

# Federal Cost & Pricing Update for Federal Contracts

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# Speaker:



## **Katie Griffin**

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**Katie Griffin** represents contractors across a range of industries on federal, state, and private projects involving government contracts, construction, and white-collar issues. Katie has extensive experience representing defense contractors with respect to government cost accounting issues, covering among other issues government proposed disallowances of executive compensation and broad-based employee compensation (including the costs associated with health and welfare benefits). She also has experience assisting government contractors with a full spectrum of other contracting issues including those involving audits and investigations, procurement fraud allegations, and contract claims and disputes with the federal government and prime-subcontractor disputes on federal and federally-funded projects. Her experience includes assisting contractors in developing and evaluating their ethics and compliance programs, as well as representing contractors who have been suspended or proposed for debarment. She is also experienced in the conduct of internal investigations and employee interviews pertaining to compliance issues and in support of independent monitor engagements.

Katie co-taught a Cost & Pricing course as an adjunct professor at George Washington University School of Law from 2014-2020. She has published on several aspects of government contracting. She served as BCABA President and Vice President in 2017 and 2016, respectively. She was recently named to DCA Live's 2022 Emerging Women Leaders in Private Practice in Washington, D.C.

# Speaker:



**Matthew Popham**  
Sr. Vice President, Government  
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**Matthew Popham** serves as the Senior Vice President, Government Compliance Director for Leidos, a Fortune 500® technology, engineering, and science solutions and services leader working to solve the world's toughest challenges in the defense, intelligence, civil, and health markets. The company's 46,000 employees support vital missions for government and commercial customers. Headquartered in Reston, Virginia, Leidos reported annual revenues of approximately \$14.4 billion for the fiscal year ended December 30, 2022.

Matt has had over 30 years of experience in government contract compliance with issues surrounding audit, incurred cost submissions, forward pricing, business systems, CAS coverage, pricing, and overall financial analysis. He previously served in a Vice President role at Mission Essential, a major language services provider. Prior to this, he was a Compliance Director for BAE Systems' Support Solutions Sector home office with responsibility for compliance relative to all reporting businesses. Matt started his career with the Defense Contract Audit Agency and accumulated approximately 10 years of experience auditing both small and large businesses prior to leaving to join the private sector.



# Speaker:



## **Laura Semple**

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Amentum**

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**Laura Semple** serves as Assistant General Counsel for Amentum, where she provides advice on Government contracting and corporate law matters.

Ms. Semple previously worked as an associate at Smith Pachter McWhorter, PLC, where she counseled Government contractors on cost and pricing issues and resolved claims related to disallowed costs, CAS noncompliances, and accounting cost impacts. Ms. Semple counseled Government contractors on compliance with mandatory disclosure obligations, incurred cost submissions, and other Government reporting requirements.

Ms. Semple is a frequent speaker on Government Contracts Cost & Pricing issues, teaching the Cost Allowability course for Federal Publications Seminars. Ms. Semple taught the Cost & Pricing course as an adjunct professor at the George Washington University Law School. She currently serves as Co-Chair of the ABA Accounting, Cost & Pricing Committee and as Vice-Chair of the National Defense Industrial Association Legal Committee (Procurement Division). She also served as President of the Boards of Contract Appeals Bar Association.

# Agenda:

- Case Law Update
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  - Cost Allowability
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  - Statute of Limitations/Claim Accrual
  - Civil False Claims Act Scienter
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## Case Law Update

- Government Access & Audit Rights
- Cost Allowability
- Cost Accounting Standards (CAS)
- Statute of Limitations/Claim Accrual
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- Claim/Contracting Officer Final Decision (COFD)

# Government Access and Audit Rights

- FAR 52.215-2, Audit and Records – Negotiation:
  - “Records includes books, documents, accounting procedures and practices, and other data, regardless of type and...whether such items are in written form, in the form of computer data, or in any other form.”
  - Cost, incentive, T&M, LH, price redeterminable contract – “contractor shall maintain [and CO shall have right to examine and audit] all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract.”
  - Certified COPD pricing actions – CO, in order to evaluate the accuracy, completeness, and currency of the certified COPD shall have the right to examine and audit all of the contractor’s records, including computations and projections related to – the proposal; the discussions conducted on the proposal (negotiations); pricing; performance
    - 3 years after final payment or FAR 4.7

