
GCA REPORT

(A publication of Government Contract Associates)

November - December 2014

Vol 20, No. 5

NEW DEVELOPMENTS

LPTA Dominates Best Value Source Selections

A recent Bloomberg Government analysis concluded that contractors who fear procurement officers are increasingly relying on lowest-price technically acceptable (LPTA) source selections are having their suspicions confirmed. The analysis found use of the LPTA process has increased over time demonstrating the government's preference for LPTA over the trade off selection process within the universe of best value solicitations. The analysis states increased use of LPTA puts pressure on contractors to carve out lower priced solutions to maintain their market share where if they are unable to identify cheaper methods, their profit margins will shrink.

For best value procurements the government is free to weigh what criteria to use for best value solicitations where there are basically two source selection approaches – trade-off and LPTA which differ in the prioritization of price and technical capability in evaluating a bid. In trade-off solicitations both cost and non-cost factors are taken into account where a winning proposal may fetch a higher price than a competing bid by offering a higher value solution with increased capability or performance. Such an approach has considerable appeal to contractors because it allows them to leverage competitive advantages such as a skilled workforce or access to advanced technologies. LPTAs make price the deciding factor where trade-offs between non-cost factors and price are not permitted as long as the technical requirements are met where, for example, past performance or skill levels are not considered if they are not outlined within the selection criteria.

The analysis found that the number of solicitations using best value language had increased by 138 percent from 2010-2014 where the volume of LPTA has stayed constant at around 60 percent. The uptick in use of LPTA is true across broad federal categories for both products and services as well as both defense and civilian agencies. Given the increased use of LPTA in recent years, companies should expect further price pressures

in an already competitive environment. In such an environment contractors must carefully consider their bids and limit capabilities to maintain their margins within the best value space. In some cases, company strategies may need to shift to areas where their product or service solutions are less susceptible to LPTA competition

DOD Issues Guidance on Using Blended Rates to Implement Multiple Compensation Caps

Oct. 24 the Director of Defense Pricing issued a memo to all service commands on the use of “blended rates” that relate to the statutory cap in FAR 31.205-6(p). The purpose of the blended rates are due to a change in the statutory compensation cap applying to contracts executed before and after June 24, 2014. Contractors performing “old” contracts signed before June 24 are subject to the previous rate cap, which was \$952,038, while those “new” contracts signed on or after June 24 are subject to a new, lower cap of \$487,000. Rather than applying multiple rate caps to individuals that are in indirect labor pools such as overhead and G&A, the memo allows computation of blended rates to simplify things. Though the short memo does not provide details it states the blended rates would be computed by each contractor as “a weighted composite cap amount specific to their contract volume prior to June 24, 2014 and on or after June 24, 2014.” Since most such rates apply to individuals in the indirect cost pools it appears as if in applying an indirect cost rate the composite rate would be based upon the relative indirect rate base dollars for old and new contracts as a percent of the fiscal year total. The memo states contractors are not required to use blended rates where, alternatively, they can choose to use separate rates or simply use the lower cap to applicable contracts. For those choosing to use the blended rate the contractor will initially calculate and use the rate for interim billings, if applicable. Subsequently, for incurred cost proposals, a blended rate will be computed that will be subject to audit. If blended rates are used, contracting officers and contractors will execute an advance agreement in accordance with FAR 31.109 where it will outline the agreed-to process, auditable data submission and expiration of the application of the blended rates. DCMA and DCAA are expected to issue further guidance.

DCAA Lacks Consistency in Accessing Internal Audit Reports

The General Accounting Office (GAO) issued a report Nov. 12 on the results of its review of DCAA actions to comply with section 832 of the national Defense Authorization Act (NDAA) for Fiscal Year 2013. Section 832 calls for documentation of access and implementation of “appropriate safeguards and protections” to ensure requested internal audit reports are not used “for any purpose other than evaluating and testing the efficacy of contractor internal controls and reliability of associated contractor business systems.” DCAA auditors are to document that access to company internal audit reports are necessary for an ongoing DCAA audit, that the request is sent to the company and the company’s response.

