
GCA REPORT

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NEW DEVELOPMENTS

DOD Slammed for Dipping Into Closed Accounts to Cover Current Expenses

(Editor's Note. Most of us have seen government representatives find quite creative ways to locate funds to pay contractors' current year invoices, especially for various adjustments (e.g. overhead rates on contracts exceeding funding levels, unexpected closeout costs, etc.). The following GAO report may likely inhibit these informal practices.)

The General Accounting Office issued a report and testified to Congress that the Department of Defense violated a host of laws intended to prevent it from going to the well of closed appropriations accounts to finance current-year spending. The report said the \$615 million of improper adjustments to closed appropriation accounts it found represented 28% of cost account adjustments. Projecting the fiscal year 2000 results to the previous decade means there were over \$26 billion of improper adjustments over a ten year period! The Report recommended DOD immediately reverse and correct the \$615 in improper charges and take steps to strengthen controls over closed appropriation account adjustments such as revising current procedures that allow for dipping into closed accounts and making managers accountable for violating these abuses.

By law, an expired appropriations account remains available for five years, during which it can be used for making disbursements to liquidate obligations that are appropriately charged against the account. After the five year period the account is closed and remaining obligated and unobligated balances cannot be used. After it closes, obligations and adjustments that would have been charged against that account must be charged to other current available appropriation accounts but competing programs often make such practices difficult.

Proposed FAR Changes to Claims and Terms Related to Termination

The FAR Council has proposed rule changes seeking to clarify certain terms related to claims and terminations. The definitions of "claim", "continued

portion of the contract", "partial termination", "terminated portion of the contract" and "termination for convenience" will be moved from their various locations in the FAR to section FAR 2.101 (Definitions). The definitions will adopt a "plain English" version so now, for example, "terminated portion of the contract" will mean "the portion of a contract that the contractor is not to perform following a partial termination" rather than the current confusing definition "the portion of a terminated contract that relates to work or end items not completed or accepted before the effective date of termination that the contractor is not to continue to perform." In addition a definition of "termination for default" will also be moved to the same FAR definition site and be defined as "the exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations." Also, a new paragraph will be added to explain the distinction between termination for convenience and cancellation - termination can be for total or partial quantity and occur any time during the life of the contract while cancellation can occur only between fiscal years and be for all subsequent fiscal years' quantities.

The change also revises the definition of a "claim" which will ensure the definition in the Disputes clause at FAR 52.233-1 is consistent with the definition. The revised definition of claim means "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms or other relief arising under or related to the contract." The definition goes on to state a written demand exceeding \$100,000 is not a claim under the Disputes act until it is certified. Also, a voucher, invoice or other routine request for payment not in dispute is not a claim. The submission may be converted to a claim when it complies with the submission and certification requirements of the clause and it is either disputed as to a liability or amount or it is not acted upon in a reasonable period of time.

In addition, FAR 33.213 (Obligation to Continue Performance) is revised to establish it is the contractor's obligation to continue performance pending resolution of a claim. The change also clarifies the distinction

between claims “arising under a contract” – which can be resolved under a clause other than the Disputes clause at FAR 52.233-1 - and claims “related to a contract” which can be resolved only under the Disputes clause.

Government Focuses on Contract Vehicles

In several unrelated acts prior to the September 11 catastrophe, the government coincidentally renewed or issued rules that provide contracting vehicles to deal with acquiring goods and services under emergency circumstances. On September 9 the House passed by voice vote legislation to extend the Defense Production Act for three years. The DPA was originally enacted in 1950 to allow the government to order contractors and other private sector organizations to supply goods and services in periods of war and national emergencies. It has been frequently invoked, most recently for critical supplies during Operations Desert Shield and Desert Storm and earlier this year, to ensure supply of natural gas to military bases and defense facilities in California. The Act gives the president sweeping authority to (1) establish, expand or maintain essential domestic industrial capacity (2) direct priority performance of contracts and orders to meet national security requirements over, for example, earlier awarded government or commercial contracts that may be more lucrative and (3) suspend or prohibit a foreign acquisition of a US firm when that acquisition threatens US national security.

