GCA REPORT
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NEW DEVELOPMENTS

OFPP Sets New Compensation Cap for FY 2012

The amount of executive compensation that would be reimbursed to federal contractors as allowable costs for fiscal year 2012 will be $952,308 which is an increase from the 2011 amount of $763,029. The statutory adjustment is required under the formula in section 39 of the OFPP Act that sets a compensation amount based on surveys of publically traded government contractors whose revenues exceed $50 million. The cap does not preclude payments of higher amounts but limits the amount that is allowable on government contracts. Contractors can also expect significantly lower caps will apply following government audits if their revenue falls below the surveyed amount of $50 million. Though the amount has not been challenged, industry representatives have criticized the delay in issuing the cap which is supposed to be set prior to each fiscal year. The recently passed Defense Authorization Act discussed below will replace the current statutory benchmark formula for 2014 though the amount is not yet clear.

Defense Authorization Act is Passed

President Obama Dec 26 signed the fiscal year 2014 National Defense Authorization Act (NDAA) which authorizes $526.8 billion for base defense budget plus $80.7 billion for overseas contingency operations. Of particular interest to contractors, the bill resets the cap on executive compensation to $625,000 and expands funding to the Office of Inspector General which is tasked with identifying waste, fraud and abuse in procurement programs.

The final NDAA is the result of hammering out a deal with the Senate and House versions of the bill where the most noteworthy feature is what the final version left out. For example, proposals to limit executive compensation to that of the President ($400,000) or the Vice President ($230,000) were rejected because they "represent an arbitrary comparison between compensation and salary which will only serve to drive talent from the nation's industrial base." In addition, other controversial proposals were eliminated such as increasing the authority of the Chief Information Officer regarding IT investments and disallowing costs related to use of counterfeit electronic parts.

Despite the NDAA's provision to lower executive compensation over previously approved amounts (see article above) contractors will have to wait for the Obama Administration to decide how much executive compensation will be allowable under federal contracts because the NDAA amount conflicts with the amount provided in the Dec 20 passed Bipartisan Budget Act (BBA). The NDAA amount of $625,000 is quite different than the $487,000 approved in the BBA where now the Obama Administration will need to decide what amount will apply.

DCAA Issues Revised Guidance On Auditing Low Risk Incurred Cost Proposals

DCAA has issued revised guidelines for auditing low risk incurred cost proposals (ICPs) over earlier ones issued in September. The guidance provides new policies and procedures to be used by field audit offices (FAOs) to assess (or reassess) risk of all adequate ICPs with auditable dollar value (ADV) of less than $250 million. What constitutes ADV can be quite detailed but generally it is considered to be federal government cost reimbursable or time-and-material contracts. Commercial work and fixed price contracts (unless there are cost determination features such as price redeterminable contracts or fee based on costs incurred) are excluded as well as allocated costs or subcontract costs that would be audited by a different FAO. The guidance states the changes are the result of an assessment of whether their earlier sampling guidelines were efficient at utilizing DCAA's limited resources and provided expanded capabilities of exercising auditor judgment in determining what ICPs are audited. The key changes to these policies include:

1. Changed prior year cost thresholds. A determination of high risk will be made if (a) 10% or more of ADV of less than $1 million is questioned (b) 5% or more or $100,000 is questioned, whichever is greater, of ADV

between $1-$5 million or (c) there is more than $250,000 of questioned costs when the ADV is between $5-$250 million.

2. If the last incurred cost audit performed found "no significant questioned costs" then all proposals with less than $5 million in ADV should be considered low risk. However, there are exceptions on this that include "significant relevant risk to the incurred cost proposal exists such as fraud referrals, unacceptable opinion from a pre-award accounting system audit or specific relevant risk with the contractor that has a material impact to the ICP."

3. For all proposals between $5 million and $250 million of ADV, if the last incurred cost audit found "no significant questioned costs" then auditors are to use their "professional judgment" to determine risk. The guidance states auditors, when determining risk, are to consider fraud referrals, "unacceptable" opinions on their pre-award reviews of accounting system or reported business system deficiencies that may be relevant to an incurred cost proposal audit (e.g. voucher processing, forward pricing effort, post award accounting system) or specific relevant risk with the contractor that has a material impact to the ICP.

