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DCAA Streamlines Responsibilities in Obtaining Overdue Incurred Cost Proposals

By Darryl Walker, CPA, CFE, CGFM Senior Director at Redstone Government Consulting, Inc.

The Defense Contract Audit Agency (DCAA) is discontinuing its practice of issuing multiple written notifications advising government contractors and the Defense Contract Management Agency (DCMA) administrative offices that submission of final indirect rate proposals are delinquent. The memorandum confirms that DCAA is stepping back in its advisory role with DCMA in obtaining overdue proposals and clarifying its role in unilaterally settling indirect rates if contractor (adequate) final rate proposals are not received timely.

In its February 3, 2014 memorandum to field audit offices, auditors are to issue only one written overdue request notification to both contractor and the cognizant DOD contracting office thirty days after the proposals are due. DCAA formerly issued several written notifications to contractors and/or the Administrative Contracting Officers (ACO) which included contractor pre-fiscal year-end reminders, subsequent overdue submission mandates, and a six-month overdue letter to the ACO recommending unilateral rate determinations. Although the new policy significantly removes auditors from the responsibility to issue multi-tiers of correspondence regarding delinquent final rate proposals, somewhat unexpectedly the policy does not relieve auditors from interfacing with and educating contractors regarding final rate regulatory requirements, supporting ACOs in obtaining late proposals, and calculating unilateral contract cost decrements

DCAA Headquarters has established preliminary goals for contractor fiscal years (CFY) 2014 and 2015 in coordinating responsibilities and actions with DCMA in identifying and reducing backlogs of overdue rate proposals and settling year-end indirect rates. For CFY 2014, the agency will provide to DCMA a list of delinquent rate proposals for contractor fiscal years 2011 or earlier and work with DCMA to obtain proposals, or otherwise settle rates on a unilateral basis. To a casual observer, it's difficult to understand why DCAA (or DCMA for that matter) has any interest in reducing the number of overdue rate proposals, noting that DCAA represents that it already has on hand far more contractor rate proposals than

THIS ISSUE:

DCAA can audit over the next two or three years.

DCAA's CFY 2015 initiatives will include providing to DCMA a list of rate proposals which are more than six months overdue without valid extensions, as well as those received but which are not adequate for audit. Moreover, DCAA will close open audit assignments within a specific time frame if rate submissions have not been received unless advised that DCMA has approved a submission extension for submission or of an initiative to obtain and adequate proposal.

When support to DCMA is required for unilaterally establishing final indirect rates and contract costs, DCAA will provide the contracting officer historical data, such as billing history and previous rate negotiation experience, if such history exists. Where "relevant" contractor history does not exist, the DCAA will suggest a "total contract cost decrement" factor, the current recommended decrement rate being 16.2 percent, which would theoretically be applicable to all unilateral rate settlements regardless of contractor size, industry, or reimbursable contract dollar volume. If utilized for any given contractor fiscal year, for each flexibly priced contract, the 16.2 percent is applied to the contract total direct and indirect costs for that year; hence, an effective reduction of $162 for every $1,000 in total contract costs.

The guidance is clear that DCAA shall yield to DCMA the final decision in determining methods for going after overdue rate proposals and for settling final indirect rates with contractors when proposals are not submitted timely. Only DCMA has final authority in choosing the process for obtaining overdue proposals; approving contractor's request for continued rate submission extensions, and; determining if decrement factors are appropriate in settling final rates.

CBCA Rules Termination for Default is Termination for Convenience

By Darryl Walker, CPA, CFE, CGFM Senior Director at Redstone Government Consulting, Inc.

The Civilian Board of Contract Appeals (CBCA) overturned a Department of Transportation Maritime Administration (MARAD) decision to terminate for default a contract awarded to ACM Construction, granting ACM's appeal that the termination action be one for "convenience". The court's decision to deem the termination one for convenience allowed ACM to collect about $194,000 in costs incurred prior to and after the termination action.

