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# GCA REPORT

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## NEW DEVELOPMENTS

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### CAS Board Clarifies FFP CAS Exemption

The Cost Accounting Standards Board issued a final rule, effective March 30, revising the CAS exemption for firm fixed price contracts and subcontracts awarded on the basis of adequate price competition without the submission of certified cost or price information. The final rule explained that when it was originally promulgated in 2000, cost or pricing data was understood to mean *certified* cost or pricing data. However, with changes to the FAR in 2010, the phrase could also mean cost or pricing data without certification so the final rule seeks to clarify that the original promulgation of certified cost or pricing data applies. Also exempt from CAS is a business segment with a contract or subcontract less than \$7.5 million if it has not been awarded a CAS covered contract worth less than \$7.5 million.

### Contractors Happy About 2019 Defense Budget Proposals; DOD Struggles to Spend More in 2018

The Defense Industry is reacting favorably to Pres. Trump's 2019 budget request. The \$686 billion request for 2019 represents a 12% hike to 2018 total funding. The overall request is \$716 billion for national defense which represents nuclear weapons. Defense industry groups are praising the request for recognizing a growing defense need while Congressional Democrats are criticizing the requests for sizable increases while ignoring massive budget deficits.

Some commentators are saying DOD Secretary Mattis has a problem others only fantasize about – his agency has more money than it knows how to spend. Since the passage of the Budget Control Act of 2011, Congress has appropriated only the capped amount in the Act so now assuming Congress approves the delayed 2018 budget DOD will have only six months to spend the sizable increased budget amount of \$619 billion (up from \$549 billion in 2017) before the fiscal year ends Sept. 30th. Using this extra money in six months means DOD will have to spend up to \$186 million more than the current

contracting rate everyday for the rest of the fiscal year. The problem is magnified by the “80-20 rule” – DOD cannot spend more than 20% of its budget in the last two months of the fiscal year.

### DOD Waiver on TINA and CAS Thresholds Increase to \$2 Million

The Defense Department has issued a class deviation which increases TINA (Truth in Negotiations Act) and CAS (Cost Accounting Standard) thresholds to \$2M, effective for all contracts executed on or after July 1, 2018. The class deviation will apply to all defense contracts until the FAR is modified to reflect the change. All other non-DOD agencies will continue using the current \$750K thresholds.

Lessons from the change include: (1) this will provide some relief for contracts between \$750K and \$2M (2) small businesses will not be affected by the CAS change since they are not covered by CAS (3) benefits to prime contractors will increase since they will no longer be subject to TINA flow down clauses for subcontracts worth less than \$2M and (4) there will be less exposure to defective pricing audits which DCAA has announced will increase following the closure of its incurred cost audit backlog.

### DCAA Issues Guidance on Changes to ICP Timings

Implementing the 2018 National Defense Acquisition Act, the Defense Contract Audit Agency has issued guidance on “Timeliness of Incurred Cost Audits.” DCAA must now notify contractors within 60 days after receiving an incurred cost proposal (ICP) whether the submission is adequate as defined in FAR 52.216-7(d) and evaluated using DCAA's “Checklist for Determining Adequacy of Contractors' Incurred Cost Proposals.” Additionally, for ICPs received after Dec 17, 2017, audit findings must be issued for an ICP audit not later than one year after receipt of the submission (which is subject to a waiver by the DOD Controller). The one-year requirement to issue audit findings is from the date of receipt of a qualified submission, not the date DCAA determines the submission is adequate.

Comments on the guidance have generally been positive with some reservations expressed. For example, some are noting that DCAA is expected to be even more harsh in its evaluations of submission adequacy. The faster one-year turnaround may result in faster demands for responses to inquiries and requests for data. The faster turnaround may also result in more audit findings which question “unsupported costs.” Finally, faster reporting of audit findings does not equate to faster resolution of those issues that are challenged by contractors (*MRD-18-PIC-001*).