4. The percentage of low risk ICPs that will be selected on a random basis for audit. Less than $1 million: 0%; $1 million - $50 million: 5%; $50 million - $100 million: 10%; $100 million – $250 million: 20% (for these ICPs, a mandatory audit will be conducted at least once every three years); over $250 million: 100%.

The memorandum provides additional guidelines where the most important include:

a. *Policy*. All ICPs with ADV over $250 million will be audited, all others will be assessed for risk and all high risk ICPs under $250 million will also be audited. Also, home office, shared services and intermediate home office ICPs will not be included in the risk sampling assessment where these areas along with segments will be assessed during the ICP adequacy or risk assessment review. If all segment ICPs are low risk then corporate/ shared services/intermediate home office reviews will not be needed.

b. *Definition of questioned costs*. As usual with DCAA, no definition of "significant questioned costs" is provided. However, the guidance does specify that questioned costs will be defined as those questioned costs that are identified in its information system that take into account the percentage of government participation plus the amount of questioned home office, intermediate home office, etc. costs multiplied by the percentage of government participation.

c. *Closure of low risk ICPs not selected for audit*. A Memorandum for Contracting Officer (using a pro-forma memo) will be issued for ICPs not selected. There should be included a signed indirect cost rate agreement, subcontractor release statement (if applicable) and a tailored cumulative allowable cost worksheet. If the latter is not available, Schedules H and I from the ICP will be attached.

d. *Status of subsequent ICPs if one low risk one is selected for audit*. If one or more low risk ICPs are selected for audit any subsequent ICPs submitted will not be dispositioned until the audit is complete. If significant questioned costs are found, then all other ICPs will be audited that were in the pool using multi-year audit procedures while if no significant questioned costs are found then close out all subsequent ICPs in the sampling pool using the procedures described above.

e. *Lack of audit experience when multiple ICPs are submitted*. If ADV levels are significantly different, consider the higher ADV ICP as high risk and audit it and treat the lower ADVs as low risk. If ADV levels are consistent across all years, use multi-year audit techniques (*13-PPD-0219(R*).

DCAA Issues Guidance on Professional and Consultant Costs

(Editor's Note. The following audit guidance with be addressed in greater depth in the next issue of the GCA DIGEST because professional and consultant costs are one of the prime areas of audit scrutiny these days.)

DCAA has issued audit guidance on what constitutes adequate documentation for claimed consultant costs to be allowable in accordance with FAR 31.205-33(f). The guidance states there are three documentation requirements:

1. An agreement that explains what the consultant will be doing for the contractor. All details of the agreement will be examined.

2. A copy of the bill for the actual services rendered. There should be sufficient evidence as to time expended and nature of services provided. Auditors are told to determine what was done in exchange for the payment required and that the terms of the agreement were met. The guidance states this documentation "does not need to be included on the actual invoice and can be supported by other evidence provided by the contractor."

3. Explanation of what the consultant accomplished for the fees paid – this can include information on the invoice or other evidence such as a drawing, a power point presentation of other evidence of the services provided.

The claimed costs will be unallowable without evidence of an agreement, invoice and what the consultant actually performed. The guidance stresses that the auditors should be looking for evidence to satisfying these three areas and not a specific set of documents. "Auditor judgment" will be the determining factor on the type and sufficiency of evidence required to satisfy these requirements.

The audit guidance also stresses that when reviewing the claimed costs that appropriate audit criteria (e.g. FAR cost principles) be applied that is based on the nature of the costs being claimed not the account in which the costs are recorded. For example, costs recorded as consultant costs may actually represent "purchased labor" where different criteria may apply (*13-PAC-026(R*).

