
GCA REPORT

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NEW DEVELOPMENTS

Mounting Calls to Restrict Contract Awards to Inverted Government Contractors

Six House and Senate Democrats are calling on the Obama administration to deny federal contracts to companies that have moved their headquarters offshore for tax purposes. In their letter to the administration, the lawmakers said the companies enjoy the infrastructure provided by US taxes but want to avoid contributing their share toward paying for them. They note though current federal law bans federal contracts to inverted corporations the companies are exploiting a “loophole” that allows companies to still qualify for contracts if they move their tax domicile overseas by merging with a smaller foreign company that is at least one-quarter the size of the US company. The lawmakers expressed support for the No Federal Contracts for Corporate Inversions Act legislation that would tighten restrictions on corporate inversions.

In a separate move it has been reported in a Crowell & Moring Sept 11 webinar that President Obama might soon issue an executive order making it tougher for inverted companies to win federal contracts. Though unclear when the order will be issued, it will probably be retroactive, covering inversions that took place before the date of the new order but will apply to only new contracts.

Industry Believes DOD Cuts Will be Eased in Next Few Years

Several trade association representatives stated at a recent Sept 3 conference in Washington that Defense Department spending mandated by sequestration will likely be eased by the new Congress and new president in fiscal year 2017. They said it is unlikely that any presidential candidate in 2016 will campaign on a platform to cut defense spending where they will likely promise to rebuild the US military. Neither political party will want to be seen as being soft on defense where the current state of international affairs and the strains on the military will be too apparent to continue

“unrealistic defense cuts.” No matter which party wins Congress the politics of the budget deficit will keep budgets essentially the same as where they are now. However, the elections will not change efforts to make money-saving cuts.

GSA Sets Flat Rates for Long Term TDY

The General Services Administration has issued a memo that establishes a flat per diem allowance for long term temporary duty (TDY). The traveler would be entitled to receive 75% of the locality per diem rate for TDY periods over 30 days but not exceeding 180 days. The memo also establishes a flat per diem allowance of 55% of the per diem rates for TDY in excess of 180 days.

FAR Proposed Rule Imposing More Requirements on Pass-Through Contracts

The FAR Council is proposing to amend the Federal Acquisition Regulation to impose additional requirements for review and approval of pass-through costs. Implementing a section of the 2014 National Defense Authorization Act, the proposed rule requires that when an offeror for a contract, task order or delivery order informs the CO of its intent to subcontract more than 70 percent of the total cost of work performed (in accordance with FAR 52.215-22) the CO must (1) consider availability of alternative contract vehicles and the feasibility of contracting directly with the subcontractors that would do the bulk of the work (2) make a written determination that the contracting approach is in the best interests of the government and (3) document the basis for such a determination (*Fed. Reg. 39361*).

Commentary on “Should I File a Protest”

Since the government spends a great deal of its appropriated money in the fourth quarter of the government fiscal year we are seeing a lot of advice related to protesting those awards. Paul Khoury and Brian Walsh of Wiley Rein LLP offer some pretty good advice where they state many types of protest may be put forward but asks “Should they?” They state there is one primary reason to protest – can a company see a realistic chance of getting business as a result of the

protest. Just because you can protest doesn't mean you should when a protest only gets you a reevaluation or an opportunity to participate in a round of proposal revisions. If your competitor clearly can undercut your price and/or offer more favorable technology then winning a protest gives you a chance to waste money on a losing proposition.

The authors provide examples of situations where there is potential upsides to protest. On one end of the spectrum, where it is apparent from your debriefing, that the agency failed to follow the evaluation criteria and remedying this flaw would likely flip the award decision. A similar easy call is when you have a solid protest related to the conduct of discussions – the agency failed to discuss a significant weakness in your proposal that turned out to be a key discriminator favoring the awardee. Unfortunately most potential protests are murkier where despite regulations requiring full disclosure debriefings are becoming less and less informative where they are often in writing where dialogue is discouraged.

In some cases, filing a protest may be advantageous when it is not initially seen that way. In a situation where the result may be a “mere disagreement” with the agency’s discretion (e.g. technical evaluation) it does not automatically indicate you should not file. For example, if the agency is risk averse, the result may be getting in the door, learning more after receiving the agency’s records or achieving some favorable corrective action or business settlement prior to the decision. After all, the GAO has reported a 40 percent “effectiveness rating” where a substantial number of protests result in favorable corrective action.

