REDUCING DEFENSE CONTRACT WASTE: THE INADEQUACY OF DEFENSE CONTRACT AUDIT PRACTICES IN PREVENTING AND RECOVERING SYSTEMIC DEFENSE CONTRACTOR WASTE

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INTRODUCTION

President Dwight D. Eisenhower's farewell address to the American people was a stern warning against citizen complacency toward maintaining a costly and technologically advanced military at the expense of democratic institutions and global peace.[1] Eisenhower cautioned that the American people "must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."[2] Eisenhower was concerned that arms manufacturers—left free from regulation and public scrutiny—would convince the American public of the necessity of a self-sustaining defense industry.[3] Instead of tax payers deciding what manner of military their government maintained, arms manufacturers would steer the government toward maintaining a large and permanent military at tax payers' expense and convince the public that doing so was in its best interest.[4]

Eisenhower's concerns with his reality in 1961—identifying what he considered a dangerous trend in a rapidly growing military-industrial complex—was a prescient anticipation of the modern American defense industry. Defense spending and overseas defense contract obligations increased substantially in the late 1990s, and significantly spiked in the early years of the War on Terror.[5]

In the modern military-industrial complex, the Department of Defense

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1. *See* Dwight D. Eisenhower, U.S. President, Farewell Address, 2–4 (Jan. 17, 1961) (available in the Eisenhower Presidential Library).

2. *Id.* at 3.

3. "Conjunction of an immense military establishment and a large arms industry is the new American experience. . . .We recognize the imperative need for this development. Yet, we must not fail to comprehend its grave implications. Our toil, resources, and livelihood are all involved. So is the very structure of our society." *Id.* at 2.

4. *See id.* at 2–4.

5. Although spending and overseas contracting obligations have declined since 2012, spending levels that year only returned to 2008's nearly $600 billion (adjusted US dollars); an increase of approximately 150% since the late 1990s. *See generally* Dinah Walker, *Trends in U.S. Military Spending*, COUNCIL ON FOREIGN RELATIONS (July 15, 2014), http://www.cfr.org/defense-budget/trends-us-military-spending/p28855; *see also* MOSHE SCHWARTZ & WENDY GINSBERG, CONG. RESEARCH SERV., R41820, DEPARTMENT OF DEFENSE TRENDS IN OVERSEAS CONTRACT OBLIGATIONS, 5–6 (2013) (indicating that the percentage of Department of Defense (DOD) contract obligations overseas from 1999 to 2012 rose sharply from 5% in 2001, peaked at 13% in 2006, and were just over 12% in 2012).

(DOD) delegates defense contract and contingency contract administration to the Defense Contract Management Agency (DCMA) and defense contract audit oversight to the Defense Contract Audit Agency (DCAA).[6] The DCAA's primary mission is to serve the public interest by performing all necessary contract audits and by providing accounting and financial advisory services to all DOD components responsible for contract procurement and administration.[7] The DCAA provides these services to ensure taxpayer dollars are spent on fair and reasonably priced contracts.[8] While the DCAA's chief objective in contract auditing is detecting defective pricing, it is also responsible for reporting incidents of suspected fraud and waste to appropriate authorities.[9] The DCAA is the only agency tasked with detecting defective pricing during and after the contracting process,[10] and it is the DOD's final means of identifying defense contractor waste for remediation.[11] A successful DCAA is therefore crucial to reducing defense contract waste. [12]

During the first decade of the War on Terror, the DCAA struggled to fulfill its mission due to lack of oversight in overseas contingency theaters,[13] audit standard failures,[14] internal corruption,[15] and incidents of auditor and

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6. *See generally* 10 U.S.C. § 101(a)(13) (2016) (defining "contingency operation" as a military operation designated by the Secretary of Defense that may involve armed forces, military actions, combat operations, or responding to a national emergency or war declared by the President or Congress); DOD, Directive No. 5105.64 § 4 (Jan. 10, 2013) (defining the Defense Contract Management Agency's (DCMA's) mission); DOD, Directive No. 5105.36 § 3 (Jan. 4, 2010) (defining the Defense Contract Audit Agency's (DCAA's) mission).

7. DOD, Directive No. 5105.36 § 3.

8. *See id.*

9. *See id.* § 5(m) at 3; *accord* DCAA, DOD, CONTRACT AUDIT MANUAL (CAM) § 4–702.2(d) (2016).

10. Kathleen C. Barger, *The Scope of DCAA's Audit Authority*, 11 PUB. CONT. L.J. 259, 262 (1979) (stating that auditor's role is determining the reasonableness of reported costs according to the Defense Acquisition Regulations (DAR)).

11. CAM § 4–702.2(d) (stating that auditors are not trained to investigate illegal acts and should instead issue an investigative referral upon obtaining a reasonable suspicion of fraud or illegal activity).

12. DCAA, REP. TO CONGRESS ON FY 2015 ACTIVITIES, at 9 (2016), http://www.dcaa.mil/DCAA_FY2015_Report_to_Congress.pdf (sustaining $5.9 billion out of $11.7 billion of DCAA-questioned costs in 2015).

13. See Duggan v. Dept. of Def., 484 F. App'x 533, 535 (Fed. Cir. 2012) (reporting systemic audit deficiencies in Iraq).

14. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-468, WIDESPREAD PROBLEMS WITH AUDIT QUALITY REQUIRE SIGNIFICANT REFORM 14–15 (2009) [hereinafter GAO REPORT: AUDIT QUALITY PROBLEMS] (finding at sixty-five of sixty-nine audited offices: audit standard compliance problems, independence issues with contractors resolving

supervisor incompetence.[16] By the time operation costs in Afghanistan and Iraq began to wind down in 2011, the government had already lost incalculable sums of taxpayer dollars due to defense contractor waste.[17]

The DCAA's principle objective of ensuring appropriate and efficient expenditure of taxpayer dollars in defense contracting is consistent with the goal of eliminating taxpayer waste in defense contracting.[18] Presently, however, the DCAA faces a number of challenges from within and throughout the defense industry that prevent it from fully realizing its mission.[19]

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deficiencies before report issuance, restricted auditor access to records, and price justification reports issued on insufficient evidence).

15. *See* Charles S. Clark, *Longtime Whistleblower at the Defense Contract Audit Agency Keeps Discontent Alive*, GOV'T EXEC. (May 8, 2013), http://www.govexec.com/defense/2013/05/longtime-dcaa-whistleblower-keeps-discontent-alive/63027/ (explaining internal restraints on employees attempting to report legitimate defective pricing and being threatened with retaliation for whistleblowing); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-857, ALLEGATIONS THAT CERTAIN AUDITS AT THREE LOCATIONS DID NOT MEET PROFESSIONAL STANDARDS WERE SUBSTANTIATED 3–4 (2008) [hereinafter GAO REPORT: PROFESSIONAL STANDARDS NOT MET] (finding that DCAA management threatened auditors with reprisals if negative audit findings weren't deleted, and supervisors changed audit opinions to indicate contractor compliance with Cost Assessment Standards without proper evidence).

16. *See* GAO REPORT: PROFESSIONAL STANDARDS NOT MET, *supra* note 15, at 7 (finding that trainee auditors were improperly assigned to advanced audits without proper supervision).

17. *See* CLARK IRWIN, COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFG., CWC-NR-49, WARTIME CONTRACTING COMMISSION RELEASES FINAL REPORT TO CONGRESS, at 2 (2011) (calculating that contracting waste and fraud in Afghanistan and Iraq from 2001 to 2011 was at least $31 billion, but possibly as high as $60 billion).

18. *See* DOD, Directive No. 5105.36 § 3 (Jan. 4, 2016).

19. Wartime contracting (especially overseas) and percentage-based cost-plus contracts are of particular concern due to the degree of impact these issues can potentially have on the American taxpayer and economy. *Compare* Lindsey Nelson, Note, *Mission Not Accomplished: Missing Billions in Iraq, Enhanced Whistleblower Protections, and a Large Failure in a Small Step*, 38 PUB. CONT. L.J. 277, 281 (2008) (quoting William Reed, DCAA Director in 2007, telling the House of Representatives Oversight and Government Reform Committee that "unsupported and questionable costs found in Iraq reconstruction added up to more than $10 billion"), *and id.* at 282–83 (singling out Kellogg Brown & Root Services, Inc. (KBR), a defense contractor and former subsidiary of Halliburton which DOD investigators identified nearly $2 billion in overpricing on $20 billion it received for reconstruction contracts for Iraq, Afghanistan, and Kuwait), *with* KBR v. United States, 742 F.3d 967, 970, 972 (Fed. Cir. 2014) (awarding KBR damages, including a $6.78 million windfall, despite KBR's gross negligence in cost calculation for construction of a dining facility for soldiers in Iraq).

The complexity of the DOD's multi-decade efforts in balancing a functional defense industry with its goal of mitigating taxpayers' vulnerability to contractor-produced tax dollar waste is another reason why describing, let alone remedying, this problem is so difficult.[20] Consequently, the military-industrial complex Eisenhower warned the American people of has become a functional organ of our government.[21] Irrespective of this phenomenon's ethical implications, if the American government and its taxpayers have any desire to reduce and eliminate the countless millions of dollars of waste generated by the defense industry, then defense contract audits require substantially more resources, significant improvement in auditing procedures, and potential changes to the contracting regulations themselves.

