PUBLIC CONTRACTING INSTITUTE

Government Contracting Update Series

Stay Current on Federal Contracting Changes & Developments

Paul E. Pompeo, Arnold & Porter
Jennifer Flickinger, Baker Tilly
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Agenda

- Regulatory Update
  - Defense Pricing and Contracting Updates
  - DCAA Memorandum for Regional Directors (MRD)
  - CAS Board
- Legislative Update
  - Section 809 Report to Congress
- Notable Legal Decisions

Regulatory Update

Class Deviation – Accounting Firm Support (2019 –O0007)

- Requires accounting firms who provide audit services to DoD to report any disciplinary proceedings against them or a member
- This deviation is important not for the notification requirements but the fact that it is part of DCAA's requirement to maintain a stable of qualified accounting firms to support DCAA ICS audits
- The first contracts for audit support were let in March with more to be let in June

Class Deviation – Pilot Program to Accelerate Contracting Process (2019 –O0008)

- Allows Contracting Officer's to waive the requirement for cost and pricing data
- Contracting Officer must have approval but is not required to document that the item could not have been acquired if cost or pricing data were required
- However, Contracting Officer must be able to document and show price analysis

Class Deviation – Quick Closeout Procedures (2019 –O0009)

- Instructs Contracting Officers to consider cost amounts to be considered "Insignificant" where total direct and indirect costs to be allocated to a contract, task order or delivery order are less than $2 million
- DCMA is further authorized to deviate from FAR 42.708(a)(2) and negotiate settlements in advance of the determination of final indirect costs regardless of the value or percent of unsettled costs
- Requirements for quick closeout:
  - The contract, task order, or delivery order is physically complete;
  - The contracting officer performs a risk assessment and determines that the use of the quick-closeout procedure is appropriate. The risk assessment shall include—
    - (i) Consideration of the contractor's accounting, estimating, and purchasing systems;
    - (ii) Other concerns of the cognizant contract auditors; and
    - (iii) Any other pertinent information, such as, documented history of Federal Government approved indirect cost rate agreements, changes to contractor's rate structure, volatility of rate fluctuations during affected periods, mergers or acquisitions, special contract provisions limiting contractor's recovery of otherwise allowable indirect costs under cost reimbursement or time-and-materials contracts; and
    - Agreement can be reached on a reasonable estimate of allocable dollars.

Class Deviation – Use of FFP Contracts (2019 –O0001)

- Requires evaluation and use of Firm Fixed Price Contracts
- Head of Agency is required to approve cost reimbursement contracts:
  - Awards > $50 million between 10/1/18 – 10/1/19
  - Awards > $25 million after 10/1/19
- Exception for R&D contracts where program risk does not permit reasonable pricing and risk transfer to the contractor

DCAA MRD – Identifying Expressly Unallowable Costs (May 14, 2019)

- Supersedes the December 2018 and January 2015 audit guidance
- Audit guidance updated to reflect recent court cases and FAR & DFARs language changes
- Generally directs audit teams to treat any costs on the list as expressly unallowable
- Specific changes include:
  - Clarifies that when compensation is paid to owners, only distribution of profits is expressly unallowable
  - Interprets several areas where a waiver or advance agreement can be obtained as a requirement for the waiver or advance agreement
  - Compensation based on value of changes in stock is unallowable and that in order to be unallowable, the award of shares need not be solely dependent upon the change in price of stock
  - Qualified Pension Costs and PRB costs must be funded by the IRS deadlines to be allowable
  - Bonus and incentive payments to those engaged in lobbying activities are not expressly unallowable
  - Long range planning, including general M&A discussions, are allowable. Discussions related to specific deals are expressly unallowable

DCAA MRD – Audits of Subcontracts and Interorganizational Costs (January 11, 2019)

