GCA REPORT

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NEW DEVELOPMENTS

Congress Agrees on Year 2000 DOD Authorization Bill

As of this printing, the House and Senate representatives have agreed to a $288 billion Defense Authorization Act bill for fiscal year 2000. Significant items of interest to our readers include:

Changes to CAS Applicability (Section 801). Changes to cost accounting standard regulations will (a) double the threshold for full CAS coverage (compliance with all 19 standards) from $25 million to $50 million (b) reinstate the "trigger" contract threshold so that CAS coverage will be triggered only by an award of a contract worth $7.5 million or more (c) permit agency heads to waive CAS applicability for contracts worth $15 million or less and (d) exempt from CAS firm fixed price contracts that did not require submission of certified cost or pricing data. *(Detailed guidance on these items will certainly be issued later.)*

Increased RDT&E. The bill authorizes $36.3 billion for research, development, test and evaluation. It requires each service to justify expenditures that are less than 2 percent higher than inflation (Section 212) and authorizes the Defense Advanced Research Project Agency (DARPA) to significantly expand award of competitive prizes for development of advanced technologies for military application (Section 244).

Less Personnel Experience Requirements. Develop guidelines to de-emphasize current experience requirements of technical staff in service contracts (usually exceeding three years) so that new organizations in rapidly changing industries can compete.

Audits of Other Transactions (Section 801). The bill gives the General Accounting Office audit access authority to "other transactions" that provide payments of $5 million or more. To not discourage traditional commercial entities from participating, audit access will be exempted for organizations that did not enter into any other agreement that provides for audit access in the previous year.

Task and Delivery Orders (Section 804). DOD is required to develop guidelines to ensure task and delivery orders are awarded more competitively so all contractors entitled to compete are given a fair opportunity.

"Commercial Service" is Clarified (Section 805). Services that are "ancillary" to a commercial item – installations, maintenance, repair, training and other support services – are to be considered commercial services regardless of whether the service is provided by the same vendor or the same time as the commercial item.

SAP Pilot Extended (Section 806). The pilot authority to apply simplified acquisition procedures (currently limited to under $100,000) to commercial items below $5 million has been extended for three years. (Simplified acquisition procedures are covered in FAR Part 13)

SDB Goal (Section 808). The current goal of awarding at least 5 percent of awards to small disadvantaged businesses and historically black colleges and universities has been extended three years.

Mentor-Protégé programs (Section 811). DOD's mentor-protégé program has been extended three years. The program helps mentors line up reliable small businesses to subcontract with while helping meet SDB goals while protégé companies receive valuable knowledge and often receive preferences for obtaining subcontracts from mentors.

Expansion of Services as Commercial Items (section 814). A pilot program is established to include certain commercial services – utilities and housekeeping, education and training and medical services – as commercial items defined in FAR Part 12 provided the services offered to the federal government are similar to those offered to the general public. Guidance will be developed to ensure negotiated prices for these services are fair and reasonable. Industry believes the pilot program is an important step toward eventually including all services as commercial items.

FOIA prevention of release of proposals (Section 819). Freedom of Information Act stipulation that prohibits

release of proposals in DOD's possession will be applied to all the services and NASA.

DCAA Makes Changes to its Audit Manual

In August, the Defense Contract Audit Agency issued its latest semi-annual edition of its contract audit manual (DCAAM) that provides audit policies and procedures to its auditors. The changes incorporate memos made during the year as well as other changes. Significant changes include:

Chapter 4. Section 4-706-1, which covers suspected illegal political contributions, has added a sentence that explains the cited statute refers to illegal contribution applicable to federal elections, not to state and local elections.