## Army is Not Adequately Administering Subcontracting Plans

In a widely reviewed report, the Defense Department’s Inspector General Office issued a report saying contracting officers had not consistently administered small business subcontracting plans or ensured that contractors provided adequate subcontracting opportunities at the Army Contracting Command (ACC). FAR Part 19.7 requires contracts over \$700,000 awarded to other than small business contractors have a subcontracting plan if opportunities exist for small businesses. They must report their subcontracting data in the Electronic Subcontracting Reporting System (eSRS) and if they fail to make a good faith effort to comply with their plan they may be liable for liquidated damages equal to the actual dollar amount they failed to achieve in their plan. The IG reviewed 50 contracts where 27 provided small business opportunities while 23 failed to provide them. ACC officials told the IG that problems occurred because COs did not understand subcontracting plan requirements or highly prioritize subcontracting plan administration. The report found that on 17 contracts COs failed to determine whether prime contractors had made a good faith effort to comply with their subcontracting goals or whether liquidated damages should be assessed.

## Bill Would Restore Quick Payment Goals for Small Businesses

A new bill called The Accelerated Payments for Small Businesses Act of 2018 was introduced March 29 requiring the government to set a goal to pay small business contractors “within 15 days of receiving a proper invoice” and for prime contractors to do the same regarding their small business subcontractors. The Professional Services Council has said the reason for the bill is a response to the failure of the Office of Management and Budget decision not to renew a key policy directive to ensure small businesses working in the federal marketplace are paid in a timely manner for the goods and services they provide.

## DOD Bolsters Postaward Debriefing Rights

In a class deviation waiver issued by Shay Assad, Director of Defense Procurement and Acquisition Policy, DOD contracting officers must now afford unsuccessful offerors in postaward debriefings “an opportunity to submit additional questions related to the debriefing within two business days after receiving the debriefing.” FAR 15.506(a) requires agencies to provide post award debriefings to unsuccessful bidders on written request within three days of award notification. Assad said that now, effective immediately, COs should include the opportunity to submit additional questions in the required debriefing information listed in the FAR section. The agency must respond in writing within five days of receiving the additional questions. The debriefing period remains open until the agency provides its responses. The timing may be significant since under FAR 33.104(c) an agency must suspend contract performance if an unsuccessful bidder protests at the General Accounting Office within the latest of (a) 10 days of award (b) five days of a debriefing date offered to a protester if there are no additional questions or (c) five days after the agency delivers its response to additional questions.

## Changes to Commercial Item Buying

The Department of Defense has revised and reissued the DOD Guidebook for Acquiring Commercial Items to incorporate recent changes to the Defense Federal Acquisition Regulation Supplement (DFARS) and several National Defense Authorization Act changes. The guidebook has two volumes; the first addresses prior commercial item determinations, market research activities, and use of commercial item procedures for non-traditional defense contractors; the second volume addresses pricing including market research, pricing analysis, preparing for negotiations and the contractor’s role in supporting reasonable price determinations. The guidebook is written “for anyone seeking additional commercial item information” (*we use it to help clients justify and price out their commercial items*).

In addition, Section 809 Panel which advises DOD, in its 600-page report has a section addressing ways to facilitate commercial items. Examples include revising FAR to eliminate inconsistent definitions such as substituting one definition for subcontractors rather than 27, revising the DFARS provision for protecting technical data rights and eliminating 165 government unique contract clauses that impede use of commercial item contracting.

## Survey and Rule Changes Show Increase in HUBZone Awards

New statutory regulations require the Small Business Administration to process Historically Underutilized Businesses Zone certification applications within 60 days of receipt of “sufficient and complete documentation” and to “develop a publicly accessible online tool that depicts HUBZones.” The HUBZone program allows agencies to award set-asides, sole source contracts and price preferences to certified small businesses in areas with low income, high poverty or high unemployment. Recent statistics demonstrate an interest in utilizing the HUBZone program where as of January there were 6,026 active vendors and in 2017 the government awarded 80,602 contracts worth \$7.3 billion to HUBZone firms.

