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THE NEWSLETTER FROM THE BDO GOVERNMENT CONTRACTING PRACTICE

BDO KNOWS: GOVERNMENT CONTRACTING

DOING BUSINESS WITH THE GOVERNMENT: ADMINISTRATIVE CHALLENGES FACED BY NONPROFIT ORGANIZATIONS

By Eric Sobota

Nonprofit organizations face a variety of challenges that begin with fundraising and can include a range of issues, including meeting growing demands for services to complying with requirements set forth by their backers. For nonprofit recipients of federal funds through grants or contracts, government agencies require highly specific reporting and accountability structures to avoid fraud, waste and abuse. Adhering to these government requirements can generate significant challenges and increased administrative burdens. What do some of these challenges look like, and what can you do to help mitigate them?

COST ACCOUNTING STANDARDS (CAS)

One of the most significant obstacles nonprofits will face is harmonizing their cost accounting practices when awarded both contracts and grants. Nonprofits covered by OMB Circular A-122, "Cost Principles for Non-Profit Organizations," can also be subject to CAS depending on their contract awards. The Cost Accounting Standards provide a more stringent set of requirements related to cost-charging practices than OMB A-122 guidance. CAS-covered nonprofit organizations should follow CAS with respect to the measurement, assignment and allocation of costs. To avoid noncompliance issues, organizations will need

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DID YOU KNOW...

According to the ***Government Accountability Office***, government spending on contracts dropped almost $58 billion to about $460 billion in fiscal year (FY) 2013.

President Obama announced in his State of the Union address that he will increase the minimum wage to $10.10 per hour for federal contract workers, cites the ***Washington Post***.

According to ***Deltek***, the Defense Department, Army and Government Accountability Office are opening significant technology contracting programs for competition in 2014, the highest contract coming from the Army at $200 million.

The Defense Department recently awarded Boeing a $51.2 million contract to supply and integrate additional weapons systems, according to the ***Motley Fool***.

The new cyber standards Obama issued in early February will impact already-awarded contracts by making them conditional on compliance with many of the standards, cites ***NextGov***.

According to ***Daily Finance***, the Defense Department is budgeted to spend about $6.2 billion a week on military hardware, infrastructure projects and supplies in FY 2014.

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to provide assurance that there is consistency in estimating, accumulating and reporting expenditures incurred, and that costs incurred for the same purpose in like circumstances have been treated consistently as either direct or indirect costs. Many organizations opt for multiple segments to alleviate this burden.

COST CHARGING

Cost charging issues faced by nonprofits can include challenges around allowability, lack of documentation and shifting of costs. These issues can lead to costs being disallowed under federal grants and contracts, and organizations will have to bear the impact. To be allowable under federal grants and contracts, all direct and indirect costs must be adequately supported by source documentation that clearly shows the purpose and circumstance for the cost incurred. It is important to note that verbal approval from a Contracting or Grant Officer is insufficient support for costs under a contract or grant. In addition, nonprofits should have controls in place to avoid costs being shifted to a federal award to "overcome funding deficiencies" as stated in OMB A-122 guidance.

SUBRECIPIENT MONITORING

Generally, government contract and grant recipients have faced difficulties managing and monitoring subrecipient costs nationwide and abroad. Recently, the federal government has increased encouragement for entities to adequately assess and monitor subrecipients. A subrecipient is different from a vendor; therefore, it is important for nonprofits to review agreements established in order to identify their current population of subrecipients. When managing subrecipients, entities are required to ensure federal funds are used for authorized purposes in accordance with laws, regulations and award provisions. In addition, documentation of monitoring actions must be retained.

TIMEKEEPING

Due to the nature of the work and a lack of training, detailed and accurate timekeeping can be an ongoing challenge for nonprofits. To be allowable, labor--whether charged directly or indirectly to Federal grants or contracts--must be based on accurate timesheets reflecting the actual activities of all employees. It is important for nonprofits to convey to employees the difference between actual and budgeted hours for timesheet purposes.

