GCA REPORT
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NEW DEVELOPMENTS

New Guidance From DCAA

DCAA has issued several important guidelines to its auditors.

♦ **DCAA May Be Lessoning Its Audits of Proposals**

As of the time of this printing, we have just received information from one of our sources that there is a proposal to modify the DFARS Procedures, Guidance and Information (PGI) to limit DCAA audit assistance to fixed price proposals exceeding $10 million and cost type proposals exceeding $100 million, unless there are unusual circumstances explained in the request for audit. When future requests for audits at the prime contract level below the revised threshold are made, DCAA is told to refer the requestor to the Defense Contract Management Agency. The revised guidance does not apply to assist audit requests by other DCAA offices or current audits being conducted before the effective date.

Early comments we have seen is the change is due to the high number of DCAA opinions stating proposals are "not acceptable as a basis for negotiating a price" which is bogging down the contracting process. Other comments are saying auditors are trained in auditing and accounting, not estimating, where there is an overemphasis on more easily auditable historical data rather than forward looking forecasts. Still other commentators are saying that the changes may not be reason to celebrate since there is a good chance that audit scrutiny will switch to defective pricing audits where there is the DCAA hope that even more questioned costs can be found by asserting cost data used to price a proposal was not accurate, current or complete. We plan on providing more information as it becomes available.

♦ **DCAA Issues Audit Guidance on Supporting Data on Forward Pricing Rates**

(*Editor's Note. The following guidance is an instance of guidelines following practice. The practice referred to is our observations that DCAA has been focusing much more closely on the basis of forward pricing rates, particularly rates used on multi-year proposals. In our opinion, because the following guidelines are general in nature and the emphasis is put on auditor judgment there will be widely different interpretations of the guidelines by individual auditors so increased care on justifying estimates of future indirect rates must be made.)*

The guidance first alludes to Table 15-2, Subsection II, Paragraph C that provides instructions to contractors that they must indicate how they computed and applied indirect rates while also showing trends and budgetary data with appropriate explanations to support reasonableness of proposed rates.

Next, the memo provides guidelines on how "larger contractors" (not defined) should use detailed management-approved budgets based on strategic or long-range forecasts (sales, plant expansions) for the first year and that proposed first year rates should be consistent with this budgetary data. Because of greater uncertainty in later time periods, the guidance states even larger contractors are not expected to prepare detailed operating budgets for each fiscal year after the first. However, FAR Part 15 does require an explanation of how rates were derived for each of the out years. The guidance rejects as acceptable "flat-lining out year rates" where there is no explanation to support the rates. Adjustments to out-year pools and bases should be made based on reasonable forecasts and the contractors' assumptions for changes to major cost groupings ("e.g. variable, semi-variable and fixed"). The guidance alludes to the DCAA Contract Audit Manual 5-507 and 5-508 that provides information on the types of budgetary documentation that auditors should expect to be provided by larger contractors in support of their indirect pool and base forecasts used to develop indirect rates.

The guidance tells auditors to recognize that adequate supporting data and budgetary data supporting indirect rates will vary from contractor to contractor where it states "smaller contractors" (again not defined) do not develop detailed budgets. Here it is not uncommon for smaller firms to have limited budgetary data and assert historical costs are the most appropriate basis to estimate all out years. When this occurs, auditors are told to make sure contractors provide the necessary trend data with appropriate explanations to support the assertion that historical costs are the most reasonable estimate for out years.

The guidelines end with the recognition that support of proposed indirect rates will vary widely by contractor and hence the auditor must "exercise judgment in ascertaining if the data provided adequately supports the contractor's proposed rates." Auditors are told to consider the specific contractor and pending award. To support their opinion on forward pricing rates auditors are told, at a minimum, to verify historical amount back to the contractor's books and records if historical trend data is used to justify rates and forecasted amounts to other contractor data (e.g. sales forecasts, budgets) if forecasted costs do not use historical data. If the contractor's indirect rate forecasts are not adequately supported throughout the entire period of performance and an examination of unsupported out years cannot be performed, then auditors are told to recommend to the contracting officer the proposal be returned to the contractor (*10-PSP-02(R*).

