

DOD Implements New Approach to Resolving Defective Pricing Issues

Written by Nick Sanders

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In the past few years, DCAA implemented a new approach to performing defective pricing audits. Defective pricing audits are known by various names, including “post-award audits,” “TINA audits,” “Truth-in-Negotiations audits,” and “Truthful-Cost-or Pricing Data Act audits.” For this article, we’re going to call them “defective pricing audits.” Your mileage may vary. Whatever you call them, DCAA [revised](#) its approach to Activity Code 4200 audits a while ago.

You probably wouldn’t know that unless you’ve experienced a recent defective pricing audit. But if you have, you know that the current approach (as memorialized in the audit program dated July 2020) is to first perform a “preliminary risk assessment” in order to determine “the overall risk that the contract price was materially increased due to defective certified cost or pricing data.” If the auditor believes that the risk is minimal, the file is documented and the contractor is told that a “no go” decision was reached. That ends the audit right there. But if the auditor believes that the risk of defective pricing is high, then a “go” decision is made and the auditor initiates a detailed examination (i.e., audit) and the entrance conference is scheduled.

While DCAA was modifying its audit approach, DCMA was still approaching adjudication and resolution of defective pricing audit findings in much the same way it had been doing for decades. The audit report went to the cognizant contracting officer, it was entered into the Contract Audit Follow-Up (CAFU) database, and the clock started ticking. When the contracting officer could find the time, the findings were reviewed and the resolution process was initiated, perhaps via a Contracting Officer Final Determination and demand for payment. Or perhaps there would be additional discussions with the contractor—especially if there was a strong rebuttal accompanying the audit report. The path toward resolution varied; however, it was rarely quick and rarely easy.

The length of the resolution process generally meant that the audit findings lingered in the CAFU database for longer than most anybody would like. In some instances, they lingered so long that the CDA statute of limitations [kicked-in](#) ; and then the accuracy of the findings didn’t matter because the government had lost its opportunity to assert a valid claim. Unresolved CAFU audit findings were also embarrassing to various DOD stakeholders such as DCMA.

For example, in the latest DOD Inspector General Semi-Annual Report to Congress (as of March 30, 2020), Appendix F (“Status of Action on Post-Award Contract Audits) indicated that, at that point in time, there were 2,036 open (unresolved) audit reports worth potentially \$12.75 billion. (We note that not all of those open reports were unresolved because of contracting officer inaction; nearly 300 were either under criminal investigation or else in litigation. Still,

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there were roughly 1,400 audit reports that had not been dispositioned and were “overage” at that time.)

Thus, it behooved DCMA to take a fresh look at its CAFU resolution process, particularly with respect to those DCAA audit reports that contained allegations of defective pricing. On October 5, 2020, that’s what they did, via [Memorandum](#) from the Acting Principal Director, Defense Pricing and Contracting. The Memo gives contracting officers the authority to request assistance, and to delegate the responsibility for, dispositioning and resolving, defective pricing audits to a new DCMA Defective Pricing Pilot Team. The Memo also provides authority for DCMA COs on that team to perform the delegated functions they receive from the cognizant contracting officers.

In the words of the Memo—“a new DCMA Defective Pricing Pilot Team will provide support to Government Procuring Contracting Officers (PCOs) in resolving and dispositioning Defense Contract Audit Agency (DCAA) Truth in Negotiations audits.”

The Memo continued—

Under each accepted delegation, DCMA will take all actions to resolve and disposition the DCAA findings of defective pricing in the Contract Audit Follow Up (CAFU) system; will issue contracting officer final decisions as needed, if no agreement is reached; and will execute any contract modifications necessary to implement final price adjustments, in coordination with the PCO. DCMA will litigate any appeal or case that results from delegated DCMA defective pricing actions.

What does this mean for contractors? It’s difficult to tell. Being optimistic, it might mean that a new center of independent and objective subject matter experts has been created to quickly evaluate and resolve allegations of defective pricing. That would be nice, wouldn’t it? But it might also mean that a bunch of strangers with no first-hand knowledge of the proposal or negotiations will be making decisions based on their interpretations of various documents—documents that will almost certainly vary in quality. There is already some industry chatter that says such a new organization would need to justify its existence through large dollar findings, which means that independence and objectivity may be compromised.

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We don't know how this new DCMA team will operate. We have had zero experience with them to date. (In fact, we'd be interested to know if the team has actually been formed at this point in time.) We will have to see what the future holds.

But in the meantime, contractors undergoing DCAA defective pricing audits should be aware of the new DOD audit resolution process, just in case the final audit report contains adverse findings.