BUDGET LIMITATIONS

Nonprofit organizations must adhere to any budget limitations or restrictions incorporated into their grants or contracts. These limitations can be in the form of types of expenses (e.g., travel not allowed), spending caps on certain expenses (e.g., travel limited to $10,000), ceilings on indirect rates or overall funding limits. It is important for nonprofits to establish a budgeting process to ensure all parties involved understand the grant or contract budget limitations. In addition, many grants and contract agreements may include a clause to prevent increases in budget line items without the prior review and approval of the Grant or Contracting Officer. The organization should ensure this approval is retained for documentation purposes.

With the recent release of the "Uniform Requirements, Cost Principles and Audit Requirements for Federal Awards" in December 2013, more commonly referred to as the Supercircular, nonprofits should make it a priority to review their current practices for compliance. The Supercircular aims to impart clarity to a complex process, and many nonprofits will need to alter the way they do business to get up to speed. However, the promise of the Supercircular is that once organizations implement the new guidance, they will no longer be subject to a confusing array of regulations and will be more prepared to appropriately administer their grants and contracts.

This article originally appeared on the website of the *Nonprofit Quarterly* on Jan. 28, 2014.

Eric Sobota is managing director with Government Contracting Advisory Services at BDO USA. He can be reached at esobota@bdo.com or 703-770-6395.

SEAL THE DEAL: THE CFO'S ROLE IN MINIMIZING POST-ACQUISITION DISPUTES IN THE GOVERNMENT CONTRACTING INDUSTRY

By Jeffrey M. Katz

M&A activity in the government contracting industry has seen a significant slowdown in the past year or so. However, due to the end of sequestration, coupled with a decline in expected government spending levels, government contractors as well as private equity firms appear to be actively looking for strategic targets. Many expect to see an increase in M&A activity in the government contracting sector in 2014.

For CFOs involved in such transactions, it is important to understand the post-acquisition dispute issues that can arise after closing. Executives that proactively consider common post-acquisition dispute issues before an agreement is reached can minimize the potential distraction of such disputes. Instead, they can focus on integrating the newly acquired business, driving operational efficiency and setting the company on a path for growth.

M&A agreements often contain clauses that adjust the purchase price post-closing. These adjustments are generally predicated on changes to the balance sheet of the company being sold between the date a deal is negotiated and the date the transaction closes. While the metrics for adjustments vary from one agreement to the next, a common adjustment is based on the change in a business' Net Working Capital. Disputes often arise because the buyer and seller have different opinions regarding the appropriate amounts to be included on the Closing Date Balance Sheet. These disputes often focus on the application of generally accepted accounting principles (GAAP) within the context of the M&A agreement terms.

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SEAL THE DEAL

For example, M&A agreements may contain language that requires the Closing Date Balance Sheet to be prepared in accordance with GAAP and consistent with a company's past policies, practices and procedures. Post-closing purchase price adjustment disputes often arise when a company's past practice is not in accordance with GAAP and the M&A agreement is silent on which should prevail—past practice or GAAP. CFOs can play an important role in minimizing transaction disputes by suggesting clarifying language in the agreement that specifies which methodology takes precedence. If the parties' intent is that the Closing Date Balance Sheet be prepared consistently with past policies, practices and procedures, then the parties should consider not including any reference to GAAP in the M&A agreement provision discussing the preparation of the Closing Date Balance Sheet.

When drafting an M&A agreement, parties often believe that the phrase "GAAP consistent with a company's past policies, practices and procedures" provides sufficient instruction for preparing the Closing Date Balance Sheet. However, as CFOs and other executives are aware, GAAP requires management to make judgments and estimates in preparing financial statements. The buyer and seller's respective management teams may have differing estimates for the same balance sheet item, even though both estimates are in accordance with GAAP. In transactions involving government contractors, an often-disputed item when determining the post-closing purchase price adjustment is whether contracts are properly accounted for, specifically ones that use a cost-of-completion methodology. A cost-of-completion calculation requires management to make estimates of the costs to complete a project. Such estimates may affect several different balance sheet accounts, including work-in-process, unbilled accounts receivable, deferred revenue and other accrued expenses. Oftentimes, the buyer of such a business takes the view that the costs to complete are much higher than the seller has estimated. Before signing an M&A agreement, CFOs involved in M&A transactions with government contracting businesses should consider carefully reviewing the target company's cost of completion calculations in order to assess their accuracy.