# Government Access and Audit Rights

- FAR 15.408, Table 15-2: “By submitting your proposal, you grant the Contracting Officer...the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual data (regardless of form or whether the data are specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.”
- FAR 52.230-2(c), Cost Accounting Standards:
  - “Contractor shall permit any authorized [Government] representatives . . . to examine and make copies of any documents, papers, or records relating to compliance” with requirements of clause.
- FAR 52.216-7, Allowable Cost and Payment:
  - (d): Submission of final annual indirect cost rate proposal in accordance with FAR 42.7;
  - (g): CO may have invoices, vouchers, statements of cost audited, payments reduced for unallowable costs or adjustments for under/overpayments.
- FAR 31.201-2(d):
  - Contractor responsible “for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles . . . [CO] may disallow all or part of a claimed cost that is inadequately supported.”



# Government Access and Audit Rights

- *HPM Corp. v. DOE*, CBCA No. 7559 (July 12, 2023)
  - Contractor asserted nonmonetary claim regarding audit scope.
  - Appeal dismissed for failure to state claim because audit clauses (FAR 52.215-2(b), 52.216-7, DEAR 970.5204-3) could be “broad” enough to encompass FFP CLINs on contracts containing flexibly-priced and FFP CLINs (e.g., to test “misallocation and/or cost shifting”) and COFD indicated documents at issue related to indirect provisional billing rates.
  - “Even if the clauses at FAR 52.215-2 and 52.216-7 did not provide a basis for DOE’s access to any documents tied to FFP CLINs, [DEAR 970.5204-3] does . . . Government’s audit rights under these clauses are not limitless and do not provide a basis for wide-ranging document request for corporate records unrelated to the verification of actual costs [citing *Newport News*]. But the contractor does not get to stop an audit simply because it thinks that what it has produced is good enough.”
  - Board refused to “micromanage” audit.

# Government Access and Audit Rights

- *Allard Nazarian Group, Inc. dba Granite State Manufacturing*, ASBCA Nos. 62413, 62414 (July 27, 2023)
  - Government improperly decremented fixed labor rates on T&M contracts based on alleged inadequacies associated with contractor’s indirect cost rate proposal.
  - “FAR 52.216-7 [Allowable Cost and Payment] sets forth procedures for setting final indirect cost rates. FAR 52.216-7(g) provides the government the right to conduct an audit prior to final payment and to reduce or adjust any such payments *determined by the contracting officers to be unallowable costs*. FAR 52.216-7(g) does not provide the government the right to ‘recoup prior overpaid amounts where no auditable support is submitted’ (id.). Here, the contracting officer’s application of a decrement on appellant’s direct labor rate costs *was not based upon a payment ‘found by the Contracting Officer not to constitute allowable costs.’* FAR 52.216-7(g). Rather, the government applied a decrement to appellant’s direct labor rate costs *based upon appellant’s alleged failure to submit auditable indirect cost rate proposals. FAR 52.216-7(g) does not provide a proper justification, or regulatory authority, for the government’s actions taken here.*”
  - “Although FAR 42.703-2 clearly provides the contracting officer authority to set a unilateral final indirect cost rate, that provision does not grant the contracting officer authority to apply the unilaterally-established final indirect cost rates as a decrement to a contractor’s direct labor costs.”

# Government Access and Audit Rights

- *CACI-Federal v. United States Navy, Civil Action 1:23-cv-478 (RDA/IDD) (E.D. Va. May 19, 2023)*
  - Contractor claim grounded on Trade Secrets Act, 18 USC sec. 1905, not CDA.
  - Navy decision not to act on company concerns that Navy was improperly utilizing trade secrets associated with company's software was final agency action.
  - Court issued preliminary injunction under Administrative Procedure Act to stop Navy from improperly accessing software.
  - Navy's access not covered by "technical data" or "form, fit, and function" data under DFARS 252.227-7013 or -7015.

