REDSTONE Government Consulting

Government Contract INSIGHTS

A MONTHLY PUBLICATION FOR GOVERNMENT CONTRACTORS

Volume 65 JUNE 2016

2017 NDAA (Senate Version)

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

The US Senate recently passed its version of the 2017 NDAA (National Defense Authorization Act) inclusive of amendments which could impact DOD acquisitions ("could" because the Senate version must be reconciled with the House version and ultimately clear any potential Presidential vetoes). The following sections are of interest, but only if they survive the rest of the process.

811. Defense Contract Accounting Standards. Establishes a Defense CAS Board inclusive of seven members, chaired by DOD's CFO, along with 3 representatives of DOD and 3 individuals from the private sector (1 from a non-traditional defense contractor and 1 from a public accounting firm). Two overarching expectations are i) for cost accounting standards which rely on commercial standards and accounting practices and systems, and ii) recommendations to the CAS Board (Section 1502 of Title 41) to conform cost accounting standards to GAAP (Generally Accepted Accounting Principles). In defining its exemptions, the Defense Cost Accounting Standards would not apply to commercial items, prices set by law or regulation, firm fixed-price contracts/subcontracts or contracts less than $7,500,000 unless the business unit has not been awarded a contract exceeding $7,500,000 (equivalent to modified CAS). As proposed, section 811 includes an audit requirement for commercial accounting firms that information is presented (presumably by covered contractors) in compliance with US GAAP and that DCAA shall audit direct costs and indirect costs (the latter if the business unit have more than 50 percent of government cost type contracts as a percentage of sales; otherwise indirect costs would be audited through commercial audits).

Editor's comment: Regarding the audit requirements, commercial accounting firms are noted for timely audits whereas DCAA is noted for untimely audits; hence, the "collaborative" audits will result in partial completion (commercial accounting firm) awaiting DCAA's completion of its share of the audit. Secondarily and not mentioned in section 811, the only real benefit with respect to a second CAS Board would be revisiting the inflexible (and inane) administrative requirements within FAR 30.600, in particular as it relates to cost impacts for changes in cost accounting practices. Unfortunately, no such implications as proposed in the 2017 NDAA.

THIS ISSUE:

- 2017 NDAA (Senate Version)
- Six Year Statute of Limitations for Claims (FAR 33.206)
- DCAA Updates Low Risk Sampling Audit Policy
- Training Opportunities: See page 5 below
- Blog Articles and Whitepapers Posted: See page 5-6 below
- CFO Roundtable: see page 6 below

814. Elimination of B&P (Bid & Proposal) Costs and Other Expenses as Allowable IR&D (Independent Research and Development) cost on Certain Contracts. Requires the Secretary of Defense to prescribe regulations and controls which involve a determination of fair and reasonable IR&D cost for projects of potential interest to DOD. The adjusted maximum reimbursement amount for IR&D is 5 percent of the total DOD work for the preceding fiscal year and this section does have a limitation on the regulations which (disingenuously) allows a contractor to choose which technologies to pursue so long as the CEO certifies that the expenditures will advance Department of Defense future technology and advanced capability needs.

Editor's comment: Although this section refers to B&P, it only addresses IR&D which makes it all the more evident that the DOD is continuing in its efforts to constrain the "independence" within Independent Research and Development costs, perhaps analogous to limiting allowable compensation on Government contracts ($487,000 in Far 31.205-6(p)) while graciously stating that contractors are free to compensate employees at higher amounts.

815. Exception to Requirement to Include Cost or Price as a Factor in the Evaluation of Proposals for Certain Multiple-Award Task or Delivery Orders. If the contract awards will be made to each qualified offeror, cost or price need not be considered as an evaluation factor. A qualified offeror is defined as a i) responsible source, ii) responsive bid proposal and iii) the cost or price is not likely to be other than fair and reasonable.

Editor's comment: If this makes it into the final 2017 NDAA, when utilized, it would presumably eliminate circumstances when competitive bidders are compelled by a PCO request to provide "other than certified cost or pricing data" which is eerily similar to certified cost or pricing data.

