



# Pub K

**PUBLIC CONTRACTS**

**Annual Review 2022**

**January 24 – 27, 2022**

# DAY 2

12:00 p.m. Costs, Pricing & Audits

2:00 p.m. Grants & Cooperative Agreements

3:00 p.m. Cybersecurity & IT

TUESDAY, JANUARY 25, 2022

12:00 PM to 5:00 PM

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Alan Chvotkin  
President, Pub K Group  
Partner, Nichols Liu LLP

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# SESSION 4

## COSTS, PRICING, AND AUDITS

TUESDAY, JANUARY 25, 2022

12:00 PM to 1:50 PM



Joseph McCaffrey, Partner



**bakertilly**



Greg Bingham, Partner





Ryan Byrd, Managing Director



Berkeley Research Group





Paul Pompeo, Partner

**Arnold & Porter**

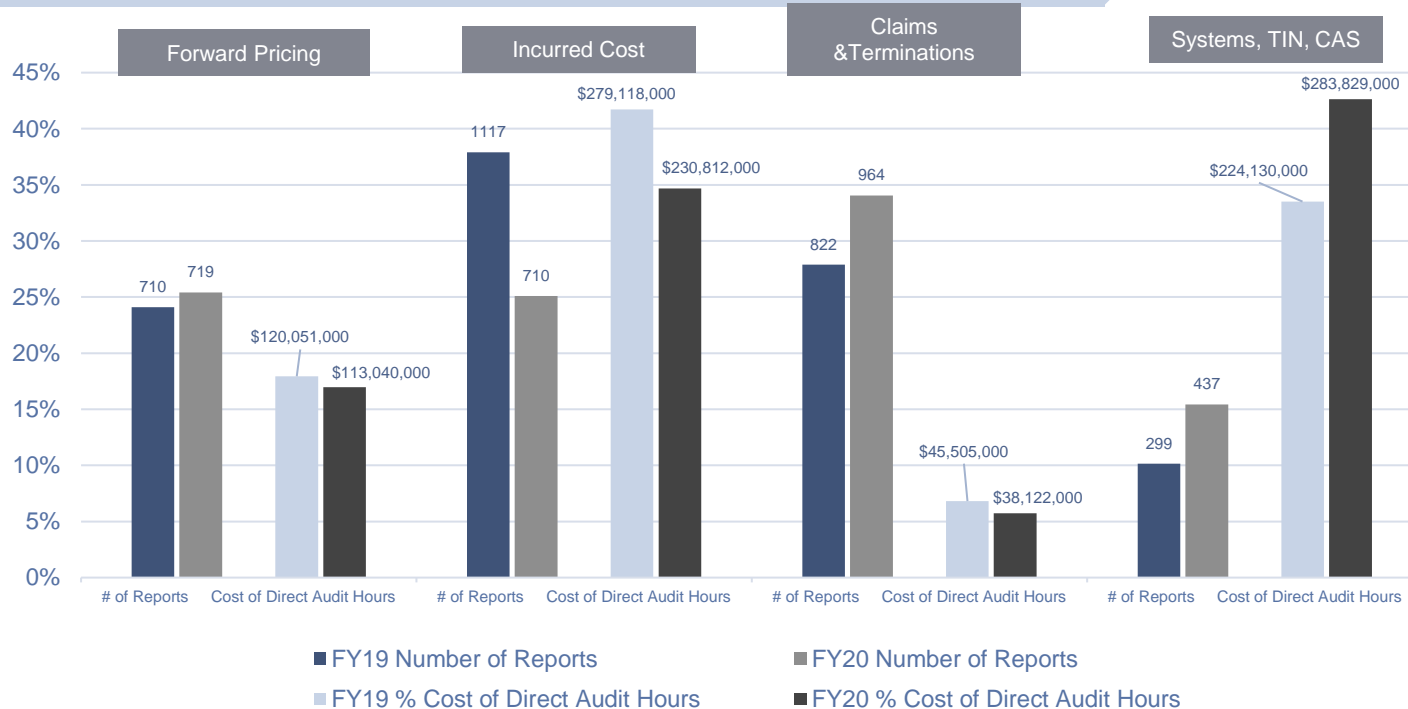
## Agenda – Major Topics

- Audit Issues
- Cost Allowability Developments
- TINA and Pricing Developments & Activity
- COVID-19
- Cost Accounting Standards

