

Legal Sidebar

Could the Defense Contract Audit Agency Be Held Liable for Malpractice? Recently Filed Litigation Raises the Question Again

11/7/2014

Can the Defense Contract Audit Agency (DCAA) be held liable in tort to a federal contractor for alleged malpractice during an audit that helped deny the contractor reimbursement of costs later determined to be owed under the contract? This question may be addressed by a federal district court in [Kellogg Brown & Root Services v. United States](#). In this recently filed case, KBR alleges that DCAA's departure from required standards when auditing one of KBR's contracts with the Army rose to the level of malpractice and caused KBR to suffer monetary losses for which DCAA is liable under the Federal Tort Claims Act (FTCA). A contractor has similarly sued DCAA for malpractice before, though that claim was dismissed under the FTCA's discretionary function exception. However, commentators have suggested that a malpractice action against DCAA could now be successful given DCAA's enlarged role in contract administration.

DCAA is [responsible for](#), among other things, performing advisory audit and accounting services in connection with negotiation, administration, and settlement of Department of Defense (DOD) contracts. In conducting audits, DCAA [follows](#) the [Generally Accepted Government Audit Standards](#) (GAGAS). Reports from the [DOD Inspector General](#) and the [Government Accountability Office](#) (GAO) have observed DCAA's failure to comply with the GAGAS while conducting audits, with one recent [report](#) finding at least one "significant inadequacy" in 13 of 16 DCAA audits from FY2012 and FY2013 that were reviewed.

Allegations of deficiencies in DCAA audits are not new. They previously led a contractor to bring action against DCAA under the FTCA for malpractice, or negligently failing to use the skill, prudence, and diligence that professional auditors typically use during audits. In that 1998 case, [General Dynamics v. United States](#), DCAA's failure to comply with auditing standards led it to erroneously conclude that a contractor improperly charged the government under a contract. This erroneous conclusion, in turn, helped inform prosecutors' decision to initiate criminal and civil litigation against the contractor. The criminal and civil litigation against the contractor was ultimately dismissed, and, through its malpractice claim against DCAA, the contractor sought recovery of the expenses it incurred during the litigation.

Although the Ninth Circuit in *General Dynamics* observed that DCAA was, in fact, negligent, it dismissed the contractor's claim as impermissible under the FTCA. The FTCA [generally](#) waives the government's sovereign immunity by providing that the government can be sued in tort to the same extent as private parties, though it contains [exceptions](#). One such exception, the [discretionary function exception](#), generally provides that the government cannot be liable in tort for claims based on its or its employees' discretionary acts. The Ninth Circuit in *General Dynamics* noted that although the contractor framed its suit against the government as one against DCAA, in reality, the case was against the prosecutors that initiated the criminal and civil litigation against the contractor. This is because the contractor's harm (i.e., litigation expenses) resulted from the decision to prosecute the contractor rather than DCAA's malpractice. The Ninth Circuit held that the discretionary function exception barred the contractor's claim because the decision to prosecute the contractor was a discretionary act by prosecutors. In recent years, [commentators](#) have noted that DCAA's role in the contract administration process seems to have expanded such that contracting officers sometimes defer to DCAA decisions, which may increase the likelihood of DCAA being held liable for malpractice despite the Ninth Circuit's decision in *General Dynamics*.

KBR's malpractice suit against DCAA appears to be the first such suit since *General Dynamics*. KBR alleges that DCAA negligently departed from the GAGAS when auditing the costs that KBR claimed pursuant to a

contract with the Army and that this negligence led to its claimed costs being denied. According to KBR, because of the negligently conducted audit, it incurred litigation expenses in recovering the claimed costs from the Army and defending against federal action under the False Claims Act.

It is unclear whether KBR's suit will be successful. The government may be able to establish, as it did in *General Dynamics*, that the discretionary function exception shields it from liability. On this issue, the true basis of KBR's claim (i.e., is it actually a claim against DCAA, or did KBR's harm result from the discretionary actions of another governmental actor?) may be important. Considering DCAA's seemingly expanded role in contract administration in recent years, the basis of KBR's claim here may be less clear than the basis of the contractor's claim in *General Dynamics*. Given the widely reported deficiencies in DCAA audits, if KBR succeeds in its malpractice claim against DCAA, it could spur other contractors to bring similar claims in the future.

Posted at 11/07/2014 08:54 AM by [Rodney M. Perry](#) | [Share Sidebar](#)

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