♦ DCAA's Guidance on Communications with Contracting Officers and Contractors

(*Editor's Note. We find one of the greatest problems contractors have during an audit is ascertaining what the auditor's position is during the audit where issuance of an adverse audit report is usually an unpleasant surprise. The following guidelines will hopefully lessen this occurrence. The guidelines are 41 pages divided into a general comments, a Q&A section and a slide show presentation*)

DCAA has issued guidelines they call "the rules of engagement" on proper communications with audit requestors (usually COs or ACOs) and contractors. Though most of the guidelines of communications with requesters are not of direct interest to contractors – we will focus primarily on what the guidelines prescribe for proper communications with contractors – communications of the scope of audit with the requester is of interest. Upon request to conduct an audit, which is limited normally to proposals and forward pricing rates, the auditor is told to hold discussions before an audit begins to obtain a clear understanding of the requester's needs, areas of concern and how DCAA can best meet these needs. Either at the time of audit request or at this meeting, DCAA is often asked to perform an audit of only parts of a proposal. Though the auditor has the discretion to discuss risk factors that may indicate additional parts of a proposal should be audited, this communication with the ACO defines the scope of audit which should be clearly communicated to the contractor.

Commencement of Audit Communications. Though not common, the guidance states the contractor should provide government representatives (e.g. DCAA, ACO and PCO) a "walk-through" of its "assertions" (proposals, incurred cost submissions, etc.). If problems are anticipated (e.g. inability to audit subcontract costs), contractors should be aware of this option. The walk-through should occur after the auditor performs an initial adequacy review of the assertion and may occur either before or during an entrance conference. At this meeting, the contractor should explain its assertion and allow the team to ask questions.

Entrance Conference. Auditors are told to explain the purpose and overall plan for performance of the audit at the entrance conference along with discussing the types of books, records and other data that exists, where it is located and what they will need. This meeting should address the concerns and scope of audit the requester made.

Communications with Contractor During the Audit. Here it is important to understand the difference between audits of forward pricing, termination or requests for equitable adjustment proposals where findings are not disclosed to contractors but form the basis of negotiating positions of the government and audits of incurred costs, system reviews, floorchecks, etc where all findings should be transparent. This is a critical step where throughout the audit, auditors are told to discuss matters with the contractor as needed to obtain a full understanding of the contractor's basis for each item of the proposal or each aspect of areas subject to audit. The auditor "should discuss preliminary findings (e.g. potential system deficiencies, potential FAR/CAS non-compliances, etc.) with the contractor to ensure conclusions are based on a complete understanding of all pertinent facts." To offset many auditors' inclination not to divulge deficiencies during the audit, they should be reminded of the requirement to disclose findings as early as the entrance conference with periodic status meeting held during the audit so minimal surprises come out. The guidance also alludes to the fact that some contractors revise their submittals during the audit in light of audit findings – auditors are told not to encourage this and to make sure their audit report addresses the original proposal, not the revised one.

Exit Conference. Upon completion of the field work the guidance states the auditor should hold an exit conference to discuss audit results and obtain the contractor's views concerning findings, conclusions and recommendations for inclusion in the audit report. The recommended timing of the exit is after the supervisor completes their review of the working papers and draft report but before the branch manager completes their final review. To facilitate discussions during the exit, auditors may provide audit results and draft reports

before the exit meeting unless the audit is for forward pricing in which case no draft report is provided where results of audit is limited to factual matters or "differences" (e.g. why was proposed material costs based on history of an older contract rather than more current data from a follow-on contract).

The guidance states it is acceptable to release the draft audit report to the ACO after the exit conference (typically five days) but before the branch manager approves the final report. Be aware that auditors may wish to "clean their desk" and release a final report quickly so if you want to include contractor comments in the final audit report or elevate areas of disagreement with the branch managers (or even higher) then you need to inform the auditor at the entrance conference of your intent.

