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Proposed Rule to Redefine "Cost or Pricing Data"

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have proposed to amend the Federal Acquisition Regulation (FAR) to clarify the term "cost or pricing data." The principle thrust of the proposed rule, under Case No. 2005-036, will be to distinguish "certified cost or pricing data," which is required under the Truth-in-Negotiations Act provisions, from "cost or pricing data."

The change seeks to make it clear that "cost or pricing data" can be required by a contracting office during the bid and negotiation of a pricing action, but that such data need not be "certified" and therefore subject to TINA post-award audit and penalties. The rule states that definition revisions are required "so it is clear that the underlying information is the same, but the requirement to certify that data distinguishes the TINA requirements."

A fall-out of this revised definition is that contracting offices may request "cost or pricing data" (omitting the word "certified") which means that "judgmental" as well as "factual" data may be needed to determine a fair and reasonable price. "Certified" cost or pricing

data, as defined by TINA, does not include judgmental information.

DOD Issues Interim Rule on "Pass-Thru" Costs

DOD has amended the DFARS regulations with added contract clauses that will explicitly deem any "excessive pass-through charges" applied to subcontract amounts as unallowable. Pass-through charges referred to in these new provisions include company (or lower tier subcontractor) indirect and/or profit amounts burdened on proposed or billed subcontract costs.

The new DFARS contract clause, 252.215-7004 very loosely defines "excessive pass-through charges" as amounts that "add no or negligible value to a contract." The clause further states, "No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added substantive value to the contract or subcontract in accomplishing the work performed under the contract." DOD contractors are therefore required to justify that any indirect expenses burdened on subcontracted costs are not excessive.

To add fuel to the fire, solicitation provisions for DOD work will require that a contractor, who plans to subcontract 70% or more of its total cost of work performed, provide to the Government a "description of the value added by the offeror as related to the work to be performed by the subcontractor(s)."

Another controversial provision is the Government's option for "recovery of excessive pass-through charges included in the contract price" for fixed-price contracts, after a price has been negotiated and the contract awarded. The recovery option applies to all DOD fixed-price contracts, and not just those meeting the 70% rule discussed above.

Because of the open-ended, vague, and one-sided recovery language contained in the new DFARS requirements, we expect the Government contractor community to challenge these provisions. In this writer's opinion, the addition of a provision that allows a "recovery" option on a "fair and reasonable price"

negotiated in good faith by both parties places an unfair advantage in the hands of Government procurement authorities. Such a provision ostensibly negates the Government's responsibility to address all proposal cost issues, including potentially excessive "pass-through charges", during the negotiation process prior to final price agreement.

The new provisions went into effect April 26, 2007. Government contractors who frequently subcontract under DOD contracts (or subcontracts), should carefully review the new



DFARS 252.215-7003 & -7004 language to better understand pass-through cost data required in bid proposals and Government options for recovering excessive pass-through charges.

Revision to Executive Compensation Guidelines

The Office of Federal Procurement Policy has announced \$597,912 as the maximum allowable executive compensation ceiling that will be allowable under federal government contracts during contractors' fiscal year 2007. The benchmark for contractors' fiscal year 2006 was \$546,689.



If Government contractors compensate their executives above this amount, the excess amount will be deemed unallowable for reimbursement under Government contracts where evaluation of bid or billed costs is stipulated in contract provisions.

The ceiling amount reflects "the median (50th percentile) amount of compensation accrued over a recent 12 month period for the top five highest paid executives of publicly traded companies with annual sales over \$50 million," OFPP explained.

DCAA Cost Issues

A caution to all Government contractors who may be preparing their incurred cost proposals before June 30, 2007. It is important that contractors thoroughly "scrub" your accounts to be sure expressly unallowable indirect costs are not included within your final indirect cost claim.

Further, auditors will expect that all proposal costs be completely supported with adequate cost accounting information so as to demonstrate the nature and purpose of the expenses. Certain cost categories that have been the subject of more thorough audit analyses include:

- Executive compensation
- Any costs related to the change in ownership of the company (Organization costs)
- Business meals and meetings
- Travel costs
- Consulting and professional fees
- Deferred compensation, particularly stock options

We'll have more to come on these issues in future newsletters and in training forums we plan to conduct later in the summer.

Job Opportunities

Company located in Kuwait seeks a government contracts compliance specialist for immediate employment in Kuwait City. Candidate will be required to assist company in meeting government contract cost accounting compliance issues, including meeting DCAA audit expectations. Interested persons should email DWalker@beasonnalley.com for more information.

Experienced Controller, with significant Deltek cost accounting software background, seeks employment with a local Government contractor. Interested companies may email DWalker@beasonnalley.com for more information.

Government Contract Training

Government Contract Accounting Systems Compliance

Brief Synopsis: This course is designed to detail the components of a government contract accounting system and explain how an accounting system helps to ensure your compliance with government contracting rules and regulations.

Presented by: Federal Publications Seminars

Dates: June 20-21, 2007, Las Vegas, NV

Instructors: Darryl Walker and Charlie Broome

Go to www.fedpubseminars.com and click on the Government Contracts tab or call Beason & Nalley at 256.533.1720.

Specialized Training

Beason & Nalley will develop and provide specialized Government contracts compliance training for client/contractor audiences. Topics on which we can provide training include estimating systems, FAR Part 31 Cost Principles, TINA and defective pricing, cost accounting system requirements, and basics of Cost Accounting Standards, just to name a few. If you have an interest in training, with educational needs specific to your company, please contact Ms. Sandra Baker at sbaker@beasonnalley.com, or at 256.533.1720.

Future Newsletters

Beason & Nalley welcomes any feedback from the readers of this newsletter. We appreciate any suggestions that you may have as to future content, presentation and format, or interesting developments in the procurement community that would be of interest to our readers. Please provide any feedback or suggestions via our email address at dwalker@beasonnalley.com.

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