Another often-disputed item is unbilled receivables. Due to the nature of working with the federal government, many companies are not able to "settle" the difference between the amounts billed to the federal government and the amount of revenue ultimately claimed on a contract for a number of years. Such differences often stem from fee withholdings and variances between indirect rates incurred and the billed rates negotiated with the government. Further complicating the issue is the requirement for many companies to have their rates audited by government auditors. Such audits can identify amounts billed or amounts included in unbilled receivables that the government auditors determine are not recoverable under federal contracts. To minimize post-acquisition disputes, CFOs and other executives should consider an in-depth review of the unbilled accounts receivable of the target company in order to address these types of risks in the M&A agreement.

In addition to Net Working Capital adjustment provisions, many M&A agreements contain earn-out provisions intended to bridge the differing views of the buyer and the seller on the value of a target business. Because these provisions often have a financial-related metric that must be achieved in order for the additional purchase price to be paid out, there are often opposing views between the buyer and seller regarding whether the targets have been met or could have been met had the business been operated differently. Such disputes often center on allegations that the buyer's post-closing decisions negatively impact the earn-out calculation, such as terminating key employees, not pursuing business or implementing an unfavorable pricing structure. Many M&A agreements that contain earn-out provisions contain language that clarifies who controls the business or who benefits from the business operation. Such language often helps to limit disputes associated with these types of allegations.

Another area of dispute is the valuation of certain contracts. Many government contractors enter into indefinite delivery, indefinite quantity (IDIQ) contracts that provide a vehicle for bidding on procurements and tasks, but do not ensure a minimum level of revenue for the contractor. Often, sellers believe that the IDIQ contract ceiling is the value of the contract, while many buyers believe that a large discount to the ceiling is necessary to align the contract's value to the future revenue and earnings to ultimately be generated. In addition, the inability to obtain necessary federal government approvals to "novate" or "transfer" a contract could impair the value of a contract or group of contracts to a buyer. In setting earn-out targets in the M&A agreement, the parties should take into account the variability as to when revenues from IDIQ contracts are expected to actualize.

Government contractors are also unique insofar as they must follow a very specific regulatory regime. Companies generally need to comply with a complex set of regulations when selling goods and services to the federal government. Common pitfalls within the various regulations include the False Claims Act, Truth in Negotiations Act, Davis Bacon Act, Cost Accounting Standards, Buy American Act and the Foreign Corrupt Practices Act for contractors that operate outside of the U.S. Lack of compliance, creates risk and possible claims against the contractor down the road. The potential liability for unasserted and unsettled claims could create an area of dispute under both the working capital as well as the earn-out provisions of a transaction.

M&A agreements are often subject to interpretation and disagreement between the buyer and seller and, in many cases, can be mitigated by clearly defining the roles and responsibilities of each throughout the transaction process. As such, CFOs can serve as valuable resources to attorneys throughout the drafting process of the M&A agreement. This can contribute to fewer post-acquisition disputes, and it can provide CFOs and other executives the opportunity to focus on their businesses.

Jeffrey M. Katz is Partner and Dispute Advisory Services practice leader with BDO Consulting. He can be reached at jkatz@bdo.com.

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REGULATORY UPDATES

DCAA Updated Audit Guidance on Revised Policies and Procedures for Low-Risk Incurred Cost Proposals Less than $250 Million in Auditable Dollar Value (ADV)

On Oct. 29, 2013, DCAA issued a memorandum to revise its policies and procedures for sampling low-risk incurred cost proposals previously established in MRD 12-PPD-023(R), dated Sept. 6, 2012. DCAA FAOs shall assess (or reassess) risk for all adequate proposals with ADV less than $250 million where fieldwork has not been started using the revised policies and procedures and the appropriate Risk Determination tool.