On July 13, the Environmental Protection Agency issued a final rule providing for use of a Notice to Proceed (NTP) contract in certain emergency response situations. An NTP is a contract that authorizes the contractor to immediately manufacture supplies or perform services pursuant to FAR 16.603 (Letter Contracts). It provides the EPA contracting officers or authorized EPA on-site coordinators authority to begin contracting actions to respond to emergency environmental events that includes the release or threat of release of a pollutant, contaminant or hazardous substance that may result in imminent and substantial danger to the public health or welfare of the US.

Since, September 11 the government has alluded to the likely use of these two rules and others including:

1. The Feed and Forage Act. Defense Secretary Rumsfeld September 21 invoked an obscure federal law to help pay for emergency costs called the Feed and Forage Act that allows military departments to spend money in excess of appropriated funds for clothing, subsistence, fuel, quarters, transportation and medical

supplies in times of emergency as well as pay to additional members of the Armed Forces such as reservists.

2. Exception to the Competition in Contracting Act. Contracting officers will likely find themselves under pressure to substitute faster sole source awards in place of more time consuming competitive awards to quickly get supplies into the field. CICA provides for seven exceptions to use noncompetitive awards (FAR Part 6.3) under unusual and compelling national security circumstances. However, protests are still allowed.

3. Extraordinary Contractual Relief. Contractors whose businesses are adversely affected by performing work for DOD (e.g. abandoning more profitable work when the government invokes the PDA) may be able to recover a percentage of contract price if the government cancels the order. Though losses on development work are not recoverable the contractor could seek extraordinary relief under Public Law 85-804 – claims could be brought before certain established boards created to hear them.

DCAA Issues Guidance on Performance-Based Payment Reviews

The Defense Department has made a priority the use of performance-based payments (PBPs) as a financing method, establishing various goals such 25 percent of all contracts valued at \$2 million or more in 2002 and 50 percent of all service contracts by 2005 and issuing a PBP guide to the contracting community at “<http://www.acq.osd.mil/ar/doc/pbpguide-012201.pdf>”. PBPs are made on the basis of predetermined objectives, measurable events and schedule commitments (commonly called milestones) whereas the traditional cost-based payments are made at regular intervals regardless of how much progress is being made on the contract. The policy statements issued by DOD have called for input by the Defense Contract Audit Agency into how PBP events and values are established, proper documentation to back up payments, how post-payment verification should be conducted and evaluations of contractors’ financial strength. The following guidance is DCAA’s first input.

DCAA should be available to conduct both pre-payment and post-payment reviews when asked by contracting officers. Prepayment assistance may be sought in structuring the agreement and negotiating terms. The PBP event should be structured to ensure contractors receive a reasonably consistent cash flow during performance to avoid long periods of insufficient cash flow when their rate of expenditure is significant. Once

the parties agree on events to trigger payments and measure accomplishments DCAA will have a role to make sure (1) PBPs do not exceed 90 percent of the price of a contract or delivery item (2) PBPs should not be structured to provide advanced payment (e.g. front-loading) (3) event values should have some “reasonable relationship” to working capital expended and (4) final payments should occur only after the government has accepted the contractor’s performance.

Once agreement is reached on events and values, DCAA recommends proper documentation for payment to include: the PBP event number, contract line item or sub-line item to which the event applies, whether the event is separate or cumulative, funding information related to the event, the event’s value and the estimated date the event is to occur. Post payment review may include verification of the accomplishment or incurred cost associated with the completion of a performance-based event. DCAA may also include a review of a contractor’s financial condition and whether the contractor is delinquent in paying its subcontractors (MRD 01-PPD-056(R)).

New Attestation Standards Allow DCAA to Audit Information Other Than Cost or Pricing Data

(Editor’s Note. The use of “information other than cost or pricing data” to justify proposed prices without subjecting offerors to liabilities stemming from submitting certified cost and pricing data is widely supported. Up to now, use of this type of data to help procurement officials negotiate contract prices has been limited because contracting officers seeking an opinion from DCAA have been frustrated because the agency has taken the position it cannot issue an opinion (either favorable or unfavorable) on the data. The following indicates this restriction may be reduced.)

