GCA REPORT
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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 inadvertently used a higher billing rate than the ceiling rate included in our contract on one of our cost type contracts and DCAA has written us a letter that it is recommending rescission of our direct billing practices. Can we challenge this?

A. We have seen this a few times and DCAA usually makes the claim they are rescinding direct billing privileges on the grounds the contractor does not properly "brief their contracts". The right to withhold direct billing privileges is administratively left to the discretion of DCAA. About your only defense, which we have successfully used, is to quote their own guidance.

In a widely distributed letter to contractors, DCAA identified the five criteria a contractor should demonstrate to be allowed to direct bill its vouchers directly to the government as well as the four criteria to rescind such privileges. Though adequate briefing of contracts was considered a criteria for direct billing it is absent from one of the four factors to rescind the privilege. We have been successful in bringing this memo to their attention (there is a constant flood of memos and few auditors know them all) and they have reconsidered their decision in a couple of cases.

Q. We have been preparing both requests for equitable adjustment and termination for convenience settlement proposals on two of our contracts and are using our employees to work on these proposals. We know they are considered to be allowable settlement costs but we are wondering whether we can apply G&A to those costs.

A. Generally, you apply G&A to those costs that are included in the G&A bases. So, for example, if you use normally direct labor on these proposals, G&A would be allocable to them since they are in the G&A base while normally, G&A personnel would not attract G&A since they are in the G&A pool, not the base. Since REAs and T of C do allow normally indirect costs to be treated as direct costs for purposes of computing settlement costs, you could, alternatively, consider the normal G&A labor as direct but you must clearly show their costs are not included in your G&A pool and are included in the G&A base for purposes of computing your G&A rate. I would not advise this alternative approach unless the settlement labor costs are significant since the required revision of treating them would raise red flags resulting in heightened scrutiny.

Q. On our time-and-material contracts we charge all labor worked on the contracts, whether they be our own employees or our subcontractors' employees, at the same labor rates contained in our contract schedules. Our contracts manager says this is allowable provided the subcontracts were identified in our proposals or in our contracts. Is this correct?

A. No. It is true that DCAA has from time to time proposed that use of prime contract labor rates be limited to only proposed subcontractors, which your contracts manager may be thinking about, but that proposal has not been passed. So, as of this writing, no such limitation is in effect and if an auditor attempts to apply it, make sure you ask him to justify it either in the FAR or even in DCAA guidelines.

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Subscription: $175 for one year, $325 for two years.

GCA REPORT
(A publication of Government Contract Associates)

November - December 2016 Vol 22, No. 6

NEW DEVELOPMENTS

New Rules Affecting Uncompensated Overtime are Delayed

The new labor laws affecting what employees are covered by the National Labor Relations Board have been delayed after a court decision *(Nevada v US Dept. of Labor, Case No. 4:16-cv-00731)*. Those rules would decrease the threshold of salaried employees from $47,476 to $23,660 meaning they would have to be paid time-and-one-half if they worked over 40 hours.

DCAA Allowed to Audit Non-DOD Agencies

Following a cessation of all audits of non-Defense departments until they clean up their backlog of incurred cost proposal (ICP) audits not to exceed 18 months, DCAA has issued guidance ending the cessation. Following a certification from the Defense Department that DCAA's backlog of ICPs does not exceed 18 months, the DCAA memo now frees up the audit agency to contract with other federal departments to provide contract audit services. Since the cessation, many departments have made other plans having either their inspector general offices and increasingly, third party CPA firms conduct the audits DCAA used to do. We have seen several criticisms of DCAA stating that the inefficiencies that created the backlog in the first place (e.g. taking inordinate time to complete these audits where, for example, there would be a one day visit by DCAA followed by nothing and then another one day visit 6-12 months later) have not been fixed. The critics claim the backlog of audits was closed not by greater efficiency but by "gimmicks" such as unilaterally increasing the pool of "low risk" contractors where reports were issued accepting proposed rates where no audit occurred or determinations that ICPs were "unauditable" and hence reducing the backlog that way. It remains to be seen whether non-DOD departments will want to continue with the alternative approaches they adopted or whether they will want to contract with DCAA and if so, whether they will accept DCAA's approaches to reducing their backlog *(MRD 16-PPD-008(R)*.

