REDSTONE Government Consulting
Formerly Beason & Nalley Government Compliance Group

Government Contract INSIGHTS
A MONTHLY PUBLICATION FOR GOVERNMENT CONTRACTORS

Volume 36 FEBRUARY 2014

OMB "Super Circular" Rewrites Grant Award and Oversight Policy

By Darryl Walker, CPA, CFE, CGFM Senior Director at Redstone Government Consulting, Inc.

The Office of Management and Budget (OMB) issued sweeping revisions to eight OMB Circulars significantly changing and streamlining the government's guidance on Administrative Requirements, Cost Principles and Audit Requirements for Federal awards. Although the Super Circular regulations are effective December 26, 2013, Federal agencies have one year to implement the revised guidance; similarly, non-federal entities have until December 26, 2014 to comply with the new circular rules.

The revisions, which finalize OMB's initial February 2013 guidance, effectively consolidate and supersede eight of the existing OMB circulars into a single policy and implementing set of guidelines, and the newly rewritten circulars largely apply to Federal grants, co-operative agreements, and other instruments awarded to state and local governments, Indian tribal nations, educational institutions, and non-profit organizations. Objectives established by the White House in revising the circulars are to more efficiently administer these awards, improve accountability of the use of federal funds, and mitigate risk of overpayment of monies to recipients of federal funding arrangements.

Key policy changes set forth in the section II, Major Policy Reforms of the December 26, 2013 Federal Register announcement include:

- Eliminating duplicative and conflicting guidance
- Focusing on performance over compliance for accountability
- Encouraging efficient use of information technology
- Limiting and controlling allowable costs, examples of which are conference hosting, employee health and welfare, relocation costs, and student activity costs
- Setting standard business processes using "Data Definitions"
- Encouraging Non-Federal entities to have family-friendly policies
- Strengthening oversight
- Targeting audit requirements toward disclosure of waste, fraud and abuse

THIS ISSUE:

Most interesting to us is the reworded verbiage, or changed guidance, related to the OMB cost principles circulars. A few updates and revisions to cost principles formerly included within OMB circulars A-21, A-87 and A-122 and previous OMB audit requirements include:

- Reinstatement of the applicability of certain Cost Accounting Standards Disclosure Statement to educational institutions that receive aggregate federal awards totaling $50 million or more in each fiscal year
- Direct costs clarified to allow clerical and administrative staff to charge their services as direct program costs, with some conditions of approval required
- Nonprofits may elect an automatic indirect cost rate of 10 percent using a modified total direct cost allocation base and continue to use this allocation base indefinitely; alternatively non-profits may elect to negotiate a different rate which is higher.
- Changes to compensation regulations that require such costs to be supported by sufficient records validating actual work performed
- Changes in several cost principles such as fringe benefits, contributions and donations, entertainment, depreciation, insurance and indemnification, general costs of government, and many others
- Requirement for complete disclosure of any violations of Federal criminal law involving fraud, bribery or gratuity violations "potentially affecting the Federal award"—provisions are much the same as required by FAR Part 3
- Audit requirements under the former A-133 Single Audit Threshold increased from $500K to $750K, and audit procedures significantly changed

OMB's final guidance has been placed in Chapters I and II of 2 Code of Federal Regulations (CFR). Government contractor recipients of grants and co-operative agreements must become familiar with the revised regulations since contractor grant administration and compliance oversight practices will require modification to avoid future non-compliance problems. For more details of the OMB Super-Circular, the Council on Financial Assistance Reform has helpfully posted training videos on YouTube: (1) Intro, (2) Administrative Requirements, (3) Cost Principles, and (4) Audit Requirements." Each is a link to a YouTube video.

ASBCA Addresses Fixed Fee Entitlement Under CPFF Contracts

By Darryl Walker, CPA, CFE, CGFM Senior Director at Redstone Government Consulting, Inc.

The Armed Services Court of Contract Appeals (ASBCA) dismissed a government motion for summary judgment pertinent to a government contractor's appeal to collect the entire fixed fee authorized under a cost-plus-fixed-fee (CPFF) U.S. Army contract, in lieu of being paid only a portion of that fee amount allowed by the contracting officer. The government contracting office asserted that the contractor was only entitled to the "percentage of the fee corresponding to the percentage of funding actually allocated to the contract", e.g. the amount of funding incrementally funded at the time of work completion.

