Can you see the coming tsunami of litigation related to government contract cost accounting? We sure can. Contributing factors include the DCAA's lack of productivity and its focus on questioned costs as a measure of audit quality, the lack of skills in the exercise of independent business judgment by DCMA Contracting Officers, the new approach to administrating contractors' "Business Systems" under the DFARS, and the application of a Statute of Limitations to the Contract Disputes Act. Not to mention sequestration and what that will mean to ongoing programs. These factors—and doubtless more—have led and will continue to lead to disputes between the Federal government and its contractors.

FAR 33.204 states that—

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571 , *et seq* .) agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

Despite the official policy stated above, we cannot remember the last time we heard about a U.S. Government CO actually negotiating a dispute settlement with a contractor. Instead, our experience is that the parties bypass any negotiations and head right into court. Which makes the attorneys happy, no doubt, but does not seem to be in the best interests of the taxpayers or corporate shareholders.

So expect more stories like **this one** , where Boeing and the United Launch Alliance (ULA) suing the Defense Department for somewhere in the neighborhood of $385 million (plus interest) for the US Air Force's refusal to pay certain costs.

If you are a long-time reader, you know we predicted this particular piece of litigation long ago. In January 2010, we **discussed** the controversy between Boeing, ULA, and the Air Force.

We're not going to repeat the details here but, all modesty aside, we think we provided more of the accounting details than anybody else did. We wrote—

So as with many government contract cost accounting matters, the truth is both complex and hard to fathom. Will Boeing have to concede $271 million in payments to which it believes it is contractually entitled? We'll look forward to the final DCAA audit report(s), and hope that they ignore any political pressure and focus solely on the facts, which (apparently) even the DOD IG seems to have gotten wrong.

This is a great example of how the facts matter, and how easy it is to allege a problem, and how hard it is to refute an allegation. Clearly, Boeing's entitlement to the $271 million depends on its 'Lot Accounting' practices, why the PM&HS costs were not fully absorbed by prior launch contracts, and how Boeing intended to amortize its production costs under future programs (and whether it would be permitted to do so under FAR and CAS parameters). As DCAA focuses on generating high-quality audits that DCMA contracting officers and buying commands can effectively utilize to make business decisions, we hope they will keep this example in mind.

About eight months later (August 2010), we told readers that DCAA Director Pat Fitzgerald—in a nearly unprecedented step—had announced its audit position on the matter to the media via e-mail. Perhaps unsurprisingly, Director Fitzgerald "called on the Defense Contract Management Agency (DCMA) to notify the United Launch Alliance team (of which Boeing is one of two team members, along with Lockheed Martin) that the costs are in non-compliance 'with federal accounting standards' and are 'unallowable.' DCMA took the matter under advisement.

We wrote, "We will be surprised if this issue isn't litigated." And indeed, it was. Boeing and ULA filed suit in the U.S. Court of Federal Claims for approximately $385 million, related to costs it allegedly had to pay back to the DOD as well as costs that DOD refused to pay in the first place.

Bloomberg (link above) reported—

Last year, United Launch repaid the Pentagon $89.2 million and lost another $199 million in prior billings because Boeing violated federal accounting standards, according to the Defense Contract Management Agency, the military's contract management agency. Boeing lost bids to have those decisions reversed.

The Bloomberg article also reported that Boeing "claimed it sued to preserve its ability to recover the money." We all know that refers to the Statute of Limitations under the Contract

Disputes Act.

Another article , over at Space News, had a few more details. It reported—

The lawsuit, filed June 14 with the United States Court of Federal Claims, says the Air Force reneged on its contractual commitment to reimburse Boeing 'hundreds of millions of dollars' incurred under the Evolved Expendable Launch Vehicle (EELV) program.

'The Air Force agreed to reimburse these costs in a set of interrelated agreements designed to secure Boeing's continued participation in the EELV program after the Air Force decided to restructure it,' the lawsuit says. The costs were incurred between 1998 and 2006, the companies said.

The article continued—

'Boeing clearly and repeatedly conditioned its willingness to participate in the restructured program on the government's agreement to contract terms ensuring Boeing's recovery of its inventoried costs, including DSC,' the lawsuit states. DSC refers deferred support costs on the Delta 4 program.

In late 2006, the lawsuit alleges, the Air Force, following reviews by auditors with the Defense Contract Management Agency and the Defense Contract Audit Agency, agreed to Boeing's terms, the lawsuit alleges. The agreement specifically approved the methodology Boeing used to account for these costs, the lawsuit states.

But the Air Force has refused to pay any such costs since 2008 and in 2011 demanded that Boeing repay $72 million, plus interest, that the service had paid the company for costs incurred on the Delta 4 program, the lawsuit states. ULA 'promptly' complied to avoid paying the interest and penalties, the lawsuit states.

The lawsuit alleges that the Air Force never said the costs in question were improperly billed or that the companies failed to meet their obligations under the EELV contract. Rather, the lawsuit says, the government maintains that the previous agreements to reimburse Boeing and ULA for the deferred Delta 4 costs are 'nonbinding and unenforceable.' In making that case, the Air Force has reversed an earlier judgment that Boeing's claim was consistent with federal cost accounting regulations, the lawsuit states.

So we'll just have to wait and see what the COFC Judge has to say about the situation. And while we all wait, we can pass the time by tallying the number of cases filed, and decisions issued, by the Courts that should have been negotiated by the parties instead of litigated.