# Audit Issues

# DCAA Report to Congress – March 2021

## Specific Types of DoD Audits and Reviews for FY 19 and FY 20



## Audit Trends and Areas of Emphasis

- Continued rise of business systems audits – Accounting, Estimating and Material Management Account System (MMAS)
- Use of Third Party Auditors
- Limited DCAA guidance/MRDs issued in 2021

## Proposed Rule - DFARS: Treatment of Incurred Independent Research and Development Costs (DFARS Case 2017-D018) (September 29, 2021)

- Proposed rule to add a contract clause at DFARS 252.242-70XX, Independent Research and Development and Bid and Proposal Incurred Costs
- Would require company CEO determination that IR&D expenses will advance the needs of DoD for future technology and advanced capability (broader definition than previous requirements)
- Would require contractors with non-commercial awards exceeding the simplified acquisition threshold to provide an incurred cost submission of IR&D and B&P costs for the prior Government fiscal year to a website for DCAA to access

## *Cellular Materials Int'l, Inc.*, ASBCA No. 61408 (Dec. 27, 2021)

- DCMA questioned consultant costs under Incurred Cost Submission
- CMI provided promissory notes as support – indicating payment due within five days of demand, consultant had not demanded payment
- Issue: Meaning of “actual cost experience” under the Allowable Cost and Payment Clause
- Board analyzed several Federal Circuit decisions to determine that cost incurrence is fact specific, but that the cases collectively show that “a future expense must be more than merely likely or probable to be an incurred cost.”
- Because the consultant had not demanded payment for nine years, the Board held that the costs are not incurred costs. They ‘are best described as “forecasted costs.”’

## *L3Techs., Inc.*, ASBCA No. 61811, 21-1 BCA ¶ 37808

- DCAA used statistical sampling during its audit of several of L3's ICPs, questioning over \$10 million in the process
- The Government issued COFDs that sustaining DCAA audit findings
- Once at the Board, the Contracting Officer withdrew the COFDs and the Government moved to dismiss for mootness
- L3 resisted the motion to dismiss, arguing that it would deny L3 the chance to get a ruling to prevent future audits from utilizing statistical sampling
- The Board dismissed the case for mootness. It held that neither exception to the mootness doctrine applied because the Government would not audit the same ICPs again in the future
- Judge Clark dissented



## *Bannum, Inc. v. US*, 151 Fed. Cl. 755 (2021)

- Bannum won a Bureau of Prisons contract for re-entry services. A disappointed bidder filed a protest at the GAO.
- The Bureau of Prisons took corrective actions due to the protest and terminated the contract for convenience.
- The CO dismissed Bannum's termination settlement proposal and Bannum appealed to the COFC.
- Bannum's claim requested 7 different types of costs; the COFC rejected all 7.
- One of Bannum's rejected requests was for its preparatory costs incurred before the contract was terminated for convenience. The only evidence that Bannum provided to support its preparatory costs was a spreadsheet based on Bannum's general ledger.
- The COFC held that the spreadsheet was insufficient because there were no paystubs or payment documentation to support entries for labor or subcontractor costs.

## *LAX Electronics v. U.S.*, 151 Fed. Cl. 115 (2021)

- The Court of Federal Claims denied a protest challenging a Defense Logistics Agency decision to remove the protester from its supply lists on the grounds that the removal violated procedures in a DoD manual.
- The Court held the DCMA manual was not binding law because it was informal guidance that had not been promulgated into regulation and therefore could not form the basis of a protest.

# Cost Allowability Developments

## *Raytheon Co. and Raytheon Missile Sys., ASBCA Nos. 59435 et al., 21-1 BCA ¶ 37796*

### ■ The ASBCA ruled on allowability of:

- ▷ Government Relations Costs
- ▷ Corporation Development Costs
- ▷ Engineering Labor Overhead Costs
- ▷ Outside Patent Legal Costs
- ▷ Airfare Costs
- ▷ Recruiting Travel Costs
- ▷ Bonus, Incentive Compensation, and Restricted Stock Costs
- ▷ “Souvenir” or “Reminder Items” Costs

■ On June 8, 2021, the ASBCA denied the Government's request for reconsideration and request for referral to the Senior Decision Group, holding that DCMA was essentially attempting to re-try the appeals

# Government Relations Costs

- Raytheon in-house lobbyists would record their costs and time; but, would not record time outside of regular business hours.
- Raytheon removed unallowable business expenses that were recorded during normal business hours.
- DCMA questioned 100% of the costs – Felt that hours worked outside of normal business hours and non-lobbyist administrative staff costs led to an incorrect calculation.
- DCMA assessed a penalty for including expressly unallowable lobbying costs.
- The Board held that the Government failed to meet its burden of proof to demonstrate the costs were expressly unallowable.

