GCA REPORT
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NEW DEVELOPMENTS

Industry Group Calls for Withdrawal of FAR Ethics and Business Conduct Requirements

The influential Council of Defense and Space Industry Associations (CODSIA) is calling for the withdrawal of a recently proposed FAR Council rule to have contractors establish in writing a "code of ethics and business conduct." The proposed rule was a legislative initiative by the new Congress in response to recent scandals. It would require contractors and subcontractors having non-commercial item awards in excess of $5 million with a performance period exceeding 120 days to have in place a written code of ethics and business conduct within 30 days of contract award followed by an employee ethics and compliance training program within 90 days. Failure to comply can result in withholding of payments or loss of award fee. Though it endorses the goal of having consistent standards of ethics and business conduct, CODSIA states the proposed rule in its current form is "overreaching" and "duplicative of similar requirements" where the impact would be to provide a strong disincentive for contractors to sell to the government, especially small and median sized businesses. It expressed great concern over the penalty remedies and stated it should not be a flow down requirement to subcontractors because prime contractors should not be responsible for oversight of its subcontractors. CODSIA believes most contractors' voluntary adherence to the Defense Industry Initiative on Business Ethics and Conduct (DII) provides sufficient ethics guidelines and that if the FAR Council wants to add such standards it should incorporate DOD's DFARS Subpart 203.70, "Contractor Standards of Conduct."

DOD Proposes Longer Interim Payment Period on Cost Type Contracts; Use of Wide Area Network for Billing

The Defense Department August 2 proposed amending the Defense Federal Acquisition Regulations Supplement (DFARS) to provide interim payments under cost reimbursement contracts for services within 30 days instead of the current DOD policy of making payments within 14 days. The change would not apply to small businesses. In the same proposal, DOD is proposing to "update and clarify" requirements for the unique identification and evaluation of all delivered items for which the government's acquisition unit price is $5,000 or more. Also, a final rule was issued prohibiting DOD from using tiered evaluation – known as "cascading set-asides" - when awarding DOD contracts or task orders unless the contracting officer has conducted market research and after such research is unable to determine whether a sufficient number of qualified small businesses are available to justify limiting competition to such businesses (*Fed. Reg. 42366*).

The Defense Department published a proposed rule to the DFARS to require use of the Wide Area Workflow-Receipt and Acceptance (WAWF-RA) electronic system to use for submitting and processing payment requests for DOD contracts. When fully implemented WAWF-RA is intended to eliminate paper documentation and redundant data entry, improve data accuracy, reduce the number of lost documents and provide more timely payments. The proposed rule will still allow contractors to submit a payment request through another electronic means or non-electronically if authorized by the CO (*Fed. Reg. 45405*).

Government Says It Will Process Security Clearances Though FY 2007

The Defense Security Service announced it should have enough funding to continue processing industry applications for security clearance investigations through the end of the fiscal year in spite of earlier predictions it would run out of money. For two weeks in May 2006 DSS stopped processing industry applications for "Secret" clearances saying it ran out of funds while applications processing for top secret and confidential clearances lasted two months. Congress provided additional funding and funding for FY 2008 has been increased more than 10 percent.

DOD Pushes for EVM Implementation

DOD is stepping up its efforts to implement earned value management (EVM) as a "proven" tool to

increase effective management of large, complex projects. EVM systems – a continuous, integrated system that provides program managers with cost, schedule and work performance measures – are required government-wide through a rule that went into affect April 2006. Among the actions and responsibilities identified in a six page memo issued by Under Secretary of Defense for Acquisition, Technology and Logistics (1) the office will prepare DFARS changes to implement EVM policy (2) the Defense Contract Management Agency is to identify programs to have EVM and to ensure the EVM systems supplied by prime and sub-tier suppliers are adequate and (3) DCAA is to periodically review supplier accounting systems to assess compliance with EVM systems and to review contract performance records to determine accuracy and reliability of the financial data generated by the systems.

