

Written by Administrator
Monday, 28 June 2010 00:00

To meet urgent needs, the Department of Defense (DOD) can authorize contractors to begin work and incur costs before reaching a final agreement on contract terms and conditions, including price. Such agreements are called undefinitized contract actions (UCAs). UCAs are binding commitments used when the government needs the contractor to start work immediately and there is insufficient time to negotiate all of the terms and conditions for a contract. UCAs can be entered into via different contract vehicles, such as a letter contract (a stand-alone contract), a task or delivery order issued against a pre-established umbrella contract, or a modification to an already established contract.

As the Government Accountability Office (GAO) reported to Congress—

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The FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) govern how and when UCAs can be used. The regulations also establish requirements as to how quickly UCAs must be definitized. Although each regulation contains two criteria, they are not the same. The FAR states that a letter contract needs to be definitized within 180 days after the award date or before 40 percent of the work is complete, whichever occurs first. While the DFARS includes the 180-day time frame, it addresses all UCAs (including undefinitized task and delivery orders and contract modifications) and adds a requirement to definitize before more than 50 percent of funds are obligated. ... The definitization time frame can also be extended an additional 180 days when a qualifying proposal is received from the contractor. The contractor does not receive profit or fee during the undefinitized period, but can recoup it once the contract is definitized.

In June 2007, GAO [reported](#) on DOD's use of UCAs. Fundamentally, GAO found that the Government's timeliness in "definitizing" the UCAs—i.e., negotiating a final contract price played a key part in controlling costs (and profits) paid to contractors. In particular, GAO found that—

We reported that DOD contracting officials were more likely to adhere to the Defense Contract Audit Agency's advice regarding the disposition of questioned

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and unsupported costs when negotiations were timely and occurred before contractors had incurred substantial costs under UCAs. On the other hand, contracting officials were less likely to remove questioned costs from a contract proposal when the contractor had already incurred these costs during the undefinitized period.

The majority of UCAs reviewed by GAO were not definitized within the required timeframes. GAO further reported that the number one reason for delays was an “untimely receipt of a qualifying proposal” from the contractor. Among the other reasons cited were “protracted negotiations” between DOD and its contractors and “delays in obtaining certified cost and pricing data” (*sic*).

In January, 2010, GAO issued a [follow-up report](#), in which it noted improvement by DOD in this area. However, GAO also reported that “local commands are generally not meeting DOD’s management standards” with regard to UCA definitization and documentation of contractor negotiations. GAO found that—

According to DOD regulations, contracting officers are required to consider any reduced cost risk to the contractor for costs incurred before negotiation of the final price. Further, contracting officers must document this risk assessment in the contract files. Sixty-six of the 83 contract actions we reviewed were definitized and should have documented a risk assessment in their contract file and used the weighted guideline worksheet or an alternative method to determine allowable profit or fee for negotiation purposes. About half of the cases we reviewed—34 of 66—did not use the weighted guidelines or document any consideration of cost risk to the contractor during the undefinitized period when establishing profit or fee negotiation objectives. Instead, we found these contracting officers based their profit or fee negotiation objectives on previously negotiated rates under contracts for similar work or other factors. None of these included the required consideration of any reduced cost risk to determine whether the contractor's proposal included fair and reasonable prices. ... In the remaining 32 of 66 UCAs we reviewed, the contract files included weighted guideline worksheets, but it was not always clear whether the contracting officers considered any reduced cost risk to the contractor during the undefinitized period as a factor when determining allowable profit or fee as required.

Based on the foregoing, it was not surprising when, on March 24, 2010, the US Air Force issued a memo to its Major Commands entitled, "Timely Undefinitized Contract Action (UCA) Definitization/Negotiated Awards—Contractor Responsiveness." The memo focused on completing definitization within the required 180-day period, and asserted that open lines of communication and completion of established due dates would be key to meeting that objective. The memo stated—

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... it is imperative that we work effectively with our industry counterparts to receive quality documentation and data in a timely manner. ... Documentation supporting a contractor's proposal should be readily available and should be provided upon request. However, there may be circumstances where the requested data is not immediately available and reasonable timeframes should be established to provide such requested documentation.