DOD Issues Rule On Unallowability of Certain Fringe Benefit Costs

The Defense Department issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to state explicitly that fringe benefit costs that are contrary to law, employer-employee agreement or an established policy of the contractor are unallowable. This final rule caps a long term controversy over whether unallowable dependent health care costs are considered to be "expressly unallowable" and hence subject to FAR 42.709 based penalties. The controversy began with an August 2009 memo from DCAA declaring that ineligible dependent health care costs were expressly unallowable. The memo generated significant challenges stating there was no explicit provision in the FAR making such costs unallowable which meant it did not meet the requirement for a cost to be expressly unallowable. The controversy resulted in a Feb. 2012 DOD memo stating that such unallowable costs were not expressly unallowable which DCAA acknowledged in a March 2013 memo. Meanwhile, DOD did not want to give up on being able to impose penalties on these costs and hence published a proposed rule in Feb. 2013 making such unallowable costs expressly unallowable which is incorporated in the final rule.

Comments on the new regulation indicate contractors will need to have in place internal controls sufficient to ensure unallowable dependent health care costs are screened which will impact not only cost allowability but also adequacy of contractors' accounting system. It is also feared that the general language in the rule will be interpreted to be affecting all fringe benefit costs which will enlarge those costs subject to penalties (*Fed. Reg. 73451*).

Bill Will Require Automated Reviews of Security Clearance Holders

(*Editor's Note. In the aftermath of the Richard Snowden debacle and the Navy Yard killing of 12 people by a person holding a security clearance since 2007, the government is carefully reviewing its processes of awarding security clearances. For example the Office of Management and Budget is undertaking a thorough 120 day review of its processes.*)

A recently introduced Senate bill would automate review of public records for information affecting exiting security clearances. The bill would require the Office of Personnel Management (OPM) to search public records and databases, at random times, for specific information on every individual with a security clearance at least twice every five years. The audits would search for information already required for disclosure including data on criminal and/or civil proceedings, financial information, data from terrorist or criminal watch lists and any information suggesting ill intent, vulnerability to blackmail, compulsive behavior, allegiance to another country or change in ideology. The OPM would have to relay anything it finds to the agency granting the clearance and that agency would decide to take additional action.

Currently, the federal government relies on the clearance holder to self-report information between the time a clearance is granted and the time it is renewed. The bill's authors state the random audits will go beyond current "box checking" where they will provide additional incentives for clearance holders to self-report incidents that can affect their eligibility for clearances. Many representatives of industry have endorsed the bill.

DOD Rule on Notification of In-sourcing Decisions

DOD has issued an interim rule requiring notification to the private sector on decisions to in source work. The interim rule modifies DFARS 237.102-79 to establish procedures for the timely notification of any contractor who performs a function that DOD plans to convert to performance by DOD employees. A written notification will be provided to affected incumbent contractors within 20 business days of the CO's receipt of an in-sourcing decision by the cognizant

in-souring program official. The notification will summarize why the services are being in-sourced where a copy of the notification will be provided to the congressional defense committees (*Fed. Reg. 65218*).

New Opportunities During the New Era of Budget Cuts

New articles on dealing with budget cuts and the government shutdown continue to proliferate. A few of particular interest are discussed below.

Eric Crusius of Centre Law Group reminds contractors to file claims ASAP for those whose work was affected by the recent government shutdown. Some contracting agencies will accept claims with little resistance while others will try hard to reject them. Many contractors have complained about the lack of guidance for resuming operations after the government reopened. Mr. Crusius states some contractors believe and are even told by government representatives they may not be compensated for loss time due to the assertion that "sovereign acts" of the government may prevent recovery of costs paid to employees during the shutdown. He points to a case (*Raytheon STX, GSBCA No. 14296*) that undermines this argument where the Board found that Raytheon was entitled to reimbursement of costs on its cost type contracts resulting from a similar government shutdown in 1995. Here the appeals board ruled the impact on government contracts "was merely incidental to the accomplishments of a broader government objective" where the shutdown was a "public and general act." Though the shutdown was a sovereign act, the board granted the recovery of costs, concluding the sovereign act does not bar recovery since the cost reimbursable contracts obligate the government to pay the allocable increased costs attributable to the shutdown.