DCAA stated that lobbyists kept their time accurately

Raytheon “strategy” adopted before audit

# Corporation Development Costs

- Raytheon had headquarters employees worked on strategic business activities such as mergers, acquisitions, and divestitures.
  - Before decision to make an offer or go to market - employees would record their time as allowable under FAR 31.205-27
  - After decision to make an offer or go to market - employees would record their time as unallowable under FAR 31.205-12
- DCMA's position was that all costs were unallowable organization costs.
- DCMA further objected to the employees' timekeeping practices, arguing that they were unreliable and insufficiently documented.
- Board found that Raytheon's practices were a reasonable interpretation of the regulations and the ASBCA's precedent in Dynalelectron and Raytheon I.
- The Board also held that DCMA had failed to demonstrate that the employees' timekeeping practices were deficient.

# Engineering Labor Overhead Patent Costs

- Raytheon had a process for reviewing potentially patentable inventions and determining whether to pursue a patent application or not.
  - Included the costs for this administrative process in its allowable costs up to the point Raytheon decided to pursue a patent.
  - After that point, Raytheon would designate the costs as unallowable.
- DCMA's view was that all costs relating to Raytheon's patent assessment process were unallowable under FAR 31.205-30, regardless if the costs were required by the contract with the Government.
- The Board held that both interpretations of FAR 31.205-30 were unreasonable and came to the following conclusions:
  - ▷ Any costs related to a patent are patent costs under FAR 31.205-30.
  - ▷ Patent costs required by the contract are allowable.
  - ▷ All other patent costs are unallowable.
  - ▷ If no patent ever results from an administrative review, the costs are allowable.

## Outside Patent Legal Costs

- Raytheon used outside counsel to prepare and submit Raytheon's patent applications. Raytheon pooled these costs with the rest of its outside counsel legal costs and treated them as indirect costs.
  - If the outside patent legal costs were incurred for a FAR 31.205-30 "subject invention" as part of a contract, Raytheon would include the costs with its allowable costs.
  - If not, then Raytheon would include the costs with its unallowable costs.
- DCMA objected to this practice and argued that Raytheon should have charged the costs as direct costs to the particular contract.
- The Board disagreed with DCMA and upheld Raytheon's practices of treating the costs as allowable and allocable indirect costs.



# Airfare Costs

There were two issues related to airfare:

FAR 31.205-46 in effect during contract performance allowed airfare only to the extent of normal coach prices available to the general public.

- ▷ FAR 31.205-46 amended after award of contract allowed airfare at the lowest rate available to the contractor
- ▷ Despite the amendment taking force after contract award, DCMA disallowed costs in excess of the lower rate available to Raytheon.

FAR 31.205-46 allowed for higher airfare rates if the lowest airfare rule would result in an unnecessary circuitous route, increased costs, or other difficulties.

- ▷ Any request for a higher airfare would have to be supported by documentation.
- ▷ Raytheon had a policy for these situations and DCMA disputed that the criteria were unreasonable.

The Board held that the version of FAR 31.205-46 only disallowed costs in excess of what was available to the general public and that Raytheon's increased airfare policy was reasonable to accommodate the "physical or medical needs" of the traveler.

## Recruiting Travel Costs

- Raytheon reimbursed several prospective employees for travel expenses during the recruitment process.
- DCMA questioned most of these costs on the grounds that Raytheon had not provided supporting documentation that the individuals had been interviewed.
- DCMA contended that the lack of supporting evidence demonstrated that the individuals were guests of other possible recruits.
- Raytheon voluntarily rescinded half of the costs at issue. For the remainder of the costs, the Board agreed with Raytheon that the FAR did not require the contractor to produce evidence signed by the potential recruit to recoup the recruitment costs.

## Bonus, Incentive Comp., and Restricted Stock

- Raytheon paid bonuses to several employees who were engaged in work that DCMA characterized as unallowable under FAR 21.205-22, 31.205-27, and 31.205-47.
- Under DCMA's view, this made the bonuses unallowable as well.
- The Board rejected DCMA's interpretation because the Board had not found any costs that were unallowable under FAR 31.205-22, 31.205-27, or 31.205-47 in the proceedings.