The key changes to the policies and procedures include:

1. Changed prior year questioned cost thresholds.

ADV Strata	Policies and Procedures Changes
<$1 million	Questioned cost is > 10% of the last completed incurred cost audit's ADV
$1 million-$5 million	Questioned cost is > 5% of the last completed incurred cost audit's ADV or $100K, whichever is greater
$5 million-$250 million	Questioned cost is >$250K in the last completed incurred cost audit

2. If the last incurred cost audit performed found no significant questioned costs, all proposals with less than $5 million in ADV should be considered low-risk unless significant relevant risk material to the incurred cost proposal exists, such as fraud referral (Form 2000), "unacceptable" opinion from a pre-award accounting review, no previous experience (e.g., voucher processing, forward pricing effort, pre-award accounting systems, etc.) or specific relevant risk with the contractor that has material impact to the incurred cost proposal (identified by the contracting officer or auditor).

3. For all proposals between $5 million and $250 million in ADV, if the last incurred cost audit performed found no significant questioned costs, auditors should use professional judgment to determine risk, considering significant relevant risk applicable to the proposal, such as fraud referral (Form 2000), "unacceptable" opinion from a pre-award accounting review or reported business system deficiencies relevant to the incurred cost proposal (e.g., voucher processing, forward pricing effort, pre-award accounting systems, etc.) or specific relevant risk with the contractor that has material impact to the incurred cost proposal (identified by the contracting officer or auditor).

4. There will be no sampling for low-risk proposals with ADV <$1 million.

All adequate annual incurred cost proposals exceeding $250 million in ADV will be audited. All other incurred cost proposals received and determined to be adequate will be assessed for risk. All adequate high-risk proposals will be audited.

DCAA Audit Alert on Professional and Consultant Service Costs (FAR 31.205-33) and Purchased Labor

On Dec. 19, 2013, DCAA issued an audit alert to emphasize guidance pertaining to the evidentiary requirements needed to satisfy the FAR 31.205-33(f) for professional and consultant service expenses. FAR 31.205-33(f) contains three documentation support standards to verify the professional and consultant service costs: (1) details of all agreements; (2) invoices or billings; and (3) consultant work product and related documents. This is to determine the totality of the evidence demonstrating the nature and scope of the services provided. The evidence required by the contractor includes:

- An agreement that explains what the consultant will be doing for the contractor;
- A copy of the bill for the actual services rendered, including sufficient evidence as to the time expended and nature of the services provided. This documentation does not need to be included on the actual invoice and can be supported by other evidence provided by the contractor; and
- Explanation of what the consultant accomplished for the fees paid – this could be information on the invoice, a drawing, a PowerPoint presentation or some other evidence of the service provided.

FAR does not have a specific cost principle covering purchased labor. However, the contractor should have adequate documentation to support the reasonableness of amounts paid, demonstrate the service provider and have evidence that the effort represented allowable activities.

Final FAR Rules

Case 2012-031; Accelerated Payments to Small Business Subcontractors; effective Dec. 26, 2013. DoD, GASA and NASA issued a final rule amending the Federal Acquisition Regulation (FAR) to implement the policy provided by Office of Management and Budget (OMB) Memoranda M-12-16; dated July 11, 2012 and M-13-15; dated July 11, 2013 by incorporating a new clause to provide accelerated payments to small business subcontractors. The new clause now requires the prime contractor, upon receipt of accelerated payment from the government, to make accelerated payments to small business subcontractors subsequent to the receipt of a suitable invoice and associated sufficient supporting documentation from the subcontractor. This rule will be inserted into all new solicitations issued after the effective date of this rule and resultant contracts.

