transferring him. The day after signing the agreement Dale told his superiors he intended to retire in six months and requested the agency to "hold his transfer in abeyance" where DEA refused. Dale reported to his duty station and as promise retired six months later where the DEA directed him to repay the costs of relocating him. Dale argued in his appeal that the DEA has discretion to waive collection of the money and it should exercise it because it knew he intended to retire in less than one year and still transferred him. He also asserted in was the agency's de facto practice to not collect costs from employees who fail to fulfill their service agreements. The Board rejected his appeal agreeing DEA had discretion to decide whether Dale should repay the costs and that they exercised this discretion in their refusal. Further, in denying his request to stay at his old duty station does not suggest the DEA expected him to violate his service agreement but rather it would have been reasonable for DEA to expect Dale to defer his retirement several more months to fulfill the requirement of his agreement. As for the de facto practice, the Board stated it was irrelevant because DEA had the discretion to enforce policy where it believed it was appropriate even if Dale was the only employee to have to repay (Dale Shepard, GSBCA 16921-RELO).

Employees Snooze Alone at Their Own Expense

Steven was transferred to Atlanta and took his wife and kids to look for potential new homes. Smith rented two hotel suits while in the area where the cost of both rooms was less than the maximum lodging per diem for a couple on a house-hunting trip to the area. In his appeal, Steven said the two suites were necessary because both he and his wife snored and neither can sleep in the same room requiring the two separate rooms and that to pay for both would not harm the government since the costs of both were less than the maximum lodging per diem. The Board was not persuaded that federal travelers are expected to "exercise the same care in incurring expenses that a prudent person would exercise in traveling on personal business" (FTR 301-2.3). According to the Board, a reasonable person would not have rented more than one suite as lodging from a married couple even if their snoring was so disruptive they needed separate rooms (Steven Smith, GSBCA 16908(RELO).

CASES/DECISIONS

Government Should Consider Subcontractor's Past Performance History if RFP is Silent

The RFP for masonry repair asked offerors for references consisting of at least three "relevant" previously performed contracts but did not specifically state that past performance of proposed subcontractors would not be considered. Singleton's proposal was rejected because only two previous contracts were performed by it along with three contracts performed by the firm's proposed major subcontractor. In its protest citing the agency's failure to consider subcontractor's past performance the government argued the RFP referred to evaluation of "offerors" past performance and that FAR 15.305(a)(2)(iii) does not mandate consideration of subcontractor past performance. The GAO rejected this argument noting that under the FAR section quoted a past performance evaluation "should take into account past performance

information regarding predecessor companies, key personnel with relevant experience or subcontractors that will perform major" parts of the contractor. The Court added that it previously ruled that an agency's consideration of a subcontractor's past performance was permissible where the solicitation neither prohibited nor mentioned such information. The GAO indicated both the government and Singleton's positions were reasonable and recommended the government amend the solicitation to clearly state what types of past performance information would be considered (Singleton Enterprises, GAO B-298576).

Contractor Protected From FOIA Disclosure of Cost Data

(Editor's Note. The following case shows how the courts are diverging from the priority of "transparency" of government contractors' dollars favored by many members of Congress.)

The Air Force awarded CCC a contract for repair and maintenance for the J85 turbojet engine. Sabreliner filed a protest where it asked for, under the Freedom of Information Act (FOIA), detailed cost and pricing information for option year prices. CCC brought a "reverse FOIA" action to prevent the Air Force from releasing the information asserting the release of its cost and pricing data would cause it competitive harm. In evaluating the contractor's challenge to the Air Force's decision to release the data, the Court explained that FOIA Exemption 4 permits the government to withhold information in response to a FOIA request if that information is commercial or financial and privileged or confidential. The Court said because the information was submitted "involuntarily" - required for the contract proposal - it is considered "privileged or confidential" if it is likely either to (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the plaintiffs' competitive position.

The Air Force ruled for CCC arguing neither condition was met and thus Exemption 4 did not apply. For the first condition, the government asserted the Court could not "second-guess" the government assessment of its own interests and that it had released similar information in the past with no harm. As for the second condition, the government asserted no harm would result from divulging of "contract prices. The Court rejected the Air Force's first contention stating that its "vague and unsupported contentions" did not square with the need to specifically explain why future interests will not likely be impaired by the release of the information and that it had found no evidence that the type of information the FAR allows to be released is the type in question here. As for its second assertion of no harm, the Air Force's "amorphous term of 'contract prices'" fails to analyze whether the information is "cost breakdown" information which is protected from discloser by the FAR and Exemption 4 or "unit price" information which may be disclosed under the FAR (Canadian Commercial Corp. v Dept. of Air Force, No. 04-1189).