## Bill Would Create Preference for DOD Firms Employing Veterans

A bi-partisan bill introduced in the House called The Encouraging Veterans Employment Act will authorize the Defense Department to employ preferential treatment for businesses that “employ veterans as a large percentage of their workforce.” If passed, DOD may give preference to offerors that employ veterans on a full time basis when procuring goods and services. DOD currently has similar provisions allowing preferences to women owned firms. In 2016, a similar bill was passed giving the Department of Veterans Affairs contractors a preference if they employed veterans on a full time basis.

## E Proposals are Increasing But Paper Still Reigns

Federal agencies are allowing contractors to submit work proposals to the government electronically more and more these days. However, most requests for proposals (RFPs) still require contractors to submit their pitches in paper formats which is still the default method despite recognition it is unnecessarily costly and time consuming. Even with the slow trend, other means such as videos and websites are moving even slower. This is still “an antiquated system” say industry representatives.

## House Democrats Seek to Expand “Buy America”

Both Republicans and Democrats are competing to see who will lead the “Buy America” efforts. Most recently 20 House Democrats introduced the Buy America Act 2.0 to “require all federally funded infrastructure projects use materials made here in America.” Citing goals of increasing US employment under the bill, all transportation and

infrastructure projects using federal funds may not be approved unless steel, iron and manufactured goods used are made in America. “Buy America” refers to several statutes and regulations that impose domestic content restrictions

## GSA Releases Its Portal Plan

Industry seems to be approving the joint General Services Administration and Office of Management and Budget’s plan to commercialize its purchases of small, off-the-shelf goods by creating “e commerce portals.” The selected portal providers, which will include two or more online retailers such as Walmart, Staples and Amazon, will be paid a fee to sell goods to federal agencies through the GSA portal. The GSA is also studying a “portal of portal” approach which is likened to a “kayak experience” (named after the travel website that aggregates searches for travel) where contracting officers can go to one portal to make its purchases rather than the current system of having six or seven commercial portals available.

## GAO Finalizes Changes to Bid Protest System

The Government Accounting Office has issued a series of changes to the bid protest process including details about a new electronic filing system. Beginning May 1 protesters may be obligated to use the GAO’s soon-to-be-unveiled Electronic Protest Docketing System (EPDS) to file new protests and update and monitor existing cases. Previously, bid protest cases were maintained through various communications including email and postal mail where there will be a \$350 fee. The GAO also clarified that the filing deadline for any particular day will remain 5:30 Eastern Standard Time which will count only if the filings are received by EPDS by that time. Protest lawyers are calling the change the most significant change in years.

## Sales Opportunities

- **Aircraft Delays Mean More Business for Maintenance Providers**

As delays in procuring military aircraft continue to increase there is likely to be increased opportunities for companies that maintain aircraft. Though delays and rising costs in advanced aircraft and development programs are not unusual, the problem is efforts to speed up the process have had limited success. Whereas development of new military aircraft is usually limited to

a small number of large companies, vendors that provide maintenance, logistics support and training will have more chances to win business in this environment.

- **Cybersecurity Funds to Flow to Agencies Under Omnibus**

With cybersecurity being perhaps the newest concern, federal agencies will have more money than in prior years to curb cyberattacks against US elections, energy systems and infrastructure from the 2018 omnibus spending law. Examples of cybersecurity measures in the Omnibus bill include:

(a) \$380 million in funding for the Election Assistance Commission to help states upgrade their election computer systems and counter cyberattacks where funds will be used to (i) install equipment with voter-verified paper records (ii) implementing post-election audit systems (iii) address cyber vulnerabilities by the Dept. of Homeland Security (DHS) and (iv) provide cybersecurity training to state and local election officials.

(b) An agreement to provide \$7.9 billion for the Defense Department's cyberspace operations and related research.

(c) \$1.09 billion in operations and procurement funding for DHS's National Protection and Programs Directorate to protect civilian federal networks from cyberattacks.

(d) \$100 million to GSA's Technology Modernization Fund to establish IT working capital funds with each large federal agency.