Final DFARS Rules

Case 2012-D038; Unallowable Fringe Benefits Costs; effective Dec. 6, 2013. DoD published a new rule in the Federal Register at 78 FR 13606 on Feb. 28, 2013 to revise the DFARS at 231.205-6 to implement the Director of Defense Pricing policy memo "Unallowable Costs for Ineligible Dependent Health Care Benefits"; dated Feb. 17, 2013. This rule adds paragraph 231.205-6(m)(1) to explicitly state that fringe benefit costs that are contrary to law, employer-employee agreement or an established policy of the contractor are unallowable. The memorandum emphasizes and clarifies existing policies but does not create new policies. These existing policies make fringe benefit costs expressly unallowable when such costs are unreasonable or conflict with law, employer-employee agreements or an established policy of the

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contractor. The rule encourages contractors to adopt reasonable internal controls to eliminate costs that are already unallowable.

Penalties may be assessed if unallowable dependent healthcare costs are contained in a final indirect cost rate proposal, a final statement of costs incurred or estimated to be incurred under a fixed-priced incentive contract. Because contractors are already required to exclude unallowable costs from a final indirect cost rate proposal or a final statement or cost incurred, penalties will only accrue to contractors that fail to comply with rules that already exist. Penalties can be waived in accordance with FAR 42.709-5(c).

Interim DFARS Rules

Case 2013-D016; Limitation on Use of Cost-Reimbursement Line Items; effective Jan. 29, 2014. DoD is issuing an interim rule amending the DFARS to implement section 811 of the National Defense Authorization Act (NDAA) for fiscal year (FY) 2013, which prohibits DoD from entering into cost-type contracts for production of major defense acquisition programs. Section 811(a) requires DoD to modify the acquisition regulations to prohibit DoD from entering into cost-type contracts for the production of major defense acquisition programs for contracts entered into on or after Oct. 1, 2014, with one exception in section 811(b). Under section 811(b), the Under Secretary of Defense for Acquisition, Technology, and Logistics may submit to the Congressional defense committees: (1) A written certification that the particular cost-type contract is needed to provide a required capability in a timely, cost effective manner; and (2) An explanation of the steps taken to ensure that the use of cost-type pricing is limited to only those line items or portions of the contact where such pricing is needed to achieve the purpose of the exception.

Comments on the interim rule should be submitted on or before March 31, 2014 to be considered in the final rule.

SBA Final Rules

1. The Small Business Administration (SBA) is increasing two small business size standards in North American Industry Classification System (NAICS) Sector 23, Construction, and retaining the current standards for the 30 remaining industries in that Sector. Specifically, SBA is increasing the size standards for NAICS 237210, Land Subdivision, from $7 million in average annual receipts to $25.5 million, and for Dredging and Surface Cleanup Activities, a sub-industry category (or an "exception") under NAICS 237990, Other Heavy and Civil Engineering Construction, from $20 million to $25.5 million. As part of its ongoing comprehensive size standards review, SBA evaluated all size standards in NAICS Sector 23 to determine whether they should be retained or revised. This rule is effective Jan. 22, 2014.

2. Effective as of Dec. 31, 2013, the Small Business Administration (SBA) is amending its regulations governing small business contracting procedures. Specifically, this rule amends SBA's regulations to establish policies and procedures for setting aside, partially setting aside and reserving Multiple Award Contracts for small business concerns. SBA is also establishing policies and procedures for setting aside task and delivery orders for small business concerns under Multiple Award Contracts. In addition, SBA is addressing how it will determine size under certain agreements and when recertification of status will be required. Finally, SBA is establishing a new definition of consolidation and reorganizing its prime contracting assistance regulations.

Other

GAO

On Jan. 2, 2014, the Government Accountability Office (GAO) issued its Bid Protest Annual Report to Congress for FY 2013. The Comptroller General is required by the Competition in Contracting Act of 1984 (CICA) to report to Congress each year in which a federal agency did not fully implement a recommendation made in connection with a bid protest that was decided the prior fiscal year. The report also contains statistics covering overall bid protest filings for the fiscal year. A new requirement in 2013 requires GAO to report on the most prevalent grounds for sustaining protests. The report states the most prevalent reasons for sustaining protests were:

1. Failure on the part of federal agencies to follow their stated bid or proposal evaluation criteria;
2. Inadequate documentation of the record;
3. Unequal treatment of offerors; and
4. Unreasonable price or cost evaluation.