817. Non-Traditional Contractor Definition. This defines a non-traditional defense contractor as a specific business unit which is not currently performing (one year preceding the solicitation) a DOD contract or subcontract subject to full coverage under the cost accounting standards in section 1502 of title 41 (see also FAR 52.230-2). As proposed, that definition would exclude a business unit which received a transfer from another business unit (affiliated).

Editor's comment: This definition is of interest to any entity, not subject to full CAS (FAR 52.230-2) which is considering "OTAs" (Other Transaction Authority) as a more contractor friendly contractual means to engage in DOD contracting. However, recent experience with an OTA solicitation serves as a reminder that not every DOD contracting authority appears to understand OTA. In this case, the particular solicitation explicitly excluded FAR Part 31 (cost principles) while stating that offeror indirect rates needed to be scrubbed for unallowable costs (in fact giving preference to forward pricing rate agreements or government forward pricing rate recommendations which would be net of unallowable costs based upon FAR Part 31). Absent FAR Part 31 (explicitly excluded per the solicitation), it is a bit of a conundrum in terms of what criteria to apply to exclude unallowable costs. Beyond this confusing requirement, the government "OTA" solicitation had requirements for uncertified cost or pricing data which were quite similar (actually identical) to the cost elements described in FAR 15.408, Table II. Probably not going to motivate "Silicon Valley" and other hotbeds of non-traditional DOD contractors to join the fun of being a DOD contractor.

821. Government Accountability Officer Bid Protest Reforms. As proposed would invoke bid protestor fees to cover the costs incurred by GAO for processing a protest if i) all elements of the bid protest are denied and ii) the bid protest was filed by "party with revenues in excess of $100,000,000 during the previous year". For incumbent contractors (i.e. those involved in a "re-compete" of an existing contract), section 821 would invoke payment withholds (amounts above the incurred costs; hence, fee or profit) on bridge contracts or temporary contract extensions. The withholds would be released to the contractor if the incumbent (protestor) was awarded the protested contract; conversely, for a bid protestor/incumbent contractor which was not awarded the contract, the withholds would be retained by the GAO (to offset bid protest processing costs related to small businesses).

836. Disclosure of Risk in Cost Estimates. Would require discussion of risk, the potential impacts of risk and approaches to mitigate risk on major defense acquisition programs. Additionally, a requirement to "ensure that cost estimates are based on historical cost information that is based on demonstrated contractor and government performance and that such estimates provide a high degree of confidence…."

Editor's comment: Noting that historical costs may not be a good predictor of future costs, good luck with this absolute requirement to use historical cost information.

862. Department of Defense Exemptions for Certain Regulations. The exemptions which only apply to commercially available off-the-shelf items is primarily a list of Executive Orders which broadly applied to Government contractors (rarely having any exemptions for commercial contractors; for example, EO 13706, Establishing Paid Sick Leave).

Editor's comment. As proposed, this exemption would apply to a relatively narrow universe, commercial off-the-shelf, which leaves other commercial items and services in the mix, so to speak. Once again, a de-motivator for any commercial entity contemplating the pursuit of Government contracts.

891. Contractor Business Systems Requirements. Requires the Secretary of Defense to develop and initiate a program for the improvement of contractor business systems. The program would include system requirements, system reviews, approval/disapproval authority, conditional approval, reduced reliance and enhanced analysis (of contractor data provided by a disapproved system), and remedial actions including withholds up to 10 percent.

Editor's comment: This particular section seems to be ignoring that DFARS 252.242-7005 has existed since May 2011 and it already includes the same six business systems (system criteria and administration including withholds). However, section 891 does add the concept of conditional approval which appears to be nothing more than recognition that a system may require corrective action for deficiencies which do not rise to the level of a "significant deficiency" (defined in section 891 using identical terminology as DFARS 252.242-7005). Additionally, one additional change in terms of restricting reviews of non-covered contractor business systems (i.e. a contractor which does not have the DFARS clause in a contract). Such reviews would be performed by a third-party (commercial auditing firm) and primarily to confirm that non-covered contractor uses the same contract business system for government and commercial work and only if the contractor has cost-type DOD contract(s)).