Part I of this Comment explains the DCAA's mission, its audit standards, and its role in fraud detection and investigation. Part II outlines audit standards and noncompliance problems in the DCAA, as well as whistleblower protection failures for auditors seeking to circumnavigate internally suppressed audit reports. Part III expands on these problems to discuss the broader implications of the inadequacy of the DCAA's audit capabilities to offset an industry-wide problem—particularly focusing on overseas contingency contracting and defense contract audit outsourcing. Finally, Part IV recommends that: (1) the DCAA propose a rule to prevent contractors from outsourcing their audits to independent contractors that obstruct the DCAA's access to contractors' pricing data; (2) the reasonableness standard for contractors to justify DCAA-challenged costs should be modified to at least omit wartime circumstances as a reason for price increases; and (3) the DCAA's proposed-rule to incentivize voluntary contractor disclosure of defective pricing in exchange for more limited audits should more explicitly clarify what "limited" scope audits mean.

I. AUDIT STANDARDS AND FRAUD INVESTIGATION

A. Agency Background

In 1958, during President Eisenhower's final term in office, the DOD

20. *See generally* James Jay Carafano and Eric Sayers, *Defense Spending Fraud, Waste, and Abuse: Hype, Reality, and Real Solutions*, THE HERITAGE FOUNDATION (Nov. 20, 2008), http://www.heritage.org/research/reports/2008/11/defense-spending-fraud-waste-and-abuse-hype-reality-and-real-solutions?lfa=Protect-America.

21. *See* NPR, *Ike's Warning of Military Expansion, 50 Years Later*, NPR (Jan. 17, 2011, 5:28 AM), http://www.npr.org/2011/01/17/132942244/ikes-warning-of-military-expansion-50-years-later (citing a limited number of major contractors that are powerful lobbyists and major job providers nationwide as obstacles to reducing American dependence on the defense industry).

made its first attempt to consolidate the separate military departments' disparate accounting practices into a single auditing agency.[22] The DOD developed a general consensus that centralizing audit programs could potentially streamline auditing standards, improve auditing and contracting efficiency, and reduce wasteful spending.[23] By 1965, the DOD established the DCAA, an administrative agency to oversee all DOD contract and subcontract auditing.[24]

The DCAA is headed by the Under Secretary of Defense (DOD Under Secretary) and Chief Financial Officer (Comptroller), but is principally managed by the DCAA Director,[25] who oversees operations across the agency's five regional offices.[26] Currently, the DCAA employs roughly 4,800 personnel nationwide,[27] and has had an annual budget of between $545 and $570 million in the past three years.[28]

B. DCAA Audit Standards

The DCAA follows three primary sets of auditing standards: the

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22. Willard O. Vick, *Role of Defense Contract Audit Agency under P.L. 87-653*, 1 PUB. CONT. L.J. 58, 58 (1967); *see also* DCAA, *History*, ALLGOV.COM, http://www.allgov.com/departments/department-of-defense/defense-contract-audit-agency?agencyid=7160 (last visited July 5, 2016) (stating that before the DCAA was established, the Army, Navy, and Air Force each conducted their defense contract audits independently).

23. *See* ABOUT DCAA, DCAA.MIL, http://www.dcaa.mil/about_dcaa.html (last visited July 5, 2016); *see also* Vick, *supra* note 22, at 58–59 (stating that the military departments unanimously decided to consolidate defense contract audits due to the shared belief it would promote efficiency and effectiveness in the procurement process).

24. *See* DOD, Directive No. 5105.36 § 3.

25. *See id.* §§ 4–5, (dictating the management structure of the DCAA and responsibilities and functions of the DCAA Director).

26. Regional offices have moved periodically, but are currently established as: Central (Irving, TX), Eastern (Smyrna, GA), Mid-Atlantic (Philadelphia, PA), Northeastern (Lowell, MA), and Western (La Palma, CA). *See* CONTACT US, DCAA.MIL, http://www.dcaa.mil/contact_us.html (last visited Nov. 15, 2016).

27. DCAA, REP. TO CONGRESS ON FY 2015 ACTIVITIES, *supra* note 12 (reporting that employment as of September 30, 2015 was comprised of 4,304 auditors and 549 support staff).

28. *Compare* DCAA, FY 2016 BUDGET ESTIMATES, at 14 (2015) (reporting that the proposed budget for 2016 was $570,177,000), *with* OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER) CHIEF FINANCIAL OFFICER, DOD FISCAL YEAR 2016 BUDGET REQUEST, 1-1 through 1-2 (2015), dcmo.defense.gov/Portals/47/Documents/Publications/Annual%20Performance%20Plan/FY2016_Performance_Budget.pdf (reporting that the annual actual and requested budget for DOD from 2014–2016 was between $560.4 and $585.3 billion).

Generally Accepted Government Auditing Standards (Government Auditing Standards), the Contract Audit Manual (Manual) guidelines—including the Cost Accounting Standards (Accounting Standards)—and the Federal Acquisition Regulation (FAR).[29]

DCAA audits must be conducted in compliance with the Government Accountability Office (GAO)-issued Government Audit Standards, and all defense contracts are required to contain a clause permitting GAO audits.[30] The DCAA-issued Manual, however, is a non-binding set of procedures and techniques which DCAA supervisory personnel are advised to promote.[31] The Accounting Standards are incorporated in the Manual and largely serve to grant increased access to DCAA auditors for higher risk (i.e., more expensive) contracts.[32]

The FAR is a codification of uniform procedures for acquisition services and regulations for federal agencies that the DOD follows in conjunction with a DOD-issued supplement called the Defense Federal Acquisition Regulation Supplement (DFARS).[33] The FAR and DFARS are rules for the acquisition process for defense contracting, and their application is principally intended for use by contracting officers at the DCMA and defense contractors.[34] The DCAA audits all DCMA contracts, and is therefore subject to the FAR's requirement that contractors' financial representations to the government be allowable, allocable, and reasonable.[35] Costs are allowable if they satisfy the allocability and reasonableness requirements and are consistent with the DCAA audit

29. *See generally* GOV'T ACCOUNTABILITY OFFICE, GAO-12-331G, GOVERNMENT AUDITING STANDARDS, 13 (2011) [hereinafter GOVERNMENT AUDITING STANDARDS]; CAM, No. 7640.1, § 8-103.3 (2016); DOD & NASA, FED. ACQUISITION REG., § 1.000 (2005) [hereinafter FAR] https://www.acquisition.gov/? q=browsefar.

30. *See* 10 U.S.C. § 2313(b) (2016); Barger, *supra* note 10, at 260.

31. *See* CAM, Foreword (2016).

32. *See generally* CAM § 8–000 (containing the Cost Accounting Standards).

33. FAR issuing authorities include the Administrator of General Services, the Secretary of Defense, and the Administrator for NASA. *See* FAR, *supra* note 29, Foreword; 48 C.F.R. § 1.101 (2015); *see also* DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT (DFARS), DCAA.MIL, http://www.dcaa.mil/dfars.html (last visited Sep. 29, 2016) (stating that defense contractors must follow the procurement process in the FAR as well as the DFARS).

34. *See* FAR, *supra* note 29, Foreword; 48 C.F.R. § 1.603–1 (2015) (requiring agency heads to maintain a program for appointing and terminating contracting officers); *see also* DOD, Directive No. 5105.64 § 4 (stating that DCMA shall perform all contract and contingency contract administration services for the DOD).

35. *See* 48 C.F.R. § 31.201-2 (determining allowability); *id.* § 31.201-3 (determining reasonableness); *id.* § 31.201-4 (determining allocability).

standards and contract provisions.[36] Allocability depends on the contractor's ability to attribute costs to certain contract objects and demonstrate the relative benefits to the contract or the overall business of the contractor.[37]

Defense contractor costs are reasonable under the FAR if, in their nature and amount, they equal, or are less than, what a prudent person in the conduct of competitive business would incur.[38] If an auditor or contracting officer challenges a cost, the contractor has the burden of proving the reasonableness of the cost.[39] However, courts determining the reasonableness of a contractor's costs look to a number of factors that are so variable that it is almost impossible to predict in any given situation.[40] When compounded with the chaotic environment of overseas contingency operations, this standard can be even more unpredictable, and potentially incomprehensible.[41]

C. Waste Detection Versus Fraud Investigation

The Manual and the Government Audit Standards provide auditors with best practices guidelines, while the FAR and DFARS delimit the drafting rules for defense contracts.[42] While the Manual includes guidelines for identifying and reporting fraud, it is confusingly filled with disclaimers that audits are *not* about detecting fraud.[43]

The Manual requires auditors to avoid appearing to investigate fraud,

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36. *See id.* § 31.201-2(d) (stating further that contractor costs must be demonstrated with adequate supporting documentation or the contracting officer may disallow them).

37. *See id.* § 31.201-4 (stating specifically that costs are allocable if they (a) are specifically directed toward the contract; (b) proportionally benefit the contract and other work; or (c) are necessary to overall business operations, even if specific cost objectives cannot be demonstrated).

38. C.F.R. § 31.201-3(a) (elaborating that no presumption of reasonableness is to be attached to contractor-incurred costs).

39. *Id.*

40. *Id.* § 31.201-3(b) (listing the circumstantial factors for reasonableness: (1) whether costs are generally recognized as ordinary and necessary for the contractor's business performance; (2) generally accepted sound business practices, arm's-length bargaining, and federal and state laws and regulations; (3) contractors' duties to the government, other customers, business owners, employees, and the public; and (4) significant deviations from the contractor's established practices).

