



Government Contracting Update Series

Stay Current on Federal Contracting Changes & Developments

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Agenda

- Regulatory Update
- Legislative Update
- Notable Legal Decisions

Regulatory Update

Final Rule: Exemption from Certified Cost or Pricing Data (84 Fed. Reg. 27,494)

- Eliminates and exemption to the requirement to provide certified cost or pricing data
- Previously, contractors were exempt where the presumption of competition existed.
- FAR 15.403 now reads:
 - (i) A price is based on adequate price competition when -
 - (A) Two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement;
- DoD, NASA and the Coast Guard must obtain certified cost or pricing data when only one offer is received and no other exception applies
 - regardless of whether a contractor reasonably expected competition, and priced accordingly.
 - a successful offeror may have to submit a second, TINA-compliant

Final Rule: Preference for Certain Commercial Items and Services (84 Fed. Reg. 39203)

- Establishes a new DFARS clause (212.272)
- Restricts contracting officers from entering into contracts in excess of the Simplified Acquisition Threshold for facilities related, medical or transportation, or knowledge-based services which are not commercial
 - An appropriate official must decide that no adequate commercial services exist
 - For contracts above \$10 million, the head of the contracting activity, combatant commander or undersecretary of defense for acquisition and sustainment
 - For contracts below \$10 million, the contracting officer

Final Rule: Definitization Rules for UCAs (84 Fed. Reg. 39204)

- Adopts (without substantive changes) the proposed rule relating to the definitization procedures for undefinitized contract actions (UCA)
- Allows the government to permit 90 day extensions to the 180 day maximum, pursuant to higher level approval
- Provides additional oversight for unilateral definitization of contracts greater than \$50 million
- Interestingly, the 90 day extension period fails to enact Congress's intent for Section 811, to expedite negotiation

Final Rule: Use of Fixed Price Contracts (84 Fed. Reg. 65304)

- Dictates that contracting officers have a preference for Fixed Price Contracts
- Requires head of contracting activity approval for all cost type contracts in excess of \$25 million issued after October 1, 2019
- Applies to foreign military sales

Final Rule: Nondevelopmental Items as Commercial Items (84 Fed. Reg. 54760)

- Broadens the definition of a commercial item by allowing items developed exclusively at private expense to qualify as a commercial item
- The changed definition allows non-developmental items to qualify as CI when the items are sold in substantial quantities, on a competitive basis to multiple foreign governments
- Change is geared toward reducing non-commercial transactions and to decrease the cost per transaction

Class Deviation – Performance Based Payments (2019 –00011)

- Effective August 20, 2019, contracting officers must deviate from the clause provisions at DFARS 232.1005-70 and use the clauses included in the deviation.
- Clauses are provided for performance based payments on either a whole contract or deliverable item basis
- Also provides additional language related to a contractor’s incurred cost:

“Incurred cost is determined by the Contractor’s accounting books and records, to which the Contractor shall provide access upon request of the Contracting Officer for the administration of the clause. An acceptable job order cost accounting system (per DFARS 252.242-7006) is not required for reporting of incurred costs under this clause. If the Contractor’s accounting system is not capable of tracking costs on a job order basis, the contractor shall provide a realistic approximation of the allocation of incurred costs attributable to this contract in accordance with Generally Accepted Accounting Principles (GAAP) and the Contractor's accounting system. FAR 52.232-32(m) does not require certification of incurred costs. “

MRD – Audit Guidance on Using Materiality in Incurred Cost Audits

- Incorporates Professional Practice Guide language, including quantitative materiality threshold
- Recommended Materiality Thresholds for Incurred Cost Audits

Subject Matter Cost	\$100K	\$1M	\$10M	\$100M	\$500M	\$1B	> \$1B
Materiality Amount	\$5,000	\$28,117	\$158,686	\$889,140	\$2,973,018	\$5,000,000	Varies
Materiality Percentage	5%	2.81%	1.58%	0.89%	0.59%	0.50%	0.50%

For Incurred Cost Proposal Audit Subject Matter from \$1 to \$1B calculate:

Materiality Threshold = \$5,000 x ((Total Subject Matter / \$100,000) ^ .75)

For Incurred Cost Proposal Audit Subject Matter greater than \$1B calculate:

Materiality Threshold percentage of 0.50 percent

- Materiality thresholds currently apply to incurred cost audits only

Cost Accounting Standards Board

- No recent public activity; however, the board is meeting
- We are told to expect multiple discussion papers requesting comment in the next six months including:
- Federal Register “notice” with updates to the CAS Board’s Guiding Principles re: CAS-GAAP conformance. Also, the CASB’s thoughts regarding changes (or lack thereof) to the CAS Clause.
- ANPRM: how the CASB intends to address revenue and lease accounting issues re: CAS vs. GAAP (as urged by NDIA and ABA).
- Staff Development Paper on CAS 404 and 411 CAS/GAAP conformance
- ANPRM on updates to CAS 413
- ANPRM on CAS 408 and 409 CAS/GAAP conformance

Executive Orders: Limiting Agency Reliance on Guidance Documents (EO 13891 & 13892)

- On October 9, the President issued EO 13891 (Promoting the Rule of Law Through Improved Agency Guidance Documents) and EO 13892 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication)
- EO 13891 limits the impact of guidance documents and requires that guidance documents be treated as non-binding in law and in practice. Also requires public input when formulating guidance documents and that guidance documents be readily available to the public
- EO 13892 states that guidance documents cannot be utilized to impose new standards of conduct. Agencies cannot take administrative enforcement action or make a determination which has a legal consequence without establishing a violation of law by applying statutes and regulations.
- Could impact guidance issued by DCAA & DCMA including MRD's, DCAM etc.

Legislative Update

FY 2020 NDAA

- Commercial Items
 - Section 818 requires the head of an agency to document the results of market research related to commercial item determinations.
 - Section 847 exempts commercial item contractors from disclosure requirements related to beneficial ownership and foreign control
- Cost & Pricing
 - Section 803 prohibits contracting officers from determining that pricing is fair and reasonable solely on the basis of historical prices paid by the government. Also, requires that offerors who do not make a good faith effort to provide other than cost or pricing data will be ineligible for award
 - Section 810 repeals the Defense Cost Accounting Standards Board
- Competition
 - Section 819 requires DoD to report annually on its use of OTAs, including the purpose, description and status of the project. DoD must also report the amount of payments made pursuant to the OTA or follow on Contract
 - Section 823 removes requirement for justification and approval for sole-source contracts to 8(a) business where the value is under \$100 million
 - Section 824 requires the FAR to be amended to allow unsuccessful offerors on task or delivery orders valued above the simplified acquisition threshold but below \$5.5 million to receive brief explanation as to why the offeror was unsuccessful

Notable Legal Decisions

Pegasus Enterprises, LP v. Gen. Servs. Admin., CBCA 5420, 19-1 BCA ¶ 37459

- Pegasus had a lease with the GSA to provide office space. In 2012—ten years into the lease—Pegasus discovered that the government owed hundreds of thousands of dollars for overtime utilities. GSA claimed that it had asked Pegasus to terminate overtime utilities early in the lease.
- Rather than pursue a claim, Pegasus attempted to negotiate the unpaid utilities bill as part of a lease renewal. After Pegasus won an award for the follow-on lease in 2016, it submitted claims for the overtime utilities. The GSA denied the claim, asserting that the claims were time-barred.
- Pegasus appealed to the CBCA, arguing that the statute of limitations should be tolled for the time it had been negotiating with the GSA.
- The board noted that equitable tolling can defeat a statute of limitations defense if:
 - The litigant has been pursuing their rights diligently, and
 - Some extraordinary event prevented timely filing.
- In this case, the board found no “extraordinary circumstances,” only the company’s business judgment to negotiate rather than pursue a claim, so the CDA’s six-year statute of limitations barred the recovery of costs prior to 2010.
- *Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34916.

URS Fed. Servs., Inc., ASBCA No. 61227, 19-1 BCA ¶ 37431

- URS held an Army contract that required Army approval for the use of subcontractors. URS submitted invoices for subcontractor costs in 2006.
- In 2015, the DCAA audited URS's 2006 invoices and, in 2017, asserted claims against URS for unallowable costs. DCAA alleged URS failed to produce adequate documentation that:
 - It had received approval to use subcontractors, and
 - It had actually incurred the subcontracting costs.
- In an appeal to the ASBCA, the board found that the government's claim on unapproved subcontractor costs accrued in 2006 when URS submitted invoices clearly listing the subcontracting costs. This claim was therefore barred by the CDA's six-year statute of limitations.
- The board declined to rule on the issue of whether URS had actually incurred the subcontracting costs because the parties did not provide sufficient evidence regarding which documents URS was supposed to keep and for how long.
- The board also declined to grant summary judgment to URS under the doctrine of laches, finding issues of material fact concerning the government's delay.