## Souvenir or Reminder Items Costs

- Raytheon distributed several items to potential recruits to encourage them to fill out applications online.
- Raytheon included the cost for these mementos with its recruiting costs and charged them to the Government.
- DCMA disallowed the costs on the grounds that they were unallowable promotion costs instead of recruitment costs.
- The Board sided with DCMA and held that the mementos were unallowable promotion costs.

*Ology Bioservices, Inc., ASBCA No. 62663 (May 20, 2021)*

- ASBCA granted the contractor's motion for summary judgment, holding a penalty the Government assessed against the contractor for seeking unallowable costs was unwarranted
- The CO determined Ology exceeded the cap for executive compensation in its FY2013 indirect cost rate proposal
- The Agency did not publish the FY2013 cap until 2016
- The Board held the appellant's "FY2013 executive compensation costs were not expressly unallowable at the time it certified its final indirect cost rate proposal because the FY 2012 cap was no longer applicable."

*Northrop Grumman Corp.*, ASBCA No. 62165, 21-1 ¶  
BCA 37922

- COFD alleged pension costs unallowable as “directly associated” to unallowable compensation; then challenged reasonableness under FAR 31.201-3 for first time in motion
- Board held that it could decide the “reasonableness” argument
  - ▶ Reasonableness is a factor in determining allowability
  - ▶ Facts and argument are not materially different from COFD: unallowable cost
  - ▶ Relied on DynCorp (2020 decision on severance in relation to compensation cap): based decision on reasonableness

## *Triple Canopy, Inc. v. Sect'y of the Air Force,* 14 F.4<sup>th</sup> 1332 (Fed. Cir. 2021)

ASBCA held that Statute of Limitations had run on Contractor claim for Afghan after-imposed taxes when the penalty was assessed.

- ▶ Triple Canopy submitted its claim within 6 years of the results of the appeal process with the Afghan government, which reduced the initial penalty, and its payment of the penalty

Federal Circuit reversed

- ▶ FAR 52.229-6, Foreign Taxes, requires the contractor to “take all reasonable action to obtain exemption from . . . any taxes . . .”

- ▶ Appealing the taxes was a mandatory pre-claim procedure (citing KBR)

Triple Canopy had sought an exemption and DOD supported that exemption request  
Claim did not accrue until Afghanistan issued its decision on Triple Canopy’s appeal

# TINA and Pricing Developments & Activity



# TransDigm Saga Continues

## December 2021 DoD IG Report No. DODIG-2022-043

- Addressed submission of uncertified cost data in connection with many small quantity, low dollar value, sole-sourced spare parts contracts that are below the cost or pricing data threshold.
- DODIG found that price analysis techniques “were not effective for identifying excessive pricing” in a sole source market environment.
- “...although the contracting officers followed FAR guidelines for determining fair and reasonable prices, we were able to identify excess profit, because TransDigm provided us uncertified cost data that was not available to the contracting officers. Specifically, we found excess profit levels that ranged from 2.8 percent to 3850.6 percent after a 15-percent profit was applied.”
- Profit above 15% considered excessive

## TransDigm Saga Continues Hearing of House Committee on Oversight & Reform

- The December 2021 Report and January 2022 TransDigm Hearing followed similar events in 2019, after which TransDigm paid Pentagon \$16 million for alleged overcharges, while admitting no wrongdoing
- In 2022 Members of the Oversight and Reform Committee urged TransDigm to pay again; \$20.8 million this time
- Renewed focus on Cost Analysis, Price Analysis and the role of Profit
- "Culturally, we have evolved to a point where we would rather pay \$1 billion and 5% profit for a defense good, than \$500 million and 20% profit" (Pierre Chao, 2013 HASC Congressional Testimony)

# TransDigm Saga Continues

## Renewed Focus on Cost Analysis and Profit

- In response, DoD submitted two legislative proposals
  - ▶ Ensuring DoD has ability to make Commercial Item Determinations and/ or Obtain Necessary Cost or Pricing Data
  - ▶ Modifying existing statute to require submission of uncertified cost or pricing data, when necessary
- DoD IG recommended:
  - ▶ Defense Pricing and Contracting (“DPC”) should assess whether cost analysis should be required for the sole source acquisition of spare parts that are below the cost or pricing data threshold
  - ▶ DPC should consider alternate strategies for purchasing spare parts more efficiently and at lower prices