(Editor's Note. The increasing use and acceptance of independent CPA firms auditing ICPs and evaluating contractors' accounting systems as well as audits of subcontractors have resulted in a huge spike of such engagements in our consulting business. The preference for using CPA firms to conduct these reviews (we recommend using CPA firms knowledgeable about government contracting since financial audits are very different than contract accounting audits) usually comes down to the speed in which such reviews can be done by private firms For example, at the risk of tooting our own horn, our CPA consulting firm can usually conduct a review of contractors' accounting systems within 2-3 weeks compared to months and even years by the government, because we have 30 years of experience conducting these reviews and do not have a lot of other competing priorities.)

Proposed Rule on IR&D

A proposed rule published in the Federal Register would require contracting officers to consider how much a bidder plans to use future independent research and development to reduce the price of their proposals as they evaluate competitive bids on major weapons systems and major automated information systems. Traditionally, defense contractors that invested in IR&D could be reimbursed for their outlay as long as the results were of interest to DOD where the use of indirect IR&D costs could be used to reduce the prices of proposals because they were an indirect cost included in contractors' G&A rates. The proposed rule will add a new DFARS 215-303 section that will require COs, for evaluation purposes of the proposals only, to consider how much of the future IR&D costs will reduce the price of the proposal *(Fed. Reg. 78014)*.

GSA Proposes Rule on Purchase of Order Level Material on FSS Contracts

The General Services Administration is proposing to amend the GSA Acquisition Regulation to establish special ordering procedures that will allow direct purchase order materials on pricing a task order or blanket purchase agreement against a Federal Supply Schedule contract. Currently, GSA limits the amount of "open market" items only if certain procedures are followed though for non-commercial FSS time-and-material or labor-hour contracts such order level material may be included. The proposed rule will now

allow such order level material to be included in all the FSS contract orders. However, there will be limits to the amount that can be charged direct to the orders (e.g. can't be the primary basis of the order, less than 33% of the cost, the purchase will be made under a special order number, submit a minimum of three quotes and ensure the prices are fair and reasonable) *(Fed. Reg. 62445)*.

Contractor Pay Information Requirements Due January 1

Though the Fair Pay and Safe Workplace executive order is now on hold (some say it is on the "chopping block" following Trump's victory) one aspect of it is due to be implemented this Jan 1, new pay information requirements for federal contractors. Under the executive order, which applies to contracts worth over $500,000 being bid on, offerors must provide wage statements to certain workers detailing their total and overtime hours, pay rates, gross wage and any itemized deductions. In addition, businesses are required to inform their independent contractors of their status as non-employees. Though other elements of the EO are in limbo due to an injunction filed by a Texas court (e.g. violations of some 14 labor laws) the disclosure requirements are still in place.

Commercial Item Proposals Generate Industry Concerns

Recent Defense Department proposals on commercial items and reasonableness pricing is generating an avalanche of comments from influential industry groups. In August, DOD proposed amending the DFARS to implement the 2016 Defense Act to provide guidance to contracting officers. The proposal requires, among other things, COs to conduct market research "where appropriate," would define "market prices" used to determine the price of items deemed to be commercial as "current prices used that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or sources independent of the offerors." The proposal would also require contractors to provide data from subcontractors and require them to follow rules requiring certified cost and pricing data or other than certified data if the value of the subcontracts exceed the simplified acquisition threshold (currently $250,000). If additional data is needed by the CO, it should be provided on a 10 day time frame.

The Council of Defense and Space Industry Association (CODSIA) said (1) the definition focusing on "current pricing" is too narrow and should be replaced by "prices that have been" (2) should delete requirements of subcontractors to provide data because it goes beyond statutory mandate, subcontract pricing has no bearing on the commercial price offered to the government by the prime and it will be "exponentially" more difficult to require data from subcontractors on all tiers since such subcontracts may not even be negotiated at the same time as the prime and (3) a 30 day time limit is consistent with the time a head of contracting activity has to review a commercial item determination, not 10 days.

