GCA Report

(A publication of Government Contract Associates)

March - April 2016 Vol 22, No. 2

NEW DEVELOPENTS

Contractors' Websites Can Hurt Them in Winning Awards

A recent case we reported on – Deloitte Consulting LLP – has led analysts (Shlomo Katz and Ken Weckstein of Brown Rudnick LLP) to recommend that contractors take a good look at the contents of their website to avoid losing contract awards or hurting their small business status. In the case, the Board concluded that the awardee improperly received credit for its corporate experience because it did not show how its corporate parent would provide support during contract performance. The decision hinged on its website that focused on providing services to the private sector while its proposal focused on services provided to the government sector. Examples of a websites being used against offerors include the unsuccessful offeror did not show on its website that its software could operate on a Sun Microsystem platform resulting in an unacceptable technical rating, showing experience of true key personnel that differed from the proposal resulting in a successful assertion of "bait and switch", several cases showing the website did not identify experience that the proposal stated existed or website information identified experiences of affiliated companies that was used to challenge the small business status of a company. The analysts said smart offerors will examine their opponents' website looking for information to be used in protests and recommended that contractors should regularly review their website, update their product and service offerings, highlight projects that have done well and eliminate those that did not do so well.

Need to Act Now on Fair Pay Rule

Many commentators are warning contractors to take steps now to prepare for rules due this Spring from the Labor Department that will require disclosure of violations of labor and employment laws. Preparing now would give contractors a competitive edge, sooth relations with subcontractors who must also disclose information and possibly fend off suspension and debarments actions for nondisclosure. The DOL is required to propose rules by May 27 to be compliant with President Obama's Executive Order No. 13373. The Order requires the disclosure to agency contracting officers if any violations of various federal and state labor and employment laws occurred during the prior three years to bid for contracts exceeding $500,000 and for the CO to consider violations in making responsibility determinations of the contractors. Compliance will also require subcontractors to disclose their violations to prime contractors. Contractors need to get the firm's contracting team talking with its HR and legal departments on what labor violations occurred. A point person, probably from one of these departments, should be identified. Though a simple check of a box will be required to indicate whether there have been violations it will take a lot of background work, especially for larger companies, to find them. Contractors who are awardees will have to disclose details of past violations, sometimes a lot of details, which will take time to prepare. Each contract requires reporting every six months so if there are 12 contracts they will need to issue 24 reports per year. These compliance requirements will also have a "perverse effect" on how the company litigates employment laws where, for example, it may have an incentive to settle rather than fight a claim since settlements will not trigger reporting requirements. In addition, the possibility of suspensions and debarments for failing to comply with the EO will likely need the creation of relationships with suspension and debarment officials in agencies you do work with to show good faith efforts to comply.

Meanwhile, lobbyists are gearing up to challenge the EO and the soon to be issued regulation and guidance by the FAR Council and DOL. Several organizations representing contractors are preparing to attack the rule through litigation and pushing for legislation while other "progressive" groups like Nelp and the Center for American Progress are asking the administration not to succumb to business-backed pressure to delay release of the rule.

DCAA Guidance on Reporting Late Incurred Cost Submittals

DCAA issued guidance on furnishing DCMA a list of contractor fiscal years (CFYs) for which they have not received a final indirect rate proposal (ICP) and the CO

has not granted a valid extension. This year, the list will include all CFYs ending in 2014 or earlier (greater than six months overdue). In May 2016, DCAA is instructed to send a letter to the designated CO notifying them of DCAA's intent to close out individual assignments of the audit and in June 2016, DCAA will close out audit assignments for the names on the list. If ICPs are received after the assignment is closed, it will be reopened. When an audit is closed out, the CO is tasked with applying a unilateral cost decrement where how much to apply is left to their discretion. In making this determination, DCAA may provide relevant information to the CO such as billing deficiencies, incurred cost audit experience, etc. "As a last resort", DCAA will furnish DCMA a total contract cost decrement that the CO may consider when no relevant history exists. The current rate is 16.4 percent of total contract costs. The guidance includes seven pages of listed contractors where some include our subscribers. You can access this list at dcaa.mil under MRDs, dated Feb. 11 (16-PPD-004(R).