## Trends in Defective Pricing

- Significant Audit Activity relating to Defective Pricing
- DCAA initiated collaboration efforts with DCMA and the Office of the Under Secretary of Defense to resolve defective pricing audit findings.
- Train personnel on definition of cost or pricing data and elements of defective pricing

## Remember the Five Elements to Establish Defective Pricing, DCAA CAM 14-102(b)

To show that defective pricing exists, the audit must establish each of the following five points:

1. The information in question fits the definition of cost or pricing data.
2. Accurate, complete, and current data existed and were reasonably available to the contractor before the date of agreement on the price.
3. Accurate, complete, and current data were not submitted or disclosed to the contracting officer or one of the authorized representatives of the contracting officer and that these individuals did not have actual knowledge of such data or its significance to the proposal.
4. The Government relied on the defective data ...
5. The Government's reliance ... caused an increase in the contract price.

## Continuing Impact of Change in Exceptions to Submission of Cost or Pricing Data

- Before June 2019, Contractors were not required to submit certified cost or pricing data when "adequate price competition" existed, as defined by three scenarios:
  1. when two or more responsible offerors submit proposals;
  2. if there was "a reasonable expectation, based on market research or other assessment," that two or more responsible offerors would submit proposals; or
  3. when price analysis demonstrates the price is reasonable. FAR 15.403-1(c).
- The revised FAR 15.403-1(c) eliminated the second possibility for DoD, NASA, and Coast Guard procurements.

**COVID-19**

# Coronavirus Aid, Relief, and Economic Security (CARES) Act

The CARES Act, enacted on March 27, 2020, provides aid and relief in response to the national health emergency.

Major sections that could be used by contractors are:

- *Paid Leave Reimbursement* (Section 3610)
- *Paycheck Protection Program* (Sections 1102 and 1106)
- *Employee Retention Credit* (Section 2301)
- *Payroll Taxes Deferral* (CARES Act Section 2302)



## Cares Act – Paid Leave Reimbursement Section 3610

- Section 3610 allows the contracting officer the discretion to reimburse paid leave, including sick leave to maintain employees or subcontractors in a ready state.
- Reimbursement for paid leave is allowable up to 40 hours per week if employees cannot perform work at a site due to closures or other restrictions and are unable to telework because of their job duties.
- Eligible paid leave period from March 27, 2020 through September 30, 2021.
- The costs must be identified and segregated in the contractor's records.
- The maximum reimbursement to affected contractors must be reduced by the amount of any applicable credits received.

# Cares Act – Paycheck Protection Program

## Section 1102 & 1106

- The Paycheck Protection Program provided direct incentive for small businesses to keep employees on the payroll.
- The program provided eligible borrowers with an initial loan and an option for a second loan.
- The loans can be forgiven if the funds are used for:
  - ▷ Payroll costs
  - ▷ Interest on mortgages
  - ▷ Rent
  - ▷ Utilities
- At least 60% of the forgiven amount must be used for payroll

## Cares Act – Paycheck Protection Program

- The Department of Justice recently begun charging defendants with bank fraud in relation to PPP loans as part of its efforts to investigate crimes associated with COVID-19 funding.
- Falsified information submitted to financial institutions as part of a PPP loan application could result in bank fraud charges.
- Bank Fraud can result in fines up to \$1 million and/or imprisonment for up to 30 years.

# Cares Act – Employee Retention Credits

## Section 2301

- The Employee Retention Credit is a fully refundable tax credit for employers equal to a percent of qualified wages paid to employees.
- The credit is allowed against the employers' share of social security taxes.
- An eligible employer can receive both the tax credit for qualified leave wages under the FFCRA and the Employee Retention Credit under the CARES Act, but not for the same wages.
- If qualified wages were considered for PPP loan forgiveness, they are not eligible to receive the Employee Retention Credit.
- The credit applies to qualified wages paid after March 12, 2020, and before July 1, 2021.

## Cares Act – Payroll Taxes Deferral Section 2302

- Section 2302 allows employers to defer the deposit and payment of the employer's portion of Social Security taxes.
- An employer that receives a PPP loan is entitled to defer the payment and deposit of the employer's share of Social Security Tax, even if the loan is forgiven later.

