GovernmentContracts
INSIGHTS
A MONTHLY PUBLICATION FOR GOVERNMENT CONTRACTORS

Volume 12 FEBRUARY 2012

ASBCA Deems DCAA's Compensation Audit Approach as Statistically Flawed

By Darryl L. Walker, CPA, CFE, CGFM, Technical Director at Beason & Nalley, Inc.

In a decision issued January 18, 2012, the ASBCA rendered the DCAA audit approach in evaluating executive compensation for reasonableness, and calculating unallowable compensation costs, to be "fatally flawed statistically and therefore unreasonable".

The decision presents a huge blow to DCAA's long-standing, highly subjective, and previously unchallenged methods for evaluating and calculating "reasonable" (and therefore unreasonable) contractor executive compensation levels. It jeopardizes for the government all outstanding DCAA incurred cost or compensation audits, where DCAA has applied the flawed analysis cited in the case.

The Court's decision addressed an appeal by J.F. Taylor, Inc. (JFT) (ASBCA Nos. 56105 and 56322) after DCAA questioned and the DCMA supported disallowance of $589,600 allocated to six government contracts during the JFT fiscal years 2002 through 2005. Following expert testimony by both government and appellant expert witnesses, and evaluation of the subjective wage surveys and methods utilized by DCAA in deriving "reasonable" compensation levels, the Court upheld only $42,436 as unallowable (unreasonable), meaning that the remaining $547,164 challenged by the contracting office were deemed reasonable costs within the context of the FAR 31.205-6 Compensation cost principle.

In questioning unreasonable JFT executive compensation costs, DCAA followed its traditional audit examination process by comparing each of the contractor's top five executives' annual compensation to DCAA's selected wage surveys; those surveys from which data is selected for comparison to contractor salaries are supposed to be symmetrical to contractor job positions, type of business, and size of the contractor. Salaries selected by auditors from each of its surveys are almost always the "median" value for each job position, meaning the "middle" number in a series of salaries for each selected position—(in salary surveys, this equates to the "50th percentile"); individual job position salaries selected from each DCAA utilized survey are averaged ("mean" calculation), escalated by an

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arbitrary 10% "range of reasonableness" (ROR) factor, the end product of which is then compared to the contractor claimed compensation for each job position. Any difference is traditionally questioned (if DCAA surveys yield lower annual average compensation than contractor claimed), unless the contractor can produce convincing evidence that the DCAA approach and/or wage survey is flawed or not appropriate (our experience has shown that rarely has a contractor been able to produce "convincing" evidence because that usually entails subjective factors which DCAA simply ignores as was done in the JFT ASBCA Case).

The auditor's approach for selecting wage data and statistically converting that data in a credible and supportable "reasonableness" compensation calculation (resulting in questioned costs) was analyzed by a JFT expert witness who challenged the reliability of DCAA's calculations. Testimony provided by this witness methodically articulated each problematic and/or flawed audit calculation technique, and the testimony was successful in supporting the court's decision that the DCAA process was significantly broken. Principal problems in DCAA's evaluation approach raised by the appellant's witness, and largely sustained by the court, included the following:

- DCAA did not consider the dispersion of data among individual salary surveys in its calculations to determine a more precise deviation from the median—instead it used an arbitrary dispersion factor of 10% (ROR) applied to each survey. The expert's analysis noted that the 10% ROR "was not an adequate adjustment to accounting for the dispersion in any of the surveys" used by DCAA. Further, the expert noted that an acceptable 95% confidence level should be utilized to determine actual data variability—the 10% factor applied to each survey without individual survey data variability analysis is "arbitrary, unsupported, and unsupportable".
- DCAA ignored differences among sample sizes for each of its wage surveys, but utilized the data as if each survey had equal sample sizes. Example included in the testimony—DCAA assumed that a 50th percentile number from a survey with 110 comparable businesses carried equal weight and accuracy as another survey with only five companies.
- DCAA revenue apportionment to define revenue level of responsibilities among each executive was inappropriate; total revenue generated for the entire company, rather than revenue attributable to individual departments managed by each executive, should have been used in determining concomitant the executive position and compensation. This was the only principle raised where the Courts sided with the government.
- DCAA does not automatically consider financial performance of a business in assessing executive compensation worth, but rather categorizes all salaries in the 50th percentile unless the contractor disputes this initial assessment. The Court noted in its decision that "It is undisputed that JFT performs at a high level", citing JFT as having an average annual revenue growth of 20 to 25 percent during fiscal years 2002 through 2005.
- DCAA did not consider discriminators, other than financial achievements, that would add to the market worth of individual executive positions or employees. Such discriminators would include security clearances and customer satisfaction.
- DCAA did not use the same industry classification for the contractor in each of the four years to benchmark JFT to the appropriate business classification for judging compensation reasonableness
- Auditors did not benchmark individual executives to the same job positions each year for gaging comparability of salaries; for example, the Chairman and CEO was appropriately categorized in that position for three years for wage comparison, but was "demoted" in 2005 to a CEO-Non-Chairman job classification.
- DCAA did not use the same wage surveys each of the four years suggesting an arbitrary and biased process of selecting wage surveys can diminish the process of attaining a fair and reasonable salary wage level.
- Auditors interchangeably used mean and median wage survey salaries in determining reasonable compensation, but represented all values as median amounts for calculating DCAA's reasonable compensation positions.

