Government Contracts Advisory

JANUARY 12, 2011

CONTACTS

For further information regarding the topic discussed in this update, please contact one of the professionals below, or the attorney or public policy advisor with whom you regularly work.

James J. Gallagher
213.243.6165

Kevin J. Slattum
213.243.6035

Andrea Fontana
213.688.6159

Whatever Happened To Contracting Officer Authority?:

DCMA Must Abide By DCAA Recommendations For Contractor Forward Pricing Rates

On January 4, 2011, Shay Assad, Director of the Defense Procurement and Acquisition Policy ("DPAP") issued a memorandum entitled "Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending; 'Align Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) Processes to Ensure Work is Complementary" ("Memorandum"). This Memorandum identifies actions "that have been implemented" to comply with the prior memorandum issued on September 14, 2010 by the Under Secretary of Defense of Acquisition, Technology, and Logistics calling for better work alignment and reduction in the "DCMA/DCAA overlap." To that end, the Memorandum cites, among other items, the implementation of increased thresholds for DCAA field pricing audits ($100 million for cost-type proposals and $10M for fixed price-type proposals) and DCAA's withdrawal from financial capability reviews except those which are part of the Pre-Award Survey Process. However, contractors should be aware that the Memorandum also identifies one troubling action already implemented by DCMA and DCAA that challenges current regulatory law on the authority of corporate administrative contracting officers ("CACO") to determine Forward Pricing Rate Recommendations ("FPRR") and Forward Pricing Rate Agreements ("FPRA").

With regard to FPRAs and FPRRs, the Memorandum states that, in cases "where DCAA has completed an audit of a particular contractor's rates, DCMA shall adopt the DCAA recommended rates as the Department's FPRR position" (emphasis added). According to the Memorandum, DCMA has already coordinated a draft Forward Pricing Rate policy reflecting this "associated change." However, as implemented, this action conflicts with a uniform body of regulations and judicial decisions that place the final determination for such items as forward pricing rates squarely upon the shoulders of the contracting officer ("CO"). The FAR specifically mandates that the CACO be responsible unilaterally to determine a contractor's proposal and billing rates, as well as have the authority to make a determination that an FPRA is in the best interests of the government or, in the alternative, to issue an FPRR. *See* FAR § 42.302 (negotiation of forward pricing rate agreements designated to the contract administration office), § 42.704 (the contracting officer shall establish billing rates for several categories of contractors including those business units of a multidivisional corporation under the cognizance of a CACO), § 42.1701 Administrative Contracting Officer ("ACO") responsible for FPRA or issuance of an FPRR in the absence of an FPRA), § 2.101 (ACO unilaterally sets the FPRR). Decisional authority has further established that DCAA's role is to be

advisory only, and confers upon the contracting officer the discretion to determine the degree to which DCAA audit recommendations will be followed. *ELS Inc.*, B-283236, *et al.*, 99-2 CPD ¶ 92, 1999 WL 993094 (Oct. 25, 1999). Thus, traditionally, the degree to which these advisory reports are used is a matter for the contracting officer to decide. *See e.g., OAO Corp.*, B-228599.2, July 13, 1988, 88-2 CPD ¶ 42. The FAR, of course, also makes it clear that it is the contracting officer alone who is charged with the authority on behalf of the government to administer contracts and "make related determinations and findings." FAR § 1.602-1; § 2.101 (defining contracting officer as a person with authority to enter into, administer, and/or terminate contracts and make related determinations and findings"). Moreover, the contracting officer should be "allowed wide latitude to exercise business judgment," while requesting and considering the advice of specialists in audit. FAR 1.602-2.

This Memorandum turns these important principles on their ears. While it purports only to clarify the roles of DCAA and DCMA, it continues the shift in the balance of power in DCAA's favor at the expense of contracting officer independence and authority. As reflected in the Memorandum, COs will apparently now issue the final rates as determined by DCAA without the contractor having the opportunity to demonstrate to the ACO why the rates as determined by DCAA are unreasonable. Unless the contractor elects to contest the rates by submitting a claim under the Contract Disputes Act ("CDA") it will, at a minimum, lose the ability to recoup the lost amounts allocated to fixed price contracts based upon the DCAA-determined rates.

Contractors should expect more of the same over the next few years as DCAA continues to expand its influence and DCMA's authority continues to diminish. This disturbing trend likely will end only if and when there has been a successful contractor challenge before an objective third party court or board of contract appeals.