

DCAA in Senate Crosshairs (Again)

Written by Nick Sanders

Thursday, 03 February 2011 02:01

It's *déjà vu* all over again as the Senate Committee on Homeland Security & Governmental Affairs (HSGA) and its “*ad hoc* Subcommittee on Contracting Oversight” held a hearing on February 1, 2011 entitled, “Improving Federal Contract Auditing.”

Chaired by long-time DCAA critic Claire McCaskill (D-MO), the hearing—

... examined how federal agencies use contract audits to detect and prevent waste, fraud, and abuse in government contracts. In particular, the hearing reviewed the findings of the Subcommittee's ongoing investigation of the type and number of contract audits at federal agencies. The hearing also examined the role played by the Defense Contract Audit Agency (DCAA) in performing contract audits for agencies other than the Defense Department.

Not expressed in the foregoing description was the notion that DCAA may have outlived its usefulness and should be folded into a new, organizationally independent, Federal Contract Audit Agency. As we shall see, opinions on that notion were divided.

Obviously, DCAA would be represented at the hearing by its Director, Patrick Fitzgerald. In fact, Mr. Fitzgerald received [an invitation](#) to the hearing two weeks in advance, from Senators McCaskill and Scott Brown (Ranking Minority Member). In addition to Mr. Fitzgerald, other Federal government employees providing testimony included:

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Thomas Skelly, Acting CFO, U.S. Department of Education

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Ingrid Kolb, Director, Office of Management, Office of Deputy Secretary, U.S. Department of Energy

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Brian Miller, Inspector General, U.S. General Services Administration

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Jeanette Franzel, Managing Director, Financial Management and Assistance, U.S. Government Accountability Office

You can find the written testimony of the above-named individuals at the HSGA Subcommittee [website](#), along with 110 minutes of archived video goodness. But we don't want to discuss the testimony of those folks. We want to discuss Mr. Fitzgerald's written testimony, along with the written testimony of Sandy Hoe and Nick Schwellenbach. Sandy Hoe is a partner with the very respected law firm of McKenna, Long & Aldridge (and testified on behalf of the U.S. Chamber of Commerce) while Mr. Schwellenbach testified on behalf of the Project on Government Oversight (POGO).

Mr. Fitzgerald's testimony can be found [here](#).

Sandy Hoe's testimony can be found [here](#).

Mr. Schwellenbach's testimony can be found [here](#).

Looking at Mr. Fitzgerald's written testimony, we can see the usual fact-based information regarding his audit agency. Nothing new there. Next, Mr. Fitzgerald discussed DCAA's "reimbursable work" for non-DOD agencies. He noted that, historically, the percentage of DCAA's audit effort devoted to such activities ranged from 9 to 13 percent of its total workload. To clarify, that means that, at any given time, roughly 10 percent of DCAA's resources are devoted to auditing non-Defense contracts. Of that effort, about one-third is for NASA contracts and another 20 percent is for the Department of Energy. Mr. Fitzgerald testified that DCAA charges the civilian agencies a rate of \$113.84 per hour for its auditors' time.

We were struck the following statement by Mr. Fitzgerald—

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During the past year, DCAA has developed a risk-based approach to performing contract audits. This approach has allowed DCAA to focus on the highest-risk areas with the biggest payback to the U.S. taxpayer. DCAA uses this risk-based approach when performing reimbursable audit effort. In general, this has meant DCAA has expended more resources in the forward pricing area (audits of contractor proposals) at the expense of resources devoted to the incurred cost area.

As expected, Mr. Fitzgerald defended the terrible drop in recent audit productivity by focusing on audit “quality” and compliance with Generally Accepted Government Auditing Standards (GAGAS), saying, “The additional audit procedures ensure the acquisition community is getting the best possible product.” We trust our readership sees through that thin rationale. If not, there are plenty of articles on this website that will paint a different picture and posit different reasons for the growing backlog of uncompleted contract audits.

Mr. Fitzgerald’s written testimony also discussed recommendations to strengthen civilian contract audits. He advocated expanding the pending DFARS business systems rule to all Federal government agencies, and expanding DCAA’s current DCMA contracting officer dispute resolution process to civilian agencies. He also advocated applying DCAA’s recent change in proposal audit thresholds to civilian agencies. Each of these areas has been discussed on this website, and (of course) we had an opinion on the desirability of such initiatives. Suffice to say, we opined that room for improvement existed.