The CBCA case arose from a contract awarded to ACM for the replacement of a deck covering around the ship's galley, the award price of which was $188,900. After work began, performance was impaired due to several unanticipated problems, and during discussions with the government regarding delays, ACM submitted documented "condition reports" substantiating reasons for the delay. Those reports noted, for example, extensive rust and corrosion in the work area, which impeded performance and contributed to delays. The contracting officer's technical representative (COTR) rejected the condition reports, and instead asserted that the reason for the delay was ACM's failure to remove certain obstructions from the work site as required by the contract. As a result of not having removed certain equipment, the contracting office asserted that ACM had damaged some of the ship's equipment.

In responding to the government's assertion that ACM failed to remove certain obstacles before beginning work, ACM countered that the contract required ACM only remove equipment which would inhibit performance, and did not require that all equipment within the ship's galley area where work was underway be temporarily relocated.

The court agreed that the contract required removal of only certain equipment, and that MARAD's expectation for ACM to remove all equipment was out of contract scope and unreasonable. The court also agreed that ACM established a reasonable basis for an excusable delay, and that ACM's performance did not contribute to the damage of any government equipment.

Snow Days and Government and/or Contractor Work-at-Home Policies

By Michael Steen, CPA, Senior Director at Redstone Government Consulting, Inc.

The winter of 2014 continues to set records for snow-fall including a number of days which impacted Government operations in the DC area. The fallout has been a number of days wherein the Government's DC-area offices were officially closed; however, depending upon an agency's work-at-home (or telework) policies, there could have been little impact on actual productivity of the impacted government employees. In fact, if one believes the various surveys (of Government employees who telework), there should have been a net increase in productivity because the "survey says" that the majority of Government employees are more productive teleworking (free of office distractions) versus working in an office with too many distractions. Whether or not employees are more productive, the fact that the Government uses or can use telework to minimize lost productivity suggests that Government contractors should have similar policies, or otherwise risk challenges that any lost time related to accessing the facilities or plant time is unreasonable (reference to FAR 31.201-3).

Although it is by no means supported by any regulation, Government auditors, including but not limited to DCAA, frequently superimpose Government policies on contractors simply because there is no other published standard. Of more than passing interest, extending a Government policy or practice to a Government contractor to assess reasonableness (FAR 31.201-3) is conceptually invalid because FAR defines a reasonable cost as "one in its nature and amount, which does not exceed that which would be incurred by a prudent business person in the conduct of a competitive business". The last time we checked the Government is not exactly a prudent person in a competitive business; hence, any use of a Government-only policy as a standard for FAR 31.201-3 reasonableness is totally invalid (although that does not deter DCAA auditors from using this strategy).

One case in point in terms of a Government policy (which no rational contractor would implement) Government employees do not automatically work from home on snow days even if the employee has a telework agreement and the operational capability to work from home. It all depends upon the agency policy as well as the employee-specific telework agreement which might not require the employee to work from home during a Government shutdown even if the employee could easily work from home. In some cases, the employee would only work from home during a Government shutdown if the employee had been scheduled to work-at-home on that date or if the employee had foolishly signed a telework agreement wherein he/she committed to work from home during a Government shutdown (Note, the reference to a Government shutdown is with respect to weather related office closures in a defined geographic area and does not include Government shutdowns because of funding issues during which time a Government employee is prohibited from working even on a voluntary basis).

To the extent a Government contractor utilizes a work-at-home policy and that contractor is subject to DCAA audits, the contractor needs to be aware of DCAA expectations concerning controls for contractor labor costs involving a work-at-home policy. In DCAA's CAM (Contract Audit Manual) 6-405.c, DCAA instructs its auditors to accomplish the following (during a "floor-check" for which one or more of the selected employees are not physically present, but are working from home):

- Interview the employee's supervisor concentrating on obtaining evidence of the employee's work and documented supervisory control over the employee's work-at-home schedule
- Communicate (by phone) with the employee to determine the employee's knowledge of the work-at-home procedures and discuss the specific types of work being performed along with the charge numbers
- If the employee has a regularly scheduled meeting with the supervisor in the near future, any questionable practices should be verified with the employee and the supervisor. In addition, the individual's employment should be verified to payroll/personnel records (Note: DCAA believes that "employee existence" must be verified even if all other records and evidence suggest that there is no risk of "phantom employees" and unfortunately this

"logic" applies to incurred cost audits which are often five or six years after-the-fact).

