Recently the Department of Defense Office of Inspector General issued a **report** finding fault with the Defense Contract Management Agency's oversight of contractors' business systems. Specifically, the DoD IG found that DCMA was not taking timely actions with respect to administration of various contractors' estimating systems.

We are shocked by those findings. *Shocked*, we tell you. Shocked and disappointed.

That last bit was sarcasm, folks. *Sarcasm*.

We saw this coming a long time ago.

We **told** the blinded-by-bureaucracy apparatchiks on the DAR Council this was going to happen. We told them and they refused to listen. We told them a **second time** , and they again refused to listen. So here we are, mired in an environment where contractors are (quite literally) punished for the sin of failing to pass a DCAA (and DCMA functional specialist) audit. An environment where DCMA Contracting Officers are poorly trained in the adequacy criteria of the business systems and, in any case, are afraid to overrule the auditors' findings lest they find themselves the target of a IG Hotline call. An environment where the parties who are required by regulation and agency policy to effectively administer contractors' business systems are overworked and trapped in a bureaucracy that not only impedes—
but actively discourages
—use of independent judgment, decisiveness, and the taking of effective action.

So let us tell you how we really feel.

Actually, skip that. We **already told** you how we really feel about the DFARS business systems environment. Instead, let's just talk about the current DoD IG audit report and what it might tell us about that same environment.

The DoD IG audit report, as noted in the opening paragraph, reported results from the evaluation of 18 DCMA Contracting Officer actions. Seventeen of the 18 actions reviewed "did not comply with one or more DFARS requirements involving reported estimating system deficiencies." Seventeen out of 18 is quite a high percentage of failures, actually. What went wrong?

According to the DoD IG, DCMA Contracting Officers did not issue timely initial determinations and final determinations on the reported estimating system deficiencies. And they failed to obtain or adequately evaluate contractor responses to those determinations. And they failed to withhold payments "to protect the Government's interests" as they were required to do.

The IG started with eighteen DCAA audit reports implicating the adequacy of a contractor's estimating system. Each of those audit reports asserted one or more "significant deficiencies" in the estimating system. Upon receipt of an audit report addressing a contractor's estimating system, the cognizant Contracting Officer must issue an initial determination within 10 days (which is not required by any DFARS language, but is instead required by the DFARS Procedures, Guidance and Information ("PGI") at 215.407-5-70(e)(2)(ii)(A)). The contractor has 30 days to respond to that initial determination. Upon receipt of the contractor's response, the cognizant CO must issue a final determination on system adequacy within 30 days, which is (again) a PGI requirement and not a DFARS requirement. If the system is disapproved or found to be inadequate, the cognizant CO must begin withholding of a certain percentage of payments due the contractor, until the significant deficiencies are remedied. According to the IG, in 17 of the 18 audit reports reviewed, the cognizant Contracting Officer failed to take one or more of those required steps.

According to the DoD IG—

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In 12 audits, the CO failed to issue the initial determination within 10 days

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In 9 audits, the CO "failed to obtain" the contractor's response within 30 days. We'll guess that means that the contractor failed to submit the response within 30 days, which makes it arguable where the fault lies.

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In 14 audits, the CO failed to issue the final determination within 30 days after receipt of the contractor's response (assuming the contractor actually submitted a response).

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In 5 audits, the CO found the contractor's estimating system to be inadequate, but failed to withhold a percentage of payments.

Let's start by talking about that first bullet – the requirement that Contracting Officers must issue the initial determination within 10 days of receipt of the DCAA audit report. How realistic is that deadline? Before you answer, consider that DCMA Instruction 133 ("Estimating System Review") requires that COs must obtain DCMA management's "review and approval" of the initial determination letter before it goes out. Thus, not only does the cognizant Contracting Officer need to review the DCAA audit report and evaluate it for usefulness, the CO must also write the initial determination and then submit it up the food chain for review. The reviewer must be in the office (and not on TDY or leave), and then must review the audit report and the initial determination. If there are any questions, the parties must discuss them; and it's quite possible that the CO will have to revise and resubmit that initial determination in order to have it successfully approved. And only then will the initial determination be issued to the contractor.

All that activity has to take place in 10 days.

So if the cognizant CO can't make that deadline, is that the fault of the CO? Or, perhaps, is it the fault of the policy? Perhaps the policy has established an unrealistic deadline that cannot be met?

And the policy doesn't seem to take into account the quality of the initial DCAA audit report. Going back to the promulgation of the Business System Administration clause in 2012, it was clear (at the time) that the initial audit report had to be clear and complete, and granular enough for the contractor to understand the asserted deficiencies and how to correct them. (Plus the CO had to be able to understand the findings in order to evaluate them.) The current policy does not take into account the well-known and publicly documented fact that DCAA audit reports generally suffer from shortcomings in the GAGAS compliance and quality departments.

Thus, if the cognizant CO can't make the 10-day deadline, is that his or her fault? Or, perhaps, is it the fault of the initial DCAA audit report, which may be of such poor quality that neither the CO nor the contractor knows what to do with it? That's a real-life problem that the policy blithely ignores.

In a similar vein, if 50 percent of contractors don't submit their response to the initial determination within 30 days, does that mean they don't care enough to make it a priority? Or, perhaps, are they scratching their heads trying to figure out what the heck the problems actually are?

