COSTTREND CONSULTING, INC.

Government Contracting Alert

1st Quarter 2015

DFAR Council Withdraws Proposed Business System Rule

On February 4th the Defense Acquisition Regulations System closed Case 2012-D042. This Case was the Proposed Business System Rule (79 FR 41172, July 15, 2014) that would have required defense contractors subject to the business system clause to: a) conduct annual self-evaluations on their accounting, estimating, and material management and accounting systems; and b) undergo "CPA Firm Audits" of the 3 separate business systems if they received annual awards totaling $50M or more through certified cost or pricing data. DCAA would have had broad access to the work paper files.

Memorandum for Commanders on Commercial Item Determinations

On February 4, 2015, the Department of Defense (DOD) issued a Memorandum on Commercial Items Determinations. The Memorandum provided guidance to Contracting Officers (COs) on the Commercial Items Determination process. The DOD's preferred method is to use market based pricing, however when that is not available there are a number of other options. The Memorandum advises COs that "contractors should be best suited to substantiate why the prices are fair and reasonable".

In order for contractors to justify an item as commercial, they should prepare supporting documentation that focuses on:

1. Sales of the item to non-government buyers. This is the most preferred option as it relies on actual commercial sales data.
2. Market pricing for same or similar items based on detailed research and a market analysis.
3. A cost build-up for the item. This is the least preferred option.

The Memorandum states that in response to the 2013 National Defense Authorization Act (NDAA), the DOD is to draft and submit a proposed rule to revise the DFARS with regards to the Commercial Items Determination. Nothing has been released as yet, so more to come.

SBA's Proposed Rule related to the 2013 NDAA

The SBA has proposed a new rule that will make a number of important changes including:

Changes to Limitation on Subcontracting

The Limitation on Subcontracting will change from being based on the percentage of the cost of labor to the percentage of the award amount. The calculations will also exclude subcontracts issued to "similarly situated entities". A similarly situated entity is a small business that "is a participant of the same SBA program that qualified the prime contractor as an eligible offeror and awardee of the contract."

Clarification of Affiliation Rules

The proposed new rule clarifies that a "presumption of affiliation exists for firms that conduct business with each other and are owned and controlled by persons who are married couples, parties to a civil union, parents and children, and siblings."

It also clarifies that a "If a firm derives 70% or more of its revenue from another firm over the previous fiscal year, SBA will presume that the one firm is economically dependent on the other and, therefore, that the two firms are affiliated." The contractor has the option to rebut both presumptions.

Expanded Joint Ventures Options for Small Businesses

The SBA is going to "broaden the exclusion from affiliation for small business size status, to allow two or more small businesses to joint venture for any procurement without being affiliated with regard to the performance of that procurement requirement."

Clarification of the Calculation of Annual Receipts

SBA seeks to clarify that passive income is included in the calculation of annual receipts that is defined in the Federal Acquisition Regulation Subpart 19.101 as "the annual average gross revenue" of a concern for the last 3 fiscal years and "gross revenue includes revenues from sales of products and services, interest, rents, fees, commissions and/or whatever other sources derived, but less returns and allowances, sales of fixed assets, …, and taxes collected for remittance (and if due, remitted) to a third party".

Clarification of Recertification

SBA seeks to clarify "that if the merger or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award."

Statute of Limitation (SOL) Recent Cases

The Federal Circuit's decision in *Sikorsky Aircraft Corporation v. United States No.2013, 5096-5099, 2014 WL6915672* (Federal Circuit, Dec 10, 2014) goes against most existing case law by deciding that the burden of proof that a claim exceeds the six-year statute of limitations (SOL) under Contract Disputes Act's (CDA) resides with the party changeling timeliness of the claim as an affirmative defense. The court ruled that Sikorsky failed to meet its burden of proof that the USG had actual or constructive knowledge of the alleged CAS violation more than six years before the ACO's final decision.

In the *Combat Support Assocs., ASBCA No.58945, 2014 WL5563724* (Armed Services Board of Contract Appeals, October 22, 2014), the ASBCA held that the USG's receipt of an adequate incurred cost submission does not necessarily trigger the running of the CDA SOL. According to the ASBCA, the SOL clock starts when the contractor submits the underlying supporting data from which the Government learned, or had reason to learn, of its cost disallowance claim(s).

In the *Boeing Company, ASBCA No.58660, 2014 WL7007381* (Armed Services Board of Contract Appeals, November 6, 2014), ASBCA held that submitting a revised disclosure statement and a PowerPoint presentation to the USG's DACO on a forward pricing rate proposal (which included the changed cost accounting practices) was not sufficient enough to trigger the running of the CDA SOL. The ASBCA found that the SOL trigger began upon receipt of a contractor's general dollar magnitude cost impact analysis.