DCAA News

DCAA Issues 2015 Staffing Plan

As an indication of where its priority audits lie, DCAA issued its audit staff report for fiscal 2015. There are few changes from its 2014 staffing plan where it has authorized 4,892 work years, a small increase over 2014. Top priorities for staff allocation are:

- Demand audits which are requested by government agencies such as forward pricing actions, forward pricing rate proposals, termination and pre-award accounting system audits.
- Incurred cost proposal (ICP) audits to clean up its backlog. Its goal is to complete ICPs for CFY (contractor fiscal year) 2008 and earlier years, most of CFY 2009 and a portion of CFY 2010. DCAA plans to use audit teams and sampling techniques

where there will be less audits of “low risk” proposals. Auditors are told to assess CFY 2008 and earlier for Statute of Limitation issues (don't exceed six years from time they were submitted to the time a final decision by the CO is issued).

- CASB Disclosure Statement compliance audits. Though CAS audits will be a lower priority, audits of CASB disclosure statements will be a priority when there is an explicit requirement to have a compliant D/S for contract award.
- High risk, time-sensitive labor and material reviews to determine whether the costs exist and are allocable when they are first incurred.
- Contractor billing reviews to include provisional billing rates and pre and post payment reviews. There will be a focus on testing paid vouchers submitted by contractors who have not been “visited” in the last three years.
- Other audits considered to be high risk.

Business system audits will largely be on hold (hence the new proposal for contractor self-assessment and CPA audits) where they will be confined to audits of contractors’ billing control environment and in-process accounting system audits at pilot sites. Also, defective pricing audits will be limited to “high profit” contracts identified by DOD (14-OWD-013(R)).

Audit Guidance on Reporting CAS Non-Compliance During ICP and Forward Pricing Audits

When a CAS non-compliance is found during a forward pricing audit auditors are told to first determine if the impact on the proposal is significant. Once determined, the auditor is to report the impact on the proposal of the noncompliance even if the contract is not CAS covered. By questioning the impact, the guidance states the government should be able to negotiate an award value that reflects the impact or that can justify inclusion of a reopener clause. These actions, especially for fixed price contracts, are the only way for the government to recover for the impact because a defective pricing audit will not allow for recovery since the government knew of the CAS non-compliance before a price was determined. If the auditor cannot determine the significance, the auditor “will have a reservation about the engagement” and should issue a report with a modified opinion reflecting the uncertainty about the impact.

When CAS non-compliance is found during an incurred cost proposal audit, the auditor is to again determine the significance of the impact but is not to compute the impact in the audit report. Instead, the auditor is to (1) note the nature of the non-compliance (2) provide information related to the status (which may include an estimate of the impact and (3) comment that the resolution of the noncompliance will be handled through the normal process specified in FAR 30.605 (14-PAC-0113(R))

Audit Guidance on Testing of Paid Vouchers

Due to a revision of DFARS 242.803, disallowing costs after incurrence, that replaced references to direct submissions of interim public vouchers with language stating the auditor would select vouchers using a sampling methodology it will no longer be necessary for DCAA audit offices to determine if contractors are eligible to participate in the Direct Bill Program. Though no longer determining eligibility for direct billing, the guidance does state it is still DCAA's responsibility to determine whether vouchers contain allowable and allocable costs and are prepared in accordance with contract terms so the agency will continue to perform testing of paid vouchers (14-PPS-015(R)).

Audit Guidance on Billing Oversight

DCAA issued additional guidance on Revised Policies and Procedures for Billing Oversight. In addition to referencing the end of the Direct Bill Program the new guidance establishes "a risk based approach" for selecting interim public vouchers to audit at both high risk and low risk contractors and an assessment tool for pre-payment evaluation procedures. The guidance provides detailed steps on what elements of a voucher are to be audited (e.g. consistent with contract terms, labor costs reconcilable to job cost reports and labor hours traced to timesheets, correct indirect rates applied). The determination of whether contractors are high or low risk is based on that assessment of its incurred cost submittals. For example, high risk contractors may be those with auditable dollars exceeding \$250 million or if below that amount, those with high levels of questioned costs or who are late in their submittals. For high risk contractors, DCAA will annually prepare a risk assessment and sampling plan while for low risk contractors, DCAA has developed a guide to determine the number of vouchers to be selected based on the annual number of vouchers submitted. For example, if the number of vouchers are 1-12 per year then at least one voucher will be selected while if the number is 100-200 then a minimum of six and maximum of 12 vouchers will be selected (14-PPS-017(R)).

