We are holding in our hands an article published May 15, 2012 in Bloomberg BNA's Federal Contracts Report™. Written by attorneys of the august firm of McKenna, Long & Aldridge, it has the happy-making title of "DCAA Malpractice: Recovery of Damages."

This topic has been much on our minds as of late. As we've **asserted before**, contractors are giving up on the idea that they can actually negotiate a reasonable resolution to some of their pesky contract disputes—notwithstanding the FAR's clear direction to Contracting Officers that they are supposed to give negotiation their best shot. Recognizing that too many COs simply rubber-stamp DCAA's audit findings, contractors are becoming resigned to the fact that they will have to litigate in order to get a fair, impartial hearing on the merits of their positions. As we wrote (link above)—

… we believe that a tsunami of litigation is in the works. We base that impression not on any inside information, but simply on what we've heard around the watercooler. We think the Top 10 defense contractors are girding their loins for some slingshot work, aimed at the giant Federal government—and we expect to have a lot to write about when the stones start flying. …

Here's the bottom-line, in our view. If you threaten a contractor with negative impacts to its current programs, you have leverage and it will likely try very hard to resolve the issue. If you threaten a contractor with nickel-and-dime cost disallowances, it will likely settle—because doing so is cheaper than litigating. But if you threaten a contractor with multi-million dollar cost disallowances related to ancient issues that have lain unresolved for years (or perhaps even decades)—issues that have nothing to do with its current operations—then it will likely lawyer-up and drag your government ass into court. Because you have left it no other alternative.

And indeed, that's what seems to be happening, as we reported in **this article** . In addition, Law360 **recently reported** that Raytheon has filed suit at the Court of Federal Claims, "contesting $90 million in disallowed costs" related to the company's development of its active electronically scanned array (AESA) radar, which is currently used in F/A-18 Super Hornet Navy fighters. We don't have any more details about that lawsuit to share with you, mostly because the rest of the story lies behind Law360's paywall (and we can't afford a subscription). But our understanding is that more suits, from more contractors, are in process.

Indeed, we expect to see a deluge of similar suits, each contesting some aspect of a DCAA audit finding that was (allegedly) rubber-stamped by a Contracting Officer and thrown over the transom for attorneys to litigate rather than being the subject of a negotiation aimed at reaching an equitable resolution.

But that's not what's got our dander up and what got us thinking that somebody, somewhere needs to sue the bejeezus out of DCAA. No.

Over at Quimba Software, their saga of audit failure and its sad aftermath continues. As does the **Quimba blog** reporting that sad saga. For those not following the blog and its documentation of how inequitable "the system" can be to a small business that doesn't appreciate the complexities of how "the system" works, let us just say that Quimba's complaint to the DOD Inspector General does not appear to be progressing well. In fact, its progress (or lack thereof) is reminiscent of other actions Quimba has taken—or tried to take.

But Quimba's documentary of its attempts to work the maze of defense contracting—and the dead-ends that it reaches at each turn—is not what's cheesing us off today. That's not why we're studying the article on DCAA malfeasance. No.

What's really frosted our biscuits today is **this decision** over at ASBCA in the matter of Lockheed Martin Aeronautics Company. (ASBCA No. 56547, January 22, 2013.)

The case concerns a Contracting Officer Final Decision (COFD), issued May, 2008, that Lockheed Martin had "defectively priced" its proposal for the Common Configuration

Implementation Program (CCIP), because DCAA alleged that LM Aero had failed to disclose "significantly lower prices" for the Modular Mission Computer (MMC), which was supplied via a subcontract with Raytheon. The CCIP was a program to retrofit U.S. Air Force F-16 fighters. LM Aero submitted and negotiated its USAF CCIP production prime contract proposal during 1998 and 1999. The contract price was finalized in July 1999. During this time, Raytheon was negotiating with LM Aero on the "Bridge Contract". DCAA alleged that LM Aero failed to update its cost or pricing data on the production contract based on its negotiations for the Bridge Contract. The CO demanded the LM Aero cough-up $14.58 Million (plus interest). LM Aero declined and appealed the COFD.