Services Industry Group Criticizes SARA Panel Recommendations

An influential group representing numerous industry associations called the Multi-Association Group (Group) has issued criticisms of recent Acquisition Advisory Panel recommendations revising commercial practices in government procurements. Though the group says some of the findings and recommendations of the Panel are "useful" three represent a "step backward" from decades of reform:

1. *FAR Definition of Stand Alone Commercial Services.* The Panel determined that the FAR improperly expands the definition of stand alone "commercial services" when it states that "services of a type offered and sold competitively in substantial quantities in the commercial marketplace" and concludes it should be narrowed by eliminating the phrase "of a type." The Group states eliminating the phrase from the FAR definition would restrict the government from procuring serves similar but not exactly like those offered in the commercial marketplace where now the government can acquire services that are not necessarily sold in substantial quantities.

2. *Government Objectives and Requirements for T&M Contracts.* The Panel, citing a GAO report finding the government does not provide adequate oversight of time and material/labor hour contracts, recommended rigorous enforcement of exiting policies and stressed the government should not award T&M task orders unless the overall effort and objectives of the contract is sufficiently described. The Group states the recommendation is unclear and will eliminate or severely limit the ability of contracting officers to consider use of T&M contracts even when it is appropriate. The Group says that FAR 16.601 effectively limits use of improper T&M contracts by stating such a contract may only be used when the extent or duration of work and anticipated costs are reasonably stated.

3. *Protests of Task and Delivery Orders on Multiple-Award Contracts.* The Group disagrees with a Panel recommendation to set a $5 million threshold for allowing protests of task and delivery orders under MAS contracts. The Group prefers the current prohibition to protesting these orders and states that by expanding protest rights the Panel hinders the government's ability to have contracted work completed on time.

SBA Proposes Changing Employee-Based Size Calculations

The Small Business Administration is proposing to change the way it calculates the number of employees a company has for purposes of determining whether it meets the size standards for governing eligibility for federal small business programs. Under the new rule, SBA would no longer calculate a firm's average number of employees based on a rolling average over the preceding 12 months but instead would base the size calculation over the last three completed years.

Under the rule the size calculation would be based on a company's calendar year submission of IRS Form W-3, "Transmittal of Wage and Tax Statement" which would relieve SBA from reviewing payroll records. If a W-3 form was not used in one of the three relevant years, the SBA can use other information such as payroll records to show total number of employees. If a company has not been in business for three calendar years, the average number of employees would be calculated based on an annualized figure for the time it has been in business. For non-employee size standards, the SBA currently requires firms to submit their IRS tax returns that show receipts, net income, net worth and financial assets that it says has worked out well.

The SBA states it will now allow firms to calculate its employee size only once a year which would apply until the beginning of the next calendar year. The policy also coincides with new concerns by the Central Contractor Registration (CCR) and On-Line Certifications and Representations (ORCA) to have contractors update their size status annually. Proposals to use a company's total number of employees for only its last calendar year were rejected because "trends fluctuate over a period of years." Also earlier proposals to use full time equivalents as a way to calculate employee size were rejected because it raised the specter of "endless disputes and size status protests" in how to calculate FTEs (*Fed. Reg. 41240*).

Industry Groups Urge PPA Minimum Contributions Should Be Basis for CAS Revisions

Several industry groups are urging the Cost Accounting Standards Board to adopt the Pension Protection Act's minimum funding requirements as the basis for determining the measurement and assignment of CAS pension costs. The comments follow the board's request for input on how it should satisfy the congressional mandate to "harmonize" the PPA and CAS requirements. The disharmony stems from the passage of the PPA that establishes minimum funding requirements to protect retirees' benefits but does not address pension cost accounting practices while CAS 412 and 413 address the later. Congress and the CAS Board have correctly held that meeting the PPA requirements would result in increased funding over funding that would result if contractors follow CAS requirements resulting in CAS covered contractors being adversely affected.