Reponses to Business System Rule are Starting to Arrive

In the last issue we reported the Defense Department is proposing a DFARS requirement to "entrust contractors with the capability to demonstrate compliance with DFARS system criteria" for accounting, estimating and MMAS (material management and accounting system) based on self-evaluations and audits by independent CPAs. Considerable comments, which are mixed, are proliferating. On the positive side, many contractors will rejoice at the removal of DCAA where now they will be able to select, hire and fire independent auditors based on their own evaluations. Many expect the audit quality and timeliness to improve as more and more independent auditors become involved. On the negative side, where contractors have the luxury of hiring their own independent CPA firms they also have the dubious privilege of paying the bill. (DCAA Director Fitzgerald says he sees no reason why such costs should be unallowable.) Additional costs are anticipated for resources needed to meet the fast turnaround times envisioned by the proposal – six months after the end of the contractor's fiscal year – and if deficiencies are found costs to correct them. The requirements will also become a barrier of entry for commercial companies, midsize contractors and those wanting to grow beyond the small business state. In addition, the proposed rule requires DCAA to "meddle" in the affairs of both the contractor and independent CPA firm both before and after each contractor's internal assessment which will likely deter many CPA firms from getting involved in the first place.

The American Bar Association has put forth recommendations for improvement to the rule including (1) eliminating the annual reporting requirement on a contractor's review of business systems (2) requiring DCAA to accept the independent CPA findings (3) adding specific timelines for officials to review, evaluate and respond to contractor self-assessments as well as audit plans and reports (4) add procedures for DCAA and the independent auditor to resolve differences and (5) acknowledge that the costs are allowable and allocable to government contracts.

Comments on LPTA Use Voiced

A report by John Knab of Garvey, Shubert Barer stated use of lowest price, technically acceptable (LPTA) source selections is leveling off after gaining popularity in recent years as a way to save money but is raising increasing concerns about it being used inappropriately. Unlike best value procurements, set out in FAR Part

15, that allow for consideration of non-cost factors such as past performance, risk and innovation LPTAs do not permit trade-offs where proposals are evaluated for acceptability but not ranked for cost/price factors. There is a consensus that LPTA has its place when “you know what you want”, when “the agency can define requirements” and is used for “fungible” items. However, relying on LPTA for “anything other than commodities is a mistake.” When you need continuous development and enhancement rather than “routine developmental” items or you are “looking for innovation” LPTA should not be used. There has been a “creep” in use of LPTA in cases it should not be used due to fiscal constraints facing government agencies.

A recent GAO report stated that for contracts worth more than \$1 million and less than \$25 million, DOD used approximately equal amounts of best value and LPTA methods and for contracts worth more than \$25 million LPTA was used 36% in 2013, up from 26% in 2009 while trade off selection decreased from 68% to 59% in the same period. Factors cited for increased use of LPTA included (1) they are less complex than trade-off acquisitions (2) they are a good choice for mature, commercial items where there is little value in conducting a trade-off analysis (3) difficulty in justifying higher dollar solutions from a technical standpoint when solutions that meet minimal requirements exist (4) a move away from overstating requirements and (5) increased scrutiny of purchases where non-cost factors are considered more important than price.

No Change to Standard Per Diem Rates

The General Service Administration announced it would not be changing the standard per diem amounts for FY 2015. The standard amounts, which apply to all locations in the country where the GSA has not established separate rates, will remain at \$83 for lodging and \$46-71 for meals and incidentals, depending on the state. Non-standard rates applicable to specific areas will not necessarily stay the same as FY 2014. Per diem rates, which are incorporated into the federal travel regulations, are one of the three areas of the FTRs that explicitly apply to government contractors because the FTR rates are incorporated into FAR 31.205-46, travel costs. Costs claimed in excess of the per diem ceiling are not only unallowable but are considered to be “expressly unallowable” and hence subject to penalties.