The American Bar Association's Section of Public Contract Law came out with recommendations to the proposed rule. To the proposal to allow COs to rely on prior commercial item determination by the DOD, the ABA calls for expanding the determination to all agencies. The ABA rejected the proposed rule that recommends that contractors on federal supply schedules be required to submit pricing data, citing a case that ruled all FSS items qualify as commercial items so asking for more data would be redundant. The ABA also addressed the laudatory rule that would make products and services of nontraditional defense contractors be treated as commercial items and recommended clarifying what such nontraditional defense contractors are.

Trump Victory Expected to Bring Significant Changes to Government Contractors

Though he has not yet been inaugurated as of this writing, we are seeing a proliferation of opinions on the likely impact of his unexpected victory on the government contracting community. A few examples include:

The Navy is following the Trump campaign pledge to increase the number of ships from 308 to 350 where the Navy is now asking for 355. The move is in contrast to Defense Secretary Ashton Carter's emphasis on quality, not quantity. The increases are expected to increase sales for General Dynamics and Huntington Ingals Industries and subcontractors for combat vessels, Lockheed Martin for its Aegis combat system and Raytheon for its electronic and missile defense systems.

Donald Trump is showing he is not reluctant to put on notice and speak out about Defense costs. On Dec 6 he zeroed in on Boeing's planned update to the Presidential jet Air Force One saying costs were "out of control" and six days later criticized the skyrocketing costs of Lockheed's F-35 fighter jet. At the same time, he said he will be proposing a ban on Pentagon procurement officials going to work for defense contractors.

requirement would not be met even though three WOSB firms performed the work. For practical purposes it is prudent to make sure that any first tier subcontractors will not subcontract any work unless the prime approves it.

Does Not Extend Across Small Business Programs

The new rule extended the similarly situated entity provision to all small business programs (e.g. veteran owned, WOSB, HUBZone, 8(a), socially disadvantaged, general small business). So for a general small business set aside contract, any qualified small business will count as a similarly situated entity. However, for program specific set asides like veteran owned or HUBZone, the similarly selected entity does not apply across all programs. So under the example above, if the WOSB prime under a WOSB set aside contract subcontracted the 30% instead to a SVDOSB firm, the SOL requirement would not be met. The prime contractor may want to receive a certification from the potential subcontractor as to which program it qualifies for or it may consult the SAM.gov system to verify the subcontractor's status.

Needs to be a Small Business for the Subcontract

The new rule clarified that the subcontractor does not need to meet the same size standard as the prime did. The SBA permits a small business prime to designate a North American Industry Classification System (NAICS) code specific to the work required by a specific contract while the specific NAICS code for the subcontract can be the same but does not have to be. A subcontractor can still be a similarly situated entity as long as it is small for the NAICS code that is assigned to the subcontract. This aspect of the rule allows teams to get creative. Especially where there are a variety of products and services for a contract, the prime can subcontract with a company that may not be small for one part of the contract but can be for another part.

QUESTIONS & ANSWERS

Q. None of our salaried employees incur uncompensated overtime (UOT) – any hours worked over 40 per week they are paid for. The only exception is our CEO who bills some time direct. I am concerned that the auditors will divide his salary for the year by the total hours on his timesheets which would result in his "effective rate" being lower than the billed rate where we would then owe money back to the agencies.

A. Yes you are vulnerable to the need to calculate an "effective rate" adjustment if that is your accounting practice. You have two other choices that the government recognizes as a legitimate treatment of UOT – either credit the overhead pool for the amount of UOT or provide a "pro forma" distribution of his salary to direct projects and indirect cost pool. Your method of accounting for UOT should be in a written policy. Also, the facts you present indicate that UOT is an immaterial amount of costs for your firm. Since neither DCAA nor the government require total time reporting if the amount of UOT is immaterial you may have the option of not recording UOT hours. You may, for example, allocate the first 8 hours reported in which case you would want to be able to demonstrate that cost reimbursable contracts are not allocated a disproportionate amount of the UOT hours and dollars.