The report reveals that during FY 2013, the GAO received 2,429 cases, including 2,298 protests, 56 cost claims and 75 requests for reconsideration. GAO closed 2,538 cases, of which 2,389 were protests, 55 cost claims and 86 requests for reconsideration. In addition, of the 2,538 cases closed, 259 were attributable to GAO's bid protest jurisdiction over task orders. See below for a chart comparing the bid protest data for fiscal years 2009 through 2013.

OFCCP

The Office of Federal Contract Compliance Programs (OFCCP) is publishing revisions to its current regulations of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, (VEVRAA), which prohibits employment discrimination against certain protected veterans by covered federal

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
Cases Filed	2,429	2,475	2,353	2,299	1,989
Cases Closed	2,538	2,495	2,292	2,226	1,920
Merit (Sustain and Deny) Decisions	509	570	417	441	315
Number of Sustains	87	106	67	82	57
Sustain Rate	17%	18.6%	16%	19%	18%
Effectiveness Rate	43%	42%	42%	42%	45%
Alternative Dispute Resolution (ADR)	145	106	140	159	149
ADR Success Rate	86%	80%	82%	80%	93%
Hearings	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)	10% (61 cases)	12% (65 cases)

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contractors and subcontractors. VEVRAA also requires each covered federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

Although progress has been made in the employment of veterans, the number of unemployed veterans still remains too high, and substantial disparities in unemployment and pay rates continue to persist, especially for some categories of veterans. The final rule, effective March 24, 2014, strengthens several provisions that are intended to aid in recruitment and hiring efforts, such as clarifying the mandatory job listing requirements, requiring data collection pertaining to protected veteran applicants and hires and establishing hiring benchmarks to assist in measuring the effectiveness of their affirmative action efforts.

Federal contractors must engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, gender, national origin, disability or status as a protected veteran. Executive Order 11246 as amended prohibits employment discrimination on the basis of race, religion, color, national origin and gender. Simultaneous with these revisions, OFCCP is also publishing revisions to the implementing regulations of Section 503 of the Rehabilitation Act of 1973, as amended, which prohibits employment discrimination against individuals with disabilities. OFCCP has historically viewed these regulations together, maintaining identity between the two regulations where possible and allowing contractors to prepare an Affirmative Action Plan that covers both laws jointly.

OFPP

The Office of Federal Procurement Policy, established under the Office of Management and Budget, published its memorandum to the Heads of Executive Departments and Agencies announcing that $952,308 is the "benchmark compensation amount" for the top five senior executives in each home office or segment of the company. The benchmark compensation amount applies to both defense and civilian agencies. This cap is the maximum total allowable annual compensation amount under all federal contracts that is reimbursable during the contractor's FY 2012. Compensation includes the total amount of wages, salaries, bonuses, restricted stock, deferred and performance incentive compensation and other compensation for the year, whether paid, earned or otherwise accruing, as recorded in the employer's accounting records for the year.

Although the statute places a cap on the amount that the federal government will reimburse the contractor, the statute does not limit the amount of compensation that the contractor actually pays to its employees. Therefore, contractors can provide compensation amounts that exceed the amount that is reimbursed by the government.

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PErspective in Government Contracting

Efforts to reduce government spending continue to squeeze budgets across sectors and industries. Government contractors are being hit particularly hard by the decline in federal spending: 2013 was the fourth year in a row to see a decrease in government dollars going toward federal contracts – the longest period of decline in more than 25 years, according to *Bloomberg BusinessWeek*.

So how is private equity reacting to sequestration and related budget cuts?

2013 was a slow year for exits. Due to the tenuous federal budget, investors that bought into contracting businesses in peak years (2006 and 2007) that normally would have made exits instead chose to hold on to their investments – "hunkering down" and waiting for market improvement.