The Defense Contract Audit Agency has issued guidance to its auditors indicating they may conduct an audit on certain “Information Other Than Cost or Pricing Data” and render an opinion. FAR 2.101 defines Information Other Than Cost or Pricing Data as any data not required to be certified under FAR 15.406-2 that is needed for determining price reasonableness or cost realism. Previously, auditors who must follow Generally Accepted Government Auditing Standards (GAGAS) were prohibited from either conducting an audit (or “examination”) of this information or issuing an opinion on the data in response to CO’s requests. GAGAS prohibited audits because proposals based on “Information Other Than Cost or Pricing Data” lacked a certification of cost or pricing data which failed to meet the Statement on Auditing

Standards (SAS) requirement to have a written management representation. Certification of cost or pricing data has been held to be the equivalent of the representation and its absence meant an audit or examination could not be conducted. Rather, less rigorous standards called “agreed-to procedures” could be used to analyze the data but GAGAS prevents issuing an opinion on analysis of data using these procedures.

Recently, GAGAS recently accepted new American Institute of CPAs (AICPA) attestation standards which differ from SAS in ways that allow auditors to audit pricing proposals supported by information other than cost or pricing data (i.e. written management representations are no longer required meaning certified cost or pricing data is no longer required to conduct an audit). The guidance states that now some, but by no means all, information other than cost or pricing data may be audited. The guidance does not indicate what kinds of data can now be examined but does indicate that proposals based solely on pricing or sales information or cost realism analyses can not be audited. In such cases, agreed-to procedures will be followed where still, no audit opinion can be rendered. When the acceptable data is audited, auditors are told to report their findings and opinions on currently used proforma reports and to substitute “cost or pricing data” with the phrase “information other than cost or pricing data” (MRD 01-PPD-055(R)).

BRIEFLY...

DOD Proposes to Raise Progress Payment Rate for Large Businesses

The Defense Department proposes to raise the progress payment rate from 75 percent to 80 percent for large businesses performing government contracts on or after October 1, 2001. Contracts awarded prior to that date will not be modified to include the 80 percent rate. The proposed change will place DOD’s large contractors on the same footing as contractors for other federal agencies. DOD progress payment rates for small and small disadvantaged businesses of 90 percent and 95 percent, respectively, will not change.

FAR Council Withdraws Proposed Rule On Signing and Retention Bonuses

The Federal Acquisition Regulation Council withdrew its proposed rule that would have explicitly made allowable signing and retention bonuses that contractors provide primarily high-tech workers. The December 2000 proposed rule was intended to help contractors

attract and keep workers with critical skills. Many commentators expressed concern the proposed rule would be more restrictive than the current FAR resulting in decreased use of bonuses. After reviewing the comments, the FAR Council concluded the proposed rule was unnecessary since recruitment and retention bonuses are already allowable costs on government contracts if reasonable and allocable to them.

Lee Wants FedBizOpp Solicitations “One Click Away”

Last April the Department of Defense ordered synopses of all government solicitations over \$25,000 to be available through the Federal Business Opportunities web-site at <http://www.FedBizOpps.gov>. The new site is intended to replace the Commerce Business Daily for contracting opportunities by January 2002. After receiving complaints that it was difficult to obtain the actual solicitation, DOD Director of Procurement Deidre Lee issued a memo making it clear that the synopses must include an electronic link to the solicitation which would be a “click away” from either the actual solicitation or, at least, one listed clearly on a project page.

Prime Contractors May be Able to Determine if Subcontract Items are Commercial

A Department of Defense proposed rule would require prime contractors to determine whether a subcontracting item meets the definition of a commercial item. Contractors will be expected to exercise reasonable business judgement in making these determinations consistent with FAR Part 10 guidelines for conducting market research. COs will be instructed to examine contractors’ documentation for making these determinations and consider their adequacy when evaluating contractors’ purchasing systems.