DCAA issued its post-award audit report, alleging defective pricing in September 2002. So the COFD was just a hair under six years after the audit report was issued. Consequently, LM Aero did not assert that the CDA Statute of Limitations had passed (to our knowledge, anyway). But let's note here that we are discussing as 2013 ASBCA decision about a 2008 COFD about negotiations that had taken place a full decade before that.

And people wonder if our system is broken.

Anyway, the bottom-line is that LM Aero won the case. Judge Peacock, writing for the Board, found that "any nondisclosure of the Bridge prices did not contribute to an overstatement of the CCIP prices." Thus, LM Aero's appeal was sustained. The decision might be appealed, of course. But right now LM Aero gets to celebrate a victory

So what's chapping our britches? Just this: ***the case should never have been litigated***.

According to the Statement of Facts in the decision, the original DCAA audit report confused the pricing negotiated between LM Aero and Raytheon for the MMC 3000 system—which was a fully mature production unit—with the pricing negotiated for the MMC 5000 system—which was in development and intended to supply LM Aero's Engineering and Manufacturing Development (EMD) program. In addition, the DCAA auditors attributed non-recurring engineering development costs to the recurring costs of production, thus inflating the alleged price difference even more.

The two subcontracts had negotiated price points based on volume. Judge Peacock found that

the DCAA auditors had used an inappropriate volume price point that also inflated the price difference.

In other words, the DCAA "post-award" audit was a colossal screw-up—an example of professional malpractice in which every aspect seemed designed to increase the amount of costs alleged to have been "defectively priced" rather than to reach an accurate, "apples-to-apples" comparison between the disclosed and negotiated prices of the MMCs.

But don't take our word for it. Let's quote Judge Peacock—

If the original price adjustment set forth in the post-award audit and final decision were recalculated by changing only the MMC 5000 system price ($382,868), the government's recommended price adjustment would have been $3,603,962 rather than the initially claimed total of approximately $14,982,578.

The government's auditor conceded at the hearing that the price of MMC systems is very sensitive to, and significantly impacted by, the AMDR [Average Monthly Delivery Rate] and a valid comparison of prices between the Bridge and MRC subcontracts requires that the AMDR be considered. If the price adjustment calculations in the post-award audit and final decision were revised using the Bridge price for an MMC 5000 system shipset ($382,868) at a 10-15 AMDR and comparing it to the proposed and lower MRC price of an MMC 5000 system shipset in the 10-15 AMDR range ($380,220) ***the entire recommended price adjustment would be eliminated for both years*** .

[Emphasis added. Internal citations omitted.]

In other words, had the DCAA auditor done a decent job, there would have been zero questioned costs. The Recommended Price Adjustment (RPA) would be zero. And the Air Force's Revised RPA (RRPA)—in which it jettisoned the auditor's analysis and the CO's findings—would also have been zero.

Yes, that's right. Realizing the fatal flaws in the auditor's analysis, the Air Force attorneys—in a show of adversarial chutzpah, if not actually an abuse of the trial process and their positions as officers of the court—came up with *their own* damage theories and calculations of quantum. The Air Force RRPA theories did not impress Judge Peacock, who wrote—

There is no evidence in the record that the Air Force's RRPA and/or proposed decrement were reviewed, analyzed, or approved by, negotiators or the CO prior to its presentation in the AF cross-motion, and its assumed decrement is based solely on the above-described price reduction between the first and second period of the MRC in AMDR 4-9 range. *It is otherwise unsupported by documents or testimony in the record. The post-award auditor (the only auditor who examined the RRPA after the motion was filed) disclaimed any theoretical justification for the calculation, admitting at trial that his calculations were for the purpose of 'trying to prepare something for the trial attorney' and not based on new information or his own independent judgment. The auditor did not discuss the RRPA with his supervisors and no supplemental audit report was issued.*
…

There is nothing in the record that post-trial RRPAs were endorsed by government auditors, negotiators and/or the CO. To the limited extent the calculations and assumptions underlying the post-trial revisions can be understood and analyzed without explanatory and supporting testimony, they appear to suffer from the same or similar conceptual problems and deficiencies discussed above. …

[Emphasis added. Internal citations omitted.]

