

2018-2019 Government Contracts Updates: Cybersecurity, Cost and Pricing, and OTs

Quincy Stott, Managing Associate
Denver
+1 303 634 4316
quincy.stott@dentons.com

Tess Gosda, Associate
Denver
+1 303 634 4000
tess.gosda@dentons.com

Agenda

- Cybersecurity
- Cost and Pricing
 - Truthful Cost or Pricing Data
 - Advance Agreements
 - Statute of Limitations
 - Expressly Unallowable Costs
- OTA New Guidebook

Cybersecurity

Growing Emphasis on Cybersecurity

- 35,000 cybersecurity incidents reported by federal agencies in FY 2017
- September 20, 2018: Trump Administration unveils the National Cyber Strategy
- GAO published 8 reports about cybersecurity in 2018
 - Critical infrastructure (February 2018)
 - Federal agency supply chain (July 2018)
- GAO's 2019 report identified 35 high-risk areas
 - 1 area removed after 29 years on the list: DOD supply chain management
- Open FAR Case No. 2017-016, Controlled Unclassified Information
 - February 27, 2019: DRC agreed to draft proposed FAR rule
- March 4, 2019: Navy's Cybersecurity Readiness Review

U.S. Navy Guidance

- September 2018 U.S. Navy Memo: a CDRL is required for delivery and approval of a system security plan (SSP)
 - Contractors must allow the government to validate the SSP every 3 years (ad hoc and without notice)
 - SSPs will not be approved without full implementation of:
 - Multi-factor authentication
 - FIPS 140-2 validated encryption

DoD Cybersecurity Guidance

- November 6, 2018 Director, Defense Pricing and Contracting, guidance for:
 - Reviewing SSPs and NIST SP 800-171 security controls not implemented
 - Assessing compliance of and enhancing protections for a contractor's internal unclassified information system
 - NIST SP 800-171 compliance as a separate technical evaluation factor in solicitations
 - On-site assessment of NIST SP 800-171 compliance
- December 17, 2018 DoD memo: Strengthening Contract Requirements Language for Cybersecurity in the Defense Industrial Base
 - Provided sample SOW language in conjunction with DPC guidance requiring SSPs and assessment of compliance
 - Ensures access to/delivery of SSP, plan to track flow down of CDI, and assess compliance of known tier 1 suppliers

CPSR Cybersecurity Guidance

- January 21, 2019 memo from Ellen Lord; CPSR review will include a review of contractor procedures to:
 - Ensure making and distribution statements flow to tier 1 suppliers; and
 - Assess compliance of tier 1 suppliers with DFARS 252.204-7012 and NIST SP 800-171
- February 26, 2019 CPSR Guidebook's cybersecurity revisions
 - DFARS 252.204-7012 “is not an indiscriminate flow down”
 - Ensure CUI is properly marked and not included in files not subject to the clause
 - Demonstrate how CUI is transferred to a subcontractor
 - Validate/document that subcontractor has a covered contractor information system
 - Track variance requests and incident report numbers

Risks Associated with Noncompliance

- Weaker proposals, non-responsiveness to RFPs
- Breach of contract
- CPSR findings, including significant deficiencies
- False Claims Act liability (e.g., *United States v. Aerojet Rocketdyne Holdings, Inc.*, --- F. Supp. 3d ----, 2019 WL 2024595 (May 8, 2019))
- Cybersecurity incidents

Cost and Pricing

Truthful Cost or Pricing Data Act (TINA)

Truthful Cost or Pricing Data (TINA) Threshold Increases to \$2 Million

- Section 811 of the National Defense Authorization Act (NDAA) for FY 2018
 - Cost or pricing data threshold increased from \$750,000 to \$2 million under 10 U.S.C. § 2306a and 41 U.S.C. § 3502
 - Updates to FAR Clauses at 52.215-10 et seq.
- Potential Effects:
 - Ease regulatory burden on contractors
 - Quicker pre-award phase for solicitations below the threshold
 - Increase likelihood of audits for contracts above the threshold

Class Deviations Implementing New TINA Threshold

- Defense Procurement and Acquisition Policy Class Deviation
 - TINA threshold also increases CAS covered contracts threshold to \$2 million (48 C.F.R. 9903.201-(1)(b)(2))
 - Instructs COs to use updated CAS clauses at FAR 52.230-1 through 52.230-5
 - Effective July 1, 2018
- Civilian Agency Acquisition Council Memorandum
 - Contracts entered into before June 30, 2018 are excluded from the threshold increase
 - DoD, GSA, and NASA have started rulemaking to incorporate the new threshold into the FAR (FAR Case No. 2018-005)
 - Agencies that have issued class deviations include DoE, NASA, Treasury, Agriculture, and USAID

TINA “Sweep” Memorandum

- “Reducing Acquisition Lead Time by Eliminating Inefficiencies Associated with Cost or Pricing Data Submissions after Price Agreement (‘Sweep Data’)”
 - Issued by Director of Defense Procurement and Acquisition Policy on June 7, 2018
 - Contractors are submitting cost or pricing data after the date of price agreement as part of its “sweep” efforts to ensure that the cost or pricing data to which it is certifying is accurate, complete, and current
 - This “sweep” practice allegedly increases acquisition lead time by delaying submission of the Certificate of Current Cost or Pricing Data, and by requiring the CO to review additional data
 - DoD COs should request Certificates “no later than five business days after the date of price agreement”
 - COs to defer consideration of the sweep data on price agreement until after award as a potential defective pricing event. If defective pricing found, the government will be entitled to a price adjustment in accordance with FAR 52.215-10 and 11

Advance Agreements

United Launch Servs., LLC v. United States, **No. 12-380C, 2018 WL 4347780** **(Fed. Cl. Aug. 29, 2018)**

