In the fall of 2009, DCAA Director April Stephenson told the Commission on Wartime Contracting that "Through FY 2009, DCAA has reported total exceptions of $16.3 billion consisting of recommended reductions in proposed and billed contract costs of $8.8 billion and $7.5 billion of estimated costs where the contractor has not provided sufficient rationale for the estimate." In addition, she told the Commission that "DCAA has issued over 140 Forms 1 under the Logistics Civil Augmentation Program (LOGCAP) III program that suspended or disapproved over $655 million." (Stephenson Testimony, 11/02/2009) Based on Ms. Stephenson's testimony, the Commission officially reported that it estimated "waste and fraud together range from $31 billion to $60 billion," which was footnoted as being an estimate that 10 to 20 percent of every dollar spent in Iraq and Afghanistan was wasted, and that 5 to 9 percent of every dollar spent was fraudulently billed by contractors. As the Commission reported, "The Commission's estimate of a 5 percent to 9 percent fraud rate would indicate that between $10.3 billion and $18.5 billion of the $206 billion in funds spent for contingency contracts and grants has been lost to fraud." (Transforming Wartime Contracting: Controlling Costs, Reducing Risks, 8/31/2011)

Of course we all know today that the majority of DCAA's questioned and suspended costs was not sustained, and that millions of dollars of such cost that were sustained were subsequently overturned on appeal. We know now – seven years later – that Ms. Stephenson's testimony was self-serving at best and misleading at worst. In 2009 we linked the claims in Ms. Stephenson's testimony (particularly those related to allegedly inadequate contractor business systems) to then-contemporaneous GAO and DOD IG reports blasting the audit agency's audit quality. We wrote: "so long as the spotlight is turned on the contractors, DCAA can hide in the darkness." It is unfortunate that the country's perception of contingency contractors has been tainted by that testimony, just as it is unfortunate that we now have an expensive, nearly unworkable, and essentially valueless "contractor business system" administration and oversight regime as a direct result of that testimony.

Even before 2009, DCAA had issued **audit guidance** (04-PPD-023) that addressed the pay differentials contractors provided to their employees for working in combat areas such as Iraq and Afghanistan. The audit guidance was based on questionable statistics (e.g., a survey of the practices 37 contractors) rather than on an actual policy position based on contract terms and conditions. Some (unknown) amount of the questioned and suspended costs that were reported to the Commission on Wartime Contracting came from application of that audit guidance to contingency contractors. Importantly, the audit guidance focused on the Department of State Standardized Regulations (DSSR) as establishing allowability criteria, regardless of what the contract might have actually said. The audit guidance stated:

Most contractors justified providing the deployed employees with hardship pay differential due to the known difficult living conditions they would be working under. … However, the statistics that follow demonstrate that contractors did not adopt the DSSR specific percentage allowance or the salary base to which the percentage allowance was applied. The DSSR hardship pay differential for Iraq is 25 percent of an employee's base pay, calculated on a 40 hour work week. … Since the predominant industry practice for the deployed contractor employees working on non-USAID contracts is to cite the DSSR as the basis for the hardship pay differential, auditors should evaluate contractors offering a hardship pay differential in excess of the DSSR hardship pay differential of 25 percent of base pay, calculated on a 40 hour work week. Review the contractor's hardship pay policy and practices, the basis to calculate hardship pay, the deployed employees' compensation agreements, and consider factors determined to be relevant by the contracting officer. In cases where there is inadequate contractor support to justify hardship payments beyond the DSSR allowances, challenges to these costs should be made in accordance with FAR 31.205-6(b) because the costs exceed compensation practices of other firms in the same geographic area (i.e., Iraq). In accordance with FAR 31.201-3(a), the burden of proof is then upon the contractor to establish that such a cost is reasonable. … The DSSR danger pay allowance for Iraq is 25 percent of an employee's base pay, calculated on a 40 hour work week. … For those non-USAID contracts, auditors should perform an evaluation of contractors offering their deployed employees a danger pay allowance in excess of the DSSR danger pay allowance of 25 percent of base pay, calculated on a 40 hour work week. Review the contractor's danger pay policy and practices, the basis to calculate the danger pay, the deployed employees' compensation agreements, and consider factors determined to be relevant by the contracting officer. In cases where there is inadequate contractor support to justify danger pay allowances beyond the DSSR allowances, challenges to these costs should be made in accordance with FAR 31.205-6(b) because the costs exceed compensation practices of other firms in the same geographic area (i.e., Iraq). In accordance with FAR 31.201-3(a), the burden of proof is then upon the contractor to establish that such a cost is reasonable.

And so the DCAA auditors followed that audit guidance and questioned contractor compensation costs because they did not strictly follow the DSSR guidance (as interpreted by Fort Belvoir) and the contractor could not provide sufficient justification to the auditor as to why its practices deviated from those directed by the DSSR. (Note that second criterion is an entirely subjective factor, one that many if not all contractors likely would be unable to meet.) We don't know how many millions of dollars' worth of hazardous duty post and danger pay uplifts were questioned, but we know it was a lot (because we have worked with some of those contractors). Some contractors accepted the audit findings, others negotiated a compromise, and still others fought them.

One contractor that fought the audit findings was CACI.

CACI won at the ASBCA, on a motion for summary judgment. The **decision** may be appealed, but we think Judge Prouty's logic is sound. Writing for the Board, he summarized the issue at the heart of the dispute as follows—

This appeal comes down to the interpretation of a contract provision permitting [CACI] to be reimbursed by the government for hazardous duty pay made to its employees assigned to work overseas …. . The pay at issue was 35% of the 'basic compensation' made by CACI to its employees. In its pending motion for summary judgment, the government contends that this 'basic compensation' is what the CACI employees are paid for non-overtime hours. After the employees were paid for the first 40 hours that they worked per week, the government argues, any additional hours that they worked should be considered to be overtime and not subject to the 35% pay supplement.

CACI urges the Board to recognize that the 'normal hours' that its employees were expected to work by the government (depending on the government task order at issue), were either 84 or 72 hours per week, without such hours being considered overtime. Thus, as CACI would have it, since 84 or 72 hours per week were the employees' expected hours, pay for the entirety of those hours was the employees' basic compensation to which the 35% pay supplement should apply.

As Judge Prouty wrote in his decision: "CACI prevails."

This is an important decision, because it overturns 12 years of DCAA audit guidance, audit guidance based on a flawed interpretation of the DSSR. The contracting parties had incorporated the DSSR rules into the contract, but the flawed interpretation by DCAA, the Special Inspector General for Iraqi Reconstruction (SIGIR), and the Contracting Officer required CACI to litigate in order to prevail. Judge Prouty quoted the DSSR at length and compared the requirements therein to requirements found elsewhere in the contract. We urge readers with similar audit findings to read his decision in detail. But for this blog article, we'll summarize as follows.

Despite the fact that contractor employees were working far in excess of 40 hours per week on a routine basis, the contract refused to recognize those excess hours as being overtime. Because the hours worked in excess of 40 were not overtime hours, they were part of the employees' "basic compensation." (This makes sense because the employees were expected to work those excess hours on a routine basis and did not get any overtime premium pay for

working them, to which they might otherwise have been entitled.) Because the excess hours were part of the employees' basic compensation, CACI properly used the employees' total work hours as the basis for applying danger pay uplifts.

Although the dollars involved were relatively small, the issue is large. This decision, unless overturned on appeal, will establish proper application of salary uplifts for contractor employees assigned to support overseas operations.