

Written by Nick Sanders  
Monday, 12 October 2015 00:00

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I recently finished a fairly lengthy paper to be presented at the upcoming ABA Section of Public Contract Law meeting in Charleston, SC. The meeting's theme is "Building Bridges to Succeed in Federal Contracting and Grants"—which to me implies that the pathway to successful Federal contracting is paved with strong relationships rather than arms-length bargaining and strict compliance to contract terms. I'm not sure I buy that but, you know, they asked me to join one of the panels and I like Charleston (or should I say pre-deluge Charleston?), and so I agreed. The name of my panel is "A Bridge Too Far: The Ever-Increasing Compliance Challenges for Government Contractors"—which is a topic I have opinions about.

And then they told me I could submit either PowerPoint slides or an article for publication.

The article had to be at least ten typewritten, double-spaced, pages in length. So of course I turned in a 20-pager, because (as I said) I have opinions about the topic.

Writing the paper was not enormously difficult. I've been writing about compliance for a long time now, as evidenced by this blog. I chose to focus on the relatively recent compliance phenomenon commonly known as "contractor business systems" or "business systems administration" or "business systems oversight regime" because, you know, I have opinions about that particular relatively recent compliance challenge. Opinions that I have expressed in this blog.

So my basic approach was to build on opinions previously expressed and then punch it up (in terms of history and support for those opinions) ... and then tone it down (because there will be Government folks – lawyers! – in the audience).

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The executive summary of my paper, prior to punch-up and tone-down, may be found [here](#).

My paper was informed by recent DoD OIG audits of DCMA, in which reviewers found that DCMA was not meeting business system administration deadlines established in DFARS contract terms and in DFARS PGI (“Procedures, Guidance, and Information”). The first DoD OIG review was discussed in [this blog article](#). The article contained opinions about the DoD OIG report. Chief among those opinions was the notion that the DAR Council set up the contracting parties (and DCAA) to fail when it issued the final business systems oversight rules in 2012, because requirements were established on Government agencies that didn’t have the resources to meet them. And it wasn’t as if the DAR Council didn’t know or understand what it was doing:

*it simply didn’t care.*

Thus, my primary opinion is that the DFARS contractor business systems administration/oversight regime cannot work as intended. DCAA cannot devote audit resources from efforts to catch-up on “incurred cost” audits in order to perform business system reviews (and the required follow-up reviews to verify the efficacy of contractors’ corrective actions). DCMA cannot meet PGI-imposed deadlines for initial determinations and final determinations and the multiple layers of management review (including the DCMA HQ CBS Review Boards). The “first line of defense” is a fragile illusion, because it is simply unworkable in practice.

Given all that, should anybody be surprised that the DoD OIG issued [yet another report](#) finding that DCMA Contracting Officers were failing to meet process milestone deadlines when administering contractor business system deficiency reports received from DCAA?

To be honest, there is very little new in the DoD OIG report; there is very little that expands on the recent DoD OIG findings with respect to contractors’ estimating systems. The difference in this report is that it covers all business systems. Here’s a summary:

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DCAA issued 164 business system deficiency reports between July 2012 and June 2013. OIG selected 21 of those reports for review. *The OIG found a 100% failure rate.* That is to say, in each of the 21 DCAA reports reviewed, the DCMA Contracting Officers failed to comply with one or more applicable DFARS requirements.

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Of the 21 reports, the initial determination was issued late in 17; the Contracting Officer failed to obtain a timely contractor response in 13; the Contracting Officer failed to make a timely evaluation of the contractor's response in 16; the Contracting Officer failed to issue a timely final determination in 17; and the Contracting Officer failed to disapprove systems and make payment withholds in 8 instances.

And so it goes, right? Basically we have a series of bureaucratic processes with self-inflicted deadlines that are pretty much impossible to meet. But that doesn't stop the intrepid OIG auditors from pointing out the missed deadlines. And it doesn't stop the Director, DCMA, from promising to do better next time. Everybody promises to work harder and to do better ... but nobody actually, you know, points out that the system is unworkable and what few resources there are should not be devoted to working harder to make an unworkable system work better.

Because that is the elephant in the room: *the contractor business system administration and oversight regime is unworkable as currently designed and implemented.*

And even if it could work, it is arguable as to whether any value is being added, or whether any taxpayer dollars are being saved from waste, fraud, and/or abuse by virtue of the fact that contractors have approved business systems.

The one interesting point from the latest DoD OIG finger-pointing exercise is a recommendation to the Director, DCMA, that DCMA Business Instructions should be revised to require "contracting officers [to] request a Board of Review when they reject an auditor's opinion based on the significance of a business system deficiency." Fortunately for us all, the Director, DCMA, considered that recommendation and "concluded that the determination of significance is within the contracting officer's authority and responsibility." Hence, the OIG recommendation was not adopted.

At the end of the day, opinions vary. My opinions regarding the history and current processes of contractor oversight gave me a 20-page paper that is going to be presented and discussed before a room full of lawyers—both from the Government and from Big Law. The conclusion of that paper calls for a ABA-led task force (which I believe should include Government attorneys and Contracting Officers) to reform the current contractor administration/oversight regime, and to develop the next generation solution. We shall see how it goes from there.

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