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Government Contracting Regulatory Update

NCMA Potomac Chapter Meeting

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Agenda

1. Current Compliance Environment Observations
2. Regulatory Update
3. DCAA Initiatives
4. Contractor Accountability
5. Hot Topics and Trends
6. Court Cases
7. Question and Answer

Current Compliance Environment Observations

- The common theme of the latest round of regulatory changes, beginning with the mandatory disclosure rules in 2008, is that “guidance” has become “contractual” with enforcement penalties
- Higher standards have been placed on contractors for self-governance and accountability
- Compliance organizations are becoming more strategic and reliant on formal control systems using more advanced processes and technology
- Compliance systems can be a competitive advantage or disadvantage

Regulatory Update

Federal Acquisition Circular 2005-52, Effective June 30, 2011

Revised contract closeout rules:

- Clarify the auditor 's role and procedures
- Change the threshold for quick closeout procedures to increase their use on contracts with insignificant unaudited costs
- Define the contents of an adequate indirect cost rate proposal
- Make fee withholds mandatory on fixed fee and incentive fee contracts pending submission of an adequate certified final indirect rate proposal

Regulatory Update

FAC 2005-52

FAR 42.705-1 (b) Contracting officer determination procedure

- The contractor must submit an adequate final indirect cost rate proposal
- The auditor will review and provide written description of inadequacies to the contracting officer and contractor
- The auditor will elevate unresolved inadequacies to the contracting officer
- Detailed supporting data now required (formerly guidance) to comply with FAR 52.216-7
- Adequacy determination is made before audit starts

Regulatory Update

FAC 2005-52

Contract closeout rules:

- FAR 42.708 Quick-closeout procedure threshold
 - applies to “unsettled *direct and* indirect costs for a specific contract, task or delivery order”
 - is the lesser of \$1M or 10% of the total contract, task order or delivery order amount
- FAR 52.217-7 Allowable Cost and Payment clause –
 - Defines “adequate” indirect cost rate proposal contents (DCAA model)
 - Provides that additional information that may be required from the contractor during the audit

Regulatory Update

- **FAC 2005-52** - Contract closeout provision and clause changes to FAR 52.216-8 Fixed Fee, -9 Fixed Fee-Construction, & -10 Incentive Fee clauses –
 - Contracting officer *shall* withhold a reserve not to exceed 15% of the total fee or \$100K, whichever is less, to protect the government's interest
 - Contracting officer shall release 75% of withheld fee upon submission of an adequate certified final indirect cost rate proposal and satisfaction of other requirements
 - Contracting officer may release up to 90% of the fee withholds based upon the contractor's past performance related to the submission and settlement of final indirect cost rate proposals
- **FAC 2005-53** Effective August 4, 2011 - Specifies that interest on overpayments resulting from defective cost or pricing data be calculated with interest *compounded daily*

DCAA Initiatives

- Incurred cost proposals – new audit efforts underway (2009 and prior)
- Guidance expected on the new DFARS business systems interim rule
- Pilot billing and accounting system audits
- Other areas of audit focus
 - Home office allocations
 - Advance agreements
 - Commercial item exceptions
 - Dependent health benefit costs
- Long term DCAA strategy – accountability, quality, training, relationships and resources

Reports on Contractor Accountability

Commission on Wartime Contracting Final Report

The Commission on Wartime Contracting in Iraq and Afghanistan submitted its final report to Congress in August 2011

The report cited that an estimated \$31B and possibly up to \$60B has been lost to contract waste and fraud of \$206B expected to be spent through FY11

Contract waste, fraud and abuse was considered to be driven by:

- Ill conceived projects
- Poor planning and oversight by the U.S. government, and
- Criminal behavior and blatant corruption

Reports on Contractor Accountability

Commission on Wartime Contracting Final Report

Main findings:

- Agencies over-rely on contractors for contingency operations
- ‘Inherently governmental’ rules do not guide appropriate use of contractors in contingencies
- Inattention to contingency contracting leads to massive waste, fraud, and abuse
- Looming sustainment costs risk massive new waste
- Agencies have not institutionalized acquisition as a core function
- Agency structures and authorities prevent effective interagency coordination
- Contract competition, management, and enforcement are ineffective
- The way forward demands major reforms

Reports on Contractor Accountability

Commission on Wartime Contracting Final Report

Recommendations:

1. Use risk factors in deciding whether to contract in contingencies
2. Develop deployable cadres for acquisition management and contractor oversight
3. Phase out use of private security contractors for certain functions
4. Improve interagency coordination and guidance for using security contractors in contingency operations
5. Take actions to mitigate the threat of additional waste from unsustainability
6. Elevate the positions and expand the authority of civilian officials responsible for contingency contracting at Defense, State, and USAID

Reports on Contractor Accountability

Commission on Wartime Contracting Final Report

Recommendations:

7. Elevate and expand the authority of military officials responsible for contingency contracting on the Joint Staff, the combatant commanders' staffs, and in the military services
8. Establish a new, dual-hatted senior position at OMB and the NSC staff to provide oversight and strategic direction
9. Create a permanent office of inspector general for contingency operations
10. Set and meet annual increases in competition goals for contingency contracts
11. Improve contractor performance-data recording and use
12. Strengthen enforcement tools

Reports on Contractor Accountability

Commission on Wartime Contracting Final Report

Recommendations:

13. Provide adequate staffing and resources, and establish procedures to protect the government's interests
14. Congress should provide or reallocate resources for contingency contracting reform to cure or mitigate the numerous defects described by the Commission
15. Congress should enact legislation requiring regular assessment and reporting of agencies' progress in implementing reform recommendations

Contractor Accountability

Pending GAO Report on the effectiveness of contractor internal audit organizations

- GAO initiated a study of major contractor internal audit organizations in October of 2010
- Sampled internal audits conducted by contractors during 2008 and 2009 relating to government contract controls, policies and transactions
- Review included other areas:
 - Internal audit standards
 - Use of contractor internal audit results by DCAA
- Report likely to address the effectiveness of risk assessments, compliance programs and control monitoring / reporting

Hot Topics and Trends

Senate bill under development to address weapon system development costs and program cost overruns

- Would force contractors to share 25% of major weapons systems development costs
- Would promote the use of fixed price contracts to make contractors liable for cost overruns
- Has support of L. Graham (R-SC), C. Levin (D-MI) and J. McCain (R-AZ) as well as others
- Effort to keep DoD budget from automatic cuts

Hot Topics and Trends

Status on repeal of 3% withholding tax on contractors

- Bills introduced in both House and Senate with bi-partisan support
- House bill has 226 co-sponsors
- Implementation had been delayed three times from January 1, 2011 to January 1, 2013
- Action likely this Fall

CAS Board eliminates overseas exemption

- Effective October 10, 2011, contracts and subcontracts executed and performed outside the U.S. may be subject to CAS
- No changes to other exemptions or thresholds (CAS 401 and 402 apply to foreign concerns)
- Affected contractors may need Disclosure Statements (German, Canadian and U.K. forms have been approved for use)

Hot Topics and Trends

Inherently governmental work definition clarified

- Office of Federal Procurement Policy adopted the definition from the Federal Activities Inventory Reform (FAIR) Act
- Defines inherently governmental function as one that “is so intimately related to the public interest as to require performance by federal government employees” and provides evaluation guidance

Office of Management and Budget update

- Federal contracting decreased from \$550B in FY09 to \$535B in FY10
- Initiative underway to increase competition and reduce cost type contracts including time and materials contracts
- July 7, 2011 Directive issued to agencies to cut support service contracts by 15% by FY12
- September 14, 2011 memo issued to accelerate payments to small business by 15 days (to create jobs, growth and more SB contractors)

Hot Topics and Trends

Contractors and Government facing experience and talent drain

Baby boomers are beginning to retire

Organizations lack experienced contracts professionals

Effective training and knowledge transfer programs are critical

Deficit reduction pressures

Greater use of price related factors in competitions

Increase in bid protests

Delays and terminations

Continuous organizational change

Court Cases

- In an ID/IQ contract, the fee withholding in FAR 5216-8 applied at the order level (WestWind Technologies, Inc., ASBCA No. 57436, July 21, 2011, 11-2 BCA ¶ 34805)
- A verbal agreement with the contracting officer's technical representative was not a contract (General Construction Services, Inc., ASBCA No. 57187, August 4, 2011, 11-2 BCA ¶ 34816)
- Costs to maintain a standby letter of credit were allowable administrative costs of short-term borrowings for working capital (SRI International, ASBCA No. 56353, February 18, 2011, 11-1 BCA ¶ 34694)
- A contract clause that required the contractor to obtain DBA insurance "at its own expense" did not preclude recovery under a cost reimbursement contract (U.S. ex rel. Irwin Saltzman v. Textron Systems et. al., U.S. District Court, D. Mass No. 09-11985-RGS, June 9, 2011, 55 CCF ¶ 79,609)