This blog has been active for more than ten years. That's a decade of reporting observations and opinions about what we have seen in the Federal acquisition environment.

For much of that time, we've observed the Department of Defense Office of Inspector General (DOD OIG) criticize the contracting officers of the Defense Contract Management Agency (DCMA). Some of that criticism has been warranted, to be sure.[i] However, in our view (as expressed time and time again on this blog) much of the criticism has not been fair, or has been the result of sloppy (or even misleading) audit procedures that seemed designed to generate headlines and Congressional support rather than report an independent and objective conclusion. Much of that OIG criticism has been directed at contracting officers who deviate from Defense Contract Audit Agency (DCAA) audit findings without an adequately documented rationale.

For us, the bottom-line has been that DCMA contracting officers are charged with using independent business judgment to resolve administrative disagreements before they ripen into disputes. This is the policy of the United States Federal government, as expressed in Federal Acquisition Regulation 33.204. The policy is clear: "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."

The rationale for that policy position should also be clear: litigation wastes time and resources of both sides. The government simply does not have sufficient attorneys to litigate every disagreement, nor do contracting officers have sufficient time available to support those attorneys. Discovery efforts are lengthy and painful. Depositions are lengthy and painful. Going to court is often a crapshoot, and often bad precedents are set based on bad fact patterns. This is true for both sides, and thus both sides have a vested interest in avoiding litigation wherever possible.

Yet it seems that the auditors from the DOD OIG don't see it that way. Based on the various audit reports we've seen (and discussed here), the OIG auditors seem to think that the use of independent business judgment should be curtailed unless the contracting officer has (1) reviewed all positions with legal support, and (2) documented all deviations from the initial DCAA audit positions.

Lost in this kerfuffle is the fact that DCAA audit positions are not always correct. Just before this blog started, you would have to go a long way to find anybody who thought DCAA's audit conclusions were accurate or well-supported. It was the DOD OIG itself that leveled quite a bit of criticism at the DCAA audit procedures. Not to mention all the Congressional hearings. There was a real (and valid) belief at the time that DCAA as an audit agency had overstayed its welcome within DOD, and that DCMA contracting officers had better find alternate means of getting field pricing assistance or incurred cost audit assistance. That DCAA has come back from the brink is laudable—but its reputation was tainted and, for many, remains tainted to this day.

Thus, there is a tacit or even overt understanding that DCMA contracting officers will not always agree with DCAA audit findings—nor do they need to. As then-DCMA Director Charlie Williams **expressed it** to his contracting officers in 2011, with respect to forward pricing rates—

Working closely with DCAA auditors is a critical factor in your ability to be successful in the final outcomes that result from your rate decisions. … it is our policy that when you receive an audit report from DCAA, you should use the audited rates as the single government forward pricing rate recommendation. While this is policy, you will not find anything that states, ACOs should ignore common sense or relinquish their discretion in promulgating FPRRs. So simply put, it is my expectation that ACOs should always apply judgment and well informed thought prior to making any decision. I fully expect that there will be times when the contracting officer determines, in his or her judgment, that the rates contained in the audit may not be the best representation of future projections. When that judgment is well informed by fact and data, you must not be reticent or feel constrained in communicating your views with the auditors and if necessary requesting a Board of Review to elevate real differences.

But that was then and this is now.

Today, the DOD OIG criticizes DCMA contracting officers for using "common sense" and "discretion" to resolve differences in opinion between contractor and DCAA. And that is the relationship: DCAA has expressed a conclusion, the contractor disagrees, and it is up to the contracting officer to try to resolve that disagreement before it leads to litigation. Or, as the Claims Court stated: "[T]he contracting officer must act impartially in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge."[ii]

Despite the foregoing, DOD OIG auditors don't see it that way. The latest manifestation of their concerns is Report No. **DODIG-2020-049** , a redacted version of which was issued January 10, 2020. In that report, the OIG auditors criticized 18 (of 28) contracting officers for failing to "adequately explain why they disagreed with DCAA's recommendations to assess penalties on $43 million in unallowable indirect costs." More specifically—

- For $32 million, the contracting officers determined that the costs were not subject to penalties. However, the DCMA contracting officers did not document adequate rationale for disagreeing with DCAA that the costs were unallowable and subject to penalties.

- For $11 million, the contracting officers determined that the costs met the FAR criteria for waiving penalties. However, the DCMA contracting officers did not document adequate rationale to show that the DoD contractor met the FAR criteria for waiving penalties.

Thus, according to the OIG auditors, "the contracting officers did not comply with the FAR requirement that contracting officers document adequate rationale when they disagree with DCAA recommendations."

Because of the alleged violations of FAR requirements, "DCMA will review the 18 DCAA audit reports in which contracting officers did not document adequate rationale and attempt to recoup any unallowable costs and assess penalties and interest." So if you are one of those 18 contractors who thought you had settled your final rates, you may want to think again.

We would say more but we think we made our point. It very much seems to us that any attempt by DCMA contracting officers to use their judgment and discretion to resolve controversies before they become full-fledged disputes will be met with criticism from the DOD Office of Inspector General.

[i] Pun fully intended.

[ii] *Penner Installation Corp. v. United States*, 89 F. Supp. 545, 547 (Ct. Cl. 1950); aff'd by an equally divided court, 340 U.S. 898 (1950). Cited in *Atkins North America & Mactech Engineering and Consulting v. US*, No. 09-112 C (Ct. Cl. Aug 30, 2012); motion for interlocutory appeal denied.