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Rarely have we had more difficult time coming up with an appropriate title for an article. Believe us, this one has it all: A DOD Hotline allegation, arguments about the adequacy of a contractor's business systems, untimely DCAA follow-up audits, interference from a DCMA Review Board, untimely Contracting Officer action, the Christian Doctrine … it was truly hard to come up with a unifying theme for the piece.

So we shall just dive in and see where the currents take us.

If you have been reading this blog for any length of time, you will understand that we pay special attention to the administration of the DOD Business Systems oversight regime. In one of the lasting impacts from the Commission on Wartime Contracting (CWC), the DFARS was revised significantly (via interim rule) on May 18, 2011 to address six (6) contractor "Business Systems." Formerly there had been 10 Internal Control Systems; but as of that date the 10 became six, the criteria for system adequacy were codified and revised, and a requirement was added that mandated payment withholds from "covered contracts" for systems deemed "inadequate" or "disapproved" (when the appropriate clause was present). We expect this is old news to most of you; but if it's not then you can search this site and find many articles delving into different aspects of the new oversight regime.

Remember, readers, this all came into effect on May 18, 2011 and it only applied to contracts awarded after that date-and only if those contracts contained the requisite clause(s). As the DOD Inspector General noted, "With minor changes, the interim rule was adopted as a final rule on February 24, 2012." Thus, the rule has been around in final state for about three years.

Let's see what the DOD IG has to say about administration of the Business Systems oversight regime on one "major contractor" in the DCAA's Western Region, by way of an **audit report** issued June 20, 2014.

According to the audit report, DCAA issued four reports in 2010 and 2011 that identified "significant system deficiencies." The cognizant DCMA Contracting Officer received the reports and requested that the contractor "provide a written response to the reported deficiencies." The contractor "disagreed in principle with some of the reported findings, but agreed to take several corrective actions." Subsequently, "the contractor eventually notified the contracting officer … that it had completed the corrective actions for each system." Within "approximately 8 months" after receiving the contractor's notifications, the CO approved the contractor's billing and accounting systems. It took "nearly 19 months" for the CO to approve the contractor's estimating system; and that approval was issued only after DCAA issued a memo "informing the contracting officer that the contractor appeared to have implemented internal controls to address the remaining deficiencies."

That covers three out of the four systems with significant deficiencies. What about the fourth business system? Well, according to the DOD IG-

Even though the contracting officer has also proposed to approve the compensation system, the contracting officer has not yet received the necessary authorization to do so by the DCMA's Board of Review Committee. … The Committee advised the contracting officer that additional testing of the contractor's corrective actions needs to take place before it could authorize the proposed determination.

And then somebody called the DOD IG Hotline to complain that the DCMA Contracting Officer "did not take timely or appropriate action on several [DCAA] audit reports …."

The table below shows the key dates.

Business System

Date of DCAA Audit Report
Compensation
5/18/2010
6/21/2010
11/03/2010
NEVER
1,373

Date of Contractor Response
Compensation
6/21/2010
11/03/2010
NEVER
1,373

Date CAP was Completed
Compensation
11/03/2010
NEVER
1,373

Date of CO Final Determination
Compensation
NEVER
1,373

Number of Days to Issue a COFD
Compensation
1,373

Billing
11/18/2010
5/23/2011
5/23/2011
2/01/2012
256
Accounting
11/24/2010
2/03/2011
7/20/2011
10/04/2011

243

Estimating

2/15/2011

7/21/2011

1/09/2012

8/06/2013

747

According to the DOD IG, "the contracting officer did not make timely final determinations on the contractor's business systems." The DOD IG is careful to note that the DFARS PGI (at 242.7502(d)) requires that CO Final Determinations must be made within 30 days, but does not take the opportunity to determine the root cause(s) for the CO's failure to comply.

According to the DOD IG, "the contracting officer needed to promptly make a determination that significant deficiencies existed and implement withholdings on contracts containing the business system clause in order to protect the Government's interests." The DOD IG asserted this even though "the contracting officer documented … that the business systems clause does not apply because none of the contractor's contracts contain the clause." However, the DOD IG found several contracts that it believed "should include the business systems clause because they were executed after May 18, 2011, and subject to the Cost Accounting Standards." The audit report noted that the IG had requested a ruling from DCMA as to whether "these contracts actually contain the clause as required," but DCMA had not gotten back to

the IG nearly a year later.

