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32nd Annual

OUNCE OF PREVENTION SEMINAR

May 25-26, 2016

Cost and Accounting – Items at the Top of the Ledger

Terry Albertson

Rob Burton

Steve McBrady

Skye Mathieson

Agenda

Cost and Accounting – Items at the Top of the Ledger

- Growing Restrictions on Allowability of Independent Research and Development Costs
- Continued Development of the CDA Statute of Limitations
- The *Raytheon* Decision and Offsets Among Multiple Simultaneous Changes in Cost Accounting Practice
- NDAA Provisions Affecting DCAA
  - DCAA Audit of Non-DOD Contracts Restricted
  - Required Identification of Materiality Standards Used by DCAA

Guerilla Attacks on IR&D

- DOD August 26 “white paper” provides that "beginning in FY 2017, DoD will require contractors to record the name of the government party with whom, and date when, a technical interchange took place prior to IR&D project initiation and to provide this information as part of the required IR&D submissions made to [DTIC]," and DCMA and DCAA "will use these DTIC inputs when making allowability determinations for IR&D costs."
- February 8 notice in Federal Register proposing a new DFARS requirements that offerors to identify IR&D projects on which the offeror would rely to perform the resultant contract, so that the cost of the IR&D project can be considered for cost evaluation purposes

CDA Statute of Limitations

- The Contract Disputes Act, 41 U.S.C. §§ 7101-7109, includes a 6-year SOL
- Claims submitted more than six years after **accrual** are barred by the CDA
- CDA does not define the term "accrual." The Board (and the Court) rely on the Federal Acquisition Regulation 33.201 definition:

  … **the date when all events, which fix the alleged liability** of either the Government or the contractor and permit the assertion of the claim, **were known or should have been known** …
- Until recently, SOL was held to be "jurisdictional," which meant that the boards and COFC lacked jurisdiction over claims beyond the 6-year window -- SOL could be raised at any time, by either party, or the court, and it could not be waived or tolled by agreement of the parties
- In *Sikorsky* (Dec. 2014), the Federal Circuit made a significant change in the SOL landscape

Statute of Limitations

- *Appeal of Alion Science & Tech. Corp.*, ASBCA No. 58992 (Nov. 10, 2015)
- *Appeal of Combat Support Associates*, ASBCA No. 58945
- *Kellogg Brown & Root Services, Inc.*, ASBCA No. 58175

Statute of Limitations

- *Appeal of Thorpe See-Op. Corp.*, ASBCA No. 58960
- *Appeal of Systems Management & Research Techs. Corp. v. Dep't of Energy*, CBCA 4068
- *Kellogg Brown & Root Services, Inc. v. Murphy*, Fed. Cir. (May 18, 2016)

National Defense Authorization Act

NDAA Provisions Affecting DCAA

- DCAA Audit of Non-DOD Contracts Restricted
- Required Identification of Materiality Standards Used by DCAA

Accounting Changes

Appeal of Raytheon Co., ASBCA Nos. 57801, 57803, 58068 (May 7, 2015)

- ASBCA held that under FAR 30.606 contractors may not offset cost impacts from simultaneous accounting changes within the same business segment.
- Likely to cause major disruptions when contractors make multiple changes in cost accounting practices made after 2005 (the date of the FAR change).
- Board ignored the language of CAS 9903.306(b)-(c), which states that when there is a change in accounting practice the government should not pay more than the "contract costs, price, or profit" that "would have been agreed to" had the accounting changes been known, which would logically include all simultaneous changes, not just changes that decrease the costs.

Congressional Investigations

- Proposed rule would make costs incurred in connection with Congressional investigations unallowable.
- As written, not clearly limited to the contractor that is actually the subject of the "proceeding or inquiry."

Expressly Unallowable Costs

Appeal of Raytheon Co., ASBCA Nos. 57576 et al.

- Board rejected the Government's overbroad interpretation of "expressly unallowable"
- Decision undercuts the positions asserted in recent DCAA (Mis)guidance titled "Audit Alert on Identifying Expressly Unallowable Costs" (Jan. 7, 2015) and "Audit Alert Distributing a Listing of Cost Principles That Identify Expressly Unallowable Costs" (Dec. 18, 2014)

Rescinded Government Claims

Appeal of L-3 Commc'ns, ASBCA Nos. 60431, 60432 (Apr. 25, 2016)

- ACOs issued, and then rescinded, two final decisions demanding payment for allegedly unallowable costs incurred in FY 2008.
- In the meantime, the contractor had already appealed the Government claims, arguing that the claims were barred by the CDA statute of limitations.
- Board held that the Government's recision mooted the appeals.
- Although the COs had not yet agreed to settle the claims or provide any assurance that the claims would not be reasserted in the future, COs are presumed to act in good faith, and, without evidence of contrary intent, there was no reason not to "trust" that the claims will not be reasserted.

Travel Costs

Appeal of Raytheon Co., ASBCA No. 58212

- Final rule took effect January 10, 2010, changing the FAR 31.25-46(b) phrase "lowest customary standard, coach, or equivalent airfare" to "lowest priced coach class, or equivalent, airfare available to the contractor during normal business hours."
- Parties disputed the appropriate baseline for measuring the amount of unallowable "premium" airfare costs under the pre-2010 version of FAR 31.205-46(b)
- Board denied the parties' cross-motions for partial summary judgment on the retroactive effect, if any, of the January 2010 amendments to the FAR travel cost principle

GOVERNMENT CONTRACTORS UNDER THE MAGNIFYING GLASS

Contacts

Terry Albertson
Partner
202-624-2635
talbertson@crowell.com

Rob Burton
Partner
202-624-2982
rburton@crowell.com

Steve McBrady
Partner
202-624-2547
smcbrady@crowell.com

Skye Mathieson
Associate
202-624-2606
smathieson@crowell.com