# Cost Allowability

- FAR Part 31 - Contract Cost Principles & Procedures
  - Defines allowable costs for procurement contracts, grants, and cooperative agreements.
  - Based on agency policies, statutory requirements and Cost Accounting Standards.
- Burden of Proof
  - Government burden to prove statute, regulation, or contract provision makes cost unallowable.
  - Contractor burden to prove costs are reasonable (FAR) and allocable (case law).
- Applicability
  - Cost reimbursable contracts and subcontracts.
  - Time and materials (T&M) contracts.
  - Fixed price contracts and subcontracts priced based on submission of certified cost or pricing data.
  - Certain contract modifications.
  - Cost principles in effect when contract awarded applicable for life of contract, with certain exceptions.
- Overhead certificates & penalties for unallowable costs
  - Risks of double and treble damages, plus interest.

# Cost Allowability

- *Secretary of Defense v. Raytheon Company, Raytheon Missile Systems*, CAFC No. 21-2304, January 3, 2023
  - Federal Circuit overruled ASBCA.
  - Found contractor’s policies inconsistent with FAR.
  - Time spent on lobbying outside of working hours.
    - Citing FAR 31.201-6(e)(2): “after hours work on unallowable activities should be accounted for . . . Though both parties point out that this provision is not directly applicable, it is nonetheless instructive: if after-hours activities should be considered for directly associated costs, for consistency’s sake they should also be considered for expressly unallowable costs . . . A salary, by definition, compensates an employee for everything the employee does on behalf of the company irrespective of the time spent on those services . . . Because [the contractor’s submissions] accounted only for unallowable costs incurred during regular hours and ignored after-hours lobbying, they do not accurately reflect the proportion of time that . . . Employees spent on unallowable lobbying activities.”
  - Economic planning costs vs. organization costs.
    - “By only reporting time after the submission of an indicative offer or the decision to go to market with offering materials . . . [contractor’s] policies are plainly inconsistent with the regulation . . . Even identifying the subject of the decision involves preliminarily planning the acquisition or divestiture and is, per the regulation, unallowable.”
  - Remanded to ASBCA to quantify unallowable costs “improperly charged to the government.”

# Cost Allowability

- *Northrop Grumman Corp.*, ASBCA No. 62165 (July 5, 2023)
  - Nonqualified defined-benefit “pay-as-you-go” pension plan.
  - “It is undisputed that [contractor] incurred higher pension costs because it utilized as a factor in its pension plan formula compensation that did not exclude amounts paid in excess of the cap.”
    - Comp cap applies to bonus and salary utilized in formula even though pension costs not subject to cap.
    - Pension costs unallowable as directly associated costs.
    - Alternatively—citing *DynCorp Int’l LLC*, ASBCA No. 61950—pension costs unreasonable because derived from unallowable compensation.

# Cost Allowability

- *General Atomics Aeronautical Systems, Inc.*, ASBCA Nos. 61333, 61731, February 8, 2023
  - Government alleged CAS 405, 410, and 420 noncompliances because contractor excluded lease charges exceeding “normal costs of ownership” from its G&A allocation base.
  - Contractor argued excess were not costs.
  - Board summarized decisions defining “cost” : “made an outlay for the operation of its business, gave an economic sacrifice, paid a price, or surrendered something to obtain” goods or services.
  - ASBCA denied government motion for summary judgment – triable question as to whether excess amounts are a cost or “tax and treasury efficient vehicles for conveyance of funds between related entities” because contractor offered declaration that it could still occupy properties regardless of whether it transferred lease charges exceeding ownership costs.”

# Cost Allowability

- *Voxtel, Inc.*, ASBCA No. 60129 (March 9, 2023)
  - IR&D: Although cost account nomenclature referenced contract numbers, Government failed to meet its burden to demonstrate claimed costs were not properly included with IR&D efforts.
  - Rent: Costs incurred after lease expired found unreasonable where contractor offered no credible documentary or testimonial evidence to show rationale for payments.
  - Executive Compensation: Compensation through K-1 distribution found allowable; government failed to meet its burden to demonstrate claimed costs were unallowable profit distribution.