Q. In our proposals we have escalated pay rates in out years. Do we have to raise the pay rate for employees as we escalate to avoid owing money back to the government? The confusion is that the escalation is different on every project (some clients don't allow it at all, others have differing percentages). What are the requirements for how we pay employees? I'm not sure if we have to escalate the payments to employees to exactly match the bill rates or not and how we do it if the rates are all different.

A. The answer to your question largely depends on the types of contracts you have. If you have either fixed price or time and material contracts, the rates you used to establish the price on your FP contracts or billing rates for T&M were estimates so actual costs cannot be used to revise those prices. The only exceptions is if you had some reopener clause on these contracts (rare) or if you had knowledge at the time you signed the contract that actuals would be different than you proposed. It's a different story for cost reimbursable contracts - you will owe money (or they may owe you) if actuals are different than what you billed.

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? We were told that the cost accounting standards limit a fiscal year to 15 months?

A. Last question first – since you are a small business your contracts are not covered by CAS. 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 Regulation does not require the 15 month rule. In this

with several provisions and that SBC violated several federal regulations. The appeals courts said the case should be settled based on the findings of the implied false certification in the light of the recent Supreme Court decision in *Universal Health Servs v. Escobar*. In Escobar, the Court held that implied false certification can support liability under two conditions (1) the claim does not merely request payment but makes specific representations about the goods and services provided and (2) failure to disclose noncompliance makes those representations half-truths. In addition, misrepresentations about compliance must be material to the government's decision to pay. The Court ruled the qui tam relator did not meet either condition, saying he offered no evidence that SBC offered any representations at all in its claims for payment, let alone false or misleading ones. In addition, the Court ruled the relator failed to establish materiality where the relator failed to show that the government decision to pay would have been different had it known of alleged non-compliance with Title IV regulations. On the contrary, several federal agencies had examined SBC several times and found neither administrative penalties nor termination was warranted *(US v Sanford Brown, 2016 WL 6205746)*.

GAO Sustains Rejection of Contractors Not Verifying They Have Adequate Accounting System

(Editor's Note. The following illustrates the trend that increasingly offerors have to demonstrate they have an adequate accounting system to be able to bill the government accurately.)

The National Institutes of Health disqualified two companies from an IT competition because they did not provide verification that they had an adequate cost accounting system. The GAO agreed, stating verification was a material solicitation requirement *(AttainX Inc., GAO B-413104)*.

NEW/SMALL CONTRACTORS

Clarifications of New SBA Limitations on Who You Should Subcontract With

(Editor's Note. We frequently receive inquiries by our small business readers and clients about who they can and cannot team with and how they must distribute their work while meeting the SBA rules on contracting. The rules change periodically so here is an update of the most recent one. We based much of our discussion below on an interesting commentary in the Oct 18 issue of Bloomberg BNA by Bryan King of Bass. Berry and Sims.)

Historically, the Small Business Administration has required a small business to perform a minimum percentage of work on every prime contract it is awarded. This is known as the Limitation on Subcontract (LOS) rule. For example, the LOS rule has traditionally required non-construction small businesses to perform 50% of the work with its own employees. Though laudable, this requirement has become more complex as small contractors team with several contractors, both large and small, to be able to perform more highly technical contracts where the result is there is often a balancing act to be able to use the expertise of their subcontractors while still complying with the LOS.

A new rule passed in June 2016 was intended to help manage this balancing act. A previous version of the LOS rule allowed certain categories of small businesses such as disadvantaged veteran owned small business (SVDOSBs) and HUBZone firms to use similar SVDOSB and HUBZone subcontractors at any tier and still get credit for meeting their LOS requirements. However, there was no such rule for other small business categories such as 8(a), women-owned firms or general small businesses.

The new rule introduced a uniform system applicable to all small business set aside contracts. Under the new rule, small business prime contracts must still perform a certain percent of the work but now the prime small business contractor can receive credit for work contracted to certain subcontractors that are "similarly situated entities." Similarly situated entities is a subcontractor that has the same small business status as the prime. Under this rule any first tier subcontractor of a similar situated prime entity can count as though the prime did the work. For example, if a women owned small business (WOSB) prime contractor performed 30% of the work, another WOSB first tier subcontractor performed 20% of the work and a large contractor performed the other 50% the SOL criteria would be met.