The expert witness who testified for the government was equally instrumental in defeating the government's case as the appellant's expert witness testimony was in supporting the appellant's assertions. The credibility of the government's witness was significantly diminished when legitimate challenges to his doctorate credential were raised. In testimony, the government's expert acknowledged certain practices that should be undertaken in determining compensation reasonableness, such as: revenue should not be exclusively used as a measure of reasonableness–however, the JFT expert witness testified that DCAA

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apparently did not consider other discriminatory factors in his analysis of compensation. Further, when challenging the JFT practice of paying each of its executives (four vice-presidents) the same compensation level, the government witness stated, "…I don't believe there's anything in the rules that says you can't pay everybody the same, it's just that you can't turn around and charge the government for doing that." The court's decision states that "…the government effort to support its own methodology was supplanted by an expert witness of questionable judgment."

The Decision of the court also states that in the absence of any government rebuttal to the appellant's statistical arguments, the court was essentially left with no other decision than to consider the DCAA approach "fatally flawed".

Also interesting in this case is that the Court analyzed the FAR 31.205-6 Compensation cost principle verbiage in place at the time of award of each of the six contracts to which government determined unreasonable compensation costs were billed. The Court recognized that the FAR rules in place at the time of contract award are those rules to which compliance must be measured for a specific contract. Recognition of the applicable rules in place at time of contract award is not always a consistent practice among government procurement and audit professionals (see additional discussion in the article "*Contractor Compensation—Still Under Attack*").

Contractor Compensation – Still Under Attack

By Michael E. Steen, CPA Technical Director at Beason & Nalley, Inc.

Although DCAA failed in its attempt to "attack" the reasonableness of contractor compensation using existing regulations (see preceding article), on January 31, 2012, the current administration re-launched its seemingly bi-monthly charge that government contractors are recovering too much related to executive compensation; hence, the statutory cap should be well below the existing $693,951. The January 31, 2012 Executive Office push for a lower cap, did not actually state an amount, but does assert that $693,951 is too high as will be the next statutory cap which has been represented to be approximately $750,000.

In a complementary action (coordinated attack on contractor compensation) on January 31, 2012, OMB (Office of Management and Budget) urged Congress to repeal the existing statutory formula to bring the cap down to a level on par with what the government pays its own executives–$200,000. This amount is a none-too-coincidental repeat of an amount suggested by the current administration in the fall of 2011 in reference to the maximum salary paid to cabinet level government executives.

Neither the current administration or OMB bothers to mention that whereas OMB timely published the existing cap ($693,951) on April 15, 2010 for contractor fiscal year 2010,OMB has inexplicably failed to issue any cap for 2011 (hence the urgency for Congress to change the formula). For the record, the cap is based upon data gathered from SEC filings for publicly traded corporations whose revenues exceed $50 million and the 2011 data has long since existed, has long since been analyzed by DCAA for OMB, but has mysteriously remained unpublished by OMB. Actually there is no mystery in terms of why OMB failed to publish this data in April 2011; OMB simply does not want to comply with the existing Congressional formula which unfortunately does not contain a mandatory publication date.

It is no coincidence that the current attack comes at a time when Congress is considering a continuation of the freeze on government employee compensation thus the "obvious inequity" of placing the deficit reduction burden on government employees. Again, the current administration seems to ignore the fact that Congress did expand the contractor cap to apply to all contractor employees beginning with contracts in 2012 in contrast to the previous cap which only applied to the top five executives/managers. Thus, the cap will reduce allowable costs for certain contractors and contracts executed in 2012.