# Cost Allowability

- *Defense Integrated Solutions*, COFC No. No. 23-64C. (April 5, 2023)
  - In context of interpreting SBA regulation, Court held: “‘Contract performance’ means meeting the contract’s statement of work, in compliance with the contract’s terms and conditions . . . a contractor does not engage in contract performance when it files a claim with a CO, or opposes the United States in litigation . . . the decision to file, litigate, or settle a claim does not constitute a contractor’s performance.”
  - Court did not rely on or reference FAR 31.205-47 or any precedent distinguishing between allowable contract administration legal costs and unallowable claim prosecution or defense costs.

# Cost Allowability

- *Washington River Protection Solutions LLC v. DOE*, CBCA No. 7056 (June 28, 2023)
  - DOE disallowed \$6M staff augmentation costs based on sample, multiplied by 2x factor, alleging sampled hourly rates:
    - Exceeded FTE hourly rates; no Make v. Buy.
    - Exceeded Blanket Master Agreements with staff augmentation contractors.
    - Increased “overnight.”
    - Did not align with qualification requirements.
  - Board rejected DOE position:
    - Contractor relied on technical skills/expertise, GSA rates, competition, historical prices.
    - Contractor demonstrated it would have incurred additional costs if it hired full-time employees.
    - 2x factor noncompliant with FAR (CO did not identify specific cost challenged on reasonableness).

# Cost Accounting Standards

- CAS seeks to “achieve uniformity and consistency in cost accounting practices” (estimate, accumulate, report); governs cost measurement, assignment to cost accounting periods, and allocability based on beneficial or causal relationship.
  - CAS 410 - “provide[s] criteria for the allocation of business unit general and administrative (G&A) expenses to business unit final cost objectives based on their beneficial or causal relationship.”
- CAS applies to contracts (modified v. full coverage).
- Government bears burden of proving CAS non-compliance.

# Cost Accounting Standards

- *Honeywell International, Inc.*, ASBCA No. 63286 (June 7, 2023)
  - Government’s claim seeks ~\$56M in damages plus ~\$100M in interest going back more than 40 years, to 1980 when Honeywell first started performing CAS-covered contracts.
  - In its April 2022 claim, USG alleged contractor violated CAS 410 and its disclosure statement by excluding costs associated with manufacturing gyros for its commercial business unit (“interorganizational transfer costs”) from its TCI allocation base.
  - Contractor appealed government claim and moved for judgment on the pleadings (treated as a motion to dismiss for failure to state a claim), asserting CAS 410 granted it discretion to send interorganizational transfer costs to its commercial business.
  - ASBCA denied contractor’s motion holding government presented plausible arguments in its final determination that excluding costs from TCI allocation base resulted in higher G&A rate being applied to government contracts and the base no longer included “all significant elements of cost input and no longer represented the total activity of the segment,” as required for a TCI allocation base.

# Cost Accounting Standards

- Booz Allen Hamilton/DOJ Settlement (July 21, 2023) –
- “Covered Period”: April 1, 2011 through March 31, 2021.
- “Covered Conduct” allegations:
  - “Booz Allen allocated indirect costs that supported Booz Allen’s commercial and/or international businesses to Government contracts and subcontracts that should have been allocated to commercial and/or international contracts . . .”
  - “Booz Allen created and maintained indirect cost pools that included commingled costs supporting both (i) commercial and/or international contracts and (ii) Government contracts and subcontracts . . . such commingling allocated indirect costs disproportionately . . .”
  - “Booz Allen submitted inaccurate and/or misleading statements (including but not limited to in its CAS Disclosure Statements) regarding the methods [of accounting]”
  - “Booz Allen shifted employees and work relating to its commercial and/or international businesses . . . in violation of the requirements of the FAR and CAS . . .”
- Upon release of settlement amount, USG will release company from civil or administrative monetary claims for the alleged Covered Conduct under the civil False Claims Act and other specified civil statutes and common law theories of liability.

# Cost Accounting Standards

- Booz Allen Hamilton facts of investigation and settlement:
  - Beginning in 2011, “Every year, the company discloses its cost accounting practices and rates . . . .”
  - Prior to DOJ Investigation in 2017, USG had not completed incurred costs audits; “company had not received any indication that the government had concerns with” its disclosed practices.
  - When employee raised questions “Booz Allen promptly facilitated meetings for the employee with its financial, compliance, and accounting teams, as well as external finance and legal experts, to hear and consider her concerns. Over the next year, these experts repeatedly affirmed that the company’s practices were lawful and compliant.”
  - For 6 years, “Booz Allen fully cooperated with the government to reach a resolution, turning over gigabytes of documents and other information, and providing access to numerous experts on the topic, all of whom validated the company’s methodology and stated that it had acted correctly.”
  - DOJ closed criminal investigation without taking action.
  - SEC closed its inquiry without any action.
  - Settlement resolved civil allegations; no determination, or admission, of liability.