41. *See infra* Part III. B.

42. *See* CAM, Foreword; GOVERNMENT AUDITING STANDARDS, *supra* note 29, at 1; FAR, *supra* note 29, Foreword; DFARS, *supra* note 33.

43. *See* CAM, § 4-702.3(i) (emphasizing that "the audit team is not auditing to the fraud risk factors. They are not the objectives of the audit").

despite requiring that auditors be trained to detect and report fraud.[44] These conflicting guidelines needlessly complicate auditors' roles by encouraging auditor vigilance but discouraging auditors from actively auditing for fraud.[45]

Fortunately, where the DCAA auditor's role in fraud remediation ends, the DOD Inspector General's (IG's) office takes over.[46] The IG has broad authority to recommend and provide policy and direction to promote efficiency in preventing and detecting fraud in DOD programs and operations.[47] The defense contractor fraud investigatory process begins with the IG issuing guidelines for detecting fraud to the DCAA to incorporate into its auditing practices in the Manual.[48] These contract audit fraud scenarios and indicators of fraud risk identify weaknesses in institutional controls within contracting organizations.[49]

When a DCAA auditor encounters what he or she suspects is fraud, the auditor should complete the "Suspected Irregularity Referral Form," provided the fraud indicators have raised a "reasonable suspicion" of fraud, corruption, or unlawful activity.[50] The auditor then submits the Suspected Irregularity Referral Form to his or her Field Audit Office manager, who will send it to DCAA headquarters.[51] Once the DOD Under Secretary is

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44. *Id.* § 4-702.2(d)–(e) (stating that investigation of illegal acts is not the responsibility of DCAA auditors, and should be referred to DOD investigators and law enforcement).

45. *See id.* § 1-102(b)–(c) (stating that the role of the auditor is *supervisory* and that detecting fraud and unlawful conduct is not the primary goal of an audit) (emphasis added). *But see id.*, § 1-104.2(d) (stating that auditors should be alert for indicators of excessive contract prices or profits and for evidence of overcharges or inadequate compensation to the government).

46. DOD, Directive No. 5106.01 § 3 (Aug. 19, 2014) (stating that the role of the Office of the Inspector General (IG) is to conduct and supervise audits, investigations, evaluations, and inspections relating to programs and operations of the DOD).

47. *See id.* § 5; *see also* ABOUT US, DODIG.MIL, http://www.dodig.mil/About_Us/index.html (last visited Aug. 10, 2016) (providing general background information on the IG).

48. *See* CAM § 4-702.2(b).

49. *See* AUDITOR FRAUD RESOURCES, DODIG.MIL, http://www.dodig.mil/resources/fraud/resources.html (last visited Aug. 10, 2016); GOVERNMENT AUDIT STANDARDS, *supra* note 29, Appendix I, Information to Accompany Chapter 1; *see also* CAM § 4-702.3(h) (identifying non-segregation of duties, inadequate management monitoring for policy compliance, non-adherence to laws and regulations, and lack of asset accountability or safeguarding procedures).

50. *See* DCAA, F-2000 (Suspected Irregularity Referral Form); CAM § 4-702.4(a).

51. Forms are sent to the Justice Liaison Auditor (if classified), or Operations Investigative Support Division (if not classified). *See* CAM § 4-702.4(b).

notified, the report is then sent to the appropriate Defense Criminal Investigative Organization at the IG's Office—which is typically the IG's criminal investigation branch, the Defense Criminal Investigative Service (DCIS).[52]

At the direction of the IG, the DCIS initiates, conducts, and supervises all investigations of the DOD, and works with DOD agencies' and military departments' internal investigative units to avoid duplication and to streamline investigations.[53] Specifically, the DCIS investigates procurement fraud and public corruption, product substitution, health care fraud, illegal technology transfers, and computer crimes.[54] Provided that the DCIS has jurisdiction over a fraud investigation, it may initiate an investigation.[55]

A prevailing disruption to this process has been the DCAA's ongoing internal corruption and audit standard compliance problems.[56] Given the doubts about the integrity of the supervision within the DCAA from the GAO, contractors, and Congress, it is unsurprising that auditors have increasingly turned toward whistleblowing to air what would otherwise be suppressed reports of fraud or defective pricing.[57]

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52. *See* DOD, Instruction 5505.02, Enclosure 3, § 1 (2013, as amended 2016) (detailing the scope of the Defense Criminal Investigative Service's (DCIS's) jurisdictional responsibility for investigating allegations of fraud).

53. *See* Inspector General Act, 5 U.S.C. app. §§ 8(c)(2), (c)(9) (2012).

54. INVESTIGATIONS—DCIS, DODIG.GOV, http://www.dodig.mil/Inv_DCIS/index.cfm (last visited Aug. 8, 2016) (providing general information about the DCIS's mission and investigative priorities).

55. *See* DOD, Instruction 5505.02, Enclosure 3, § 2 (stating that the DCIS only has investigatory jurisdiction if the contract is between the contractor and the DOD, rather than one of the specific military departments).

56. *See, e.g.*, Robert O'Harrow Jr. & Dana Hedgpeth, *Contracting Audit Agency Target of Investigations*, WASH. POST (Sept. 10, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/09/AR2008090902925.html (reporting that seasoned DCAA auditors were repeatedly told by supervisors to ignore FAR violations, ultimately allowing Boeing to recover roughly $270 million in losses resulting from a defective accounting system); Robert Brodsky, *Contractors Improperly Influenced Defense Audits GAO Finds*, GOV'T EXEC. (July 23, 2008), http://www.govexec.com/defense/2008/07/contractors-improperly-influenced-defense-audits-gao-finds/27312/ (reporting that the GAO discovered in 2002 that DCAA officials made an upfront agreement with a major aerospace contractor to deliberately limit the scope of its audit).

57. *See* Andrew Lapin, *Contractors Remain a Focal Point in Cost-Cutting Efforts*, GOV'T EXEC. (Mar. 29, 2012), http://www.govexec.com/contracting/2012/03/contractors-remain-focal-point-cost-cutting-efforts/41617/?oref=river (Senator Claire McCaskill, Chairwoman for the Senate Homeland Security Subcommittee on Financial and Contracting Oversight, expressed doubts that contracting is the cheapest means of defense procurement, and called for the DOD to cut contracting costs.); *id.* (John Gage, President of American Federation of

II. INTERNAL COMPLIANCE PROBLEMS AND WHISTLEBLOWER FAILURES

A. Whistleblowing and Whistleblower Protection

The Whistleblower Protection Act provides protected status to federal employees who disclose when they reasonably believe other federal employees have violated any law, rule, or regulation, or are otherwise responsible for fraud, waste, abuse, unnecessary government expenditure, or pose a substantial and specific threat to public health or safety.[58] The Office of Special Counsel is an independent investigative and prosecutorial agency that enforces the Whistleblower Protection Act, and can take disciplinary action against federal employees who commit prohibited personnel practices.[59]

The Office of Special Counsel works closely with the Merit Systems Protection Board (Protection Board)—a quasi-judicial body that oversees certain cases of federal employer abuse and mismanagement.[60] Decisions by the Protection Board are non-binding, provided they are successfully appealed to the United States Circuit Court for the Federal Circuit.[61]

If a DCAA auditor believes that his or her reports of defective pricing or fraud are being ignored and that his or her superiors will not properly consider his or her Suspected Irregularity Referral Form, he or she may contact the DCAA Whistleblower Hotline.[62] The hotline exists to provide

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Government Employees, claimed that current and previous administrations have been unwilling to enforce sourcing and workforce management laws.); Robert Brodsky, *Report of Defense Audit Scandal Makes Waves*, GOV'T EXEC. (July 28, 2008), http://www.govexec.com/federal-news/2008/07/report-of-defense-audit-scandal-makes-waves/27336/ (Senator Joseph Lieberman commented that the "GAO has substantiated serious whistleblower allegations that show that some DCAA supervisors were cutting corners and pressuring their subordinates to give more favorable audits to contractors than the auditors felt the contractors deserved.").

58. Whistleblower Protection Act, 5 U.S.C. §§ 1201–1219, 1221–1222, 3352 (1978, as amended 1989); *see* 5 U.S.C. § 2302(b)(8) (2015) (listing prohibited personnel practices for federal organizations and their employees).

59. *See* WHAT WE DO, OSC.GOV, https://osc.gov/Pages/DOW.aspx (last visited July 4, 2016).

60. *See* 5 U.S.C. § 1201; *see also* ABOUT MSPB, MSPB.GOV, http://www.mspb.gov/about/about.htm (last visited July 5, 2016).

61. The Merit Systems Protection Board has original jurisdiction over whistleblower protection claims regarding the prohibited personnel practices in the Whistleblower Protection Act. *See* 5 U.S.C. § 1214; QUESTIONS AND ANSWERS ABOUT WHISTLEBLOWER APPEALS, https://www.mspb.gov/appeals/whistleblower.htm (last visited Feb. 18, 2017).