New Contract-Related Interest Rate Set for Second Half of 2010

The Treasury Secretary has set a rate of 3.125% for the period July through December 2010. The new rate is a slight decrease from the 3.250% rate applicable in the first six months of 2010. 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 and (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 Standards 414 and 417 as well as FAR 31.205-10 and when a discount factor is used to calculate the present value of future payments (e.g. deferred compensation).

Gates Announces Spending Cuts and Dissatisfaction With Insourcing Results, Industry Calls for End of Insourcing Efforts

(*Editor's Note. Despite anticipated cuts in DOD spending, the pendulum for outsourcing versus insourcing government work seems to be moving back to outsourcing following a brief emphasis on insourcing over the last couple of years.)*

Secretary of Defense Robert Gates announced the Pentagon would be cutting funding for support contracts by 10 percent annually for the next three years. Gates said that support and advisory contacts have increased from 26% of the DOD workforce in 2000 to 39% in 2009. He also announced dissatisfaction with a plan announced earlier in the year to reduce support contractors by 33,000 and insource them by increasing government jobs, stressing that recent efforts to insource jobs has not resulted in the savings that were expected. He stated no more full time positions would be added to replace contractors after the current fiscal year. Following the announcement many industry groups have been calling for a moratorium on insourcing efforts stating real economic growth and job creation occurs in the private sector where the government should not be competing with its citizens.

DCAA Director Advocates Cost Based Subcontract Proposals for Contingency Contracts

Because competition is often limited in contingency operations (e.g. Iraq, Afghanistan) and hence market forces do not provide the government the best prices, DCAA's new Director Patrick Fitzgerald told a Congress Committee that the government's interests would be better served if subcontract prices were based on cost. He said many prime contractors are saying that adequate competition for subcontracts was maintained when only one bid was received. In addition, alluding to recent proposals to increase penalties on contractors who fail to remedy deficiencies in their business systems and internal controls, Mr. Fitzgerald states a prime contractor's best protection against unreasonably high subcontract prices is to maintain an adequate purchasing system and management over subcontractors' billing practices.

FAR Clarifications to Cost and Pricing Data

(*Editor's Note. The FAR alludes to three categories of cost or pricing data – "certified price or costing data", "data other than certified cost or pricing data" and "information other than cost or pricing data" – that causes considerable confusion to both contracting officers and contractors. The stakes are high where unnecessary submission of "certified" data can make a contractor vulnerable to assertions of defective pricing accompanied by price adjustments, penalties and possible investigations while unnecessary submission of other types of cost data can be onerous and seriously impact pricing actions. Since the 19 page rule change is complex yet important, we will simply summarize the changes here and provide more detailed coverage in the next issue of the GCA DIGEST.)*

The FAR Council has issued a final amendment to the FAR seeking to clarify the differences between "certified cost or pricing data" and "data other than certified cost or pricing data" Additional clarification includes when cost or pricing data needs to be submitted, responsibilities on requesting both types of cost or pricing data and when it is required, retains the current order of preference for deciding types of data needed

and why cost data need not be requested and instructions for offerors when cost or pricing data is needed. Highlights of the changes include:

1. Neither expands nor diminishes COs' rights to obtain cost or pricing data nor contractors' responsibilities to provide it.

2. Whether a contractor must submit certified cost or pricing data depends on the requirement of the Truth in Negotiations Act (TINA) or its waivers.

3. Regarding non-certified cost or pricing data, the rule clarifies the policy statement in FAR 15.402(a) – the CO should continue seeking that information necessary for it to ensure prices are fair and reasonable with the caution that COs must not request more data than is necessary.

4. The rule writers concede that there is considerable confusion on the government's right to obtain data other than certified cost or pricing data, what the term means and whether offerors are required to submit it. They state the source of the confusion is that definitions overlap and are not consistent with TINA e.g. the TINA defines cost or pricing data to be certified whereas the FAR does not make certification part of the definition.

5. Confusion is made worse by the inclusion of the third phrase 'information other than cost or pricing data" which is to be eliminated.

6. The language of FAR 15.408, Table 5 has been revised to make new submittal requirements for "other than certified cost or pricing data" to include the addition of "judgmental information" reasonably needed to explain the estimating process, "judgmental factors" applied or "mathematical or other methods used" in the estimate including projections from actual data and amount and number of "contingencies" used in estimating the price. Such judgmental amounts do not apply to certified cost or pricing data because such non-factual data is not covered by TINA.