It was also a relatively quiet year for new private equity investment. According to PitchBook, there were 15 private equity deals in government contracting in 2013, a decrease from 24 in 2012 and 35 in 2011. This is due to a range of factors, including: the uncertain federal budget making the identification of long-term investment opportunities difficult; a lack of quality companies of scale; and a general transition of generalist private equity firms away from the space. This means fewer funds are investing in the industry.

However, moving into 2014, the tide may be turning.

Historically, private equity investment in this space has been attractive, given the government's consistent, regular payments, but this has changed over the last four years as the federal budget has been volatile. However, the industry is reaching more solid ground. As Jason Rigoli, principal at LRR Partners, put it: "The federal budget's approval has been liberating for the industry – it's like night and day. Whether everyone is pleased with the ultimate outcome or not, simply knowing what you can spend with great certainty is placing the entire industry on stronger footing. And this is spreading to private equity funds investing in the space."

Accordingly, specialist firms are expected to begin investing in the space again. With the federal budget in place, combined with increasing tax rates and continuing low interest rates, those firms that know how to identify the right, quality opportunities are poised for action. "Now is the time for private equity funds to grow, seek capital and make investments," said Rigoli. "Over the last six to nine months we've been seeing the quality of companies on the market increase. Paired with the finalized federal budget, there are great opportunities for private equity funds specializing in government contracting."

PErspective in Government Contracting is a feature examining the role of private equity in the Government Contracting industry.

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The cap for FY 2011 was $763,029 for costs incurred after Jan. 1, 2011. For contracts awarded before Dec. 31, 2011, proposed regulations issued on June 26, 2013 would implement the Dec. 31, 2011 statutory change applying the cap to all employees retroactively for DoD, NASA and Coast Guard contracts.

The Bipartisan Budget Act of 2013 (BBA) repeals the compensation cap formula used by OFPP and sets a new initial allowable cost cap of $487,000 for executive compensation costs claimed on contracts and subcontracts awarded on or after 180 days after the enactment. The proposed effective date is June 24, 2014 and FAR 31.205-6(p) has not yet been revised to reflect this statutory change. Additionally, this cap will be adjusted on an annual basis based on the Bureau of Labor and Statistics' Employment Cost Index.

OMB

On Dec. 26, 2013, the Office of Management and Budget (OMB) issued "Uniform Guidance on Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards." The changes therein are an essential element of the federal effort to more effectively focus resources on enhancing performance and results while ensuring the financial integrity of taxpayer dollars in partnership with non-federal stakeholders. This guidance provides a government-wide framework for grants management.

The reform of OMB guidance will reduce administrative burden for non-federal entities receiving federal awards while reducing the risk of waste, fraud and abuse. The final guidance supersedes and streamlines requirements from eight existing OMB Circulars (A–21, A–50, A-87, A-89, A-102, A–110, A–122 and A–133), and consolidates the guidance previously contained in the aforementioned citations into a streamlined format that aims to improve both clarity and accessibility. The purpose of merging these circulars is to eliminate duplicative language in order to clarify when the policy is substantively different across types of entities and where it is not.

NEW IRS FORM 8822-B: CHANGE OF ADDRESS OR RESPONSIBLE PARTY

By Jeffrey Schragg

In an effort to maintain correct ownership details, curb tax abuse schemes and ensure the correct person is contacted when resolving a tax matter, the IRS is imposing new requirements to report a change in the identity of a "responsible party" for any entity that has an employer identification number (EIN), regardless of whether the entity is actively engaged in a trade or business. Effective Jan. 1, 2014, an entity must report a change in its "responsible party" on Form 8822-B to the IRS within 60 days of the change. In addition, any change in "responsible party" made prior to 2014 must be reported on Form 8822-B prior to March 1, 2014.