62. Auditors may likewise contact the Whistleblower Hotline if superiors have told them to modify "inadequate" or "partially inadequate" reports to "adequate," without

a confidential avenue for individuals to report allegations of fraud, waste, abuse, and other wrongdoings that fall within the DCAA's purview.[63] Whistleblowers may also reach out through the DOD IG Complaint Hotline, which is set up in a similar manner to the DCAA IG's, and processes similar complaints.[64]

The whistleblower hotline played a major role in notifying the GAO of the extent of the DCAA's internal mismanagement problems.[65] If, however, a DCAA auditor remains dissatisfied after pursuing these outlets (although he or she need not have exhausted these remedies first), he or she may file a qui tam suit under the False Claims Act.[66]

Qui tam lawsuits allow a person or entity with evidence of fraud regarding federal programs or contracts to sue the wrongdoer on behalf of the federal government.[67] Even if the government declines to partake in the lawsuit, the whistleblower may still sue, provided that no other party has filed a complaint based on the same evidence.[68] Despite the public exposure that comes with bringing a qui tam case against an allegedly fraudulent actor, the False Claims Act incorporates a whistleblower protection provision to permit whistleblowers the option of openly litigating their claims without reprisal.[69]

However, there are procedural drawbacks to bringing a complaint under the False Claims Act, such as the "first-to-file" rule. [70] The first-to-file rule

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documenting proper support for the changes. *See* DCAA HOTLINE, DCAA.MIL, http://www.dcaa.mil/hotline/ (last visited July 1, 2016).

63. The DCAA Office of the IG administers the hotline. *See id.*

64. While callers can opt to remain anonymous, failure to provide contact information will prevent the agency from providing whistleblowers with a response to their complaints. DOD HOTLINE, HOTLINE COMPLAINT, DODIG.MIL, http://www.dodig.mil/Hotline/hotlinecomplaint.html (last visited July 1, 2016).

65. *See* GAO REPORT: PROFESSIONAL STANDARDS NOT MET, *supra* note 15, at 3; GAO REPORT: AUDIT QUALITY PROBLEMS, *supra* note 14, at 14–15.

66. *See* False Claims Act, 31 U.S.C. §§ 3729–3733 (1863, as amended in 1986).

67. Qui tam, BLACK'S LAW DICTIONARY 1368 (19th ed. 2009) ("who as well for the king as for himself sues in this matter . . . ."); *see also* FALSE CLAIMS ACT/QUI TAM FAQ, NATIONAL WHISTLEBLOWER CENTER, http://www.whistleblowers.org/resources/faq-page/false-claims-actqui-tam-faq#what%20is%20false (last visited June 22, 2016) [hereinafter QUI TAM FAQ].

68. *See* QUI TAM FAQ, *supra* note 67.

69. *See* 31 U.S.C. § 3730(h) (providing whistleblowers with reinstatement of employment, double back pay, and compensation for special damages, including litigation costs and reasonable attorney's fees).

70. *See* Neil Gordon, *KBR Fraud Case Gets to Supreme Court*, PROJECT ON GOV'T OVERSIGHT (Oct. 30, 2014), http://www.pogo.org/blog/2014/10/20141030-kbr-iraq-fraud-case-gets-to-supreme-court.html.

can entirely obstruct a well-prepared plaintiff's complaint if another person has previously filed a similar complaint on the same facts.[71] Additionally, all claims must be filed in camera (i.e., without public access or knowledge), and must remain under seal for a period of government review of at least sixty days.[72] This mandatory review period can compound the frustrations a plaintiff faces with the first-to-file rule when an original complaint is already backlogged under seal.[73] Furthermore, despite the explicit guarantees of whistleblower protection in the False Claims Act, agencies can circumvent these protections through alternative means.[74]

B. Whistleblower Protection Failures

The whistleblower mechanisms and qui tam suits implicitly promise at least some justice when internal agency mechanisms for reporting defense contractor waste fail. Unfortunately, whistleblowers face a difficult burden of proof when attempting to show causal connections between their whistleblowing and subsequent reprisals suffered, as the Supreme Court established in *Mount Healthy Board of Education v. Doyle*.[75]

In *Doyle*, a teacher and then-member of the Education Board (Doyle) disclosed the contents of an internal memo to a radio station which the Board found reprehensible.[76] The Board had a contentious history with Doyle, and when it considered whether to rehire him, it chose not to do so.[77] Doyle challenged the Board's decision as a violation of his

71. *See* 31 U.S.C. § 3730(b)(5) (barring any party other than the government and the relator from suing for related action based on the facts underlying the pending action); § (e)(3) (barring a person from brining an action under the False Claims Act which is based upon allegations that are the subject of a civil suit or administrative money penalty proceeding to which the government is already a party).

72. *Id.* § 3730(b)(2)–(3) (stating that the government may also extend this sixty day under-seal period for its own review of the claim (potentially prolonging the suit for months or even years)).

73. Petitioner was delayed from bringing his claim under the first-to-file rule because two qui tam complaints filed—alleging that KBR was billing the government for twelve-hour workdays regardless of actual work performed—were held under seal for four years before the government decided not to involve itself in the cases. *See* Gordon, *supra* note 70.

74. *See* 31 U.S.C. § 3730(h) ("Employees shall be entitled to relief to make that person whole in the event of discharge, demotion, suspension, threat, harassment, and discrimination based on the employees' lawful acts in furtherance of a False Claims Act complaint.").

75. 429 U.S. 274 (1976).

76. *See id.* at 282.

77. *Id.* at 281–82 (listing Doyle's history of confrontation with staff and students).

constitutional rights to free speech and equal protection.[78] The Supreme Court rejected this argument, holding that the Board had shown by a "preponderance of the evidence" that it would have reached the same decision to not rehire Doyle, even in the absence of his radio appearance.[79]

Doyle established a causal nexus test, whereby the party seeking to prove that an allegedly retaliatory sequence of events is in fact causal must show that his or her initial action was a "substantial factor" in leading to the retaliation.[80] *Doyle* presents a cumbersome challenge for DCAA whistleblowers attempting to prove that their whistleblowing was a substantial factor leading to their reprimand because the test presumes a non-causal relationship between whistleblowing and reprisals.[81] Merely demonstrating reprisals followed whistleblowing is therefore insufficient proof of causality; for example:

> If a government auditor reports that his agency is permitting a defense contractor to include questionable entertainment costs in a defense contract, and the auditor is later transferred to a less desirable location against his objections, why should it follow that the later transfer was caused by the earlier whistleblowing?[82]

In *Duggan v. Department of Defense*,[83] a certified public accountant and DCAA senior auditor (Duggan) unsuccessfully tried to prove that the DCAA retaliated against his whistleblowing.[84] Duggan's whistleblower complaint concerned a roughly ten month-period performing DCAA audits in Iraq in 2007.[85] Shortly after his return from Iraq, Duggan began sending letters to David Rapallo—then-chief investigative counsel of the House of Representatives Committee on Oversight and Government

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78. *Id.* at 287 (claiming that his appearance on the radio had been a "substantial factor" in motivating the Board's decision not to rehire him).

79. *Id.*

80. *Id.* at 286 (adopting a causation test citing previous cases where the Court formulated similar causation tests distinguishing results caused by constitutional violations from independently caused results).

81. The *post hoc ergo propter hoc* fallacy on which the test relies states that just because A preceded B, it does not necessarily mean that A caused B. *See* Bruce D. Fisher, *Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 377 (1991).

82. *Id.*

83. 484 F. App'x 533 (2016); *see also* Starrett v. Special Counsel, 792 F.2d 1246, 1255 (4th Cir. 1986) (holding that a DCAA whistleblower lost his case because he failed to demonstrate a causal nexus between what he claimed were reprisals and his attempts to issue a report that was critical of a contractor he was auditing).

84. *Duggan*, 484 F. App'x At 534–35. Duggan's other complaint alleging retaliation for filing a negative report of another contractor he was auditing was dismissed on the same grounds. *Id.*

85. *Compare id.* at 535–36 *with* Clark, *supra* note 15.

Reform—describing systemically deficient audit practices in Iraq.[86] Despite Duggan receiving an "outstanding" exit review upon returning to his branch in California, his supervisor issued a year-end rating of "unacceptable."[87]

The Federal Circuit Court dismissed Duggan's complaint due to his inability to demonstrate a causal nexus between his protected disclosures and the allegedly retaliatory action.[88] Afterwards, Duggan went to the press with his story, explaining that pursuant to Freedom of Information Act requests he submitted to the DCAA, he received documents showing that DCAA managers initiated fraudulent investigations of employee complaints to the DCAA Hotline.[89]

The *Doyle* causal nexus test is paralytic to the DCAA's capacity to properly report contractor waste—especially given the prevalence of threatened reprisals when auditors issue negative reports or attempt to blow the whistle—because all the DCAA has to do to dismiss allegations of bad faith reprisals is to prove by a preponderance of the evidence that some other defect in the auditor's conduct led to the reprisal.[90] When the DCAA fails to combat contractor waste due to internal corruption and suppression of honest audits, contractors become unaccountable for the tax dollars with which they are entrusted. This risk is intensified, and the losses are

86. *See Duggan*, 484 F. App'x at 535.

87. *Id.* at 535–36 (noting that Duggan's subsequent grievance in regards to the unfounded performance rating was eventually modified to "exceeds fully successful").

88. *See* 5 U.S.C. § 2302(b)(8)(A) (2006) (defining "protected disclosures" as disclosures which an employee reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety has occurred); *Duggan*, 484 F. App'x at 539 (finding that Duggan failed to demonstrate that his supervisors knew of his disclosures to Congress, despite his repeated warnings of an impending GAO report on the DCAA).

89. *See* Clark, *supra* note 15 (involving harassment of auditors, stalled investigations, and improper dismissal of hotline complaints).

