As we see it, there are two types of people who help contractors comply with various FAR and CAS compliance challenges.

The first type is comprised of those folks who started in Contracts or perhaps even Law. They understand the legal ramifications of a contract: offer, acceptance, consideration, etc. They have read several Cibinic & Nash books, and they might even subscribe to the newsletter. The have read Restatement (2nd) of Contracts and have a good familiarity with the Uniform Commercial Code. They understand the legal ramifications of new judicial decisions, including when a decision is precedential and when it is not. But they tend to struggle with the accounting aspects of compliance. They don't really like cost accounting. They don't understand the nuances of revenue recognition. The interplay between balance sheet and income/expense statement is lost on them. They understand the legal decisions interpreting the Cost Accounting Standards – and they can probably quote from them – but how the Standards work in real life, in an accounting system or ERP system, is a mystery.

They know the theory cold, but the practical application is largely an unknown realm.

The second type of compliance people are the accountants. They are numbers people, at home inside complex spreadsheets populated with data pulled from detailed queries. Maybe they started out as auditors, at DCAA or in a public accounting firm. Maybe they started out as junior analysts in a contractor's accounting department and graduated into audit liaison positions. At some point, they either prepared a final billing rate proposal or audited one. They understand the FAR Cost Principles cold. They've read the DCAA Contract Audit Manual cover-to-cover; they have a good familiarity with the audit programs as well as the latest MRD's. They may not understand the legal decisions interpreting CAS, but they understand how the accounting system works and can demonstrate compliance. They understand the contractor's financial statements and how cost accounting works. They have a firm grasp of details within the realm of audit and accounting, but legal decisions are far outside their purview. They take direction from above, trusting that the direction is the result of consultation with legal counsel.

They know the practical application of GAAP and FAR and CAS as those rules are actually applied in day-to-day accounting transactions, but the legal theories and judicial interpretations are largely an unknown realm.

There are a few people who straddle both worlds (Tom Lemmer of Mckenna Long & Aldridge, and Lou Rosen, formerly of Ernst & Young, come to mind). But they are few and far between.

This is a problem.

In order to be a good government contract compliance manager, you have to actually straddle both worlds. You have to have a solid grasp of the accounting transactions and the rules of GAAP, FAR and CAS. You have to understand the CAM and read the latest MRDs. In addition, you have to keep up on legal decisions that affect government contract compliance. You have to read ASBCA decisions and Court of Federal Claims decisions, and you have to keep an ear to the ground to listen for rumblings of how the Federal Circuit may have affirmed or overturned those decisions on appeal. You don't have to be a lawyer but you have to be able to read through legal decisions – or at least subscribe to newsletters and bulletins and client alerts wherein lawyers translate those decisions into laypersons' terms. You have to have one foot in several different camps: you have to be a little bit lawyer and a little bit accountant and a little bit auditor.

Successful compliance folks figure out how to pull-off that balancing trick. The unsuccessful ones focus on, and specialize in, one domain while remaining ignorant of the others. They may be the world's greatest accountants or the world's greatest internal auditors, but if they don't at least dabble in the legal world, they don't have all the pieces they need to put together a solid compliance system and defend that system to external auditors. Whether you are a DCAA auditor or a DCMA Contracting Officer or a contractor audit liaison, financial analyst or accountant, if all you do is worry about the accounting, you are missing a big piece of the puzzle.

Chances are, if you are ignoring the legal decisions, you are missing *the most important aspect* of government contract cost accounting and compliance.

It's an unalterable fact of life that the FAR and CAS are just words, subject to multiple interpretations and disputes – until a judge or group of judges agree on a specific interpretation and meaning of those words, and that interpretation is affirmed on appeal. That interpretation, as "blessed" by an Appellate Court, creates a "bright line" that the rest of us use to establish our compliance baselines. Until we get a precedential legal decision or an affirmed decision, all we have is speculation about what the words mean. And your speculation is pretty much just as

good as anybody else's speculation.