Continued Use of Termination Settlement Proposal and Subcontracting Plan Forms

The FAR Council submitted a request to the Office of Management and Budget to approve an extension of currently approved information collection requirements for termination settlement proposal forms – SF 1436 though SF 1440. The forms provide a standardized format for listing essential cost and inventory information needed to support the terminated contractor's negotiation position (*Fed. Reg. 45020*). (*Editor's Note. When preparing termination settlement proposals for clients we often find these forms to be inadequate so we then request the termination contracting officer or prime contractor to allow other formats be used. The request has always been approved.*)

The FAR Council has also submitted to OMB a request to approve an extension of information collection requirements concerning subcontracting plans and subcontracting reporting for individual contracts. FAR 19.702 requires contractors receiving a contract for more than the simplified acquisition threshold to have small businesses, small disadvantaged businesses, women-owned small businesses and HUBZone small concerns participate in the contract performance as much as possible. So, contractors receiving a contract or modification to a contract expected to exceed $550,000 ($1 million for construction) must submit a subcontracting plan for utilizing the above mentioned firms and they must submit semiannual reports of their progress on SF 294 (*Fed. Reg. 46477*).

Industry Group Oppose FAR Changes to Support Price Reasonableness

CODSIA recently expressed "grave concerns" about recent changes called for in an April 23 proposed rule and have urged the FAR Council to hold public meetings before proceeding further. The changes moving commercial items toward more cost based pricing, which we detailed in the last issue of the GCA DIGEST, would (1) amend the definitions at FAR 2.101 to add a new term "data other than certified cost or pricing data" which would mean any data including cost or pricing data as well as judgmental information the contracting officer would need to determine a fair and reasonable price (2) remove the current term "information other than cost or pricing data" which the rule writers say would be more consistent with the Truth in Negotiations Act (TINA) and instruct COs to obtain "data other than certified cost or pricing data" where certification of that cost or pricing data is not required by TINA (3) revise the definition of "cost or pricing data" to remove reference to certification while adding another definition of "certified cost or pricing data" (4) revise FAR 15.4 to "clarify the need and authority to obtain a detailed cost estimate, including cost or pricing data, when there is no other means to determine fair and reasonable pricing during price analysis even though the cost or pricing data will not be certified" and (5) incorporate the instructions in Table 15-2 of FAR 15.408 as mandatory for the submission of required data when TINA applies.

CODSIA put forth many "strong" objections stating the proposed changes will:

1. Conflict with TINA and provisions of the Federal Acquisition Streamlining Act exempting commercial items from TINA requirements of certified cost or pricing data and penalties when such data are not accurate, current or complete.

2. Significantly "reprioritize" the government hierarchical policies on what data is needed to support fair and reasonable pricing, putting COs in the position to demand the maximum amount of data from offerors and thereby creating more risk for contractors which in turn will make it more difficult for the government to obtain its needed products and services.

4. Provide expanded audit rights not contemplated by TINA (e.g. review of judgments and estimates in addition to factual information).

5. Eliminate the "bright line test" that distinguishes data subject to TINA and not subject to it that currently

government and industry clearly recognize. In contrast to the well understood concept of "cost or pricing data", whether it is certified or not, now "judgments" and "estimates", which are not well defined, must be disclosed because they may have a bearing on the reasonableness of a proposed price. The fact there will be no defective pricing liability under TINA for such judgments – TINA defective pricing penalties apply only to factual not judgmental information – "is small comfort" if contractors must defend themselves against False Claims Act cases no matter how meritless the case.

DCAA Issues New Guidelines

The Defense Contract Audit Agency has issued several memos to its auditors. The new guidelines address Form 1 letters to suspend or disapprove costs, time and material and labor hour contracts, maintaining pension records, changes to OMB Circular 133, supporting cost realism analyses, credits due to insurance settlement agreements and other issues. Since the guidance is both numerous and in some cases quite significant, we will discuss these and other new guidelines recently issued in greater depth in the next issue of the GCA DIGEST rather than attempt to summarize them here.

CASES/DECISIONS

Failure to Object to Error in Solicitation Results in Waiver

The solicitation for a contract to provide ferry services to Alcatraz Island stated questions had to be submitted in writing 30 days in advance of the due date for proposals where B&G did not submit any questions or raise objections prior to submission of proposals. After the government selected Hornblower for award, B&G protested arguing the government erred in determining that Hornblower was financially viable because its wages and benefits for its employees were not in accordance with the Service Contracts Act. The GAO dismissed the protest and two appeals courts upheld the GAO ruling asserting that the solicitation did not include any requirement that bidders consider the SCA so B&G's assertion the SCA should have been applied amounted to a challenge to the solicitation itself. The fact there was no mention of the SCA in the solicitation amounted to a "patent error" and the Court, in ruling against B&G, stated "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest" (*Blue & Gold Fleet LP v US, Fed.Cir., No. 2006-5064*).