Of the eight randomly selected requests for internal audit reports examined the report states none contained adequate documentation of how the internal audit requests were connected to ongoing DCAA related work or how the internal audit reports were relevant to evaluating internal controls or risk assessments and why DCAA access was necessary. In its evaluation of DCAA revised audit guidance required by section 832, it stated the guidance was specific about physical safeguards for companies’ internal audit information but was not as clear about safeguards to prevent unauthorized use of internal audit reports (e.g. not to be used for purposes unrelated to evaluating internal controls and reliability of business systems).

As it was initially drafted, section 832 would have largely met DCAA’s 35 year efforts to expand their unfettered access to companies’ internal audit reports and materials. However, these provisions were substantially revised in the final bill to ensure DCAA cannot use internal audits and supporting materials for purposes other than assessing risk and evaluating the efficacy of contractor internal controls and reliability of associated business systems.

Criticism of Executive Order on Disclosing Labor Law Violations Continues to Mount

President Obama’s Executive Order No. 13673 signed July 31, 2014 continues to draw criticism from most industry groups. Under the order solicitations will require offerors to represent, to the best of their knowledge and belief, whether there have been any “administrative merits, determinations, arbitral awards or decision or civil judgments” within the preceding 3 years period of violations of any of 14 federal statutes and executive

orders and equivalent state laws that address wage and hour, safety and health, collective bargaining, family and medical leave and civil rights protections. Contracting officers will be required to consider those disclosures in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics. The order further says COs should, prior to making responsibility determinations, give offerors an opportunity to disclose any steps taken to correct their labor law violations and improve their compliance with the 14 labor laws. The EO will not be effective until the FAR is amended and the Labor Department has issued guidelines implementing the forthcoming FAR clause but statements by Labor Secretary Perez – “cheaters shouldn’t win” – indicate DOL will take a tough stance. Some attorneys are recommending firms conduct a labor law compliance audit to review their labor policies and practices, identify past violations and any pending litigation and administrative investigations and undertake training as well as making sure their handbooks and written procedures are adequate.

Annual GAO Report Shows that Protesters Continue to Obtain Relief in 43 Percent of Protests

The GAO issued its recent Bid Protest Annual Report to Congress which indicates more than ever a protester is most likely to win a protest through voluntary agency corrective action rather than a final decision by GAO. The report says the GAO sustained protests at a rate of just 13 percent which is a new low compared to prior years. However, this does not mean there is less success for protesters. Despite the drop in sustains, the overall “effectiveness rate” – the percentage of protests in which a protester obtains relief through either a sustain or voluntary corrective action has remained consistent reaching 43% in 2014. Though the reason is not certain it appears that agencies on the whole have become savvier about spotting (and proactively addressing) serious procurement flaws that come to light during a protest. Commentators on this state the most fruitful time to achieve a desired outcome may be the first days after a protest is filed, well before the process has proceeded very far and an agency report is issued. Though convincing the GAO of the merits is the ultimate task, the protesters first objective is to convince the agency it is right.

The GAO report also shows the number of task order protests continue to rise, reaching 12% of all the 2,458 protests filed. The GAO report also show a continuing trend of holding fewer hearing where now less than 5% of protests filed result in fully developed cases compared

to 12% in 2009. The reason for the drop may lie with GAO attempts to conserve its resources and the fact agencies are choosing to take correct action rather than go through a hearing.

In response to a new congressional mandate, the GAO for the first time included a summary of the most often cited grounds for sustaining bid protests which were (1) failure to follow evaluation criteria (2) flawed selection decisions (3) unreasonable technical evaluation and (4) unequal treatment.

