REDSTONE Government Consulting

Government Contract INSIGHTS

A MONTHLY PUBLICATION FOR GOVERNMENT CONTRACTORS

Volume 49

MARCH 2015

DCAA Policy on Overdue Indirect Cost Rate Proposal Issued then Removed (from www.DCAA.mil)

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

In its MRD (Memorandum for Regional Directors) 15-PPD-002(R), dated February 12, 2015, DCAA notified auditors of an updated policy on the treatment of overdue indirect cost rate proposals (ICPs). The reference to overdue indirect cost rate proposals is with respect to the FAR 52.216-7(d) requirement for contractors to submit an adequate indirect cost rate proposal within six months of the end of the contractor fiscal year. For calendar year contractors, that six month due date is June 30, a date with negative connotations similar to April 15 for individual tax payers.

With respect to DCAA's updated policy, it should be recognized that it is nothing new in terms of the implications that DCAA is only tracking overdue indirect cost rate proposals up until the point at which the ICP is six months overdue. This was stated in a previous MRD 14-PPD-002(R), February 3, 2014, which eliminated the long-standing practice of notifying contractors of late ICPs while maintaining the following DCAA actions:

- Educate contractors of their contractual requirement to submit final ICPs (in the DCAA preferred format)
- Support contracting officers in obtaining adequate ICPs
- Support contracting officers in calculating a unilateral contract cost decrement

As stated in DCAA's audit policy, DCMA in coordination with DCAA and with respect to ICPs more than six months overdue plans to obtain an adequate proposal within 30 days or unilaterally establish contract costs as authorized by FAR 42.703-2(c)(1) and -705(c)(1). In order to assist DCMA in unilaterally establishing contract costs, DCAA has developed a decrement factor of 16.2% (based upon "Agency-wide analysis", but otherwise unexplained or supported) which would be applied to total (direct and indirect) auditable (flexibly priced) contract costs. For example, if an allegedly recalcitrant contractor's overdue ICP

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included $10 million of auditable direct and indirect costs, DCAA would recommend that DCMA unilaterally establish contract costs of $8.38 million (i.e. apply a decrement factor of 16.2% even though neither the contractor or the ACO has any way to validate the 16.2%...by implication, "trust me, I'm a DCAA auditor").

In addition to reiterating the DCAA and DCMA actions taken with respect to overdue ICPs, DCAA's February 2015 MRD also describes the internal process for tracking, then removing the contractor's ICP (planned) audit assignment from DCAA's management information system. Of more than passing interest, DCAA will close the assignment as "assignment completed, but no formal report issued, unilateral memo issued, zero audited dollars, and net savings for the amount negotiated by the contracting officer. Hence, in the example of the $10 million decremented down to $8.38 million, if in fact a contracting officer "negotiates" that amount, DCAA will take credit for net savings of $1.62 million in spite of doing nothing more than applying an "agency factor" to total auditable (flexibly-priced) contract dollars.

Noting that DCAA annually (and proudly) reports its return on investment for which aggregate net savings is the numerator and the DCAA annual budget is the denominator, one should assume that DCAA auditors will be encouraged to reject contractor ICPs as inadequate in hopes of moving toward a unilateral determination of contract costs by the contracting officer. This is self-evident in the attachment to the February 2015 MRD which was a very long list of contractors with allegedly overdue FY2013 ICPs (which were due on or before June 30, 2014). Shortly after this MRD was issued, a number of bloggers made note of this list and those bloggers (many of whom are consultants for government contractors) asserted that contractors on the list had timely submitted ICPs only to be rejected by DCAA as inadequate and un-auditable for inane/inconsequential reasons. Additionally, that some contractors were on the list in spite of the fact that they had been notified by DCAA that the contractor's ICP was adequate. Rest assured that if a contractor was incorrectly on the list, DCAA's letter of apology will be "in the mail".

Mysteriously and with no explanation, in mid-March 2015, DCAA removed MRD 15-PPD-002(R) from its website. This author suspects that DCAA removed the MRD because the listing of contractors with allegedly delinquent ICPs should never have been in the public domain. In fact, DCAA coincidentally removed the MRD shortly after this author mentioned to a DCAA manager that it was peculiar if not inappropriate disclosure of contractor proprietary information. DCAA may publish or make accessible the universe of contractors subject to DCAA audits; however, DCAA should never publicly disclose audit results or similar contractor specific (negative) information.