Of course, the expansion of the cap to a broader range of employees is prospective only as pre-existing contracts are subject to the regulation (FAR Part 31.2) in effect on the date of each contract. In terms of affected contracts, it remains to be seen if the government will follow its own regulations noting that it has failed on at least two occasions in attempts to retroactively apply the statutory cap to pre-existing contracts. The basic issue, contracts executed before January 1, 1998 did not include the statutory cap but to the extent these contracts continued to be performed and incur costs beyond January 1, 1998, the government attempted to apply the cap to those contracts (typically in reducing allowable G&A allocated to those contracts). In 2000 this was determined to be a government breach of contract (General Dynamics Corp.

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v. United States, 47 Fed Cl 514). More recently, that failed attempt was displayed in the ASBCA Cases 55395, 55418, 55812 in a decision for partial summary judgment for ATK Thiokol and denial of the government motion for partial summary judgment.

In the ATK decision, dated April 9, 2009, the government attempted to apply the statutory cap retroactively in spite of having lost this issue as a breach of contract in 2000. In the ATK case, the contractor revised its outstanding incurred cost proposals to exclude any statutory cap for contracts executed before January 1, 1998 and to upwardly adjust provisional billing rates which were based upon the erroneous application of the statutory cap. In fact, the government basically forced ATK Thiokol into disputes by failing to make a decision on ATK's November 2003 incurred cost revisions and request to mutually agree to adjust provisional billing rates.

In challenging ATK, the government relied on the allowable cost and payment clause and the timing of the final indirect cost rate agreement as defining the applicable regulations in contrast to (or blatantly ignoring) the long standing and long accepted doctrine that a contract is subject to FAR Part 31.2 "in effect on the date of this contract". In defending its actions for not allowing ATK to increase its provisional billing rates (after January 1, 1998), the government relied upon the allowable cost and payment clause that "billing rates are set by the CO on an interim basis and may only be changed with CO's consent pending resolution of the final indirect rates". In the decision, the ASBCA disagreed on both counts finding that the government action (or inaction) constituted a breach of contract. The ASBCA noted the government failed to cite any case law (or anything else) to support the government position.

For any contractor whose provisional billing rates have been established at rates below the anticipated final rates because of the erroneous removal of allowable costs (executive compensation in this case, but certainly not limited to executive compensation), the ATK decision confirms that the contractor is entitled to relief through the CDA (Contract Disputes Act). Specifically, "the government's failure to modify the billing rates to reflect these otherwise allowable costs and to pay them as requested by the appellant was a breach of contract". Although the CDA is in many cases an action of last resort, it may be the only option for any contractor whose provisional billing rates are below anticipated final rates wherein the government (DCMA/DCAA) refuses to take any action to mutually agree to increase the understated provisional billing rates.

IR&D and B&P under DoD Contracts

By Michael E. Steen, CPA Technical Director at Beason & Nalley, Inc.

DFARS IR&D Reporting Requirement.

On January 30, 2011, a final DFARS rule imposed significant changes for "major" contractors as it relates to reporting IR&D (Independent Research and Development) technical descriptions. The final rule includes the following requirements and we've also highlighted some of the more significant changes from the March 2011 proposed rule:

- DFARS 231-205-18(C) stipulates that for IR&D costs to be allowable the IR&D projects must be reported at least annually and when a project is completed to DTIC (Defense Technical Information Center). This requirement only applies to "major" contractors, for this purpose contractors whose covered segments' annual IR&D/B&P (Bid & Proposal) costs exceed $11,000,000 costs allocated to covered contracts during the preceding year. Covered contracts exclude firm fixed price contracts and segments exclude any segment whose annual IR&D/B&P allocated to covered contracts is less than $1.1 million (see DCAA Contract Audit Manual 7-1503). The proposed rule had a reporting threshold of only $50,000 albeit limited to IR&D (illogically while conveniently using an existing definition in DFARS 231.205-18(a)(iii), the final rule combines IR&D/B&P costs for defining a major contractor even though the DTIC reporting requirement only applies to IR&D projects).
- In spite of public comments suggesting that allowability not be contingent upon reporting into DTIC, the DAR Counsel disagreed and never addressed the fact that the data is already readily available at "major" contractors for whom there has been a long-standing process for reporting annual IR&D/B&P expenses (the actual reporting was by DCAA although major contractors anticipated and provided this data as a matter of routine).
- The DAR Counsel never seemed to grasp the meaning of public comments suggesting that DCAA is not qualified to evaluate IR&D projects in terms of the DFARS 231.205-18(c)(iii)(B) which states that allowable IR&D/B&P costs are limited to those for projects of potential interest to

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DoD. In typical fashion, the DAR Counsel stated that the final rule does not place additional oversight responsibilities onto DCAA and DCMA noting however, "that when specialized expertise is required, contracting officers are expected to consult with auditors and other individuals with specialized experience, as necessary, to ensure a full understanding of the issues". Apparently the DAR Counsel does not want to overlook the possibility that an auditor may coincidentally have the "specialized experience" to evaluate the potential interest of an IR&D/B&P project to DoD. In most cases, auditors expressing such an opinion would be at odds with Government Auditing Standards which prohibit an audit opinion for matters outside the competency of the auditor.