7. The final rule makes clear that COs may require submission of both types of cost or pricing data. Also, the new rule makes clear that COs may ask for data other than certified cost or pricing data for commercial item acquisitions, making it certain that no negotiated procurement is now exempt from providing non-certified cost or pricing data (*Fed. Reg. 53135*).

FAR Thresholds Adjusted for Inflation

The FAR Council issued, in accordance with an earlier rule to adjust for inflation every five years, statutory acquisition related thresholds (the Davis Bacon and Service Contract Acts are exempted). The effect of the increases on the most commonly used thresholds are:

1. The simplified acquisition threshold is raised from $100,000 to $150,000 (FAR 2.101).

2. The cost or pricing threshold under the Truth and Negotiations Act is increased from $650,000 to $700,000 (FAR 15.403).

3. The threshold for requirements related to prime contractor subcontractor plans has increased from $550,000 to $650,000 (FAR 19.702) where for construction contracts the threshold is increased from $1 million to $1.5 million.

4. The commercial item test program increased from $5.5 million to $6.5 million (FAR 13.500).

5. Both the micropurchase threshold of $3,000 (FAR2.101) and the $25,000 threshold to provide FedBizOpps preaward and postaward notices remain unchanged (*Fed. Reg. 53129*).

New Rules Intended to Limit Use of T&M/LH Contracts for Commercial Services

The Defense Department made final an interim rule addressing the types of commercial item acquisitions that can use time and material or labor hour contracts. In addition, it kept the clarification that the terms "general public" and "non-governmental entities" that affect when commercial item provisions can apply includes the federal, state, local or foreign governments. Shortly after posting the final rule the DOD issued a notice saying the final rule is delayed due to comments on the interim rule that had been found not to have been considered (*Fed. Reg. 52650*)

Meanwhile a proposed FAR rule would ensure that contracting officers be made aware of restrictions on the use of T&M/LH contracts for commercial items, including those under the GSA schedules program. The proposed rule would also make explicit the fact that T&M/LH contracts are not fixed price. The proposal follows a GAO report stating that contracting officers were generally unaware of the steps needed to use such contract vehicles only when others were not suitable.

Initiative to Expand Small Business Contracting Opportunities

In an announcement that the federal government fell short of its goal of awarding 23% of prime contract value to small businesses, there have been several

actions taken to increase small business awards. Of note are:

1. An interagency task force charged with creating new opportunities for small business participation in government contracts issued a set of recommendations in mid-September. Recommendations intended to set clearer contracting policies included updating current policies related to small business set-asides, new policies to prevent unjustified bundling of separate contracts and mitigating justified bundling efforts, developing government-wide framework for mentor-protégé programs and teaming rules, strengthening requirements for subcontract plans and evaluating impact of insourcing on small businesses. Recommendations were made for holding agencies responsible for increasing small business awards and using electronic means, strengthening the skills of agency personnel, enhancing "carrot and stick" incentives, creating best practices and improving FedBizOpps to provide one stop shopping for prime and subcontracting opportunities.

2. President Obama signed the Small Business Jobs and Credit Act. Highlights of the act of particular relevance to contractors include reducing contract bundling from a $10 million to a $2 million limit, directing prime contractors to actually acquire small buasiness supplies and services in the amount stated in its proposal, require COs to consider failure to promptly pay subcontractors a negative factor in evaluating past performance, require the Small Business Administration to review and update size standards at least every five years and clarify that no single contracting program – 8(a), HUBZone, women-owned business – has any priority over another. (*Editor's Note. The last item is intended to address recent decisions by the courts that say HUBZone firms have priority over all others.)*

Industry Groups Oppose New Subcontract and Executive Pay Reporting Rules

(*Editor's Note. We have received numerous inquiries related to a recent GCA Report article reporting on new reporting requirements of prime contractors and their first tier subcontractors. In addition to the confusion over the new rules, industry groups are also objecting.)*

Most major industry association groups have called the new rules "administratively burdensome" and "functionally unworkable." The rules, effective July 8, requires contractors to report first tier subcontract awards of $25,000 or more for contractors and their first tier subcontractors and to report executive compensation. The subcontract reporting does not apply to classified contracts nor contracts to individuals or if their gross income is less than $300,000 while the executive compensation reporting applies only if the firm received 80% of its annual gross revenue and $25 million from federal contract awards and only if senior executives are not required to report their compensation for other purposes.

