Have you been following the messy trail left by Dr. Ashton Carter's drive for "affordability" in defense programs? If you answered, "no" to that question, you must not have been reading our articles on the topic.

Let's start **here** , in September 2010, wherein we reported that Dr. Carter (USD, AT&L) had issued a 17-page memo laying out Pentagon tactics to be used to drive down the cost of defense programs—which he asserted would lead to huge savings. In that article we reported that Dr. Carter directed that his DOD contracting officers—

Use Forward Pricing Rate Recommendations (FPRRs) in lieu of Forward Pricing Rate Agreements (FPRAs). In particular, 'where DCAA has completed an audit of a particular contractor's rates, DCMA shall adopt the DCAA recommended rates as the Department's position with regard to those rates.'

We opined at the time that, "The substitution of DCAA audit findings for DCMA discretion and negotiation ability strikes us as a spectacularly bad idea…."

In January 2011, we **followed-up** with an article about Shay Assad's Memo clarifying the roles and responsibilities of DCMA and DCAA. As part of the memo, Mr. Assad (Director, DPAP) told DOD contracting officers that—

In those cases where DCAA has completed an audit of a particular contractor's rates, DCMA shall adopt the DCAA recommended rates as the Department's FPRR position. … This policy supports the goal of better aligning the work of the two agencies by ensuring a single department rate position is provided to DCMA/DCAA customers at all times.

Naturally we had a problem with that direction. Although we grant you that DCAA recently changed its mission statement to acknowledge the *de facto* truth that the taxpayers of the United States of America are its ultimate customers, the practical reality is that those who issued audit requests to the audit agency are its real customers—chief among those the very same DOD contracting officers whom Mr. Assad was concerned may not have been fully aligned with DCAA's "rate position". Suffice to say, our view is that Mr. Assad's direction that

DCAA's audit position "shall" be adopted by the cognizant DCMA Administrative Contracting Officer (ACO) as the official DOD position was (and still is) a cure in search of a disease.

We're not the only ones who think that way either. If you check out **this article** on recent testimony before the Senate's HSGA's ad hoc Committee on Contracting Oversight, you'll see that we pointed attention to testimony from Sandy Hoe, an Inside-the-Beltway government contracts attorney from the respected firm McKenna, Long & Aldridge (testifying on behalf of the U.S. Chamber of Commerce). Mr. Hoe testified that—

The January 4 DPAP memorandum indicates that contracting officers will apparently now issue final [Forward Pricing Recommended] rates as determined by DCAA without the contractor having the opportunity to demonstrate to the Administrative Contracting Officer ('ACO') why such rates may be unreasonable. Unless the contractor elects to contest the rates by submitting a claim under the Contract Disputes Act ('CDA'), it will, at a minimum, lose the ability to recoup the lost amounts allocated to fixed price contracts based upon the DCAA-determined rates. This approach would be unfair to contractors and directly conflict with established regulatory law.

Moreover, in the Summer 2010 edition of the ABA's Public Contract Law Journal, John Pachter (Partner, Smith Pachter McWhorter PLC) wrote an article entitled, "The Incredible Shrinking Contracting Officer." In that article, asserted that—

A number of factors have emerged that tend to marginalize the Contracting Officer as other players occupy more of the stage and clamor for action. … Contracting Officers must confront the notion, expressed in various ways, that auditors' advice is presumptively correct. Rather than being allowed to rely on the advice of auditors and then make a considered decision as the FAR contemplates, Contracting Officers now have the burden of justifying their decisions when they differ from those of auditors. The result is pressure on Contracting Officers to acquiesce in the recommendations of auditors. … Accordingly, the underlying message to Contracting Officers … is, 'Go easy on yourself. You can avoid having to justify your decisions to higher authorities if you simply accept the auditor's recommendations in the first place.'

(Internal footnotes omitted.)

With all that background in mind, we were very interested in a January memo from Ronald

Youngs, Acting Executive Director, Contracts, DCMA, implementing Mr. Assad's direction. The memo, entitled Information Memorandum 11-108, "Forward Pricing Rate Recommendations (INFORMATION)," can be found **here** . It said (in part)—

Effective immediately our policy regarding FPRR development is amended as follows.