New GSA Professional Services Schedule to Soon Replace Eight Existing Programs

A Nov 24 Bloomberg Government webinar called attention to professional services contractors that the General Services Administration schedules program will be consolidating eight of its current schedules. The speakers stressed that companies should be ready to take advantage of new opportunities from the merger of the following professional services schedules: Consolidated (OOCorp), MOBIS (874), PES (871), FABS (520), AIMS (541), LOGWORLD (874V), Environmental (899) and Language (738II). The new Professional Services Schedule (PSS) will be one of the government's largest multiple award contracts (MACs) that is expected to provide some \$5 billion in opportunities each year. The consolidation of existing professional services schedules affects virtually all professional services offered through the GSA's schedule programs where it is intended to ease complex procurement and reduce administrative costs. Migration of contracts are beginning on Jan 1, 2015 and the eight existing schedules are due to terminate Feb. 28, 2015. Presenters recommended "reaching out" to the GSA "to make sure they are aware of you and you of them" and stated if they have not notified you about the transition "don't wait." 40 percent of the 200 largest federal contractors in 2013 won contracts on at least one of the eight GSA schedules with many holding multiple contracts on more than one.

FAR Interim Rule Affects \$10.10 Federal Contractor Minimum Wage

The Defense Department, General Services Administration and National Aeronautics and Space Administration announced Dec. 12 they are issuing an interim rule to amend the Federal Acquisition Regulation to implement an executive order and Labor Dept. rule calling for a \$10.10 hourly wage for employees of federal contractors. The interim rule will apply to solicitations for contracts covered by the FAR issued on or after the rule's effective date of Dec. 15. The Executive Order

13,658 was signed Feb. 12 and the Labor Department published its final rule on Oct 7 clarifying the minimum wage applies to all contracts for construction covered by the Davis-Bacon Act, contracts for services covered by the Service Contract Act, concession contracts (e.g. food, lodging, auto fuel, etc.) and contracts to provide services such as child care or dry cleaning on federal property. The interim rule adds a new subpart – FAR 22.19 – and like the DOL rule, establishes a minimum wage of \$10.10 starting Jan 2015 where beginning Jan 1, 2016 and each year after the labor secretary will determine a minimum wage based on the consumer price index. The interim rule holds a contractor responsible for compliance by its subcontractors and states a contractor may be held liable for unpaid wages due its subcontractors' workers. However, unlike the DOL rule, the interim rule does not hold upper-tier subcontractors responsible for compliance by lower-tier subcontractors.

DOD IG Report Cite Problems with Awarding Cost Reimbursable Contracts

The Defense Department's Inspector General Office Nov 7 issued a report saying DOD contracting personnel have not consistently implemented FAR requirements for use of cost reimbursement contracts saying personnel were unaware of the interim FAR rule or were unclear about some of its provisions. Section 864 of the National Defense Authorization Act for 2009 imposed requirements on the use of cost reimbursable contracts which were implemented in a final FAR change in 2012 that required documentation of (1) approval at least one level above the contracting officer (2) justification for the use of a cost reimbursement-type contract (3) plans, if any, to transition to a firm fixed price contract in the future (4) available resources to monitor the contract and (5) the adequacy of the contractor's accounting system.

The IG reviewed 604 contracts worth \$82.7 billion and found lapses in the documents and stated reasons for the lapses including: (a) insufficient approval for cost reimbursable contracts – 202 (33%) where some personnel did not believe the requirements applied to low-dollar awards and some awards were already approved by the highest ranking official in the contracting office (b) no justification for use of cost reimbursable contracts – 121 contracts (20%) – where personnel said they were unaware of the interim rule or thought other guidance justified use of the contracts (c) absence of documenting the possibility for transitioning to FFP contracts – 227 contracts (38%) where there was either lack of awareness or there were no opportunities to transition because they were a one time award (d) failure to determine there was adequate government resources

to manage the contracts – 138 contracts (23%) where there was lack of awareness, no acknowledgment from the CO's representative or a COR was not assigned until after award and (e) lack of verifying the contractor had an adequate accounting system – 167 contracts (28%) citing lack of awareness, there was no documentation where assessments had actually been performed, timely DCAA reports were not received or COs performed their own accounting assessments by obtaining statements and certification from the contractor.

IG's recommendations for improvement ranged from reinforcing or clarifying recent guidance, clarifying conditions when a cost reimbursable contract can transition to a FFP contract, identify best practices to assess accounting systems and clarify whether decisions for a basic contract apply to task orders or options under the contract.

