

COST AND PRICING: NO CONTRACT IS REALLY FINAL

Terry Albertson
Skye Mathieson
Liz Buehler

Three Phases

- Proposal
- Performance and Billing
- Final Payment

Proposal

- Forward pricing rates
 - Labor rates
 - Indirect cost rates
 - Material and ODCs
- Cost Accounting Standards
 - About how the accounting system works – what gets charged where
 - Flows down from covered primes
 - Exemptions for competition, commercial items, award value, small business
 - No clear rules for requirements contracts, IDIQ, task order, multiple CLINs of different types
 - Disclosure
 - Consistency
 - Substantive requirements

Proposal (cont.)

- Truth in Negotiations Act (TINA)
 - Disclose certified cost information (to USG and/or to higher tier primes and subcontractors)
 - Competition and commercial item exemptions
 - Covers initial awards and mods over the coverage threshold
- FAR Part 31 “Cost Principles”
 - No exemptions
 - Very complicated and detailed rules – based on politics, policy, and petulance

Performance and Billing

- Progress payments based on costs (for FFP and FPI contracts)
 - Based on interim labor rates and indirect cost rates
 - Limits on amount billable
 - No specific requirement that costs must be allowable, but . . .
 - Loss ratio formula for contracts that are losing money
- Performance based billing/milestone billing
- T&M billing based on hours worked and actual costs for material
- “Public vouchers” for cost-reimbursement contracting
- All bills subject to periodic audit and testing

Final Payment

- On FFP contracts, bill on delivery or, if there have been interim payments, liquidate unbilled amounts on delivery – generally no audit of incurred costs and no formal “close out”
- On cost-reimbursement contracts
 - Indirect cost rates for all contracts proposed, audited, and negotiated annually
 - Direct costs are sometimes, but not always, subject to audit
 - Final payment and close out when all costs are known and audits are complete – usually many years after completion of performance
- On FPI contracts, calculate “shareline” adjustments due when all costs are known
- On T&M contracts
 - Verify hours charged to the contract
 - Material reimbursed at actual costs, plus actual indirect cost, if applicable.

Post-Award Price Adjustments

- FAR Part 31 Allowability Rules
- TINA
- CAS

FAR Part 31 Allowability Rules

- Annual audit of indirect “incurred cost submission” (ICS)
- Penalties for charging expressly unallowable costs (double damages) or agreed to be unallowable costs (treble damages)
- Applicable generally to cost-reimbursement and FPI contracts and CLINs, not FFP or T&M contracts
- 6-year statute of limitations, probably from submission of annual ICS

TINA

- Post-award audit limited to contracts and subcontracts subject to TINA at the time of award or at the time of modification (mods may be covered even though award was exempt)
- Prime and sub prices may be adjusted (downward only) to reflect natural and probable consequences of failure to disclose all relevant information at all tiers
- Offsets available for undisclosed data that would have increased price if disclosed
- 6-year statute of limitations, but from when is not decided, except that it is no later than the date of any audit report identifying a potential claim

CAS

- Downward only price adjustment on any covered contracts for increased costs when:
 - Contractor fails to comply with disclosed or established practices
 - Contractor fails to comply with substantive accounting requirements of CAS
 - Contractor changes accounting practices, other than changes required by the regulations or changes found by the government to be desirable
- Adjustments calculated “in the aggregate” for affected contracts, permitting some netting of increases and decreases (but less than one would hope)
- Statute of limitations
 - For changes, SOL begins to run on the date the contractor discloses the change and provides an estimated cost impact (regardless whether the estimated impact turns out to be accurate)
 - For noncompliance, it is not entirely clear when the government would be charged with knowledge that starts running of the SOL, but certainly no later than the date of any audit report identifying a noncompliant practice

QUESTIONS?

Terry Albertson
talbertson@crowell.com
(202) 624-2635

Skye Mathieson
smathieson@crowell.com
(202) 624-2606

Liz Buehler
ebuehler@crowell.com
(202) 624-2821