Government contractors must comply with the requirements of many upon many contract clauses. It's safe to say that the principle purpose of government contract compliance is to understand those requirements and to help the contractor adhere to them, and then demonstrate to the government auditors that the contractor has done so.

Two of the more important clauses are 52.215-2 ("Audit and Records-Negotiation") and 52.216-7 ("Allowable Cost and Payment"). If you are a contract compliance professional you should have basically memorized those clauses. They are that important.

Generally speaking, 52.215-2 (which is a mandatory clause for all negotiated contracts unless the contract is exempted by 15.209(b)) is what gives auditors access to contractor records. It's not unlimited access and you should understand the guardrails established by the clause. In addition, 52.216-7 (which is a mandatory clause for all cost-reimbursement contracts) establishes how billing rates are to be calculated, adjusted, and submitted for audit and finalization. It is also the clause that invokes the FAR Part 31 Cost Principles; without it contractors wouldn't really need to worry about allowable and unallowable costs.

Both clauses are fundamental and you should study them thoroughly if you have not yet done so.

We have discussed both clauses before. One of interesting aspects of 52.215-2 is that it grants auditor access but that access may be worthless to the auditors. What do we mean? Well, in **this ASBCA decision** from 2017, we discussed the happy result that DCAA had audit access but the government was prevented from asserting a claim based on the DCAA's audit findings, because the Contract Disputes Act (CDA) Statute of Limitations had been found to have passed before the contracting officer got around to asserting the claim.
*Oops!*

We wrote:

But what about that 52.215-2 audit clause that gives the government the right to audit contractor

costs up to three years after final payment? Sure. Absolutely correct. The clause requires that 'The Contractor *shall make available* at its office at all reasonable times the records, materials, and other evidence … for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in [FAR Subpart 4.7], or for any longer period required by statute or by other clauses of this contract.' (Emphasis added.) Thus, the contractor has a duty to make documents available for audit and the government has the right to audit those documents,
*but the government does not have the right to assert a claim*
with respect to any audit findings related to costs that were invoiced and paid more than six years before. If the contractor's final voucher doesn't contain any new direct costs—
*which it shouldn't*
—
*then the 52.215-2 audit right is essentially worthless*
—absent, perhaps, a claim of fraud.

So, in the case of Sparton deLeon Springs's appeal of the Contracting Officer's Final Decision (COFD), the government had moved too slowly to recoup any of the funds it believed had been insufficiently supported by the contractor. Sorry; not sorry.

More recently, the ASBCA dealt with a **similar case** that (largely) had a similar outcome.

Doubleshot, Inc., a small business, had at least four cost-type (or partially cost-type) contracts that were characterized as R&D contracts. The earliest of those contracts was awarded in 2006; the latest was awarded in 2008. Now, before awarding those contracts, the various government contracting officers were required to find that Doubleshot possessed and accounting system adequate to account for contract costs. (See FAR 16.301-3(a)(3).) The record is silent on this point, but it is not disputed that, when DCAA showed up to evaluate Doubleshot's accounting system in January, 2010, the contractor did not fare well.[1] More than a year later, a "Flash" Report was issued. ("The report identified what can only be characterized as major problems with Doubleshot's recordkeeping, which it does not dispute. Among other things, DCAA observed that Doubleshot did not maintain a general ledger and that its 'accounting system is non-existent'.")[2]

One manifestation of Doubleshot's problematic accounting system was that the contractor did not submit its proposals to establish final billing rates on time as required by 52.216-7.[3] DCAA also told a contracting officer that the audit agency would not longer be approving interim vouchers submitted by Doubleshot. The contracting officer deobligated remaining funds on two of the four contracts via unilateral modification. It very much appeared that Doubleshot was out

of the cost-reimbursable government contracting business.
*Oops!*

The contracting officer also demanded that Doubleshot immediately submit its overdue final billing rate proposals, under the threat that its contract costs would be unilaterally established at values that were 20% below whatever Doubleshot might claim. (Note that 20% decrement would include both direct and indirect costs, so kind of a big stick to hit Doubleshot with. We've written about unilateral decrements before; we're not fans.)

For whatever reason, Doubleshot submitted adequate "incurred cost proposals" for its Fiscal Years 2009 and 2010 15 months later, in August, 2013.[4] DCAA found the proposals to be adequate within 24 hours, except for minor issues that were satisfied via revised submissions a month later. DCAA started to audit in November, 2015 and, as part of that audit, received Doubleshot's general ledger for review on December 29, 2015.
[5]

On June 12, 2017, DCAA issued its audit report, questioning various direct and indirect costs.
[6]

It took the contracting officer a hair less than another year to issue the COFD, demanding repayment of $804,979. ("She concluded that Doubleshot had been overpaid direct and indirect costs on contract Nos. 416, 386, and 497, and had been underpaid on No. 295.")