DCAA Issues Guidance on Blended Compensation Caps

DCMA issued guidance in Oct 2014 on the use of "blended rates" caused by a change in the statutory compensation caps applying to new contracts awarded after June 24, 2014. The guidance was issued because the cap after June 24, 2014 was $487,000 while the cap before that date was $952,038. The guidance promised more detailed guidance would be issued by DCMA and DCAA where Feb 19 it was issued. The 23 page guidance is quite detailed with illustrations on computing the blended rates and applying them to 2014 and subsequent fiscal year provisional and forward pricing rates and incurred cost submittals. We will summarize this guidance in the next issue of the GCA DIGEST.

New Defense Budget Tries to "Do-It-All"

On the eve of the release of the president's fiscal year 2017 defense budget it appears that a fight is brewing in the Pentagon about whether to spend money fighting the small wars of today or preparing to fight the potential big wars of tomorrow where which side comes out on top should affect defense contractors and their subcontractors. Many people point to the full plate facing the US military – preserving stability in Korea, countering a more assertive China, leading NATO, countering moves by Russia, maintaining a credible nuclear deterrent, fighting Islamic State militants in the Middle East and Africa and, supporting Afghan fights against the Taliban – indicating where to spend the next dollar is a tough call. In one corner is the "War of Today" camp representing a coalition concerned that the military's readiness to fight today is declining due to a reduction in training and maintenance. The other camp worries that concerns for current conflicts are hurting our ability to fight the next big war against large adversaries such as Russia and China where supporters say we must invest in these capabilities necessary to deter these types of conflicts such as higher tech and greater lethality of weapons. It appears that DOD Secretary Carter is deciding in favor of both sides where the recently proposed $585 billion defense budget is oriented to the need to act on all fronts where Carter states the "budget stresses we need to do it all."

DOL Proposes Paid Sick Leave Mandate for Contractors

Acting on an executive order signed in September 2015. the Department of Labor's Wage and Hour Division (WHD) proposed mandating that government contractors offer one hour of paid leave for every 30 hours of work, effective on all new or renewed contracts beginning in 2017. Employees could use the time to care for themselves or a family member and for absences resulting from sexual assault, domestic violence or stalking. The WHD estimates the rule would extend paid sick leave to 437,000 workers who currently do not receive it and within five years that number would be expanded to 828,000.

Features of the proposed rule, some of which are expected to generate opposition include: (1) paid sick leave would carry over from year to year which can build up some significant liabilities that will need to be disclosed on financial statements (2) the rule will apply to employees working on government contracts that are covered by the Davis Bacon Act, Services Contract Act, concessions contracts or those connected to federal property (3) since it is difficult to distinguish between employees working on covered contracts and those not covered, it is expected that contractors, especially small and mid-sized companies currently not offering sick leave, will apply the rules to all employees rather than trying to determine who works on contracts and who does not (4) the rule will apply to both prime contractors and subcontractors where there will be a small exception to federal grants, arrangements with Indian tribes and construction contracts for less than $2,000 (5) federal agencies will be responsible for placing a clause in their contracts and they will be responsible for withholding funds from companies that do not comply (6) leave accrual will be calculated on a weekly basis or alternatively, a minimum of 56 hours of paid leave will be accrued at the start of each year (7) "family

members" that employees are eligible to take leave for are child, parent, spouse, domestic partner, blood relative or "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" and (8) the definition of "child" is broader than expected which is a biological, adopted, step or foster son or daughter of the employee, their spouse or domestic partner, a person who is a legal ward or was a legal ward when they were a minor of a person *(Fed. Reg. Feb. 25).*

Defense Firm Valuations Increase Since Sequestration

A recent Feb 23 panel on the defense industry sponsored by Bloomberg BNA has generated comments that more certainties regarding defense spending has fueled a recent surge in company valuations and merger and acquisition activities. Where sequestration left companies unsure of business prospects and where to invest, greater clarity over the federal budget and lower deficits have tended to have defense stocks increase in value as investor fear has subsided. The participants point to the anecdotal belief that federal budgets rise and fall in seven year cycles where now the defense industry is in the early stages of a new cycle which is another trend pushing valuations of defense firms higher.