# Statute of Limitations/Claim Accrual

- 41 U.S.C. § 7103(a)(4) (A) In general.--Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.
- FAR 33.201, Disputes and Appeals, Definitions: “ ‘*Accrual of a claim*’ means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.”
- **Objective Standard:** See, e.g., *Afghan Premier Logistics*, ASBCA Nos. 62938, et al. (June 15, 2023) (affirming that “The issue of ‘whether the pertinent events [for claim accrual] have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue.’”); *Beechcraft Defense*, ASBCA 61743, et al. (Feb. 3, 2023); *Patricia I. Romero, dba Pacific West Builders*, ASBCA No. 63093 (May 16, 2023).

# Civil False Claims Act Scienter

- *United States ex rel. Schutte v. Supervalu Inc.*, No. 21-1326 (SCt June 1, 2023)
  - Alleged Medicare/Medicaid fraud; company sought reimbursement of retail, not discounted, drug prices as “usual and customary”
  - “FCA’s scienter element refers to respondents’ knowledge and subjective beliefs – not to what an objectively reasonable person may have known or believed. And, even though the phrase ‘usual and customary’ may be ambiguous on its face, such facial ambiguity alone is not sufficient to preclude a finding that respondents knew their claims were false.”
  - FCA’s “knowing” or “knowingly” element refers to a defendant’s knowledge and subjective beliefs—not what an objectively reasonable person may have known or believed.
- FCA standard is different than objective standard applicable to CDA statute of limitations and claim accrual.



# Definitization ≠ Claim/COFD

- *Lockheed Martin Aeronautics Co. v. Air Force*, Fed. Cir. 2022-1035 (April 25, 2023)
  - Contractor claimed contracting officer did not definitize at reasonable price and appealed to ASBCA.
  - Government moved to dismiss because no certified contractor claim and no COFD.
  - ASBCA dismissed for lack of jurisdiction; Federal Circuit affirmed.
  - Court held: “definitizations of the contracts here were not government claims . . . they were not demands or assertions by the government seeking relief against” contractor.

# Demand Letter = Claim/COFD

- *PAE Applied Technologies LLC*, ASBCA No. 63233 (August 24, 2023)
  - CO demand letter for repayment of alleged unallowable COVID costs constituted COFD on USG claim
    - Pre-trial govt motion to dismiss denied.
    - Navy issued demand letter for repayment of amount previously paid for allegedly COVID-related costs, “to invite [PAE] to comment on its refusal to adequately substantiate the COVID-related costs and did not intend it to be a COFD.”
  - CDA does not state a claim must say it is a COFD
  - “A contracting officer’s subjective intent is not controlling as to whether a communication is a final decision.”

# CAS Board Updates

# CAS Board Updates

- CAS Board has been inactive
- Recently filled two vacant positions – quorum achieved
- Meetings likely to commence in near future
- Matters potentially to be addressed –
  - Segment closing pension adjustment
  - CAS applicability to indefinite delivery vehicle and hybrid contracts
  - Conformance of CAS and GAAP
  - Revenue recognition and lease accounting

# Policy Updates

- DCMA Policy-Type Memorandum
- DCAA Memorandums for Regional Directors (MRDs)

## DCMA Policy-Type Memorandum 23-002, Change to DCMA Manual 2201-02, “Cost Accounting Standards Administration,” for “Less than Material” Noncompliances

- September 11, 2023
- “Establishes procedures for processing alleged ‘Less than Material’ noncompliance(s) with CAS requirements identified by DCAA.”
- “Applies only to CAS noncompliance(s) that are categorized by DCAA as ‘Less than Material’ or a like term and are not included in the body of the DCAA Audit Report, but instead are included as an Appendix to the Audit Report or in a separate memorandum to the contracting officer.
- “‘Less than Material’ noncompliances have not risen to the level of a reportable noncompliance and therefore do not trigger the 15-day notice and determination requirements described at FAR Subpart 30.605(b ), however, should still be addressed timely.”
- “Although processing alleged ‘Less than Material’ noncompliances in accordance with the process in FAR Subpart 30.605 is always an option for the CFAO, there are simplified or alternate procedures...that should be considered and performed prior to, or instead of, initiating the process in FAR Subpart 30.605.”
- “A Board of Review is necessary to address disagreements with DCAA.”