90. *See* GAO REPORT: PROFESSIONAL STANDARDS NOT MET, *supra* note 15, at 7 (finding, *inter alia*, that auditors who raised questions about being instructed to omit audit findings and change draft opinions were subjected to verbal admonishments, reassignments, and threats of disciplinary action). This can compound the negative impact on whistleblowers by incentivizing the DCAA to smear their reputations by citing poor past performance as reason for the reprisal. *See, e.g.*, *Duggan*, 484 F. App'x at 538 (citing auditor's disparaging remarks, rather than history of whistleblowing, as reason for disciplinary action); Starrett v. Special Counsel, 792 F.2d 1246, 1248–50 (4th Cir. 1986) (citing auditor's poor *quality* of reporting in a report indicating the audited contractor had included over $150 million in excess costs).

amplified during wartimes amidst the chaos of overseas contingency operations.[91]

III. SYSTEMIC BURDENS ON THE DCAA

A. LOGCAP III and KBR

The 2003 invasion of Iraq cost hundreds of thousands of lives and trillions of dollars.[92] Despite this substantial human and financial cost, defense contractors reaped considerable profits from the outcome of the war.[93] Since 1992, the U.S. Army has awarded a series of long-term, massive defense contracts called the Logistics Civil Augmentation Program (LOGCAP).[94] Until the current LOGCAP IV, the previous three contracts were awarded in whole to a single bidder.[95] While these contracts cover a wide range in total costs, the smallest, LOGCAP II—which was awarded to DynCorp at $102 million—pales in comparison to Kellogg Brown & Root Services, Inc.'s (KBR's) LOGCAP III, which reached at least $35.7 billion.[96]

KBR is a former subsidiary of Halliburton—a global technology, engineering, procurement, and construction company.[97] In 2001, the government awarded LOGCAP III to KBR, granting it all contracting rights for life support (i.e. housing, water filtration, food provision, etc.) and

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91. While this Comment focuses on pecuniary losses, it is critical to bear in mind that these operations also take a devastating toll on human life and international security as well.

92. *See Iraq Body Count*, IRAQ BODY COUNT https://www.iraqbodycount.org/ (last visited Jan. 3, 2017) (recording the total number of violent deaths (including combatants) in Iraq between 2003 and 2016 at 264,000); *see also* Daniel Trotta, *Iraq War Costs U.S. More Than $2 Trillion: Study*, REUTERS (Mar. 14, 2013), http://www.reuters.com/ article/us-iraq-war-anniversary-idUSBRE92D0PG20130314 (estimating total cost of the Iraq War as of 2013 at $1.7 trillion, with an additional $490 billion owed in veterans benefits).

93. Special IG of Iraq Reconstruction, Stuart Bowen, remarked that overseas defense contractor opportunity is contingent on the unpredictable rhythm of fragile state failure. *See* Anna Fifield, *Contractors Reap $138bn from Iraq War*, FIN. TIMES (Mar. 18, 2013), https://www.ft.com/content/7f435f04-8c05-11e2-b001-00144feabdc0 (reporting that the top ten contractors' businesses in Iraq were worth at least $72 billion in 2013).

94. *See* Army Sustainment Command Public Affairs, *LOGCAP III Task Order Continues Support in Iraq*, U.S. ARMY (May 5, 2010), https://www.army.mil/article/ 38607/logcap-iii-task-order-continues-support-in-iraq (indicating that as of 2010, four such contracts had been awarded, each starting roughly when the previous one expired).

95. *See id.*

96. *See id.* (reporting costs in 2010).

97. Gordon, *supra* note 70 (stating that former Vice President Dick Cheney was CEO and Chairman of KBR/Halliburton at the time KBR was awarded LOGCAP III in 2001).

construction services in Iraq and Afghanistan for what was scheduled to end in 2009, but was extended until the final troop withdrawals from Iraq were complete at the end of 2011.[98]

LOGCAP III was a cost-plus-award-fee, indefinite-delivery/indefinite-quantity (ID/IQ) contract.[99] Simple cost-plus contracts entail full repayment to the contractor of the performance costs plus an additional percentage-based award of the actual cost incurred.[100] This cost-plus repayment system and ID/IQ indefinite period for performance and quantity of supplies—combined with the unknown timespan over which wars can stretch—created the perfect storm of exploitable contracting conditions. With an option to renew LOGCAP III annually, KBR had no competition as long as the war continued.[101] This guaranteed that KBR would not only be repaid for the entire cost of each of its projects, but it would also receive an additional percentage profit of the total performance costs.[102] Regardless of whether KBR acted in good faith, was fraudulent, or negligent in its billing of the government, the outcome would be the same: KBR would receive total repayment for all costs incurred, plus a bonus percentage of those costs. The greater the costs incurred, the greater the percentage, effectively incentivizing KBR and its subcontractors to drive up costs.[103]

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98. Non-contingency areas of operation for LOGCAP III also included Kuwait, Jordan, Turkey, Uzbekistan, Djibouti, and Georgia. *See* Army Sustainment Command Public Affairs, *supra* note 94 (explaining that the extension of LOGCAP III stemmed from a desire not to disrupt military procedures of withdrawal that such changes in contracting procedures might produce); *see also Project Profile LOGCAP III*, https://kbr.com/Documents/Project%20Profiles/ProjectProfile_LOGCAPIII.pdf (last visited Aug. 20, 2016).

99. Indefinite-Delivery/Indefinite-Quantity (ID/IQ) contracts supply an indefinite amount of supplies, goods, and materials for an indefinite period of time. *See* 48 C.F.R § 16.501-2 (Indefinite-Delivery Contracts); *Id.* § 16.504 (Indefinite-Quantity Contracts).

100. Cost-plus contract, BLACK'S LAW DICTIONARY 368 (9th ed. 2009).

101. Valerie Bailey Grasso, CONG. RESEARCH SERV., RL33834, DEFENSE LOGISTICAL SUPPORT CONTRACTS IN IRAQ AND AFGHANISTAN: ISSUES FOR CONGRESS, at 8 (2010).

102. *See id.* (stating that press estimates of the LOGCAP III percentage range between 1% with an additional 2% incentive bonus, and a 2% fixed fee with the potential for up to a 5% incentive fee).

103. *See, e.g.* KBR, ASBCA No. 56358, 11-1 BCA ¶ 34,614 (involving a dispute between KBR and the Army over KBR's subcontractors' use of Private Security Companies (PSCs) when KBR billed the Army for the PSCs despite LOGCAP III prohibiting their use (with some exceptions, but which were not met)); *see also* DOD IG, REPORT NO. D-2010-046, CONTRACTING FOR TACTICAL VEHICLE FIELD MAINTENANCE AT JOINT BASE BALAD, IRAQ, (2010) (finding that because of inadequate government review of contractor utilization data, nearly $4.6 million of the $5 million KBR billed the Army for tactical field

For the past decade, the U.S. Government and KBR have engaged in extensive and ongoing litigation over KBR's overbilling for construction contracts and subcontracts.[104] While LOGCAP III granted KBR the most extensive contracting rights for the bulk of the War on Terror, the abuse and mismanagement of government funds that occurred in Iraq and Afghanistan is not a problem unique to KBR, but a broader problem with defense contract oversight.[105] Nonetheless, KBR litigation in the Federal Circuit illustrates how the FAR's reasonableness standard for justifying overcharged costs can render DCAA audits almost entirely ineffective for contingency contracts.[106]

B. The Reasonableness Standard's Impact on Contingency Contract Audits

In 2009, KBR sued the United States for the recovery of $8.3 million that the DCAA suspended in repayment costs for a dining facility construction subcontract under the umbrella of LOGCAP III.[107] Although KBR won partial damages of $6.78 million, it appealed for the entire

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maintenance services from 2008 to 2009 was for unrequired services); P.W. Singer, *Outsourcing the Fight*, FORBES (June 5, 2008), http://www.forbes.com/2008/06/05/outsourcing-army-halliburton-tech-cx_ps_logistics08_0605outsource.html (discussing incidents of reported KBR waste in Iraq, including billing for soldiers' meals that were never cooked and charges for shipping convoys of so-called "sailboat fuel"—KBR drivers' sarcastic term for driving empty pallets between sites).

104. *See, e.g.*, KBR, ASBCA No. 56358, 11-1 BCA ¶ 34,614 (pertaining to "force protection"); KBR v. United States, 742 F.3d 967 (Fed. Cir. 2014); KBR v. United States, 107 Fed. Cl. 16 (2012) (pertaining to dining facility construction).

105. *See, e.g.*, Erik Eckholm, *U.S. Contractor Found Guilty of $3 Million Fraud in Iraq*, N.Y. TIMES (Mar. 10, 2006), http://www.nytimes.com/2006/03/10/world/middleeast/us-contractor-found-guilty-of-3-million-fraud-in-iraq.html?_r=0 (discussing Custer Battles, LLC which grossly inflated invoices, falsified invoices from shell companies, and provided inoperable vehicles in vehicle procurement contracts); Neil Gordon, *DynCorp Facing New Charges of Fraud on Iraq Contract*, PROJECT ON GOV'T OVERSIGHT (July 22, 2016), http://www.pogo.org/blog/2016/07/dyncorp-facing-new-charges-fraud-iraq-contract.html (discussing a DOJ False Claims Act case against DynCorp for excessive and unreasonable charges related to inflated subcontractors' bills in Iraq).

