We hear it from many clients (and potential clients): DCMA is cracking down on prime contractors that fail to obtain contractor cost or pricing data (or “certified” cost or pricing data) where warranted, or that fail to perform a rigorous cost or price analysis on the subcontractor’s proposal using that cost or pricing data, or that fail to adequately document subcontractor price reasonableness.

It’s a thing that can drive a prime contractor crazy.

It’s not like we haven’t discussed this notion before. In 2012, we devoted an *entire series* of articles to the topic. Heck, in February 2015 we spoke in front of a joint NCMA/AGA audience on nothing else
but
this topic. But those articles and presentations focused primarily on how DCAA might question otherwise allowable subcontractor costs for a failure to adequately document price reasonableness. What’s different today is that we are learning that DCMA can also use prime contractor failures in this area to assert significant deficiencies in one or more of the prime contractor’s business systems.

Wholly aside from having subcontractor costs questioned, a failure in one of the areas listed in the first paragraph can result in significant deficiencies in the prime contractor’s Estimating or Purchasing System—or both. This is obviously a less-than-optimal result.

We sketched-out some of the requirements associated with obtaining subcontractor cost or pricing data in our recent two-part article entitled “TINA Sweeps and Defective Pricing.” Just to recap some of the prime contractor’s responsibilities in this area:

Where required by contract clause, the subcontractor (and all subcontractors at lower tiers that meet the requirements) must provide certified cost or pricing data to the prime contractor. Where not required by contract clause—but necessary in the eyes of the prime contractor’s buyer—the subcontractor must provide (uncertified) cost or pricing data to the prime contractor. As we wrote in the two-part article:

The prime contractor is responsible for standing in the government's shoes and obtaining certified cost or pricing data (in the required format) from any subcontractor whose pricing action trips the threshold at 15.403-4—before award of that subcontract. The certified cost or pricing data is to be submitted in the format of FAR Table 15-2, and the prime contractor is required to obtain a CCCPD from the subcontractor, certifying that the cost or pricing data was accurate, complete, and current as of the date of price agreement.

Readers will note that the above has to take place before award of the subcontract. But the subcontract award will likely take place after award of the prime contract, and so that timing won't work for the prime contractor's initial proposal to its government customer. We also wrote in that article—

If the subcontract value is greater than 10% of the prime's (or higher tier subcontractor's) contract value then the certified cost or pricing data becomes part of the prime's cost or pricing data, and must be submitted to the government. Further, the prime contractor (or higher tier subcontractor) is also responsible for performing cost or price analysis on the data it receives from its subcontractors. (Remember that the prime also has to award its subcontracts at fair and reasonable prices.) That analysis becomes cost or pricing data and may have to be submitted to the government (and updated!) as part of compliance. (See 15.404-3(b) and (c).)

Thus, entirely apart from the requirement to award subcontracts at fair and reasonable prices, the prime (or higher tier subcontractor) must comply with the requirement to obtain (certified) cost or pricing data ahead of the subcontract award—*often well ahead of the subcontract award*—and analyze it and reach a conclusion and provide the (certified) cost or pricing data as well as the documented conclusion to the government customer as part of the prime contractor's submission of its own (certified) cost or pricing data.

Therein lies the problem. It's a timing thing. On one hand, the prime wins the contract award and then, as part of prime contract performance, enters into fact-finding and analysis and negotiations with the subcontractor—a process that culminates in a subcontract award at a well-documented fair and reasonable price. But on the other hand, the prime obtains (certified) cost or pricing data from the subcontractor as part of the proposal preparation process, right in the middle of "crunch time" when everybody is working late and on weekends to get that proposal properly priced, reviewed by Red and Green (and the other color) Teams, and submitted before the date and time specified by the customer. (Because "late is late" and nobody wants to tell the boss that the company just spent a million bucks of B&P funds on a proposal that wasn't even reviewed because it was submitted one hour late.) Right there in the middle of "crunch time" somebody (or some bodies) will have to take the time to work with the

subcontractor, not only to obtain a good subcontractor proposal, but also to obtain (certified) cost or pricing data. And then somebody (or some bodies) have to take the time to review that (certified) cost or pricing data, and analyze it, and determine whether the subcontractor's proposed price is fair and reasonable or, if not, decide what the fair and reasonable price should be, and document that conclusion, and create a package, and feed it to the proposal preparation team in time for the proposal to be reviewed and submitted. (And then continue to update the package throughout prime contract negotiations.)