KBR Files A Claim Asserting DCAA was Professionally Negligent

A Federal Torts Claims Act (FTCA) claim for over \$12 million of legal and administrative costs is asserting that

DCAA in its audit of Kellogg Brown & Root (KBR) committed gross professional negligence is receiving considerable attention. The claim is based on a DCAA audit report issued in 2007 questioning \$99.6 million in unallowable private security costs. KBR is asserting the audit report was false and DCAA conducted the audit in a negligent manner where it is asserting that this particular audit is only one example of a larger pattern of professional malpractice to which KBR and other contractors have been subject to. The complaint asserts DCAA consistently failed to comply with government auditing standards (GAGAS) despite the report’s statement that GAGAS was adhered to. Other evidence presented in the claim draws upon information obtained by the Armed Services Board of Contract Appeals decision that made the costs allowable.

Specifically the complaint asserts both DCAA and the Army’s contracting agency were pandering to political pressures from a congressional committee where the Army CO directed DCAA to issue a Form 1 disallowing \$19.7 million of security costs. DCAA audit personnel admitted it failed to perform mandatory steps required by GAGAS standards because the Army already determined the security costs to be unallowable. DCAA said it undertook the audit as a “clerical assignment” that was not part of a professional audit despite assertions in the report it was based on GAGAS. Comments we have seen is that the assertions are “disturbing” and that “should KBR succeed, its success could be a pre-cursor to a flood of similar actions” asserting DCAA did not comply with GAGAS and failed to properly supervise its auditors.

DOL Issues Final Rule Raising the Minimum Wage for Federal Contractors

The Department of Labor Oct. 1 issued the final rule requiring the minimum wage for workers on federal services and construction contracts be \$10.10 per hour and indexing it to inflation in future years. The rule will apply to new contracts with the federal government and replacements for Jan 1 and to contracts that are awarded outside the solicitation process on or after Jan. 1. Business groups’ responses to the interim rule argued that the Obama administration had overreached executive authority and should withdraw the proposal while several unions praised the broad definitions to ensure maximum number of workers will receive the \$10.10 wage rate, requesting that even more workers than the DOL’s estimate of 200,000 be affected (*Fed. Reg. 13658*)

CASES/DECISIONS

Personnel Changes Should Have Disqualified Awardee

The agency requested task order proposals from holders of its Engineering and Support Services multiple award contract where offerors were required under the key personnel subfactor to propose a contracts program manager and a task order lead. The incumbent Paradigm and Booz Allen submitted proposals where before contract award Booz was told that its proposed contracts manager had selected a job elsewhere where Booz notified their CO soon after receiving the initial award. Paradigm protested where the agency reevaluated proposals and decided Paradigm's proposal was not worth its proposed cost premium and again made the award to Booz. The GAO sustained the protest stating the record showed the agency knew prior to reevaluating the proposals that Booz's proposed contract manager had left the firm where once this occurred Booz's proposal no longer satisfied a material requirement of the solicitation. The GAO said the agency should either have rejected Booz's proposal as technically unacceptable or reopened discussions to permit correction of the deficiency (*Paradigm Techs., GAO B-409221*).

Agency's Mechanical Application of Government Estimate is Unreasonable

(Editor's Note. The following case addresses an all too common occurrence when the government incorrectly compares proposed factors with its own estimates.)

FEMA issued an RFP for various services at some of its facilities that would be awarded based on work plan, management plan, staffing plan/key personnel, experience and past performance. For the staffing plan/key personnel portion FEMA indicated it would review proposed staffing for accomplishing its performance work statement (PWS) task, proposed labor mix, key personnel qualifications and recruiting approaches where it did not provide a staffing estimate but did develop an internally prepared estimate for proposal evaluation purposes. Evaluators compared NRDC's proposed staffing levels as represented by its proposed full time equivalents (FTE's) with its own estimates and concluded it represented "a shortage of staff that would potentially cause delays and issues with overall quality." Bestway, the awardee, received an outstanding rating for its staffing/key personnel rating based on its FTE count which was very close to the government's estimate. In its protest, NRDC argued the agency improperly

evaluated its proposed staffing based on comparing it to an undisclosed FTE number. The GAO said it is improper for an agency to downgrade a proposal simply because the overall proposed FTEs differed from the government estimate where that estimate was not disclosed to offerors, the agency failed to conduct discussions on the discrepancy and the agency did not look beyond the bottom line. It said there was no evidence of an analysis determining specific areas where the FTE's were insufficient where here the agency "mechanically" compared NRDC's FTE with its own estimate without any explanation (*Native Res. Dev. Co., Comp. Gen. Dec. B-409617*).