Only First Tier

In creating the new rule, the SBA extended the similarly situated entity only to first tier subcontractors. Even if a similarly situated entity is a second tier or lower subcontractor, work performed by them under the SOL rule would count the same as if it was performed by a large contractor and hence not meet the SOL. In the example above, if the first tier WOSB subcontract company subcontracted all or part of its work to another WOSB under a second tier subcontract, the LOS

Trump held a meeting with top technology executives Dec. 14 soliciting their help in applying data analysis technology to detecting and eliminating government waste, a key campaign pledge.

A Labor Department subagency that enforces affirmative action and nondiscrimination obligations along with several attorneys are stating the federal contracting environment is likely to become "more business friendly" with fast food executive Andrew Puzder as Labor Secretary. Mr. Puzder has a history of opposing many DOL regulations asserting they are a burden on business.

Many government contractors are expressing hope the new administration will keep its promise to wipe out "job-killing" regulations and reverse many of the executive orders Pres. Obama passed in the last eight years. Two EOs that are highest on contractors' wish list for elimination are (1) the Fair Pay and Workplace Act (EO 13673) that mandates contractors comply with 14 applicable labor laws and disclose violations of them where such disclosures will be required to be considered during evaluations for awards and (2) establishing Paid Sick Leave for Federal Contractors (EO 13706) where employees can earn up to seven days of paid sick leave including leave for family care.

In the light of Mr. Trump's emphasis on monitoring who comes across our borders, many commentators are expecting biometric technology to explode following an expected surge in such spending by the Homeland Security department.

Final Rules on Compensation, Technical Data Rights, IR&D and Gifts are Passed

Compensation. The Defense Department, GSA and NASA adopted as final with some minor changes the interim rules amending the FAR to implement the Bipartisan Budget Act. The final rule, applicable to contractor and subcontractor employees, revised earlier compensation limits and calculation formula and instead imposes a $487,000 limit per year on employee compensation (lower limits will likely apply to smaller and mid-sized companies if audited) for all contracts awarded on or after June 24. 2014. The final rule also implements a targeted exception to the allowable cost limit for scientists, engineers and other specialists an agency considers to be an exception to ensure access to needed skills *(Fed. Reg. 67778)*.

Technical Data Rights. DOD issued a final rule addressing rights to technical data related to major weapons systems that expands the application of the presumption that a commercial item was developed entirely at private expense. Previously, a provider of commercial items other than off-the-shelf items had to prove it was developed with its own funds when a CO challenged restrictions of technical data rights for contractors. Under the new rule, amending DFARS 252.227-7013, the term "developed exclusively at private expense" which provides highly limited rights to the government means development occurred when the costs were included as indirect costs (e.g. IR&D included in G&A costs), costs not allocated to government contracts or any combination *(Fed. Reg. 65565)*.

IR&D. The Defense Department issued a final rule amending the DFARS Section 231.205-18 to require proposed new independent research and development effort be communicated to appropriate DOD personnel before initiating those efforts. The new rule will require, as a condition of subsequent allowability of IR&D costs, contractors to engage in "technical interchange" with a technical or operational employee before initiating the IR&D effort starting in fiscal year 2017. The final rule has eliminated an earlier requirement of the interim rule to submit project summaries and annual updates of IR&D effort *(Fed. Reg. 78008)*.

Gifts to Federal Employees. The Office of Government Ethics (OGE) has issued a final rule, with some changes over earlier rules and guidance, on solicitation or acceptance of gifts by executive branch employees. The rule generally prohibits federal employees from soliciting or accepting gifts from a prohibited source or gift given because of an employee's official position. The final rule clarifies that a gift is given because of the employee's official position if it is given from a person other than an employee and would not have been given had the employee not held the position. The final rule also lays out exceptions to the general rule. Permissible gifts include, for example, noncash gifts worth $20 or less (with a $50 year limit), gifts based on personal outside business relationships, discounts generally offered to federal employees, free attendance at widely attended gatherings and gifts authorized by law or regulation *(Fed. Reg. 8141)*.

