

Government Contracts Blog

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Let's Just Eliminate All Pretense Of Balance

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Under our system of laws, legal liability has customarily been based on certain showings, *e.g.*, that an act or omission actually caused an injury, with liability usually measured by the aggrieved party's actual loss. These useful legal constructs have served us well over the years in helping to avoid misuse of the law through the imposition of liabilities without proof of injury or without regard to the damage actually caused by the alleged misconduct. Proximate cause, injury in fact and proportionality of response were nice concepts while they lasted, but they appear to have outworn their welcome within the Department of Defense. Under regulations proposed by DOD, it would soon have the power to withhold anywhere from 10 percent to 100 percent of the payments otherwise due and owing to its contractors. The basis for this withholding would be a mere determination by the Defense Contract Audit Agency that one or more "deficiencies" exist in any of the following contractor systems: cost estimating, earned value management, or EVMS; material management and accounting, or MMAS; accounting; purchasing; and property management.

Click [here](#) to read this entire article by John W. Chierichella and W. Bruce Shirk, which was originally published by Thomson Reuters in its July 12, 2010 issue of the Westlaw Journal Government Contract (formerly Andrews Litigation Reporter) and is reprinted here with permission.