- Prime Contractor Audit Teams will no longer request subcontract audit assist at the beginning of contract performance
  - Request will be risk based
- Stresses the requirements of Prime Contractors to oversee subcontractors
  - Bill subcontract costs
  - Settle subcontract costs and indirect rates
  - Provide oversight and surveillance
- Failure of a prime to provide adequate oversight will not automatically result in the costs being considered unallowable and unsupported
  - Prime contract audit team must perform alternative audit procedures
  - However, prime's failure could result in a business system deficiency

DCAA MRD – Incomplete Subcontractor Cost or Price Analysis (November 27, 2018)

- If prime has failed to either a cost or price analysis, costs will not automatically be considered unsupported
- Prime contract audit team must perform alternative procedures
- Depending on risk and materiality, prime contract audit team can propose decrements or request an assist audit
- Prime contractor must document its attempts at cost/price analysis
  - If access to data is prevented by the subcontractor, the prime should document the denial
  - Prime should proactively communicate with government counter parts
- Failure to perform analysis and/or document and communicate the attempts to perform could result in a business system deficiency

CAS Board Discussion Paper – CAS GAAP Streamlining

- Proposes guidelines which will serve as the guidelines for evaluation criteria
  - Reduce CAS requirements where practicable to minimize the burden on contractors while protecting the interests of the Federal Government.
  - Consider whether the proposed action would result in a net burden reduction (e.g., would the benefits of eliminating a requirement in one cost accounting standard be outweighed by the burdens made by changes required in other CAS) .
  - Consider whether other CAS requirements may protect the Government's interests when evaluating the potential risk of any gaps created by relying on GAAP instead of CAS. In addition, consider whether existing requirements in other relevant rules (e.g., Federal Acquisition Regulation (FAR)) may protect the Government's interests while not infringing on the Board's exclusive authority over the measurement, assignment, and allocation of costs for Government contracts.

CAS Board Discussion Paper – CAS GAAP Streamlining

- Also provides a road map grouping CAS standards for evaluation
  - Group one – Cost measurement and Assignment (404,407, 408, 409, 411, 415 & 416)
  - Group two – Allocation (403, 410, 418 & 420)
  - Group 3 – Unique Government Contract Requirements (412, 413, 414 & 417)
  - Group 4 – Foundational Standards (401, 402, 405 & 406)
- The Board notified the public of its intention to focus on group one which it believes have the greatest opportunity for streamlining
- Comment letter also provides an initial analysis of CAS 408 & 409. CAS Board performed a line by line analysis vice a conformance
- Comment letter indicates the plan to provide an analysis of 2 more measurement and assignment standards with the next comment letter
- CASB also identifies the changes in GAAP to the lease standards and revenue recognition as an area requiring analysis and potential changes for efficiency

CAS Board Discussion Paper – ABA Response

- ABA's Comment Letter
  - Set some historical perspective
    - Then: negotiated long-term FFP contracts
    - Now: short term, competitive cost type contracts, TOs, and CLINs
  - Encouraged the CASB to take a step back and look at the big picture relative to what Congress desires, which is to reduce the burden of government-unique accounting rules on commercial companies
    - Focus on 809 Panel recommendation #30 (Report Vol 2, June 2018)
    - Then conform lease and revenue GAAP
    - Then focus on conforming the Standards
  - Generally agreed with CASB's Guiding Principles, but expressed concerns regarding CASB's apparent approach to:
    - Practicable (vs. practical)
    - Protecting the Government's interests (should be narrowly construed re: uniformity and consistency)
  - Recommended that CASB should eliminate CAS to the extent GAAP provides for uniformity and consistency of cost measurement and assignment (acknowledged that GAAP doesn't address cost allocation to contracts)
  - Urged CASB to avoid extending CAS administration requirements to GAAP compliance where CAS has been eliminated