Proposed Rule Will Require FAPIIS to Have Owner, Subsidiary and Predecessor Data

A proposed rule to amend the FAR was issued Dec. 4 in the Federal Register to include in the Federal Awardee Performance and Integrity Information System (FAPIIS) identification of any immediate owner or subsidiary and all predecessors of offerors that held federal contracts or grants within the last three years. The rule would apply to commercial items, including commercially available off-the-shelf items as well as acquisitions below the simplified acquisition threshold. Though the Defense Authorization Act originally requested additional information, the FAR Council reasoned that the further the distance between entities the less relevant the information and stated it would be too costly to create a system that monitors interrelationships of companies and their changes in ownership as well as any direct and indirect subsidiaries that could occur. It was decided that providing information about all predecessors of the offeror that received a federal contract or grant within the last three years is sufficient information and is consistent with the period required by FAR 42.1503(g) for consideration of most past performance information.

Defense Contracting Takes Bigger Hit under Sequestration

As so many government contractors know, contract spending absorbed a larger share of cuts under sequestration than other DOD spending categories according to an annual report by the Center of Strategic and International Studies (CSIS). The annual report compares DOD contract spending on prime contracts to prior fiscal years and excludes classified programs.

Defense contract obligations fell 16 percent from FY 2012 to FY 2013, the first year of sequestration. By comparison, gross defense outlays declined 8 percent with noncontract gross outlays remaining essentially flat. The decline in contracting was four times as steep as during the FY 2009-2012 budget drawdown and three times as steep as between FY 2011 and 2012. Military construction from 2012-2013 fell 37 percent, operations and maintenance declined 15 percent, research, development and testing fell 10 percent and procurement fell 9 percent. Declines in contract obligations varied by service with the Air Force falling 22 percent.

CASES/DECISIONS

New Statute of Limitations Decision Eliminates Clarity on When the Clock Starts

(Editor's Note. Recent cases we have reported on indicate that the six year statute of limitations clock on questioning costs starts when a contractor submits its incurred cost proposal. The following case makes those rather clear rulings much murkier.)

Basically the government has six years from the date a claim accrues to assert a claim against a contractor where under the FAR a claim accrues on "the date when all events that fix the alleged liability of either the government or contractor and permit assertion of the claim, were known or should have been known" (FAR 33.201). When the six years have passed, courts and appeals boards are barred from hearing disputes under the Contract Disputes Act. Recent board decisions have ruled, in most instances, that the six year statute of limitation begins to run when invoices or an adequate incurred cost proposal (ICP) for indirect costs are submitted. However, in the current case, the government contended it had no knowledge and therefore no reason to know whether certain costs that were included in the ICP were allowable until the contractor "provided detailed information showing the costs were allowable." The board sided with the government, stating that even where the contractor submitted an adequate ICP the government did not know or have reason to know of claims related to costs contained in the ICP concluding that only upon receipt of the supporting data did the government have reason to know of its claims (*Combat Support Associates, ASBCA No. 58945*). *(Editor's Note. Many attorney comments vehemently disagree with this new ruling stating if it stands, DCAA can expect to "sit on its hands", delay an audit where it will request supporting documentation and still have a valid claim long after the statute of limitations has run. One recommendation we have seen is for contractors to consider*

where they may have potentially questioned costs and then, though not required, to provide supporting documentation with the ICP submissions to pre-empt a successful argument under the Combat decision above.)

ASBCA Allows For Limited Recovery of Costs from a Termination

The Government terminated for convenience a fixed price, commercial items requirements contract before performance began to provide various services for storage of privately owned vehicles for Army military members. SWR submitted a claim for \$3 million with the terminating contracting officer where their appeal of the rejected claim hinged on the proper interpretation of FAR 52.2.12-4(l), the standard T for C clause for commercial item contracts. The first prong of the clause provides for recovery of a percentage of the contract price reflecting a percentage of work performed before notice of termination where the board ruled SWR was not entitled to any recovery stating though a contractor is entitled to fair and just compensation from the government that compensation does not include anticipated but unearned profit for contracts terminated before performance began. However, the second prong of the clause, which allows for recovery of reasonable charges resulting from a termination, did entitle SWR to certain reasonable charges such as \$15,000 related to a promise to pay a property lease for vehicle storage and \$75,000 payment to a rent provider for a non-refundable deposit just after the Army's award decision. Though the court said SWR could recover \$129,489 of documented charges, other claims such as \$6 million for a tent were rejected because the costs were not substantiated (*SWR Inc., ASBCA No 56708*).