Also as expected, Mr. Fitzgerald defended the status quo, and asserted that there was no need to create a new Federal Contract Audit Agency.

Next Sandy Hoe testified about contractor concerns with recent encroachments by DCAA and the Inspector General into contracting officer authority, noting that such authority conflicts with both Federal regulations and case law. He testified that—

The FAR mandates that the corporate administrative contracting officer (“CACO”) is unilaterally responsible for determining a contractor’s proposal and billing rates, and for determining whether to accept an FPRA as being in the government’s interest, or, alternatively, to issue an FPRR. Decisional authority has further established that DCAA’s role is to be advisory, and that the contracting officer may exercise discretion in deciding whether to follow DCAA audit

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recommendations. ELS Inc., B-283236, et al., 99-2 CPD ¶ 92, 1999 WL 993094 (Oct. 25, 1999); see also OAO Corp., B-228599.2, July 13, 1988, 88-2 CPD ¶ 42, at 6 (“DCAA audits are only advisory; the degree to which they are used is a matter for the contracting officer to decide”). This balance of authority is appropriate, given the contracting officer’s authority to administer contracts and “make related determinations and findings,” FAR § 1.602-1; § 2.101, as well as the contracting officer’s “wide latitude to exercise business judgment” in requesting and considering the advice of audit specialists. FAR § 1.602-2.

The January 4 DPAP memorandum indicates that contracting officers will apparently now issue final rates as determined by DCAA without the contractor having the opportunity to demonstrate to the Administrative Contracting Officer (“ACO”) why such rates may be unreasonable. Unless the contractor elects to contest the rates by submitting a claim under the Contract Disputes Act (“CDA”), it will, at a minimum, lose the ability to recoup the lost amounts allocated to fixed price contracts based upon the DCAA-determined rates. This approach would be unfair to contractors and directly conflict with established regulatory law.

Sandy also criticized DCAA, testifying that—

Some in industry have noted a sharp upturn in DCAA’s reluctance to engage in rational discussion of audit issues since 2008 and 2009 about the same time when the Congress and the GAO demanded improvements to DCAA. While DCAA took many specific and warranted actions in response to the criticism, a less tangible response has been for DCAA to take a no risk approach to addressing audit issues.

The FAR cost principles and other cost and price compliance regulations are relatively explicit, but still cannot and do not cover every circumstance that may arise. Judgment often is necessary in applying the regulations to resolve issues. Unfortunately, since 2008/2009, DCAA seems to have lost its appetite for analysis of the intent of a regulation versus its literal application. Once it has applied the literal language, DCAA seems little moved by any argument that the result reached is nonsensical or that it could not have been what the drafters intended. This has confounded some in the contractor community who believe that the goal of the regulations, and of government contracting generally, is to reach rational results. Combining DCAA’s recent stridency with the enhanced authority it is being given for FFPA’s and FFPR’s produces a potentially toxic mix for contractors.

(We note for the record that we’ve made many of those same points on this website—but never

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with such felicitous language.)

Finally, POGO's Nick Schwellenbach advocated doing away with DCAA and, instead, implementing the Federal Contract Audit Agency that Mr. Fitzgerald asserted was unnecessary. He testified—

We need a contract audit agency that is not afraid of its own shadow. We need an independent and muscular audit agency that protects the taxpayers' interests. ... There are other possible benefits to pulling DCAA out from the DoD and transforming it into an FCAA, the most significant being the independence issue. Currently the DCAA reports to the DoD Comptroller, who is the Chief Financial Officer of DoD, and who in turn reports to the Deputy Secretary of Defense. We have grave reservations whether this structure ensures adequate independence for DCAA, particularly as DCAA's work often establishes issues with how DOD works with contractors.

Furthermore, it is apparent to us that the DCAA Office of General Counsel is not independent—its attorneys are evaluated by the Pentagon's Defense Legal Services Agency. It should therefore come as no surprise that some of these attorneys are responsible for the gag letter sent to one of the DCAA whistleblowers. A similar independence problem previously existed with the

Pentagon Inspector General (IG) and in 2008 the IG Reform Act gave the Pentagon IG its own independent general counsel and severed its tie to the Defense Legal Services Agency.