Subcontract Clause Does Not Create a Right To Sponsorship of a CDA Appeal

(Editor's Note. The following case reminds us of the rights of a subcontractor to challenge the government.)

The Army contracted with Leidos for a helicopter training simulator where BSC was a subcontractor for part of the trainer. A dispute arose about the Army's right to use and distribute BSC's software and after the Army ruled against it, BSC filed a notice of appeal where the appeals board directed Leidos to provide proof that it was sponsoring BSC's appeal. Leidos responded it did not sponsor the appeal and was not asked to do so while BSC asserted its subcontract disputes clause in its contract with Leidos allows it to prosecute an appeal in the prime's name when the contracting officer and prime elect not to appeal. The appeals board, citing several cases, stated parties that are not in privity of contract with the government may not bring a contract disputes act appeal saying "the no privity rule is synonymous with a finding there is no express or implied contract between the government and subcontractor." The board said only "rare, exceptional circumstances" must exist to create privity of contract between a subcontractor and the government (e.g. where the prime acts as a mere government agent) which did not occur here. For the appeals board to consider a claim of a subcontract not in privity with the government the appeal must be sponsored by the party that is in privity, the prime contractor. The Board rejected BSC's assertion that under the contract disputes clause Leidos cannot refuse sponsorship and therefore was sponsored saying it "is irrelevant" whether the terms of the contract between Leidos and BSC might require Leidos to sponsor an appeal saying that is a dispute between the two parties concerning the interpretation of subcontract terms. The only thing that is relevant is the board's decision that Leidos did not sponsor the appeal and hence it had no jurisdiction for the appeal (*Binghamton Simulator Co., ASBCA 59117*).

10 Month Wait For a CO Decision is Unreasonable

Brad West filed a request for an equitable adjustment (REA) in June 2013. In Feb 2014 Brad West submitted a certified claim for over \$1 million where in March 2014 the agency stated it anticipated issuing a contracting officer (CO) final decision by Dec 17, 2014. Brad West appealed asserting excessive time while the agency argued the planned decision date was reasonable due to the complexity of the claim consisting of six claims with sub-items. The appeals board noted that under the Contract Disputes Act for claims exceeding \$100,000 a CO must issue a decision within 60 days or notify the contractor when a decision will be issued where the amount of time allowed depends on the complexity of the claim and adequacy of information provided by the parties. The Board ruled the planned Dec date was unreasonable because the agency was already familiar with the claim where it had already reviewed the REA.

The Board also rejected the agency's assertion its attorney was too busy working on other claims where it said the agency has the obligation to assign additional attorneys to review Brad West's claim when its designated personnel are unable to make a decision in a reasonable amount of time (*Brad West & Assocs., v Dept of Transportation, CBCA No 3879*).

Potential Problems With Rule of Two Discretion

The VA sought an emergency notification service for several medical facilities where the CO awarded a task order to Everbridge from its FSS schedule. Kingdomware protested asserting the VA failed to make the award a set-aside to a service disabled veteran owned small business (SDVOSB) where the VA was required to conduct a Rule of Two analysis to see whether there were two or more eligible SDVOSBs capable of performing the work. Both the court and appeals court ruled against Kingdomware. They asserted the VA acted reasonably noting the Rule of Two rule exists for the purpose of meeting small business goals meaning the VA has the discretion of not performing the Rule of Two analysis for every contract as long as it was meeting its small business goals which had occurred here. However, a dissenting opinion to the majority was put forward saying the Rule of Two is always required arguing (1) the plain language of the act requires the analysis under all acquisitions be made including task orders under FSS (2) to not require the analysis when goals are reached would "gut" the act (3) by saying the analysis is not required if goals are met is impossible to know during the year in question because COs have no way of knowing whether

the goals are met until the end of the year (*Kingdomware Techs v US, 2014 B 154196, fed cir No. 2013-5041*).