Proposal Would Disallow Congressional Inquiry Costs

The FAR Council proposed Feb. 17 to prohibit reimbursement of contract costs incurred responding to a congressional investigation into a matter that results in a finding of fault. A "finding of fault" includes an investigation that results in a criminal conviction, a finding of civil liability for fraud or similar conduct, a decision to debar or suspend a contractor or rescind, void or terminate for default its contract. The proposal alludes to FAR 31.205-47(b) that already makes unallowable costs incurred for proceedings by federal, state, local or foreign government or by contractor employees alleging whistleblower reprisal when the result is one of the above listed findings of fault. Exceptions to the allowability rule includes when a consent decree or compromise specifically provides for allowability or when the contracting officer, in consultation with legal counsel, determines there is "very little likelihood" of success as a qui tam relator in a False Claims Act (*Fed. Reg. Feb 17).*

Final Rule Requiring Bidders to Disclose Prior Ownership

A final rule, published March 4, will require DOD, NASA and GSA contractors to disclose information about immediate owners and subsidiaries and on predecessors that held a contract or grant in the past three years. Contractors will need one submission a year providing the Commercial and Government Entity Code and legal name of the predecessors. Most companies, including small businesses, are not exempt where they will simply check a box. The information is intended to (1) detect small business and set-aside fraud by making corporate affiliations clearer and (2) identify poor performers with records of repeated misconduct who incorporate new entities to disguise who they are *(Fed. Reg, March 7).*

LPTA Still Exists But Is to Be Minimized

Recent guidance issued March 3 could mean the Defense Department will begin relegating lowest price technically acceptable (LPTA) usage to nontechnical and commodity purchases only. The recent guidance follows several other guidelines issued in 2015 and Jan 2016 intended to limit LPTA. Several factors are cited as contributing to the limitation of LPTA use: Sec. of Defense Ashton Carter's innovation initiatives which favor capabilities over price, a shrinking vendor base as companies spin off low margin work and backlash from industry groups complaining about LPTA usage on two technology service contracts valued at $17.6 billion and $6 billion.

EEOC Wants to Add More Pay Data

The Equal Employment Opportunity Commission recently proposed revising the Employer Information Report (EEO-1) to add data collection. Currently, the EEO-1 report directs certain covered employers with more than 50 employees (contractors) or 100 employees (private industry) to report annually on the number of individuals they employ by job category and by race, ethnicity and sex. The revised data form would have two components: Component 1 collects the same data as the current EEO-1 while Component 2 gathers data on employees' W-2 earnings and hours worked. Under the proposal, all EEO-1 filers would submit data under Componet 1 in 2016 but starting in 2017, both industry and contractor filers with at least 100 employees would submit data for both components while contractors with 50-99 employees would only submit data for Component 1.

Analysts Say Contractors Should Prepare for Four GWAC Recompetes

Bloomberg issued an analysis warning for contractors to get ready to bid on $90 billion in contract recompletes for four of the eight active government-wide acquisition vehicles (GWACs). By the third quarter of 2016 requests for proposals will be released for Alliant 2 (A2), Aliant Small Business 2 (A2AB), Chief Information Officer Solutions and Partners 3 Small Businesses (CIO-SP3 SB) and Veterans Technology Services (VETS 2). Openings to get on GWACs are infrequent and contractors need to think hard about bidding on them. Tips on what to look for include:

1. A2 is a must win for large businesses where it will be the most important information technology services contract of the next decade. Due to the success and popularity of Alliant, there will probably be greater use of A2. Two questions still remain unanswered – will new joint ventures have a chance to bid and can small business offerors include the performance of subcontractor team members.

2. Pure play small businesses have to consider client purchasing patterns and use of awards on each GWAC to determine which GWACs to target. For example, while A2SB, which will award 80 new contracts and VETS 2 70 will have fewer competitors for task orders while CIO-SP3 SB will have 94 contracts and may add many more through on-ramps.

