

CAUTION CONTRACTORS: YOUR CLAIM IS SUBJECT TO 3 SEPARATE FRAUD SECTIONS IN THE U.S. CODE

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Contractors must use considerable caution when submitting claims to their contracting officers and must ensure that the supporting data they provide and the claims they make are not fraudulent in any way. The Government has three separate U.S. Code sections that can be used against a contractor's fraudulent claim: two for monetary damages pursuant to the False Claims Act and the Contract Disputes Act, and one for forfeiture of the fraudulent amount. The Government recently tried unsuccessfully to assess all three for alleged fraud in *Hernandez, Kroone and Associates, Inc. v. United States*, No. 07-165C (Fed. Claims March 29, 2013) (hereafter "HKA"). Although the Government was unable to prove fraud in *Hernandez*, it successfully proved \$50.6 million in fraud in *Daewoo Engineering and Const. Co., Ltd. V. United States*, 557 F. 3d 1332 (Fed. Cir. 2009).

THREE CODE SECTIONS

The False Claims Act ("FCA") provides that

any person who ... knowingly presents or causes to be presented, a false or fraudulent claim for payment or approval," is liable "for a civil penalty of not less than \$[5,500] and not more than \$[11,000].

31 U.S.C. § 3729(a)(1); *cf.* 28 C.F.R. § 85.3(a)(9) (adjusted for inflation). The government must prove that the claim presented was false or fraudulent, and that the presenter knew the claim was false or fraudulent. "Knowingly" is defined as "actual knowledge," acting "in deliberate ignorance of the truth or falsity of the information," or acting "in reckless disregard of the truth or falsity of information." 31 U.S.C. § 3729(b). No proof of specific intent to defraud is required. *Id.* The government must prove the case by a preponderance of the evidence.

The fraud provision of the Contract Disputes Act ("CDA") provides:

If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.

41 U.S.C. § 7103(c)(2). The CDA defines the term "misrepresentation of fact" as meaning "a false statement of substantive fact, or conduct that leads to a belief of a substantive fact." The government must establish this falsity and intent by a preponderance of the evidence.

There is also a special fraud forfeiture provision at 28 U.S.C. § 2514, which provides:

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

Under this provision, the Government must establish by clear and convincing evidence that the contractor knew that its submitted claims cited were false and that it intended to defraud the government by submitting the cited claims. Proof of negligence or ineptitude does not meet the standard of clear and convincing evidence. Clear and convincing evidence is a higher proof burden than proof by the preponderance of the evidence but a lower burden than proof beyond a reasonable doubt.

HKA's CLAIMS

HKA, an 8(a) contractor, received a contract from the Army Corps of Engineers (“COE”) to build a Border Patrol Station for the Department of Homeland Security. HKA’s claims totaled about \$253,000, and arose primarily because of additional work required above the contract requirements. Of this amount, the Court allowed \$10,921.20, so HKA did not make a really convincing case. However, the Government counterclaimed in fraud.

GOVERNMENT COUNTERCLAIMS IN FRAUD

The assertions and Court’s answers were as follows:

- Fraud: Modular building as constructed did not conform to contract specifications

COURT: This assertion is inconsistent with the COE’s assertion that HKA’s proposal was part of the contract, something which caused confusion in HKA’s claim for extra work.

- Fraud: HKA initially submitted a claim for \$840,522, which COE asserts was a falsity about the scope of work.

COURT: HKA “evolved to the view that its proposal was not part of the awarded contract” and the Court agreed. No fraud.

- Fraud: Subcontractors never submitted a claim to HKA, but HKA listed them in its claim

COURT: HKA attempted to estimate the cost for asserted added work and identified anticipated contractors. Use of rate compilation books to estimate cost is an accepted construction industry practice.

- Fraud: HKA' use of 172 percent of direct labor as a general and administrative rate was a "falsity"

COURT: Government offered no proof that the claimed rate was false. An independent expert came up with 165%.

- Fraud: HKA submitted a false spreadsheet for 6 additional light poles which included false estimates

COURT: These were estimates; no knowing falsity was proven. No expert testified as to the invalidity of the estimates.

- Fraud: HKA submitted false books and accounting records

COURT: HKA suffered from a failure to coordinate adequately its booked labor cost entries with other recorded data such as Quality Control reports. The evidence supports HKA's ineptitude with respect to its records, not fraud.

FINAL COURT RULING

The Court held that the Government had not established fraud by a preponderance of evidence. The Court noted that in *Daewoo*, the contractor's project manager testified that [*Daewoo*] filed at least \$50 million of its certified claim as a negotiating ploy" merely to indicate "the seriousness of the situation" and to get the Government to "pay attention so it would agree to a cheaper method of constructing embankments." Based on this testimony, the *Daewoo* court determined that the portion of the claim that *Daewoo* was unable to support because of misrepresentation of fact or fraud was \$50.6 million, and therefore granted the government's fraud claim.

The Court in HKA said "[t] here is no evidence in the instant case similar to that in *Daewoo*. The Government "did not present evidence, as to the portion of HKA's CDA claim estimates that HKA would be unable to support, attributed to some specific misrepresentation of fact or fraud." Without such evidence, the Court held that the Government had failed to meet its burden of proof.

TIPS: Be careful when submitting equitable adjustments and claims, and be sure that you can support them. Facts must be accurate, and not fraudulent. You may disagree about the impact of facts, or the way you choose to estimate, as long as you explain the basis of estimates. Always have supporting evidence and supporting rationale, so the Government may not claim fraud.