// GCA Report

(A publication of Government Contract Associates)

January - February 2016 Vol 22, No. 1

WE HAVE A NEW WEBSITE

We have developed a new website that promises to be more user friendly and be the best resource for contract, cost and pricing issues. For subscribers, we have made it easy to renew your subscription, provided close to 20 years of prior newsletters and a new state-of-the-art word search function. We are also continuing our highly popular "Ask the Experts" feature that allows subscribers to call or email contract, cost or pricing questions and receive an immediate answer at no charge from our panel of experts. We also provide a complete list of consulting services if you are so inclined. Check it out at govcontractassoc.com.

NEW DEVELOPMENTS

New Contract-Related Interest Rate Set for First Half of 2015

The Treasury Secretary has set a rate of 2.50% for the period January through June 2016. The new rate is an increase from the 2.375% rate applicable to the last six months of 2015. 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).

New Rule Would Make Primes Report Late Subcontracting Payments

The Defense Dept. published a proposed rule Jan 20 that would require contractors to self-report late or reduced payments to small business subcontractors. Payments would be considered "late" if they are more than 90 days past due. The proposed rule would also require contracting officers to record contractors with a history of late or reduced payments to small business subcontractors to the electronic past performance system in the Federal Awardee Performance and Integrity Information Systems (FAPIIS). The proposed rule will apply to prime contracts that require small business subcontracting plans and would also cover acquisitions for commercial items (*Fed. Reg. Jan 20, 2016*).

DCAA In the News

- **DCAA Issues Guidance on the Cessation of Audit Support to Non-Defense Agencies**

(*Editor's note. Since passage of the National Defense Authorization Act (NDAA) of 2016 ending DCAA audit support of non-Defense Agencies until the backlog of incurred cost audits is less than 18 months, we are actually seeing DCAA no longer conducting audits for contractors doing work with other agencies and suspending audits with those contractors. We are also hearing that non-DOD agencies are planning on increasing pressure on prime contractors and upper tier subcontractors to audit their own subcontractors – see our feature article below.*)

The Defense Contract Audit Agency, following issuance of an opinion from its legal team, has put forth guidance on the impact of the NDAA changes. Highlights of the guidance includes:

1. Services DCAA will continue providing to its non-DOD agencies will include negotiation support, litigation support, investigative support (performed by OIS) and non-audit services such as requests for specific cost/rate information.

2. DCAA will cease work on any in-process assignments from non-DOD agencies (they refer to them as "100% reimbursable" because the agencies pay DCAA for their services) and will no longer accept an engagement to

perform these audits. DCAA will communicate with these agencies where it has prepared a pro-forma letter.

3. For assignments where there is a mix of DOD and non-DOD contracts DCAA will still be responsible for determining rates for the contractor's fiscal year and must perform the audit. It is assumed that indirect costs cannot be segregated by DOD and non-DOD contracts.

4. As for auditing direct costs for assignments where there is a mix of DOD and non-DOD contracts, it will depend on the amount of effort involved. If there is very little additional effort – if it is "de minimus" – the audit will continue as in the past but if the effort is more than a de minimus amount, direct costs of non-DOD contracts will not be audited. The only exception is when the audit needs to confirm the total base is accurate and complete in which case it will conduct a reconciliation to books and records and ensure all costs are included.

A separate Q&A section defines what is de minimus and what is not. Examples of de minimus are if the incurred cost proposal is 70% DOD and 30% non-DOD, the same accounting system is used for all contracts, non-DOD contracts do not have special terms and conditions, direct costs elements for DOD and non-DOD contracts are generally homogeneous and a *statistical* sample will be performed where transactions are selected for each direct cost element regardless of whether only DOD or both types of contracts are audited. Examples of not de minimus is the incurred cost proposal is 50% DOD and 50% non-DOD, the same accounting system is used, non-DOD contracts have special terms and conditions, one of the non-DOD contracts is a high dollar contract which had previously identified issues, the direct cost elements are homogeneous and DCAA plans using a *judgmental* sample selection based on the size of accounts and risk factors associated with different contracts.