Department of Defense budget cuts will continue over the next five to seven years according to Joshua Hartman of Horizon Strategic Group. He reminds people that similar periods of budget cuts over the last 50 years have lasted 5-7 years where they have then ended following "emotional events" that then trigger increased spending (e.g. terror attacks in the 80s, September 11). Mr. Hartman says the government will rely increasingly on use of indefinite-delivery-indefinite quantity contracts and blanket order agreements for small acquisitions and they can expect increased spending in such areas as IT and cybersecurity as well as areas of "disruptive technologies." Though he does not identify what these technologies are he states contractors should look toward what the private sector is focusing on.

A recent May 2013 study by the consulting firm McKinsey identifies twelve "disruptive technologies" that will have the most significant impact on the nation and world's economies over the next 20 years. These 12 technologies include: (1) Mobile Internet (e.g. increasingly inexpensive computing and internet connectivity (2) Automation of Knowledge (e.g. software that can perform knowledge work involving unstructured commands and subtle judgment (3) Internet of Things (e.g. networks of inexpensive sensors, actuators for data collection, monitoring, decision making and process optimization (4) Cloud Technology (e.g. use of hardware and software delivered over a network or the internet, often as a service (5) Advanced Robotics that will automate many tasks (6) Autonomous and Near Autonomous Vehicles that will navigate and operate with no or little human intervention (7) Next Generation Genomics that will involve fast, low cost screening, advanced big data analytics and synthetic biology (8) Energy Storage that will include devices that store energy for later use such as new types of batteries (9) 3D Printing (10) Advanced Materials (11) Advanced Oil and Gas Exploration and (12) Renewable Energy.

IG Offices Are Critical of Process of Awarding Cost Type and T&M Contracts

(*Editor's Note. Though cost reimbursable and time and material/labor hour types of contracts still represent a sizable portion of awarded contracts, the significant administrative burdens in justifying their use indicate their use may decrease.)*

A couple of recent Inspector General reports are critical of agencies not complying with requirements of awarding cost type and T&M contracts. For example, the Office of Inspector General at the Department of Commerce issued a report saying DOC wasted $170 million in failing to properly award and monitor time-and-material and labor-hour contracts between 2009-2011. The report found that COs often failed to follow proper procedures such as the FAR requirement to write a justification (called a determination and finding) for the T&M contract where other forms of contracts would not work or for failing to establish a ceiling price where if it is exceeded a contractor proceeds at its own risk.

In another IG report, the OIG of the Defense Department stated DOD failed to comply with a FAR interim rule that requires authorizations and documentation on contracts other than fixed price contracts. The report summarizes the interim rule as (1) obtaining approval of use of a cost reimbursable contract at least one level above the CO and document this (2) justifying the use of these contracts (3)

documenting the potential of cost type contracts transitioning to fixed price vehicles (4) ensuring adequate resources are available to administer these contracts and (5) determining the adequacy of the contractors' accounting system during the entire period of performance of the cost type contract. The report found that officials did not obtain necessary approvals, document the possibility of transitions to fixed price contracts and verify the contractors' accounting system was adequate for cost reimbursable contracts. Recommendations included actions to ensure these deficiencies were minimized. For a copy of the report go to "dodig.mil/pubs/documents/DODIG-2014-011.pdf").

Rule on Accelerated Payments to Subcontractors is Finalized

A final rule effective Dec 26 will add a new clause requiring all prime contractors that receive accelerated payments from the government to make similar payments to their small business subcontractors. The clause will be inserted into all solicitations and contracts, including those for commercial items. The final rule implements a July 2011 policy memorandum directing agencies to make payments on an accelerated schedule to all of their prime contractors for the next year with the understanding that these contractors would accelerate payment to their small business subcontractors, typically within 15 days. Commentary indicates though the rule is well intentioned it is "too vague" because it lacks specifics on both the definition of "accelerated payments" and enforcement mechanisms as well as the high variability of payment terms and schedules merely provides a "best efforts" approach where subcontract disparities are likely to continue (*Fed. Reg. 70477*).