- Although the IR&D reporting requirements only apply to major contractors, contractors who do not meet the threshold are "encouraged to use DTIC on-line reporting to provide DoD with visibility into the technical content of the contractors' IR&D activity". Undoubtedly the response to voluntary reporting will be overwhelming.

It remains to be seen if the new DFARS rule will have the "unintended consequences" of heightening DoD's interest in rethinking its general acceptance that virtually any IR&D or B&P project has a "potential interest to DOD". Continuing DoD budget pressures may bring new challenges notwithstanding the fact that even DCAA states that "the broad definition of potential interest to DOD" reduces the probability that certain IR&D/B&P projects are unallowable due to a lack of potential interest to DoD" (DCAA CAM 7-1503).

DoD Memorandum on Direct vs. Indirect Proposal Preparation Costs

On November 10, 2011, the Director Defense Pricing (Shay Assad) issued a memorandum reminding various DoD procurement activities that certain proposal preparation costs are indirect (B&P subject to FAR 31.205-18) whereas proposal preparation costs and negotiation support costs associated with a contractual requirement under an existing contract are direct costs only (allocable to the contract which requires the proposal). In its memorandum, DoD appears to be focused on direct costs, stating, "as a matter of policy, contracting officers should minimize the situations where a contractor will be contractually required to prepare proposals for new requirements or to definitize unpriced contractual actions".

This particular DoD memorandum states in the absolute that proposal preparation costs as a contract requirement must be charged to the contract which requires the proposal and cannot be transferred to the new contract (resulting from the proposal) or charged as indirect B&P. The regulatory basis for the prohibition on charging the costs as indirect B&P is CAS 9904.402-61(c). Oddly enough, another component of DoD, namely DCAA refers to the same regulation in stating that CAS 402-61, Interpretation, "notes that contractors may elect to charge all proposal costs (including B&P costs and those required by contract) indirect provided that the practice is applied consistently". Upon reviewing the regulations, DCAA's more specific reference is actually CAS 9904.402-61(d), which apparently was invisible when DoD referred only to 9904.402-61(c).

Regardless of the inconsistencies and confusion between the Director Defense Pricing and DCAA, contractors should also be aware of the fact that there is case law, United States ex rel. Bagley v. TRW Inc., NO CV 95-4153-AHM wherein bid proposal costs required by a joint venture agreement were deemed unallowable as indirect B&P for TRW.

ASBCA Determines DCMA Claim for Increased Costs to CAS Contracts for Voluntary Accounting System Change Untimely

By Darryl L. Walker, CPA, CFE, CGFM, Technical Director at Beason & Nalley, Inc.

The ASBCA issued a January 6, 2012 decision finding that a DCMA claim for increased costs submitted to The Boeing Company (due to a voluntary accounting change) as having passed the six-year statute of limitations and was therefore invalid. For a claim for payment under the Contract Disputes Act (CDA), the claim (government or contractor) must be submitted within six years after the accrual of the claim.

The genesis of this decision related to an appeal filed by Boeing (ASBCA No. 57490) for dismissal of the government's claim for $6.42 million since the final decision (which equated to the demand for payment) was more than six years after the claim accrued.

The Boeing Company had implemented a change in cost accounting practice which was effective beginning Boeing's fiscal year January 1, 2001. Following a DCAA audit in June

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2002, the Administrative Contracting Officer (ACO) notified Boeing on September 17, 2003 that the accounting revision was an undesirable voluntary change within the provisions of the Cost Accounting Standards (CAS), and therefore Boeing was liable for resulting increase in costs to affected government CAS covered contracts. The September 2003 letter also acknowledged that the government was willing to negotiate a settlement as to increased costs.

A final decision was not issued by the ACO until October 25, 2010 in which the ACO clearly outlined the events upon which the claimed is based, demanded payment of $6.42 million for increased contract costs, and more telling, clearly illustrated that the ACO was very much aware of the events regarding a potential liability during September 2003 time frame.