The DoD IG audit report fails to address the most prominent problem in the business system oversight and administration regime, which is that DCAA's definition of "significant deficiency" doesn't match the regulatory definition of "significant deficiency". Thus, when DCAA asserts that a contractor's estimating system has one or more significant deficiencies, it is (intentionally?) speaking a different language—one that requires the Contracting Officer to translate into DFARS. This takes time and it takes training and it takes expertise; too many COs lack one or more of those necessary attributes. Consequently, when the average CO sees "significant deficiency" in a DCAA audit report, that deficiency tends to show up—word for word—in the initial business system determination, whether or not warranted by the language of the DFARS definition and system adequacy criteria themselves. *This is a problem.* It is in our view the most prominent problem that leads to the majority of the disputes between government and contractor. The problem is not going to be solved until both the Inspector General and the DCMA leadership acknowledge it, and until they call out DCAA on the rogue definition.

In the meantime, cognizant Contracting Officers are faced with a choice: either overrule DCAA on the basis that their *sui generis* definition of "significant deficiency" is an impermissible deviation from regulatory requirements (which runs the risk of an IG Hotline call), or else ignore the problem and move forward in an attempt to meet the arbitrary policy deadline. In our experience, the vast majority of COs choose the latter course of action.

Similarly, when a contractor response to the initial business system determination is received, should a reasonable person expect the average CO to accomplish the following actions within 30 days?

… evaluat[e] the sufficiency of the contractor's response to the initial determination in order to determine whether the contractor addressed all significant deficiencies. If the contractor included a corrective action plan in its response, the contracting officer is required to verify the proposed actions and the milestones to eliminate the deficiencies in consultation with the auditor.

According to the DoD IG, in six of the 18 cases reviewed, the CO's took an average of 157 days—five full months—to evaluate the contractors' responses. You know what? That doesn't seem especially unreasonable to us. But it did to the IG.

With respect to issuance of final determinations, eight of the 18 were issued late—taking an average of 236 days (nearly eight months) instead of the policy-required 30 days. Is that the fault of the Contracting Officers, or something else? What was the root cause or causes of the delays? We don't know the answer to that question because the DoD IG stopped when it reported data and failed to meaningfully analyze that data.

Similarly, in five of the 18 cases, the contractors' estimating systems were found to be inadequate, but the COs didn't start payment withholdings. Again, the DoD IG didn't delve into the causes of the failure to follow regulatory requirements, so we don't know if the root cause is overwork, poor guidance (as in, the COs didn't know *how* to implement payment withholdings), or what. Maybe the COs felt bad for the poor contractors, or maybe the COs were simply too lazy to follow direction. We don't know, because the DoD IG didn't deign to dig into the problem.

In responding to the DoD IG's findings, the Director, DCMA, noted that some situations are "complex," and may therefore "require additional time" to fully disposition, regardless of policy requirements. In addition, the DCMA Director noted that payment withholds, while mandatory for disapproved or inadequate systems, "are not the only remedy contracting officers can use to incentivize contractors to take corrective action on deficient business systems." Other potential remedies include "reduction in contract financing, suspension of progress payments, or revocation of the Government's assumption of risk for loss of property." In other words, in some cases it may not be the best course of action to implement payment withholds (despite the regulatory requirement to do so), especially if another incentive is more readily available.

The DCMA Director noted that DCMA has developed the "Contractor Business System Determination Timeline Tracking Tool" to help ensure that Contracting Officers make timely determinations. In addition, and "to further assure compliance," DCMA has "been working on development of a performance indicator that measures the timeliness of business system determinations." According to the new performance metric, determinations are being issued on time (as defined by policy) 68 percent of the time.

Need we point out that DCMA has created yet another process, database, and performance metric to overlay on top of all the other processes, databases, and metrics? Is this progress or, perhaps, evidence of an encroaching bureaucracy? Or is it perhaps evidence of the number of bandaids necessary to stop the bleeding of a broken system, one that was ill conceived and implemented despite the pleas of those who foresaw the problems that quickly manifested themselves?

Finally, the Director, DCMA, noted that at the time, there were 132 contractor business systems that had been disapproved and/or declared to be inadequate. The breakdown of inadequate/disapproved business systems is as follows—

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Accounting 42

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Estimating 24

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Earned Value 9

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MMAS 1

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Property 35

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Purchasing 21

Those deficient systems had generated $180.9 million in payment withholds. In other words, to date contractors have been assessed nearly $200 million in penalties for failing to pass their business system audits.

We told the DAR Council this was a bad idea. We were certainly not alone in that regard. Many others cautioned concern and pleaded for restraint. The DAR Council would have none of that. Council members dismissed public input—and our input in particular—with a wave of the hand: "*The need to have effective oversight mechanisms is unrelated to resources.*" And so here we are, years later, dealing with the fallout from that callous and cavalier disregard for the limitations of real world by bureaucrats who, it seems, couldn't have cared less.

We predict the DoD Inspector General will continue to issue reports blaming DCMA Contracting Officers for failing to execute their responsibilities as delineated by regulation and policy. We predict the DCMA Director will continue to promise to do better next time. Meanwhile, contractors have lost nearly $200 million—funds that could have gone to hiring extra employees or investing in additional IR&D efforts—because they failed their business system audits.

Many of us knew this would be the result of the DFARS business system administration

clauses and oversight protocols. We saw this trainwreck coming from a long way away. And yet, we couldn't get off the rails. None of us could.

Don't blame the DCMA Contracting Officers for this mess.

Blame the DAR Council. Blame Congress. Blame DCAA.

Blame yourselves for failing to submit comments to the rules and for failing to have the DAR Council held accountable for the high-handed actions of the members.

There's plenty of blame to go around.