Interim FAR and DFARS Rules Protecting Whistleblowers and Making Legal Costs Unallowable

In response to recent concerns over whether whistleblowers are being adequately protected both the FAR and DFARS have been changed to reflect interim rules implementing the 2013 Defense Authorization Act. The new rules provide additional rights and protections for whistleblowers and makes legal costs unallowable that arise from legal proceedings raised by employees who submit complaints of reprisals. Highlights of the change include (1) extending protection of prime and subcontractor employees and allows them "compensatory damages" assuming they have been victims of reprisal actions (2) expands the type of misconduct disclosures that are protected including violations of rules or regulations, abuse of authority or assertions of gross mismanagement of government funds (3) expands protected disclosures to include not just those made to government officials, OIGs, Dept. of Justice but now appropriate contractor or subcontractor authorities (4) prohibits reprisals against an employee even if they are untaken at the request of government officials and (5) requires all contractors and subcontractors to notify in writing all employees of their rights as whistleblowers.

In addition, FAR 31.205-47(b) was amended to explicitly address the allowability of legal fees associated with proceedings brought by a contractor or subcontractor employee who submits a compliant of a reprisal.

CASES/DECISIONS

Allowability of Subcontract Prices

KBR appealed a court ruling that had sustained DCAA and the CO questioned costs on a fixed price subcontract for a dining facility under its cost reimbursable prime contract in Iraq on the basis the costs were not "reasonable." The Appeals Court stated KBR did not meet its burden of proving, by a preponderance of the evidence, that the subcontract price did not exceed that which a prudent person would incur in the conduct of its business as required under FAR 31.201-3. The Court rejected KBR's argument that cost reimbursable contracts require only that the contractor give its "best efforts" when performing where its costs are payable absent gross misconduct, arguing there was no support for this position in the FAR section. In its arguments the government did not attempt to defend DCAA's questioned costs but rather stressed the contractor has the burden of proof that the subcontract price was reasonable after the costs are questioned where the Court ruled KBR failed to do (*Kellogg Brown & Root, Inc. v U.S., 728 F.3d 1348 (Fed. Cir. 2013*).

(*Editor's Note. Comments on the case indicated the Court did not provide any guidance on what type of "independent analysis" would prove the subcontract price was reasonable, stating a contractor would have a hard time proving the costs were reasonable after a judge ruled they were not. They also state this ruling is significant because it provides considerable risk that under a cost reimbursable contract government officials may challenge each cost incurred on the grounds it was not reasonable where though such challenges were rare in the past this ruling may inspire DCAA and COs to make more of an effort in this*

regard. Comments have also stated the ruling establishes new dangers for holders of cost type contracts to provide fixed price subcontracts which can hurt the government that wants to encourage use of such subcontract price vehicles.) .

Agency Used Improper Method of Evaluating Proposed Support Services

The proposed contract provided for three CLINS – lab support, support services and quality assurance - and called for offerors to submit a technical proposal describing how they would perform the work and the labor mix (and other pricing factors) they would employ to come up with their proposed prices for the three CLINS. The government found AXIS's proposal satisfactory where its proposed price was close to half that of the winner but the agency increased its proposed price to match the historical labor mix while it adjusted the winner's proposal downward resulting in the winner having a slightly lower adjusted price. The adjustment resulted in the winner having a slightly higher technical proposal and lower price which made a decision easy to award it the contract after which AXIS protested the award. The GAO sided with AXIS stating the type of "normalization" evaluation used was "irrational". (Normalization, which is usually considered an unacceptable method of evaluating proposals, occurs when work requirements are expressed in terms of end results but then uses historical labor mixes to analyze proposed prices rather than the labor mix proposed by offerors.) The court did state that normalization may be proper if the factor being evaluated cannot be altered by the way the offeror decides to perform the work and the agency is conducting a cost realism analysis but here, the proposal was calling for offerors to provide the most effective approach to accomplishing a task (*AXIS Management Group, Comp. Gen. Dec., B-408575*).