Legislative Update

Section 809 Panel

- Final report issued January 15, 2019
- From a cost accounting perspective several important recommendations:
  - Reduction of accounting system criteria from 18 to 7
  - Conforms the deficiency language (material weakness vs. significant deficiency)
  - Recommended significant CAS coverage threshold increases
  - Recommendations surrounding application of CAS to IDIQ Contracts
- The audit working group also developed a Professional Practice Guide with specific recommendations surrounding materiality and risk evaluations
  - DCAA and DCMA were key players in the PPG development
  - A copy can be found here:

  https://bakertilly.com/uploads/Sec809Panel_ProfessionalPracticeGuide.pdf

Notable Legal Decisions

Electric Boat Corp., ASBCA No. 58672, 19-1 BCA ¶ 37233

- Contractor filed claim for additional costs associated with new OSHA regulations – effective 2004. Contractor requested contract adjustment in 2005 and cost proposal in 2007.
- Government failed to include a special clause allowing price adjustments and did not amend for the clause until 2010. Contractor waited until 2012 to file a certified claim for both its costs and its subcontractor costs.
- Board found claim for EB's costs to be barred by the statute of limitations – regardless of absence of special clause, nothing prevented filing a claim.
    - + Board found that there was no continuing claim, because the funding was one continues event for the submarine.
- Board found claim for EB's subcontractor's costs timely, because the subcontractor costs were not eligible for recovery until the H-30 clause was included, and then flowed down.

AMEC Foster Wheeler Env't & Infrastructure, Inc., CBCA Nos. 5168, 6298, 19-1 BCA ¶ 37272 (February 27, 2019)

- In September 2011, the Department of Interior (DOI) awarded AMEC a task order for stabilizing and repairing the underground citadel and the shower rooms of the Alcatraz Cellhouse. AMEC filed a certified claim for $12.7 million alleging constructive change and breach of the duty of good faith. AMEC filed appealed (CBCA 5168).
- During discovery of CBCA 5168, AMEC learned that DOI had information that was not disclosed to the bidders. In August 2018, AMEC submitted a new claim for $13.2 million alleging DOI withheld superior knowledge from AMEC prior to award. The CO denied the 2018 claim and AMEC appealed (CBCA 6296).
- DOI filed a motion to dismiss arguing that AMEC's 2018 claim was time-barred by the statute of limitations. DOI maintained that AMEC knew as of January 2012, when it began work, that the solicitation did not reflect the conditions that AMEC actually encountered.
- The Board found that AMEC did not know enough to "permit assertion of" its 2018 claims until AMEC took discovery in CBCA 5168. The Board held AMEC's 2018 claim was timely.

Europe Asia Constr. Logistic, ASBCA No. 61553, 19-1 BCA ¶ 37267(February 14, 2019)

- April 22, 2010 the Army awarded the contract.
- April 24, 2010, the CO issued a notice to proceed.
- May 17, 2010, the Army terminated for convenience, and reduced the amount of the contract to the $300 DBA insurance payment.
- Contractor submitted a claim in September 2017.
- Board held that the claim was untimely under the statute of limitations and should have been filed within six years of the May 17, 2010 zero sum termination.

United Liquid Gas Co. D/B/A United Pacific Energy, CBCA No. 5846, 18-1 BCA ¶ 37172

- Contractor sought partial relief from CO final decision seeking $3,321,946.62 in overpayments.
  - •+ Agency issued four task orders against the GSA schedule contract for propane gas during fiscal years 2011, 2012, 2013 and 2014, which contractor fulfilled.
  - •+ In 2016, GSA determined that the contractor overbilled agency on the task orders.
- Contractor argued that $279,029.64 in overpayments occurred prior to 2011 and that this portion of the claim was untimely under the statute of limitations.
- Board concluded that claims in issue began to accrue on January 5, 2011, when the government overpaid the first task order invoice submitted for payment under the task order.
  - •+ At that point in time, the terms of the contract clearly put both Ft. Irwin and GSA on notice that contractor was overbilling the government and all events that fixed the alleged liability, specifically, in this case, overpayments in a "sum certain," were known or should have been known.
  - •+ Government claims continued accruing each time Ft. Irwin overpaid a task order 1 invoice under the MAS contract, because every time a payment was made on an invoice, the government knew or should have known of the overpayment and the "sum certain" it was overpaying.
- Therefore, any government claims for overpayments predating June 13, 2011, were time-barred.