- **Airforce Releases \$6.4 Billion Crises Support RFP**

The Air Force released a draft RFP for a 10-year contract that can deliver a \$6.4 billion on-demand boost in troop support worldwide. The contract draws on resources and expertise from the private sector for a full range of base operations and logistics support services such as contingency planning, deploying and training troops and emergency construction. Awards for 4-8 contractors are scheduled for 2020.

- **Three Takeaways from JEDI Cloud Industry Day**

Contractors attended an industry day for the Pentagon's highly anticipated Joint Enterprise Defense Infrastructure (JEDI) cloud computing contracts. Three key take aways included (1) DOD will issue a single ID/IQ, winner take all, contract (2) despite "infrastructure" in the name, JEDI

will be a platform-as-a-Service (PaaS) and (3) JEDI will not replace every cloud contract...yet but is expected to replace many contracts as they expire.

In other actions, Congressional representatives are expressing concerns that one firm, Amazon, may be given a multi-year contract for cloud services worth billions of dollars. In May, the Pentagon announced it would choose one vendor for the contract where Amazon is the favorite to win, prompting criticism and a slew of lobbying actions by Microsoft, IBM and Oracle.

## CASES/DECISIONS

### No Adequate Comparative Analysis of ManTech's Higher Bid

DOD selected Buffalo's \$771M bid over ManTech's \$846M higher technically rated bid in a best-value competition to provide IT services where ManTech protested saying the government failed to conduct a proper trade-off analysis on why its premium price was not justified. The GAO sided with ManTech ruling the agency did provide a brief recitation of ManTech's strengths but lacked a substantive proposal comparison or the rationale for why ManTech's higher rated proposal was not worth the premium price offered. The GAO ruled the agency must make a new award decision with a reasonable documented comparative analysis of the proposals and the rationale for any cost/technical tradeoffs (*ManTech Advanced Systems, GAO B-415497*).

### Spinoff of Business That Will Perform the Contract Did Not Invalidate the Award

*(Editor's Note. We have seen several instances of contractors losing recently won contracts after their business units were sold in a corporate restructuring before performing the contract. The following provides some guidance on how to lessen the chances of this occurring.)*

As one of its protest arguments two unsuccessful offerors protested the award of an IT support contract on the grounds that Lockheed's IS&GS business unit, the winner of the contract, was sold to Leidos. Lockheed's price proposal disclosed the pending sale and stated (1) Lockheed had entered into an agreement to separate and combine IS&GS business with Leidos (2) the transaction was expected to close in 2016 (3) in the interim, IS&GS would operate as a Lockheed business (4) the Government IT business was part of the IS&GS business (5) Lockheed

structured the proposal so that the transaction would not materially affect performance of any resulting contract (6) Lockheed personnel, equipment, technology or services identified in the proposal would be converted to a subcontract or supply agreement with Leidos covering the same products, services and capabilities in the same quantities and same pricing terms (7) Leidos and Lockheed agreed that certain fringe benefits and back office functions not included with the IS&GS business would continue to be provided by Lockheed during the transition period (8) the transition period would provide enough time for a seamless transition to Leidos' systems to ensure contract performance without disruption. The Comp. Gen. rejected the protester's assertion that the agency failed to assess the impact of the corporate transaction saying protest decisions on corporate restructuring was highly fact specific and turns largely on the timing and circumstances of the transaction. It cited *IBMUS (B-409806)* ruling that if an acquisition or restructuring does not appear likely to significantly affect cost or performance and the offering entity remains intact with the same resources reflected in the proposal the acquisition does not render the agency's award decision improper which is the case here (*Enter. Serv. Comp. Gen. (B-415368)*).

### **Removal from \$50B GSA Competition Was Unfair**

Centech said it had taken steps to secure signatures on its past performance forms but the contracting officers refused to sign the forms dispute there being no disagreement about Centech's performance. The GSA reduced some points from its proposal due to the absence of signatures resulting in their not being within the award range for a \$50B GSA Alliance 2 Large Business contract. The Appeals court ruled that is was unfair to remove Centech from the award stating the GSA had sufficient information about Centech's past performance concluding the agency should have taken action such as waiving the signature requirement or contacting the COs for direct verification (*The Centech Group, v U.S., Fed. Cl., No 17-2031C*).

