

## CDA Statute of Limitations: The Path Forward

Written by Nick Sanders  
Thursday, 20 June 2013 00:00

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Remember that time we told you about [some conversations](#) with a DCAA auditor? We told you “the story continues,” and indeed it has. Over the past year we have continued to assist our client in continuing to support the continuing DCAA audit of its incurred costs, submitted a very, very long time ago. The reaudit of the previously performed audit has largely wrapped-up, though management review comments have led to a reaudit of the previously performed reaudit of the previously performed audit.

Truly, it is no wonder that DCAA now takes, on average, nearly four years to complete a single incurred cost audit.

But we are coming to the conclusion that DCAA and DCMA have come to the conclusion that they cannot win on disallowances of contractor costs, where the Contracting Officer Final Decision is issued more than six years after the submission of the contractor’s proposal to establish final billing rates.

Now, we believe it’s true (as we [told you](#)) that DCAA has implemented a policy to continue audits of submissions that are older than six years—especially on smaller contractors—because the agency believes that those smaller contractors may be ignorant of the recent legal decisions that have tended, generally, to strictly enforce the six-year timeclock. But we are learning that the agency strategy can be overturned, simply by the contractor stating its intention to use the untimeliness of the audit as an affirmative defense (or jurisdictional argument) in litigation. Apparently, the mere mention of the CDA SoL may be sufficient to get the DCAA auditor to stop—or perhaps even cancel—the audit.

That last bit isn’t completely definitive, but that’s what we’re hearing and we have no evidence that it’s not working. We’ll let you know how it goes, as we gain experience with this strategy. So stay tuned.

We are also learning that DCAA is desperately trying to beat the CDA SoL timeclock and support DCMA Contracting Officer rate finalization efforts. Where audits cannot be completed in time, DCAA is issuing Memos in lieu of audit reports. Those Memos are not GAGAS-compliant conclusions.

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One minion recently reported to us that the Memos will be based on “average questioned issues in audits for that year.” The minion opined that the resulting recommended decrements would “sound good” but would be “arbitrary,” and not be based on evidential matter. DCAA believes it can get away with such deficient findings because the Memos are not expressing conclusions and, accordingly, need not be compliant with GAGAS.

For those who are members of this site, you already have access to the DCMA training slides we posted. Those training slides (dated April, 2013) noted that DCAA had told DCMA that there were some 7,000 Incurred Cost Proposals for years 2008 and earlier that were “unaudited and at risk of going beyond a valid claim date.” The training slides also stated—

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No rates will be established without a DCAA memo or audit report

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If DCAA provides a decrement for consideration in a memo, a one page or less PNO/PNM discussing the basis for the ACO’s decision shall be placed in the incurred cost file

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Direct Costs: ACOs will not apply the DCAA offered decrement to direct costs unless DCAA has specific documentation relating to direct costs or DCAA issues a Form 1 for ACO disposition

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The rate year closeout file will consist of the letter from the ACO conveying the final rates and the DCAA memo. A one page PNO/PNM will be included if the ACO establishes the rates using a DCAA memo and settles at other than at the proposed rates

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The ACO will use the risk specific decrement information to settle rates where possible or issue unilateral rates. *ACOs shall accept the rates as proposed if there is no known risk or the contractor does not accept unilateral rates and the ACO determines the decrement is not significant and/or cannot be defended.*

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So if you are a contractor with an proposal to establish final billing rates that is older than six years, or coming up on that six year due date, you should expect your DCAA auditors to issue a Memo to the ACO recommending a decrement based on prior questioned cost history. (Note: DCAA does not appear to be adjusting for sustention rates.) The ACO is likely to use that Memo in order to establish the final billing rates unilaterally—*i.e.*, without negotiation and without the contractor's concurrence.

The good news is that you don't have to accept those unilateral rates, particularly if you can show the DCAA Memo was based on erroneously calculated decrement factors, or used decrement factors based on non-sustained questioned costs. If you can put doubt into your ACO's mind that the decrement factors cannot be defended in court, then you stand a very good chance of having your proposed final rates be accepted by the ACO.

This is really, really good news for contractors.

The only thing missing from this acceptance of the situation by DCMA and DCAA is the guidance to DCAA FAO Managers that tells them to cancel audits as the six-year deadline approaches and they cannot issue a timely audit report. As we write this, DCAA continues to audit, even after the six-year timeclock expires. We suspect that automaton-like approach will change shortly.