Since we are all just guessing and speculating and making individual interpretations of what the rules require, we are likely to disagree with each other. For instance, DCAA is likely to base its audit findings and Form 1 disallowances on its agency's interpretation of the words, which is probably not going to be super helpful to the average government contractor. DCMA Contracting Officers are going to follow their agency's direction and their Guidebook, which are both just another interpretation. Contractors are going to interpret things as permissively as possible, focusing on creating ambiguity, so as to maximize allowability and cost recovery. Everybody's got their interpretation of the words, and those interpretations vary. That's just what happens when there is no "bright line" and we all have to make it up as we go along.

Multiple interpretations and differing agendas lead to disputes. And while the FAR clearly says those disputes should be resolved without resorting to litigation whenever possible, the sad truth is that it rarely happens these days—or, at least, it happens a lot less frequently than it used to. Consequently, we have a lot of disputes that require a lot of attorneys and a lot of unallowable legal fees. DCMA is jammed with Contracting Officer Final Decisions and the Courts are jammed with contractor appeals thereof.

All because we don't have a "bright line" to guide us.

Which leads us, inexorably, to yet *another* discussion of the Contract Disputes Act's Statute of Limitations.

The CDA Statute of Limitations (SoL) has been a frequent topic of discussion on this website. It's been a frequent topic of discussion because the law is "evolving" and we still don't have a "bright line" to guide the contracting (and litigating) parties. Writing as a non-lawyer, we are still looking for clear guidance so that we can properly advise our clients. It still doesn't exist.

Some of the problem stems from differing opinions by the Judges of the Court of Federal Claims and the Judges of the ASBCA. Some of the problem stems from the fact that the Judges of the Court of Federal Claims don't have to follow each others' opinions as being precedential. Some of the problem stems from the fact that the Judges of the ASBCA don't have to follow each others' opinions as being precedential. Some of the problem stems from

the fact that the ASBCA Judges don't need to treat CoFC decisions as being precedential, and vice versa. Some of the problem stems from the fact that few CDA SoL cases have made it to the Court of Appeals.

There's plenty of blame to spread around but, regardless of who's at fault, the current situation is difficult to navigate.

A great example of the lack of "bright line" comes from comparing two ASBCA decisions.

The first case is one we've **written about before** : Raytheon Missile Systems, ASBCA No. 58011, issued in January, 2013. In that decision, Judge Menick dismissed the Government's claim for the impact of a CAS noncompliance as being "untimely and … therefore invalid." Judge Melnick found that "The events fixing liability should have been known when they occurred unless then can be reasonably found to have been either concealed or 'inherently unknowable' at that time." Notice that the Judge focused on the
events themselves
rather than on knowledge of damages. As we've written, we believe that is the proper interpretation of the FAR's definition of claim accrual. We agree with Judge Melnick's decision that "claim accrual does not turn upon what a party subjectively understood; it objectively turns on what facts are reasonably knowable."

Judge Melnick wrote –

Accrual of a contracting party's claim is not suspended until it performs an audit or other financial analysis to determine the amount of its damages. … Damages need not have actually been calculated for a claim to accrue. … The fact of an injury must simply be knowable. … The fact the government waited until 2006 to declare in an audit report that these earlier materials provided that notice is irrelevant. Delay by a contracting party assessing the information available to it does not suspend the accrual of its claim.

Based on that decision, as well as the decisions in two other Raytheon appeals (ASBCA Nos. 57576 and 57679, December, 2012), we thought the ASBCA was moving toward the kind of "bright line" guidance that the contracting parties could use in resolving disputes and potential disputes, without the need to resort to litigation. We were feeling pretty good about things.

Not so fast there, bucko.

ASBCA Judge McIlmail, ruling in the **appeals** of *Combat Support Associates* (ASBCA Nos. 58945 and 58946, October, 2014), kind of bent that nascent "bright line" back into an ebon opaqueness. Key findings of fact included the following –

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CSA submitted its FY 2006 proposal to establish final billing rates ("incurred cost submission" or "ICS") on August 30, 2007. Well, the ICS was actually submitted earlier than that, but on May 10, 2007, DCAA requested some additional information, including Schedule T. That revised Schedule T was submitted on May 20, 2007.