### **Government is Not Entitled to a Credit For Unperformed Contract Work**

The Army Corps.' contract provided that AWC had to build two temporary bridges to gain access to one of the bridges it was required to build. Concerned it would not have enough time to complete the required bridge if it had to build two temporary bridges it sought instead to gain access to the bridge construction sight via a levee from a

local water district which it did. Though the Corps. never explicitly approved the levee plan both the Corps' resident engineer (Macias) and administrative contracting officer testified they knew of the levee plan and had not objected to it. It was not until the work was completed that Macias sent a letter to AWC demanding it submit a proposal for the credit owed for the cost savings of not having to build the two temporary bridges. AWC disputed any credit was owed and the CO issued a final decision for the credit. The Board began its analysis saying it was clear that AWC was required to build the two temporary bridges and that when it failed to perform the Changes clause permits the CO to make an equitable adjustment to deduct the payment owed for the cost it would have incurred if had complied with the contract. However, the ASBCA states the law provides that the government may waive strict compliance with contractual requirements and then be "estopped" from later re-imposing those requirements on the contractor. It ruled it was undisputed that the two Corps. representatives were aware of the levee decision where AWC not only believed it had the government's consent but it also relied on that consent. The ASBCA concluded the Government was not entitled to recover the contractor's cost savings for the two bridges because that requirement was waived. It stated that the contract requirement for the temporary bridges was "dead" and hence the Changes clause did not apply because the two temporary bridges were no longer required (*American West Constr., ASBCA No. 61094*).

### **DLA Improperly Declined to Consider Manager's Past Performance**

The RFP asked offerors to provide past performance information from prior customers and if not available a different rating could be achieved if the offeror proposed management personnel who had a successful record of performance on relevant contracts. EUC provided past performance information on three prior contracts and on three vice presidents. The source selection committee gave EUC an "unknown confidence" past performance rating finding none of the prior contracts were relevant to the one being bid on and the three vice presidents were also not relevant because the experience shown was for individuals and not the company as a whole. In its protest EUC argued the agency erroneously found none of its past performance references were relevant because the solicitation permitted offerors to utilize management personnel's past performance to demonstrate a successful past performance record while the DLA argued only one recent vice president of operations was offered and no corporate experience was offered. The Court sided with EUC ruling nothing in the record showed DLA

considered the VP of Operations' past performance information but rather just concluded it was irrelevant because it represented an individual and not the company, finding that the solicitation did contemplate a different rating if an offeror submitted past performance of a proposed management personnel (*E. Coast Utility Contractors, Comp. Gen Dec. B-415493*).

## Contractors May Learn There is No False Claims Silver Bullet

Many people would conclude that if the government continued paying a contractor knowing that a possible fraud had occurred then the alleged fraud must have been too unimportant to the government and a false claim case would fail for lack of materiality. The Supreme Court has ruled previously that this defense is not a "silver bullet" where payment must be only one consideration of whether the claim should be invalidated. Two lower court cases concluded the defense was sufficient where now two companies are petitioning the Supreme Court to consider whether the payment is a "silver bullet."

# SMALL/NEW CONTRACTORS

## Labor Interviews

Many of our readers are reporting increased floor checks are occurring. We suspect it may be because DCAA auditors are experiencing less demands for incurred cost audits and certain systems audits so for whatever reason we thought it would be a good idea to revisit the topic of labor interviews during floorchecks so they can have an idea what to expect. Though some veteran contractor personnel have experienced floorchecks we find that both new contractors and many relatively new people within veteran contractors' organizations are unfamiliar with DCAA's approach. Based upon our experience as consultants and former DCAA auditors as well as DCAA's own updated guidance we have set forth what you can expect during a labor interview. Feel free to copy this article and distribute it to people within your organization - employees likely to be interviewed, project managers, supervisors, internal auditors, human resources - who may benefit. It should be stressed that DCAA's written guidance is still oriented to "manual" timekeeping practices even though electronic versions predominate.