Although DCAA's work-at-home expectations are not found in any contract regulation, Government contractors with work-at-home policies should be aware of DCAA's expectations. Although DCAA only refers to their expectations in the context of a DCAA floor-check (which might occur at large/major contractors but rarely at small-medium non-major contractors), there are creative auditors who will make these inquiries during an incurred cost audit or as a question posed during an accounting system pre-award audit. Hence, one more area for any contractor to have some policies and controls in place, not just for the contractor's own purposes, but "just in case" there are DCAA audit inquiries.

Government Declaration: Government Rules are Cost Effective

By Michael Steen, CPA, Senior Director at Redstone Government Consulting, Inc.

In the 1990s, the Government itself recognized that its contract rules and regulations came with a cost premium. As a point of reference during the days of FARA and FASA (Federal Acquisition Reform or Streamlining), there was a study by a CPA firm which concluded that the FAR/CAS regulatory cost premium was between 5 and 10 percent of the total cost of Government procurement. The "cost premium" was at best an estimate largely based upon interviews and estimates provided by those dealing with Government regulations. Moreover, it was viewed by many, particularly those within the Government with contract oversight responsibilities, as a predestined determination which would superficially provide additional support to Government efforts to reduce the burdens of Government regulations.

Fast-forward to 2014 (or January 2009, the beginning of the current administration) at which time each passing year brings additional regulations with additional administrative costs. Although it is a totally useless process, the regulatory process requires the rule-writer to determine the cost of continuing and/or implementing a regulation (e.g. a regulation with an annual reporting requirement); however, the cost assumptions are estimates which cannot be proven right or proven wrong. In some cases, even the rule writer tacitly acknowledges that a previous estimate was understated; recently (February 14, 2014 Federal Register related to Examination of Records by the Comptroller General and Contract Audits) a reporting requirement which in the previous year had been estimated at .10 hours per report was changed to 1 hour per report (the previous estimate was off by only 600%). Our personal favorite, the December 18, 2013 Federal Register related to reporting foreign purchases for which the rule writer estimated 1,708,220 actions at a cost (time spent for each report) of .01 hours or 36 seconds per report…Seriously?

However, anyone dealing with Government regulations will be happy to know that an OMB (Office of Management and Budget) spokesperson recently assured everyone that the requirement for each agency to perform a "retrospective review" (of rules) has demonstrated that "through four years of this administration, the net benefits for rules reviewed by OIRA (Office of Information and Regulatory Affairs) has been $159 billion and that the fifth year was expected to show net benefits of $25 billion". The OMB spokesperson noted that agencies were completing the most recent retrospective reviews and these efforts were already saving $10 billion. A naïve, but irrational reader would obviously beg for more regulations in order to yield even more net savings, perhaps sufficient to eliminate the national debt (overlooking the fact that the OMB/OIRA net savings are "smoke and mirrors" and the national debt is real).

Undoubtedly, the savings from retrospective reviews are identical to virtually all other reported savings from Government actions; based upon assumptions, the resulting net savings are unverifiable to any factual/auditable data, and the process is more than slightly influenced by a bias towards a pre-determined objective/outcome. OIRA has indicated that it is currently taking actions to improve the transparency of this process; therein, we can only hope that retrospective reviews and OIRA will migrate to the highest level of transparency which is to become invisible (i.e. non-existent). OIRA's report of net savings are unsupported, non-value added estimates with the only factual aspect of any of this that the money spent on agency "retrospective reviews" and OIRA reports could be better spent elsewhere.

REDSTONE Government Consulting

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July 15-17, 2014 – The Masters Institute in Government Contract Costs
Hilton Head Island, SC

October 20-21, 2014 – Accounting Compliance for Government Contractors
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Instructors

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- Darryl Walker
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In achieving government contractor goals, all consulting services are planned and executed utilizing a quality control system to ensure client objectives and goals are fully understood; the right mix of experts with the proper experience are assigned to the requested task; clients are kept abreast of work progress; continuous communication is maintained during the engagement; work is managed and reviewed during the engagement; deliverables are consistent with and tailored to the original agreed-to scope of work, and; follow-up communication to determine the effectiveness of solutions and guidance provided by our experts.

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