Contractor May Pursue Negligence Claim on Behalf of Subcontractor

Prime contractor TAS Group brought a suit under the Federal Tort Claims Act against the US Marshall Service (USMS) on behalf of its subcontractor, CSI for damages to a CSI aircraft allegedly caused by USMS pilot negligence. The government claimed it was not liable because under the plain language of the contract clause the government is liable only for damages to the prime contractor's property. In rejecting the government's argument, the board noted that while the contract uses the term "contractor" when setting forth the requirements of the contract, both the government and TAS understood that CSI, as subcontractor, would be fulfilling the work of TAS in certain key elements of the contract (e.g. providing and maintaining aircraft). Because it found the contract does not distinguish between the prime contractor and subcontractor the board ruled "the term 'subcontractor' is subsumed within the term 'contractor'" (*TAS Group Inc. v US Dept of Justice, CBCA No 52*).

Navy Project Manager Does Not Have Authority to Modify Contract

(*Editor's Note. The following demonstrates the common problem of having project management and technical representatives apparently approve changes which are not formally approved by contracting officers.*)

During a pre-performance conference under a construction contract, the Navy stated the project manager – the resident officer in charge of contracts (ROICC) – would administer the contract and that all correspondences should be sent to him. Presentation slides stated work should not be performed beyond contract requirements without the ROICC's written notification. After performance began, the Navy notified Cath that day-to-day administration of the contract would be the responsibility of the engineer in charge of construction (EIC) and the EIC received Cath's numerous requests for information (RFI) for contract clarification and the ROICC signed responses to the RFIs. When the Navy rejected Cath's claims for price adjustments after performance asserting the EIC, acting as project manager, had no authority to approve changes to the contract, the appeals board sided with Cath and held the EIC had express authority to resolve minor contract problems based on the Navy's RFI responses which indicated the EIC was authorized to provide "technical and administrative direction."

The appeals court reversed the board decision noting the federal government has given authority to enter into

and modify contracts to a very limited class of government employees - contracting officers. A CO may delegate some of their authority, which seemed to occur here, because the contract included a clause stating the CO could designate a representative to perform certain technical and administrative functions, but delegations were limited and did not extend to authority for the EIC to make contract modifications. The court cited a DOD regulation (48 C.F.R. 201.602-2), which was incorporated into the contract, that states a CO's representative "may not be delegated authority to make commitments regarding price, quality, quantify or delivery changes." The court conceded the pre-performance conference confused the issue and contradicted the clear language of the contract but nonetheless, the contract language governs (*Sec. of Navy v Cath-Dr/Balti Joint Venture, Fed. Cir. No 2006-1359*).

Cardinal Change in Workload Justified Refusal to Perform

(*Editor's Note. Sometimes we are asked whether a firm is entitled to stop work under certain circumstances. Though the Changes clause generally precludes such extreme action, the following provides a good example of when it is justified.*)

Under its postal service contract, KI was obligated to deliver mail to 250 residential mailboxes in Yellville, Ark. Under the changes clause of the contract USPS was permitted to make "minor service changes" – defined as increases not exceeding $2,500. USPS made a unilateral addition of 52 mailboxes and said KI's pay would be increased by $1,088 where KI said it was not enough and USPS eventually agreed to increase it by an additional $1,603 bringing the total value of the change to $2,691. Whereas USPS considered the changes to be "insignificant minor service changes" that could be made unilaterally KI disagreed and refused to provide the additional changes. USPS eventually procured the services elsewhere and deducted the costs from payments otherwise due to KI after which KI ceased all performance and USPS terminated the contract for default.

KI filed suit challenging the default termination and seeking breach damages including payments for the remainder of the contract and litigation costs while USPS contended that under the Changes clause KI was required to perform in response to any and all service changes ordered by the CO. The Court sided with KI stating though a government contractor's duty to proceed is broad, it is not absolute. An exception to the duty exists for "cardinal changes" – situations in which "the government has attempted to effect a change which fundamentally alters the parties' contractual undertaking." The court stated nothing prevented USPS from ordering KI to deliver mail to the 52 boxes temporarily and then negotiating and agreeing upon a permanent change to secure the work but the CO was not entitled to order KI to perform more than $2,500 in additional work on a permanent basis without first securing the contractor's consent. Unilaterally increasing the contract work by more than $2,500 represented a material breach of the contract that justified KI's refusal to perform both the original and additional work (*Keeter Trading Co. Inc. v US, Fed. Cl. No 05-243*).