The Industry groups' objections to the new rule include assertions that (1) reporting of non-classified contract information will reveal US national defense capabilities and not secure sensitive but unclassified information (2) requirements applied to commercial items and commercial off the shelf items will make commercial firms think twice about doing business with the government (3) provide competitive harm to firms doing business with the government due to disclosure of sensitive information (4) expose prime contractors to potential breach of contract accusations due to prevalent non-disclosure clauses in its contract terms with subcontractors and (5) the administrative burdens will result in higher prices paid for the allowable administrative costs of compliance.

House Bill Approved that Will Allow COs to Weigh Impact of Jobs Creation on Award Decisions

A House Committee approved by voice vote a bill that would permit contracting officers to consider how many American jobs an offeror says it will create or save when making award decisions. The bill would also allow debarment of a contractor that significantly overestimated the jobs impact. The bill will state that solicitations will provide for a voluntary "jobs impact" statement with every offer where number of domestic jobs created or saved will be identified and would include guarantees the contractor will not out source jobs to another country. A contractor will submit a jobs impact analysis six months after award and then annually where results will impact subsequent awards or follow-on awards.

CASES/DECISIONS

Board Rejects Hourly Rate Interpretation

Champion received task orders to provide 960 hours of secretarial support services and 960 hours for administrative services where later GSA determined the contractor had erroneously received payments for holidays and vacation hours and tried to recoup these amounts. Champion asserted it had routinely invoiced for these costs and the GSA had set a precedent by paying for them and filed a claim. The GSA asserted

the underlying contract for the delivery orders stipulated holiday and vacation days were not to be charged to the government whereas Champion viewed the delivery orders as calling for 960 hours to be provided at each location over a specified performance period at a fixed price where the defined performance period necessarily included government holidays. The Board disagreement with Champion's assertion the delivery orders were fixed price saying they were ID/IQ labor hour type contracts where contractors were expressly instructed to make hourly rates "fully loaded" meaning they were to include costs for holiday and vacations. The Board stated all pertinent documents made clear the contractor could not bill the government for the holidays and vacation days and if there was any ambiguity Champion was obligated to ask the government. As for payment being a precedent, the board ruled payment was not a precedent because there was no knowing acquiescence to Champion's interpretation (*Champion Business Services v GSA, CBCA No. 1736*).

Lack of "Sum Certain" Amounts Do Not Represent Valid Claims

Donovan submitted a sponsored claim for its subcontractor in the amount of $559,764 where it noted "Donavan has or will have approximately $65,000 of additional direct and administrative costs that should be added" to the subcontract amount. The contracting officer treated the claim as one for $624,764 (subcontract amount plus Donovan's) and denied it in its entirety. The Appeals Court rejected the claim stating it did not have jurisdiction to settle the matter because the wording "will have approximately $65,000" did not represent a clear "sum certain" amount which is required for a claim to be valid (*J.P. Donovan Constr., ASBCA 55335*).

Failure to Perform Tradeoff Analysis Sustains Protest

The EPA posted a RFQ to maintain a safety facility that stated technical approach, personnel/experience and past performance combined were more important than price. SEI's proposal, which was the lowest price, had a marginal rating for technical and personnel/ experience and a very good rating for past performance but the EPA did not include it or other low priced proposals in its tradeoff analysis unless there was an overall "very good" rating on all criteria. SEI protested the award to McDean stating its marginal rating was too low and the agency failed to consider its lower price. The GAO ruled the marginal rating was justified but sustained the protest saying EPA did not perform an adequate price/technical tradeoff analysis. The GAO said that under a best value procurement an agency must perform a tradeoff analysis between price and non-price factors to determine whether the non-price factors were worth the higher price, even if price is stated to be of less importance than other factors. The GAO ruled the agency's conducting of a tradeoff analysis of only two offerors was inadequate where SEI's proposal was not unsatisfactory or too deficient to be considered for award (*System Engrg International, GAO B-402754*).