5. Upon request, DCAA will reverse its normal policy of not releasing work papers, and will provide access to its in-process working papers to the successor auditor if it believes there is a useful purpose served. A cover letter will be released and each page of the working papers will be marked "DRAFT" (*MRD 16-PPD-011(R*).

- **DCAA Increasing Reviews of Employee Qualifications Generating Concern**

When tasked with auditing incurred cost proposals several commentators are pointing out that the Defense Contract Audit Agency has become increasingly active in challenging employee qualifications to perform service contracts. An article in the January 2016 issue of CPA Reports has said this new trend is inappropriate for three reasons: (1) there is no contractual basis for DCAA auditors, when tasked to establish indirect rates, to burden contractors to provide documentation concerning whether employees who performed services had requisite contractual qualification (2) the "rule of finality of acceptance" often precludes challenges to an employee's qualifications years after invoices have been paid and (3) the method used by the government in making these challenges wrongfully places the burden of proof on the contractor. For these reasons, contractors should resist DCAA forays into this area (the article mentions any forays into direct expense reviews should also be resisted) when they are tasked with finalizing indirect cost rates for a specific fiscal year.

- **DCAA Reduces Number of Regions**

DCAA has reorganized itself by reducing its four regions to three while still keeping its field detachment unit (conducts audits at most secret and top secret facilities). The three regions are now: (1) Western, headquartered in Los Angeles, which is by far the largest geographic area covering more than half the country (2) Eastern, headquartered in Philadelphia and (3) Central, headquartered in Dallas. The Eastern region now includes all states on the Atlantic coast except for Florida while the Central region now includes all other southern and many central states. The older Southern region has been consolidated into both the Eastern and Central regions while the Northeast region has been eliminated and incorporated into both the Eastern and Central regions.

New Guidelines Issued to Improve Contractor Business System Adequacy

The following shows that evaluating contractors' business systems is still a hot area of audit scrutiny.

- **Pentagon Increases Pratt & Whitney Penalty Over Business Systems**

(*Editor's Note. The following shows the government is getting serious about fixing deficiencies in business systems.*)

The Pentagon is again withholding 5 percent of billings from United Technologies' Pratt & Whitney engine unit, citing a long-running dispute over shortcomings in its business systems that track costs and schedules. The Defense Contract Management Agency is currently withholding $40 million from the sole source supplier of engines for the F-35 fighter that is up from $26 million in April 2014. Five percent, which is the maximum the government can withhold for each major shortcomings

in any of six business systems, was imposed in Sep. 2013 and was reduced to 2 percent in June 2014 because progress was made in improving its "earned value management system" which tracks costs, schedules and how much work is performed for every dollar spent on the contract. In November 2015 the DCMA re-imposed 5 percent because of P&W's continued difficulties in estimating the costs to complete contracts and its broader performance in meeting contract goals.

- **DOD Issues Second Report Criticizing DCMA Actions on Contractor Business Systems**

The DOD Inspector General issued a report citing Defense Contract Management Agency deficiencies in complying with DOD contractor business system policy. While the first report, issued in June 2015, addressed estimating system audits by DCAA the second report addresses the other contracting business systems such as accounting, billing, material management and accounting systems under DFARS 252.242-7005. The report states that for all 21 DCAA audit reports examined, ACOs failed to comply with one or more requirements stating ACOs failed to issue timely initial and final determinations, obtain or adequately evaluate contractor responses and withhold a percentage of contractor payments. Comments on the report stated there was confusion by the DOD IG on what the requirements actually were (*DODIG-2016-001*).

GAO Releases GAO 2015 Bid Protest Statistics

The Government Accountability Office bid protest statistics for fiscal year 2015 were released Dec 10. The report found that the number of protests filed rose to 2,639 – 3% higher than 2014 – where the GAO sustained 12 percent of the protests but the protest "effectiveness rate" was 45 percent which is defined as either the protest being sustained or the agency taking "corrective action" as a result of the protest. The most prevalent reasons for the protests being sustained are first, "unreasonable cost or price evaluation" second, "unreasonable past performance evaluation" third, "failure to follow evaluation criteria" fourth, "inadequate documentation of the record" and fifth, "unreasonable technical evaluation."