Costs of Unsuccessful Defense Against Qui Tam Action are Unallowable

In defending against a qui tam suit under the False Claims Act the court ruled against Rockwell. In its interpretation of the Department of Energy contract and the DOE Acquisition Regulation, the appeals board ruled that legal fees incurred in unsuccessfully defending against a qui tam suit under the FCA are unallowable (*Boeing Co., Successor-in-Interest to Rockwell, CBCA 337*).

Board Affirms Rule on Timeliness of Appeals When 90th Day Falls on Sunday

When the contractor's appeal of a government final decision was received on Monday, 91 days after the contractor received the final decision, the government argued it was late because the appeal was not received within the 90 day limit. The government claimed the Contract Disputes Act clearly establishes a 90 day period and that accepting an appeal after that impermissibly expands the statutory period. The appeals board, citing *Wood-Ivey Sys. Corp, (Fed Cir 961)*, disagreed ruling that receipt of the board appeal on the 91st day is timely when the 90th day falls on a Saturday, Sunday or holiday (*DLT Solutions Inc. ASBCA No. 55822*).

NEW/SMALL CONTRACTORS

Adequate Billing Systems

An adequate billing system has increasingly become a precondition for taking advantage of many of the contracting reforms passed in the last few years. Privileges such as direct billings to paying offices, qualifying for less audit effort on incurred cost submittals and quick close-out procedures as well as media stories about excess billing incidents have

contributed to the requirement that contractors demonstrate their billing system is adequate. As a result, we are seeing more and more audit scrutiny of contractors' billing practices, either as separate audits or additional steps of other audits such as incurred cost and invoice reviews. Though we have addressed this issue from time to time in the past, we thought it would be a good idea to describe what auditors now are instructed to look for in evaluating billing practices especially since there have been numerous changes over the years.

Section 5-1100 of the Defense Contract Audit Agency's Contract Audit Manual (DCAM) is the most commonly available source we have found that describes what an adequate system is and what approach auditors are likely to take in reviewing billing systems. The stated objective is to ensure billings are accurate and are prepared in accordance with laws and regulations as well as specific contract terms. Significant areas of review include:

1. ***Contract type determines approach***. The guidance cautions its auditors that areas of emphasis will depend on the type of contracts held by contractors. For example, fixed price contracts that provide for interim payments calls for close scrutiny of estimates-to-complete, billing data such as progress payments and liquidation percentages and loss ratios when appropriate. Fixed price/level of effort contracts should be reviewed like time and material contracts where ceiling rates and unallowable and unallocable costs are identified in the contract and hours and labor categories billed are closely verified. For cost type contracts, auditors are instructed to reconcile costs billed with properly recorded costs, limitation of cost requirements are followed and indirect billing rates are adjusted for revised budget data.

2. ***Adequate Policies and Procedures***. Sections 5-1107 through 1109 of the DCAM inform auditors that formal written statements of policies and procedures (rather than informal practices based on custom) should exist for contractors doing "substantial business" with the Government. *(Editor's Note. We find such terms as "substantial" and "significant" are usually left undefined and vary widely by each DCAA office.)* Areas to be covered by these policies and procedures include:

a) *Training*. Because government billings are unique, the guidance stresses personnel involved with billing should have on-the-job or outside education courses that cover a basic understanding of the contractor's accounting system, specific billing procedures, instruction how to brief a contract, a description of the review and approval of billings, guidance on applicable FAR and contract clauses and close-out procedures.

b) *Reconciliation of Recorded and Billed Costs*. The contractor should be able to demonstrate its billings are prepared from cost accounting records or, at least, able to be reconciled with accounting records such as the general ledger or subsidiary ledgers. Billings produced through automated systems should demonstrate the system's capability to identify ceiling amounts and non-billable items.

