

## Has DCAA Disallowed a Cost? Don't Give in Too Quickly

By Guest Author: Jerome Gabig, Attorney, Wilmer & Lee

Because FAR § 31.201-3 states “the burden of proof shall be upon the contractor to establish that such cost is reasonable,” contractors often are too quick to give in when DCAA disallows a cost. Although not mentioned in the FAR, a corollary to the rule is that “when the government disallows costs on the basis of a FAR cost principle, the burden is on the government to prove that the costs are unallowable.” See *SRI International*, 11-1 BCA ¶ 34694, ASBCA No. 56353. In 2017 the Armed Services Board of Contracts Appeal (ASBCA) issued a decision that provides a good lesson about not giving in too quickly when DCAA disallows a cost.

The underlying controversy in *A-T Solutions, Inc.*, ASBCA No. 59338, 17-1 BCA ¶ 36,655 involved an Army contract to provide professional services and materials to train on improvised explosive devices. The training was to take place both within the United States and overseas. The cost-plus-fixed-fee contract was awarded for a base year and up to four option years. Under the contract, ATS provided the training materials and equipment as commercial items and was paid for them at its catalog prices. ATS's proposal stated that it was a provider of commercial training and that its training materials were priced using its product catalog.

In July 2011, DCAA issued a report questioning ATS's charging for training material based on commercial prices rather than at actual costs as set forth in FAR § 31.205-26 Material Costs. The contracting officer deferred to DCAA. The Army suspended a percentage of reimbursement of payment on the contract. ATS appealed to the ASBCA. The Board decided in favor of ATS by holding “we find that the government has not met its burden to show that the transfers of commercial ATS training materials between ATS divisions were not the sort of transfers contemplated by FAR 31.205-26(e).” *Id.* Hence, ATS prevailed simply by holding DCAA to its burden of proof—something DCAA could not meet.

In summary, do not give in too quickly when DCAA disallows a cost. There is no expense for a contractor to request the contracting officer to issue a final decision. Also, there is no expense to appeal the final decision to a Board of Contracts Appeal. Rarely do DCAA or contracting officers consider their burden of proof when disallowing costs. However, upon being confronted with this reality by going through the appeal process, the Government is likely to be more receptive to a fair settlement.

Another noteworthy point about the *A-T Solutions* decision is that the Government tried to use ATS's basic accounting system, Peachtree, against ATS. As ATS's business grew, the company transitioned to Deltek Costpoint. To the Board's credit, it recognized that a small business's accounting should not be held to the standard of a sophisticated accounting system:

Moreover, the government's argument relies on a negative—what ATS's 2007-2008 accounting records do not show. Those accounting records were the product of an unsophisticated small business accounting software application that did not provide visibility into transactions at the divisional level (finding 19). ATS witnesses testified credibly that the Training division determined what materials would be needed for a particular training....

*Id.* Hence, through the testimony of its Chief Financial Officer, ATS was able to explain to the satisfaction of the Board matters that were not fully documented in ATS's accounting system.

## The Peril of Proposing Key Personnel

By Guest Author: Jerome Gabig, Attorney, Wilmer & Lee

About 53% of DOD's annual procurement budget is expended on services.<sup>1</sup> In the highly competitive market of selling services to the government, highly qualified personnel often make the difference whether a proposal is selected for award of a contract or task order. It is generally known that proposing top talent (such as a distinguished scientist) without any intent of using that individual is considered fraudulent. Also, vendors who practice what is known as “bait and switch” of key personnel fall short of the Government's expectation that “contractors must conduct themselves with the highest degree of integrity.” FAR § 3.1002.

Where a contractor submits a proposal fully intending to use the proposed key personnel but late into the evaluation process learns that a proposed key person is no longer available, there can be a peril that is not fully appreciated by

<sup>1</sup> See GAO-17-244SP, Contracting Data Analysis: Assessment of Government-wide Trends (Mar. 9, 2017), at 5, available at <https://www.gao.gov/assets/690/683273.pdf>

many government contractors. The root of the problem is that exceptionally qualified individuals generally are in high demand. Typically, such individuals are unlikely to remain idle for months waiting for a contract or task order to be awarded. This dynamic of highly qualified individuals pursuing other opportunities can create a dilemma for contractors.

A protest in 2017 to the General Accountability Office (GAO) captures the dilemma that an offeror faces when a proposed key person is no longer available after final proposal revisions have been submitted. The protest involved a Department of Labor (DOL) solicitation to operate its Job Corps center in Los Angeles. The solicitation required the offerors to submit a resume and letter of commitment for the proposed center director. YMCA of Greater Los Angeles was the incumbent. The proposal of Management and Training Corporation (MTC) was selected for award. However, twenty-six days after submission of final proposal revisions, MTC notified DOL that its proposed center director was no longer available; MTC offered another center director. YMCA protested that the switch of proposed directors constituted unequal discussions. The GAO sustained the protest.

Because of the harsh result in the *YMCA* decision from the perspective of the apparent winner, offerors may be tempted not to disclose that a proposed key person is no longer available. This temptation should be resisted since there are serious consequences to not disclosing. The GAO has made clear that:

“Our Office has explained that offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals. When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal.”

*General Revenue Corporation*, B-414220.3, March 27, 2017.

According to the GAO, the obligation to disclose the nonavailability of a proposed key person is fundamental to the integrity of the procurement process. *FCi Federal, Inc.*, B-408558.8, August 5, 2015. More recently, a contractor’s failure to notify an agency that a proposed key person was no longer employed by the company was held to be a “misrepresentation” resulting in a rescission of the award. *NetCentrics Corporation*, B-417285.3, June 5, 2019.

The bottom line is that in responding to solicitations, offerors should perform a risk assessment of each proposed key

person as to whether he or she is likely to be available should the proposal be selected for award. Otherwise, despite an exhaustive (and expensive) effort to compete for a lucrative contract or task order, award may be lost because the offeror cannot provide a proposed key person.

## Contract Disputes Decisions with Universal Messages for Government Contractors

By Michael Steen, Senior Advisor

The ASBCA (Armed Services Board of Contract Appeals) and the CBCA (Civilian Board of Contract Appeals), recently issued decisions, each having some situation specific facts, but both decisions also reinforce the universal importance of carefully reading Government solicitations followed by carefully reading the Government contract(s).

CBCA 6029, 6030. The contract dispute involved a contracting officer’s deemed denial of a contractor claim for wages paid under the SCA (Service Contract Act). FAR 22.10, Service Contract Act Wage-Determination invoke contract clauses 52.222-41 and 52.222-43 which typically involve Government and contractor responsibilities in terms of compliance with the SCA. As discussed in the case (which serves as a primer in terms of the application of the SCA and the typical responsibilities of the Government and of the Contractor), the Contracting Officer determines if the SCA applies followed by the Contractor’s duty to identify labor categories that are covered by the SCA and matching those categories to the applicable wage determination. However, in this particular case, the contract assigned greater responsibility to the Contracting Officer to identify (task order) labor subject to the SCA and to apply wages as required by FAR 22.10. As noted in the decision, the more specific contract terms displaced the default terms and conditions (FAR 52.222-41).

The case also highlights the role of the DOL (Department of Labor) in terms of its authority to determine if contract labor is subject exempt from or subject to the SCA. In this case, the DOL opined that the SCA applied, but only after the first task order award which caused the contracting officer (at DOL’s direction) to issue a contract modification but the contracting officer failed to provide an equitable adjustment (price increase). The CBCA confirmed that the contractor, through application of the contract specific terms, was entitled to an equitable adjustment on the first task order as well as the second and third task orders. The CBCA did not render an