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Federal Contracts Report™

DCAA

DCAA Malpractice: Recovery of Damages



BY TOM LEMMER, PHIL SECKMAN AND JOE MARTINEZ

Being subjected to Defense Contract Audit Agency (DCAA) audits is a cost of doing business for defense contractors, who often find that DCAA audit reports are less than helpful, and that disagreements between the DCAA and the contractor over audit findings are cumbersome and difficult to resolve. Unfortunately, these audit findings can result from DCAA's professional malpractice (i.e., negligence) in conducting the audits, owing to failure to comply with the Generally Accepted Government Auditing Standards ("GAGAS"), among other professional requirements. This is reflected in inadequate support for audit conclusions, lack of objectivity, lack of technical support, and inappropriate auditing techniques, among others.

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This problem is exacerbated by the fact the DCAA is now the *de facto* decision maker in several areas of contract administration, essentially displacing the contracting officer's role. DCAA's shift into this role, which began in the mid-1980s, has accelerated during the recent growth in government contracting as a result of the conflicts in Iraq and Afghanistan. DCAA seized the opportunity presented by these conflicts to garner headlines with sensational, though often flawed, congressional testimony regarding alleged contractor excesses and abuses. As a result, Congress became convinced that DCAA auditors, rather than the contract management professionals in the Defense Contract Management Agency (DCMA), were best suited for protecting the taxpayer from defense contractor waste, fraud, and abuse. Riding this wave of congressional approval, the DCAA has not only successfully expanded the scope of areas it routinely reviews, but also created a political environment in which contracting officers (COs) are reluctant to challenge or overturn its actions.

The DCAA's growing authority and the COs' reluctance to challenge its findings often result in the DCAA having the final say on matters of contract administration without a contractor initiating the claims process. For instance, the DCAA can and, as the authors can attest, has determined contractor costs to be unreasonable or otherwise unallowable and, on its own initiative, suspended payments to the contractor, with little or no "due process" for the contractor. Similarly, the DCAA may issue audit findings disapproving a contractor's ac-

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counting or estimating practices, thereby inhibiting the contractor's ability to submit proposals for new work. Insult is added to injury when the DCAA's findings are based upon erroneous or spurious conclusions resulting from the failure of its auditors to comply with GAGAS.

However, as the Government Accountability Office (GAO) recently noted,[1] the DCAA is understaffed and undertrained, and routinely fails to perform proper audits. A DCAA failure to comply with GAGAS is a breach of professional duty, and constitutes malpractice, which creates opportunities for contractors to protect their interests. A Contract Disputes Act (CDA) litigation to overturn a decision based on a negligent audit is the most obvious example. Recovery under the CDA, however, often does not make the contractor whole for the injuries that a negligent audit can cause. These injuries include the costs of having to address audit issues based on malpractice. Fortunately, contractors may recover for these injuries caused by DCAA malpractice by suing the United States under the Federal Tort Claims Act (FTCA) for DCAA's negligent acts.

This article explores the substantive and jurisdictional bases for FTCA negligence claims against the United States for DCAA malpractice. First, the fundamental professional standards with which *all* government auditors, including DCAA auditors, are obligated to comply, and which are the baseline for DCAA malpractice, are examined. Second, certain procedural issues that contractors should carefully consider when contemplating an action under the FTCA are addressed. Third, the concept of parallel contract proceedings and the circumstances in which litigation under the FTCA may not be the most advantageous to contractors are discussed. Finally, some practical considerations for contractors when considering this type of action, including actions that should be taken to preserve evidence that will be necessary to support a viable FTCA claim are outlined.