c) *Adjustment of Cost and Rates*. Auditors want some assurance that indirect costs billed closely resemble actual costs incurred. Consequently, they focus on procedures that adjust original projected rates to actual as soon as they are known. Segregation of costs by year and, at least, annual re-approval of rates are considered essential controls.

d) *Overpayments, Refunds and Offsets*. Recent revelations of overpayments have made DCAA stress the need to have appropriate internal controls in place that (i) compare amounts billed to amount received for each invoice, identify any over/under payments and provide for timely notification to the ACO (ii) process refunds due the government in a timely manner, maintain a list of all refunds made to the government and identify reasons for the refunds and (iii) make offsets to contract billings in accordance with CO and payment office instructions and maintain a list of all offsets. In addition, contractors need to have policies and procedures in place to ensure their subcontractors' accounting and billing systems are adequate to identify and resolve overpayments, refunds and offsets.

e) *Estimates-to-Complete*. Progress payments using SF 1443, Contractor's Request for Progress Payment, must fill in line 12b that is used to determine reasonableness of billings. Since this is a critical factor, the contractor must demonstrate these estimates-to-complete are kept current (not more than 6 months old).

3. ***Implementation of Policies and Procedures***. The DCAM urges its auditors to ensure the written policies and procedures are properly executed. The guidance specifies that (1) policies and procedures are disseminated to employees (2) they obtain proper training (3) contract briefing forms (summary sheets of essential contract information) for each contract are maintained (4) evidence of management reviews of billings before they are submitted exists and (5) proper information technology controls (e.g. general controls like preventing unauthorized use is prevented, billing system application controls) are effective.

QUESTIONS AND ANSWERS

(*Editor's Note. One of the attorney members of our Ask the Experts panel, Len Birnbaum, helped us with the following question.*)

Q. Our firm was awarded a firm fixed price contract for the manufacture and delivery of specialty items to the Navy. The shipping point is F.O.B. destination. The items, once manufactured, are stored at origin until they are needed by the Navy where they are shipped from the East coast to California via dedicated refrigerated trucks. The original proposal and contract pricing was based on freight costs as they were known at that time. It was impossible to anticipate the additional $6,560 in fuel surcharges that have been added to the shipping costs by the carrier. Since the additional freight costs associated with this contract are out of our control do we have any recourse regarding cost recovery? Are there any FAR or other government regulations that would help us recover the unanticipated fuel surcharge costs?

A. First, I am surprised to hear there was no government bill of lading, where they pay all shipments. Though I doubt it is there, you should first look closely at the contract to see if there is a provision indicating relief for an increase in freight charges. But assuming you are responsible for payment and it is included in your contract price, then you are most likely responsible for all payments, including increases. Unless the contract provides for relief, the only opportunity I see for you is Public Law 85-804, which is basically implemented in FAR Part 50 that gives the contracting officer the discretion to adjust the contract price upward to prevent hardship. If the amount is substantial, or would put the contract in a loss position, that would certainly apply. I would recommend calling the CO and explain the situation to them, even referencing Part 50. I forget the amount of the dollar threshold but I think its around $50,000 where the CO has authority to resolve the situation without going higher up their chain of command.

Q. Is there any difference between Bid & Proposal costs and what we would term "Support to Marketing" (i.e. an Engineer goes with a Marketing type guy to a potential customer to explain capabilities and/or product definition)? I believe the STM description falls under 31-205.38(c)1. B&P gets OH applied to it and goes into the G&A pool for allocation. Under my definition above, would STM also get OH or is it just a transfer of expense to the G&A pool? I guess my confusion lies in the fact if both get OH & transfer to the G&A pool, what is the difference between the tasks & why would FAR distinguish between B&P & STM.

A. Bid and Proposal costs are part of IR&D/B&P that is covered by CAS 420 and FAR 31.205-18, which requires the same treatment as CAS 420, while, as you state, the marketing expense would be addressed elsewhere in the FAR. Hence, B&P, like IR&D, must be included in the overhead base (presumably direct labor) and then when it is moved to the G&A pool, as you say, it gets its share of overhead since its part of the overhead base. (Technically, IR&D/B&P is not considered to be G&A costs but other costs that are allocated on the same basis as G&A - hence, they are normally included in the G&A pool.) Your STM or marketing costs are most generally considered cost elements of the G&A pool (they contribute to the business as a whole) and as such are treated differently than B&P costs. Your STM costs are includable in the G&A pool without any overhead added since they are not included in the overhead base as CAS 420 requires.

