This article concludes the long and complex story involving LOGCAP contractor KBR and its DFAC subcontractor, Tamimi, in support of contingency operations at Camp Anaconda, Iraq. In a **recent legal decision** , KBR lost out on at about $30 million in payments to Tamimi, because it was unable to show that those payments were based on prices that were fair and reasonable.

In Part 1, we discussed DCAA's relatively new contention that subcontractor payments are unallowable when the prime (or higher-tier) subcontractor is unable to demonstrate that the price it's paying is fair and reasonable, as the FAR requires.

In Part 2, we discussed the stormy marriage between KBR and Tamimi, and how that marriage suffered from several problems (such as noncompliances with the requirements of KBR's Purchasing System and a lack of payment of Tamimi invoices). Among the bigger problems was a "solution" devised by KBR and Tamimi to construct permanent dining facilities at Anaconda despite initial Contracting Officer objections. As a result of these problems, KBR had significant difficulties demonstrating Tamimi's price reasonableness, even when attempting to do so after the subcontract had already been awarded.

In Part 3, we discussed DCAA's concerns with Tamimi's pricing and issuance of a "Form 1" suspending payments to KBR. We quoted extensively from the Judge's decision regarding "reasonableness" as an element of cost allowability, and also told readers how simply attacking DCAA's methodology was insufficient to demonstrate reasonableness when challenged. Judge Miller found that KBR's deal with Tamimi—especially the pricing structure—was unreasonable. However, she was able to find that some amount of KBR's payments to Tamimi was reasonable. Hence, KBR recovered about $12 million of the $41 Million initially suspended by DCAA.

In this final article, we want to explore some lessons that might be learned from KBR's travails.

The first lesson is that Judge Miller was willing to cut KBR some slack. She agreed that what was "reasonable" depended on the context in which the questioned costs were incurred. In particular, she understood that life in a war-zone was different from life in a conference room. However, that slack was given only for those circumstances over which KBR had no control. Where KBR had control of circumstances, she gave the contractor no slack at all. She wrote—

The Government agreed to compensate KBR for costs reasonably incurred under LOGCAP III; it did not agree to be an insurer of any business decision that KBR attempted to implement and will not be held to such a standard.

She also noted that the Army did not "foist" a fixed-price subcontract arrangement with Tamimi; that was KBR's doing. KBR had the ability to determine the best subcontract type, to conduct (and document) negotiations and, thus, to be prepared to demonstrate why Tamimi's prices were fair and reasonable. Ultimately, KBR was not able convince Judge Miller that it had done a good job in those areas.

The second lesson is that attacking a flawed DCAA audit methodology will not result in a finding that your costs were, in fact, reasonable. In other words, showing that DCAA acted unreasonably is irrelevant to cost allowability. The contractor bears the burden of proof once the costs are challenged; it is irrelevant whether or not the costs were properly challenged. In this case, there were serious flaws with DCAA's audit methodology and its conclusions were largely wrong. But once the Contracting Officer agreed with DCAA, it then fell to KBR to demonstrate why its costs (and Tamimi's prices) were reasonable. This they could not do to the Judge's satisfaction.

However, the Judge did write that there was more than one way to demonstrate the reasonableness of subcontractor prices. Competition was not always a requirement. In this case, she agreed that a comparison of Tamimi's current (non-competed) pricing to its previous competitive bid pricing could form an acceptable basis of showing reasonableness. And so KBR was able to recover about a quarter of its DCAA-suspended costs.

The third lesson is that acquisition personnel need to own subcontractor source selection and award decisions. In this case, KBR's Operations personnel ran roughshod over KBR's Purchasing System policies and procedures in the name of expediency and troop support. The Judge was not impressed with that rationale and stated that—

Plaintiff wanted the work, got on the ground early, and took on the risk under its costplus contracts that it would not be able to pass on to the Government its subcontractors' prices negotiated in a challenging environment when the prime contractor had few options. No one should be heard to play the violin tune of we-couldn't-abandon-our-commitment-to-feeding-the-troops.

KBR deployed its back-office support personnel after the fact, and without tremendous effect. In particular, its key negotiator failed to impress the Judge, and the errors and omissions in the negotiator's files did not help KBR's cause. KBR personnel obviously did not work as a coherent team, and let organizational silos get in the way—which cost shareholders quite a bit of earnings.

We think the final lesson is this: contractors need to invest in themselves. Contractors need to have robust business systems (such as Purchasing) with strong command media. Contractors need to train employees in the requirements those systems, and then they need to hold those employees accountable for compliance. In this case, KBR can play a nice "what if?" game. What if it had invested $10 million in enhancing its Purchasing System to meet the challenges of contingency contracting? What if it had invested $10 million in employee training and in internal reviews? What if it had invested $5 million in make sure the Tamimi subcontract met all requirements?

If KBR had done all those things, it would still have $5 million more than it does right now, not counting unallowable legal fees.