Obviously the only way the clause could be read into the contract is by operation of **The Christian Doctrine**. Color us skeptical.

Moreover, the IG's opinion that "if the business systems clause was omitted in error, the DCMA contracting officer should have instructed the contracting officials who executed the contracts to add the clause" strikes us as disingenuous at best and a violation of the duty of good faith and fair dealing at worst. The DOD IG's position elides any discussion as to whether the solicitation contained (or should have contained) the requisite clause and it elides any discussion as to whether the contract that is entered into is the contract that must be enforced.

Vern Edwards tackled **that subject** in his own blog and unequivocally stated-

Once the government and a contractor enter into a contract a deal is a deal, and the government and the contractor are bound by the clauses in the awarded contracts until the contracts are completed. Nothing in FAR and no standard FAR clause authorizes a CO to unilaterally update, add, or delete clauses in a contract after award. None of the five Changes clauses, FAR 52.243-1 through -5, empower a CO to do that. … Purchase orders and solicitations *must* include the contract clauses that are applicable on the date the solicitation is issued, and they *may* include any clauses that become applicable after that date as long as they are expected to be applicable on or after the date of contract award. … Absent express language in the contract to the contrary, a CO may not unilaterally change the clauses in a contract when funding the contract or exercising an option. He or she may change clauses only with the assent of the contractor and with consideration for the change.

[Emphasis in original.]

So the DOD IG essentially criticized the DCMA Contracting Officer for failing to breach the contracts the government had entered into. Suffice to say: we disagree with the IG's position.

Further, the DOD IG did not address whether DCAA audit reports issued before implementation of the new DFARS clauses (in some cases a year before) would subject a Contracting Officer to the same disposition timeline as those issued after the new rule. The new rule also revised (in some cases significantly) the individual system adequacy criteria. The DOD IG skipped over that little nuance. It would be literally impossible for the DCAA audit reports to identify significant deficiencies in the contractor's Business Systems that would be subject to the new rule, a year before that rule was promulgated.

Time machines don't exist in Government Contracting; or if they do they are restricted to use only on classified contracts. Accordingly, it's tough to see how an audit report issued before the Business Systems clauses were effective would be subject to their requirements. It would have been nice if the IG had addressed that implicit timewarp logic; but of course doing so would have undercut its position.

But that's not all.

The DOD IG failed to address why the Compensation System, in particular, would be subject to the DFARS requirements or the DFARS PGI requirements, *since it was eliminated as a stand-alone Business System effective May 18, 2011*. If we were advising the contractor in question, we would have laughed out loud (and called the attorneys) if the CO tried to implement payment withholds on a Business System that didn't exist. Perhaps that logic problem contributed to the CO's alleged lack of diligence? We don't know the answer, because the IG never addressed the question.

But the DCMA Contracting Officer was not the only entity in the DOD IG crosshairs. As has become the norm, the IG took an opportunity to criticize DCAA for not performing timely follow-up audits on the contractor's four Business Systems. According to the IG audit report, "the FAO told us that the follow-up audits were delayed in part because of other priority work and staffing constraints." In other words, if DCAA wants to play in the Business Systems oversight regime, it needs to jump in and own its responsibilities; otherwise, it should get out of the way.

All in all, this DOD IG audit report is a great illustration of what's so broken in today's defense acquisition system. We've got oversight upon oversight upon oversight, and still it's not working to the level written into the rules. It's almost like the rules were drafted and implemented by clueless political appointees, advised by clueless career bureaucrats-neither

group of which had much in the way of real-world, roll-up-your-shirtsleeves-and-dig-into-the-situation, actual experience.

We are loathe to defend DCMA and DCAA from the political predations of the DOD Inspector General. Lord knows we have had our differences with employees of those two entities-especially in regard to the DFARS Business Systems oversight and administration regime. But in this case we believe the DOD IG audit report missed the mark completely and revealed just how superficial the IG can be, when its targets are government civil servants mired in a bureaucratic, Kafkaesque, and damn near unworkable, system.