

Updates of Potential Interest

Written by Nick Sanders
Monday, 13 July 2020 00:00

A couple of quick updates of potential interest to readers.

First, the Prompt Payment Interest Rate for the second half of 2020 was [published](#) in the Federal Register on July 10, 2020. The current interest rate is now 1.125 percent per year. In accordance with the Prompt Payment Act, as implemented in FAR 32.907 and associated contract clauses—and as calculated in accordance with 5 CFR 1315—the government must pay an interest penalty automatically, without the need of a contractor request to do so, when it makes a late payment to the contractor. The current interest rate is a key component of that penalty calculation.

Note that circumstances in which the government is required to pay an interest penalty vary considerably and, before you go off demanding such a payment (if one was not made automatically), you definitely should read FAR 32.9 and the payment clause(s) in your contract.

Importantly, the Prompt Payment Interest Rate is not just used for calculating the interest penalty for late government payments to contractors. It is also used for calculating interest that accrues on a claim made under the Contract Disputes Act. That same interest rate is also used to calculate Facilities Capital Cost of Money factors for compliance with Cost Accounting Standards 414 and 417. Note that FAR 31.205-10 makes CAS 414 applicable to all contracts, even if otherwise exempt from CAS, should a contractor elect to propose and receive FCCOM on its contracts.

So it's kind of a big deal, if you are one of the many contractors that use it. But 1.125% is not at all a high rate, and thus calculations that involve the Prompt Payment Act Interest Rate are going to be smaller than they have been historically.

Next, let's talk about the TINA threshold. (Yes, we know it's not called "TINA" anymore, but it will always be TINA to us.) Federal Acquisition Circular 2020-007, published in the Federal Register on July 2, 2020, included a Final Rule that implemented statutory changes made to the TINA Threshold by the FY 2018 National Defense Authorization Act (NDAA). [FAR Case 2018-005](#) was opened "to increase the threshold for requesting certified cost or pricing data from \$750,000 to \$2 million for contracts entered into after June 30, 2018. The threshold for Cost Accounting Standards applicability is required by 41 U.S.C. 1502(b)(1)(B) to be the same threshold as the

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one for requesting certified cost or pricing data.”

Thus, the new threshold for obtaining certified cost or pricing data is now \$2 million, as is the threshold at which CAS might be applied to a contract. (Note that CAS still contains a \$7.5 million “trigger contract” value, so application of CAS to a contract is not automatic.)

When we say the TINA/CAS threshold is now \$2 million, we should recognize that there have been Class Deviations that implemented the “new” threshold in place for months, because the policy makers got impatient waiting for the rule-makers to do their thing. We have several blog articles discussing whether or not a statutory change could (or must) trump the regulatory rules that implement it. We also lamented the slow pace of the regulatory rule-making.

But regardless of how long it took to get here, here we are.

However, we still have a problem with contracts awarded prior to June 30, 2018. It is likely that those contracts contain the “old” TINA threshold, which would apply to subcontractors under those prime contracts. That’s a problem, because now those contracts are out of alignment with the current thresholds. What can be done?

Well, according to the final rule—

Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a \$2 million threshold for obtaining certified cost or pricing data from subcontractors.

In our view, any prime contractor that does not make that request is doing a disservice to itself. Further, if we were a subcontractor, we would immediately request that our subcontract be modified to use the new thresholds.

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Why would we care?

According to the final rule, there are cost savings associated with the threshold change. According to the regulatory analysis, contractors stand to realize \$589 million in cost savings (across the entire spectrum of government contractors), and the government stands to realize an additional \$91 million in cost savings, from raising the thresholds. The cost savings come from having fewer contractors submit certified cost or pricing data and having fewer contractors subject to CAS. That's a decent amount of savings. Makes us frustrated (once again) that the FAR Councils took their sweet time implementing this statutory change.

We should also note that even if a prime or subcontract were modified to implement the new thresholds, we don't believe it would change history. Subcontractors that submitted certified cost or pricing data under the old threshold would still be subject to defective pricing allegations if it turns out their certified cost or pricing data was not accurate, complete, or current. Similarly, we think subcontracts that were CAS-covered under the old threshold still remain CAS-covered under the new threshold, even if they were valued at less than \$2 million. It's axiomatic that a contract modification does not impact CAS applicability; and we believe that rule still would hold true in this case.