106. *See KBR*, 742 F.3d at 971 (citing FAR 16.301-2(a)(2)) (stating that cost-reimbursement contracts are intended to shift the risk of unexpected performance costs to the government when "uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract").

107. *See Id.* at 970; *KBR*, 107 Fed. Cl. at 16. The original DCAA suspension was for $12.53 million, but was amended by the court when the parties agreed certain costs were not at issue. *See KBR*, 107 Fed. Cl. at 43-44; *KBR*, 742 F.3d at 968.

suspended payment.[108] The Court of Appeals for the Federal Circuit affirmed, holding that despite KBR's gross negligence in calculating the cost of the facility, KBR's questionable post-audit justification report was acceptable given that the FAR shifted the risk of unexpected performance costs to the government.[109]

After ABC International Group (KBR's subcontract) began construction of the H4 prefabricated dining facility for $10.44 million, the Army ordered KBR to construct the facility out of reinforced concrete and adjust the housing size from 2501–3,500 to "6,200+."[110] KBR requested a new proposal from ABC, which ABC submitted with an adjusted headband count and a cost estimate of $32.48 million.[111] Despite certain KBR representatives' concerns that labor costs were too high, KBR issued a Price Negotiation Memorandum (Memo) approving ABC's new cost proposal as reasonable.[112] Despite gross calculation errors and inadequate support data, KBR submitted the Memo and implemented the proposed changes as "Change Order 1."[113]

Two years after H4's completion, the DCAA suspended the reimbursement of $8.3 million from KBR to ABC in regards to Change Order 1.[114] When KBR learned of the DCAA's audit of the cost justification for H4, it instructed KBR's then-Procurement Supply Manager for LOGCAP III to draft a new price-reasonableness justification, given the

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108. *See KBR*, 742 F.3d at 968.

109. *See id.* at 971.

110. *See id.* at 968–69 (quoting monthly prices for three different "headcount bands" (i.e., 1,000-person ranges for soldier housing capacity) as optional sizes for the facility).

111. ABC International Group followed its proposal with an unsolicited e-mail explaining that this cost increase was due to the need for additional labor and equipment, adding that the level of violence and terrorist brutality in the region had driven up labor costs and created a severe shortage of available labor. *See KBR*, 107 Fed. Cl. at 21; *see also KBR*, 742 F.3d at 969 n.3 (noting that "the Army prohibited KBR from employing Iraqi nationals to work in dining facilities in Iraq").

112. *See KBR*, 107 Fed. Cl. at 19 n.3 (testifying that the Price Negotiation Memorandum (Memo) contained an inadequate level of necessary supporting documentation, failed to provide a breakdown of different price components, and insufficiently detailed how circumstances had changed since the original bid).

113. *See id.* at 22 (indicating KBR justified the costs based on the "exigencies of war" leading it to double the number of troops served, multiplied by the rate per person (which KBR also doubled), resulting in a nearly quadrupled potential cost).

114. The $8.3 million figure was reached by subtracting the government's properly calculated cost of $20.82 million from KBR's miscalculated cost of $31.31 million and subtracting an additional $2.19 million (costs the court determined were not at issue). *See id.* at 43–44 (showing the DCAA's and the court's calculation of damages).

inadequate and missing information in the Memo.[115] KBR also ordered a team of its senior estimators to conduct a separate "Independent Cost Estimate" (the Estimate), comparing H4 to other dining facilities to demonstrate the reasonableness of its cost.[116]

KBR told its estimators to base their comparison on a substantially smaller facility in Jordan called the Q-West facility.[117] To make their comparison more meaningful, the estimators applied an "area adjustment" to Q-West, bringing its cost to $6.78 million.[118] Meanwhile, the Procurement Supply Manager reviewed fifty-one KBR subcontracts before selecting facility D16 in Iraq to use for his comparative price justification.[119] D16, however, was also substantially different from H4.[120] The Procurement Supply Manager made similar selective theoretical modifications to D16 as the Estimate team did to Q-West in order to make the two facilities comparable in price.[121]

KBR combined these two comparisons in its 2007 Justification report which it sent to the DCAA to demonstrate that the Change Order 1 facility price (excluding all labor and equipment costs) of $6.79 million was reasonably justified compared to the 2007 Justification's $6.78 million.[122] When the DCAA still insisted on disallowing the costs, KBR sued for payment of the originally-suspended $12.53 million.[123]

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115. *Id.* at 24 (citing e-mail correspondence between a subcontract administrator in KBR's Procurement Compliance Department and then-head of KBR's facility subcontractor team responsible for H4, which states, "The [Memo] doesn't have adequate price justification, so we are trying to find historical data that we can use for the basis of comparison to justify the price after the fact.").

116. *Id.* at 28 (stating the United States' expert witness's opinion that the KBR-ordered "Estimate" was not truly independent because it was prepared after the fact by individuals who knew the price was being justified). *But see id.* (indicating that the Estimate team was aware that the facility costs for H4 (excluding labor, equipment, etc.) was approximately $7 million and that they should use this figure as the target when finding facilities to compare H4 with).

117. *See id.* at 24.

118. *See id.* (adjusting Q-West's square footage of 3,400 to 4,500 square meters to bring it closer to H4's 5,000).

119. *See id.* at 24–25.

120. *See id.* at 25 (lacking the reinforced concrete walls of H4, D16 more closely resembled the prefabricated metal structure of H4's original blueprint).

121. *See id.* (adding the cost of massive reinforced-concrete walls, while omitting the cost for overhead protective structures).

122. *See* KBR v. United States, 742 F.3d 907, 970 (Fed. Cir. 2014).

123. The total $12.53 million ($8.3 as adjusted) included the facility cost as well as other assessed labor, equipment, and consumables that the DCAA found unjustified. *See id.*

The FAR standard for reasonableness is determined by a fact-intensive and context-specific factors test, including: whether costs are generally ordinary or necessary; generally accepted sound business practices; the contractor's responsibility to the government, the public, and other businesses; and significant deviations from the contractor's established practices.[124]

The court held that KBR failed to meet this burden, noting that KBR's gross negligence in the "seriously flawed" Memo and KBR's awareness of the Memo's inadequacies leading to more than tripled price for roughly double the troops "should have prompted KBR to balk, or at least request an explanation of how ABC arrived at its proposal."[125] Despite noting the 2007 Justification's after-the-fact preparation and the lack of similarity between the facilities used as comparisons, however, the court concluded that KBR was entitled to $6.78 million of the DCAA-questioned costs.[126]

The outcome of this case exposes the barriers the DCAA faces in turning legitimately questionable costs into actual recovered costs for the government and U.S. taxpayers due to constraints imposed by the acquisition rules.[127] Essentially, the DCAA identified that KBR had charged the government an additional $8.3 million for a facility that should have cost $20.82 million.[128] The court deemed this negligent surplus charge unreasonable.[129] However, due to the FAR shifting the risk of unexpected performance costs in uncertain situations to the government, KBR was permitted to throw together a highly selective comparative cost analysis to justify the $8.3 million after it had already charged the government without previous justification.[130] The result: KBR—through its own negligence—increased the cost of H4 by $8.3 million, and managed to walk away with $6.78 million of that surplus.[131]

Much of the outcome in this case is a product of FAR contracting

124. 48 C.F.R. § 31.201-3(b)(1–4).

125. *See KBR*, 742 F.3d at 971–72.

126. *See KBR*, 107 Fed. Cl. at 45 (finding that the costs KBR incurred were reasonable given increased capacity, sudden change in type of construction, and evidence that various VIP extras were required).

127. *See KBR*, 742 F.3d at 971 (holding that even though the contractor failed to show it acted as a reasonably prudent business through its gross negligence, it was still entitled to whatever costs it could justify in an after-the-fact and non-independently prepared report).

128. *See KBR*, 107 Fed. Cl. at 43–44 (explaining how the court reached the $8.3 million figure).

129. *See KBR*, 742 F.3d at 971.

130. *See KBR*, 107 Fed. Cl. at 45.

131. *See KBR*, 742 F.3d at 971–72 (affirming the award of the lower court, permitting the $6.78 million as reasonably justified costs).

provisions that place the government at a substantial disadvantage compared to contractors—particularly in overseas contingency operations.[132] $6.78 million is a relatively small sum compared with the totality of KBR's $35.7 billion LOGCAP III contract, but this case demonstrates that the FAR's reasonableness standard is too easy for contractors to meet under contingency contracting circumstances due to KBR's success in passing off its blatant gross negligence as merely a byproduct of the chaotic warzone environment.[133]

The DCAA recently proposed a rule in the Federal Register designed to incentivize voluntary contractor disclosure of defective pricing that could potentially help avoid situations like *KBR v. United States*.[134] If enacted, contractors that are aware of limited defective pricing in certain areas of their contracts could voluntarily disclose the pricing errors to the DCAA in exchange for a more limited audit directed at the areas affected by defective pricing.[135] Applied to this case, KBR could have disclosed the defective pricing when it knew about it in the Memo, prior to implementing Change Order 1 and could have potentially saved itself and the government millions of dollars in taxpayer waste and court fees.[136] While the proposed rule could potentially achieve this for future defense contract audits, it does require some clarification.[137]

C. Continuing Risks—Contingency Contracting & Audit Outsourcing

In late 2011, the Commission on Wartime Contracting in Iraq and Afghanistan issued its final report to Congress, offering its estimate of total contractor fraud and waste from the two wars since 2001.[138] The Commission concluded that contracting waste in Iraq and Afghanistan was at least $31 billion over this period, and could be as high as nearly $60 billion.[139] Of the numerous problems identified with the defense contract oversight in these theaters, many of them directly impact the DCAA and

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132. By allowing KBR to cite the poor security situation in Iraq as justification for increased costs, the court set a precedent that contingency contractors can use the contingency itself (in this case, the war) as reason for price increases. *Id.* at 972.

