Written by Nick Sanders
Tuesday, 01 September 2015 00:00

Recently the Department of Justice **announced** that Sandia Corporation, a wholly owned subsidiary of Lockheed Martin, had agreed to pay $4.7 million in order to "resolve allegations that [it] violated the Byrd Amendment and the False Claims Act by using federal funds for activities related to lobbying Congress and federal agencies." Lobbying, of course, is one of those activities made expressly unallowable by the FAR Cost Principle at 31.205-22. Not merely unallowable: *expressly* unallowable. A Federal contractor cannot claim the costs of lobbying activities as allowable costs. *Period*

.

To make the concept even clearer for its contractors, the Department of Energy has a **webpage** devoted to the topic of lobbying. The webpage lists in great detail the various statutory and regulatory prohibitions on using Federal funds to engage in lobbying activities. There is really no room for misinterpretation as far as we can tell.

Regardless of the foregoing, it appears that the management team at Sandia Corporation allegedly "used federal funds to support activities to lobby Congress and other federal officials to receive a non-competitive extension" of its Management & Operating (M&O contract with the DOE.

Apparently, they should not have done that.

How did this happen? According to various sources—among them a **recent story** by Time magazine—the goal of the (alleged) lobbying efforts was to keep the DOE from awarding a follow-on M&O contract through competition. Historically the DOE has been criticized for awarding its M&O contracts on a sole or single-source basis and, to address that criticism, the agency formulated a strategy of competing the follow-on M&O contracts. Apparently, Lockheed Martin and its subsidiary thought they had a good chance of overturning that strategy if they could persuade a small number of legislators and high-ranking officials that competition would not be in the interests of the taxpayers.

(As a side note, as our recent **article** on the GAO's concerns with competition showed, there may well have been some merit to that strategy.)

The allegations stemmed from a series of DOE Inspector General audit reports, the most recent of which (dated November, 2014) can be found **here** . The DOE IG report documented that Lockheed Martin and its subsidiary had allegedly used M&O funds to secure non-competitive contract extensions for a long time—dating back to 1998. Naturally, the decision-makers at Sandia Corporation had a rationale for such use. As the DOE IG report stated—

Clearly, SNL [*ed. note: Sandia National Labs, not Saturday Night Live*] officials were committed to the notion that the SNL/LMC relationship should continue into the future and that this should be accomplished without the benefit of competition. This was, as best we could determine, the underlying rationale for the actions identified in this report. SNL took the position that FAR 35.017, *Federal*
ly Funded Research and Development Centers
, allowed SNL to undertake these activities in order to be prepared to demonstrate to the Department/NNSA that SNL was fulfilling the Department's needs. SNL indicated that these were typical activities for any contractor intent on continuing a relationship with its sponsor, especially a Jong-term relationship, and that SNL was preparing to demonstrate that it deserved a full 5-year extension as contemplated by the FAR. Also, SNL indicated that, in accordance with prime contract clause I-8, FAR 52.203-12,
Limitations on Payments to Influence Certain Federal Transactions
, Subsection C, and prior to a formal solicitation for competition, SNL prepared information and met with NNSA personnel because SNL felt it necessary for the Department and NNSA to make an informed decision on a contract extension. SNL argued that its actions to obtain a contract extension were based on 'the merits of the matter,' and that SNL costs associated with such activities were allowable.

What did the DOE IG think of that rationale? The report stated--

In contrast, we find that the position and actions taken by SNL to develop and execute the contract extension plan to be highly problematic. Given the specific prohibitions against such activity, we could not comprehend the logic of using Federal funds for the development of a plan to influence members of Congress and Federal officials to, in essence, prevent competition. As noted above, SNL was cognizant of problems with using Federal funds for similar purposes, but chose to interpret Federal regulations and use Federal funds in a manner that was intended to benefit its parent corporation.

Based on the foregoing, it appears to us that Sandia's compliance folks were told one thing (*i.e.*, that the "capture team" was simply preparing pre-RFP *information* for Congress and other high-ranking officials with no intent to influence anybody), while instead the team was (allegedly) working hard to influence individuals in order to avoid the issuance of an RFP in the first place. The compliance folks seem to have been given a certain set of facts about the activities, and then they found enough ambiguity in the regulations and contract clauses to make those activities allowable.

Or so they thought at the time. Years later, $4.7 million proves they were overly optimistic—or else simply misled. We suspect it's the latter and not the former.

The lesson to be learned here is that facts matter. The determination of cost allowability is highly fact-dependent.

If you tell us what you are doing and (more importantly) *why you are doing it*, we can give you an allowability determination with a high degree of confidence. But it you mislead us, or withhold certain crucial facts, then our determination may well be wrong. And that error may end up costing the company millions of profit dollars.

As a corollary to that lesson, remember that compliance practitioners need to dig for the facts. We cannot simply accept what we are told without challenge. We need to probe and compare and question, so as to make sure we are confident we understand *the what* and *the why*, so

that the correct cost allowability determination can be made. If we just accept what we are told without probing and verifying, then we become "yes men" instead of professionals.

Being a compliance practitioner is hard. Sometimes it involves deep research in order to understand the rules governing certain transactions. Often, it involves saying "no," which is always a risky proposition from a career point of view. But that is what the job entails. If you are not up for it, you need to find another line of work.