PROGRAM MATERIALS
Program #36105
April 30, 2026

Claims and Requests for Equitable Adjustments

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

April 30, 2026

By Wojciech Z. Kornacki, Esq.

Lecturer

Not Legal Advice / For Educational Purposes Only

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Agenda:

Federal Acquisition Regulation, Part 33

Board of Contract Appeals Caselaw

Court of Federal Claims and Court of Appeals for the Federal Circuit Caselaw

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Sources:

Contract Disputes Act of 1978, 41 U.S.C. §7101-7109

Federal Acquisition Regulation, Part 33 https://www.acquisition.gov/far/part-33

Contracts Restatement (Second) (1981)

Armed Services Board of Contract Appeals https://www.asbca.mil/

Civilian Board of Contract Appeals https://www.cbca.gov/

U.S. Court of Federal Claims https://www.uscfc.uscourts.gov/

U.S. Court of Appeals for the Federal Circuit https://www.cafc.uscourts.gov/

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Federal Claims and Disputes: Goals

Sets out procedures and requirements for asserting and resolving claims

Many opportunities to resolve disputes before litigation

Provide alternate forums to handle different types of disputes

Prevent baseless claims

Fair and equitable treatment of contractors and Government agencies

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

When Does It Apply → Start With Checking the Contract

May Apply To:
1 – procurement of property
2 – procurement of services
3 – construction, maintenance, repair
4 – disposal of personal property
5 – Army, Air Force, Navy, Marine Corps, Coast Guard, Space Force, and NASA Exchanges

Likely Does Not Apply To:
1 – tort claims that do not arise under or relate to express of an implied-in-fact contract
2 – claims for penalties or forfeitures
3 – bid protests
4 – non-appropriated funds
5 – foreign contracts / international organization contracts

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Contract Change – any addition, subtraction or modification of the work required under a contract made during contract performance (not an amendment)

Change Order – the contracting officer unilaterally directing the contractor, by written order, to make a change within the general scope of the contract

Unilateral/Bilateral Changes – executed by the contracting officer only / executed by the contracting officer and the contractor after negotiations

FAR 43.103(a) *Types of contract modifications*

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

In-Scope Change – A contract change that is within the general scope of the original contract in terms of type and amount of work, period of performance, and manner of performance.

Out-of-Scope ("Cardinal") Change – A contract change that is not within the general scope of the original contract in terms of type and amount of work, period of performance, and manner of performance.

Equitable Adjustment – A contract modification, usually to contract price, that enables a contractor to receive compensation for additional costs of performance including a reasonable profit, caused by an in-scope contract change.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Unauthorized changes – changes not made by the contracting officer. The contractor bears the responsibility of immediately notifying the contracting officer in writing of the alleged change to confirm whether the government is officially ordering the change. FAR 43.104

Latent Ambiguity – does not readily appear in the language of a document but arises from a collateral matter *Foothill Eng'g*., IBCA No. 3119-A, - misplacement of a comma in a figure – did not trigger a duty to inquiry – contractor too busy to notice it

Patent Ambiguity – clearly appears on the face of a document – gross, obvious, glaring; *White v. Edsall Constr. Co., Inc*., 296 F.3d 1081 (2002) – note disclaiming the government's warranty on one of several design drawings

SF 30 – Amendment of Solicitation/Modification of Contract - Before the last payment

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Request for Equitable Adjustment (REA) – A contractor request (not a demand) that the contracting officer adjust the contract price to provide an equitable (i.e. "fair and reasonable") increase in contract price based on a change to contract requirements. REAs are handled under the contract's Changes Clause.