3. Accessibility to specific customer agencies should be considered. For contractors targeting work at Defense or Energy departments A2SB will be a vehicle to use while for IT orders at HHS, its better to rely on CIO SP3 SB.

4. VETS 2 will be limited to service disabled veteran owned small businesses where if not selected on the recent $22.3 billion T4NG contracts VETS 2 will offer more opportunities.

Proposed Rule on Effectiveness of IR&D Costs

The Defense Department is proposing an amendment to the DFARS that would require proposed new independent research and development efforts be communicated to appropriate DOD personnel prior to the initiation of these investments and the results of these investments must be shared with appropriate DOD personnel. The proposed rule would apply only to major contractors whose covered segments allocated a total of more than $11 million in IR&D and bid and proposal cots to covered contracts during the preceding fiscal year *(Fed. Reg. Feb. 16).*

CASES/DECISIONS

Firm Used Wrong FSS Labor Categories to Win a Linguistics Order

(Editor's Note. Commentators on this case indicate it provides reasons to accelerate the trend of agencies abandoning the GSA Schedule in favor of procuring their needs on an open market basis.)

The General Services Administration sought to acquire linguistic services to be provided in Southeast Asia where the solicitation was limited to holders of federal supply schedules. SOS won the award with a quote of $17 million compared to AllWorld's quote of nearly $32 million. In its protest, AllWorld asserted SOS should not have received a technically acceptable rating because it quoted a labor category that did not meet the personnel requirements stated in the solicitation. The GAO agreed ruling the price quote was based on the hourly rate for a labor category of linguists that clearly lacked required functions and by using this misaligned labor category, SOS avoided a more expensive labor category and thus gained an unfair competitive advantage. Comments on the case said that the GSA correctly argued that no FSS labor categories align perfectly with a particular performance work statement which leaves an agency in a Catch 22 situation – its can either conduct a GSA schedule procurement with vague requirements, which is not in anyone's interest or it can abandon the GSA schedule program and procure its needs on an open market basis. More and more of these types of cases are pointing to the need to adopt the latter approach *(AllWorld Language Consultants, GAO B-411481).*

Unequal Discussion Taints Award

The solicitation was for a small business set aside to remove brush and vegetation from an Air Force base. During evaluation, the agency contacted Jimmy Church to get more information about an alternative contracts manager who seemed to lack sufficient experience where after communication the evaluators learned the individual did have the minimum experience which made its proposal technically acceptable while Cascadian's proposal was deem technically unacceptable. The GAO sided with Cascadian in its protest ruling that the agency's discussion with Jimmy Church and another

unsuccessful bidder about key personnel required it to engage in discussions with all offerors including Cascadian to allow them to address weaknesses in their proposals. The GAO said Cascadian might have been in line for award if it had an equal chance to address evaluators' concerns and ruled in favor of Cascadian *(Cascadian Am. Enters., GAO B-412208).*

Modification to a Fixed Price Contract Requires Payment Based on Actual Labor Costs Incurred

Jan Mobley worked on a firm fixed price contract where a modification for an additional two months was made that provided that payment of labor would be based on documented hours worked. All invoices were paid and work was completed where an Inspector General audit subsequently disallowed all the labor costs under the modification because it lacked proper documentation for the incurred labor costs. Jane Mobley asserted that the contracting officer confirmed the contract was firm fixed price and the amount billed and paid was appropriate since it was firm fixed price. The appeals board disagreed with Jane Mobley stating the clear language of the modification stated compensation would be based on documented labor hours and costs incurred despite the fixed price nature of the contract and assertions of the CO *(Jane Mobley, CBSA 2878).*

Several Flaws in Award of a GSA Contract Award

(Editor's Note. The following case is interesting because it highlights several common flaws.)

