

DCAA and Access to Contractor Records: The Continuing Saga of Re-Writing the Regulations

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In an Audit Guidance Memorandum issued dated December 19, 2008 (08-PAS-042(R)), DCAA reasserted and redefined its access to records under FAR 52.215-2. Since issuing that document, DCAA has been informing contractors of these new expectations represented as a “brave new world” in presentations by DCAA’s Director to industry associations. In turn, I and virtually every other consultant have discussed the implications of this “brave new world”. In revisiting this particular audit policy, it is most meaningful to do so in the context of actual applications; that is DCAA auditor requests for records (inclusive of contractor employees). In one recent example, as a component of an entrance conference for initiating an audit of a contractor’s Control Environment and Overall Accounting System Controls, DCAA’s request included 29 separate line items including several which are premised upon the December 12, 2008 effective date of Contractor Business Ethics Compliance Program and Disclosure Requirements (“COBEC” effected by FAR 52.203-13 and -14). In requesting data from the contractor, DCAA wholly ignores the provisions of FAR 52.203-13 and -14 and the extensive and thorough discussion in the Federal Register Vol. 73 No 219, November 12, 2008. Of particular note:

DCAA requests that the contractor “cite consequences for violations” of a contractor code of conduct by providing DCAA with a list of all violations which occurred in the past 12 months. However, the mandatory disclosure requirements effective December 12, 2008 contain no such requirement. There are specific violations which are subject to mandatory disclosure; however, they are very specific (FAR 52.213(b)(3)(i) and by no means include all violations of a contractor’s code of conduct.

DCAA requests that the contractor provide appropriate disclosure to the government and “we (DCAA) define appropriate disclosure to DCAA and the ACO within 5-10 days of identification”. However, the mandatory disclosure requirements explicitly stated in the regulation do not provide for any disclosure to DCAA or directly to the ACO. The mandatory disclosure is to an Agency IG (Inspector General) with a copy to the Contracting Officer. Further, the implementing regulation thoroughly vetted the concept of “timely” disclosure and specifically avoided a stated time period (although many respondents suggested a specific number of days). Finally, in rewriting the regulation, DCAA applies timely disclosure to the term “identification” whereas the actual regulation uses the terminology “credible evidence”.

DCAA requests that the contractor identify the location of DoD IG Hotline posters after citing FAR 52.203-13(c)(2)(ii)(D) which, taken in conjunction with FAR 52.203-14(c), explicitly permits a contractor to utilize an internal reporting mechanism, such as the company equivalent of a hotline poster, in lieu of posting DoD-IG hotline posters. Somewhat related to this, DCAA has insisted upon knowing the location of hotline posters for contracts performed entirely outside

the United States in total disregard to FAR 3.1004 which excludes these contracts. As it relates to the regulatory requirement for posting Agency IG Hotline posters, DCAA is once again re-writing or otherwise ignoring the explicit criteria within the applicable regulation.

DCAA requests that contractor furnish documentation to “verify that the external CPA does not provide accounting service to the contractor”. This is a matter which pertains to PCAOB Independence Standards for which DCAA has no authority whatsoever. In fact, it is unlikely that DCAA is qualified to render an opinion or even interpret matters of compliance with PCAOB independence standards. Nonetheless, DCAA is requesting this information as if it has applicability or relevance to DCAA’s audit.

DCAA requests copies of the annual report or 10K report for publicly traded corporations. Of note, DCAA makes a similar request when performing financial capability reviews. In all cases, if DCAA would merely access the publicly accessible website, DCAA would be able to obtain these documents. Such ready access has apparently not deterred DCAA from insisting that the contractor provide the documents.

DCAA requests that the contractor complete a “contractor’s basic organizational structure” questionnaire for the contractor’s next fiscal year. This four page document is for DCAA’s convenience in developing DCAA’s audit plans for the next fiscal year; however, this data has absolutely no connection to any DCAA audit opinion concerning the allowability of contract costs. As such, this request for data falls outside of FAR 52.215-2; nonetheless DCAA requests the information as if the data is subject to the access to records provisions. Of further note, FAR 52.215-2(d)(2) states that the audit and records clause “may not be construed to require the contractor to create or maintain any record that the contractor does not maintain in the ordinary course of business or pursuant to a provision of a law”.

DCAA’s request for data under the provisions of FAR 52.215-2 suggest that perhaps Senator Chuck Grassley is on point when he recently challenged a civilian agency’s continuing use of DCAA audits for CMS (Centers for Medicare and Medicaid Services). On June 3, 2009, Senator Grassley expressed his concerns referring to CMS’ reliance on substandard audits in the context of audits which have been identified by the GAO as failing to comply with auditing standards. In the case of DCAA’s wholesale disregard for the “COBEC” regulations as, it is indeterminable if this is an intended disregard or mere ignorance of the regulations. The fact that DCAA’s demands are being replicated across multiple contractors suggests intentional disregard; but in either case, such requests are a failure to follow auditing standards. In particular, due professional care given that DCAA’s failure to adhere to the contractual terms (as clearly stated and vetted when published in the Federal Register) is far short of “due professional care”.

On a related but slightly different note concerning DCAA’s interpretation of timely access to records, DCAA often requests “same day”, “next day” or “day two” response times to very lengthy requests for data. Failure to accomplish such response times is then translated by DCAA into a systems deficiency report. Apparently there is no similar concept of timeliness when applied to DCAA audits and audit operations. Specifically, the concurrent article on DCAA’s ICE model refers to a DCAA memorandum issued on

June 15, 2009 correcting errors in the DCAA electronic ICE model issued in May 2008. Although the actual corrections were presumably made sometime before June 15, 2009, the fact remains that it took several months for DCAA to identify (with the help of frustrated contractors) and correct errors in its ICE Model, all the while expecting contractors to work around the errors and submit and timely support incurred cost proposals. This issue is indicative of a double standard when applied to DCAA's definition of timeliness.