Partial exercise of an option

Failure to order services combined with using Government employees performing the same work

Failure to incorporate revised wage determination

Performing additional work or testing

Different site conditions

Stop Work Order / Re-Mobilization

Delays caused by government inspections if the delay causes additional work

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

FAR 33.206 – Initiation of a Claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1,1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1,1995, or to a Government claim based on a contractor claim involving fraud.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

1. Must be in writing

2. Must make a demand for a sum certain or a non-monetary claim

3. Must be submitted to the primary government contactor (authorized individual), preferably to the contracting officer for a final decision

4. Must be properly certified if it exceeds $100,000, by a proper official

5. Must be signed

6. Anything else?

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Only the prime contractor and the government may normally submit a claim

McPherson Contractors, Inc., ASBCA No.50830, appeal dismissed where prime stated it did not wish to pursue the appeal

Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, the subcontractor's direct communication with the government did not establish privity

Subcontractor may not submit a claim but may complain to the government, and / or request to sponsor its claim

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Statute of Limitations

A claim accrues when "all events, that fix the alleged liability...and permit assertion of the claim, were known or a claim accrues when "all events, that fix the alleged liability...and permit assertion of the claim, were known or should have been known," and some injury has occurred. Raytheon Company, Space & Airborne Systems, ASBCA No. 57801, Apr. 22, 2013, 13-1 BCA ¶ 35,319.

This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

The 6-year statute of limitations is not jurisdictional. This means that a court decides the case on the merits. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014).

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

FAR 33.213 Obligation to continue performance.

(a) In general, before passage of the Disputes statute, the obligation to continue performance applied only to claims arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, *Disputes*, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1.) This distinction is recognized by the clause with its Alternate I (see 33.215).

(b) In all contracts that include the clause at 52.233-1, Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; provided, that the Government's interest is properly secured.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

FAR 52.233-1, *Disputes*

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

FAR 52.233-1, *Disputes, Alternate I*

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

FAR 33.208, *Interest on claims*

a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that-

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232-17 for the right of the Government to collect interest on its claims against a contractor.)

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29,1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29,1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

FAR 33.207, *Contractor certification*

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding $100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

(e) The certification may be executed by any person authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

FAR 2.101, *Definitions* / FAR 52.233-1, *Disputes*

a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract.

Claims over $100,000 require certification

An invoice or a voucher is not a claim

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (2009)

Facts: The company submitted a certified claim for $64 million even though the evidence supported a claim for $13 million.

Holding: The trial court awarded $50 million for the United States. Liability under the Contract Disputes Act did not preclude liability under the False Claims Act, and the the penalty was proper. The forfeiture of the contractor's claim for $13 million was correct.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Supporting Evidence

pre-award communications

contract administration communications

prior course of dealing

custom, trade, or industry standard

Pioneer Enters., Inc., ASBCA No. 43739 Pre-award acceptance of a contractor's cost-cutting suggestion may also bind the government

Cessna Aircraft Co., ASBCA No. 48118 & *Dalton v. Cessna Aircraft Co*., 98 F.3d 1298 (1996)