Chapter 6. Chapter 6-107 has been added to provide guidance on performing "concurrent auditing". Intended to speed up establishing final rates and closing out contracts, new procedures are called for to accelerate audit steps that can be taken concurrently with other audits (i.e. proposals, internal control adequacy, Cost Accounting Standard reviews) before an incurred cost proposal is submitted rather than waiting until receipt and review of adequacy is made. Several examples are cited such as (1) selecting certain accounts that may be audited and transaction testing accomplished before a final year is completed (2) taking other steps such as identifying changes to accounting practices, reclassifying certain costs or reviewing substantial changes in particular accounts that may be performed after the close of the fiscal year but before receipt of the proposal. Once the proposal is accepted, the remaining steps may require only a review of "high risk" accounts and reconciliation of claimed costs to accounting records. Contractors selected for concurrent audits should have demonstrated they have an adequate accounting system, properly screen unallowable costs and commit to making on-time submittals of its incurred cost proposals.

Chapter 7. Section 7-1706 has been revised to advise auditors to include CAS 405 and 406 compliance reviews as part of its routine audits rather than as separate reviews in the past. Similar changes to reviews of CAS 401 and 402 were made earlier. These are the four standards that modified CAS contractors must comply with. Auditors are cautioned that they must document their files that testing for compliance of the four standards has been performed. The impact on contractors is likely to be mixed – they no longer must undergo separate audits but auditors will be even more vigilant during their other audits to ensure compliance with these four standards.

Chapter 10. When reporting on a contractor's accounting and management system as well as related internal controls an auditor is supposed to express an opinion that the system and internal controls are "adequate", "inadequate" or "inadequate in part". Section 10-408 is clarified to provide guidance where under certain circumstances a contractor's internal controls can still be deemed "adequate" in spite of the existence of one or more significant deficiencies. Examples of such circumstances include: contractors voluntarily identify deficiencies, contractors are in the process of correcting the deficiencies or contractors have developed acceptable correction plans which will fix the deficiencies in a reasonable period of time (e.g. 60 days).

Section 10-1000 has been added that describes the requirements for applying "agreed-upon procedures" to contractor submissions which are intended to limit the scope of auditors' efforts compared to full "audits".

Chapter 12. Section 12-101 has been added to provide guidance on when a termination proposal becomes a Contract Dispute Act claim. A termination settlement proposal submitted under a termination clause is usually not a claim because it is submitted for purposes of negotiation. For the proposal to become a CDA claim one of the following occurs: (1) the submission states or otherwise indicates the contractor desires a final decision and the contracting officer does not accept its proposed terms (2) negotiations between the termination contracting officer (CTO) and the contractor have reached an impasse or (3) the TCO issues a final decision.

In Section 12-309, the new guidance states that legal and consultant costs incurred in the prosecution of a CDA claim are unallowable once the proposal becomes a claim. The guidance also specifically states that the legal and consultant costs necessary to prepare and support the proposal for negotiation are generally allowable as contract administration costs as long as they are reasonable.

Section 12-500 adds similar guidelines for allowability of legal and consultant costs for equitable adjustment proposals.

Increased Oversight Over Intra-Company Subcontracts

Following increased consolidations among traditional contractors, DOD is concerned that former competitors now belonging to the same corporate group may result in less competition and less value in its acquisitions. Both the Department of Defense and DCAA have issued guidance intended to increase scrutiny over intra-

company subcontracting arrangements. The Principal Deputy Under Secretary of Defense, in a July 5 memorandum, called on all DOD program managers and contracting officers to "increase oversight over the subcontractor selection process" when another division of a company is a potential offeror of a subsystem. The memo says solicitations should ask offerors to submit a plan explaining how they intend to ensure subcontractor competition will be conducted fairly and will result in the best value for the government. If the plans show bias, the government is to seek revisions to the proposed plans and as a last resort, is to provide the subsystem themselves in the form of Government Furnished Property. The plan is to address: (1) selection criteria or evaluation process to ensure best value results (2) how offerors will protect intellectual property rights of unaffiliated companies competing for a subcontract (3) whether independent advisors will be used in the selection process (4) whether "firewalls" will be created to isolate source selection personnel from other company personnel that may influence their decision and (5) assessing whether having two sources for a subsystem is cost effective.