Commentary on the statistics state 45-50 percent (maybe more) of initial protests are being resolved by voluntary corrective action. Some protest attorneys state it is common to see protests go away a week or 10 days after filing where agencies don't want to go through the expense of fighting protests and the cost to contractors is minimal. They say filing a protest makes sense, even if it is litigated, because companies commonly incur more than $1 million for large procurements so a $50,000 protest may cost pennies on the dollar to get an agency to take a second look. However, when an agency does take corrective action it does not mean the contractor changes or there is any material impact where it is estimated that 20 percent will result in "winning" the contract. Factors causing the increase in protests include the fact that IDIQ contracts are decreasing which provides fewer ways to market sales to the government, fewer contracting opportunities cause contractors to fight for every dollar and increased staff mistakes caused by more experienced people leaving due to budget tightening. However, calls to improve communications during discussions and better debriefing after awards are made might provide more insight into why proposals are not selected and hence less protests *(GAO Bid Protest Annual report to Congress for Fiscal Year 2015*).

Memo Puts New Focus on Executives and Ethics Culture in Fraud Probes

Federal contractor executives should be concerned about the Dept. of Justice's new focus on prosecuting individuals in corporate fraud investigations, analysts say. The comments are based on a Sept. memo by Assist. Attorney General Sally Quillan announcing that DOJ should "fully leverage its resources to identify culpable individuals at all levels in corporate cases" because it is one of the most effective ways to fight corporate crime. Though DOJ has targeted individuals along with companies in the past, the memo "sharpens the tone." Comments indicate that many innocent managers will be trapped in an investigation triggered by the illegal conduct of lower ranking employees where DOJ will be going after "big fish."

If company officials had no knowledge of the criminal activity the next thing DOJ will do is question the company's "ethical culture" or lack of attention to it where the firm's commitment to training employees on ethics must be continuous. Michael Payne of Cohen Seglias Pallas Greenhall & Furman says that simply having a code of business ethics and conduct is not enough where many companies have drafted a code, conducted one round of training and have virtually no follow-up for many years. This sort of superficial ethics program will not be enough to convince the government it has done everything possible to avoid unethical conduct and will increase the chances the company will be implicated in the misconduct of offending employees. Payne recommends the firm review its ethics program at least once a year where an ongoing ethics compliance

program should be in place, managers and employees should receive frequent training and companies should have an internal control system to set standards and procedures to discover improper conduct and ensure corrective measures are carried out.

Subcontracting Rules Will Affect Small Firms Analysts Say

Several analysts are saying small businesses should anticipate several new procurement regulations that are aimed at them. Expected rules include:

1. A final rule that will "dramatically change" the criteria for compliance with subcontracting limitations that would permit small businesses to subcontract more than 50 percent of the total value of a contract. The rule is intended to make it easier to form teaming agreements to perform set-aside contracts. The rule will help small contractors fulfill their subcontracting obligations with a combination of labor and other direct costs that will be easier to measure and track and will allow prime contractors to exceed subcontracting limitations if a subcontract is awarded to a small business of the same classification as the prime.

2. Another big change is an expected final rule on lower-tier subcontracting that would allow large prime contractors operating under individual subcontract plans to get credit for small businesses performing at any subcontracting tier.

3. Another final rule is expected to open the mentor-protégé program to all small businesses which should alter the "competitive landscape" because it would allow large businesses to participate in small business set asides as joint venture partners which currently applies only to 8(a) firm participants.

4. Amending requirements for small businesses to form joint ventures for small business set-asides. Changes will include requiring all joint venture agreements to be in writing and eliminating "populated joint ventures" i.e. those that have their own employees.

5. Contractors are awaiting a decision by the Supreme Court to decide whether the Veterans Admin. is required to conduct a "rule of two" analysis of veteran-owned businesses' ability to compete for a contract before using the Federal Supply Schedules which will affect millions of dollars in contracting.