The initial allocated award value of the task order was $6.1 million in cost and $488K in fixed fee, with a broadly defined scope for work; due to subsequent modifications, including refining the scope of effort to a specific number of hardware items, the CPFF was increased to approximately $11.1 million of which $823K represented the fixed fee; however, the "incrementally funded" amount remained at the initial $6.1 obligated value until the task order effort was completed.

Upon completion of all defined work, e.g., delivery of the hardware items, the contactor's incurred costs did not approach the total expected cost ($11.1 million), and the fixed fee collected at that time was $417 K. The government asserted that because the contractor "never reached the total cost ceiling contemplated by the contract", the contractor "is not entitled to the full fixed fee" of $823 K. The contracting office opined that under an incrementally funded contract (e.g., Limitation of Funds clause) in a case where not all work contemplated by the contract could have been performed beyond the funding limitation, only a fixed fee value equal to the ratio of the incrementally funded value to total expected cost (limitation of cost) should be paid to the contractor.

In determining if the contractor's appeal should remain in place, the Court examined the distinctions set forth in FAR 16.306(d)(1) and (d)(2) between "completion form" and "term form" CPFF contracts. "Completion form" contracts include defined goals or targets and specify an end product, in which case there is ordinarily no barrier in collecting fully allocated fixed fee if the goals are met; "term form" arrangements on the other hand define work in general terms, such a certain level of effort, in which case total fee would be paid only upon completion of all level of work. The government argued that the contractor's task order was a "term form" arrangement, and therefore would only be entitled to the fully allocated fixed fee "if it performed the agreed-upon level of effort for the agreed-upon time period". The contractor, however, argued that the task order was more akin to the "completion form" criteria since the scope of work was defined in terms of a specific number of hardware items, and that all items requested were delivered on time.

The Court decided to allow the contractor's appeal to go forward, and therefore denied the government's motion for summary judgment, since there was not clear and persuasive evidence supporting the Army's position. Interestingly, the ASBCA Decision notes that the task order requirement for a set number of hardware items with a specified delivery date appears "consistent with the hallmark of a "completion form" CPFF contract where there is clearly a stated goal or target and a specified end product.

Two Court Decisions Highlight Contractor Misunderstandings in Filing CDA Claims

By Darryl Walker, CPA, CFE, CGFM Senior Director at Redstone Government Consulting, Inc.

Two ASBCA decisions issued between January and February 2014 which dismissed contractor claims filed against the government under the Contracts Disputes Act (CDA) should send a clear message to contractors and their attorneys: before spending huge amounts of administrative effort and money filing a claim under the CDA, understand all CDA requirements and parameters, or likely face a claim dismissal.

The ASBCA rejected one of the claims because the six-year statute of limitations for filing a claim under FAR 33.206 had come and gone (six years after the accrual of a claim), and the other, on the basis that the company's claim did not identify the specific amount it intended to recover.

The Taj Al Rajaa Company filed an appeal, by email, in July 2013 for unexpired vehicle lease costs incurred pertinent to the May 2007 expiration of a contract. The government moved to dismiss the appeal asserting that the contractor never filed a valid CDA claim identifying a "sum certain", and if a valid claim was considered to have been filed, it was not submitted within the CDA six year period of the claim's accrual. The appellant's correspondence, almost entirely by email, with the government prior to the July 2013 claim assertion (accepted by the ASBCA) was considered insufficient as to represent a claim since it did not meet the CDA's form and substantiating documentation requirements.

The ASBCA recognized a June 1 2013 email from the appellant as sufficient evidence for identifying a claimed value. However, the court granted the government's motion to dismiss the appeal since the accrual of the claim (May 2007) occurred more than six years before the first date, June 1 2013, in which a claim was effectively asserted by the appellant.

In the other ASBCA case (ASBCA 59007-945), CSG, LLC petitioned the ASBCA to direct a U.S. Navy contracting office to issue a final decision on a non-monetary claim filed for breach of contract. In its appeal, CSG asserted that the contracting office's failure to have awarded any task orders to CSG under an Indefinite-Delivery/Indefinite-Quantity (IDIQ) type contract within the first contract year constituted such a breach. The government moved to dismiss the CSG petition for lack of jurisdiction since CSG's assertions did not constitute a claim under the CDA.

Although CSG characterized its petition as a non-monetary claim, the court disagreed stating that the CSG's request "is monetary in nature" and that the CSG "was capable of filing a sum certain claim" but elected not to do so. In the absence of a claimed dollar amount, a requirement of a CDA action, the Board determined it lacked jurisdiction to order the contracting office to issue a final decision and granted the government's motion to dismiss the petition.