NEW/SMALL CONTRACTORS

How to Avoid Assertions of Affiliation When the Large and Small Business Switch Roles

There has been a noticeable increase in conversion of service contracts from open competitions to set asides for small business competitions. When this occurs, the large incumbent contractor may find itself ineligible to compete but will nonetheless want to continue benefitting from the work it has been engaged in. A common solution is for the incumbent contractor to become a subcontractor to the small business. This, of course, benefits the incumbent contractor by allowing it to stay in the game and also benefits the government by allowing a trusted supplier to continue. However, this arrangement is increasingly being challenged by disappointed offerors who want to make the claim that the small business is really an "affiliate" of the large business and hence is ineligible for award. These protesters attempt to point out a variety of things that indicate an affiliation relationship exists where the large business often contributes to this perception in its reluctance to change its behavior vis-à-vis the small business and the government (e.g. cannot reconcile itself to a subordinate role). This risk of being seen as an affiliate stems from the Ostensible Subcontractor Rule (OSR) created by the Small Business Administration which states the two concerns are affiliated when "an ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or of an order under a multiple award schedule contract or a subcontractor upon which the prime contractor is unusually reliant." We are relying on a timely article in the October 14 issue of Federal Contracts Report by Richard O'Keefe of Wiley Rein.

The basic rules are that eligibility to compete in small business set-asides is determined by use of size standards which vary depending on the type of work to be performed and corresponds to the competitors' annual receipts or employee head count. For example, if the size standard is \$10 million and a firm has \$7 million in revenue it would appear to be eligible for a set-aside but if it was found to be affiliated with a \$5 million company those two figures would be added up and the firm would be deemed not a small business. The OSR provisions are broad where the author identifies

several takeaway points: (1) teams including a former incumbent are targets for an OSR protest though any team can be considered potentially affiliated (2) the work share allocation between the prime and subcontractor are critical to determining whether the protest will be successful and (3) the range of circumstances relating to the relationship between the team members can be quite broad. Though there can be many more areas of concern the author focuses on three areas to lessen OSR risk – terms of the teaming agreement, preparation of the proposal and the employment by the small business of personnel from the large business.

Teaming Agreement and/or Subcontract. The teaming or subcontract agreement is commonly used in a protest to prove affiliation. To avoid this, Mr. O’Keeffe says the teaming agreement should (1) carefully describe the work share between the prime and subcontractor for both the proposal and work itself (2) in describing the work share, include a discussion analyzing the work elements identifying “the primary or vital” aspects and make sure the prime is performing these (3) explicitly state the prime will have overall control of all aspects of the work (4) strictly limit the subcontractor’s direct contact with the government and (5) explicitly state no affiliation relationship is intended.

Proposal Preparation. In addition to the agreement, actions during the proposal preparation and competition are often construed by various parties to indicate affiliation exists. Mr. O’Keeffe recommends actions in this area such as (1) consider composition of the team attending site visits where the subcontractor should not be the only party and issues addressed should come from the prime (2) highlight in the proposal any aspects of the prime’s project management experience (3) describe the prime’s overall relevant experience with as much detail as possible (4) in describing past performance, if the subcontractor is the current incumbent downplay their contract as much as possible (the evaluators already know) (5) limit the number of times the subcontractor’s logo appears in the proposal (6) org charts should be consistent with what entities will be providing what and (7) be clear about who is doing what.

Staffing the Project Team. It is often tempting (especially when the incumbent is well liked by the agency) to sweeten a proposal by offering continuity of project management where the new prime offers key personnel from the former prime. However, this approach is risky during a protest where the impulse should be to minimize the former incumbent’s personnel. If the subcontractor’s employees are to be hired by the prime as key personnel for the new project they should (1)

specifically say so in the proposal (i.e. they will be hired not loaned out) where it should clearly state who the key personnel are and that they will be employees of the small business (2) make sure the PM is an employee of the prime and that all project personnel report to that PM (3) prepare employment agreements before submitting the proposal at least in draft with salary and other key terms identified and (4) employment agreements with the subcontractor’s employees who will be working with the prime should clearly state that all ties with the prior employer are severed.