FAR Proposed Rule Prohibiting Confidentiality Agreements

A proposed amendment to the FAR would prohibit the use of funds for a contract with an entity that required its employees or subcontractors to sign an internal confidentiality agreement that restricts them from reporting waste, fraud or abuse to a designated government representative. The proposed rule will apply to all solicitations and resultant contracts funded with FY 2015 funds that will include awards lower than the simplified acquisition threshold and commercial items, including off-the-shelf items. A new clause would have to be added to existing contracts before obligating FY 2015 funds.

Industry Proposes a New Agenda to Increase Cutting-Edge Technologies

Several influential industry groups have issued a white paper proposing measures to speed up the government's acquisition of cutting-edge technology. Seeking to overcome past practices that "encumbered" accessibility to companies providing high tech solutions the paper outlines several areas the acquisition system can be improved to provide competition and innovation. Specifically, the paper proposes broadening the definition of a "commercial item" or service to include multiple acquisitions instead of requiring contractors to qualify each acquisition individually where a company can offer a "platform-as-a-service" which could be a "delivery mechanism" for a number of services. The paper also proposes eliminating contractor allowable compensation cost caps for all but top executives where it says the competitive market forces should determine compensation allowing companies to attract highly talented technology experts and getting more value over time from a few rather than a larger number of less talented people.

Other proposals include: (1) better post-award contractor briefings that include all information that could be requested in a legal discovery to make procurements more transparent and accessible and helping companies improve their performance from one opportunity to the next (such information should provide useful information why a company lost than being forced to protest to obtain relevant information) (2) using "emerging technology provisions" in contracts allowing firms to integrate new or evolving technology (3) raising the cost accounting standards threshold (4) revising intellectual property and rights in data regulations to ensure they are consistent with contemporary practices (5) using prime contractor past performance

as a key metric on solicitations and (6) helping ensure the government acquisitions workforce is well trained by giving the Office of Federal Procurement Policy authority over the entire workforce, having mandatory cross-functional rotations and training (e.g. making sure they are skilled in identifying commercial items and conducting price analysis).

Incorrect Use of Option to Extend Service Clause

A GAO report says the Army's use of the FAR "option to extend service" clause for periods greater than six months failed to follow the terms and limitations of the clause. The Oct 2015 report says that agencies' use of bridge contracts, including the FAR option to extend services as a way to bridge a potential gap in services is inappropriate. The report states that if COs need to extend contracts to avoid gaps in services they have several authorities to do so including use of the FAR clause 52.2.17-8 option to extend services as long as the total period of performance does not exceed six months. The GAO found the clause was improperly used in several instances including ones where the contract did not include the clause. The report attributed the cause to inexperienced army contracting officials and called for more training in a timely manner (*GAO-16-262R*).

Pentagon Delays Cybersecurity Requirements for 10,000 Contractors

The Defense Department has delayed for almost two years a requirement that would have over 10,000 contractors show they have systems in place to protect sensitive but unclassified information from cyber-attack before signing new defense contracts. Congress mandated new cybersecurity rules as part of its 2013 budget after repeated warnings about hacking threats. An interim version of the rule, in effect since August 2015, requires defense companies that get new contracts to report penetrations of their networks within 72 hours of discovery of intrusions if the hacking degrades their ability to provide critical support to the military or has the potential to do so. Though DOD thought it would be easy to switch to one set of cybersecurity standards to a new one feedback from industry indicated they "could not fully comply from Day One." Though the interim provision is still in effect the requirement for contractors to document that they and their suppliers have systems to protect sensitive information was delayed until Dec. 31, 2017.