DCAA, in a Memo to Regional Directors (99-PFC-07R(R), has alerted its auditors to carefully follow guidelines for auditing subcontractors and be especially diligent in requesting assist audits when intra-company subcontracts are proposed. It is also instructing its auditors to notify contracting officers if affiliated divisions are identified in a proposal so COs can implement their guidance.

Proposal to Tie Contract Awards to Labor Compliance

In an apparent move to fulfill Vice President Gore's two year old pledge to organized labor, the FAR Council is seeking to revise government-wide procurement rules to promote federal contractors' compliance with labor laws. The proposed rule would make changes to two parts of the Federal Acquisition Regulation.

Part 9, addressing contractor responsibility, would be revised to add a list of examples of activities that would contribute to an "unsatisfactory record" of integrity and business ethics including but not limited to noncompliance with tax laws, "substantial noncompliance" with labor and employment laws as well as environmental and antitrust laws. There must be a "pattern or practice" of violations not just an occasional slip up for the contractor to be ineligible for future awards.

In addition, two cost principles of FAR Part 31 would be revised to make unallowable the costs of (1) attempting to influence employee decisions regarding unionization (FAR 31.205-21, "Labor relations costs") and (2) legal expenses related to the defense of judicial or administrative proceedings brought by the federal government where the contractor was found to have violated a labor law or regulation or the matter was settled by consent or compromise, except as specifically made allowable in the settlement agreement (FAR 31.205-47, "Costs related to legal and other proceedings"). Even though findings of violation of law or regulation is not declared, remedial orders by such civil proceedings as the National Labor Relations Board or the Equal Employment Opportunity Commission would also qualify for unallowable legal costs.

As expected, numerous industry groups are preparing to challenge what they call "blacklisting" practices the new rules represent. Most of the challenges surfacing thus far criticize the fact that the rule places excess power in the hands of a contracting officer to rule a contractor can be disqualified from award and such action can be based on little more than preliminary findings of discrimination.

New Contract-Related Interest Rate Set for Second Half of 1999

The Treasury Secretary has set a rate of 6.5% for the period July 1 through December 31, 1999. The new rate is an increase over the 5% applicable in the first six months of 1999. The Secretary of the Treasury semiannually establishes an interest rate that is then applied for several government contract-related purposes. Among other things, the rates apply to (1) what a contractor must pay the government under the "Interest" clause at FAR 52.232-17 (2) what the government must pay a contractor on either a claim decided in its favor under the Contract Disputes Act or payment delays under the Prompt Payment Act. The rate also applies to cost of money calculations under Cost Accounting Standard 414 and FAR 31.205-10.

CASB Proposes New Definition of an Accounting Change and Revision of Cost Impact Process

The Cost Accounting Standards Board has issued a second Supplemental Notice of Proposed Rulemaking (SNPRM) that addresses (1) what constitutes a change to an accounting practice (2) exemptions from its normal rule and (3) once a change is ascertained, what steps are needed to identify a cost impact on CAS covered

contracts. The second SNPRM, which is part of the required rule changing steps of the CASB, follows an earlier one issued in 1996.

What is a "Cost Accounting Practice Change"? This is a contentious issue between industry and government and revolves around how broadly to define a cost accounting change. Currently, a change is triggered only when a contractor changes an established or disclosed "method" or "technique" for "allocation of costs to costs objectives, assignment of costs to a cost accounting period or measurement of a cost". A 1995 case (*Perry v. Martin Marietta*) established that mere shifts in the amounts of costs allocated among cost pools did not constitute a change. In a move to limit the effect of the Marietta case, the current proposal broadens the definition by making "clear" that "changes in the selection and/or composition of the cost pools" are, in fact, accounting changes. In other words, combining pools, spinning out pools or transfers of on-going functions from one pool to another would constitute an accounting change. Verbiage and new illustrations are intended to conform to this new, broader definition.