Disclosure of CLIN Unit Prices and Contract Price Not Covered by FOIA Exemption

(*Editor's Note. We have reported on a few cases recently where the government decided on what information is legitimately released to the public under the Freedom of Information Act and what is not because release would cause financial or competitive harm to the contractor. This evolving area is further illuminated under the following case.)*

The Navy awarded JCI a contract that was fully performed after which the Navy received a FOIA request for a copy of the contract and other documents. JCI asserted the information should not be released because the unit prices for each contract line item and total price of the contract fell within the Exemption 4 of FOIA which protects contractors from disclosure of trade secrets and commercial and financial information. JCI said disclosure of such information would harm it because it would help its competitors when it came time to bid on a new contract while the government disagreed and said it would release the information. In evaluating JCI's Exemption 4 argument the court stated the only dispute was whether the information was "privileged or confidential" in which case there was the likelihood of "substantial competitive injury" if the information was disclosed. Here some of the information was already in the public domain because some of the information was included in a letter to the Navy which is filed on a publicly available database while the rest of the information was not likely to cause severe competitive harm because of the "presence of too many fluctuating variables" that made it unlikely JCI's competitors could figure out its bidding strategy and hence underbid it in the future. As to JCI's assertions that release of its unit prices could cause harm the court stated it was purely speculative whether the prices would remain the same and be useful to competitors. It concluded the public interest in favor of disclosure outweighed any confidentiality concerns by JCI (*JCI Metals Products vs. US Navy, No. 09-CV-2130*).

Failure to Consider Adverse Past Performance Information was Unreasonable

The RFP for a design/build contract stated evaluation of experience, past performance, project experience and price would be made. For the experience factor, the RFP requested 5-10 projects either underway or completed would form the basis for the past performance evaluation where offerors were to submit letters of recommendation, performance evaluations, letters of appreciation, commendations and awards from the listed projects. Zafer was awarded the best value contract and in its protest, Contrack gave the agency negative information about Zafer found in contractor performance assessment reports (CPARs), IG reports and a Bloomberg news article. A subsequent evaluation of performance gave Zafer the same "excellent" rating it originally received and raised Contrack's rating to satisfactory. Contrack argued the assessment was unreasonable because the government again failed to consider negative information about Zafer where it had considered only two CPARs while three others included marginal or only satisfactory performance indicating past performance problems. The government stated its assessment was based on the "totality of past performance information." The GAO sustained the protest ruling there was no indication in the record that the government made any effort to investigate the merits of these reports (*Contract Int'l Inc., Comp. Gen. B-401871*).

Inadequate Discussions Preclude Proper Award of Contract

The Coast Guard gave AMEC only a satisfactory rating with moderate risk because it had concerns that its software program had adequate analytic capabilities to help in the design/build contract. Rather than surface concerns, the Coast Guard simply asked AMEC to address specific questions about the software. The GAO sustained AMEC's protest on the grounds that the discussions with the contractor was misleading where it failed to convey the true nature of its concerns. It concluded that being asked to respond to specific questions AMEC could not have reasonably understood the agency's broader concerns about the software and hence be able to respond to those concerns (*AMEC Earth & Environmental Inc., GAO B-401961*).

Contractor Entitled to Full Payment Despite Insufficient Funding

The General Services Administration awarded DSS a task order to provide support services where it was to acquire hardware and software either in support of those services or at the government's request. Though the contract was modified numerous times none identified a CLIN against which the equipment could be charged under. The GSA rejected an invoice for the equipment because the amount exceeded the funding remaining in the contract and though a project manager had authorized purchase of the equipment the GSA said he had acted without proper authority. The Board framed the issue as whether DSS was entitled to be paid for the rest of the amount due under the invoice even though no additional funds were allocated to cover the remaining amount. The Board sided with DSS asserting one of the mods did expressly require DSS to provide equipment in support of various projects worldwide so equipment ordered for one specific location should be included in the clause contemplating worldwide purchases and hence there was no need to modify the contract for the equipment purchases here. It concluded the CO did authorize purchases and therefore the contractor should be compensated even though insufficient funds had been allocated (*DSS Services Inc. v GSA, CBCA No. 1093*).