Lawyers Warn That Protest Forum is Not the Time to Challenge Negative Performance Reports

An article in the Dec. 6 Federal Contract Report reported that many attorneys are warning contractors that protest venues are inappropriate and ineffective venues to challenge performance reports. The attorneys say by the time a bad performance report is used to lose a contract

"it is too late to save the contract since a bid protest does not allow one to challenge a negative report." There are many reasons why poor performance reports are not challenged in a timely fashion (e.g. lack of resources to monitor them, poor communications between customer and contractors during contract performance, project people may not want to believe performance is not going bad where a subsequent negative report surprises the company) but nonetheless contractors must do so because negative reports will continue to hamper future awards. Contractors must have a plan in place to challenge negative opinions and be able to mobilize resources to challenge the reports quickly. So, for example, the agency often issues a notice of intent to issue an interim negative performance report where the contractor must issue in writing a response saying the assertions are false. In a week or two, a report is issued and contractor must issue a letter demanding withdrawal of the performance report. If the demand is rejected and the contract is terminated the contractor must file a complaint challenging the performance report.

DARPA Seeks Streamlined Contracting to Attract New Companies

The Defense Advanced Research Projects Agency (DARPA), the originator of much of our high tech innovations, is seeking to entice new contractors to apply innovative solutions by lowering the barriers to enter government contracting. According to DARPA it will be offering "a simpler contracting approach for companies and other entities that have not previously worked with DARPA or had large contracts with DOD." The new approach involves use of "Other Transaction Authority" which provides alternatives to FAR based contracting where customized agreements can be crafted and more flexible accounting and reporting flexibilities can be used that more closely mirror the commercial world. Any non-government entity with less than $50 million in DOD contracts the previous year is eligible to work with DARPA. Technologies it hopes to partner with include (1) Internet of Things sensor technologies to explore capabilities of local data processing and cybersecurity defense applications (2) wireless technologies to secure increased use of the congested electromagnet spectrum and (3) electronics capabilities useful for hardware and software.

Report on Small Business Marketing Costs and Win Rates for New Contracts

According to a new report by American Express OPEN for Government Contractors, government contractors are spending more money in seeking government contracts. Smaller contractors spent an average of $148,000 in 2015 hunting for contracts, an increase of 15% since 2013 and a 75% increase since 2009. The ratio of victories to bids submitted was, on average, 50% down from 55% in an earlier report while for subcontractors the win rate is 68%, down from 85%. The success rate rises with larger dollar contracts which is 65% for contracts valued at over $5 million and 29% for those between $250K-$1 million.

Potential Dueling CAS Boards are Possible in the Future

The 2017 Defense Bill created a new defense-specific Cost Accounting Standards Board but the extent of its authority, compared to the existing government wide CAS Board, is uncertain at this time. The Defense Board would be led by the Pentagon's CFO and would include three DOD representatives and three from the private sector where one would be a nontraditional defense contractor and one from a CPA firm.

Lockheed's Protest Loss Can Change How M&A's are Handled by Contractors

(Editor's Note. The following discussion is a painful reminder of how one of our former company's failure to properly inform the DOE of a divestment resulted in our company losing a $100 million contract it had won.)

In its bid for a $564 million DOD computing competition, its protest was rejected on the grounds it did not inform the Army Corp of Engineers that it would be divesting its Information Systems and Global Solutions (IS&GS) group where in its proposal it had list the group as one of its vendors. The divestment was ruled as creating additional performance risk and the government could not assess the realism of the IS&CS proposal. Commentators on the protest stress it should change the way contractors approach mergers and acquisitions saying (1) contractors should no longer keep bid and proposal teams separate from the teams working on the restructuring (2) contractors should be careful to disclose specific details to source selection officials so they understand the likely effects of a major restructuring transaction and (3) the decision resembles an August decision to rescind a $5 billion contract to another Lockheed subsidiary where it did not show it was part of a Leidos acquisition of Lockheed's information technology and services unit.