Inclusion of Items on its FSS Does Not Preclude Government From Purchasing Items Elsewhere

MBE protested the government solicitation for an indefinite quantity of fiber optic cables arguing the government should have purchased the items under its Federal Supply Schedule contract rather then competing the requirement. Though MBE conceded its FSS contract is non-mandatory it asserted the government was required to order against that contract. In support of its position, it alluded to FAR 8.404 which generally provides that orders placed against FSS are considered to be placed after full and open competition and FAR 8.002 which places non-mandatory FSS contracts above commercial sources in priority of use. The GAO disagreed explaining that FAR 8.404 provides guidance on use of FSS but does not require its use. Just because an agency's placement of an FSS order indicates a conclusion the order represents best value, FAR 8.404 does not establish a presumption that all FSS contractors represent best value such that the agency would be required to purchase from an FSS contractor. Similarly, GAO ruled though FAR 8.002 places non-mandatory FSS contracts above commercial sources of priority, it does not require an agency to order from the FSS (Murray-Benjamin Electric Co. GAO, B-298481).

Failure to Deliver Flu Vaccines Was Default and Supplier's Problem is No Excuse

GIV was to deliver flu vaccines to the Defense Logistics Agency between September and November 2004. However, GIV's United Kingdom based supplier Chiron Vaccines notified the Federal Food and Drug Administration in August that certain lots were contaminated and could not be shipped to the US. Because GIV did not find an alternative supplier, it could not deliver any of the vaccine and its contract was terminated for cause. GIV argued it had no contractual obligation to deliver the flu vaccine unless and until Chiron and the FDA released the vaccine for sale in the US - the FDA approval was a "condition precedent" to its obligation to deliver. The Board rejected GIV contention citing the general principle of law that "a party may not use the non-performance of

a condition precedent when that party…is responsible for the non-performance of the condition." Hence Chiron, and thus GIV were responsible for the lack of FDA approval. The Board also rejected GIV's argument the government had to prove that GIV's failure to deliver acceptable vaccine was due to Chirons's negligence, ruling GIV had to show its failure to perform was beyond its control which it did not do. Because procured or subcontracted items are "of the very essence" of a government contract, a contractor is generally to be held responsible for the actions of its subcontractors and suppliers (General Injectables & Vaccines, Inc. ASBCA No. 54930).

Follow-Up…

In a government appeal, the US Circuit Court of Appeals confirmed that the Air Force is not entitled to a $300 million price reduction under a multibillion dollar jet engine contract because the Air Force failed to show it relied on UTech's alleged defective cost or pricing data when it determined price reasonableness. In confirming the Appeals Board denial of the government's Truth in Negotiations Act Claim (TINA), the Court rejected the Air Force's contention that it was not required to show "detrimental reliance" (i.e. it relied on the defective data to its detriment) but only to establish the contract price was calculated using defective data. The Board had ruled that in an earlier ruling it had improperly focused on the contractor's initial price proposal rather than on its best and final offer (BAFO) pricing and that the Air Force had not relied upon or even reviewed the allegedly defective pricing data in UTech's BAFO pricing. The Court ruled that TINA, Section 2306(f) provided that defective cost or pricing data increases a contract price only if the government relies on the defective data to its detriment in agreeing to a price (Wynne v United Technologies corp. Fed. Cir. No. 05-1393).

AM General asked the Appeals Board to reconsider its decision that certain of the company's accounting practices were inconsistent with CAS 418 by submitting an affidavit prepared by "an expert in cost accounting" and especially on CAS 418. The Board struck down the affidavit saying the interpretation of CAS is an issue of law on which the Board should not receive expert views and that the delay in presenting the affidavit would harm the government and could escalate into an "extensive relitigation" of the issue. In its earlier decision, the board concluded that AM General, which manufactures both High Mobility Multipurpse Wheeled Vehicles (HMMWVs) for the Army and similar vehicles sold commercial under the name Hummer violated CAS 418 by including all manufacturing overhead for both vehicles in a single cost pool and allocating it to each unit produced. Though AM General conducted the majority of its production for both vehicles at a single plant, the commercial Hummers were finished in another building as they came off the production line and the cost of this additional building was 11 percent of the total manufacturing expense. The Board concluded this added costs should be segregated and charged to the commercial program only (AM General LLC, ASBCA No. 53610, government's motion to strike granted).

NEW/SMALL CONTRACTORS

Primer on Variety of Indirect Cost Rates

New contractors (yes, even veterans) are often confused on the different names of indirect rates commonly bandied about. What is the difference between proposal rates and final rates? When is a billing and actual rate used? How do these differ from rates used for booking inventory costs? The following list and brief descriptions will hopefully clarify the meaning of these terms. (Though we have liberally inserted insights from our own experience, we have also used Lane Andersons' Accounting for Government Contracts, Cost Accounting Standards.)