*Pre-interview Analysis.* Auditors are instructed to review their Contract Audit Manual Chapter 6-404, identify high risk areas (e.g. locations where employees work on cost type and T&M federal contracts), determine which employees to interview (e.g. all or a sample, depending on the number) and evaluate time cards (we use time card and time sheets interchangeably) of selected employees looking for changing charge patterns, corrections, alterations, white outs, indications of someone other than the employee entering information, etc.

*What to look for during the interview.* Auditors are told to conduct their interviews at the employee's work location, attempt to ascertain labor mischarging and level of compliance with the contractor's timekeeping controls, record employees' complete responses noting inconsistencies or reactions, obtain available documentation to substantiate labor efforts, seek leads that other people may be involved in labor mischarging and, if appropriate, interview management, accounting, timekeeping and other personnel to clarify employees' statements.

The actual interview will usually be conducted by two auditors - one asking questions, the other writing responses and taking notes. Auditors may have pre-written questionnaires that can vary somewhat or none at all but you can be reasonably sure they will do the following:

1. Identify basic information - date, time, location, employee name, number, job title, department and supervisor.
2. Determine if the employee is present and if not find out where he/she is.
3. If absent, they may pick another employee for their follow-up. If a follow-up on the missing employee is not planned, then they will, at least, conduct steps to verify the employee's existence (e.g. observe work areas, review personnel/ security file, conduct a telephone interview).
4. Examine the timecard to determine:
  - Is it in employee's possession
  - In ink
  - Completed through yesterday's date
  - Signed only after completed being filled out
  - Free of alterations

Be aware, that electronic timekeeping practices need to have equivalent controls in place. (e.g. secure access to timesheet, audit trail for changes before and after posting).

5. Separately list the labor charges (hours and accounts by day) from the timecard. If the timecard is incomplete, the employee is asked to complete it and the auditor will add the changes to their list

6. To verify the timecards, the auditor will ask the employee what they were working on when they were approached (job number, project name, indirect function and account) and to describe the employee's work related activities for each job as well as when the employee first began work. The auditor will likely ask for technical instructions (e.g. job description, blueprints, project report) or other work-related documentation such as work authorizations where the auditor can verify that the appropriate job was charged to work performed. He will either visually examine the documentation or ask for copies.

7. Other questions most like to be asked are:

- a. Was the employee preparing the timecard when the auditor arrived
- b. What basis – hourly, daily, weekly, other – does the employee usually complete the timecard
- c. What administrative instructions was the employee provided for completing the timecard
- d. Who approves the timecard
- e. When are timecards turned in
- f. Give a few examples of indirect effort and codes/accounts for indirect effort
- g. If employee is salaried, are they paid overtime. If not, how is overtime recorded; is yes, how is salary equitably allocated to all effort

If overtime is not paid and total time is not recorded, the auditor will attempt to determine whether the failure to report total time will have a material impact on charging contracts. To ascertain the level of uncompensated overtime, the auditor will ask whether overtime was generally worked in the last several weeks and whether the employee typically works on more than one assignment during a pay period.

## QUESTIONS & ANSWERS

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**Q.** I live about 200 miles from Denver and always fly through Denver and catch a connecting flight home. I have two business trips planned with a few days in between and rather than flying home I was wondering if I can go to Denver and stay there a few days before heading

out on my next trip. What do the travel regulations say about this?

**A.** We recently reported on an appeals case similar to your situation and it appears that you can charge the government for the Denver stay (hotel and per diem) as long as the savings of not flying home exceeds costs of the Denver stay.

The related case allowed a civilian employee of the government to stay two days in Atlanta – authorizing payments of hotel and per diem expenses for \$144 – which saved the government \$433 on reduction of airfare for flying into Atlanta rather than home. The Board ruled since the stay in Atlanta resulted in combining what would have been two separate trips into a single longer one saving the government money, the employee was entitled to not only the hotel expenses requested but also per diem and incidental expenses for the two days.

