

SBIR Phase II Contractor Must Comply with CDA

Written by Nick Sanders
Monday, 21 October 2013 00:00



We have often provided counsel to contractors who have Small Business Innovation Research (SBIR) programs, as they transition from the firm fixed-price contract type of Phase I into the cost-reimbursement contract type of Phase II. That transition requires planning and, almost always, a significant change in the way in which the business is managed. Too many small business contractors cannot make the necessary changes and, as a result, end up in a dispute with their government customers.

For one example of the foregoing, see the hard-to-believe case of PHI Applied Physical Sciences, Inc., which we discussed [right here](#). For another example, take a look at [our article](#) on Inframat. For a third example, consider the [hard lesson](#) learned by Thomas Associates, Inc.

As we considered the challenges for a small business faced with the transition into cost-type contracting we found the entire topic to be depressing, so depressing that we [wrote about](#) the sad situation and noted that the House Armed Services Committee (HASC) had similar concerns about the environment in which small business defense contractors operated.

Now we have another example to add to the stack of sad stories: [the appeal](#) by Sperient Corporation of “DCAA’s failure to reimburse Sperient for direct and indirect costs,” which Sperient characterized as being breaches of contract. According to Judge Braden, “Sperient seeks \$632,765 in damages of 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

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2010, for a total of \$801,515.”

The issues first arose in September, 2012, when DCAA “disallowed indirect costs incurred.” Even though Sperient provided DCAA with “additional details supporting the direct costs incurred,” DCAA “took no action” and in March, 2013, Sperient filed its complaint at the U.S. Court of Federal Claims (CoFC).

“Now wait a second,” we hear you saying, “since when does DCAA get to make the final decisions in cost disallowances, and since when does a contractor get to file a complaint without going through the contracting officer?”

Indeed, the record seems to be murky, because Judge Braden did not see fit to explain DCAA’s role in the direct and indirect cost disallowances. All we know is that “The Military Departments ... refused to reimburse various costs incurred by Sperient...” presumably based on the DCAA audit report or reports.

With respect to your second question, Judge Braden pondered the same issue. He concluded the CoFC lacked jurisdiction to hear Sperient’s case, because “the court has determined that the SBIR Phase II contracts in dispute are best construed as procurement contracts that require Sperient to obtain a final decision by the responsible CO, pursuant to the Contract Disputes Act.”

The thing of it is, Judge Braden acknowledged that Sperient’s arguments and precedents were “persuasive” even if ultimately not sufficient to win the argument. Sperient’s counsel, who was very knowledgeable about government contract matters, provided a strong showing that, in other (distinguishable) circumstances, a SBIR award had been found to be other than a procurement contract, and thus the procedural requirements of the Contract Disputes Act would not be applicable. Unfortunately for Sperient, however, its strong arguments did not prevail and the case was dismissed (without prejudice).

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.

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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.