Small Businesses are Affiliated with their Proposed Subcontractor and Hence Ineligible for Award

A solicitation for weather observation services was to be a small business set-aside. CJ Rogers and ATS were among several firms to receive the set-aside awards where both proposed Control Systems, the incumbent, to provide a significant role in performance. IBEX protested challenging both firms' size determination. The Board agreed with IBEX finding that CJ Rogers, together with its subcontractor Control Systems, should be considered affiliated under the "newly organized concern" rule of the Code of Federal Regulations 121.103(h)(4) and hence not a small business where evaluators should have recognized that a key employee for CJ Rogers had worked for Control Systems for several years having broad managerial responsibilities over multiple contracts. The Board also concluded both CJ Rogers and ATS were affiliated with Control Systems under the "ostensible contractor" rule of the same CFR section. This rule provided that when a subcontractor is actually performing primary contract requirements, the two firms are affiliated for purposes of the procurement at issue. Finally the Board concluded the two awardees' past experience would not have satisfied the solicitation's requirements without the augmentation from Control Systems (*IBEX Weather Svcs., ODRA, 13-ODRA-00641*).

Increased Costs From an Accounting Change May Be Offset Against Decreased Costs

(*Editor's Note. The following provides insight into how to compute cost impacts on accounting changes as well as highlighting the need to refer to the regulations in effect on the date a contract is executed.*)

On Jan 1, 2005 Boeing made three unilateral accounting changes at its Philadelphia segment where two of the changes resulted in decreased costs on its CAS covered contracts and one increased costs. On the same day it also made six unilateral changes at its El Segundo segment where four resulted in decreased costs and two in increased costs. Citing FAR 30.606(a) as amended April 8, 2005 the ACO responsible for both segments took the position that increased costs could not be offset against decreased costs unless all the changes resulted in increased costs asserting Boeing was responsible for the increased costs at both segments. Boeing argued that the regulation in effect at the time it executed the contracts, all before Jan 1, 2005, expressly allowed for the offsetting of increased and decreased costs for the purpose of making a price adjustment on CAS covered contracts. The Appeals Board sided with Boeing stating the regulations applicable to a contract are those in effect on the date the contract was executed where prior to the April 8, 2005 change the DCMC and DCAA guidance expressly stated that within a segment, several accounting changes can be combined for cost impact purposes as long as they have the same effective date. Since the April 8, 2005 changes were irrelevant here, the Board did not address the meaning of FAR 30.606(a) (*Boeing Co., ASBCA No 57549*).

NEW/SMALL CONTRACTORS

Contractors Should More Aggressively Shape Contents of RFPs

(*Editor's Note. We have often discussed some of the business development tasks contractors need to master in order to win more awards (e.g. business intelligence about competitors' cost structure.) The following article goes a step further in the types of business development that needs to be applied to the objectives of winning more business. This article should be distributed throughout the company.*)

Oleesia Smotroval-Taylor of OST Global Solutions has stated that contractors should work diligently, within legal, ethical channels, to help shape the requirements in a request for proposal to increase its chances of winning awards. In a widely read blog post, Oleesia offered tips for how contractors can engage government customers to "wire the contracts to themselves early on and seal the deal with the perfect proposal." She states wiring is not negative as long as you are not violating any of the procurement integrity laws. She provides general guidelines to define the scope of work, define the solution and engage the customer without appearing to create preferential treatment.

Scope of Work. It is best to help an agency define what it needs to accomplish, how best to accomplish it and the most appropriate way to measure progress – all with the goal of making the requirement fit your company's solution so you are in the best position to win. You want to keep the scope under one procurement rather than splitting it up into multiple procurements. The author states a prescription statement of work as opposed to a looser statement of objectives or a performance work statement will help dictate the scope of work and type of contract that would best benefit your company. For example, you may want a strictly defined scope of work issued under a fixed price contract over a less defined scope of work under a less desirable (to the government) flexible contract. Other tools you can use is to persuade the customer to exclude some elements because they are not to your advantage, arguing for inclusion of other elements which make it more difficult for your competitors or shaping performance metrics to give your firm advantages.

