This is a topic that's been much on the mind lately. We've alluded to the issue—almost as a throw-away—in several recent blog articles. It's a complex topic so bear with us if we maunder a bit.

It's come to our attention that Contracting Officers don't resolve very many disputes these days. Instead, what we've seen is a rash of shoot-from-the-hip Contracting Officer Final Decisions (COFDs)—creating what is essentially a dare to the contractor to litigate the issue, if it thinks it can afford the time and expense to prevail in court.

We can argue about the cause of the situation. Perhaps it's that the average CO is intimidated by DCAA and knows that if s/he ignores any audit findings, an auditor might get upset and call the DOD Inspector General. Maybe the situation is caused by the **well-publicized** decline of the necessary skill sets at DCMA, coupled with a decade of agency mismanagement and ineffective organizational structures. Perhaps issues are being given short shrift because the number of COs is well below the level it should be, and the resulting workload is simply too overwhelming to handle. Maybe there's been a loss of individual CO accountability. Perhaps the issue stems from
direction
from Fort Lee to quickly "disposition" complex issues so that the reporting metrics look pretty. Maybe the cause is
perceived pressure
from the looming six-year Statute of Limitations of the Contracts Disputes Act (CDA), leading to a situation where issuing
any
decision—no matter how dubious the position taken—is better than missing the filing deadline and seeing the Government's claim thrown out of court without a hearing.

Perhaps the situation we've experienced is caused by *all* of the above reasons, plus more causative factors we can't even guess at. Hey, it's all speculation on our part; we don't work for DCMA.

But whatever the cause, we think the result is undeniable. COs don't resolve complex issues any more. They don't negotiate DCAA audit findings (such as cost disallowances or CAS noncompliances). They don't look to "split the baby" because getting an assured half a loaf now is no longer better than litigating for an entire loaf (plus interest), even when the probability of getting that entire loaf in a judicial award approaches zero.

No, it seems that the prevailing DCMA logic these days is to issue a COFD and let the lawyers handle the rest. In our view, too many DCMA Contracting Officers are ignoring the contractor's side of the story, and essentially rubber-stamping DCAA audit reports. Aside from the obvious drawbacks with that approach, the problem with that lack of use of "independent business judgment" is leading inexorably to a tsunami of litigation over at the Armed Services Board of Contract Appeals (ASBCA) and the Court of Federal Claims (COFC). Those government lawyers are going to get spread awfully thin trying to handle all the looming contract-related litigation, in our opinion. And while it's undeniably good news for external counsel, the shareholders of government contractors are going to be seeing some large legal expenses and some large balance sheet reserves in the near future, and they are going to be much less happy than the lawyers. (The contractors' legal expenses, we should note, will almost certainly be unallowable and come out of company profits.)

Want an example of what we're talking about? See **our article(s)** on the Boeing EELV controversy. Boeing and the United Launch Alliance are suing the U.S. Government for some $385 Million (plus interest), simply because the issue had dragged on so long without resolution and the companies needed to file their claim(s) in order to "preserve the ability to recover the money" (according to a Boeing spokesperson quoted in the article to which we linked). We know of other, less public, litigation battles that are being waged at the ASBCA and at the COFC as we write this. Readers, you ain't seen nothing yet.

This situation *should not be happening*, according to regulation, agency guidance, and legal precedent. Yet here we are.

As we've mentioned before, the FAR requires COs to attempt to settle issues *before* they ripen into disputes. FAR 33.204 clearly establishes the policy of the U.S. Government thusly—

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable.

Clearly, too many DCMA Contracting Officers are violating this policy and nobody is holding them accountable as individuals. Clearly, DCMA *as an agency* is not enforcing this policy and nobody is being taken out to the woodshed. Mr. Williams ought to be ashamed that his organization is so ineffectual at resolving "contractual issues in controversy" by "mutual agreement at the contracting officer's level," but if nobody is making it into an issue at his level,

then why should he worry about it?

Let's propose right here and now that DCMA get its attorneys together and start tracking (if they do not already do it) the number of cases filed at the ASBCA and COFC that relate to contractual issues in controversy, as well as the number that get mutually resolved at the contracting officer's level. Further, let's propose that the claims that make it to the courts, and their ultimate disposition, are tracked so that the number of losers can be reported. Finally, let's propose that the DCMA attorneys offer feedback to DCMA leadership, identifying the court cases that should never have been litigated, because they should have been mutually resolved at the contracting officer's level, in accordance with the FAR. (We admit that last one would be more than a little subjective, but you've got to start somewhere.)

We think the foregoing metrics would help Mr. Williams (as well as Mr. Kendall and SECDEF Panetta and Congress) assess how well the COs are doing their jobs. If they care about such things.

It's not as if DCMA hasn't issued sufficient guidance to its Contracting Officers. It **certainly has**. They just seem to be able to ignore their guidance with impunity.

The DCMA guidance to its COs (link above) clearly states that "DCMA ACOs [Administrative Contracting Officers] and TCOs [Termination Contracting Officers] have the responsibility and authority to resolve disputes, including through the use of ADR [Alternate Dispute Resolution] methods." Clearly, DCMA has told its contracting officers that they not only have the authority to settle issues before they end up in court, but that *they also have the responsibility to do so*.

So why don't they?

And the DCMA COs aren't failing in executing just that one particular FAR policy section; indeed, by failing to make a serious attempt to negotiate and resolve issues in controversy, they are also failing to execute that little piece of the FAR that states—

An essential consideration in every aspect of the System is maintaining the public's trust. Not

only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly, each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public.

(See FAR 1.102-1(b)(1).)

If the FAR requires that "each member of the Team is responsible and accountable" for its actions, then why don't we read about disciplinary actions being taken against those COs who fail to execute their job responsibilities in the proper manner?

Let's also not forget this bit from FAR 1.602-2(b):"*Contracting officers are responsible for ensuring … that contractors receive impartial, fair, and equitable treatment ….*" When COs don't give contractors a fair chance to tell their side of the story, and don't even make a token attempt to negotiate audit findings, then how is that treatment either fair or equitable? If the CO's simply rubber-stamp a DCAA audit report and attach it to a COFD, how is that action treating contractors impartially?

Answer: *it's not*. And nobody in DCMA or DOD leadership seems to care. They don't seem to care that the Federal Acquisition Regulations, as well as agency guidance, are being flouted on a routine basis.

The DCMA guidance to its COs also reinforces the need for the COs to use independent business judgment. The guidance states—

A Final Decision must represent the independent decision and determination of the ACO or TCO issuing the decision. While it may be necessary to obtain assistance from legal and other advisors (e.g., Defense Contract Audit Agency auditors, technical specialists, etc.), ACOs or TCOs are responsible for the ultimate decision and must make that decision after thoroughly reviewing all facts and recommendations.

Yes, that's the standard. And our recent experience has been that it's only rarely met by DCMA Contracting Officers.

In Part 2 of this topic, we'll review some ancient ASBCA cases that discuss what happens when a Contracting Officer doesn't do his/her job properly.

(Hat-tip to Bob Dourandish of Quimba Software for the FAR references.)