Q. A quick question on overtime premium. We have always charged it as a Direct charge to a contract (as ODC). I see some companies charge it as a cost to their overhead pools but I disagree because 1) it is directly identifiable to a job and therefore, a direct cost and 2) in the case of cost plus fixed fee and time-and-materials jobs, it is unallowable unless an approval for OT is received. I can't see how you can take an otherwise unallowable cost & make it allowable by charging it to the OH pool. Can it be an OH cost and charged indirectly?

A. Whether or not OT would be considered unallowable on a particular contract comes down to what are your firm's accounting practices - if OT is considered a direct cost, then yes it should be considered an unallowable cost for those contracts that don't allow for it. However, if your accounting practices are to charge OT indirect then, which is a commonly accepted practice, it should be allowable. After all, for example, if an employee working ten hours in a day works on two or more jobs, then how do you decide what job incurred the OT? That's a common justification for charging it indirect.

The fact the OT costs may not be reimbursable as a direct cost on a particular contract does not mean they are or should be unallowable as an indirect cost. The fact that OT costs are commonly not reimbursable is one of the reasons it is usually charged indirect. Alternatively, your accounting practice could be to treat OT both ways - direct when a contract calls for it and

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indirect in other circumstances. That way, you could have it both ways.

Q. Our company has two accounts that accumulate costs for Incentive Compensation - Executive Incentive Compensation which is used to pay bonuses to high level executives and corporate officers, and Regular Incentive Compensation which is used to pay bonuses to all other employees. Both of these accounts are part of our Fringe Pool and that practice was used in computing our 2007 provisional billing rates. Now that 75% of our year is completed it appears that we are going to significantly over-run Fringe and significantly under-run Overhead and G&A. Would it be feasible for us to move Regular Incentive Compensation to our Overhead Pool and/or move Executive Incentive Compensation to our G&A pool? If feasible could we make this change retroactive to the beginning of the year? Would permission from the government be required? If permission from the government is not required, would we be required to notify them before they find out through a review of our indirect cost submission?

A. The general rule is you need to be consistent with the way you propose and book costs so the retroactive changes you outline would be a significant uphill battle. You would have a better case making the change prospectively – that is after the current fiscal year. That said, however, I have seen contractors make the type of retroactive change you are proposing by presenting a strong position paper demonstrating the change is "desirable" e.g. represents a significantly better cost allocation method. In such a case, you may or may not have to demonstrate the cost impact of the change. You could argue, for example, that inclusion of the executive bonus in fringe benefits with total labor in the base represents a distortion since the bonus applies only to executives and should be assigned to G&A or similarly, the regular incentive compensation applies only to non-executives and hence is better included in the overhead pool. As for notification, since you are not CAS covered, you need not notify the government of the changes until you submit your incurred cost proposals where you need to clearly identify the changes. However, contractors usually notify their ACO earlier as a courtesy. You need to think hard how to handle it.

Q. First Question. We have a contract that stipulates that we can add G&A to our Travel Invoices only up to a specified rate. Our actual and provisional G&A rate is much higher than the amount the contract allows us to bill. Do we have any recourse to recover our remaining G&A? Second Question. Our subcontractor claims that this rate does not apply to them and that they have the right to add their own G&A rate to their travel and then my company (the prime contractor) can add the contract stipulated G&A to the subcontractor invoice. This in effect charges the Government for G&A twice (once for the subcontractor and once for the prime contractor). Is my subcontractor correct?

A. First Question. It seems like the G&A rate applied to travel costs is capped no matter how high the actual rate goes - I see no way to get around that unless the wording establishing the cap is unclear. Second Question. You need to examine the contract to see if your cap applies to subcontractors' rates also and whether there is a prohibition against the double G&A charge (I doubt both). If the contract is silent, then normally the cap applies only to your G&A rates and the subcontractor is free to add their projected indirect rates onto their direct costs, including G&A. The government usually does not prohibit pyramiding of costs.

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