When we **wrote** about issuance of the interim DFARS rule on “business systems” we opined that seeing the rule in print was like receiving a long-expected—yet still dreaded—phone call from your oncology specialist or from your spouse’s divorce attorney.

This feeling is worse than that. Much worse.

On May 31, 2011, the final FAR rule on contract close-out **was issued** in the Federal Register.

Where to start?

Quick-close outs are authorized when unsettled direct and indirect costs associated with the contract do not exceed the lesser of $1 million or 10 percent of the total contract, task order, or delivery order amount. This is more restrictive than the prior language, which focused only on indirect costs and provided for more contracting officer discretion.

(The quick close-out amount(s) also represent a significant reduction from the amount(s) in the proposed rule. DCAA submitted a comment that the proposed amounts were too high. Given that DCAA got everything it wanted in this rule, it is hardly surprising that the FAR Councils lowered the quick close-out ceilings as well.)

The Allowable Cost and Payment contract clause—which is mandatory for cost-type contracts—has been revised to define what an “adequate” final indirect cost rate proposal must look like. It contains fifteen (15) mandatory schedules and fifteen (15) “supplemental” schedules. The 15 mandatory schedules must be submitted in order for the proposal to be considered “adequate” while the 15 supplemental schedules must be provided during audit.

Final “completion” vouchers/invoices must include settled subcontractor amounts/rates. According to the new rule, “The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of

subcontractor audits to the contracting officer upon request."

Fee withholds are now mandatory instead of being discretionary. The new rule revises the Fixed Fee clause (52.216-8) to state—

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total fixed fee or $100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

Similar changes have been made to clauses 52.216-9 (Fixed Fee-Construction) and 52.216-10 (Incentive Fee).

We have railed and ranted about this rule before. In August, 2009, we **reported** that—

Although some aspects of the proposed rule change did, in fact, address contract close-out activities, the majority of the language turned out to be a 'wolf in sheep's clothing' that, if implemented as drafted, will significantly expand the powers of DCAA, and will force contractors to comply with arbitrary DCAA demands or risk monetary penalties.

In October, 2009, we **told you** about some of the comments the FAR Councils had received. Those comments were considered and, in the main, ignored. Although the ostensible purpose of the rule originally was to improve the contract close-out process, during the rulemaking process that purpose became "to ensure uniformity, consistency, and fairness to all contractors." The new rule "assures that contractors are fully informed in advance of the Government's parameters for the content of an adequate final indirect cost rate proposal."

The FAR Councils' responses to the public comments were, to put it diplomatically, misleading. For example, the FAR Councils assert that, "no new requirement is imposed on contractors by this rule. The list of data (schedules) now included in FAR 52.216-7(d) requires the same information previously cited in FAR 42.705-1(b)."

The language at 42.705-1(b) was—

A contractor shall support its proposal with adequate supporting data. For guidance on what generally constitutes an adequate final indirect cost rate proposal and supporting data, contractors should refer to the Model Incurred Cost Proposal in Chapter 6 of the Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors, available via the Internet at http://www.dcaa.mil .

Unfortunately, that "guidance on what generally constitutes an adequate final indirect cost rate proposal and supporting data" has now become "See the clause at 52.216-7(d)(2) for the description of an adequate final indirect cost rate proposal and supporting data." And of course, that clause now lists the 15 *mandatory* schedules we noted above. The guidance has become the absolute rule.

If that's not a significant regulatory change, we'll eat our hat(s). Yet that's what the FAR Councils would have us believe. They state—

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule does not impose any additional requirements on small businesses. The changes to FAR parts 4 and 42 clarify and streamline closeout procedures. The changes to the clauses at FAR 52.216-8, 52.216-9, and 52.216-10 allow for a reserve to be set-aside to protect the Government's interest. Contracting Officers already may set aside a reserve under current FAR procedures.

To sum up, this rule does nothing to streamline contract close-outs. Instead, it gives DCAA sole authority to determine whether a contractor has submitted an "adequate" incurred cost submission/final indirect cost rate proposal. Sure, the rule states that the cognizant

Administrative Contracting Officer makes the official determination, but when was the last time an ACO picked a fight with DCAA? How many DCMA Review Boards does it take to teach ACOs that the path of least resistance—rubber-stamp agreement with DCAA—is the unofficial DCMA policy?

The proposed rule omits any discussion regarding whether the ACO's determination constitutes a "final decision" under the Contracts Dispute Act. If the determination is a final decision under the CDA, then it is appealable to the U.S. Court of Federal Claims or to the appropriate Board of Contract Appeals. If it is not a final decision, then no appeal is possible.

And any attempt to fight DCAA's checklist approach to adequacy, to argue that certain mandatory schedules are not applicable to the facts and circumstances of a particular contractor, will result in monetary penalties—as the ACO invokes *mandatory* fee withholds that will not released until the contractor agrees (under financial duress) to submit exactly the schedules that DCAA demands.

Did you submit a comment? Did you point out the inequity of this rule? If not, you have no reason to complain. Go download your DCAA "ICE" model and prepare your final rates.