CASES/DECISIONS

Credit for Corporate Experience Must Be Spelled Out

Deloitte protested the task order award to PricewaterhouseCoopers stating the agency improperly gave credit for its corporate parent's experience in the technical evaluation. The GAO sustained the protest saying the awardee's quotation did not explain how it would work with its corporate parent during performance in a way that justified receiving credit for the corporate parent's experience. The GAO stated that if an offeror relies on its corporate parent or affiliate for credit it should spell out how the parent or affiliate's workforce, management, facilities or other resources will have a "meaningful involvement" in the subsidiary's contract performance (*Deloitte Consulting LLP, GAO B-411884).*

Change in Interpretation of IR&D Costs Justify Reopening of Bid Process

In its RFP the Air Force asked for detailed cost information on what steps offerors would take to reduce the costs of development effort for a new radar system. With regard to charging some of the costs as independent research and development costs the RFP stated any cost claimed to be IR&D or a capital investment is not allowable if it is for work "implicitly" required for performance or "explicitly" required to be done by terms of the contract. During discussions, Raytheon said this interpretation of the regulations was wrong because *ATK Thiokol* held that costs could be treated as IR&D if the work was only implicitly required to perform contract effort. The Air Force changed its view and communicated its new view to Raytheon by accepting Raytheon's treatment of certain costs as IR&D which allowed them to reduce the direct costs of development but the Air Force never told another competitor, Northrop, of this change of position. When Raytheon was selected as the winner Northrop protested the award where the Federal Court agreed with Northrop and called for corrective action that would reopen bids. Raytheon challenged this corrective action where the Court ruled against it stating Northrop was prejudiced because it might have reduced its costs had it known it could charge some of its direct costs to IR&D and hence the reopening of the bid process was appropriate (*Raytheon Co. v US, 121 Fed. Cl. 135*).

Cost Reimbursable Contracts are Not Always Risk Free

In theory, cost reimbursable contracts are considered pretty risk free since the limitation of cost clause does not obligate continued performance once funds dry up and the government has to come up with more money if it wants to complete performance. However, in a recent protest case the agency downgraded a protester's past performance in the cost area because as the incumbent contractor it was billing at higher labor rates than it had originally proposed where the agency considered this to be a significant "cost risk." Commentators state this case is a clear indication that contractors bear a significant risk it they overrun a cost type contract where there are two ways to modify this risk – either make sure not to propose low estimated costs in order to win a competition or if an overrun is about to occur consider not asking the government for more money but complete the work with your own funds which, in effect, converts the cost type contract to a fixed price contract (*INDUS Technology Inc. Comp. Gen. Dec. B-411919*).

Evaluation of G&A Rates Not Conducted According to the RFP Plan

The RFP required offerors to submit general and administrative (G&A) rates on their proposal and stated the rates alone would be used to evaluate price. The RFP required offerors to provide certified financial statements or a DCAA report to substantiate their proposed rates. The government contacted eight offerors and requested they confirm their G&A rates as required by the RFP. When the awarded offerors generally responded by "self" affirming their G&A rates West Coast protested saying the evaluation was inconsistent with the RFP requirements. The GAO ruled in favor of the protester stating the RFP unequivocally required price proposals to include either certified financial statements or a DCAA report substantiating the rates and that it further stated proposed rates would be evaluated using cost analysis based on verification of the offeror's cost submissions. Nothing in the record indicated the government requested any support for these verified rates or conducted a cost analysis but rather the government accepted G&A rates not supported by any financial data (*West Coast General Corp., 31 CGEN (115020*).

Board Denies Motion for Summary Judgment on Contractor's SOL Defense

(*Editor's Note. The following is one of among several cases that are defining when the Contract Dispute Act's Statute of Limitation's clock starts to prohibit government claims that exceed six years.*)

Alion submitted its FY 2005 incurred cost proposal (ICP) on March 31, 2006 but DCAA notified the company that it could not begin its audit because it had failed to provide Schedule H-1, participation in indirect cost pools and Schedule L, reconciliation of payroll to total labor distribution. Alion submitted the missing schedules on Sep. 7, 2007. On Jan 7, 2008 DCAA informed Alion by letter it still considered the ICP inadequate where between Jan 21-Feb 20, 2008 Alion submitted an access database, revised Sch. H and a revised database. DCAA issued its audit report April 19, 2012 and the ACO issued a final decision on Aug. 31, 2013 which assigned penalties on unallowable costs. Alion moved for dismissal claiming the final letter was time barred under the Contract Dispute's Act's statute of limitations of six years while the ACO asserted its final decision letter was not time barred because Alion's original ICP did not include Schedule H and its final decision was less than the six years after Alion completed its submitted schedules. The Board stated the question before it was whether it was reasonably knowable from the March 31, 2006 submittal that Alion's final indirect cost rate proposal included the specific costs the government alleges are expressly unallowable. The government argued it required detailed transaction information to determine if Alion's ICP contained expressly unallowable costs where it did not have this information until Alion submitted its Access database or, alternatively, its claim did not accrue until Alion submitted adequate Schedules H and H-1 in Feb 2008. The Board ruled in favor of the government asserting it was a genuine issue of material fact as to whether the March 31, 2006 ICP included the alleged unallowable costs at issue where it denied Albion's motion.