# Families First Coronavirus Response Act (FFCRA)

- FFCRA provided relief to employees and employers through expanded employee leave and a variety of employer tax credits.
- FFCRA mandated leave expired on December 31, 2020 and was extended through March 31, 2021 by the Consolidated Appropriations Act for leave voluntarily provided.
  - ▷ Section 3102 – Paid leave from the 11<sup>th</sup> day onward for public health emergency leave
  - ▷ Section 5102 – Leave for COVID-19 related illness
  - ▷ Section 7001 – 100% credit against payroll taxes for leave under section 5102
  - ▷ Section 7003 – 100% credit against payroll taxes for leave under section 3102
  - ▷ Section 7005 – The 7001 and 7003 credit is increased by the amount of IRC Section 3111(b) tax paid on qualified sick leave wages or qualified family leave wages.

## Internal Revenue Code of 1986 (IRC)

- The American Rescue Plan Act of 2021 revised Chapter 21 of the IRC to include a Subchapter D – Credits which continued the FFCRA credits under Sections 7001, 7003, and 7005 from April 1, 2021 – September 30, 2021.
- Section 3134 extended the Employee Retention Credit from July 1, 2021 through December 31, 2021.
- Pension Funding Stabilization table updated to extend existing pension funding relief and allows sponsors to assume higher than expected interest rates, resulting in lower annual pension costs through 2025.

## MRD 20-PIC-006(R) Incurred Cost Considerations PPP Loan Forgiveness and Subsequent Credits

- PPP loan forgiveness credits are subject to FAR 31.201-1, Composition of Total Costs, and FAR 31.201-5, Credits.
  - ▶ The contractor may claim the costs in the year incurred and provide the credits when the PPP loan is forgiven.
  - ▶ PPP loan forgiveness credits should apply to contract costs in the same manner in which the PPP loan funds were originally spent.
  - ▶ PPP funds used to pay rent should be credited to rent when the loan is forgiven. If rent is part of an indirect pool, the indirect cost pool should be credited.
  - ▶ Forgiven PPP loan amounts used solely to pay employees working on commercial efforts would not create a credit or refund to the Government.



## MRD 20-PIC-006(R) Incurred Cost Considerations CARES Act Paid Leave

- Best practice to charge Section 3610 paid leave costs to specific COVID-19 account or indirect cost pool.
- Cost may be allocated to contracts on a reasonable allocation.
- It may be appropriate in some situations to charge Section 3610 costs through indirect costs pools (overhead, G&A, etc.).
- Ensure that Section 3610 costs don't include costs for which the employee received unemployment benefits allowed under the CARES Act. Under the CARES Act, employees did not have to be laid off or furloughed to collect unemployment benefits.

## MRD 20-PIC-006(R) Forward Pricing COVID-19 Considerations

- The pandemic has resulted in impacts to operations, including telework, facility closures, layoffs, contract delays, and changes in historical spending trends.
- Consider how historical data used as the basis for estimates was impacted and determine if those impacts will continue.
- Evaluate changes or planned revisions to policies and procedures for increased use of telework, leave policies, and new benefits or company reimbursed expenses.

## MRD 20-PIC-006(R) Forward Pricing COVID-19 Considerations

- Evaluate production processes for changes needed to safeguard employees and protect employee health and wellbeing.
- Contingencies should be excluded from the cost estimates under the elements of costs but should be disclosed separately to facilitate the negotiation of appropriate contractual coverage.
- Evaluate lower Pension Stabilization Funding interest rates, resulting in lower annual pension costs through 2025.

## *Pernix Serka Joint Venture v. U.S.*, 894 Fed. Appx. 928 (Fed. Cir. 2021)

- The Federal Circuit affirmed a CBCA opinion holding that a contractor with a firm-fixed price contract could not recover increased costs associated with its response to the Ebola outbreak in Sierra Leone.
- When approached for guidance on Ebola response, the Agency refused to provide direction. The contractor submitted a request for equitable adjustment for the \$1.26 million it incurred due to the disruption of work of demobilizing and remobilizing its personnel.
- CBCA determined FAR 52.249-10 limited the contractor's recovery to time, not money, for its excusable delays, and therefore could not justify recovery of costs.
- CBCA rejected the contractors' reliance on the theories of cardinal and constructive change
  - There was no cardinal change because the Government did not change the description of work; rather, the circumstances arose from the Ebola outbreak and the host country's response
  - There was no constructive change because the Government did not direct the contractor to take any action, nor was it required to

# Cost Accounting Standards Board and CAS Activity

## Cost Accounting Standard Board Activity

Unfortunately, Nothing To Report

# THANK YOU!

Paul Pompeo  
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Ryan Byrd  
BRG

Joseph McCaffrey  
Baker Tilly

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