The agency posted a request for quotes on the General Services Administration's site, seeking a quote from Federal Supply Schedule (FSS) contract holders for services. Castro protested the award asserting the GAO (1) misevaluated its technical and past performance factors and (2) did not document its justification for the higher score given to the awardee. The GAO sided with Castro. First it ruled the past performance evaluation was unreasonable because the record showed that Castro received a weakness for a reference not closely aligned with the solicitation requirements despite an evaluation document notification showing the reference should not be considered. The technical evaluation was also flawed because though the evaluation report did not identify any weaknesses, the agency cited a weakness for Castro in its award explanation where the weakness here was copied from one evaluator whose assessment "contrasts strikingly" from three other evaluators. Finally, the GAO ruled the awarding evaluation score was not supported by documentation where the record lacked evidence the agency compared strengths and weaknesses between the two offerors or there was no documentary justification for paying the awardee a $298,000 premium *(Castro & Co., GAO, B-412398).*

High Court Uncertainty Will Affect Many Contractors

(Editor's Note. Many comments are addressing the effect of Justice Scalia's death on pending Supreme Court decisions affecting government contractors. Here is one example.)

Last June the Supreme Court agreed to hear a case if the Veterans Administration must always examine whether it can select a veteran-owned small business to perform a contract before using the Federal Supply Schedule to place an order. The lower court sided with the VA concluding that pursuing a set aside is not mandatory once an agency has satisfied its small business goals. A dissenting judge criticized the decision saying it ignored the mandatory "Rule of Two" under which the VA must investigate whether there is a reasonable expectation that at least two eligible firms will make offers and failed to explain how COs can make a determination whether contracting goals have been met before the end of the year. If the lower court finding is upheld, which would occur if the Supreme Court vote is four to four, it can adversely affect the ability of service disable veteran owned small businesses to get VA contracts as well as other socially disadvantaged procurements *(Kingdomware Techs., vs US).*

Feds Scolded for Seeking "Fairyland" Damages on Davis Bacon Violation

The Appeals Court ruled that Circle C violated the False Claims Act when it submitted compliance statements to the government for its contract to construct numerous warehouses. Circle C indicated it and its subcontractors were paying workers the relevant Davis Bacon Act wages when it actually underpaid them for $9,916. The FCA does allow the government to recover three times its actual damages where the government asserted the entire contract was worthless and that underpayment for the construction could have equaled $259,000 on the construction so when multiplied three times the damages would equal $777,000 and it sought that amount in damages. The Court disagreed with the government stating first the warehouses were not worthless and second the contract breach can be fixed by simply making up the dollar amount that was underpaid. The Court noted that the Davis Bacon rules state that a contractor's failure to pay required wages allows the government

to withhold payment equal to the amount of wage underpayments plus estimated liquidated damages where here the amount equals $9,900, not $259,000..The Court ruled that damages must be "grounded in reality" where the government could not forever withhold payments to a contractor for work on several dozen warehouses and yet have the work continue while receiving benefits from the warehouses. The Court concluded the damages the government seeks are "fairyland rather than actual" *(US vs Wall v Circle C Constr, 2016 BL 30895).*

NEW/SMALL CONTRACTORS

Some Indirect Rates You May Want to Adopt, Part 1

(Editor's Notes. For a number of reasons our clients and readers have been more frequently asking us about adopting different indirect costing methods. Though the motivation may be the desire for more accurate accounting, more often the incentive is evenly divided between increasing recoveries on new contracts without affecting existing contracts and lowering indirect rate allocations to be more competitive. We thought it would be a good idea to revisit some of the insights into indirect rate structure we explored 10-15 years ago. In this first of two articles, we will focus on typical choices found in manufacturing environments where our choice of topics were selected because they may be of interest to service and professional firms also (e.g. material and subcontract handling, multiple department rates). In the second article we will focus on handling fringe benefits, support and service centers, G&A and home office costs for all firms with single and multiple locations. These two articles are not intended to cover all conceivable alternatives but touch on the most common. Before selecting a particular rate you will need to analyze the pros and cons of various alternatives, conduct sensitivity analyses to see which one best serves your pricing needs currently and in the near future and consider how changes are most readily accepted by the government.)

