

SubCon

TRAINING WORKSHOPS
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The Difference Perspectives of Subcontract Management

Friday, March 31 at 10:30am - 12:00pm

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Agenda

- The New Reality
- Case Study
- What's Your Perspective?
 - Government viewpoint
 - Contractor viewpoint
 - Subcontractor viewpoint

DCAA Rewrites FAR 42.202: Primes Now Responsible for Auditing Subcontractors

- There is a government-wide perception that better (government) buying power depends upon better subcontract management.
- FAR 42.202(e)(2) states that prime contractors are responsible for managing subcontracts, DCAA has launched or relaunched a strategy which presumes that prime contractors are responsible for “auditing” subcontractors. Unfortunately, DCMA seems to have embraced this concept with respect to closing out [cost-type subcontracts](#). Specifically DCMA Instruction 135, section 3.2.3.2 states that prime contractors are responsible for auditing subcontracts and closing subcontract using procedures similar to those used by the government.
- DCAA’s embellishment of FAR 42.202(e)(2) is not new; however, it’s becoming more prevalent as evidenced by a number of DCAA audit reports issued between April 1 and September 30, 2015. Millions of subcontract (direct costs) are being questioned within a number of incurred cost audits and the bases are: i) prime contractor failure to audit subcontract costs, ii) prime contractor failure to obtain competitive bids (before awarding a subcontract), and iii) various descriptions of inadequate documentation (prime contractor) supporting the allowability, allocability or reasonableness of subcontract costs (Source: DOD-IG Semi-Annual Report to Congress for the reporting period April 1, 2015 to September 30, 2015).

Case Study – Real Stories in Subcontract Management

- Divide into groups
- Identify the facts
- Discuss the merits of the case

How should the court rule?

Background

- Contractor awarded IDIQ prime contract with T&M task orders to provide various type of personnel such as IT, administrative, security, and logisticians
- Contract included FAR 52.232-7, Payments Under Time-and-Materials and Labor-Hour Contracts
- Prime, as a large business, subcontracted with other companies on a T&M basis

DCAA Audit

- DCAA initiated an audit of the prime's incurred costs for the task orders under the contract as part of the contractor's annual incurred cost submission
- DCAA questioned “claimed direct subcontract costs based on received assist audit support” and “subcontractor costs at the prime contractor level”
- As part of the back-and-forth discussion with the prime, DCAA stated
 - It was prohibited from disclosing results of subcontractor assist audits
 - It is the prime's responsibility to manage its subcontractors

DCAA Position

- Prime is to negotiate access to subcontractor's specific audit results that pertain to the prime's ability to settle claims with the Government
- The prime is in noncompliance with FAR 42.202(e)(2) which states "The prime contractor is responsible for managing its subcontractors."
- It's the Government's intent the prime act as both CO and CAO in accordance with FAR 42.201 and FAR 42.302
- The prime did not provide evidence of an attempt to cause subcontractors to prepare incurred cost submissions or of any assist audit request

Contracting Officer Final Determination

- Prime did not properly maintain oversight of its subcontractors
- Breach of contractor's duty of performance
- Demand payment of \$102,294,891
 - 46 subs did not submit an adequate incurred cost to prime
 - Prime did not audit, or request audit assistance from DCAA on the subcontractors as the prime must do under this contract type

What's Your Perspective?

- Government Contracting Officer
- Government Contracting Officer Technical Representative
- Prime Contracts Manager
- Prime Subcontracts Manager
- Prime Program Manager
- Subcontractor Contracts Manager
- Subcontract Program Manager
- DCMA
- Tax Payer

The Price of Non-Compliance

- Can you afford not to have the proper oversight and surveillance in place? All that's at risk is your prime contract....

- **Vicarious liability:** To be held responsible for the actions or omissions of another person.

Prime Contractor Obligations – only the tip of the iceberg

- Reporting Requirements

- Subcontractor Executive Compensation
 - FFATA

- Regulatory Oversight

- OCI – Subcontractor OCI can cost Prime Contractor's a contract
 - FCPA – Parent company liability when using "agents"
 - False Claims Act
 - Anti-kickback Act of 1986 - "for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection **with a subcontract** relating to a prime contract"
 - Export – DFARS 252.204-7008 - Mandatory Flow down – puts onus on Prime Contractor
 - The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.
 - (c) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled [items](#) exists independent of, and is not established or limited by, the information provided by this clause.
 - The Contractor **shall** include the substance of this clause, including this paragraph (e), in all subcontracts.

- But we have not even talked about execution yet....

THANK YOU