CASES/DECISIONS

Energizer Looses "Buy America" Battery Challenge

(Editor's Note. The following illustrates how the Buy America provisions can prevent award to a well-known supplier. Comments on the case indicate it can lead to more operations being done in the US to comply with the Buy America Act.)

The Buy America Act bars the government from purchasing certain products that are not produced in the US. Though there are exceptions (e.g. domestic purchases would cost too much) goods made with parts made outside the US may still qualify if they are "substantially transformed" in the US. Unlike regular flashlights the ones in question here are extremely rugged, waterproof and receive infrared where the flashlights are made with about 50 parts manufactured in China and assembled, tested and packaged in the US. Energizer asserted the flashlights are substantially transformed in the US but the court disagreed saying these activities do not constitute substantially transformed. It said the operations in the US does not change the name and parts of the flashlight where the work here is simple, consisting of adding the parts and screwing them together, taking 7-14 minutes a piece *(Energizer Battery Inc. v US, 2016 BLA06469).*

Army Must Consider Commercial Solution of Palantir in Its Data Weapon System

Palantir sued the US after losing a challenge to the Army's bid selection process that ruled out any commercially available sources for upgrading its Distributed Common Ground System (DCGS), a project it has been developing for 15 years at a cost of $6 billion. Palantir is owned by Peter Thiel, billionaire founder of PayPal and early investor in Facebook who is on Trump's transition team. Palantir contended it had been barred for competing for the contract and its offering was touted as the best solution for the DCGS. The judge ruled the Army failed to consider commercially available options, effectively shutting out the Silicon Valley firm from bidding and ordered the Army to restart the process of evaluating technology that already exists which puts Palantir back in the running for the lucrative contract (*Palantir USG Inc. v US, Fed. Cir. No. 16-cv-00784).*

DOD Should Have Stopped Procurement

(Editor's Note. Stopping contract performance is often the primary motive for protesting an award and the following shows when this is the case, filing a protest with the GAO is the best move.)

The Government awarded three contracts on Sep 27 for technology services and Favor filed a protest with the GAO on Oct 7 seeking an automatic stay of performance. The agency said the protest did not meet the 10 day filing deadline asserting the contract date was Sep 26, not Sept 27. The Court of Federal Claims stated the government could not demonstrate the award was Sept 26 and ruled therefore Favor's protest was timely and entitled Favor the automatic stay. It stated the automatic stay provision in the Competition in Contracting Act (FICA) is a major benefit of protesting a contract award to the GAO over the Court of Federal Claims because the GAO stops the agency from moving forward with what could be an unfair selection *(Favor TechConsulting v US Fed. Cl., No 16-136C),*

Court Upholds Decision against Awardee for Unequal Treatment

(Editor's Note. The following case is being touted as a classic case of treating one offeror differently than another.)

In a Veterans Administration veteran owned set aside contract to supply medical supplies, Progressive challenged numerous aspects of the competition. The court ruled in Progressive's favor in most instances. The findings include: (1) VA held discussions with one offeror and not the other, permitting the offeror to modify its proposal based on these discussions (2) applied a stated evaluation criteria in the solicitation differently for one offeror over the other (3) noncompliance with the evaluation plan – an agency document that describes an evaluation process and methodology – was a valid basis for the protest where it should cause agencies to think twice about deviating from its terms (4) the contracting officer improperly delegated authority to establish the competitive range to a technical team's evaluators and (5) the CO seemingly hid the deficiencies of the awardee from these evaluators *(Progressive Inds Inc. v US, Fed. Cl. No. 14-1225C).*

Court Address Implied Certification and Materiality After Escobar Decision

(Editor's Note. The following case illustrates the evolving implications of the recent Supreme Court Escabar case that seems to expand the conditions for when a contractor is subject to false claims assertions.)

A former employee of Sanford Brown College (SBC), a for profit college, brought a qui tam case alleging its recruitment and retention practices resulted in false claims to the government under the False Claims Act. The FCA claim asserted that Title IV of the Higher Education Act conditioned payments to compliance