Exemption for Restructuring-Related Changes. So not to discourage actions that will result in improved operations and lower costs, the new SNPRM would remove certain voluntary change made in conjunction with contractor restructuring activities from rules covering contract price or cost adjustment. The proposed exemption applies when the contractor can demonstrate (1) a planned restructuring activity will result in cost savings to the government (2) the practice would not occur but for the restructuring activities (3) reductions in contractor personnel or facilities will occur and (4) overall contract cost reductions are expected to occur for flexibly priced CAS covered contracts or subcontracts or future CAS covered contracts or subcontracts.

To further encourage efficiencies, changes that result in overall cost savings on current and future CAS covered contracts and subcontracts that do not otherwise meet the definition of the above restructuring costs will also be considered on a case-by-case basis for the same exemption.

Creating a "Definitive" Cost Impact Process. (Editor's Note. We constantly encounter opportunities for contractors to change their accounting practices that provide benefit to all parties but the ideas are quickly dismissed because of the burdensome requirement of preparing cost impact analyses and proposals.) The new SNPRM seeks to establish a better impact process by establishing a three step sequential process: (1) an initial evaluation to determine if the cost impact is material (2) use a General Dollar Magnitude (GDM) settlement proposal and (3) submission of a detailed cost impact proposal on contracts exceeding materiality thresholds. The SNPRM proves price adjustments on individual contracts only when an impact is material. It purports to offer COs greater flexibility in resolving cost impacts by permitting "alternative actions".

Industry analysts criticize the expanded definition of change in accounting practice and express skepticism on whether the cost impact administration process will be reduced.

DCAA Issues Guidance on Late CAS Disclosure Statements in New Format

(Editor's Note. If late, the following provides an excellent opportunity to fine tune prior disclosure statements to reflect accounting practices. In resolving questioned costs disputes, contracting officers strongly rely on disclosed practices, either in disclosure statements or less formal venues. If current or future disputes are anticipated, completion of the new form offers opportunities to clarify practices. Accounting changes, however, must still follow impact regulations.)

The Cost Accounting Standards Board issued a rule in 1996 that contractors need to submit a disclosure statement using a revised form CASB DS-1 no later than January 1, 1999. Noting that many contractors have not complied, DCAA has issued guidance to identify contractors required to submit the revised disclosure statement. When they are delinquent, auditors are to inform both the contractors and the ACO in writing of the requirement for the revised disclosure statement. DCAA is also to recommend to contracting officers to withdraw adequacy determinations when revised disclosure statements are not received within 90 days after notice of delinquency.

Government Addresses Exclusive Teaming Arrangements

As exclusive teaming arrangements have become more common in winning government business, the government has been increasingly concerned that inadequate competition may result. Exclusive teaming arrangements exist when one or more companies agree, either in writing or "understanding", to team together to pursue government opportunities and further agree not to team with any other competitors. DOD has issued guidance indicating such arrangement should be scrutinized and has proposed a change to FAR 3.303(c) that will add exclusive teaming arrangements to the list of actions that "may be evidence of a violation" of antitrust laws.

The Defense Contract Audit Agency issued guidance in March 1999 that industry believed went too far and DOD and DCAA has softened its position in the form of new guidance issued by DCAA. According to industry representatives, the DCAA guidance incorrectly implied that all exclusive arrangements are anti-competitive. They also indicated the guidance associated exclusive teaming with fraud when auditors were required to seek guidance in section 4-702 of their audit manual (Procedures for Referring Suspicions) when the effort of resolving anti-competitive teaming arrangements were unsuccessful. The new guidance clarifies that the existence of exclusive teaming arrangements does not necessarily mean an anti-competitive situation exists. It also omits reference to the cited section and instead instructs its auditors to consult with its headquarters for further guidance when effort to resolve anti-competitive exclusive teaming arrangements fail.

