Recently Law360 reported that Sperient Corporation was back at the US Court of Federal Claims, asserting that the Department of Defense breached its SBIR contract when it permitted DCAA to disallow certain direct and indirect costs. We've been following this case with some interest since we first **wrote** about it back in October, 2013.

Our original blog article (link above) provided details regarding Sperient's claims. In a nutshell, Sperient asserted that DCAA inappropriately disallowed "$632,765 in for indirect costs incurred in fiscal years 2007 through 2011 and $168,750 for direct costs related to the leased radar range incurred in fiscal years 2007 through 2010, for a total of $801,515." The original article noted that Judge Braden did not provide details regarding how DCAA might "disallow" costs. It also noted that Sperient had filed its claim at the CoFC without first obtaining a Contracting Officer Final Decision (COFD), in possible violation of the procedural requirements of the Contract Disputes Act (CDA). Although Sperient submitted caselaw that indicated a SBIR Phase II contract was not a procurement contract (and thus not subject to the CDA), Judge Braden was able to distinguish those cases from the case at hand.

Consequently, Sperient's initial claim was dismissed without prejudice, so that it could first submit the claim to its cognizant Contracting Officer for a decision, which could then be appealed. We wrote (in our initial blog article) –

Now Sperient needs to go back to its contracting officer and get a final decision, which it must then appeal (again) before a court. Seems like a painful re-do, but if you've been reading our blog articles, then you know that the courts strictly construe the CDA's requirements.

The lesson to be learned here is that it's really not going to be possible to short-circuit the procedural requirements when you decide to take on the U.S. Government in a contracting dispute. As painfully long and expensive as the process is going to be, if you want to have your day in court, then you need to be prepared for it.

Evidently Sperion did all that and the Contracting Officer rejected the claim. We wonder how much thought and effort went into that COFD, or whether it was just another "rubber stamp" of a DCAA audit finding. (Caselaw requires the Contracting Officer to independently adjudicate the claim rather than try to protect the interests of the Government.)

We wonder whether the Contracting Officer tried to negotiate a settlement (as would be required by FAR 33.204. ("The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim.") Or perhaps the Contracting Officer, knowing that a suit had already been filed once, simply abdicated all responsibility and turned it over to Legal?

We don't know the answers to any of those questions. But we hope the answer will emerge through litigation.

One final thought.

With a bit of hindsight, we can review Sperient's original claim in a different light. In the original claim, Sperient asserted that DCAA "disallowed indirect costs incurred" in September, 2012. In response to the initial disallowance, Sperient provided DCAA with "additional details supporting the direct costs incurred." But DCAA "took no action" and did not revise its preliminary audit conclusions in response to the additional information provided.

Compare Sperient's situation with the situation described by the DoD Office of Inspector General in its report addressing a Hotline compliant, which we wrote about **here** . According to the DoD IG –

Our evaluation disclosed that DCAA failed to comply with Chapter 5 of GAGAS and the AICPA standard by not obtaining adequate evidence to support its conclusion that $33 million in subcontract costs were unsupported. Specifically, *the auditor's failure to obtain adequate evidence was due, at least in part, to the auditor not considering all information provided by the contractor.* For each of the 70 selected transactions, the auditor documented in the working papers her reasons for concluding that the contractor did not adequately support the claimed costs. Then, according to the working papers, the contractor provided a rebuttal to each of the auditor's conclusions and, in many cases, the rebuttal indicates the contractor provided the auditor with additional information or explanations to support the allowability of the claimed cost. However, we found no evidence suggesting that the auditor appropriately considered the additional information or explanations included in the rebuttal.

[Emphasis added.]

According to the DoD IG, if a contractor provides additional information but the auditor fails to consider that additional information and (if appropriate) modify the preliminary finding, then the auditor is in noncompliance with Generally Accepted Government Auditing Standards (GAGAS). Thus (based on the sketchy information provided so far) it would seem that Sperient may have a colorable claim for professional malpractice under the Federal Tort Claims Act, similar to the suit **recently filed** by KBR against DCAA.[1]

We'll have to wait and see what Sperient does in this situation. But as we've opined before, it's a shame that a small business has to go through all these painful procedural hoops in order to recover allegedly allowable expenses it has incurred.

[1] We have heard through unofficial sources that the FAO named in the DoD IG Hotline Report as being noncompliant with GAGAS is the same FAO that is being sued by KBR for professional malpractice. WE HAVE NOT CONFIRMED THAT CONNECTION. But if true, *how interesting*, no?