Langdon Eng'g, ASBCA No. 61959, 19-1 *BCA ¶ 37427*

- Throughout performance of the contract, Langdon and the Navy “regularly communicated via email.”
- Navy terminated the contract with Langdon for cause on September 27, 2018.
 - CO emailed the Notice of Termination letter and sent it by certified mail.
- On October 29, Langdon emailed the CO stating that no one was available to sign for the certified mail.
- On October 30, the CO resent the Notice of Termination via email and certified mail.
 - The CO stated that he was resending the documents as a courtesy, as “these documents have already been successfully received [via email].”
 - Langdon acknowledged receiving the second certified mailing on November 5.
- Langdon appealed the Termination for Cause to the ASBCA via email on February 1, 2019—88 days after receipt of the second certified mail delivery.
 - But appeal was filed 127 days from the date of the first email sent by the CO.
- ASBCA decided that the CO introduced confusion as to the date on which the appeal period started by sending a second notice by certified mail.
 - 90-day appeal period began from receipt of the second certified mailing and appeal was timely.

Sandstone Assocs., Inc. v. U.S., No. 19-900C, 2019 WL 6769344 (Fed. Cl. Dec. 12, 2019)

- Court dismissed the complaint because it was filed more than 12 months after the plaintiff's attorney received the contracting officer's final decision denying its claim.
 - Concluded that the 12-month appeal period under the CDA is jurisdictional.
 - Cited *Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990), a Tucker Act case, for this proposition.
- *Sikorsky Aircraft Corp. v. U.S.*, 773 F.3d 1315 (Fed. Cir. 2014), however, held that the CDA statute of limitations is not jurisdictional.

Raytheon Co. v. Sec. Def., 940 F.3d 1310 (Fed. Cir. 2019)

- Prior ASBCA precedent held that compensation and bonus and incentive compensation costs “associated with” lobbying activities are not expressly unallowable because they are not “specifically named and stated” as unallowable under FAR 31.205-22.
- Court held that salary costs associated with lobbying are expressly unallowable under FAR 31.205-22 under the “associated with” language.
 - Even though salary is not “specifically named and stated” in FAR 31.205-22, the court reasoned that “costs unambiguously falling within a generic definition of a ‘type’ of unallowable cost are also ‘expressly unallowable.’ Here, salaries of in-house lobbyists are a prototypical lobbying expense.”
- Elements influencing the Court’s opinion:
 - Inability to reconcile any other type of cost that the cost principle would be addressing (i.e., salary).
 - Examination of administrative history. The court looked at the prior DAR language, which had specifically included salary within the prohibition, but was removed upon the promulgation of the FAR.

Sec'y of Def. v. Northrop Grumman Corp., 942 F.3d 1134 (Fed. Cir. 2019)

- Contracting Officer disallowed certain Post Retirement Benefit (PRB) costs because Northrop Grumman failed to calculate its PRB costs using the proper accounting method from 1995 - 2006.
 - Northrop Grumman used a method conforming to DEFRA, rather than FAS 106.
- When switching to the FAS 106 accounting method in 2006, Northrop Grumman included a “transition obligation,” for the \$253 million difference between the DEFRA and FAS 106 accounting methods dating back to 1995.
 - Under FAR 31.205-6(o), CACO disallowed payment for the transition obligation
- At the same time, Northrop Grumman amended its PRB plans, capping the amount it would contribute for future healthcare costs, which reduced its obligation on the plan by \$307 million.
- ASBCA found that Northrop Grumman never incurred the disallowed costs and that the Government had not paid, and would never pay, “excess” resulting from the improper accounting.
- Federal Circuit decided that Northrop Grumman’s negative plan adjustment eliminated the disputed \$253 million from the transition obligation.

Stobil Enter. v. Dep't of Veterans Affairs, CBCA 5698, 19-1 BCA ¶ 37428

- The VA awarded Stobil a FFP contract that allowed for price adjustments to the contract pursuant to the SCA and Fair Labor Standards Act. Stobil submitted a claim seeking its costs for increases in wages and fringe benefits.
- The CO paid Stobil for the increased costs based on the actual hours worked by Stobil employees but denied the amount for which Stobil failed to provide supporting documentation.
- On appeal to the CBCA, the board found that any adjustment to contract price under FAR 52.222-43 must be based on the contractor's actual increases in applicable wages and benefits.
 - The board granted relief in favor of the VA because Stobil had produced the annual full-time amount that its employees were projected to earn, not wages actually paid to employees.