**Q.** In one of the exhibits in DCAA's ICE model, DCAA asks us to complete the executive compensation exhibit that asks about "sales scope" for each executive. What is this about?

**A.** Most people would agree that it is intended to provide a way for DCAA to question certain executive compensation costs. So if a company CEO or CFO is in charge of a company's total revenue (say \$25M), other executive positions such as sales executive might have province over lower "sales scope" (say a \$5M division) which would allow DCAA to use a salary survey that benchmarks appropriate compensation for sales executives of a \$5M rather than \$25M company. Be careful when identifying a "sales scope" that is different than the entire company revenue because you can be opening yourself up to have compensation questioned as excessive. We have also seen the opposite effect producing a more desirable outcome when a sales or operations executive is in charge of corporate sales and operations functions and uses the higher corporate revenue "sales scope" while the CEO or CFO may be the head of only a division's operations forcing use of a lower "sales scope" for them.

**Q.** We recently were notified that we were not selected for award of a large MAS IDIQ. We have filed a protest. Are the legal fees associated with the development of and submission of our protest allowable?

**A.** Protest costs are generally considered to be unallowable legal costs. Many contractors find the legal costs worth the opportunity to have the government reconsider their bid and possibly win. In addition, if you clearly prevail you might be able to claim reimbursement for your

protest costs.

**Q.** We accrue for our estimated state income taxes in the current year and I intended to reflect the accrual in both our incurred cost submittal and forward pricing rates. Our controller said the income taxes are unallowable. Who is right?

**A.** You and your controller are both right or wrong, depending how you look at it. State income taxes, as opposed to federal income taxes, are allowable according to FAR 31.205-41, Taxes. Claiming the accrued taxes (that is, the estimated amount) on your incurred cost proposal would be improper – you need to include the actual taxes paid. For the forward pricing proposal, estimated taxes should be acceptable since forward pricing rates are primarily estimates of future expenses.

**Q.** We are a subsidiary of a large company and believe extensive referencing of our parent's resources will help us win a contract we are pursuing. Our parent company is quite willing (even anxious) to participate in the contract but refuses to sign anything that would commit itself to the government. Can we still reference the resources or should we not discuss them since our parent refuses to formally commit itself?

**A.** Discussing how your parent's resources will enhance contract performance provides a powerful competitive advantage and we have seen many subsidiaries win contracts largely based on their parent's competencies. An agency does have the discretion to ask for a formal agreement from a parent but, in our experience, such a request is quite rare. An agency is pleased to see considerable resources used to help make a procurement successful and understands that it is usually in both the subsidiary and parent's interest to help meet the

objectives of the contract without having to unnecessarily complicate the procurement with formal agreements and other such red tape.

We remember a case a few years ago reported in the Nash & Cibinic Report. A subsidiary of Hallmark (Ensemble) extensively referenced Hallmark's technical, manufacturing, systems and financial strengths in a successful competition. A bidder protesting the award stated the agency should have obtained a formal written notice from Hallmark that would back up its commitments to help Ensemble perform the contract. The court rejected the protest stating it is quite proper for an agency to consider a parent's resources in performing the contract with or without a formal agreement and furthermore, it is rational for an agency to risk that a parent will not help perform. The Court cited with approval numerous cases where agencies were found to have properly used parents' resources in evaluating the capability of subsidiaries without requiring formal agreements.

**Q.** We are a systems engineering, professional services firm and are considering breaking up our overhead rate into separate rates – one for fringe benefits and one for non-fringe benefit overhead costs. Is this common and are there any benefits for doing so?

**A.** Yes it is quite common to have a fringe benefit and overhead rate. As for benefits, it depends. For example, if the fringe benefits for direct labor "follow" the direct labor (i.e. are charged directly to the benefiting contract) then your direct charges may be higher and your overhead rate would be lower. Your customers may or may not like the changes depending on who gets charged the higher direct costs or who get the benefit of the lower indirect rate.