CAS Related Quarter Interest Rates and Post Award Interest Rates Announced

The Internal Revenue Service announced the interest rates to be used for contract price adjustments related to cost accounting standards. The rates for the third quarter of 2001 will be decreased from the prior quarter. The new rates are: (1) 7 percent for overpayments (b) 7 percent for underpayments and (c) 9 percent for large corporate underpayments. The Defense Contract Audit Agency released guidance to its auditors that the interest rate applicable to post award findings (i.e. defective pricing) will be 7 percent for the fourth quarter of 2001.

These rates are different than the treasury interest rates applicable to cost of money factors which is 5.875 percent for the second half of 2001.

TRAVEL AND RELOCATION EXPENSES...

(Editor Notes. Though only three parts of the Federal Travel Regulations formally apply to contractors – combined per diem rates, definitions of meals and incidentals and unusual conditions justifying payment of up to 300% of per diem rates – many contractors follow FTR either because some contracts call for incorporation of them or contractors choose to follow them. Therefore, we continue to present significant new changes or decisions likely to affect contractors’ travel and relocation expenses.)

You Usually Need Advanced Permission With Solid Documentation to be Reimbursed for Actual Travel Expenses Exceeding FTR Ceilings

A Department of Energy employee was to attend a training conference where hotel rates were \$125 in an area capping maximum lodging rates at \$77. He looked for another lower cost hotel “conveniently close” but could not locate one with a lower rate than \$125. After booking the room his supervisor said the rate was too high and suggested finding a lower rate. He unsuccessfully tried again and then went out of town on assignment where he could not continue looking for lower rates. When he returned and prepared to go to the training, his only choice was to cancel the training resulting in forfeiting the registration fee or stay at the \$125 rate and hope to be reimbursed later. When he was not reimbursed he appealed his agency’s decision but the appeals board denied his request ruling (1) he knew in advance he may not be fully reimbursed and (2) he did not submit evidence no other hotels were available at the maximum per diem rate (GSBCA 15416-TRAV).

In a separate case, a conference attendee intended to share a room at \$129 in a \$65 maximum lodging area and when his colleague was delayed he believed a lower cost room could not be found at the last minute so stayed in the room. The Appeals Board ruled that actual expenses in excess of per diem rates can be authorized under extraordinary circumstances but that it should not be taken lightly. Requests should be made before travel and such requests need to be fully documented as to why the normal per diem is not sufficient. The employee’s “belief” that lower cost lodging is unavailable was not enough to qualify for higher reimbursement (GSBCA 15428-TRAV)

Reimbursement Limited to “Constructive Costs”

Rather than take a plane to his temporary assignment, which was considered the mode of transportation in the “government’s best interest,” the employee took his motor-home to and from the location. When he sought reimbursement for all related expenses (hotels, meals, etc.) the government refused total payment. The Appeals board ruled that when an employee chooses to travel by “a mode other than by means of transportation most advantageous to the government”, an agency must (1) calculate total allowable costs claimed by the employee (2) “constructive cost” of travel deemed in the best interest of the government (e.g. airlines ticket, parking, tolls, etc.) and (3) limit reimbursement to the “constructive cost” (GSBCA 15109-TRAV).

Children’s Cost Not Reimbursable on Relocation Trip

On the house-hunting trip to his new duty station, the employee brought his wife and two children on the trip because he was unable to arrange childcare for them. His agency refused to reimburse airfare costs for the children stating FTR Section 302-4.7 allows only an employee and their spouse reimbursement for house-hunting trips. His argument was (1) he did not know he could not bring his children and (2) they were brought out of necessity. The Board rejected his appeal stating the FTR is clear about what agencies can reimburse and no exceptions exist (ASBCA-RELO, April 28).

CASES/DECISIONS

Its OK to Exclude Payments Based on Revenue Sharing From G&A Base

(Editor’s Note. Various forms of strategic alliances are becoming much more common with government contractors and the following case demonstrates that traditional cost and contracting requirements may apply differently to these new arrangements.)