Contractor has a duty to resolve patent ambiguities

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Supporting Evidence

cost breakdown

invoices

corporate records supporting the claimed amounts

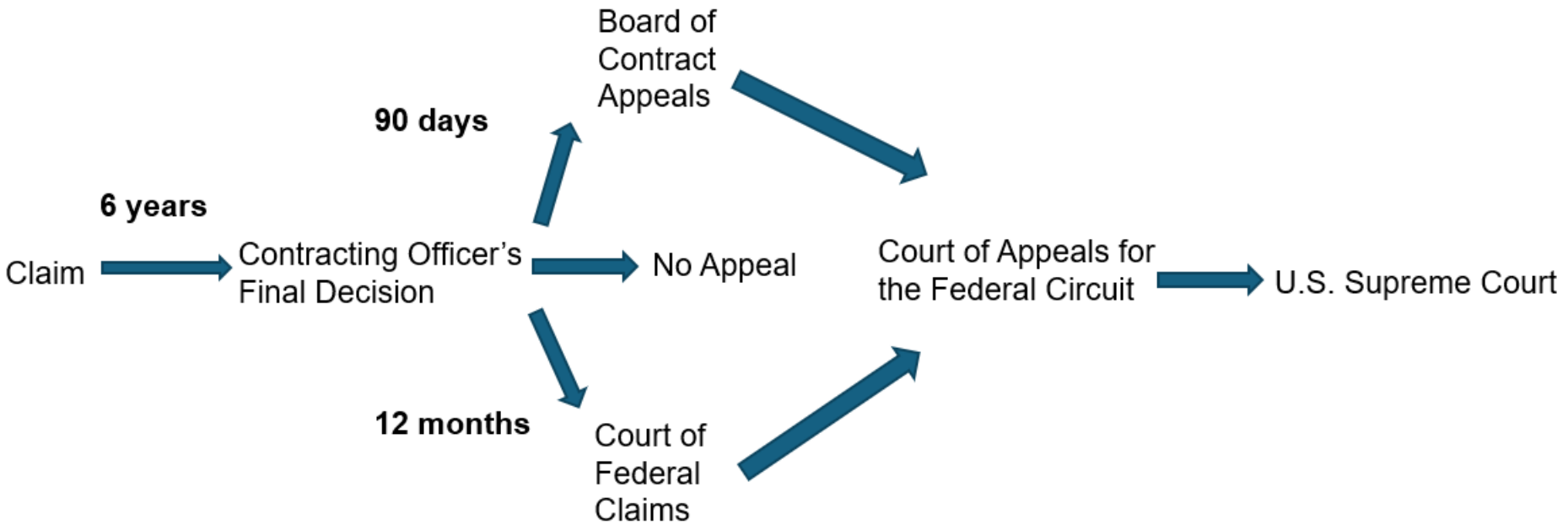
always verify each amount and maintain supporting documents

John T. Jones Constr. Co., ASBCA No. 48303, the contracting officer's desire for more information did not invalidate the contractor's claim submission.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Life of a Claim



Not Legal Advice / For Educational Purposes Only

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Failure to Follow the FAR = No Relief

Williams v. United States, 118 Fed. Cl. 533 (2014)

Facts: The contractor alleged that the government intentionally misrepresented the value of an airplane during an auction by failing to disclose its condition and its lack of flight certification. The contractor never filed a claim with the contracting officer.

Holding: The Court dismissed the lawsuit because it had no jurisdiction over the claim.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Keydata Sys, Inc. v. Department of the Treasury, GSBCA No. 14281-TD, 97-2, denying the contractor's petition for a final decision because it failed to correct substantial certification defects.

F Tokyo Co., ASBCA No. 59059, failure to properly sign or execute claim not correctable; company's official stamp not sufficient

Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993) substituting the word "understanding" for "knowledge" did not render certificate defective

The contracting officer need not render a final decision if he notifies the contractor in writing of the defect within 60 days after receipt of the claim. 41 U.S.C. § 7103(b)(3)

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Contracting Officer's Final Decision

The contracting officer must issue a decision:

Claims of less than $100,000 – within 60 days

Certified claims exceeding $100,000 – within 60 days the contracting officer must notify the contractor of a firm date by which it will issue a final decision, or issue the decision

Contractor Remedy For No Decision

Request the tribunal concerned to direct the contracting officer to issue a final decision. 41 U.S.C. § 7103(f)(4); FAR 33.211(f). *See* American Industries, ASBCA No. 26930-15, 82-1 BCA ¶ 15,753.

Treat the contracting officer's failure to issue a final decision as an appealable final decision (i.e., a "deemed denial"). 41 U.S.C. § 7103(f)(5); FAR 33.211(g).