I. Government Liability Under FTCA for DCAA Malpractice. A lawsuit against the United States based upon DCAA professional malpractice is certainly not the typical approach for reining in DCAA excesses. Importantly, however, such an action has precedent. In 1996, the General Dynamics Corporation brought suit against the Unites States for DCAA professional malpractice during an audit that led to unfounded fraud indictments brought by the Department of Justice (DOJ).[2] The U.S. district court held that DCAA had engaged in professional malpractice because it negligently failed to assess the contract's terms and failed to seek expert assistance from legal advisors or the CO regarding the contract's requirements, despite finding that General Dynamics had fraudulently failed to comply with the contract.[3] The district court concluded that the government was liable for the legal costs General Dynamics incurred in defending itself against the resulting fraud indictments.[4]

General Dynamics' victory was subsequently overturned by the Court of Appeals for the Ninth Circuit under the so-called ''discretionary function'' exception to the FTCA.[5] As discussed below, the FTCA does not permit suit for an injury caused by a government official performing a discretionary function. In the *General Dynamics* case, the appellate court found that General Dynamics' injury was actually caused by the DOJ's decision to initiate the fraud investigation, because, had the DOJ not initiated the investigation, the DCAA audit would not have injured General Dynamics.[6] The appellate court further concluded that the decision to initiate an investigation is a ''discretionary function'' that is not covered by the FTCA and, therefore, General Dynamics was without a remedy under the FTCA. Critically, the appellate court did not take issue with the trial court's conclusion that the DCAA had acted negligently or that the DCAA itself does not perform discretionary functions when conducting its audits.

Although General Dynamics was ultimately unsuccessful in its FTCA suit, the DCAA's changing role has made it more critical than ever for contractors to realize that professional malpractice suits are a means, sometimes the only means, to remedy the significant harm of a negligently prepared DCAA audit report. As discussed in the introductory section, the DCAA is taking on more and more responsibility for acting as the decision-maker in contract administration. Thus, unlike the *General Dynamics* case, the DCAA is directly injuring contractors, whether by erroneously deciding that a business system is insufficient or by deciding to withhold payment of purportedly unallowable costs. In other words, the injury being caused by DCAA in today's environment is more likely the direct result of DCAA action, rather than the intervening discretionary acts by other officials that the appellate court held to preclude suit under the FTCA.

II. Establishing DCAA Liability. Under the doctrine of sovereign immunity, the United States cannot be sued unless and until Congress gives permission for such lawsuits.[7] As contractors are well aware, the CDA permits lawsuits related to contract claims against the government. Similarly, the FTCA waives sovereign immunity with regard to certain tort claims against the government, including claims for negligence by government employees.[8] Such negligence includes reckless driving by a government employee while on duty, malpractice by government doctors, and, as discussed below, negligent DCAA audits.

In order to establish liability for negligence under the FTCA, a claimant must demonstrate that the government employee's[9] act or failure to act constitutes negligence under the law of the state or locality in which the act or omission occurred.[10] Accordingly, a party's ability to establish liability will depend upon the specific law to be applied, and may vary from state to state. Under the general principles of tort law, however, an individual is negligent when that individual: (1) deviates

[1] *See U.S. Govt. Accountability Office, GAO-09-468, DCAA Audits: Widespread Problems With Audit Quality Require Significant Reform* (2009).

[2] *See Gen. Dynamics Corp. v. United States*, No. CV 89-6762 JGD, 1996 WL 200255, at *1 (C.D. Cal. Mar. 25, 1996).

[3] *Id.* at *7-9.

[4] *Id.* at *35.

[5] *See Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1281 (9th Cir. 1998).

[6] *Id.* at 1286.

[7] *United Statesv. Sherwood*, 312 U.S. 584, 586 (1941).

[8] *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

[9] In an FTCA action in district court, the United States is the defendant rather than the individual employee or the particular federal agency. *See* 28 U.S.C. § 2679(a); *see also Rivera v. United States*, 928 F.2d 592, 608-609 (2nd Cir. 1991).

[10] *See* 28 U.S.C. § 1346(b)(1).

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from the applicable standard of care; (2) causing injury as a result; (3) to a party to which the individual owed a duty.[11] Thus, in order to establish that a DCAA auditor acted negligently, a contractor must demonstrate that the DCAA audit failed to conform to the applicable professional standards for a DCAA audit, that the contractor was harmed as a result of the improper audit, and that the DCAA owed a duty to the contractor.