- In 1998 Boeing entered into a development agreement (OTA) and a FAR Part 12 initial launch services (ILS) contract
 - Boeing employed a “lot accounting method”
 - Incurred certain costs that Boeing classified as an asset and deferred
- Boeing/AF executed advance agreements concerning the deferred costs; government would pay Boeing under a separate CLIN for these deferred costs under the ELC contract
- Years later, following a GAO report, new DCAA audits assert Boeing is noncompliant with CAS 406 and 405; ACO demands \$72 million of overpayments and \$17 million in interest and claims advance agreements unenforceable because they were illegal
- Boeing seeks summary judgment advancing a “plainly and palpably” illegal standard; the COFC rejects this argument finding COs lack the authority to bind the government to contractual payment provisions if they are contrary to statute or regulation and, therefore, illegal

Expressly Unallowable Costs

Raytheon Co., ASBCA No. 57743, 2018 WL 4427232

TAKEAWAY:
Potentially expands the
range of costs subject
to penalties.

- Raytheon and the government moved for reconsideration of the Board’s 2017 decision (*Raytheon Co.*, ASBCA No. 57743, 17-1 BCA ¶ 36,724)
 - Holding: salary expenses of employees who engaged in lobbying (generating unallowable lobbying costs) were unallowable and aircraft fractional lease costs agreed to be unallowable pursuant to an advance agreement were not expressly unallowable
- In 2018 decision, Board held, “by application of common sense, it is obvious that salary costs are ‘associated with unallowable lobbying costs’ and thus were expressly unallowable and subject to penalties.”
- Double penalties apply if the agency head determines that a contractor’s proposal for settlement of indirect costs “includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal.”
- The claim for level two penalties was a separate claim than the claim for level one penalties
- Since the corporate ACO did not assess level two penalties, the Board found there was no proper Government claim for double penalties before it, as required by the CDA

Statute of Limitations

Drs Glob. Enter. Sols., Inc., ASBCA No. 61368, 18-1 BCA ¶ 37131 (Aug. 30, 2018)

TAKEAWAY: Difficult for
contractors to dispose of old cost
disallowance claims with SOL

- The government's 2017 claim disallowing FY 2006 costs was not necessarily time-barred by the CDA 6 year SOL
- There is no “blanket rule” providing that the statute of limitations begins to run when the government pays a voucher or invoice
- Distinguished from *Spartan DeLeon Springs, LLC*, ASBCA No. 60416, 17-1 BCA ¶ 36,601
 - Unlike in *Spartan DeLeon*, DRS was not able to offer undisputed facts demonstrating that DRS's vouchers contained sufficient information
 - Board did not abandon entirely its *Spartan DeLeon* decision that government direct cost disallowance claims may accrue at the time the government initially reviewed and decided to pay the direct costs
- The more information that accompanies vouchers, invoices, and FICRPs, the more likely a stale government cost disallowance claim will be barred by SOL

New Other Transaction Authority Guidebook

Revised Other Transactions Guide

- On December 3, 2018, DoD rescinded in its entirety the previous OT guide and issued a new revised guide with more flexible terms.
- Guide provides advice and lessons learned on the planning, publicizing, soliciting, evaluating, negotiation, award, and administration of OTs, to include all three types of OT agreements:
 - Research
 - Prototype
 - Production
- Not a formal policy document

Background on OTs

- OTs are designed to give DoD more flexibility to team with traditional and non-traditional contractors
- OTs **are not** governed by FAR based procurement contracts, grants, cooperative agreements, or cooperative research and development agreements (CRADAs)
- OTs may be subject to DoD Instruction (DoDI) 5000.02 dependent upon the acquisition pathway selected by the program office

Types of OTs

- Research OTs: authorized under 10 U.S.C. § 2371 for basic, applied, and advanced research projects
- Prototype OTs are authorized under 10 U.S.C. § 2371b to acquire prototype capabilities and allow for those prototypes to transition into Production OTs
- Production OTs are authorized under 10 U.S.C. § 2371b(f) as noncompetitive, follow-on OTs to a Prototype OT agreement that was competitively awarded and successfully completed
 - Requires that advanced consideration be given and notice be made of the potential for a follow-on OT; this is a necessary precondition for a follow-on Production OT
 - *Oracle Am., Inc.*, B-416061 (May 31, 2018) (sustained protest of agency's entry into Production OT where the agency did not comply with the requirements of the statute)

New Guide Debunks OT Myths

1. There is only one type of OT available to DoD
2. The OT authorities are new and are rarely used
3. Since an OT is termed an “agreement,” it is not a contract
4. Since CICA does not apply to OTs, competition and fairness are not a consideration
5. OTs cannot be protested
6. None of the federal statutes or regulations apply to OTs
7. OTs can only be awarded through a consortium
8. The OT authorities can only use RDT&E appropriations
9. Anyone in DoD can award an OT
10. OTs will always be faster to award than other contractual instruments

Key Changes from Previous Guide

- The prior guide required Agreement Officers (AOs) to be warranted DoD COs
 - Now DoD components are instructed to create their own AO warrant procedure
- Agreement Officers are instructed that “[i]f a strategy, practice, or procedure is in the best interest of the Government and is not prohibited by law or Executive Order, *the Government team should assume it is permitted.*”
- New guide encourages more latitude in negotiation appropriate IP clauses
 - In reference to the Bayh-Dole Act, 35 U.S.C. § 201-204 for patents and 10 U.S.C. § 2320-21 for technical data, the new guide instructs that “these statutes do not apply to OTs and *negotiation of rights of a different scope is permissible and encouraged*” (emphasis in original).

Thank you

大成 DENTONS

Dentons US LLP
1400 Wewatta Street
Suite 700
Denver, CO 80202-5548
United States

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.