

On September 21, 2011, DCMA issued policy guidance to Contracting Officers addressing the process for making final determinations regarding Contractor Business Systems. As readers should be aware, in May 2011 the DAR Council [published](#) an interim rule on Contractor Business Systems, defining six (6) Business Systems and establishing a process for those systems to be reviewed, for “significant deficiencies” to be reported to a DCMA Contracting Officer, and for that Contracting Officer to make a determination that the Business System in question is either “adequate” or “inadequate”. If the Business System is determined to be inadequate, then the new rule requires a mandatory payment withhold on covered contracts (ranging from five to ten percent of total contract costs).

Industry bitterly fought the proposed rule but, ultimately, lost the battle and the new oversight/enforcement regime was established. (Even Apogee Consulting, Inc. submitted comments to the DAR Council.) One of the biggest concerns expressed by those opposed to the rule was in regard to the process, which seemed ill-defined and prone to subjectivity and inconsistency. The DCMA policy established by the memo goes a long way to address those concerns.

The policy memo establishes a Contractor Business Systems Review Panel for the purpose of performing “a higher-level review of the COs final determination to disapprove a Contractor’s Business System, prior to notifying the Contractor in writing that the system is disapproved.” The memo states that the Panel will “fully evaluate and discuss” all significant deficiencies identified by DCAA, and will ensure “consistent application of the Business System criteria and policy requirements.”

According to the policy memo, the process is as follows—

1. When a CACO/DACO/ACO network exists, the CO responsible for making the final determination must obtain concurrence from all network COs prior to notifying the Contractor of the final (negative) determination.
2. All final determinations must be approved by the CMO Contracts Director or the Director of the Pricing Center prior to issuance to the Contractor.
3. Prior to notifying the Contractor, the cognizant CO must submit a review package to the Business System Review Panel. The package must include (a) a copy of the audit report, (b) the Contractor’s response to that audit report, and (c) a proposed final determination written notice.
4. The intent is to convene the Panel within three days to review the CO’s determination.

Importantly, the Panel’s recommendations and opinions “are advisory” (“for most cases”) but “shall be considered” by the CO prior to disapproving a Contractor’s Business System.

We have gone on record as disapproving—quite stridently—of the DCMA’s recent predilection for convening Review Boards. We think that such Boards undercut the FAR-mandated discretion of Contracting Officers, intimidate personnel and stop them from disagreeing with DCAA audit findings, and (in general) unreasonably slow down the procurement system. That being said, we think this particular Review Board is a good interim step to ensuring an equitable

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application of an inequitable rule.

In the long run, however, we think the better approach is to properly train Contracting Officers, reinforce their discretion and authority, and then hold them accountable for their decisions.