A. The DCAA's Standard of Care when Auditing Contractors.

Similar to lawyers, doctors, and engineers, there is an objective standard of care or quality with which the DCAA must comport when auditing contractors. GAGAS, the DCAA Contract Audit Manual, and related regulations establish these fundamental requirements.

The DCAA Charter states that the DCAA serves the Department of Defense (DOD) and the public interest by providing accounting and financial advisory services.[12] In the context of auditing, examining, and/or reviewing contractor and subcontractor records, systems, and other accounting practices, the DCAA Charter, reissued on January 4, 2010, now requires that such efforts be performed ''in accordance with Generally Accepted Government Auditing Standards (''GAGAS'') (already defined above), the Federal Acquisition Regulation, the Defense Federal Acquisition Regulation Supplement, and other applicable laws and regulations. . . .''[13] Thus, the DCAA Charter establishes that DCAA auditors are held to a professional standard of care when performing their duties that is intended to protect the public interest and DOD's interests. Moreover, the DCAA Charter also establishes that DCAA personnel cannot disregard the operative requirements of GAGAS, the various acquisition regulations, or other applicable law in performing their duties.

Of particular importance is GAGAS. As the GAO has recognized, GAGAS is the baseline for assessing the quality of a DCAA audit. This is because GAGAS establishes the principles that a government auditor must follow in order to perform a professionally sound audit. A full discussion of what GAGAS requires is beyond the scope of this article, but requirements range from what an auditor must do to prepare for an audit, to how the auditor must perform the audit, to how the auditor is to arrive at and support audit conclusions.[14] Importantly, even when auditor judgment is required, GAGAS establishes principles for ensuring that the exercise of judgment is professionally reasonable.

In practice, the courts assess whether or not the DCAA complied with GAGAS and other relevant requirements for conducting audits. The *General Dynamics* court, for instance, considered the fact that: (1) the auditor's work papers did not support the conclusions reached in the audit; (2) the auditor failed to consult with technical experts; (3) the contract's plain terms regarding contract type were in direct conflict with the position the auditor took regarding contract requirements; and (4) no entrance or exit conferences were held with General Dynamics.[15] Based upon these facts, the court concluded the DCAA had deviated from the requisite standard of care.[16]

Other potential deviations would include any violation of GAGAS, such as: (1) the use of inadequately qualified personnel; (2) failing to properly supervise such personnel; (3) indications that the audit outcome was predetermined; (4) audit conclusions reached without relevant input from technical experts; and (5) conclusions materially lacking any evidentiary basis.[17] Another example of a deviation from the required standard of care, cited in the *J.F. Taylor* decision, is the DCAA's use of statistically invalid sampling techniques in performing executive compensation audits.[18]

B. Contractor Injury Resulting from DCAA Malpractice.

While by no means exhaustive, the following illustrate a few circumstances in which negligent DCAA audit activities may injure contractors, and to which, therefore, contractors should be particularly attentive. DCAA may act negligently in the approval of interim vouchers under DFARS Part 242, serving as the contracting officer's representative, by delaying or withholding amounts owed to the contractor. Thus, if the DCAA issues a Form 1 suspending or disapproving costs and/or initiates a cost withhold without action or input from the CO and has done so negligently, contractors should consider the FTCA remedy. Similarly, the DCAA may disapprove a contractor's business system because of a negligently prepared audit. The disapproval of a contractor's business system could preclude the contractor from competing for a new contract while the resolution of the disapproval is pending. Contractors may also have to expend resources in responding to DCAA issued flash reports or Statements of Conditions and Recommendations that were issued as a result of a negligent audit.

Another nettlesome issue that any FTCA claimant will encounter is how to measure its damages resulting from the injury. While a detailed analysis of damages issues is outside the scope of this article, the district court's decision in the *General Dynamics* case, which held that General Dynamics was entitled to all of its attorneys fees associated with defending itself against the indictments brought by the United States,[19] is noteworthy. Importantly, the court of appeals did not question or disparage the district court's damages finding.[20] Indeed, Judge O'Scannlain noted in his partial dissent that ''identifying the injury for which General Dynamics seeks relief is simple: the injury is the indictment. In defending itself against the erroneously premised indictment, General Dynamics spent over $25,000,000 in attorney's fees.''[21] Subsequent court decisions have confirmed that a party may recover attorneys' fees that were expended in another proceeding, such as a suit

[11] *See* 57A Am. Jur. 2d Negligence § 71.

