

DCAA Addresses Lack of OFPP Action Through New Audit Guidance

Written by Nick Sanders

Tuesday, 01 September 2020 00:00

Readers know that we often have issues with the dilatory performance of the Office of Federal Procurement Policy (OFPP). You'd think that a function focused on "procurement policy" might take its statutorily imposed duties seriously, but we think you'd be wrong if you did.

It's fairly obvious that the OFPP doesn't put priority on the areas that Congress says it should. Whether it's moving the CAS Board agenda forward or fulfilling other duties and responsibilities imposed by public law, the OFPP is far behind where we think they should be.

Apparently, DCAA agrees with our opinion.

The Bipartisan Budget Act (BBA) of 2013 requires OFPP to publish an annual compensation ceiling amount, above which compensation (as calculated in accordance with FAR 31.205-6) is unallowable. (See 31.205-6(p)(4). We also discussed the situation in [this article](#).) The key word being "annual" – the compensation ceiling is required by the BBA to be escalated annually, based on changes in the Employment Cost Index (ECI) for all workers as calculated by the Bureau of Labor Statistics (BLS). From the beginning, OFPP has been publishing the required ceiling only sporadically, on some arbitrary basis that defies logical analysis.

But even though OFPP is seemingly free to ignore the statute, contractors are still required to comply with the FAR cost principles. If they don't comply with the requirements of FAR 31.205-6(p), they may be found by DCAA to have claimed unallowable compensation costs. Indeed, DCAA may assert that compensation amounts claimed in excess of (nonexistent) OFPP ceiling amounts are *expressly* unallowable—subjecting the contractor to assessment of penalties and interest.

It's a gray area, to be sure. DCAA lists 31.205-6(p) as one of the cost principles that identifies expressly unallowable costs. (See [MRD 19-PAC-002](#), dated May 14, 2019.) However, it's unclear as to how anybody reasonably might determine the executive compensation ceiling, given the lack of OFPP publication. The ambiguity is further exacerbated because the DCAA Selected Areas of Cost Guidebook, Chapter 10 (Compensation for Personal Services) is "under construction" and has been in that state seemingly forever. Thus, we don't really know what DCAA might make of a contractor who claims, through no fault of its own, compensation in excess of an unpublished ceiling.

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All that being said—and as we’ve written before—smart contractors have been doing OFPP’s job themselves. They’ve been taking what info has been available, either from what OFPP has sporadically published or from the original BBA from seven years ago, and calculating their own executive compensation ceilings. They’re looking at the BLS employment cost index and calculating what the ceiling should be. They’re calculating the ceiling on their own because OFPP has failed to comply with the public law and they still need to make sure they don’t claim too much, lest they be subject to audit findings.

Smart contractors have been doing this on their own and, so far as we know, DCAA auditors have been accepting it. We have not heard of any auditor rejecting a contractor’s ceiling calculations, so long as the calculations comply with the BBA requirements. But it’s been an unofficial thing—at least until now.

On August 20, 2020, DCAA published [MRD 20-PSP-004](#), entitled “Audit Alert on Update to the Bipartisan Budget Act of 2013 (BBA) Contractor Compensation Caps – Calendar Years (CY) 2019 and 2020.” The MRD started out by forthrightly admitting that OFPP has been derelict in its statutorily required duty to publish annually the executive compensation ceiling. In that regard, the MRD stated “OFPP is responsible for adjusting [the executive compensation] cap annually to reflect the change in the ECI for all workers as calculated by the BLS. [OFPP] has not published the CY 2019 and 2020 compensation cap amounts on its website.” (Emphasis in original.) The audit guidance then formalized what had up until then been an informal understanding between contractors and DCAA auditors. It stated—

... OFPP has published the formula for computing the cap amounts. This formula allows anyone to compute new cap amounts as soon as the Bureau of Labor Statistics (BLS) releases the applicable Employment Cost Index (ECI) table and prior to OFPP formally publishing the new cap amounts on its website.

It’s so simple anyone can do it!

Except, apparently, for the OFPP. It’s just too dang hard for those folks.

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Helpfully, DCAA calculated the ceiling amounts that OFPP found too difficult to calculate, and published them in the MRD. They are as follows:

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Calendar Year 2019: \$540,000

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Calendar Year 2020: \$555,000

The MRD concludes with a notice that the DCAA Contract Audit Manual will not be updated until OFPP “formally publishes” the ceilings. Until then, this MRD serves as the only formal documentation regarding the values that DCAA auditors will accept from contractors.