DOD Offers Incentives for Cost-Saving VECPS

Director of Defense Procurement Eleanor Spector extended the current class deviation for value engineering change proposals to offer contractors even greater incentives to come forward with ideas to save the government money and share in the savings. Specifically, the deviation (1) extends the sharing period from three years to a range of 3-5 years (2) increases the incentive sharing arrangement from a current fixed rate of 50 percent for contractors to a range of 50-70 percent and (3) changes the fixed contractor shared collateral savings rate of 20 percent to a range of 20-100 percent. Under the VECP clause (FAR 52.248-1), the VECP concept enables a contractor to voluntarily prepare and submit a proposed alternative to a contractually required manufacturing or engineering configuration that will save the government money without impairing the essential functions or characteristics. If the CO accepts the proposal, the contractor is entitled to share in the government's net savings – including the contract under which the VECP is proposed as well as collateral savings and future contract savings.

CASES/DECISIONS

Court Clarifies When Services are Commercial Items

(Editor's Note. When a service qualifies as a commercial item, prices can be based on commercial prices rather than a cost build up estimate. The following decision helps clarify when a service qualifies as a commercial item.)

In a recent ruling that disposal of radioactive wastes services did not qualify as a commercial item, the court spelled out the conditions for how a service may be considered a commercial item. The Court pointed out that "commercial items" are defined in FAR Part 12 to include services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices and performed under standard commercial terms and conditions. Though the FAR offers no guidance as to when a competitive market exists nor defines a "market price", the legislative history of FAR Part 12 suggests that "market prices" are current prices established in the course of ordinary trade and the "key element" is that it can be substantiated from sources independent of the offeror. The judge ruled that there was no such market prices for the radioactive wastes services and ruled that an article in a trade journal listing price ranges for certain *hazardous* waste disposal was not sufficient for establishing a market price since the article did not include specific prices for any vendor nor did it address price ranges for *radioactive* waste (Envirocare of Utah, Inc. v United States, Fed. Cl. No. 99-76C).

Clarification on When Cost or Pricing Data is and is Not Required

A hearing to determine whether a contractor should be allowed to appeal a government's defective pricing claim for $95.7 million clarifies when cost or pricing data is required versus when it is not. The contractor claims its original contract and subsequent option periods were exempt from cost or pricing data submission requirements under the Truth and Negotiations Act (TINA) because they were awarded as a result of adequate price competition and in fact the Air Force did not obtain cost and pricing data for the option periods.

The Board reviewed TINA and stated it describes two types of contracts – one for which certified cost or pricing data and a price adjustment clause is *required* and one for which certified data and price adjustment "need not" be required. While the first category provides no CO discretion the second category does not require but "plainly permits" the CO to seek the data. The CO's discretion applies to contracts awarded "based upon adequate price competition" which is one of the statutory exemptions applicable to the second category. TINA neither defines "adequate price competition" nor spells out how the CO should exercise its discretion,

leaving procurement regulations to fill in the gap. The Court asserted the regulations determine the existence of price competition, whether it was adequate and whether the price was based on such competition. Where adequate competition exists, the CO is deemed to abuse his discretion if he required certified cost or pricing data, inserts a price adjustment or seeks recovery of a defective pricing claim. The Board has concluded the contractor may have sufficient facts to present to prove it was not covered by TINA and ruled the case should proceed (United Technologies Corp., Pratt & Whitney).

Contractor Runs Risk of Different Quantity Orders

When the government placed larger than expected orders under a requirements contract, the contractor sought an equitable price adjustment of $324,000 because its bid price was based on the expectation of a steady flow of orders. The contractor claimed the government knew for months about the need for larger quantities. The General Services Board of Contract Appeals ruled against the contractor arguing that it must show that the agency acted in bad faith or with reckless disregard in its original estimates to recover and absent such a showing, the government will be presumed to have varied its requirements for valid business reasons. The Board said when it entered into the contract the contractor was taking a risk on the steady flow of orders and when a requirements contractor gambles the government will order a limited number of units, it must live with the consequences (Workrite Uniform Co. v. GSBCA, No. 14839).