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However, on August 25, 2007, CSA submitted "revised Schedules A and B of its ICS." We don't know why and Judge McIlmail didn't say.

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Sometime after those dates, DCAA conducted its audit. We don't know when the audit started. But we do know that on June 17, 2013, the DCAA issued its audit report. About two months later, on August 23, 2013, the ACO issued two final decisions (COFDs) – "one demanding that appellant pay the government $332,167 in disallowed direct costs … and the other disallowing indirect costs and unilaterally determining appellant's indirect cost rates for FY 2006."

According to the Judge –

The ACO's payment demand consist[ed] of two categories of disallowed direct costs: (1) $308,889 in equipment costs, and (2) $23,278 in telephone and fax expenses. The ACO disallowed and demanded repayment of $164,008 of the equipment costs because [s/he] determined that appellant had failed to provide documentation that justified the purchase of Caterpillar equipment from Winner International Trading Company (Winner), as opposed to from whom the ACO identified as the sole authorized distributor of Caterpillar equipment in Kuwait in FY 2006, Mohamed Adulrahman Al-Bahar. The amount disallowed was the difference in price between the two suppliers. The ACO disallowed and demanded repayment of $144,881 of the equipment costs because it determined that appellant had failed to provide documentation that justified 'the selection of Volvo Motor Road Grader rather than the lowest bidder supplier'.

[Internal citations omitted.]

CSA Moved for Summary Judgment, based on the fact that the COFD was issued more than six years after submission of its ICS. As Judge McIlmail wrote, "Given the CDA's six-year limitation, to be timely, the government's 23 August 2013 claims must have accrued on or after 23 August 2007." The Judge ruled that the government's claims were timely, because "the supporting data related to those costs identified in the two (2) Government contracting officer final decisions dated August 23, 2013 was not provided to the auditors until after August 23, 2007" (which was the testimony of the DCAA Supervisory Auditor).

Judge McIlmail based his decision on the fact that the information in CSA's final billing rate proposal was insufficient to put the government on notice that CSA had incurred the costs that were eventually disallowed. He wrote –

Appellant replies that a contractor is not required to submit supporting data with an ICS. That misses the point. The issue raised by appellant's motion is when the government knew or should have known of its claims; not whether the ICS satisfied the requirements for an ICS. Upon the record currently before the Board, the government has established that it knew or had reason to know of its claims only after 23 August 2007, upon appellant's submission of the 'supporting data' from which the government learned, or had reason to learn, of its claims.

Well, now we seem to be back to square one.

Hey, we're not attorneys! Our thoughts and feelings and beliefs are worthless. You should ignore them! On the other hand, we're not practicing law here; we're writing a blog article – one that is supposed to express a point of view.

And our point of view is that this decision is a step backwards.

According to the logic in this decision, the government cannot know of an injury until a DCAA auditor requests some magic, unidentified and nonregulatory, "supporting documentation" and reviews it. Then and only then, does the CDA SoL clock start to tick. Based on this logic, the government can delay the clock from starting, simply by delaying the start of its audit. If the auditors never request supporting data – or never get around to reviewing it – then then the clock never starts to tick.

That position, in our layperson's mind, is ridiculous.

Regardless of our thoughts and feelings and beliefs about the decision, it does illustrate how different illustrious Judges of the same contract dispute forum reach different conclusions using different logic. And it does illustrate how frustrating it is to try to discern a "bright line" regarding when a claim accrues under the Contract Disputes Act. Because different Judges have different measuring sticks, the contracting parties are left in the dark, wondering when they can breathe easy because the CDA SoL has expired and the time for successful litigation has passed.

We need a bright line here and, so far, the contract disputes fora have failed to provide it—which is a shame, because the uncertainty leads to litigation, whereas knowledge certain would (presumably) lead to negotiated resolutions without the need to litigate.

Speaking as taxpayers first and as contract compliance practitioners second, *let's get this situation fixed, please.*