892. Authority to Provide Reimbursable Auditing Services to Certain Defense Agencies. This section would amend Section 893(a) of the 2016 NDAA, allowing DCAA to provide audit support to the National Nuclear Security Administration.

Editor's comment: In and of itself, this section provides no significant relief (to DCAA) from Section 893 of the 2016 NDAA (which prohibits DCAA from providing audit services to non-DOD agencies). However, the House version of the 2017 NDAA does have an amendment which would rescind Section 893 of the 2016 NDAA.

Six Year Statute of Limitations for Claims (FAR 33.206)

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

The six-year SOL (Statute of Limitations) limits contractor or Government claims and the critical date is defined as the accrual date; the point when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim were known or should have been known. For contractors, the six-year SOL has taken on a particular significance because of DCAA's delays in auditing contractor indirect cost rate proposals or ICPs (FAR 52.216-7(d)). At one point (published decisions in 2013), contractors had prevailed with an assertion that the accrual date was the date of the contractor's certified indirect cost rate proposal; however, more recent disputes (2015) have favored the Government. In two cases, DCAA auditor affidavits stated that the auditor did not have the detailed accounting records necessary to determine that a cost was unallowable until more recent dates; thus advancing the accrual date and negating any applicability/impact of the six-year SOL.

Very recently, a published decision (US Court of Appeals for the Federal Circuit, 2015-1148, KBR v. Secretary of the Army) favored the contractor on the basis that a contractor "claim" includes a written demand seeking payment of money in a sum certain. In the opinion of the Appeals Court, the fact that events (which led to the claim) were much earlier were not determinative (did not establish the claim accrual date) because of the requirement that the "sum certain" is known. Although the contractor may have been "injured" by

Government actions or inactions, the contractor did not request nor could it have reasonably requested a "sum certain").

Although published decisions involving the six-year SOL involve some element of case-specific facts, this recent published decision would seemingly be one more interpretation which broadly works against any contractor attempting to use its ICP submission date as its line in the sand for starting the Government's six-year SOL clock. As it stands, contractors are up against i) DCAA affidavits stating that the Government did not have the records necessary to assert a claim and ii) the Court of Appeals stating (by implication) that either the Government or the Contractor must be able claim a sum certain. Coincidentally, the Court of Appeals interpretation plays directly into the DCAA strategy for auditor affidavits.

DCAA Updates Low Risk Sampling Audit Policy

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

DCAA published MRD 16-PPD-006, dated May 27, 2016, which revised its policy and procedures for low-risk incurred cost proposals (ICPs) less than $250 million ADV (Auditable Dollar Volume which includes contractor costs associated with cost type, T&M, fixed-price incentive contract types).

This policy focuses on ICPs of less than $5 million ADV including the requirement for reassessments of all which are adequate, but awaiting audit. Ultimately, the objective is to ensure that DCAA field offices effectively identify ICPs with relevant and substantial risk that would necessitate an audit. DCAA's MRD implicates the need to reassess which suggests that the initial assessments yielded the wrong answer (e.g. too many were not assessed as low risk leaving too many in the high-risk in-box awaiting full audits at a time when DCAA is trying to manage down its backlog). That said, good news for contractors in this very low dollar ICP universe; however, the downside, that DCAA's MRD also implicates less than full audits. In this case, that a risk assessment might suggest an audit of a specific direct cost only under a 17900 assignment code. Although the MRD provides no examples, one potential would be a DCAA audit limited to labor qualifications on T&M contracts (comparing labor hours invoiced from the contractual qualifications to the employee personnel file; unqualified labor equates to 100% cost questioned). As with most DCAA MRDs, never totally a good news story for contractors which are subject to DCAA audits.