Pratt and Whitney (P&W) manufactures jet engines and formed a collaboration with several foreign firms to develop an advanced engine. The relationship stipulated that each party, called independent contractors, would bear their own expenses and risk and would be compensated at fixed percentage rates out of the revenue of any sales with P&W contributing and receiving over 80%. When revenue was distributed to the firms the government maintained these were

costs and hence should be included in P&W’s allocation base for distributing general and administrative and independent research and development expenses. Since they were excluded from the bases, DCAA questioned the higher costs resulting from a higher G&A rate and cited P&W for noncompliance with CAS 410 and 418.

In its appeal the government asserted the revenue payments to the collaborators were payments for parts, equivalent to prime contractor payments to subcontractors, and hence should be considered costs included in the G&A and IR&D bases. P&W asserted there was no CAS noncompliance because CAS did not address collaboration revenue share distributions but that generally accepted accounting principles (GAAP) explicitly said they are not a cost. Further, P&W asserted (1) the collaboration agreement was a form of strategic alliance not a prime/subcontractor relationship (2) the parts provided to P&W were the same as customer furnished parts and (3) P&W obtained the parts at no cost making exclusion of the disputed amounts mandatory by CAS.

The Appeals Board sided with P&W stating (1) the agreement, in spite of the words “independent contractors”, was not a prime/subcontractor relationship but rather was a “collaborative partnership” because of the sharing of risk and revenue (2) the share distributions were not a “cost” under either GAAP or CAS but was more a consignment of parts and (3) further proof a cost did not exist is evidenced by the fact P&W did not take title to the parts nor was the price fixed or determinative in advance because payment was contingent on sale of the engine (United Technology Corp., Pratt and Whitney, ASBCA Nos. 47416, et al).

Prime is Responsible for Subcontractor’s Lack of Record Retention

(Editor’s Note. The following provides a dramatic example of the responsibility of prime contractors to ensure their subcontractors’ records are in order.)

AAC received a cost-plus-fixed-fee (CPFF) contract and subcontracted a portion to MGA on a CPFF basis. The subcontract flowed down the audit negotiation clause of FAR 52.215-2 which referenced FAR 4.7 relating to record retention periods. MGA later filed for bankruptcy and though its costs for the first two of the six years of its subcontract were audited, the last four were not. When DCAA attempted to audit the third year costs, the bankruptcy trustee could not or would not provide any documentation supporting \$220,000 of costs billed and paid to AAC. Therefore, DCAA questioned this amount and when the CO sustained the

questioned costs and asked for a refund of \$220,000 from AAC, they appealed.

Because there was no evidence to indicate what costs MGA incurred in performing the subcontract during the year in question or whether they were allowable or allocable to the prime contract, the Board concluded there was no basis upon which to justify the costs. The Board determined that AAC made no attempt to ensure MGA complied with the record retention provisions of its subcontract and concluded the government's claim for \$220,000 was justified (Analytical Assessment Corp., ASBCA Nos. 52393 and 52394).

Interest Penalties Do Not Apply to Payments on Cost Type Contracts

The cost-plus-award-fee contract provided for payments to the contractor "when requested as work progresses." The contract contained the standard FAR Prompt Payment clause (52.232-15) that provides for payment of interest penalties for late "invoice payments" which also mentions "contract financing payments" are not subject to interest penalties. The contractor submitted customary public vouchers every two weeks on Standard Form 1034 for reimbursement of costs and because payment for most of the invoices was late submitted a claim of \$172,000 for interest penalties.

The government asserted the payments were "contract financing payments" which are disbursements to a contractor prior to acceptance of supplies and services by the government. The contractor maintained the government continuously inspected and accepted services under the contract's Inspection and Acceptance clause which meant its invoices amounted to requests for payment for partial performance of services. The Board disagreed with the contractor saying its vouchers did not purport to be payments for particular services accepted. The Board pointed to a revision to the FAR Prompt Payment Act in March 1997 (FAR 32.903(f) that indicates partial payments are not available for cost type contracts where the invoiced price cannot be determined until after settlement of total contract costs (e.g. until after incurred cost proposals are settled). Hence the contract is not eligible for interest penalties until final cost and fee amounts have been settled (Johnson Controls World Services Inc., ASBCA No. 51640).