Kansas City Power & Light Co. v. U.S., No. 15-348C (May 9, 2019)

- In contract for electrical service, GSA agreed to indemnify and defend KCP&L with respect to claims related to the provision of electrical service. GSA then refused to do so when a GSA employee sustained fatal injuries and sued for wrongful death.
- The COFC held that four distinct events fixed GSA's purported liability on KCP&L's duty to defend claim: (1) KCP&L executed a contract on August 19, 2005; (2) that contract obligated GSA to provide KCP&L with a defense when sued on March 27, 2007; (3) GSA refused to provide that defense in a written message on March 7, 2008; and (4) KCP&L sustained damages resulting from that refusal "as soon as it received" notice of that refusal, because KCP&L must continue paying its own costs.
  - Claim accordingly time barred as it began to accrue on March 7, 2008.
- The COFC found KCP&L's duty to indemnify claim to accrue on May 18, 2010, when the court approved the wrongful death settlement, rendering that CDA claim timely.
- Impact:
  - Puts a gloss on the Federal Circuit's 2016 *Kellogg Brown & Root Servs., Inc.* case, which seemed to suggest that a claim would not accrue until the full amount is known, instead of as soon as “some injury” occurred.
  - This case clarifies the "sum certain" requirement is met even when the precise amount claimed continues to increase over the term of the litigation.

The Tolliver Group, Inc. v. U.S., 140 Fed. Cl. 520 (2018)

- Contractor successfully prevailed over qui tam relator in a False Claims Act case brought regarding the contractor's fixed-price, level-of-effort contract. The contractor sought to recover legal fees from the government, but the government denied the claim, the contractor appealed to the Court of Federal Claims, and the government moved to dismiss.
- The Court denied the government's motion to dismiss because:

  + Although neither an express nor implied term allowing cost reimbursement appeared in the contract, the cost principles of FAR 31.2 appeared to apply by operation of law under the *Christian* doctrine.

    - The Court determined that the cost principles applied by operation of law if the contract required cost analysis or if reimbursement of legal fees claimed by the contractor represented a significant or deeply ingrained aspect of a fixed price, level of effort development contract.

  + Since the contract was manifestly established on the basis of cost principles pursuant to FAR 15.404-1 and FAR 31.103, FAR 31.205-47 appeared to apply.

  + The contractor pled sufficient facts to satisfy the requirements of FAR 31.205-47 and the remainder of FAR 31.2 did not otherwise prohibit reimbursement of the legal costs.

Energy Matter Conversion Corp., ASBCA No. 61583, 19-1 BCA ¶ 37225

- Contractor incurred legal fees in connection with DOJ investigation.
- Parties settled, contractor included legal fees in incurred cost submission.
- Board found the costs expressly unallowable:
  - + 31.205-47(b) "specifically state[s] that costs incurred in connection with any proceedings – including investigations – brought by the government for a violation of law that result in disposition by compromise are unallowable if 'the proceeding could have led to debarment.'"
  - + Because proceeding could have resulted in debarment if not resolved, the costs were expressly unallowable.
  - + Could not apportion the costs to reflect "success" to the extent that the settlement was only 55% of the potential liability.

The Boeing Co. v. United States, No. 17-1969C (May 29, 2019)