Common Manufacturing Pools and Bases

Generally costs are not recoverable unless the indirect cost pools and bases are pre-established. For example, costs of handling material cannot be proposed or recovered unless they are separately identified and established in a material handling pool. Manufacturing firms can be considered labor, material or subcontract or capital intensive and each often calls for using different types of indirect rates.

Some firms may use a single manufacturing pool while for many more diverse and complex organizations additional cost pools may be appropriate. Separate pools are most commonly established by departments that may include fabrication, assembly, tooling, testing, quality assurance, inspection, machine shop, paint shop and welding. Though we rarely see indirect rates for each department, multiple rates are not unusual depending on their relative significance to others. Though multiple rates could be used, one or two can be decided upon, especially when there is no material differences between rates in multiple departments. On the other hand, more pools than are necessary may be used even when there is little difference when companies, for example, want to track activity under different managers.

- **Labor Intensive Firms**

When a firm is labor intensive, the allocation base used for most cost pools are direct labor hours or direct labor dollars. Labor dollars have tended to be more favored because it is not affected by inflation – labor costs increase in proportion to the pool - while labor hours will tend to increase rates under inflationary conditions. The drawback to using labor dollars occurs when the labor base includes a wide range of wages and salaries resulting in increased allocation to higher paid labor activities. Generally, if the pool of expenses to be allocated are more closely related to the number of employees then a labor hour base is preferable; if the pool is more related to compensation then a labor dollar base should be used. Some cases (e.g. Brown Engineering) have ruled that premiums, bonuses and other pay differentials should be excluded from a direct labor dollar base.

In manufacturing companies where labor is decreasing as a percent of total cost firms may adopt activity based costing applications where labor bases give way to other allocation schemes. Common bases are machine set-ups, set-up hours, standard processing times, items inspected, engineering changes, drawings, routing, etc.

- **Material Intensive Firms**

When a firm is material intensive then material related cost pools should be considered. Material related costs might include material handling costs (e.g. unpacking, inspection, moving from and to storage) as well as purchasing and ordering. The government may object to allocating a significant amount of material related cost on a labor base asserting there is little correlation (i.e. casual/beneficial relationship). Using a labor base for material oriented costs may also be inconsistent with

a company's goals – for example, for contracts with a relatively heavy material component and lighter labor cost, recovery would be less. Conversely, contracts containing a relatively high labor component may attract a disproportionately large amount of indirect costs which may or not be desirable. If material is used uniformly on all jobs then a separate pool is unnecessary. Also, if labor costs are insignificant, then a material base may be appropriate for all indirect costs. Multiple material related pools may also be necessary - for example, when both material and customer-furnished material are significant and their proportionate use on contracts differ, then separate pools and bases may be needed.

A variation of a material related pool is a subcontract administration pool. A separate pool may be needed if subcontract related expenses are significant and are not incurred in the same ratio as material costs. We have seen a wide variety of costs included in subcontract handling pools from ordering and administering subcontracts to proportionate shares of engineering, marketing and research and development costs. Generally, direct subcontract costs are the allocation base.

When activity based costing is used, potential allocation bases for material costs may include the size of material, number of items, number of times material is moved within a facility, number of purchase orders, etc. We have seen numerous pools of material related costs divided by a variety of materials where, for example, the cost of one category was allocated to contracts based on number of purchase orders while the cost of another category was allocated to contracts on the number of items handled.

- **Capital Intensive Firms**

For capital intensive companies, other allocation pools and bases may be appropriate. Capital intensive manufacturing usually translates into equipment intensive so pools and bases are more oriented to equipment usage. For example, the costs related to a machine shop may constitute a separate pool using a machine hour base. DCAA has come up with guidance for allocating special facility costs where there is a preference, in descending order, for (1) use basis for allocation where predetermine rates are set for a year (2) allocation based on direct charging of specifically identifiable costs and allocating the rest to overhead accounts and (3) allocation to normal overhead cost pools.

Other Manufacturing Rates

Spare Parts. To price spare parts more accurately, you may want to pool costs associated with handling, packaging, shipping, storing spare parts and allocating them on such bases as cost of spare parts or number of items shipped. In selecting a base, you need to consider circumstance – if number of items on an order can vary widely inequities can result if the allocation base is number of shipped items.