GAO Denies Protest Alleging Conflict of Interest

Alliant protested an award give to Raytheon to design a radar air defense system. The protest asserted there was an organizational conflict of interest where Raytheon had an unfair competitive advantage since the design specifications were based on work Raytheon conducted with the Air Force, giving it an "undue influence" and that Raytheon had unequal access to certain proprietary information. The GAO disagreed stating while current specifications may be based on work developed by Raytheon, that alone did not constitute biased ground rules. As for unequal access to information due to its prior work with the Air Force the GAO said while an offeror may possess unique information, advantages and capabilities due to its prior experience under a government contract the government is not required to

equalize competition to make up for such an advantage unless there is evidence of preferential treatment or other improper action (*Alliant Techsystems, GAO B-410036*).

Board Denies G&A Applied to Direct Travel Costs

Sosi's contract called for use of a single burdened hourly rate to include "all costs associated with contract performance" such as wages, management overhead, G&A and profit. The contract also allowed for reimbursement of "exception" travel costs (as opposed to local travel which was not reimbursable) which required those costs to be reimbursed at actual incurred costs. Of significance, the contract contained FAR 52.232-7, time and material payment clause which expressly deems "applicable indirect costs as an allowable part of 'material' costs." Consistent with its accounting practices where G&A costs were allocated on a total cost base, Sosi applied its G&A rate to all the exceptional travel costs it incurred. The contracting officer rejected the G&A costs applied to travel invoices stating they should be built into the burdened labor hour rate. In addressing the appeal, the board debated whether the application of the T&M payment clause, which allows for indirect costs applicable to "materials" should apply or whether the solicitation and subsequent contract was clear in their intent to having all G&A costs included in the single labor rate. The Board came down on the solicitation/contract terms ruling the contract was clear about the intent to include G&A costs in the rate despite the conflict with both the T&M payment clause and Sosi's cost accounting practices (*SOS International, CBSA 3678*). (*Editor's Note. Comments we have seen warns that disallowance of the G&A costs should be a warning to contractors that the courts will defer to contract terms rather clearly accepted clauses and contractors' accounting practices.*)

Contractor's Allocation of Costs is Compliant with CAS

Sikorsky is a CAS covered government contractor that produces aircraft and other goods and services for both the government and commercial markets. The case addresses whether Sikorsky's method of allocating its material overhead pool of costs violated the cost accounting standards, specifically CAS 418. Sikorsky collects its manufacturing and material overhead costs in an indirect cost pool which includes costs of purchasing and handling material. Prior to 1999, it allocated these costs on a direct material base that excluded government furnished material where it found the method distorted allocation of its material costs, undercharging government contracts and overcharging

commercial contracts. Between 1999-2005, Sikorsky allocated its material overhead costs by using a direct labor base where in Dec 2008, the contracting officer issued a final determination that the use of a direct labor base rather than a direct material base did not comply with CAS 418 and determined that Sikorsky owed \$80 million, that include overcharging government contracts plus associated interest.

The government's position is the pool should be allocated using a direct material base rather than a direct labor base. Though the arguments are complex much of the debate hinged on whether CAS 418-50(d) or 418-50(e) applied and whether the amounts of material related overhead was "material." In addressing whether the supervision and management costs were a "material amount" the Court concluded they were not since the logistics work force represented only 7 percent of the pool and the purchasing group represented 14 percent of the pool. In concluding the amount was not material, the court rejected the government's definition of material being more than a "de minimus" amount ruling that "material" refers to a "significant amount." Since the amount of these costs were not material, the court ruled either a direct labor or direct material base would be in compliance with CAS 418-50(d) and (e). The court also held that Sikorsky's pool complied with CAS 418-40(b) that states indirect costs must be accumulated into indirect cost pools which are "homogeneous." Though the pool contains both manufacturing and material overhead costs the court ruled it can still be homogeneous if the allocation to contracts was not "materially different from the allocation that would result if the costs were allocated separately" where Sikorsky successfully demonstrated the government had failed to show there was any significant differences in allocation results from combining material and manufacturing overhead costs (*Sikorsky Aircraft Corp. v US, Fed. Cir. No. 2013-5096*). (*Editor's Note. Comments on the case praised the rejection of the tendency for the government to argue that something is material if it is more than de minimus. Such arguments are often behind government's disapproval of cost accounting practices and business systems as well as disallowance of costs, essentially requiring contractors to be perfect in its allocation practices. The court' ruling provides a sound basis for contractors to use materiality as a defense when the relevant standards provide that immaterial impacts do not create noncompliance.*)