Advanced Glob. Res., LLC, ASBCA No. 62070, 19-1 BCA ¶ 37433

- After the Army awarded Advanced Global Resources (AGR) a contract for IT support services, AGR entered into an employment contract with one key employee. The contract did not contain terms regarding GAO protests or stays of performance under FAR 52.233-3.
- One week after hiring the key employee, the Army notified AGR to stop work due to a GAO protest. AGR understood that the protest would be resolved within 100 days.
- After the Army rescinded the stop work order, AGR filed a claim for idle direct labor costs and unabsorbed home office overhead.
- The ASBCA found that the contract contained FAR 52.233-3 pursuant to the *Christian* doctrine.
- The board denied both of AGR's claims:
 - The direct labor costs were denied because AGR did not seek to limit the costs of the employee.
 - The unabsorbed home office overhead was denied because the government-caused delay was for a certain period and AGR failed to establish that its performance period was extended or that it was on standby and required to be able to resume work immediately.

Falmouth Sci., Inc., ASBCA No. 60776, 19-1 BCA ¶ 37389

- Falmouth was awarded a cost-reimbursement contract, under which it and its subcontractors conducted research and technical work.
- DCAA audit of Incurred Cost Proposals (ICP) identified overpayment of indirect costs.
 - The government agreed to adjust the G&A rates in exchange for Falmouth's repayment of a portion of the overpayment.
 - Falmouth executed indirect cost rate agreements for prior years of the contract that yielded the agreed-upon repayment amount.
- Falmouth appealed the demand for payment and the ACO's application of "G&A rates to certain costs and not others," as well as DCAA's application of a "DCAA-wide decrement factor."
- ASBCA rejected Falmouth's claim because it was premised on the parties' bilateral agreement on the indirect cost rates.
 - Although informed by the DCAA audit, the agreement was the product of negotiations between the parties "as contemplated by FAR 52.216-7, which is incorporated into the contract."

Fluor Fed. Sols., LLC, ASBCA No. 61093, *19-1 BCA ¶ 37431*

- Navy awarded a contract to Fluor to operate a water treatment plant. Despite pre-bid responses to RFIs indicating that the contract did not require 24/7 staffing, and after more than two years of contract performance, the Navy found that Fluor was not complying with contract requirements by not providing 24/7 staffing.
 - Navy then withheld payments, deducted amounts from contract price, and gave Fluor negative CPARs.
- ASBCA decided that the Navy’s interpretation of the contract requirements was not reasonable for three reasons:
 - The Navy answered pre-bid RFIs asking if 24/7 staffing by stating that staffing was to be determined by permits issued by the Florida Department of Environmental Protection.
 - The permits did not require 24/7 staffing.
 - Fluor submitted logs showing the hours worked by its employees for the first two-and-a-half years of the contract, during which time the Navy failed to object, demonstrating a “clear course of dealing” in conflict with the Navy’s interpretation of the contract as requiring 24/7 staffing.
 - The contract terms were performance specifications, which did not specify how the contractor was to achieve the objectives.

BGT Holdings, LLC v. U.S., 142 Fed. Cl. 474 (2019)

- U.S. Navy contract listed Government Furnished Equipment (GFE). At the postaward kick-off meeting, the CO stated that the GFE would not be released to the contractor unless the contractor decreased the FFP of the contract.
 - After the Navy and the contractor failed to agree on a reduction in the FFP, the Navy informed the contractor that that GFE was no longer available for use.
 - The contractor purchased the equipment that was to have been provided by the government and submitted a claim for the cost.
 - When the Navy did not accept the claim, the contractor filed suit in the COFC, claiming Constructive Change—Equitable Adjustment, Breach of Contract, and Breach of Duty of Good Faith.
- The COFC denied the contractor’s claims:
 - FAR 52.245-1(i) requires equitable adjustments to be made in accordance with the procedures in the Changes clause, and the Changes clause stated that the contractor was only to comply with orders in writing and signed by the CO (the refusal to provide the GFE was not in writing).
 - FAR 52.245-1(i)(3) states that the government shall not be liable for breach of contract due to “[a]n increase, decrease, or substitution of Government-furnished property.”
 - COFC determined that this FAR clause trumped the specific terms of the contract

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