The Air Force memo directed that "for all sole source contract actions greater than \$50 million and any UCA greater than \$1 million, contracting officers shall schedule a proposal kick-off meeting." The kick-off meeting should include all stakeholders, including the Air Force and contractor, DCAA auditors, DCMA functional specialists and, "at the prime contractor's discretion," major subcontractors. The memo also directs that—

... after proposal submittal and preliminary review ... the contracting officer shall require the contractor to provide a proposal walk-through for the Government to ensure an understanding of the proposal composition, validate or revisit the

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definitization/award schedule, and establish action items for any obvious data omissions.

Significantly, the Air Force memo focuses on contractor responsiveness, stating, “If the requested data is not provided by the requested date or ... the agreed-to date, and an acceptable resolution cannot be achieved, the issue shall be immediately elevated to the appropriate senior management for both the government and the contractor.” Even more significantly, the Air Force memo then notes that “DCAA has issued guidance for handling denial of access to contractor’s records IAW 15.404-2(d). *We endorse the procedures ...*” (Emphasis added.)

On May 25, 2010, DCAA issued the Air Force memo under [MRD 10-PSP-016\(R\)](#).

The audit guidance directs auditors to cooperate with the Air Force’s process. Among other actions, the audit guidance states—

The proposal kick-off meeting will occur soon after the contracting officer's release of the RFP. The meeting will focus on procurement schedule requirements, expectations of timely contractor support, and the identification of expected major subcontracts. DCAA auditors should attend these kick-off meetings to get an understanding of the acquisition milestones and general nature of the proposal. It should be clearly communicated at this meeting that contractor supporting data should generally be readily available once the proposal is submitted. ...

DCAA should attend these meetings to obtain an understanding of the contractor's proposal, including supporting data. The contractor should also identify the contractor personnel responsible for the underlying data and estimates. DCAA will require access to these individuals during the audit process. ... During these meetings, the auditor should identify any apparent proposal inadequacies. If data omissions are so significant as to render the proposal inadequate for analysis, the auditor should recommend that the Contracting Officer reject the proposal. Audit report due dates for the particular proposal should be established after the completion of the audit risk assessment.

The audit guidance further cautions auditors to avoid "comments that could be construed as advising the contractor on how to develop its proposal" so as to avoid any allegations that the auditors are participating in an Integrated Process Team (IPT), an activity which has been prohibited as it has been alleged to impair auditor independence.

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Well, then. We generally endorse any process that would definitize UCAs within the required timeframes, but we wonder if the foregoing Air Force and DCAA direction might not be avoiding addressing the real problem—which is insufficient identification of Government requirements, and subsequent changes to those requirements—which prevents contractors from submitting timely and comprehensive proposals. (See the GAO reports linked above, which show the lack of defined requirements is as much a problem as any lack of cost or pricing data.) Focusing on enforcing timely contractor provision of requested data to support fact-finding and negotiations seems to be a fundamentally misplaced management emphasis—particularly since the Air Force is now endorsing DCAA’s arbitrary and punitive “denial of access to records” process. (We criticized DCAA’s approach, which focuses on timeliness at the expense of factual accuracy and audit quality, in our article that was republished in West’s [The New Landscape of Government Contracting](#)

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We also note that DCAA has (once again) attempted to extend its audit access to contractor personnel, despite regulatory direction (supported by settled case law) that limits auditor access to cost, accounting, and financial records—as well as other cost or pricing data identified by the contractor.

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Finally, despite DCAA's cautious directions to the contrary, this smells very much like an IPT-like process and we smirk at DCAA's protestations to the contrary. Candidly, auditors should participate in IPTs and DCAA should tell those who criticize that participation to stuff it.

It is becoming an open secret that DCAA's temper tantrum (stemming from GAO findings and well-publicized Congressional criticism) is starting to paralyze the Defense acquisition process. This guidance strikes us as a small Band-Aid that looks good, but which fails to address fundamental problems at the audit agency that continue to impair timely issuance of quality audit reports, leaving DCMA and DOD buying commands in limbo as they attempt to award, administer, and manage contracts.

DOD Blames Contractors for Lack of Contract Definitization, Establishes New Process Groundrules

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