FEATURE ARTICLE

DOD Issues Proposal Checklist

The Defense Department has issued its long awaited checklist for determining the adequacy of forward pricing rate proposals in the Dec. 11 issues of the Federal Register. The rule instructs contractors to include the checklist when submitting their forward pricing rate proposals (FPRPs). The checklist is intended to "ensure submission of thorough, accurate and complete proposals, provide consistency and communicate common expectations to prevent rework and improve efficiency of the negotiations process." As described in the rule the checklist contains high-level, generic topics that are focused on the contractor communicating the bases for its proposed rates. It is highly oriented to ensuring the proposal contain adequate documentation for the basis of the proposed costs. Significant items include:

General Instructions

1. Is there a completed first page that includes name and address, name and telephone number of point of contact, date of submission, and name, title and signature of authorized representative?
2. Whether your organization is subject to cost accounting standards (CAS), a CAS Disclosure statement has been submitted, whether you have been notified that you are or may be in noncompliance with your disclosure statement or CAS (other than a noncompliance that has been determined to have an immaterial cost impact) and whether any aspect of your proposal is inconsistent with CAS or your disclosure statement.
3. You will need the following statement: "this forward pricing proposal reflects our estimates, as of the date of submission entered in (date) below and conforms with Table 215.403-1. By submitting this proposal, we grant the Contracting Officer and authorized representative(s) the right to examine those records, which include books, documents, accounting procedures and practices and other data, regardless of type and form or whether such supporting information specifically references or is included in the proposal as the basis for each estimate, that will permit an adequate evaluation of the proposed rates and factors."
4. Table of Contents or index (a) identifying and referencing all supporting data accompanying or identified in the proposal (b) identification and location

for supporting documentation not provided with the proposal along with name, phone number and email address of a point of contract.

5. Identify known or anticipated changes in business activities or processes that can have a material impact on the proposed rates (if not previously provided) such as (a) management initiatives to reduce costs (b) changes in management objectives as a result of economic conditions or increased competitiveness (c) company reorganizations including acquisitions or divestitures (d) shutdown of facilities or (e) changes in business volume and/or contract type.

6. Changes in accounting policies and practices such as (i) reclassification of expenses from direct to indirect or vice versa (ii) new methods of accumulating and allocating indirect costs and related impact and (iii) advance agreements.

7. Do proposed costs based on judgment factors include an explanation of the estimating processes and methods used, including those used to project known data.

8. Does the proposal show trends and budget data and does the proposal provide an explanation of how data as well as any adjustments were used.

9. The proposal should be internally consistent and should reconcile to the supporting data references where if not reconcilable, identify relevant pages and explain.

Direct Labor

1. Does the proposal include an explanation of the methodology used to develop direct labor rates and basis of each estimate? The location of supporting documents for the base labor rates (e.g. payroll records) should be identified.

2. Escalation factors for out-years and which costs the factors apply to.

3. Does the proposal identify planned or anticipated changes in the composition of labor rates, labor categories, union agreements, headcount or other factors having a significant impact on labor rates?

Indirect Rates (Fringe, Overhead, G&A, etc.)

1. Identification of the basis of each estimate and provide an explanation of the methodology used to develop the indirect rates.

2. Identify the location of supporting documents.

3. Identify indirect expenses by burden center, by cost element by year (including any voluntary deletions) in a format that is consistent with the accounting system.