Discussion in both ASBCA decisions make it clear that the two contractors were not well informed of not only the specific time parameters and documentation expectations for identifying and submitting a claim, but also the meticulous care that must be taken in effectively communicating claim assertions to the government. More importantly, before filing an action against the government using the CDA as the basis for the action, these case decisions illustrate that contractors must become familiar with the criteria set forth in the CDA contract clause or otherwise forfeit the opportunity to secure restitution for a legitimate dispute with the government. In particular, failure to comply with the "technical requirements" for filing a CDA will mean that the substance of the claim will never be considered.

DOJ Fraud Recoveries for 2013

By Michael Steen, CPA, Senior Director at Redstone Government Consulting, Inc.

The In late 2013 DOJ made its annual announcement of fraud recoveries related to the FCA (False Claims Act). In 2013 DOJ "secured" $3.8 billion in settlements from civil cases involving alleged fraud against the government and the DOJ announcement also highlighted the fact that DOJ has recovered $17 billion since January 2009. Coincidentally that date is the start of the Obama administration as if fraud recoveries during an administration have any correlation to the policies of a particular administration. In fact, any given fraud recovery can and does span years including years of the fraudulent activity (before being detected and/or reported by a "whistleblower"), years before the Government decides to intervene, and years for an investigation and settlement. Hence, fraud recoveries in any given year or spanning the years of a particular administration are nothing more than the culmination of a long process whose success is largely dependent upon the careerist (DOJ attorneys, agency investigators and auditors) opposed to the political appointees and those who appointed them.

In its announcement, the DOJ made note of the fact that the majority of FCA recoveries are, as in recent years, health care fraud ($2.6 billion); however, procurement fraud "related primarily to defense contracts" accounted for another $890 billion, a record in that area. With respect to the FCA recoveries related to defense contracts, 2013 included a single recovery involving defective pricing (failure to disclose historical discounts from suppliers) in 1985-1990 for which the Government filed suit against the contractor in 1999. An initial decision was in 2008 followed by additional litigation ultimately leading to the June 19, 2013 award of $473 million plus interest (which has been reported to increase the amount to $664 million). Although the "recovery" was in 2013, there is absolutely no nexus between the current administration and this recovery which clearly pre-dates January 2009. In its highly political media releases (in 2009 and subsequent years), the current administration (through DOJ) seemingly has no shame in taking credit for this and other recoveries "secured" in 2013 while disregarding the fact that the issues and much of the investigative work pre-dates 2009.

The fact that for political purposes the DOJ slightly misrepresents the facts does not change the fact that the DOJ continues to pursue allegations of FCA violations along with other notable areas including FCPA (Foreign Corrupt Practices Act) and very recently allegations of price fixing involving the Sherman Anti-trust Act. In many cases, the source of the FCA allegations are whistleblowers or more accurately Qui Tam Relators (a source with non-public information who sues on behalf of the United States who is then entitled to a significant portion of the Government recovery should the Government prevail). In its 2013 FCA recoveries, approximately 76 percent of the dollars were associated with a Qui Tam. The percentage is typically higher; however, the single defense contract action ($664 million recovery) previously discussed was not a Qui Tam. Typically, the Qui Tam recoveries are between 85-90 percent of total FCA recoveries serving as a reminder that a contractor's worst enemy can be an employee or an ex-employee with knowledge or perceived knowledge of FCA violations. In 2013 and more recently in 2014, DOJ media releases have reported FCA violations (originating with Qui Tams or whistleblowers) involving i) false time charging (employees charging paid time off as if working on a government project in Afghanistan), ii) bribes and/or kickbacks paid to US military or civilians who conspired to divert fuel shipments (recorded as delivered to a US military installation, but diverted to a private source for resale) and iii) attempts to bribe members of the US military to falsify receipts of goods (which would have been diverted to private sources).

Also a reminder that under the legal cost principle, FAR 31.205-47, the cost to defend against a civil action by the United States or by a Qui Tam Relator are unallowable if the