The government asserted that the September 17, 2003 letter was actually the demand for payment, e.g., a claim, and therefore a lapse between claim accrual and filing of a claim did not exist. However, the ASBCA disagreed, opining that a specific sum demanded from Boeing was not made at that time, and only in its final decision letter (October 2010) did the government present a demand for payment, hence the date of the claim; moreover, since the government was aware of the basis of the claim in September 2003, that date would stand as the point in time a liability was accrued under the intent of the CDA.

The Court decision agrees with Boeing that the government's claim is invalid, and thus denies Boeing's appeal since the claim is a nullity, and leaving ASBCA with no jurisdiction to entertain an appeal. In other words, the Court tacitly ruled that Boeing owed nothing to the government because the claim lacked validity due to the government's lack of timely submission of a claim.

The government's missteps in promptly negotiating and resolving such issues, and/or its inability to recognize end dates at which time the government must assert a claim before it loses the right for monetary recovery from contractors, is due to the government's inability to understand statutory time parameters or its assumption that such time constraints only apply to the contractor in a CDA. Additionally, the government is seemingly plagued by a lack of competent (or willing) resources to make decisions to promptly settle such issues. Initiatives set forth by the DCAA and the DOD in their Joint Cost Recovery initiative (October 2010), with a focus on open CAS compliance issues as one area, will lose credibility if such easily avoidable mistakes such as losing track of statutory time limitations become recurring and systemic.

DCAA Untimely Audits and IG Reports

By Michael E. Steen, CPA Technical Director at Beason & Nalley, Inc.

In a January 10, 2012 DoD-IG (Inspector General) report, both DCAA and DCMA were criticized for actions or inactions related to contract closeouts. This report comes after a similar IG report in September 2011 wherein DCAA was criticized for failure to timely audit interim vouchers (December 2011 Newsletter "DCAA Hotline Referral which Backfired") and in both reports, the common thread is the fact that DCAA ignored contracting officer requests for audits.

With respect to the January 2012 report, the DCMA criticism is in the context of a contracting officer (CO) who graciously cancelled the audit request; unfortunately, that CO had no authority to cancel an audit which had been requested by a different CO who had the authority to request the audit in the first place. Fortunately, DCMA's corrective action was rather simple, to consider administrative action for the CO who acted without authority.

DCAA's corrective actions weren't quite that obvious or simple given the fact that DCAA's failures were more egregious. DCAA was requested to audit 128 final vouchers and DCAA managed to audit 24 of those vouchers taking an average 8 months to complete the reviews (referred to as unacceptable by the DoD-IG). In defending itself, the DCAA audit team stated that it is understaffed, the contractor did not adequately list the contract terms and conditions for some of the vouchers, and the auditor was awaiting unidentified support from the contract. In typical fashion, although DCAA's inactions were unacceptable, the DCAA field office blamed the contractor for two of three excuses. Regarding the inadequate listing of contract terms and conditions, a competent and motivated auditor could have solved this him/herself by obtaining these "critical" contract terms and conditions from the CO; however, that never happened nor did DCAA keep the CO apprised of the progress (or lack of progress) on the audits. By any measure, DCAA miserably failed to timely complete "low risk" audits (which is why these were at the bottom of the pile so to speak).

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In responding to the IG recommendations, DCAA reportedly "non-concurred" but offered alternative actions which the IG stated were "responsive to the recommendations". It was of particular note that the Director, DCAA agreed to assess its current prioritization of performing final voucher reviews and take action consistent with the assessment of available staffing. Translated, if this occurs again, DCAA will essentially do nothing because "taking action consistent with the assessment of available staffing" is exactly why DCAA did little or nothing with the 128 final vouchers. Far short of a meaningful commitment and for those of us totally frustrated by DCAA's inability to timely audit anything, it is all too apparent that the DoD-IG will simply not "call a pig a pig".

Perhaps coincidentally, as DCAA continues to be criticized for untimely audits (or no audits), they have published an audit policy on Milestone Plans (12-PPS-001(R), January 25, 2012) which has been referred-to in some circles as a going-away present to a recent Mid-Atlantic Regional Director retiree (corporations give gold watches to executive retirees and apparently DCAA gives an audit policy). The milestone plan is full of great concepts including specific and measurable milestones, realistic dates, considering the contracting officer's needs, a shared commitment to meet the milestones, etc. However, it is quite telling that the milestone plan is merely a plan and in no way will it compromise or risk DCAA's all-out pursuit of the perfect audit in full compliance with Government Auditing Standards. Anyone familiar with DCAA processes will determine this immediately because within the milestone policy "there is no requirement for the format of a milestone plan". Everyone familiar with DCAA knows that any serious DCAA commitment involves highly prescriptive processes including formats, audit programs and checklists.

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