Comments on the case state after years of establishing the precedent that a government claim begins to accrue when it *should have known* about the facts underlying a claim this case and a few before it are holding to an *actual knowledge* standard. Under the should have known standard claim accrual was suspended only where injury was actively concealed or was inherently unknowable while now the government may argue that a claim does not begin to accrue until it begins an audit of the costs in question or contractors provide specific, detailed data the government claims supports its claim. We are seeing recommendations from the legal community to start the six year SOL clock by including submission of as much data as possible with ICPs, specifically cost transaction data for costs contractors believe the government may question (*Alion Scient & Tech. Corp. ASBCA 58992*).

NEW/SMALL CONTRACTORS

Primes and Upper-Tier Subcontractors are Increasingly Responsible for Auditing Their Subcontractors

(*Editor's Note. Since many of our consultants are former DCAA auditors we are receiving a large number of requests to audit prime contractor and upper tier subcontractors' subcontracts. Whereas this used to be more infrequent where primes could depend on the government conducting the audits, the government is increasingly putting the burden on primes to audit their subcontracts. Whether it is decreasing government audit resources being responsible for this trend or new interpretations of the regulations, the trend is undeniable. References to regulations and memos in this article are based on a couple of interesting blogs from the Redstone group while we are responsible for most of the content.*)

DCAA, the Defense Contract Management Agency and non-DOD agencies are increasingly stressing that prime contractors (and upper tier large subcontractors) are responsible for auditing their subcontractors both for closing out cost type subcontracts and evaluating forward pricing proposals. FAR 52.216-7(d)(5) is commonly cited as a requirement of the prime to settle subcontractor amounts and rates included in prime contractor vouchers. FAR 42.202 is also cited as the basis for requiring prime audits of subcontractors (though one commentator states the latter's reference to "manage" subcontracts is not the same as "auditing" them). DCAA has launched a strategy which presumes prime contractors are responsible for auditing their subcontractors while DCMA has embraced the strategy with respect to closing out cost type subcontracts. In DCMA Instruction 135, section 3.2.3.2 it states prime contractors are responsible for auditing subcontractors and closing subcontractors using procedures similar to those used by the government in the past.

When DCAA audits a prime contractor's indirect cost proposal (ICP) it is now encouraging its auditors to focus on any and all subcontract costs on its flexible type prime contracts (e.g. cost reimbursable, time and material, fixed price incentive fees). If a prime contractor cannot demonstrate it "audited" the costs claimed by a subcontractor on its cost type contract, DCAA is now questioning 100% of those subcontract costs. Whereas before it used to audit those costs itself, DCAA is now increasingly asserting it is not their responsibility. The same holds true with T&M contracts where there are T&M subcontracts – if the prime did not audit the subcontractor's records, 100% is questioned. The same also holds true when a subcontract is fixed price under a cost type prime contract. We are also hearing about DCAA second guessing the sufficiency of the prime's cost or price analysis leading DCAA to assert the FFP subcontract price is not fair and reasonable or is based on insufficient competition and hence unallowable under FAR 31.201-3.

A recent DOD memo – DODIG Semi-Annual Report to Contract for the Reporting period April 1 – September 30, 2015) - reports that millions of subcontract dollars (direct costs) are being questioned as part of several ICP audits where the basis includes: (1) prime contractor failure to audit subcontract costs (2) prime contractor failure to obtain competitive bids before awarding a subcontract and (3) inadequate documentation by the prime supporting the allowability, allocability or reasonableness of subcontract costs. DCAA is also renewing its emphasis on questioning subcontract costs in recent training material on the subject.