outcome is a finding of contractor liability or imposition of a monetary penalty. Hence, in the case of the defense contract action stemming from alleged over-pricing going back to 1985-1990 and the ensuing litigation and significant legal costs over a period of years, the true cost to the contractor is certainly more than just the amounts recovered by the United States Government. Additionally a reminder that FAR 52.203-13 and -14 (standards of conduct and display of hotline posters) implicate mandatory disclosure if a contractor has credible evidence of contract fraud; however, those FAR clauses also permit a contractor to have its own internal hotline and to conduct its own internal investigation before making any mandatory disclosures. In our opinion, a government contractor cannot afford to be without an effective "standards of conduct" program including an internal hotline which employees will first consider in identifying and reporting perceptions of violations of company policies and/or contract clauses (before considering a government agency hotline number). A contractor must comply with mandatory disclosure requirements, but if this occurs after an internal investigation the contractor will then know the facts and will also have had the opportunity to bolster internal controls before making the mandatory disclosure. In contrast, the worst possible scenario is to be the "last to know" of allegations of company wrong-doing. Borrowing a quotation from the movie Black Hawk Down, a government contractor should "not lose the initiative" which is exactly what happens once an allegation becomes a Government investigation or proceeding.

Redstone Government Consulting, Inc. is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be submitted to the National Registry of CPE Sponsors through its website: www.learningmarket.org.

Training Opportunities

2014 Redstone Government Consulting Sponsored Seminar Schedule

March 20, 2014 – Terminations in Government Contracts
WEBINAR – **REGISTER HERE**

April 3, 2014 – (NEW) The Life Cycle of an Indirect Cost Proposal and the Road to Contract Closeout
LIVE EVENT Huntsville, AL – **REGISTER HERE**

2014 Federal Publications Sponsored Seminar Schedule

May 6-8, 2014 – The Masters Institute in Government Contract Costs
San Diego, CA

May 20-21, 2014 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Las Vegas, NV

July 14-15, 2014 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Hilton Head Island, SC

July 15-17, 2014 – The Masters Institute in Government Contract Costs
Hilton Head Island, SC

October 20-21, 2014 – Accounting Compliance for Government Contractors
Las Vegas, NV

Instructors

- Mike Steen
- Darryl Walker
- Scott Butler
- Courtney Edmonson
- Cyndi Dunn
- Wayne Murdock
- Cheryl Anderson
- Robert Eldridge
- Asa Gilliland

Go to www.fedpubseminars.com and click on the Government Contracts tab.

Blog Articles Posted to our Website

Don't Assume! Recent ASBCA and GAO Decisions
Posted by Robert Eldridge on Mon, Feb 24, 2014 – Read More

DOD Revises Solicitation DFARS Proposal Adequacy Checklist
Posted by Darryl Walker on Thu, Feb 20, 2014 – Read More

The Adventures of Government Auditors: What we've Learned from 2013 Incurred Cost Proposal (ICP) Audits
Posted by Darryl Walker on Mon, Jan 27, 2014 – Read More

What Foreign Contractors Need to Know When Contracting with the U.S. Government
Posted by Tim Di Guiseppe on Mon, Jan 25, 2014 – Read More

For More Blog Articles: http://info.redstonegci.com/blog

Whitepapers Posted to our Website

The Audit World's Biggest Myths
A Whitepaper by Wayne Murdock – Read More

Government Contracting and Uncompensated Overtime
A Whitepaper by Wayne Murdock – Read More

DCAA Rejection of Incurred Cost Proposals
A Whitepaper by Michael Steen – Read More

For More Whitepapers:
http://www.redstonegci.com/resources/white-papers

About Redstone Government Consulting, Inc.

Our Company's Mission Statement: RGCI enables contractors doing business with the U.S. government to comply with the complex and challenging procurement regulatory provisions and contract requirements by providing superior cost, pricing, accounting, and contracts administration consulting expertise to clients expeditiously, efficiently, and within customer expectations. Our consulting expertise and experience is unparalleled in understanding unique challenges of government contractors, our operating procedures are crafted and monitored to ensure rock-solid compliance, and our company's charter and implementing policies are designed to continuously meet needs of clients while fostering a long-term partnership with each client through pro-active communication with our clients

In achieving government contractor goals, all consulting services are planned and executed utilizing a quality control system to ensure client objectives and goals are fully understood; the right mix of experts with the proper experience are assigned to the requested task; clients are kept abreast of work progress; continuous communication is maintained during the engagement; work is managed and reviewed during the engagement; deliverables are consistent with and tailored to the original agreed-to scope of work, and; follow-up communication to determine the effectiveness of solutions and guidance provided by our experts.

Specialized Training

Redstone Government Consulting, Inc. 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. Lori Beth Moses at lmoses@redstonegci.com, or at 256-704-9811.

REDSTONE Government Consulting

Redstone Government Consulting, Inc.

Huntsville, AL
101 Monroe Street
Huntsville, AL 35801
T: 256.704.9800

Email: info@redstonegci.com
On the web: www.redstonegci.com