Contractor is Entitled to Delay Adjustment Even When It Finished Ahead of Schedule

Contractor was to repair and replace underground gas mains and service lines while another contractor was to provide main gas connections. When the main gas connection was not made, the government was obligated to inform the contractor on how to proceed which it failed to do. Even though contractor finished the job ahead of schedule, it filed a claim for increased costs associated with the delay because it was fully capable and intended to complete the job even earlier. The government rejected the claim, saying no price adjustment was due since there was no delay because the job was finished ahead of schedule and the government should have been notified if the contractor planned an early completion date. The Board ruled in favor of the contractor, stating the contractor would have completed early but for the government's failure to coordinate installation of the gas mains in a timely manner and also claimed there was no requirement for the contractor to notify the government of its early completion date (U.A. Anderson Construction Co., ASBCA No. 48087).

Agency Must Explain Technical/Price Tradeoffs Even Under Simplified Acquisition Procedures

In reversing a small business set-aside award the General Accounting Office ruled that use of simplified acquisition regulations (SAP) does not relieve an agency of the requirement to adequately explain price/technical tradeoffs, conduct appropriate discussions and adequately evaluate past performance. Though SAP is designed to reduce unnecessary administrative burdens and detailed justifications for supporting best value determinations, the regulations covering them (FAR Part 13) require evaluations of proposals need to be consistent with criteria set in the solicitation, support the award if other than price is a factor and document the rationale for selecting an offeror when tradeoffs are considered (Universal Building Maintenance Inc., GAO B-282456).

Government Must Justify Excluding Neutral Rated Contractor

National proposed $10,500 for supplying sheet metal and received a neutral past performance rating since it did not have significant history of contracting. Tara Metal proposed $13,000 and had a favorable past performance rating. In spite of National's offer of faster delivery service and confirmation the metal sheets were in stock, the CO determined that Tara represented less risk of nonperformance and awarded them the contract. National protested the award and the GAO sustained the protest stating that the CO failed to make a meaningful best value determination. Commentators have pointed to this case as an indication the government cannot use a neutral past performance rating as the sole basis for disqualifying an offer from receiving a best value award. Instead, the government must base its award decision on other factors that show why the lack of performance history poses a threat to successful completion of the contract and why the award to another offeror represents the best value (National Aerospace Group, Inc. B-281958).

Discarded Inventory Allowed on Termination Settlement Proposal

In its termination settlement proposal, contractor sought recovery of cost related to work-in-process inventory it lost and discarded and the government questioned the costs on the grounds it was not given permission to

dispose of the inventory and any recovery should be limited to fair market value. In its appeal, the judge ruled that absent fraudulent conduct or conduct that is in gross disregard of its contractual obligations, the contractor should be entitled to the cost of that inventory minus any fair market value. There was no suggestion that the contractor profited from the sale of the inventory and the court noted that missing termination inventory is common in supply contracts (Industrial Tectonics Bearings Corp. v. United States, Fed. Cl. No.97-767).

QUESTIONS & ANSWERS

Q. Though we have several contracts with other government agencies, we have recently submitted our first proposal to the Department of Defense and the agency personnel told us that our G&A is too high, indicating an amount over 12% is excessive. Is this true? If we proposed a 12% rate we would be loosing money on the contract.

A. We constantly hear about contracting officials, either through misunderstanding or negotiating ploys, putting forth myths about appropriate indirect cost rates. Such assertions either represents "common wisdom" or they may correspond to actual negotiated prices on earlier contracts - perhaps with the contractor, its competitors or firms in the same business. There is certainly no regulation or policy in either the FAR or agencies' own acquisition regulations (DFARS, DEAR, HHSAR, GSAAR, etc). If such an assertion is made, request the official cite the regulation.

The Armed Services Pricing Manual (ASPM) addressed this issue: "Part of the prejudice against overhead is obvious in the expression, 'that rate is too high'. This conclusion is often inane and can be outright dangerous. Because a rate represents the relationship between one number and another, it is relevant only to what is in those numbers". The ASPM goes on to note that an overhead rate of 90 percent may be too high and another of 400 percent may be too low depending on what is in the base and what is in the overhead pool.

The best way of avoiding such controversy is to not disclose detail on the elements of your proposal (labor, material, overhead, G&A) unless it is specifically required by the solicitation. In this era of more emphasis on "commercial practices", many regulatory developments are discouraging Uncle Sam from asking for this level of detail.