Field Service Pools. When field or customer services at off-site locations are significant and especially when such activity for different products or projects are unequal then one or more field service cost pools may be necessary including training of customer personnel, warranty repairs, liaison with operating personnel as well as fully burdened labor costs including allocations of fringe benefits, facilities costs, etc. The allocation base is commonly direct labor dollars or hours.

Process Cost Pools. Sometimes costs are accumulated by the various processes a product goes through before completion rather than on a job or contract basis. Indirect costs not identified with a process must still be allocated to output or equivalent units under the full-absorption concept of government accounting. Though a direct labor base is commonly used, rates can sometimes be quite high especially when the labor component is small. Alternative allocation bases might be machine hours, units of output or product cost.

QUESTIONS AND ANSWERS

Q. We are establishing a new deferred compensation plan. Is this allowable? Are there any limitations?

A. First, as in all costs, it must meet the "reasonableness" test which is undefined. Second, you should make sure the method you use for calculating it are consistent with provisions of CAS 415, whether or not you have any CAS covered contracts. Third, you want to make sure you are compliant with FAR 31.205-6(k) and have a written policy. Fourth, be aware that deferred compensation is considered to be one of the four elements of employee compensation – the other three are salary/wages, bonuses and defined benefit pension plan company contributions – so it could still be disallowed if total compensation is considered "excessive."

Q. I thought I saw an article concerning the need for marketing personnel to charge B&P codes directly rather than charge their time to (general) indirect time. However, I can't track it down. Our company has a technical marketing manager who helps out on B&Ps

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but who wants to charge indirect. If I am mistaken, and there is no article, what are the guidelines regarding this area?

A. I have no recollection of such an article. CAS 420 and FAR 31.205-18 address B&P costs. We have also written several articles so go to our website and do a word search (we have a new website).

As for addressing your points, generally B&P costs are indirect, usually G&A costs. It may seem as if B&P costs are direct because (1) the B&P labor costs are usually included in the overhead base (2) the B&P costs are often accumulated as a separate "job order" number but then those costs should be transferred to the G&A pool or (3) B&P costs associated with a task order, for example, may be charged directly to that task order. But usually, B&P is an indirect, G&A cost. If you want to charge B&P costs as direct costs associated with a task or even a contract, that contract should provide for such accounting treatment and you should have a written policy that spells out when these normally indirect costs are direct.

Q. We have a contract employee who we are currently investigating for misconduct. Our government customer discovered this misconduct and has asked that he not return to the customer site. We are taking three days to investigate the allegations, and have placed the employee on paid administrative leave for these three days. Our employee handbook states employees will be paid under many circumstances including payment of leave during an investigation. Is the labor cost for the three days of administrative leave allowable?

A. I didn't see anything in DCAA guidance or my reference material that explicitly addresses this issue. The good news is that there is nothing explicitly indicating the costs are unallowable. Therefore, I would say the compensation for the investigation is a prudent, reasonable expense and hence should be allowable. The fact you explicitly address the issue in writing in your handbook provides further, strong justification for its allowability.

Q. We have an employee who we plan to provide a commission for business he is responsible for bringing in which is based on a percentage of the revenue his efforts generate. I have looked at the FAR on selling costs and it says in part "…commissions…are allowable only when paid to a bona fide employee…" I would think that would support the commission. What do you think?

A. Yes, it's a good quote to support the sales commission aspect of the payment. However, the payment also seems to be a form of an employee incentive payment (e.g. bonus) covered by FAR 31.205-6(f) so you need to make sure the "commission" meets the criteria for adequate bonuses. Bonuses are one of the most closely scrutinized costs by DCAA these days so you must make sure it meets the criteria for allowability e.g. a bona fide "agreement" between the employee and employer. If you don't have it now, I would draft a written policy addressing this type of bonus (better yet, a policy addressing all bonus payments) and show there is an agreement (written would be preferable) between this employee and the company..