Background

In general, every entity must obtain an EIN to be used for tax filing and reporting purposes. The IRS requires an entity to complete Form SS-4, Application for Employer Identification Number, to obtain an EIN. Prior to January 2010, the name and identifying number (usually Social Security number) of the principal officer, general partner, grantor, owner or trustor was reported on Line 7a of the SS-4. Effective January 2010, the IRS revised Form SS-4, Line 7a to instead report the name and Social Security number of the entity's "responsible party." However, the IRS believed that in many instances the individual originally reported was either acting on behalf of the entity or is no longer in that position. Therefore, in an effort to improve its records, the IRS is imposing the new Form 8822-B reporting requirements as explained above.

Who Is a "Responsible Party?"

The instructions define "responsible party" as the "person who has a level of control over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the individual, directly or indirectly, to control, manage or direct the entity and the disposition of its funds and assets." This definition is very general and, depending on the type of entity, the identity of the "responsible party" may not always be obvious. This is especially true if the entity does not have owners. If you are unsure who should be reported as the "responsible party" of your entity, you should consult your attorney for assistance.

What Actions Need to be Taken?

Generally speaking, if your entity applied for its EIN prior to Jan. 1, 2010, Form 8822-B should be filed by March 1, 2014, and should report only the most recent changes. Entities formed after Jan. 1, 2010, must determine their "responsible party;" if that individual is not the person reported on the original Form SS-4, Form 8822-B should be filed by March 1, 2014. The form should be sent to one of two addresses and depends on the taxpayer's old business address. These addresses are reported at the bottom of Form 8822-B. Currently, Form 8822-B cannot be e-filed.

Going forward, entities must report changes in their "responsible party" within 60 days. The IRS has stated that the new requirement will only minimally affect entities, since it does not require much time to complete the form.

What Does this Mean for Government Contractors?

The new IRS requirement impacts every business entity with an EIN, and government contractors are no different. As long as a business has employees, operates as a corporation or a partnership or has any of the other qualities outlined on the IRS' website, the entity will need an EIN.

As the federal contracting space is so heavily regulated, it's important for government contractors and any other commercial entity to complete all due diligence on their business responsibilities and be aware of new policies. Effectively managing all reporting requirements now will help mitigate potential penalties later.

Form 8822-B and instructions are available on the IRS website at http://www.irs.gov/pub/irs-pdf/f8822b.pdf

Jeffrey Schragg is a tax partner in the Government Contracting practice at BDO USA. He can be reached at jschragg@bdo.com.

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MARK YOUR CALENDAR...

MARCH 2014

March 12
BDO Spring Government Contracting Marketplace Outlook*
Webinar

March 26-27
NASBC's 10th Annual National Small Business Federal Contracting Week
Embassy Suites Washington D.C.
Washington, D.C.

March 27-28
NCMA's Subcontract Management Training Forum
Westin San Diego
San Diego, Calif.

APRIL 2014

April 16
24th Annual Government Procurement Conference
Walter E. Washington Convention Center
Washington, D.C.

April 30
BDO Executive Seminar for Government Contractors*
The Ritz-Carlton, Tysons Corner
McLean, Va.

MAY 2014

May 5
GSA's Doing Business with GSA
Webinar

May 7-8
NDIA's Midwest Small Business Government Contracting Symposium
iWireless Center
Moline, Ill.

* Indicates that BDO is hosting this event.

CONTACT:

PAUL ARGY
Partner, National Director - Government Contracting
703-770-6315
pargy@bdo.com

JOE BURKE
Partner, Transaction Advisory Services
703-770-6323
jburke@bdo.com

CHRISTOPHER CARSON
Audit Office Managing Partner
703-770-6324
ccarson@bdo.com

KELLYE JENNINGS
Audit Partner
703-770-6345
kjennings@bdo.com

WILLIAM KEATING
Managing Director, Government Contracting Advisory Services
703-770-6307
wkeating@bdo.com

STEPHEN RITCHEY
Audit Partner
703-770-6346
sritchey@bdo.com

JEFF SCHRAGG
Tax Partner
703-770-6313
jschragg@bdo.com

ERIC SOBOTA
Managing Director, Government Contracting Advisory Services
703-770-6395
esobota@bdo.com

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