# DCAA MRDs

- October 3, 2023: Revised Audit Guidance on the Cost Impact Calculation for a Unilateral Cost Accounting Practice Change

Change in ETC Cost Accumulation	Increased/(Decreased) Cost (FAR 30.604(h)(3)(i), (ii) & (iii))	Increased Cost in the Aggregate (*)	Notes
Increased ETC on Flex, Decreased ETC on Fixed	Increased Cost on Flex and Fixed	Increased cost to the Government is calculated by combining across contract/subcontract groups, less duplicated cost due to cost shifts	(1)
Increased ETC on Flex and Fixed	Increased Cost on Flex, Decreased Cost on Fixed	Increased cost to the Government on flexibly priced contracts/subcontracts	(2)
Decreased ETC on Flex and Fixed	Decreased Cost on Flex, Increased Cost on Fixed	Increased cost to the Government is calculated by combining across contract/subcontract groups	(3)
Decreased ETC on Flex, Increased ETC on Fixed	Decreased Cost on Flex and Fixed	None	(4)

# DCAA MRDs

- August 9, 2023: Revised Procedures for Real-Time Audits of Labor and Purchase Existence and Consumption (MAAR 6 and 13)
  - Removed mandatory annual audit requirements; “have to justify and identify a specific risk to perform a real-time audit.”
  - Established best practices for use of alternate interview/floorcheck techniques, such as telephone or video conferencing; “determined and designed by the audit team based on documented audit risk.”
  - Increased emphasis and revised procedures for testing contractor’s work at home programs.
    - “Determine if the contractor has an employee work at home (WAH) program and assess the materiality of the costs incurred by employees in the program.”
    - “[P]erform floorchecks of the employee [WAH] by telephone or video . . . In addition, if material . . . verify internal controls necessary for a contractor’s WAH policies to be considered acceptable for Government contract costing.”



# DCAA MRDs

- January 6, 2023: Contractor Compensation Cap – Statutory Fiscal Year 2023 (\$619,200)
- January 26, 2023: Early Engagement of Forward Pricing Price Proposals and Forward Pricing Rate Proposals

# Final Rules

- DFARS
- FAR

# Final Rule: Contract Administration Functions (March 22, 2023)

DFARS Case 2022-D021

- Clarifies contract administration authority to settle direct costs.
- Allows procuring contracting office to delegate authority.
- Impact on scope / intent of incurred cost audit?
  - DCMA Memorandum: “Publication of DFARS 242.302(b)(S-71)(A) and (B) on Questioned Direct Costs.”
  - DCMA ACO “should discuss present workload with their chain of command before agreeing to settle questioned direct costs for” PCO.

# Final Rule: Undefined Contract Actions (May 25, 2023)

DFARS Case 2021-D003

- Proposed rule – October 28, 2022
  - Incentivize timely submission of qualifying proposals.
  - Address DoD Inspector General recommendations.
- Withholds (< 5%) or “other appropriate actions” (e.g., negative CPAR, T4D) may apply if “qualifying” proposal is not submitted timely; justification must be documented.
- CO “shall” assess extent to which costs incurred prior to definitization; appropriate to reduce risk for incurred costs.
  - If “substantial portion” incurred may assign value “as low as 0%.”
  - BUT if contractor submitted qualifying proposal and CO does not definitize within 180 days, profit “shall accurately reflect” cost risk that existed when proposal submitted.

