

Government Contracts Blog

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DoD Acts To Rein In DCAA (Again)

On January 15, 2010, the Department of Defense announced plans to amend the Defense Federal Acquisition Regulation Supplement (“DFARS”) to allow contracting officers to withhold payments from companies with “deficient” business systems in an effort to prevent “unallowable and unreasonable costs on government contracts.” 75 Fed. Reg. 2457. Contracting officers would have the authority to withhold payments on cost reimbursement, incentive, time-and-materials, and labor-hour contracts.

The proposed rule appears to be a DoD effort to rein in the Defense Contract Audit Agency (“DCAA”). We have previously written about (1) how DCAA has engaged in the dark art of [intimidation](#) (with [historical perspective](#)); (2) how a contracting officer’s mere [disagreement](#) with the DCAA could result in DCAA’s referral of that officer to the IG; and (3) DCAA Guidelines that severely restrict an auditor’s exercise of [independent judgment](#). Most recently, we explored the [“Top Ten Reasons DCAA Should Let COs Do Their Bloody Job.”](#)

The proposed rule attempts to remedy the internal DoD wrangling by firmly placing with the contracting officer the responsibility for (1) determining if there is a business system deficiency and (2) withholding payment because of that deficiency. While the contracting officer must consult with DCAA, and other cognizant functional specialists, the contracting officer is the ultimate decision maker.

This proposed rule is prompted by the findings of the Commission on Wartime Contracting. The Commission determined that deficiencies in contractor business systems “increased the likelihood that contractors will provide proposal estimates that include unallowable costs or that they will request reimbursement of contract costs to which they are not entitled or which they cannot support.” The Commission also explained that the lack of cooperation between DCAA auditors and contracting officers contributed to the problem.

“Contractor business systems” is broadly defined under the proposed rule as: accounting systems, purchasing systems, estimating systems, earned value management systems (“EVMS”), property management systems, and material management and accounting systems (“MMAS”). The proposed rule includes a detailed description of an acceptable system for each of the six enumerated business systems.

The DCAA auditors and “functional specialists” are required to document deficiencies in a

contractor's business system in a report to the contracting officer. The contracting officer will have the ultimate authority to determine if there is a system deficiency and provide that initial determination to the company.

The company will have an opportunity to respond to the initial determination. The contracting officer will review the contractor's response in consultation with DCAA auditors and other functional specialists, and issue a final determination. If the contractor demonstrates that its business systems are not deficient or successfully corrects any deficiency, the contracting officer may withdraw the initial deficiency determination and no payments will be withheld.

If the company fails to (1) fix the problems documented in the ACO's initial determination or (2) submit a corrective action plan within 45 days, the contracting officer may begin withholding 10% of contract payments immediately. If the company submits an acceptable corrective action plan but then does not completely remedy the deficiencies, then contracting officers could withhold 5% of contract payments.

If a company has multiple identified business system deficiencies, the cumulative percentage of payments withheld will not generally exceed 50%. Contracting officers, however, will have the authority to withhold up to 100% of payments for deficient business systems if the contracting officer determines that the identified deficiencies are "highly likely to lead to improper payments being made" or are considered "an unacceptable risk of loss to the government."

The proposed rule also includes a contract clause that requires companies to certify – there is the liability-laden work again – that they have no major defects in each of the enumerated business systems.

Comments on this proposed rule must be submitted by March 16, 2010.

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