Editor's side-note: The DOD-IG issues a semi-annual report to Congress which includes an Appendix H, Section 845 Annex Audit Reports with Significant Findings. In the latest semiannual report (6 months ending March 31, 2016), there are brief descriptions of 21 DCAA Audit Reports, many with a common issue, significant cost questioned "because the (contractor) employees did not meet the education and/or experience qualifications specified in the contract". Over the last six DOD-IG semiannual reports, this has been a continuous issue and it will remain a risk to T&M contractors whose documentation of employee labor qualification is not up to DCAA's pristine standards.

Training Opportunities

2016 Redstone Government Consulting Sponsored Seminar Schedule

September 8, 2016 – The Life Cycle of an Indirect Cost Rate Proposal
LIVE event; Huntsville, AL – REGISTER HERE

2016 Federal Publications Sponsored Seminar Schedule

August 22-23, 2016 – Cost and Price Analysis in Government Contracts
Arlington, VA

August 25-26, 2016 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Arlington, VA

September 19-20, 2016 – Cost and Price Analysis in Government Contracts
Fort Worth, TX

October 24-25, 2016 – Accounting Compliance for Government Contractors
Sterling, VA

November 3-4, 2016 – Cost and Price Analysis in Government Contracts
Sterling, VA

Instructors:

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

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

Blog Articles Posted to our Website

DCAA Should Resume Its Full Mission
Posted by Wayne Murdock on Thu, Jun 23, 2016 – Read More

When a Firm-Fixed Price Contract Becomes a Curse
Posted by Cheryl Anderson on Fri, Jun 3, 2016 – Read More

Department of Labor Issues New Dollar Threshold for Salary Exempt Employees
Posted by Sheri Buchanan on Tue, May 24, 2016 – Read More

Compensation Caps: The Right and Wrong Way to Compute Blended Rates
Posted by Michael Steen on Tue, May 17, 2016 – Read More

Appealing to the Armed Services Board of Contract Appeals (ASBCA)?
Posted by Cheryl Anderson on Fri, May 6, 2016 – Read More

2017 Defense Authorization Act Section 820 Reinstating DCAA Audits for Civilian Agencies
Posted by Michael Steen on Tue, May 3, 2016 – Read More

The Risks of Fixed-Price-Incentive (FPI)
Posted by Michael Steen on Mon, Apr 18, 2016 – Read More

Work Authorizations Missing During Labor Floor Checks?
Posted by Wayne Murdock on Fri, Apr 8, 2016 – Read More

News Flash "April 1, 2016": DOD Seeks Waiver to Prohibition on Outsourcing DCAA Contract Audit Functions
Posted by Michael Steen on Fri, Apr 1, 2016 – Read More

Pressure on Prime Contractors Continues to Increase Relative to Subcontracts
Posted by Robert Eldridge on Tue, Mar 29, 2016 – Read More

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

Redstone Government Consulting

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

Commercial Item Determination
A Whitepaper by Robert L. Eldridge – Read More

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

CFO Roundtable

Redstone Government Consulting, Inc., Radiance Technologies, Inc., & Warren Averett will be sponsoring a CFO/Controller roundtable for Government Contractors.

All Government contractor CFO's or Controllers are invited to participate. The meetings will be held quarterly and will include lunch and networking from 11:30am – 1:00pm. The next meeting will be held on August 17, 2016 in Research Park at a location TBD. Participants will be notified via email announcements for all future locations and seminar topics.

The CFO Roundtable is **free** to attend. All participants will be invited to share topics of interest and the group will be interactive. Redstone GCI, Radiance Technologies, and Warren Averett will strive to provide speakers on topics that are of interest to the group each quarter. Please provide us your email address and we will notify you 30 days in advance of each meeting. RSVP's are required.

Sign up for CFO Roundtable here

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.

NEW ADDRESS
Huntsville, AL
4240 Balmoral Drive SW, Suite 400
Huntsville, AL 35802
T: 256.704.9800

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