- Contractor challenged contracting officer's final decision on government claim and rejection of contractor's claim.
  - Boeing alleged that FAR 30.606 – which precludes offsetting simultaneous cost accounting changes "unless all of the cost impacts are increased costs to the Government" – violates the CAS statute.
  - Contractor asserted contract claims and challenges FAR 30.606 on a novel "illegal exaction" claim under the U.S. Constitution. ~~The Court exercised jurisdiction over both under the CDA~~.
- The Court denied Boeing's contract claims, holding that Boeing had effectively waived its challenge to FAR 30.606.
  - Boeing argued that FAR 30.606 was "extra-contractual" because it was not incorporated into the contract either in full text or by reference in the list of FAR provisions.
  - The Court noted that Boeing was a sophisticated contractor that entered into numerous contracts with the government after the relevant portion of FAR 30.606 went into effect in 2005, and cannot seek to change the pricing framework for its contract now. If there was any ambiguity as to the applicability of FAR 30.606, it was a patent ambiguity requiring that Boeing file a protest or seek clarification before award.
  - The Court also held that "the CAS statute primarily protects the government."
- The Court dismissed Boeing's illegal exaction claim for lack of subject matter jurisdiction.
  - Illegal exaction involves money that was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."
  - The Court held that there is no right afforded a contractor to bring a claim for monetary damages under the CAS statute, thus there is no "money-mandating statute" as required to prevail on an illegal exaction claim.

The Boeing Co., ASBCA No. 60373, 18-1 BCA ¶ 37112

Issue concerned whether software developed with costs charged to Technology Investment Agreements (TIAs) pursuant to 10 U.S.C. § 2358, Research and development projects, constitute software developed "exclusively at private expense" as term is defined in DFARS 252.227-7014(a)(8).

- In relevant part, DFARS 252.227-7017(a) provides that:

  + (8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

  + (9) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

  + (10) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

  - A TIA dated November 2001 was for the Airborne Manned-Unmanned System Technology—Demonstration (AMUST-D) research and development effort.

- The AMUST-D TIA was described as cooperative agreement under 10 U.S.C.§ 2358.

  + The government contributed $8,827,130 to the AMUST-D effort, while Boeing did not contribute any funds to the effort.

  - June 2003 TIA for the Manned/Unmanned Common Architecture Program (MCAP) research and development effort. + Boeing to contributed an undisclosed amount and the government contributed $11,800,000 to the MCAP effort.

  - ASBCA held to the extent that the software was funded by the AMUST-D and MCAP TIAs, the costs were not allocated to a government contract, because the TIAs were not "contracts" pursuant to the definition in the FAR.

  + Funding satisfied the definition of "developed exclusively at private expense" at DFARS 252.227-7014(a)(8).

  + Expenditures did not satisfy the definition of "developed with mixed funding" because the costs charged to the TIAs were not charged directly to a government contract as required by DFARS 252.227-7014(a)(10).

- Therefore, software developed with costs charged solely to the TIAs were developed exclusively at private expense.

Bechtel Nat'l., Inc. v. United States, Fed. Cir. No. 18-2044 (forthcoming)

- In a 2018 decision, the Court of Federal Claims strictly applied the Federal Circuit's 2009 *Tecom* decision addressing allowability of settlement costs. 137 Fed. Cl. 423 (2018).
  - The court found that costs in an employment discrimination lawsuit settlement were unallowable because the contracting officer determined the third-party lawsuits had more than "very little likelihood of success on the merits" and the contractor had not challenged that determination
  - This holding followed despite that the contractor requested and received written approval from the Contracting Officer to proceed in third party litigation through a Department of Energy (DOE) supplemental clause
- Bechtel appealed, and a merits panel of the Federal Circuit heard oral argument in early June
  - Bechtel's primary argument is that the general rule from *Tecom* should not apply where DOE includes a contract clause contemplating contractor recovery of settlement costs and DOE historically reimbursed contractors for settlement of worker discrimination claims
  - Alternatively, Bechtel argues that, if *Tecom* does apply under such circumstances, the *en banc* court should reconsider *Tecom*
- If the Federal Circuit affirms, Bechtel will have an opportunity to petition for *en banc* rehearing, with the potential for amicus briefing at that time

Contact Information

- **Presenters:**

- Paul E. Pompeo, Partner, Government Contracts and National Security, Arnold & Porter – 202.942.5723. paul.pompeo@arnoldporter.com

- Jennifer Flickinger, Principal, Government Contracts Advisory Services, Baker Tilly – 703.923.8211
- jennifer.flickinger@bakertilly.com