133. *See id.*; *see also* FAR, *supra* note 29, § 31.201-3(b) (enumerating the factors examined when accounting for reasonableness in contractor cost justification).

134. DFARS: Promoting Voluntary Post-Award Disclosure of Defective Pricing, 80 Fed. Reg. 72669 (proposed Nov. 20, 2015) (to be codified at 48 C.F.R. pt. 215).

135. *See id.*

136. *See* KBR v. United States, 107 Fed. Cl. 16, 19 n.3. (2012).

137. *See infra*, Part IV. C.

138. *See* IRWIN *supra* note 17, at 1.

139. *Id.* at 1–2.

have enabled contractors like KBR to benefit.[140]

The Commission warned that the winding down of operations in Iraq and Afghanistan would far from solve this problem, adding that "unless changes are made, continued waste and fraud will undercut the effectiveness of money spent in future [contingency-contract] operations, whether they involve hostile threats overseas or national emergencies here at home requiring military participation and interagency response."[141]

Unfortunately, many of the problems accompanying the lack of audit oversight and contracting process for LOGCAP III remain unaddressed. In 2008, Charles Smith—former Army Chief of the Field Support Command Division, who was partially responsible for managing LOGCAP III—was dismissed from his position, seemingly for questioning an unprecedented change in contract oversight policy.[142] Smith testified before the Senate that during his service, the DCAA had documented over $1.8 billion in unsupported costs, to which the DOD responded by outsourcing audit oversight of LOGCAP III to private contractor RCI Holding Corp.[143] After bringing RCI on board LOGCAP III as the new "support and oversight contractor," it issued audits to DOD of LOGCAP III without any of the DCAA-questioned costs.[144] Satisfied with RCI's work on LOGCAP III, the DOD rehired RCI (now Serco Inc.) to fulfill the same oversight role for LOGCAP IV.[145]

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140. *See id.* at 2 (including lack of adequately trained federal oversight staff in the field, duplicative or unnecessary work, inadequate business processes among contractors, and delayed audits); KBR v. United States, 742 F.3d 967, 967 (Fed. Cir. 2014); *KBR*, 107 Fed. Cl. at 16.

141. IRWIN *supra* note 17, at 2

142. *Safeguarding Taxpayer Dollars in Iraq: An Insider's View of Questionable Contracting Practices by KBR and the Pentagon Before the S. Democratic Policy Comm.*, 110th Cong. (2008) (statement of Charles Smith, Former Head of Field Support Contracting Division of the Army Field Support Command).

143. Smith cited KBR billing the government for inflated meal costs and invoices for more trucks than could reasonably have been used by the military, adding that approximately 75% of $1 billion dollars-worth of these overcharges were unsubstantiated. *Id.* at 3, 5 (testifying that General Jerome Johnson, newly installed as head of Army Sustainment Command, specifically requested that RCI replace the DCAA audits for finalizing estimated costs on task orders—which would have required auditable data that would have permitted the DCAA to complete its audits without having to outsource its role).

144. Robert H. Bauman, Robert H. Reid & Charles McDermid, *Contractors Watching Contractors? Where Is the True Oversight? (Part I)*, TRUTHOUT.ORG (Mar. 16, 2011), http://truth-out.org/archive/component/k2/item/94942:contractors-watching-contractors-where-is-the-true-oversight-part-i.

145. *See id.*

IV. IMPROVING DEFENSE CONTRACT AUDITING

This Comment proposes three alterations in the defense contract auditing process with a particular emphasis on contingency contracting due to its higher risk nature.[146] First, audit outsourcing, particularly on contingency contracts such as LOGCAP IV and future LOGCAPs, should be strongly discouraged, if not forbidden, irrespective of potential benefits to expediting the DCAA clearing its backlog of audits. Second, the criteria for determining the reasonableness of challenged contractor costs is too open-ended and should be limited at least to preventing contingency contractors from citing the contingency itself when justifying challenged costs. Finally, the DOD should clarify its proposed rule to modify the DFARS in order to incentivize defense contractors to voluntarily disclose defective pricing in exchange for more limited DCAA audits.[147]

A. Limiting Defense Contract Audit Outsourcing

Outsourcing defense contract oversight is a growing trend, primarily due to government downsizing and cutbacks during the early 2000s and the inadequate contract oversight in Iraq and Afghanistan.[148] Continuation down this path, however, runs the risk of losing even more government accountability, due to contractors' priorities to satisfy the DOD and produce profit, rather than serving the public interest.

The main problem with audit outsourcing is that the non-government auditor has no contract with the government, and is therefore only accountable to itself and the contractor using its auditing services.[149] While

146. While whistleblower protection and fraud investigation are areas in need of improvement, the following recommendations are specifically tailored to the DCAA's ability to respond to the problem. In 2014 overseas contingency operations audits and forward pricing audits were considered the highest risk of all contract audits by the DCAA. DCAA, REP. TO CONGRESS ON FY 2014 ACTIVITIES, 7 (2015), http://www.dcaa.mil/DCAA_FY2014_Report_to_Congress.pdf.

147. *See* DFARS: Promoting Voluntary Post-Award Disclosure of Defective Pricing, 80 Fed. Reg. 72669 (proposed Nov. 20, 2015) (to be codified at 48 C.F.R. pt. 215).

148. *See* Bauman, Reid & McDermid, *supra* note 144 (stating that the policy is increasingly to hire outside contractors to oversee the already outsourced auditing contractor).

149. In order to avoid this accountability problem, the outsourced audit companies would need to either hire their own independent auditor to ensure accountability, or else have the government audit them instead, effectively inserting themselves as an unnecessary middleman for the government to shoulder as an additional responsibility. *See id.* ("If contractor B was hired to provide oversight to contractor A, then contractor C would be needed to provide oversight of contractor B and so on.").

LOGCAP IV differs from LOGCAP III in that three contractors share in the project, Serco has taken on audit responsibilities for all three contractors.[150] The DOD's decision to hire additional help with the auditing process may be well-intended, but Serco's involvement has only served as a barrier to the DCAA's efforts to audit LOGCAP IV's contractors.[151] Furthermore, oversight of Serco is not the DCAA's responsibility, but Serco's.[152] Rather than expanding the scope of audit oversight as this initiative seeks to do, it limits the DCAA's access to contractor cost information, and turns over primary contract audit responsibility to a private actor, which, like the contractors it is auditing, prioritizes profits over serving the public interest.

While this Comment has aimed to show deference to the legitimacy of contracting with the government, it has also suggested that even while regulatory shortcomings and contractor exploitation are not synonymous, the conjunction of the two phenomena exacerbates the problems posed by either one on its own. Therefore, permitting or encouraging changes to the defense contracting industry that would increase the likelihood of such overlap should be discounted as policy that will likely only lead to further taxpayer waste. The DCAA should propose a rule for Notice-and-Comment that would preclude audit outsourcing, or at least require the DCAA's approval before contractors are permitted to outsource audits.[153]

B. Reigning in the Reasonableness Standard

The FAR standard of reasonableness that contractors must demonstrate to justify DCAA-challenged costs is another point of weakness in the defense contracting waste prevention mechanisms that obstructs the

150. *See* Army Sustainment Command Public Affairs, *ASC Selects LOGCAP IV Contractors*, U.S. ARMY (June 28, 2007), https://www.army.mil/article/3836/ASC_selects_LOGCAP_IV_contractors (listing the three contractors: DynCorp International LLC, Fluor Intercontinental Inc., and KBR); *see also* Maya Schenwar, *DOD Contracts Out Contractor Oversight*, TRUTHOUT.ORG (June 04, 2008), http://truth-out.org/archive/component/k2/item/78498:dod-contracts-out-contractor-oversight (describing Serco's role in LOGCAP IV as measuring contractor performance, analyzing costs, recommending improvements, and serving as a liaison between DynCorp, Fluor, and KBR).

151. *Id.* (stating that when DCAA auditors request material from contractors in Iraq, Serco acts as an intermediary that filters the information the DCAA receives by providing its own summaries and interpretation of cost assessments rather than the original documents).

152. Serco's contract requires that Serco submit a self-assessment that would assist the government Award Fee Evaluation Board in evaluating contractor performance. *Id.*

153. DOD, Directive No. 5105.36 § 3 (stating that the DCAA's role is to perform *all* necessary contract audits for DOD) (emphasis added).