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When a contractor submits a FPRP, the ACO shall review the proposal as soon as possible and may issue a new FPRR. When developing the FPRR the ACO shall follow the FPRR documentation and internal review requirements set forth in paragraph 6 of the [DCMA] Forward Pricing Rates Instruction.

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After issuing the FPRR, the ACO shall inform DCAA of any new information that may impact the rates or the FPRP audit.

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Upon ACO receipt of the audit report, the DCAA recommended rates shall be reviewed by the ACO within 5 working days and the DCAA recommended rates shall be issued immediately thereafter as the Government's recommended position.

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If the FPRP contains unsupported costs, the ACO shall work with DCAA to obtain the required supporting data from the contractor. The ACO shall opine on any unsupported cost elements in the audit report and shall include that opinion in the FPRR memorandum that accompanies the issuance of the DCAA recommended rates.

Importantly, the memo also states—

In those rare circumstances when the ACO notes significant deficiencies in the audit report

which render the report untenable, the ACO shall immediately contact DCAA to coordinate a revision to the recommended rates. If the issues cannot be resolved at the local level, the issues shall be elevated for a Contract Management Board of Review following the FPRR documentation and internal review requirements set forth in paragraph 6 of the Forward Pricing Rates Instruction.

That, dear readers, is what we in the business call “a loophole.” It provides an ACO with an option other than simply accepting DCAA’s audit results without question. Although long and painful, the Board of Review process may offer contractors a slight chance that their voice, calling attention to “deficiencies” in the DCAA audit report, might just be heard.

Sure, we agree with your objection(s) that: (1) it’s unlikely your ACO is going to relish the idea of disagreeing with DCAA and submitting that disagreement to a “Board of Review” for adjudication, (2) it’s unlikely that the “Board of Review” is going to want to approve a public disagreement with DCAA, and (3) it’s unlikely that Shay Assad and/or Pat Fitzgerald is going to accept that “Board of Review” adjudication, regardless of the merits of the decision. (Actually, it’s worse than that, since there will be *multiple* “Boards of Review” at various levels of the DCMA hierarchy.) So, yes, our “loophole” is more like the eye of a needle.

But it exists!

This situation reminds us of the **Concordat of Bologna** , that 1516 agreement between France’s King Francis I and Pope Leo X. As
this online article
explains—

In 1516 the Concordat of Bologna confirmed François I's right to make appointments to benefices, but gave the Pope the right to veto unqualified candidates and to collect a year's revenue from each post. Although this gave the Pope many rights, it gave the king more. The king of France had enormous powers to dispose of the Church's wealth and he could (and did) use the offices of bishops, abbots, etc. to provide sinecures for his faithful followers. This also meant that lords of the church were usually quite worldly people, often quite unfit for their offices if spirituality or theological learning is considered a requirement. (The Pope's veto was hardly ever exercised.)

So think of DCAA as the French King, and DCMA as the Pope, and the "Board of Review" process as the Pope exercising his official right to veto unqualified appointments. Maybe we're overreaching, but we see some resemblance.

But maybe there's another, more ancient parallel to discuss. In A Dictionary of Greek and Roman Antiquities, Volume 2 ,
Sir William Smith wrote in 1891—

… the king has no power to pardon; that pardon resides with the people, the ultimate sovereign. … though the provocatio existed in the regal period, yet the citizens have no standing right of appeal against the king like that secured by the Lex Valeria. The King Tullus Hostilius *allows* the appeal; and the fact that the appeal might not have been so allowed, and was a matter not of law but of constitutional usage, is shown by the similar freedom of the early dictatorship from the necessity of allowing the appeal. The limitations of the king's power came here, as elsewhere, not from the force of law, but from the necessity of observing formalities once established.

(Internal citations omitted; emphasis in original.)

According to Sir William Smith, even though the Roman monarch permitted an appeal "from the necessity of observing formalities once established," the last king "had broken through the constitutional usages of the monarchy"—which led inexorably to a revolution that established the Roman republic. Now we're not saying that DOD is heading for a regime change … but we did note a parallel between the king *allowing* an appeal and the DCMA Boards of Review process.

Okay, our journey from ancient Rome to sixteenth century France to the 2011 bureaucratic proclamations of the Department of Defense is now complete. We hope you enjoyed the journey.