4. Key contingencies.

5. Identify planned or anticipated changes in the nature, type or level of indirect costs including fringe benefits.

6. Corporate, home office, shared service or other incoming allocated costs as well as the source for these costs and location/point of contract for them. Also are all intermediate pools provided and reconciled to show where the costs will be allocated.

7. Are escalation factors identified, basis of each factor and what costs are the factors applied to.

8. Does the proposal provide details of the development of allocation bases? Also, is there references for supporting data for the allocation bases such as program budgets, negotiation memoranda, proposals, contract values, etc.

9. Does the proposal identify how the allocation base amount reconciles to long range plans, strategic plans, operating budgets, sales forecasts, program budgets, etc?

Other

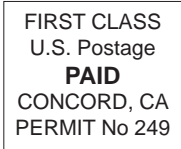
1. Does the proposal include a comparison of prior forecasted costs to actual results in the same format as the proposal and an explanation of variances?

2. Is this a revision to a previous rate proposal or a forward pricing rate agreement and does the new proposal provide a summary of the changes in circumstances or facts that require a change to the rates.

QUESTIONS & ANSWERS

Q We have been awarded an SBIR and would like to provide bonuses to our employees that work on it. Do you see any problem with this?

A. Since bonuses are paid to employees some of whom presumably work on other projects and/or indirect functions, you would likely be challenged by treating them as direct charges to the SBIR. It would be better to charge either to overhead or fringe benefit pools.



Q. We have a dispute with a company where we formed a “consortium” to pursue commercial technology. Are the legal and consulting costs allowable?

A. Two issues come to mind. First, is the “consortium” included as an arrangement that is considered to be unallowable in accordance with FAR 31.205-47(f)(5) (i) that states professional costs related to a “teaming arrangement, joint venture or similar arrangement” are unallowable. The fact the arrangement is called a “consortium” would still likely qualify it as a “teaming arrangement” or “similar arrangement.” Secondly, since it is clearly and exclusively a commercial dispute would that in itself make the costs allowable. We put the question to an attorney colleague of ours who put forth a reasoned argument that such expenses involved purely for commercial projects should be considered allowable, normal costs of doing business. Though the argument may not go unchallenged by the government, it nonetheless may create sufficient grounds to argue penalties should not be imposed which may affect your decision to claim the costs.

Q. What salary surveys are used by the government?

A. The question was put to several commentators and three responses are: (1) ECS, Watson Wyatt, Mercer and local surveys (2) Towers Watson, Mercer, ERI (Economic Research Institute) and (3) ERI. In addition, we like the Radford survey where results are significantly higher and a recent case we have reported on ruled the Radford survey, specifically, is valid. DCAA, at this time, does not like the survey, presumably because of the higher results.

Q. I don’t believe G&A people should be charged to the overhead base when they do B&P work.

A. I disagree. Any labor person doing B&P should be treated like CAS 420 prescribes which does call for B&P labor to be included in the overhead base.

Q. Our salaried employees frequently work overtime especially during busy periods and we want to establish a policy of allowing employees who work over 45 hours in a week to “bank” credit hours to be taken during slower periods when they want to work less than 35 hours. How do we account for this?

A. Some of our clients establish “comp” time for their employees. They should reflect total hours worked on their time sheets and charge the jobs/indirect functions at their normal hourly rate and book the “comp” time to a separate account (e.g. comp time over 45 hours). This account should be credited to the overhead pool – that is reduce the overhead pool by the comp hours multiplied by the hourly rate. When the comp credit hours are taken, another account is charged (e.g. Comp Time Taken) and the balance is added to the overhead pool. Alternatively, the first account can be used for both banking and using credit time by crediting or debiting it and the balance reflected in the overhead pool.

When these comp hours are not significant our experience is that government auditors usually accept the practice. If they become significant, then the auditors are more likely to question the practice if they suspect government contracts get heavily charged for the direct non-credit hours while the excess hours get credited to an overhead pool charged to all contracts. In this case, you may want to consider a different method (e.g. calculate a quarterly or annual average hourly rate taking into account the comp hours credited and debited).