QUESTIONS AND ANSWERS

(Editor's Note. We have decided to eliminate our usual article oriented to new and smaller contractors for this issue since we have included more newsy articles and wanted to catch up on some of our submitted questions.)

Q. We were originally awarded a cost type contract but since DCAA is objecting to the adequacy of our accounting practices, the contracting officer wants to have us propose all future task orders as fixed price. They are suggesting making payments on a progress payment basis. Is this common? Can we propose a higher profit like 20%?

A. Yes, we are seeing a trend toward switching elements of a contract to a fixed price basis to go around auditor opinions of inadequate accounting systems to work on cost type work. Though progress payments may be justified for large contracts over a long period of time, you are still stuck with tracking costs and estimates to completion which I doubt you could provide assurance of to auditors. Better to arrange payments either spread over expected period of performance or on agreed to milestones. As for the 20% fee, fixed price work is usually considered more risky and hence a higher fee is justifiable so it couldn't hurt to propose it and then negotiate downward.

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P.O. Box 1235
Alamo, CA 94507

Q. We received a cost type contract in August 2009 which made our business base shot up. Can we use costs going back to January for submitting our 2009 incurred cost proposal?

A. Not only can you but you should because the incurred cost submittal is supposed to cover an annual period. It's possible the ACO could object, asserting the impact of seven months without the contract distorts the rates so if that happens we can then talk about putting forth challenges.

Q. We have traditionally used historical statistical data for the previous three years to propose rates on our fixed price proposals. Now, that approach is being rejected where the auditors are saying we have to forecast future rates. Can we fight them?

A. "Cleaning up" methods of proposals are becoming a major source of audit scrutiny (see our article on DCAA's recent audit guidance). Forward pricing rates are really supposed to be based on forecasts of costs. Whereas you could provide statistical justification for using historical rates (e.g. they are similar to our forecasted rates in the past, our rates have always been stable and are expected to remain so) the burden falls on you to justify another approach other than cost forecasts.

Q. If DCAA has questioned some of our costs as "unsupported" does that mean they are considered to be "expressly unallowable" and hence subject to penalties?

A. It depends on the nature of the cost. If a cost is considered to be expressly unallowable e.g. booze, then that determines the express part, whether it's unsupported (no receipt) or supported. Conversely, if a cost is not explicitly unallowable (e.g. non-allocable cost or there is sufficient gray to make the determination less than certain) then no matter whether it's supported or not it is not expressly unallowable.

Q. Daniel parked his car at the airport for the duration of a five week assignment to another state incurring $380 in parking fees. I did not allow reimbursement since I think he was entitled to no more than taxi fare. Do you agree?

A. You are correct, especially if Daniel is a government employee covered by the Joint Travel Regulations. JTR section 301-10.308 provides that your agency may reimburse you for a parking fee not to exceed taxi fare to and from the terminal. Several cases ruling on government employee reimbursement have ruled the same (Johnnie Saunders, GSBCA 16791). If your company policy is to follow the JTRs completely then you are right. However, there is no requirement for government contractors to follow all JTR provisions since they apply primarily to government employees so you can create your own reasonable policies which need not conform with all JTR provisions.

Q. The hotel my travel agency selected requires an advance deposit for my lodging so my credit card will arrive prior to the commencement of my business travel. Can I submit an expense report in advance of my travel?

A. Yes, in accordance with the Federal Travel Regulations 301-11.32 "your agency may reimburse you for an advance room deposit when such a deposit is required by the lodging facility." However, if you are reimbursed for the advanced deposit but fail to take the trip for reasons not acceptable to your agency, then you may be forced to forfeit your deposit. Again, unique company policies need not follow the FTRs here so other practices can be used.