Regardless of DCAA's miscue in terms of inappropriately publishing contractor specific information, the audit policy for assisting contracting officers in unilaterally establishing contract costs remains. Thus, contractors whose ICPs are rejected by DCAA should recognize the "end game" which could be contracting officer unilateral actions to significantly decrement contract costs. Therein, contractors should consider timely corrections to their ICPs (even if DCAA is wrong in its inadequacy determination, it's not worth debating if the "inadequacy" can be readily corrected). For the all-too-frequent situations where a corrected ICP is subsequently rejected by DCAA for new and different reasons; a contractor may need to take a stand and challenge DCAA's opinion. In most cases the contracting officer will merely defer to DCAA; however, when push comes to shove (potential contract disputes), a contracting officer cannot merely defer to the auditor. Moreover, there is evidence which suggests that DCAA is using a contractually invalid ICP adequacy checklist; in particular, that the particular checklist is based upon a contract clause which did not exist until May 31, 2011; however, DCAA applies that checklist to ICPs which are for prior years. Additionally, the reasons for DCAA rejections are highly subjective (not expressly required by any regulation) as evidenced by DCAA auditors who continuously add "requirements" causing the ICP submission-rejection process to be an endless loop.

One last observation concerning the DCAA/DCMA coordinated policy to unilaterally establish contract costs in accordance with FAR 42.703(c)(1) and 705(c)(1), the applicable contract clauses are in reference to final indirect cost rates. However, the 16.2% decrement will be applied to direct and indirect (total) contract costs which would seem to be in conflict with the referenced clauses. Additionally, in DCAA's MRD, they refer to recording the net savings based upon the net savings negotiated by the contracting officer. In most cases, one does not negotiate unilateral rates or a unilateral determination of

contract costs; however, DCAA's reference to "negotiated" savings is a very good indication that DCAA suspects that its 16.2% factor (based upon "Agency analysis") will not withstand scrutiny. That said, no contractor should simply agree to a contracting officer proposal to apply the 16.2% decrement to flexibly-priced contract costs. It appears that both DCAA and DCMA expect to "negotiate" rather than unilaterally determine the contract costs. If it's properly applied, the FAR clause does give the contracting officer the authority to unilaterally establish final indirect cost rates; however actual experience has shown that contracting officer's will negotiate rather than unilaterally determine these rates.

OFCCP and Executive Orders The New Challenge for Government Contractors

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

In 2014 President Obama issued a number Executive Orders (EO) directed at the labor practices of government contractors. As with many Executive or Legislative actions, there is a time lag between the date of the action and its implementation through a published rule in the Federal Register; however, most of the Executive Orders have been published and will start to impact government contractors in 2015. The 2014 Executive Orders (applicable to government contractors with varying thresholds for contract amount or number of contractor employees) include:

- 13658 which will be effective January 1, 2016, establishes a minimum wage of $10.10 hour applicable to specified labor categories including those covered by the Davis-Bacon Act, the Service Contract Act and concessions/services in federal buildings. The minimum wage does not apply to executives or managers who can apparently be compensated less than $10.10/hour. Of passing interest, the Executive Order was issued February 12, 2014 under the umbrella of improving economy and efficiency in Government, in part through expectations for higher morale and less supervision. Strangely, after February 2014 there have been a number of employee walk-outs at federal buildings in Washington DC. These are employees who specifically benefitted from the higher minimum wage, but now want more. Apparently they did not get the memo requiring higher morale. However, employees on strike admittedly require less supervision.
- 13665, proposed rule published in September 2014, effective date to be determined, which will provide for non-retaliation for pay disclosure (one employee to another employee). Coincidentally, companies who have been reviewed by the Department of Labor had already been cited for this issue and forced to eliminate the pay non-disclosure policy. Hence, with or without EO 13665 and regardless of being a government contractor or merely a company subject to US labor laws, prohibiting employees from disclosing their pay is construed to be a prohibited practice.
- 13672, effective April 8, 2015 which prohibits discrimination based upon sexual orientation or gender identify. Effectively this expands the categories of employees covered by the Equal Opportunity clause in federal contracts with a flow-down requirement to subcontracts.
- 13673, effective date projected to be in 2016, Fair Pay and Safe Workplaces which will require contractors, in responding to a Government solicitation, to "self-identify" a number of the specified non-compliances with respect to labor laws, work safety, etc. Contracting officers will then determine if the violations would render the contractor as non-responsive or non-qualified. Additionally, the EO will require disclosure of paycheck details (to the respective employee) and prohibit employment agreements with mandatory arbitration clauses (for contracts greater than $1 million).

In advance of the effective dates for these EOs, OFCCP (Office of Federal Contract Compliance Programs) which is the Government agency responsible for coordinating Government oversight (compliance with the new regulations) has issued direction to a number of Government agencies requiring each agency to establish an LCA (Labor Compliance Advisor). The LCAs will work with the Department of Labor and other agencies with the stated goal to make sure "contractors are not subjected to multiple and potentially inconsistent actions that waste federal resources" (emphasis added). Not that it matters, but obviously the Department of Labor isn't considered with contractor resources which will probably be wasted in any event.