[12] Dep't of Def. Directive No. 5105.36 (Jan. 4, 2010), *available at* http://www.dtic.mil/whs/directives/corres/pdf/510536p.pdf.

[13] *Id.*

[14] *See, e.g., U.S. Govt. Accountability Office, Govt. Auditing Standards (2011).*

[15] *See Gen. Dynamics*, 1996 WL 200255, at *23-31.

[16] *Id.* at *33.

[17] *See, e.g., U.S. Govt. Accountability Office, Govt. Auditing Standards*, ¶¶ 3.69 (use of qualified personnel), 3.85(a) (supervision of auditors), 3.04 (objectivity), 3.72 (technical knowledge), 6.56 (evidentiary basis for conclusions) (2011).

[18] *J.F. Taylor, Inc.*, ASBCA Nos. 56104, 56105, 12-1 BCA ¶ 34,920 (Jan. 18, 2012).

[19] *See Gen. Dynamics*, 1996 WL 200255, at *35.

[20] *See Gen. Dynamics*, 139 F.3d at 1286.

[21] *Id.* at 1288 (J. O'Scannlain dissenting in part).

under the CDA to recover unpaid amounts, as a result of a negligently prepared audit.[22]

C. The DCAA Owes a Duty to the Contractor Being Audited.

In order to establish entitlement under tort, contractors must demonstrate that, as a matter of law, the DCAA owes a duty to the contractor to audit the contractor in accordance with the applicable professional standards. Determining whether the DCAA owes a duty to a contractor will depend upon the state law where the DCAA negligence occurred. Generally, however, when determining whether a duty exists, courts will assess the relationship between the DCAA and the contractor.[23] In the *General Dynamics* case, the district court, applying California law, held that the DCAA owed a duty to General Dynamics because the audit was intended to have an impact on General Dynamics, and it was reasonably foreseeable that a negligently prepared audit would injure General Dynamics.[24]

The DCAA is supposed to objectively audit the contract to assess the contractors' compliance with contractual requirements. While the CO is the intended recipient of the DCAA's work product, it is undeniable that the contactor is directly affected by the DCAA's findings. Indeed, given the current relationship between the DCAA and contractors, it is likely the DCAA owes a legal duty to contractors to conduct the audit in accordance with the applicable standard of care.

D. Government Defenses to Negligence Claims. The United States is free to assert any defense that the particular negligent employee could have raised.[25] Additionally, the FTCA provides a number of exceptions from liability that the government may advance to relieve it of liability.[26]

The exception to FTCA liability most relevant to contractors lawsuits for DCAA's professional malpractice is known as the ''discretionary function'' exception.[27] The plain language of the exception provides that the United States will not be liable for claims ''based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government whether or not the discretion involved be abused.''[28] Thus, the discretionary function exception, when applicable, relieves the government of liability even if the facts establish that a federal employee acted negligently in performing the discretionary function at issue.[29] Importantly, however, the concept of discretion is limited to the exercise of political, social, or economic policy judgment.[30] Accordingly, the exception does not apply to the exercise of judgments made by professional employees that have nothing to do with agency policy.[31]

One way in which the United States might attempt to insulate itself from DCAA malpractice would be to assert that the DCAA auditor performing the work is performing a discretionary function. However, this position is unlikely to be persuasive. While a DCAA auditor may be exercising professional judgment in executing the audit effort, those judgments are not political, social, or economic policy judgments. Rather, they are accounting judgments that are bound by objective standards like the GAGAS, the FAR, the DFARS, and other applicable law (including the law of negligence in state jurisdictions). These objective professional standards establish requirements that govern acceptable professional conduct, and an auditor has no discretion to violate these professional standards. Thus, just as FTCA claimants have successfully pursued suit for the professional malpractice of other professionals, like doctors, engineers, and others in the government's employment,[32] DCAA auditors are also likely not engaging in discretionary acts. Indeed, this is the conclusion reached by the district court in the *General Dynamics* case.