QUESTIONS & ANSWERS

Q. You have been reporting on DFARS business rules where contractors will need to certify they have adequate systems in place and will be required to obtain independent CPA assessments but I am not sure what companies are subject to the rules. Can you clarify?

A. It’s not yet clear what companies will finally be subject to the thresholds until further guidance is put out. For now, it appears as if estimating and accounting system rules will apply to both fully and modified CAS covered “large businesses” (not small in accordance with NAICS thresholds). So if a large business received DOD prime contracts or subcontracts totaling \$50 million or more in the last year for which certified cost or pricing data were required they would be subject to the rules. In addition, if the large business received DOD prime contracts or subcontracts totaling \$10 million or more (but less than \$50 million).they would also be covered by the rules provided the contracting officer, with concurrence from the administrative contracting officer, determines it is in the best interest of the government. Recent DCAA guidance (see above) indicating audit leads for voucher noncompliance may result in a determination of a business rule deficiency indicates the rules may even apply to non-CAS covered contractors. For material management and accounting systems (MMAS), the threshold is \$50 million in the preceding fiscal year provided the CO requests it.

Q. We are a small business and recently acquired a company who uses a calendar fiscal period while our fiscal year ends May 31. How do we handle calculation of our indirect rates? I thought the FAR limits a fiscal year to 15 months.

A. First, CAS 406, not the FAR addresses the amount of time you can define your fiscal year but since you are a small business none of your contracts are covered by CAS so you are not subject to the limitation. Though

the government often uses CAS as a yardstick for proper cost allocation methods for companies not CAS covered, CAS 406 (which limits a new fiscal year to 15 months) would not apply here since the Federal Acquisition Regulations do not require the 15 month rule. In this case you can use 17 months. As for proper handling of rates, follow your usual methods of allocating costs but be sure to use 17 months of costs in both the pool and bases.

Q. We often wait until the end of the year to pay our owners to conserve expenditures. We are working on two cost type contracts where the owners are charged at quite a high billing rate. If we are not paying them can the invoices be rejected for not reflecting actual costs?

A. If the billed rates reflect their actual salaries then the fact you are waiting to actually pay them should not result in problems with the invoices. If at the end of the period when you submit your incurred cost proposal and it is audited, if the salaries were not paid or compensation to the owners look like a “distribution of profits” rather than salaries, you are likely in for a fight. If you are not paying the principles until later, make sure you establish a liability for their salaries during the year and maintain a written policy describing your practices.

Q. We are bidding on a technical services contract and the RFP states that we cannot include a G&A rate on other direct costs (ODC) such as supplies and equipment, subcontractors and travel. We have worked with a consultant and developed a total cost input base to allocate our G&A costs – our G&A rate is based on using total costs in the denominator in which case we would apply our G&A rate to all costs. What can we do?

A. This is quite common and your options are pretty limited. One of the criteria for cost allowability is that costs must be consistent with contract terms and you would be violating these terms even though G&A added to ODC would otherwise be acceptable. If you add G&A to these costs in your proposal, it very well might be rejected as non-responsive. You might want to determine the amount you are giving up and increase your proposed profit to make it up and at the same time, make sure you propose all costs you are entitled to (e.g. cost of money).

Another option we have seen some contractors take who are not covered by cost accounting standards is to use a different method of calculating indirect cost rates (e.g. use one indirect cost pool allocated on a direct labor base) to make sure they recover their indirect costs yet remain responsive to the RFP. When doing so, contractors must be very careful to explain they are not changing their established method of accumulating and reporting costs but only recalculating their indirect costs for this contract only in order to be responsive without losing money. In most cases this approach is accepted.

Q. We want to build a 6' fence separating our facility from a motorcycle repair shop where we want to have a visual separation and noise reduction. The cost of the fence is approximately \$2500 and we want to charge it to an indirect cost center. Do you feel this is an allowable indirect cost?

A. I don't see anything that would make the cost an unallowable indirect cost unless the \$2,500 is unreasonable. I would make sure you get at least two quotes to be able to demonstrate the price is reasonable.