Mr. Schwellenbach also criticized DCAA, as well as the defense contractors that he asserted had taken advantage of the "current turmoil" at the audit agency. He testified—

As Congress weighs the pros and cons of an FCAA, we need to improve DCAA as much as possible. We are concerned about the current direction of DCAA. I have to mention that many current and former DCAA employees and knowledgeable observers believe that companies have taken advantage of the current turmoil at DCAA. In addition, you only have to read the hundreds of comments posted on the *Government Executive* website by people claiming to work at DCAA to understand that there is at least some part of the DCAA workforce that is deeply angry with the direction of their agency. Many, if not most, of the comments hammer

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home the belief that the agency has become risk-averse. Of course, contractors want DCAA to be risk-averse, and afraid to issue reports. Congress must make sure that does not happen. Unfortunately, despite its many good auditors and cases where it defended the taxpayers' interests, there have been signs that the agency is not reaching its full potential. For instance, DCAA has not issued a subpoena to a contractor in over two decades despite long-standing access to records problems they have faced from contractors. That, by definition, is risk aversion and contractors know this.

I believe the subcommittee needs to learn more about why, in FY 2010, far more assignments were canceled at DCAA than were completed, according to records POGO has obtained through the Freedom of Information Act. This is the first time this has happened for at least the past five years, and possibly ever. ...

We are concerned by the general decline in contract dollars audited and reviewed by DCAA. In particular, there has been a massive decline in the number of Truth In Negotiations Act assignments conducted by DCAA: in FY 2006 they conducted 468, in FY 2007 438, in FY 2008 348, in FY 2009 148, and in FY 2010 only 59.

[Emphasis added.]

Well, we agree with Mr. Schwellenbach that DCAA is headed in the wrong direction, has become risk averse, and recently has experienced a startling drop in productivity. We agree that many DCAA auditors are embarrassed—and even angry—with the continued leadership failures and bizarre audit guidance issued by DCAA HQ in the past couple of years.

We were startled to see in his testimony an assertion of something we have long suspected—that the number of DCAA's cancelled audits has grown substantially and potentially represents a huge example of governmental waste. (See the italicized portion of the testimony, above.) We have issues with Mr. Schwellenbach's credibility (see our comments below). But if true, it is an amazing statistic that DCAA cancelled more audits than it completed in its FY 2010. Along with our previous work showing the huge drop in completed audit reports, it paints the picture of an audit agency in death throes.

Here is Mr. Schwellenbach's footnote supporting his assertion—

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DCAA in FY2010 canceled assignments (including assignments with 'no report issued') far more often than it completed assignments with reports: 16,298 assignments were canceled or 'no report issued' versus 11,788 assignments with reports issued in FY2010, according to assignment data in the DCAA Management Information System provided by DCAA through FOIA to POGO. From FY2006 through FY2009, DCAA finished more assignments with reports issued than assignments that were canceled/no report issued, in most of those years it issued far more. For example, in FY2006, DCAA canceled (or had 'no report issued') 16,690 assignments and completed 26,698 assignments where reports were issued.

Overall, there has been a massive decline in the number of DCAA reports issued. According to the database, it has gone from 26,698 assignments with reports issued in FY 2006 to 11,788 in FY 2010 with a drop every single year, but especially large decreases in FY 2009 and FY 2010.

Wow. Go back and read that again. And remember, this is the Federal government's premier audit agency, the one all the others look to as a role model for how to conduct contract audits.

Getting back to Mr. Schwellenbach's testimony, we emphatically *do not agree* with him that contractors want this sad situation and are taking advantage of it. We do not agree that there are "long-standing" access to records "problems;" nor do we agree that DCAA is not aggressively addressing contractor delays in responding to audit requests. We don't know from what remote ivory tower Mr. Schwellenbach is viewing the current DOD contract audit environment, but from the viewpoint of people on the ground, dealing with DCAA audits and DCMA contracting officers every single day, we can say with a very high degree of certainty that he is flat-out wrong.

Contractors don't want inaccurate audit reports, nor do they want unconscionable delays in performing audits, nor do they want ridiculous delays in publishing audit reports after completion of field work. They want the same thing everybody in the defense (and civilian) acquisition community wants. They want high-quality contract audits, performed and issued timely—so that everybody can get back to the business of supporting the nation's national security and other objectives.