As discussed above, another key question is whether the contractor is directly harmed by DCAA's professional negligence, or whether there was another intervening discretionary act that precludes the conclusion that DCAA's malpractice caused the contractor's injury. In many circumstances, another federal employee, such as a CO (typically a DCMA Administrative Contracting Officer (ACO)) or DOJ, will utilize the DCAA audit report to make a decision regarding the matter audited. In these cases, the government is likely to argue that the ACO or DOJ exercised independent discretionary judgment, thus causing an intervening event that discharges the government's liability for DCAA's malpractice.[33] As noted in the introduction to this article, however, the effective decision-maker in many cases is the DCAA and, with increasing frequency, the DCAA's actions alone are responsible for the resulting injury to contractors.

III. Perfecting District Court Jurisdiction Under FTCA. The FTCA is similar to the CDA in that the FTCA is a limited waiver of sovereign immunity. And, as is the case in pursuing a claim under the CDA, certain actions must be taken by any FTCA claimant to perfect its claim and ensure that the appropriate district court will have jurisdiction to entertain the matter. A contractor must first present the claim to ''the appropriate Federal agency and [the] claim shall have been finally denied by

[22] *SeeTri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 580 (D.C. Cir. 2003). Importantly, the attorneys' fees expended in the FTCA lawsuit are not recoverable. *Id.* at 577.

[23] *See* 57A Am. Jur. 2d Negligence § 81.

[24] *See Gen. Dynamics*, 1996 WL 200255, at *33.

[25] *See* 28 U.S.C. § 2674.

[26] *See* 28 U.S.C. § 2680.

[27] *See* 28 U.S.C. § 2680(a).

[28] *Id.*

[29] *Id.*

[30] *See, e.g., United States v. Varig Airlines*, 467 U.S. 797, 798-799 (1984).

[31] *See Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir 1983); *see also Nevin v. United States*, 696 F.2d 1229, 1231 (9th Cir. 1983).

[32] *See Molzof v. United States*, 502 U.S. 301, 305 (1992) (discussing malpractice suits under the FTCA against government doctors); *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 392-393 (5th Cir. 2012) (engineering miscalculations not result of discretionary act).

[33] Importantly, it is not settled law that a CO performs a ''discretionary function'' when the CO determines whether an amount is due under a contract or whether or not a contractor has a business system that satisfies regulatory requirements. If a CO's actions are actually involved, courts are more likely to find that a contractor's claim sounds in contract rather than in torts and, therefore, should be resolved under the CDA. Importantly, however, as noted in the introduction many DCAA audits and Forms 1 result in disapproved costs with no written final decision or other meaningful action from the CO. If the CO remains silent, takes no meaningful action, or otherwise effectively abdicates his or her responsibilities to DCAA, a contractor's ability to pursue a tort action is improved.

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the agency in writing. . . .''[34] Upon receipt of the final agency denial, the claimant has six months to initiate an action in federal district court.[35] If the agency does not issue a written denial within six months, the claimant may consider the claim denied and institute an action in federal district court.[36]

The claimant must then present the above-discussed claim to the appropriate federal agency within two years after the claim accrues.[37] Under the FTCA, a claim accrues when the claimant has discovered both the injury and its cause.[38] Additionally, and importantly, when presenting the initial claim to the agency, the claimant must include the full amount of the claim, because the claimant will be unable to increase that amount in the subsequent action. [39] These timelines present some difficult issues for contractors, because, while a contractor may be aware that DCAA has prepared a negligent audit, the contractor may not be aware of the resulting damages. Similarly, this timeframe may require contractors to decide to pursue an FTCA claim prior to exhausting a negotiated resolution with the CO in order to ensure the limitations period does not run.

IV. Parallel Proceedings Under CDA. Contractors may find that the DCAA's malpractice is also a predicate for a contractual dispute with the government under the CDA. For instance, a negligently prepared audit report could result in an unsupported CO final decision to disallow amounts sought by the contractor. This circumstance will likely create some additional complexities that contractors should take into consideration.