That's no easy tasking. To say the least.

And remember, the exact same activity is supposed to be happening throughout the supply chain, down and down throughout all tiers, so long as the proposed supplier activity trips the FAR thresholds.

And this already challenging situation is made even more challenging when a subcontractor (at any tier) doesn't want to cooperate. Perhaps they believe their (certified) cost or pricing data is proprietary. Or perhaps they are a subcontractor today but a competitor tomorrow; and they don't want today's prime getting ahold of their cost information for future use as a competitor. (John P. calls companies in that situation "frenemies" or "competimates".) Often, the subcontractor is willing to provide the (certified) cost or pricing data, just not to the prime contractor. They will provide it directly to the government. (Which is fine.) The point is, there may be very legitimate reasons why the subcontractor doesn't want the prime to see its (certified) cost or pricing data—which makes performing a cost or pricing analysis on the nonexistent (or severely redacted) data virtually impossible.

In such cases, DCMA expects the prime contractor (or higher tier subcontractor) to document the unwillingness to provide (certified) cost or pricing data, and make a formal request to the contracting officer for an "assist audit" by DCAA. DCMA expects the refusal to be documented on the subcontractor's letterhead; we are told that emails are not acceptable. DCMA expects the notification to the contracting officer and request for assistance to be documented on the prime contractor's letterhead as well.

Now we all know that DCAA isn't the agile, fast-moving audit agency that it was in the past. So it's likely that DCAA will not be issuing an opinion on the reasonableness of the subcontractor's proposed costs until well after the prime contractor has submitted its proposal. That opinion may not be issued until after prime contract price negotiations have been concluded.

That opinion may not be issued until after the prime has already awarded the subcontract. If you have awarded that subcontract before receiving the DCAA “assist audit” report, that’s going to be another problem with implications for the Purchasing System. Our suggestion: If you are going to issue the subcontract award prior to receipt of the DCAA audit report, make sure you include a “reopener” clause that permits the subcontract price to be adjusted, based on the DCAA audit findings.

Another problem that’s frequently encountered is that the subcontractor is a small business who can’t even spell “FAR” let alone prepare a (certified) cost or pricing data package in the required format for analysis. The small business may not have an accounting system that generates indirect cost rates. Or if the accounting system does generate indirect cost rates, the rates may be inflated because of unallowable costs. This is not so much of a problem at the proposal stage (because few small businesses will trip the 10% threshold). But it could well be a problem at the subcontract award stage, because there are many small businesses that will trip the $750,000 threshold. What to do?

The prime contractor is going to have to work with that small business to understand what is required, prepare and format it, and then review/analyze it. This is not a project that DCAA is going to perform. It involves knowledge transfer and training and looking at the subcontractor’s accounting system for potential gaps. It involves gathering the data, vetting it, and then reviewing/analyzing it. That’s not a DCAA function. Thus, the prime contractor (or higher tier subcontractor) is going to have to devote resources to the problem.

This is a “must do”. Failure to do so may result in an assertion that the Purchasing System has a significant deficiency.

Unfortunately, many prime contractors lack sufficient bandwidth. They have to look elsewhere. Sometimes they hire consultants to augment internal resources. Prime contractors have reached out to Apogee Consulting, Inc. in the recent past to perform that function (albeit with mixed success because some small businesses just do not want to be helped. See: “the Dunning-Kruger Effect” using the search feature on this website.) The point is: regardless of where those resources come from, they *will* have to be deployed to help the subcontractor, because a failure to do so could imperil the adequacy of the Purchasing System. Similarly, the necessary resources have to be deployed during the proposal preparation phase (when required), because a failure to do so could imperil the adequacy of the Estimating System.

If a contractor receives a notification of business system deficiency, then it is going to have to devote significant resources to resolving the issue(s). It is almost certainly going to have to develop and submit a Corrective Action Plan (CAP). It is almost certainly going to have to support increased government oversight activities in that area. All that effort takes time and resources.

Given that the resources are going to be deployed in any case, doesn't it make more sense to deploy them upfront in the process, to proactively work with the subcontractor to address potential issues to prevent assertions of a business system deficiency, rather than wait for DCMA to assert a significant deficiency and then to react to the problem?

We think it does.