Contractors develop rates for each indirect cost pool. Service organizations might have general overhead, material/subcontract handling and/or general and administrative rates while manufacturing organizations may have manufacturing, engineering, materials handling and G&A. Each rate can change depending on the purpose and time of its use.

1. Forward pricing rate. Forward pricing rates are also known as bidding or proposal rates. It is the rate used to price a proposal and like the name implies, is used for the future, commonly for one or multiple years. The government will usually review these estimated rates to determine whether they can be approved for pricing purposes. A review or audit may be (1) for reasonableness purposes only - does the rate compare with common industry practices (2) cursory - are seemingly unallowable cost deleted or do individual account balances tie to budgeted amounts or (3) detailed - high dollar or "sensitive" cost accounts are examined in depth.

GCA REPORT
P.O. Box 1235
Alamo, CA 94507

2. Billing rate. A billing rate is also known as a provisional or interim rate. Its is a rate used to bill the government on either cost type contracts and subcontracts or progress payments on fixed type work. In early contract performance, if there is an agreed to forward pricing rate, the billing rate should be the same as forward pricing rates; if no agreement is made, there still should be no significant difference since if there was, it would indicate something was off. Rates can and, in fact, should be changed periodically to reflect estimates of actual rates.

3. Actual rate. The actual rate is indirect cost rates the contractor actually experienced on contract performance during the year. Year ending actual costs, adjusted for unallowable costs, will provide the basis for actual rates.

4. Final rate. When contractors have flexible contracts and subcontracts (e.g. cost type, time and material, labor-hour) the government will often audit the actual incurred cost for the year. They will audit what the contractor asserts is their actual rates and will commonly adjust them for questioned costs. Hence, the final rate is the one the government has agreed is the approved rate for any given year. This is the rate that results from the government's review or audit of incurred cost proposals and is used to settle most cost type contracts.

5. Booking rate. A booking, sometimes called a budget or inventory rate, is one that contractors often compute and use internally to estimate or determine its costs for performing a contract. It is a management tool for the company to track its actual costs or value work-in-process. It usually does not distinguish between allowable and unallowable costs, which are concepts reserved for government contract accounting, and is not usually reported to the government (though government auditors may ask to examine these rates to compare with other rates described above).

QUESTION & ANSWERS

Q. Is it possible to allocate the costs of the HR department to engineering and manufacturing as well as G&A? My experience has been that HR is strictly a G&A cost. However, my coworkers say the costs can be allocated. The FAR shows HR to be a G&A cost.

A. I'm not sure where the FAR show HR to be a G&A cost but I would agree with your coworkers. Both are normally acceptable - charging HR to G&A exclusively is quite common and charging some or all of HR to overhead pools is also quite common. You could accumulate all HR costs in a cost pool and allocate the costs to engineering, manufacturing and G&A on a headcount basis. Alternatively, you could have your HR executive in G&A and allocate remaining HR costs to one or both of the engineering and manufacturing pools. Also, all HR costs can be assigned to G&A if you establish that as your practice.

Q. My question relates to cell phone charges where the company pays a fixed rate per month for a fixed number of minutes. Cell phones are used by employees which have mixture of personal use and business use on a direct contract for employees to communicate with prime contractor and government personnel. My opinion is the company should allocate the fixed cell phone monthly charge between the contract and to the employees based on the percentage of total minutes actually used for business and personal usage (or allocate the personal use, if it is paid by company, to a fringe

GCA REPORT · P.O. Box 1235 · Alamo, CA 94507 · (tel) 925-362-0712 · (fax) 925-362-0806 · Email: gcaconsult@earthlink.net
website: www.govcontractassoc.com

Subscription: $150 for one year, $275 for two years.

benefit pool). I cannot locate anything specific in the FAR to support my opinion other than a gut feel that it is not proper to charge 100% of a fixed charge if there is non-business, non-contract related usage involved.

A. There is really no guidance I am aware of that specifies how to charge the cost nor any one definitive way you should handle it. I'm not sure from your question whether cell phone costs are charged direct to one cost type contract, is considered direct costs to several contracts or is included in an indirect cost pool. But let me give you some general guidelines.

It is really a matter of judgment and materiality. If cell phone costs are a material cost element (say more than 3-5 percent) of your indirect cost pool then you might need to conduct an analysis of what is personal and what is not. However, if it is an immaterial cost, the entire bill is commonly charged to the pool without the need to distinguish between personal and business expense unless you want to be both conservative and more precise (that's the judgment part). Be aware that once you start making the distinction, then you become vulnerable to assertions that your methodology is inaccurate and hence the cost can become unallowable. If telephone charges are direct charges of one or more contracts and they represent a material amount, then yes you might want to be more precise and conduct a personal versus business analysis and use the results of that analysis for determining costs charged.