First, contractual disputes must be raised under the CDA and litigated before the Court of Federal Claims or the boards of contract appeals.[40] The government is likely to argue that any malpractice claim against the DCAA is in essence a contractual claim, given the DCAA's contract audit function.[41] If such an argument were to be upheld, an FTCA case against the DCAA in U.S. district court would be dismissed.[42] In the *Information Systems* case, for example, the contractor brought suit under the FTCA, claiming that DCAA's negligence prevented the plaintiff from closing out its government contracts, delayed its receipt of final contract payments, and undermined its ability to obtain future contracts. In defending itself in the action, the government argued that the plaintiff's complaint was, in reality, a contract dispute and, therefore, the federal district court lacked jurisdiction under the CDA.[43] The district court determined that, in that particular case, the claims were properly deemed contract claims that fell within the ambit of the CDA and, therefore, dismissed the claims. It is, therefore, important that any FTCA complaint carefully set forth the bases to establish that the claim is a tort claim for negligence, and is distinct from any contractual claim the contractor might have.

Second, a case based upon the same facts cannot be brought before a U.S. district court and the Court of Federal Claims at the same time, even if each case seeks different relief or damages.[44] Accordingly, contractors should be careful to differentiate the facts supporting their negligence claim from those underlying any contractual claims. Contractors may also avoid parallel proceedings by litigating one case prior to litigating the other. And contractors must take care to ensure that doing so does not cause the applicable statute of limitations to run.

V. Practical Considerations. There are several practical considerations that a contractor should consider when faced with what it perceives as negligent DCAA conduct. First, the contractor should carefully document the DCAA's actions, maintaining clear and complete correspondence files and recording the results of oral communications in a written follow-up. Contractors also should promptly submit a request under the Freedom of Information Act (FOIA) for all DCAA work papers relating to their audit or review efforts. The FOIA request also should seek all DCAA correspondence with the ACO and any technical specialists with whom the DCAA consulted in the course of the audit.

When given the chance to respond to a draft audit, contractors should consider and utilize, as appropriate, criteria from GAGAS, the FAR, the DFARS, and other applicable laws and regulations to address the conclusions in the draft audit. Then, upon receiving the final audit, the contractor should consider: (1) whether there are sufficient facts indicating DCAA negligence; (2) the appropriate state jurisdiction and whether the DCAA conduct amounts to malpractice under applicable state law; (3) the procedures discussed above regarding the timely initiation of an FTCA claim; and (4) whether the potential claims are more properly considered contract claims that must be pursued under the CDA.

VI. Conclusion. Unfortunately for contractors involved in federal procurement today, COs do not feel empowered to exercise the discretion and business judgment granted to them under the FAR. As a result, the balance of actual power and *de facto* decision-making authority has moved away from COs toward the DCAA. This shift in authority is all the more worrisome because the DCAA's ability to meet its professional obligations repeatedly has been found lacking. Contractors on the receiving end of a DCAA action either in the form of an audit or Form 1 should not overlook the potential remedies provided under the FTCA.

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[34] *See* 28 U.S.C. § 2675(a).

[35] *See* 28 U.S.C. § 2401(b).

[36] *Id.* An alternative path is initiating a direct suit against the negligent federal employee. Such an action, however, will be dismissed, the United States will be substituted as the defendant, and the claimant will have to establish that the original action was initiated within two years after the injury occurred. The claimant must also file a claim with the relevant federal agency within 60 days after the original action is dismissed when reinstituting the actions against the United States. *See* 28 U.S.C. § 2679(d)(5).

[37] *See* 28 U.S.C. § 2401(b).

[38] *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

[39] *See* 28 U.S.C. § 2675(b).

[40] *See* Mem. Op. at 4-6, *Info. Sys. & Networks Corp. v. United States*, No. 8:05-cv-00868-AW (D. Md. Jan. 4, 2006), ECF No. 18.

[41] *Id.* at 4-5.

[42] *Id.* at 6.

[43] *Id.* at 4-6.

[44] *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723, 1731 (2011).