(Editor's Note. We are grateful to a discussion of this "myth" in a prior issue of the Contract Pricing Advisor)

Q. There seems to be confusion in our company about the rules of gratuities to government employees. What are they?

A. The Office of Government Ethics (OGE) has established guidelines that permit acceptance of gifts having a value of $20 or less by an executive branch employee with a cap not to exceed $50 in total for a calendar year. A recent Supreme Court case, *U.S. vs. Sun Diamond Group of California*, has addressed the issue of illegal gratuities which will surely affect laws as well as the guidelines discussed above.

Professor John Cibinic in the July 1999 issue of The Nash and Cibinic Report analyzes the case. The Court concluded that the Gratuities Statute (18 USC $201) requires that a gratuity be "linked" to a specific official act before it is illegal. A "link" between the gift and a *specific* act needs to be established which, in most case, will require some corroborative evidence in writing or conversation. Gifts provided for *goodwill* will not be considered to violate the law. The author indicates the decision leaves open the opportunity for large gifts not made for specific acts (leaving "lobbyists cheering in the streets of downtown Washington D.C.") while closing the door on all gifts including the $20 gift if there is the suspicion it is for a specific act. Gratuities for goodwill, whether the big kind or the $20 ones will not be considered a violation.

Professor Cibinic offers some sound advise – follow the "give nothing, take nothing" approach.

NEW & SMALL CONTRACTORS

When is a Claim for a Price Adjustment Justified

We frequently receive questions from clients and subscribers on when they are entitled to an equitable price adjustment, whether in the form of a request for an equitable price adjustment or a claim (we will refer to both as "claim" even though a claim is an outgrowth of the REA being rejected). We have asked an attorney colleague of ours, Tim Power of the Law Offices of Timothy Power, to provide some simple guidelines. The following is his response:

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Though there are usually a long list of regulations and rules affecting a government contract it is not necessary to know them to spot a potential claim. A few questions can help clarify when you are eligible for a claim against the government.

1. *Is the performance of the contract different than I planned when I bid the job?* If yes, and the difference in performance is increasing the time or cost of performance, then you have a claim against the government for the additional time or cost to perform the contract.

2. *What factors are causing the difference in performance?* The key to identifying entitlement and presenting your claim is to identify the specific causes for any changes in the performance. You should thoroughly investigate the causes for a delay, additional costs or why performance is different than you intended when you bid.

3. *Was I missing crucial information that would have changed the way I bid the contract?* During the bid phase, the government has an obligation to tell you about information it has that impacts the costs or methods of performance. This is especially true if the government knows you do not have the information or that it is unlikely you will learn about the information while you are preparing your bid. The information could be about the site (e.g. history of flooding) or about the process of performance (e.g. problems encountered by previous contractors providing the service or product).

4. *Did anything change from the time I bid, when I started performance or since?* This might include changes on a site for service or construction type contracts or changes to government budgets or policies.

5. *Do I interpret a contract requirement differently than the government?* Differences in interpreting contracts are endless – time of performance, product or service to be provided, method of production or construction, etc. There are numerous rules about interpreting contract terms all starting with a common sense approach to interpretation. If the government's interpretation seems unreasonable or far-fetched, you should investigate further.

6. *Are the government's inspections of my work reasonable and according to the standards required by the contract?* The contract contains specifications and drawings for how the work will be performed. Other sections of the contract contain inspection standards that define how the government will inspect the work to determine acceptability. This latter section does not define the work required. Sometimes, however, inspectors will measure or consider work that is not required by the contract merely because there is an inspection standard listed.

7. *Has the government caused the difference in performance?* The strength of your claim and how much you recover may depend upon the cause for the different performance. Generally, the government must be the cause of the difference. Therefore, a critical step in determining the existence of a claim is to establish the government has, in some way, caused the difference in performance.

We intend to explore how to identify a claim and effectively present your proposal in greater depth in subsequent articles in the GCA DIGEST.

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