Doubleshot **appealed .** Its first argument was that the government should have been on notice as early as 2010 that Doubleshot didn't know how to account for its costs properly, and that's when the government should have known that it was likely to have overpaid its contractor. ("… Doubleshot attempts to turn what could be considered an embarrassment – a non-existent accounting system – to its benefit.") The ASBCA didn't buy that argument, finding that "The undisputed evidence shows that on or before May 29, 2012, the government was aware of the inadequacy of appellant's accounting system, but it also shows that Doubleshot was eventually able to produce the ICPs and a general ledger. There is nothing in the record that identifies specific costs that the contracting officer knew, or should have known, had been overpaid as of that date."

First motion for summary judgment denied. Motion for reconsideration denied.

Because the motion for summary judgment based on the CDA Statute of Limitations was denied, the appeal proceeded. More recently, the ASBCA considered further motions for

summary judgment based on the facts that were before it.

The majority of the government claim ($633,397 out of $804,979) related to “inadequately supported costs”. Why were the costs inadequately supported? Because Doubleshot was unable to produce employee timecards as source documents for its labor transactions, even though it was able to prove that the employees had been paid. The government’s argument hinged on FAR 31.202-1(d), which requires a contractor to “maintain[ ] records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements.”

Doubleshot argued that it was not required to have retained those timecards. In its analysis, the ASBCA looked at the language of 52.215-2, particularly paragraph (f) (“Availabilty”.) That paragraph states—

The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract *or for any shorter period specified in subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR),*
or for any longer period required by statute or by other clauses of this contract. ….

(Emphasis added by the court in the decision.)

As the ASBC decision noted, “FAR 4.705 sets forth various retention periods based on the type of documents. As relevant here, it provides ‘Clock cards or other time and attendance cards: Retain 2 years.’ FAR 4.705-2(b). Thus, if a contractor submitted its final ICRP on time (six months after the end of the FY), it would have to retain the time cards for 18 months after that date.”

But remember, Doubleshot was late submitting its required final billing rate proposals. So, by operation of the FAR, the record retention period was extended. Still didn’t matter. The timecards were not required to be retained to support a delayed DCAA audit, according to the decision. (“Because Doubleshot no longer had any obligation to maintain these records, the

government's claim fails to the extent it is based on the lack of such records.")

Summary judgment granted in Doubleshot's favor on the majority of disputed costs. The disposition of the remaining costs will require further litigation.

A cautionary note: legal practitioners are citing to *dicta* in another appeal at the Civilian Board of Contract Appeals (CBCA) (Mission Support Alliance, CBCA 6477), in which it appears that, if presented with facts similar to Doubleshot's appeal, the judges at the CBCA may have ruled in the government's favor. Hmm. We believe—to the extent our layperson's judgment has any merit—that the ASBCA got it right here.

[1] Yeah, note the dates. It took DCAA nearly four years after the first contract was awarded to evaluate the contractor's accounting system. In fairness, though, remember that, at that time, DCAA was not exactly operating on all cylinders. It was a period of turmoil at the audit agency. Not that we're trying to excuse DCAA! As taxpayers, we're appalled. But as practitioners, we understand.

[2] Internal citations omitted. Note that it took DCAA more than a year to issue its *Flash* Report, which somewhat belies the name, doesn't it? As we said *supra,* not firing on all cylinders.

[3] Most people call the annual proposals to establish final billing rates "incurred cost proposals" because that's what DCAA calls them. Why does DCAA call them that? Because the audit agency likes to pretend it also audits the claimed direct costs of a contractor's cost-reimbursement contracts. The Section 809 Panel pointed out, correctly, that, in doing so, DCAA was conflating two separate and distinct requirements. (See Section 809 Panel Report, Volume 1, Recommendation #15.) *Whatever.* Nobody cares about that stuff. Certainly not DCAA.

[4] What about FYs before that time? Remember, Doubleshot received its first cost-type contract in 2006. Nobody seems to care about the prior years' claimed costs. Guess the contractor got away with an apparent noncompliance with the requirements of 52.216-7,

right? *SMH.*

[5] You're kidding me, right? The audit didn't start until the end of November, 2015? It took the auditor *more than two years* to get started, and to request and receive the contractor's general ledger? *Really?* The record is silent regarding this issue and the contractor did not allege audit malpractice in its CDA Statute of Limitation arguments, so who knows?

[6] There are many articles on this website discussing how long it used to take DCAA to perform its "incurred cost" audits, and why. This was all before Congress stepped in and told DCAA to get its audits done within a year or quit auditing—which was a significant process improvement, in our view. Too bad the process improvement had to be externally driven.