DCAA's mission.[154] The rule itself is not the problem, rather it is the wide array of circumstances taken into account which give contractors excessively wide latitude to justify costs.[155] The chief concern raised in *KBR v. United States* is that even though KBR had not identified any specific reasons for nearly quadrupling the cost in Change Order 1 when the facility size was only to be doubled, and KBR knew of the inadequate justification at the time, it was able to recover most of those excessive costs by assembling a retroactive price justification report.[156]

If DCAA questioned costs can be explained by cost justifications assembled only after the funds have been withheld, then the test is not really focused on whether the inflated costs themselves were reasonable, but which of the numerous options for justifying defective pricing is the most reasonable. The court found the DCCA questioned costs to be unreasonable, but the poor security situation in Iraq and the fast-tracking of the facility change were sufficient for the court to find the 2007 Price Justification reasonable.[157] This provides practical blanket protection for contingency contractors, such as those contractors hired in LOGCAP series contracts, because if the warzone itself is a factor for justifying cost increases, then DCAA audits of contingency contracts are likely to recover far less than they would be able to outside of wartime circumstances.[158] Considering the contract for the dining facility was an upfront fixed-price contract that both parties knew would occur under wartime circumstances when they agreed to the price, it should not be the case that the contractor can later point to those circumstances as a reason for increasing the cost.[159]

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154. *See supra* Part III. B (explaining the reasonableness standard and discussing how it permits contractors to create post-performance price justifications when no such documentation was properly recorded prior to or during performance).

155. *See* 48 C.F.R. § 31.201-3(b) (including (1) whether the type of cost is generally ordinary and necessary for the contractor's business or performance; (2) generally accepted business practices; (3) contractor's responsibilities to the government, other customers, business owners, employees, and the public; and (4) significant deviations from contractor's established practices). *Compare* KBR v. United States, 742 F.3d 967, 972 (Fed. Cir. 2014) (finding that KBR was grossly negligent and therefore did not meet the reasonableness standard for the questioned costs), *with id.* at 972 (finding that some price increase was warranted due to the admitted fast-track order and the violence in Iraq).

156. *KBR*, 742 F.3d at 967; KBR v. United States, 107 Fed. Cl. 16, 16, 45 (2012) (finding that KBR was entitled to payment of the $6.7 million based on KBR's 2007 Price Justification report).

157. *KBR*, 742 F.3d at 972 (recognizing that the violence in Iraq is a circumstance bearing on reasonableness of agreed-upon prices).

158. *See id.*

159. *Id.* at 968 (stating that cost of performance for the initial period was to be fixed

C. Clarifying Voluntary Disclosure of Defective Pricing

In November 2015, the DOD proposed a new rule that would amend the DFARS to encourage contractors to voluntarily disclose defective pricing after contract award in return for contracting officers requesting limited-scope audits.[160] Under the proposed rule, contracting officers would consult with DCAA to determine an appropriate scope for audits following voluntary disclosure of defective pricing.[161] The DOD proposed this rule in response to contractors' requests that the DOD clarify its policy guidance seeking to deter contractors from repeatedly submitting their pricing data.[162]

Should this proposed rule—or a similar rule—be implemented, the DCAA will determine the appropriate scope of its audits of contractors that voluntarily disclose defective pricing based on the following factors: (1) the completeness of the voluntary disclosure on the affected contract, (2) the accuracy of the contractor's cost impact calculation for the affected contract, and (3) the potential impact on existing contracts, task and delivery orders, and other proposals the contractor has submitted to the government.[163] While these criteria help contractors understand what the potential consequences and benefits of voluntary disclosure might be, more specific clarification would be ideal.[164]

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lump sum, and the optional period was to be paid in fixed monthly installments).

160. Promoting Voluntary Post-Award Disclosure of Defective Pricing, 80 Fed. Reg. 72669 (caveating that a full audit may be necessary under some circumstances, depending on the extent of the defective pricing).

161. *Id.* (clarifying that voluntary disclosure does not limit the government's recovery only to the voluntarily disclosed defective pricing).

162. *Id.* (explaining that contractors submit frequently updated pricing data as a defense against defective pricing claims because frequently updated data is less likely to be considered outdated, inaccurate, or defective).

163. The Notice-and-Comment period for the proposed rule ended January 19, 2016. Only one comment was posted, and it was posted after the deadline. *See* Mark Husband, Comment to 48 C.F.R. 215, Doc. 2015-29555 (Jan. 28, 2016), https://www.regulations.gov/document?D=DARS-2015-0051-0002 (recommending that the word "shall" be replaced with "may" where the rule states that "contracting officers *shall* request limited scope audits upon voluntary disclosure"); *see also* Promoting Voluntary Post-Award Disclosure of Defective Pricing, 80 Fed. Reg. 72669 (noting that voluntary disclosure is not a voluntary refund (i.e., just because a contractor discloses what it believes are overcharges does not entitle the government to recover more than what it was actually overcharged)).

164. Herb Fenster, Terra Fulham & Jason Workmaster, *Don't Bank on Relief From DCAA Audits*, NAT'L DEF. (Feb. 2016), http://www.nationaldefensemagazine.org/archive/2016/February/Pages/DontBankonReliefFromDCAAAudits.aspx (stating that contracting officers and the DCAA having sole discretion when determining whether a full audit would be

The National Defense Industrial Association (NDIA) did not participate in the notice-and-comment process, however, it did propose several recommendations on its website for providing contractors with a better understanding of what voluntary disclosure would entail.[165] In addition to providing clearer guidance on what circumstances would lead contracting officers and the DCAA to deem a full audit "appropriate," the NDIA also recommended that the rule guarantee contractors insight into the government's determination on the scope of audits following voluntary disclosure, and provide protections against contract renegotiation for contractors that in good faith disclose defective pricing for refund.[166]

This Comment aligns with the NDIA's recommendations, as implementing these changes would likely further the proposed rule's underlying intention of incentivizing voluntary disclosure.[167] Should the rule be implemented as is, it is difficult to imagine contractors wanting to voluntarily disclose and risk a potentially full-blown and costly audit, especially when they know they are already acting in good faith and in compliance with regulations and the contract terms. The Comment further supports the rule's (albeit late) sole commenter's contention that the DOD make the limited scope audit an option left to the contracting officer and the DCAA's discretion, rather than mandating *at least* a limited audit upon every voluntary disclosure.[168]

The reasoning behind this is twofold: making the audit discretionary rather than mandatory will better incentivize voluntary disclosure, because contractors will at least know that it is not guaranteed that they will be audited following disclosure, and although bad faith contractors could potentially discover ways to exploit their greater influence over disclosure, this will help the DCAA expedite its backlog reduction efforts. Although the DCAA has made significant and consistent progress in reducing its backlog over the past five years, the DCAA is still years out from eliminating it entirely—a problem that is complicated by the DCAA's inability to leverage contractors to toll statutes of limitations on backlogged

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"appropriate" is too vague a standard for contractors to feel encouraged to voluntarily disclose, since they might be inviting an unnecessary and wasteful audit).

165. National Defense Industrial Association is a voluntary association that provides a legal and ethical forum for commenting on government and national security issue. *See* National Defense Industrial Association, NDIA.ORG, http://www.ndia.org/Pages/default.aspx (last visited Sep. 30, 2016); *see also* Fenster et al., *supra* note 164.

166. Fenster, Fulham & Workmaster, *supra* note 164.

167. Promoting Voluntary Post-Award Disclosure of Defective Pricing, 80 Fed. Reg. 72669.

168. *See* Mark Husband, Comment to 48 C.F.R. 215, Doc. 2015-29555 (Jan. 28, 2016), https://www.regulations.gov/document?D=DARS-2015-0051-0002.

audits.[169] By giving contracting officers and the DCAA discretion to direct limited and full scope audits toward evidently bad faith contractors that voluntarily disclose rather than good faith voluntary disclosers, the DCAA would be able to better direct its limited resources toward higher risk areas as it works through the backlog.

CONCLUSION

Fixing defense contract auditing begins with repurposing and invigorating the DCAA so that it can better perform its assigned tasks, and actually fulfill its mission objective of protecting American taxpayer money from contractor waste through its audit processes.[170] Resolving this alone, however, will not solve problems with waste and abuse in defense contracting, nor will it solve the problems whistleblowers face when they attempt to come forward with allegations of corruption.[171] The modern contractor-saturated "defense industry"—the military-industrial complex that Eisenhower warned the American people of—requires substantial overhauls to make current government regulatory agencies operate more efficiently and consistently; in particular, improving the predictability of the standard of reasonableness for contractor cost justification. While the field of defense contracting is incredibly complex, and major changes should not be made lightly, emphasizing expediency in restructuring this rule is primarily intended to draw attention to the more pronounced risk this standard creates in overseas contingency contracting. Defense contracting cannot be realistically expected to be put on hold, nor substantially reduced while industry experts draft and implement rule changes. This should only further incentivize DOD and American taxpayers to implement changes to reduce contracting waste sooner rather than later.

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169. *See* DCAA, REP. TO CONGRESS ON FY 2015 ACTIVITIES, *supra* note 12, at 7 (noting a backlog reduction of 18% between 2014 and 2015); DCAA, REP. TO CONGRESS ON FY 2014 ACTIVITIES, *supra* note 146, at 3 (noting an improvement to net savings in 2014 were around 70% higher than the annual average between 2004 and 2009); *see also* Dave Nadler, *What to Expect from DCAA in FY 2016*, LAW360, (Sep. 10, 2015), http://www.law360.com/articles/699666/what-to-expect-from-dcaa-in-fy-2016 (noting that a bout of recent contractor-friendly statute of limitations decisions have contributed to the DCAA's recently intensified audit efforts to reduce the backlog).

170. *See* DOD, Directive No. 5105.36 § 3.

171. The Wartime Commission for Contracting in Iraq and Afghanistan concluded that much of the contractor waste in these wars could have been avoided, and that implementing more rigorous oversight was a comprehensive task that would require Congress, the White House, federal agencies, military services, and contractors all to work together. IRWIN, *supra* note 17, at 2.

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