Can't Reject a Bid When Misstatements About Solicitation Cause Excessively High Bid

An agency made several statements about the proposed work that were eventually determined to be erroneous

(too detailed to recount here). Relying on the misstatements, Lockheed Martin prepared and submitted an unnecessarily complex and costly proposal. Based upon its costly alternative, the agency concluded Lockheed was not a viable source and found that Rockwell was the only source capable of meeting its needs and awarded a delivery order to it on a sole source basis.

Lockheed protested asserting the agency misled it about its needs and asserted it would have proposed a less costly approach had it known. The Comp. Gen. agreed with Lockheed ruling the award violated the Competition in Contract Act which authorizes sole source awards only if the agency reasonably concludes a single viable source exists to satisfy its needs. Here the agency misled Lockheed, preventing its ability to show it was a viable source to perform the work (Lockheed Martin Sys. Integration – Oswego, Comp. Gen. Dec. B-287190.3).

Different Method Of Rating Subcontractors' Past Performance is OK

(Editor's Note. The following indicates some interesting strategies available for proposing subcontractors and how they may be viewed in past performance ratings.)

SRI and MESI bid on a contract where "price", "past performance" and "management approach" were weighted equally. Both bidders were given "acceptable" past performance ratings. SRI's rating was based on its "satisfactory" performance on the incumbent contract with little weight given to its subcontractor who was slated to do 20% of the work while MESI's rating was based primarily on its subcontractor and their subsidiary's past performance work because (1) MESI had no relevant prior experience and (2) the subcontractor and its subsidiary would perform most of the work.

When MESI was awarded the contract based on its low price, SRI protested arguing the agency failed to adequately consider its subcontractor's past performance while giving too much weight to MESI's subcontractor. The Comp. Gen. disagreed, noting FAR 15.305 authorizes an agency to consider a subcontractor's past performance evaluation and the key consideration is whether the subcontractor's experiences is "reasonably predictive" of the offeror's performance. Here the past performance evaluation properly focused on SRI since its subcontractor would perform only 20% of the work while the focus on MESI's proposed subcontractor was appropriate since the subcontractor and its subsidiary were scheduled to

perform significant portions of the work (Strategic Resources, Inc. Comp. Gen. Dec., B-287398).

Protest Concerning Ambiguity of Solicitation Must be Filed Before Proposal Due Date

A GSA solicitation for alarm monitoring and dispatch services required the project manager have at least five years of experience. The GSA downgraded NCLN's proposal resulting in its exclusion from the competitive range because the project manager had only 41/2 years of experience. NCLN protested after the award was made contending the project manager's experience was incorrectly measured from the wrong date. The GAO agreed the solicitation was "ambiguous" about measuring the required experience but concluded an apparent solicitation defect must be protested before the time proposals are due (NCLM20, Inc. GAO, B-287692).

NEW/SMALL CONTRACTORS

First Steps To Take When Your Contract is Terminated

Since we wrote numerous articles on how to prepare an effective termination proposal and maximize recovery we have received a variety of questions from readers and clients on the subject of terminations. One of the most frequently asked one is "what actions should we take" when we receive a notice. In this article, we will discuss both what the regulations say and don't say and make a few business judgement suggestions.

The most important first step is to follow the government's lead – where they immediately select a terminating contracting officer (TCO) a contractor needs to pick an appropriate point person. The person needs to be carefully selected because they will be called upon to coordinate a variety of internal functional efforts requiring skills in project management, accounting, contracting issues, subcontract administration as well as liaison with numerous government specialists such as the TCO, auditors, project administrators, technical personnel, etc. Since considerable dollars and future government work is at stake, picking the right person to manage the termination process is key.

As for regulation guidance, FAR Part 49 governs most aspects of a termination. For convenience terminations, most of the termination-related clauses in your contracts or subcontracts require certain actions with the intent to minimize settlement costs to the government. While the clauses affecting default terminations do not impose such requirements, it is still a good idea to take similar actions to minimize government expenses since default terminations often convert to terminations for convenience.