## DARS 2020-O0010 Rev 2 (Class Deviation - Progress Payment Rates)

- For large business concerns: When providing for progress payments, use the clause at Federal Acquisition Regulation (FAR) 52.232-16, Progress Payments, in solicitations and contracts when award is anticipated on or after July 7, 2023. Notwithstanding FAR 1.108(d)(3), contracting officers shall not amend existing contracts, task orders, and delivery orders to remove clause 52.232-16, Progress Payments (DEVIATION 2020-O0010).
- For small business concerns: When providing for progress payments, continue to use the attached clause 252.232-7004, DoD Progress Payment Rates (DEVIATION 2020-O0010), in lieu of the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7004.
- Reinstates the progress payment rate of 80 percent in the clause at FAR 52.232-16, Progress Payments for new contracts with large businesses and retains the temporary increase to the progress payment rate of 95 percent for small business concerns to enable their continued access to cash flow through this financing method.

# Final Rule: Independent Research & Development (January 31, 2023)

DFARS Case 2017-D018

- Proposed rule - September 2021.
- Implements FY 2017 NDAA Section 824.
- Removes seven criteria for allowability.
- Does not require CEO certification.
- Eliminates retroactive application.
- DCAA annual report to Congress.
- Encourages non-major contractors to use Defense Technical Information Center (“DTIC”).

# Changes to DCMA's Review of Independent Research and Development Costs

- August 2023
- ACO Responsibilities for IR&D Costs
  - DFARS 242.771-3(a); FAR 31.205-18; DFARS 231.205-18
- IR&D Costs and DFARS Case 2017-D018
  - DoD approach shifted from focusing resources on evaluating individual IR&D efforts to managing aggregate IR&D costs
  - DFARS 231.205-18 update reduces DCMA oversight
- Determining Allowability of IR&D costs
  - Interest to the Government now based on cost inclusion in DTIC
- CEO Determination does not mean IR&D costs are *per se* allowable
- IR&D costs can still be evaluated by DCAA, TS, and ACO
- CAS 420

# FAR Whistleblower Protections - Final Rule (November 6, 2023)

FAR Case 2017-005

- No changes to proposed rule.
- Applies to all solicitations and resultant contracts, including contracts and subcontracts below the SAT and for acquisition of commercial services and products.



# DOJ Update

- Evaluation of Corporate Compliance Programs
- FCA Litigation
- FCA Settlements

# DOJ – Update to Evaluation of Corporate Compliance Programs (March 20, 2023)

- Factors prosecutors should consider.
- Informed decisions on effectiveness of compliance program.
- Adequate and appropriate discipline.
- Elements of a well-designed compliance program.
- Fundamental questions:
  - Is the corporation’s compliance program well designed?
  - Is the corporation’s compliance program adequately resourced and empowered to function effectively?
  - Does the corporation’s compliance program work in practice?

# FCA Litigation

- *United States ex rel. Bonzani v United Technologies Corp. et al.* (District of Connecticut, Mar. 16, 2023)
  - Summary judgment in favor of contractor in FCA qui tam suit.
  - Realtor relied on implied false certification theory and alleged certain testing was material to government's decision to pay contractor.
  - Court cited Escobar factors and found, among other things, the testing was not a condition of payment and the government continued to make payments to contractor after learning of realtor's allegations.

# FCA Litigation

- *United States v. Sikorsky*, 11-C-0560 (E.D. Wisconsin, Oct. 17, 2023)
  - Burden of proof re damages associated with FCA liability for “illegal” cost plus percentage of cost subcontract.
    - Measure of damages is difference between amount paid and what contractor could have recovered on a claim for *quantum meruit*, “the actual value” of performance); government has burden of proving it paid more than *quantum meruit* value.
    - Contractor has burden of establishing a claim for *quantum meruit* compensation under implied-in-fact contract
  - No FCA liability associated with “labor chargebacks.”

# FCA Settlements

- Verizon (September 5, 2023)
  - Contractor disclosed potential cyber issues, cooperated with USG investigation, and “promptly took steps” to remediate issues.
  - Settlement requires continued cooperation with USG investigation of certain individuals and entities and access to documents.
- Navmar (September 15, 2023)
  - Resolved double-billing and cost-shifting allegations.
  - USG relied on contractor “sworn financial disclosures and supporting documents” in reaching settlement.
- Boeing (September 27, 2023)
  - Resolved *qui tam* allegations that from ~2007-2018, contractor failed to comply with certain contract specifications and perform required testing.

# Wrap-Up & Questions

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