These "subcontract management" trends are also expanding to non-DOD agencies. For example, OMB Super Circular (2 CFR 200) stresses that better buying power depends on better subcontract management which means prime contractors should be revisiting their policies and procedures with respect to subcontract price analysis and subcontract cost management. If a subcontractor refuses access to its accounting records to the prime, they are to consider using a third party to review the subcontractor's claimed costs that would limit the prime's access to only results of the audit, not access to its records.

QUEST IONS & ANSWERS

Q. We pay commissions to bona fide entities (third parties) based on the commercial and government sales they bring to us. They are between 5% - 12% of the total sales price. In the past, we have charged such costs to the G&A pool to increase our potential recovery of such items. We expect to have cost type contracts in the future where since these commissions are paid and identifiable to specific projects, we now want to charge them direct. However, we do not want to include them in our G&A base (which is total cost input - TCI) with other direct charges because then we will need to apply G&A to these costs (we have a very high G&A rate) resulting in an embarrassingly high amount for these costs. Do you see a problem with direct charging these costs and excluding them from the G&A base? If so, do you have any other ideas?

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A. I don't see a problem with charging the commission directly to a project. However, since your normal practice is to charge it indirect to the G&A pool, you should have a written procedure that addresses the treatment of sales commissions and why some of those costs are direct and others indirect.

As for including them in the G&A base, a TCI base should include all direct costs plus other relevant indirect costs. If you want to exclude only the direct commission costs, that would likely raise a red flag because you are, in effect, modifying the TCI base. It is possible to exclude them if you can assert the commission is so different that none of the G&A costs support it. This is a tough sell and may require considerable administrative steps to get approved. Why don't you include the commission in the base but choose simply not to allocate G&A to that cost for purposes of pricing or invoicing your contracts. There is no rule that requires you to apply G&A to all costs in the base – you are only eligible to do so.

Q. I don't understand why interest costs unallowable? They are normal business costs and not associated with such controversial costs as alcohol, entertainment, extravagant travel, etc.

A. As a matter of policy, the government does not want to fund contractor borrowing. Contractors vary widely in how they finance their operations. Some borrow heavily while others use their own capital. On a cost type contract, for example, it would not be fair to pay a contractor more because it incurred interest while effectively penalizing the contractor who financed their business internally. To put the contractors on an equal footing the government substituted cost of money for actual interest. Cost of money, which is really an imputed interest cost, applies to net assets no matter how they were financed.

Q. I wanted to protest the award of a task order but no automatic stay was granted and much of the work has been performed. I thought stays were automatic.

A. Greg Jacobs of Polsinelli PC wrote an article in the Nov 11, 2015 issue of the Federal Contracts Report addressing automatic stays under task orders and commercial item contracts saying they are "a trap for the unwary protester." If a contractor is awarded a task order under FAR Part 15 negotiated procurements there are very well defined deadlines which if met result in automatic stays of contract award. For example, an agency must receive notice of a protest within five days after a required debriefing is offered or within 10 days of an award. However, awards under other provisions of the FAR such as Part 8.4 (task orders), Part 11 (competitive items) or Part 13 (simplified acquisitions) do not have such well defined deadlines so such non-Part 15 procurements become more "opaque." So, for example, Part 8.4 requires "timely notification to unsuccessful offerors" by COs or Part 13 requires contract award be "publicized" without any timeframe where such delays prevent automatic stay requirements such as under FAR 15 procurements. Mr. Jacobs suggestions under non-Part 15 procurements are to (1) know whether you have a FAR 15 or non-15 procurement where its not always clear (2) use any means possible to determine award date where FBO.gov may not be reliable (e.g. call the CO and ask for specific award date) or (3) use whatever you have to file a viable protest where though you may not have knowledge to formulate a good protest until you know the grounds for the award decision you may be aware of at least one protest ground (e.g. the awardee may not have adequate capabilities, is not responsible, etc.).

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