Solution. In addition to influencing the scope of work you want to shape as many aspects of the customer's solution as possible to improve your win chances. Important aspects may include past performance, key personnel and resume requirements to play to your strengths. She says if your firm has the right qualifications and people to bid then the RFP should be specific as to requiring these as evaluation criteria while if you don't have those then consider the opposite. There is a list of things to push for such as specific infrastructure (e.g. a DCAA approved accounting system), resources (e.g. library, technology, tools, available project managers), facilities (e.g. in the right location), certifications and qualifications (e.g. CMMI Level 3, ISO), platforms, standards and industry best standards. In addition, the RFP schedule of performance might be tight if you can meet it while discouraging competitors or driving up their prices.

Legal and Insurance Requirements. You will want to consider the Intellectual Property rights you will be giving up to the government and how this will impact you and your competitors. You may also want to think about insurance and bonding requirements for large construction or overseas work where you already have such items in place and competitors do not.

How to Engage the Customer. You need to build relationships where you will know when to interact personally and most effectively, knowing the different types of customers and earning the status of "trusted advisor." You will want to collect information by doing your homework before meetings, listening more than talking and asking open-ended questions to learn more about the procurement especially early in the procurement cycle where the government may be more open. Also, make the customer more aware of your solution in the pre-RFP stage to see if they approve of your solutions or whether you need to tweak it. You also need to understand the chances of your solutions being divulged to competitors in which case your disclosure of solutions may change.

Be Cautious. Just as you want to skew the requirements in your favor be aware the government is often looking for opposite ways to "level the playing field." You will not want the government to appear to be biased in your favor where there is nothing worse than a protest or attention by the GAO or a congressional inquiry. Your goal is to help the government find the right product or service to meet its needs where there should be no inconsistency between shaping the RFP to your advantage while making the procurement better.

GCA REPORT
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QUESTIONS & ANSWERS

Q. Many of our contracts are in the $500-800K range where we are starting to receive contracting officer decisions to impose penalties on questioned costs in prior years. When is a contract or subcontract too small to be subject to penalties.

A. Penalty thresholds have changed over the years. The schedule is:

Before Jan 9, 2005, the threshold was $500,000
From Jan 9, 2005 to Sep 28, 2006: $550,000
From Sep 28, 2005 to Sep 30, 2010: $650,000
After Oct 1, 2010: $700,000

By the way, the FAR penalty provisions apply only to prime contracts, not subcontracts.

Q. I have submitted a response, with your help, to DCAA and the ACO on some costs that were questioned during their audit of our 2006 incurred cost proposal (ICP). I have not heard back from anyone and am inclined to "let sleeping dogs lie." What do you think?

A. Unless the ACO has accepted your position on the questioned costs, at some point the contracting officer will issue a final decision where then you have to formally appeal it if you don't like it. The final decision might be made by some other CO or ACO who does not have any information other than the audit report and will simply issue one based on that so you are running a risk by letting sleeping dogs lie. However, be aware there is a Statute of Limitations rule that recently established that the CO must issue a final decision within six years after you submitted an adequate ICP where if the six year period is exceeded, the government cannot go after any additional funds on cost type contracts.

Q. We are working on a proposal that is a MUST WIN for us. But our G&A Rate is too high to be competitive. Any ideas?

A. Yes, you can offer a lower G&A rate for any specific proposal or even for all proposals that you are expected to incur. There are several mechanisms available to do so. For example, you can show all of your estimated G&A pool and base costs and then insert a "management concession" which would represent a voluntary reduction of pool costs where the effect is to lower the G&A rate by lowering the pool. Or you could increase the base costs (denominator) by estimating on the high side those costs (e.g. project a highly optimistic estimate of work to be performed). Alternatively, you can simply propose it the normal way (e.g. estimated G&A pool and base costs) and then offer a reduced G&A rate for the one must win proposal. Offering a cap rate on CPFF contracts should earn extra evaluation points.

Q. We don't usually charge G&A on subcontract costs (we usually charge support costs direct) but we did charge G&A on subcontract costs on a fixed price contract. Is this a problem?

A. Yes, unless you have an agreement to charge similar costs incurred under similar circumstances differently. You usually can't charge subcontract "support costs" direct on some contracts and include those similar costs in your G&A pool and charge G&A on subcontracts for other contracts. That violates both FAR and CAS requirements for consistent treatment of like costs.

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