Government Improper Payments Going the Wrong Direction in 2014

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

In its March 2015 report, the GAO (Government Accountability Office) concluded that government-wide improper payments increased to $124.7 billion in 2014 (a noticeable increase from 2013 when these payments were $105.3 billion). Although this trend could be the cause for alarm, the fact is that there is no data which provides the actual amount of the government overpayments, all data reported by government agencies and reviewed by the GAO is for "estimated overpayments". In fact, in each GAO report (on government overpayments) there are issues with agency estimates, as if improved estimates would enhance the reliability of the amount reported (err…estimated) as overpayments. Obviously "accountability" and "accounting" are two different concepts because "accounting for estimates" would tend to fall into the category of an oxymoron; hence, we only have accountability for estimated overpayments and much like government financial statements, we might not ever have reliable (auditable) accounting data.

Although the GAO noted that it has spearheaded years of effort and analytical tools to reduce government overpayments, the estimated amount jumped 19 percent in 2014 and that three programs contributed to the growth and the total overpayments (Medicare, Medicaid, and the Earned Income Tax Credit). Undoubtedly this latest data comes as a surprise to the Executive Branch which essentially sponsored the 2010 and the 2012 Acts to reduce government overpayments. Perhaps the next step is an Executive Order imposing a requirement on government contractors to find a solution.

On a distantly related topic of improper payments (and raising questions concerning government competency), a recent ASBCA decision involving $240,550 (cash payments in Afghan currency) paid to someone other than the contractor. Per the ASBCA discussion, the cash payments were a means to save funds transfer fees (paid by the contractor) when payments were EFTs (electronic funds transfers); however, the cash payment arrangement also listed the names of three contractor individuals who were authorized to receive the cash. Although he was not a contractor employee or one of three names authorized to collect the cash, a Mr. Qahir began picking up the cash for the contractor and at least initially transporting the cash to the contractor. Mr. Qahir continued to pick-up the cash, but at some point skipped the second part of the equation (i.e. he allegedly absconded with several payments amounting to $240,550). The government asserted that there was no government liability because the cash payments had been made to an individual who represented himself to be an authorized courier and because the contractor never complained or mentioned that the individual was not authorized. However, in addition to the government's failure to follow its own U.S. Military Local Finance Office procedures (per the contract), the contractor also noted that the payments at issue had been made by a new service member who had no idea as to the identity of Mr. Qahir (in other words is wasn't as if a government payment official merely continued to pay an individual who was known to that government payment official). The end result, the contractor is entitled to $240,550 plus interest from the date the contracting officer received the claims and (we hope) that government payment officials will discontinue paying someone who merely walks in the door and represents themselves to be authorized to receive the cash.

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Training Opportunities

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April 14, 2015 – Preparing the Incurred Cost Proposal (aka: ICP, ICS, or ICE)

LIVE EVENT – Huntsville, AL – REGISTER HERE

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WEBINAR – REGISTER HERE

May 21, 2015 – Contract Cost Accounting and Pricing Compliance 2015 Webinar Series – Topic: TBD
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June 9, 2015 – Understanding FAR 31.205-6 Compensation for Personal Services
WEBINAR – REGISTRATION COMING SOON

June 16, 2015 – Contractor Benchmarking to Support Compensation Reasonableness
WEBINAR – REGISTRATION COMING SOON

June 18, 2015 – Contract Cost Accounting and Pricing Compliance 2015 Webinar Series – Topic: TBD
WEBINAR – CLICK HERE FOR MORE DETAILS

July 16, 2015 – Contract Cost Accounting and Pricing Compliance 2015 Webinar Series – Topic: TBD
WEBINAR – CLICK HERE FOR MORE DETAILS

August 13, 2015 – Contract Cost Accounting and Pricing Compliance 2015 Webinar Series – Topic: TBD
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Denver, CO

April 7-8, 2015 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
San Diego, CA

May 5-7, 2015 – The Masters Institute in Government Contract Costs
La Jolla, CA

June 2-3, 2015 – Accounting Compliance for Government Contractors
Arlington, VA

July 20-21, 2015 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Hilton Head Island, SC

July 21-23, 2015 – The Masters Institute in Government Contract Costs
Hilton Head Island, SC

August 18-20, 2015 – The Masters Institute in Government Contract Costs
Sterling, VA

August 20-21, 2015 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Sterling, VA

October 5-6, 2015 – Accounting Compliance for Government Contractors
Arlington, VA

Instructors:

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

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

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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.

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