When a notice of termination is received, the FAR 49.104 and the termination clauses are quite specific, requiring the contractor to:

1. Stop work immediately on the terminated portion of the contract and stop placing subcontracts
2. Terminate all subcontracts on the terminated portion of the contract
3. Continue performing the portion of the contract not terminated and promptly submit any requests for equitable price adjustments on the non-terminated work
4. Take action to protect government property in contractor's possession and deliver it to the government as directed by the TCO
5. Notify TCO of any disputes with either subcontractors or other parties related to the terminated portion of the contract
6. Settle outstanding liabilities with subcontractors and obtain any required approvals or ratification from the TCO
7. Promptly submit a settlement proposal to the TCO
8. Dispose of termination inventory as directed by the TCO

Though the FAR states a prime contractor must "immediately advise the TCO of any special circumstances precluding a stoppage of work" none of the FAR clauses include this requirement. Since many disputes arise out of alleged failure of the contractor to take timely action, it is very important to keep the TCO fully apprised in writing, of any significant developments that will impede complete stoppage of work or will minimize expenses. Also, if the termination is for default and the contractor believes it is unwarranted, the TCO should be promptly advised of extenuating circumstances that would either rescind the termination or convert it to a convenience termination.

Finally, there is no clear formula for dealing with subcontractors under a default termination. Whether or not the default is sustained, there may not be any default on the subcontractor's part. In this case, the prime contractor can only minimize its costs by

terminating the subcontractor for convenience. If a subcontractor is clearly in default vis-à-vis the prime, the prime contractor may terminate the subcontractor for default, whether or not the prime contract is terminated for convenience or default or not even terminated at all. Good business judgement suggests this is the prudent approach to avoid endangering performance or to avoid payments to a non-performing subcontractor.

QUESTIONS & ANSWERS

Q. Can we invoice the same individual at different labor rates?

A. It depends on the type of contract. For cost type contracts, the answer is no because individuals are billed at actual rates plus indirect costs and fee. For fixed price work, the answer is yes since the price is fixed and cost does not matter. For time and material or labor hour contracts, the answer is usually yes with a qualifier.

If the individual meets the requirements for each labor category specified in the contract (e.g. education, experience, skills) then they should be able to bill at the labor categories they worked. This is particularly true if the proposed and contracted rates were based on commercial-like rates such as catalogue, market rates, etc. When labor rates are based on cost buildups (i.e. average actual rates of categories of labor plus indirect costs and fee) then an individual (say, technician) billing at a higher rate (say, senior engineer) can raise some eyebrows if the negative impact to the government is significant. For example, if the technician's salary was included in the technician salary pool when hourly rates were proposed then billing at higher engineering

rates would expose a contractor to the contention the proposed engineering rates were too high due to the fact the lower cost technician was not included in the pool of salary. Be prepared to respond. Of course the opposite circumstance (e.g. when high salary engineers bill at lower technician rates) would be less worrisome to the government.

Q. Since the September 11 tragedy, we have received numerous questions about how to treat certain costs like: Can labor costs be charged direct when normally direct labor employees were sent home? Should cancelled travel costs not returned be charged direct or indirect? Etc.

A. We expect the government will issue guidelines on these type of questions but none have been issued as of this printing. The unusual nature of the event puts the proper treatment of these costs in the "gray area." First, I would look for written policies or practices that exist for analogous circumstances (e.g. paid absences for unusual circumstances, cancelled trips, etc.) and follow those practices. Secondly, since there are, in most cases, plausible justifications for both direct and indirect charging, I would trust your judgement by choosing one method and be prepared to defend it. For example, direct charging of individuals can be defended because of the extraordinary nature of the events, the government required work to cease and you want to book these normally direct charged employees in a manner consistent with the way they normally are charged; indirect charging is also plausible because most paid absences are allowable indirect costs. If challenged, there will be no penalties. Finally, if more confirmation is desired, I would consult with your cognizant CO and ask either their opinion or tell them why your choice is used.