

Payments Under Undefined Contract Actions

Written by Administrator
Tuesday, 09 March 2010 00:00

Recently we [discussed](#) use of payment withholds to spur contractor action to correct alleged deficiencies in its various internal control systems (now called “business systems” for an unknown reason). We noted (and linked to) a recent controversy about whether DOD showed favoritism or exercised improper influence with respect to its largest Logistics Capability (LOGCAP) contractor, KBR. The story is that two commanding generals in the Southwest Theater of Operations directed the cognizant Contracting Officer not to impose a 15 percent payment withhold on KBR’s invoices, even though it was operating under a Undefined Contract Action (UCA) and the FAR seemingly required such a withhold. Eventually an official waiver was granted, but in the meantime the situation was ... murky.

We noted that applicable statute and regulation requires definitization of UCA generally within 6 months, but KBR had been performing without a definitized Task Order for *more than three years*.

. Our position on this issue is pretty straightforward. If the DOD can’t get its act together and negotiate a firm price within the required timeframe, then it is unfair to penalize the contractor, who must continue to perform regardless. DOD’s failure to comply with law and regulation gives it “unclean hands” and it should

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not profit, to the other contracting party's detriment, in such circumstances.

In what is perhaps a related move, on March 5, 2010 the DOD published in the Federal Register a revision to DFARS, implementing an interim rule, to make "the limitations on payment of costs prior to definitization of unpriced change orders applicable to all categories of undefinitized contractual actions."

The interim rule purports to implement

[§ 812](#)

of the 2010 National Defense Authorization Act. What it does is revise one sentence and adding a new sentence. According to the rule (found

[here](#)

)—

Section 217.7401 is amended by revising paragraph (a)(2) and adding

paragraph (a)(3) to read as follows:

217.7401 Definitions.

* * * * *

(a) * * *

(2) It includes task orders and delivery orders.

(3) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, e.g., engineering change proposals, value engineering change proposals, and over and above work requests as described in Subpart 217.77. For policy relating to definitization of change orders, see 243.204-70.

As always, the public may submit comments to www.regulations.gov , citing DFAR Case 2009-D035.

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