So not only did the DCAA auditors and the Contracting Officer put LM Aero into the position of having to litigate something that never should have been an issue in the first place, but the Air Force attorneys delayed and exacerbated the litigation by introducing their own flawed damage theories, rather than admit the Government was wrong and had suffered no real damage, and asking the Judge to sustain the appeal. Nice job, folks.

And *that's* why we're pissed-off today.

The litigation costs forced upon LM Aero by the flawed DCAA audit, which was rubbed-stamped by the CO and formed the basis of a $14.58 Million (plus interest) payment demand, are damages. Damages might also include the burdened cost of the internal resources devoted to the litigation. Those damages stem from DCAA's negligence and from the negligent review by the CO. We would *love* to see LM Aero sue DCAA and/or DCMA for the damages caused by their negligence.

If LM Aero sued for damages caused by the negligence of its government oversight officials, it wouldn't be the first contractor to do so. See *General Dynamics Corp. v. United States*, 139 F.3d 1280, (9th Circuit, 1998).

But should LM Aero choose to follow in GD's footsteps, what would its legal theory be for entitlement? That's where we get back to the May 2012 FCR article by Tom Lemmer, Phil Seckman, and Joe Martinez. They wrote—

A DCAA failure to comply with GAGAS is a breach of professional duty, and constitutes malpractice, which creates opportunities for contractors to protect their interests. A Contract Disputes Act (CDA) litigation to overturn a decision based on a negligent audit is the move obvious example. Recovery under the CDA, however, often does not make the contractor whole from the injuries that a negligent audit can cause. … Fortunately, contractors may recover for these injuries caused by DCAA malpractice by suing the United States under the Federal Tort Claims Act (FTCA) for DCAA's negligent acts. …

In order to establish entitlement under tort, contractors must demonstrate that, as a matter of law, the DCAA owes a duty to the contractor to audit the contractor in accordance with the applicable professional standards. Determining whether DCAA owes a duty to a contractor will depend upon the state law where the DCAA negligence occurred. … In the *General Dynamics* case, the district court, applying California law, held that the DCAA owed a duty to General Dynamics because the audit was intended to have an impact on General Dynamics, and it was reasonably foreseeable that a negligently prepared audit would injure General Dynamics.

[Internal citations omitted.]

Most readers would agree with the assertion that, in today's audit environment; DCAA auditors too often forsake objectivity in its rush to "protect the taxpayers" by generating questioned costs. Most readers would agree with the assertion that, in today's oversight environment, Contracting Officers too often fail to exercise independent judgment and instead rubber-stamp DCAA's audit findings. As the attorneys at MLA wrote, "COs do not feel empowered to exercise the discretion and business judgment granted to them under the FAR. … The shift in authority [toward DCAA] is all the more worrisome because DCAA's ability to meet its professional obligations repeatedly has been found lacking."

As a result of the foregoing situation, contractors are being forced to litigate government claims that are clearly not meritorious. The LM Aero ASBCA case is a recent example of this trend. That the Air Force attorneys continued to litigate their case in the face of the obvious flaws in their position does not excuse the initial failures of DCAA and DCMA.

Sooner or later, a contractor is going to get fed up with the situation and sue DCAA for malpractice under the FTCA. We suspect it will be sooner, rather than later. And LM Aero would seem to have a strong case, should they decide to go in that direction. But if it's not LM Aero, it will be somebody else.