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Contracting Officer's Final Decision

The final decision must be the contracting officer's and contain:

Describe the claim or dispute

Refer to the pertinent or disputed contract terms

Explain disputed and undisputed facts

Explain the contracting officer's rationale

Advise the contractor on its appeal rights

Demand the repayment of any indebtedness to the government

The contracting officer's final decision is final unless appealed, or reconsidered

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Contracting Officer's Final Decision

Armed Services Board of Contract Appeals (Department of Defense)

Civilian Board of Contract Appeals (Non-Department of Defense)

U.S. Court of Federal Claims

Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) 90-day filing requirement is statutory and cannot be waived

In writing:

Show intent to appeal the decision

Post final decision discussions may defeat the finality

File a complaint within 30 days of the date the Board receives the docketing notice

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Contracting Officer's Final Decision

Money damages (must prove)

Declaratory judgement

Attorney's fees under the Equal Access to Justice Act

The board may not grant specific performance or injunctive relief. General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1; Western Aviation Maint., Inc. v. General Services Admin, GSBCA No. 14165, 98-2 BCA ¶ 29,816 the government is immune from specific performance suits.

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Contracting Officer's Final Decision

The Court decides appeals from the contracting officer's final decisions

The appeal must be filed within 12 months from the date the contractor received the contracting officer's final decision

White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145 (1992) one day after the expiration of the 12-month period is too late

Because Congress legislatively mandated the twelve-month time period, it cannot be extended out of sympathy for particular litigants, even if this effects a seemingly harsh result…

The complaint must be in writing, show that the contractor is entitled to relief, and demand a judgment, among others

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Fraudulent Claims

The U.S. Government will initiate a fraud investigation

Debarment proceedings may be initiated

The U.S. Government may file counter-claims

Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (2009)

Veridyne Corp. v. United States, 758 F.3d 1371 (2014)

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Best Strategies and Tactics

Review Solicitation and Ask Questions

Document All Communications

Identify all facts and check your calculations

Decide: REA or claim

Provide supporting documentation, ie voucher, invoice, email

Explain actual and anticipated damages

Decide whether to appeal and pursue it further

The claims process should not be used for purposes of negotiations

Watson & Associates, LLC
Attorneys | Consultants

Federal Acquisition Regulation: Claims and Requests for Equitable Adjustment

Best Practices and Tactics

Identify Questions and Get Answers

Document all Transactions, Directions, and Guidance

Properly Sign and Certify and Avoid Fraudulent Claims

Follow the Establishes Procedures

U.S. Court of Federal Claims v. Board of Contract Appeals

Deadlines Have No Sympathy

Thank you!

Wojciech Kornacki
Government Contract and Compliance Counsel,
Of Counsel
kornackiw@theodorewatson.com I 202.640-3023

CRITICAL THINKING, CLEAR DIRECTION, DECISIVE RESULTS

Not Legal Advice / For Educational Purposes Only

Part 33 Protests, Disputes, and Appeals

Parent topic: Federal Acquisition Regulation

33.000 Scope of part.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

33.001 General.

There are other Federal court-related protest authorities and dispute-appeal authorities that are not covered by this part of the FAR, e.g., 28 U.S.C. 1491 for Court of Federal *Claims* jurisdiction. *Contracting officers should* contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts.

Subpart 33.1 - Protests

33.101 Definitions.

As used in this subpart-

Day means a calendar *day*, unless otherwise specified. In the computation of any period-

(1) The *day* of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last *day* after the act, event, or default is included unless-

(i) The last *day* is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last *day* is a *day* on which weather or other conditions cause the closing of the forum for all or part of the *day*, in which event the next *day* on which the appropriate administrative forum is open is included.

Filed means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered *filed* as of the next *day*. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

Interested party for the purpose of filing a protest means an actual or prospective *offeror* whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Protest means a written objection by an interested party to any of the following:

(1) A *solicitation* or other request by an agency for *offers* for a contract for the *procurement* of property or services.

(2) The cancellation of the *solicitation* or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Protest venue means *protests filed* with the agency, the Government Accountability Office, or the U.S. Court of Federal *Claims*. U.S. District Courts do not have any bid *protest* jurisdiction.

33.102 General.

(a) Without regard to the *protest venue*, *contracting officers shall* consider all *protests* and seek legal advice, whether *protests* are submitted before or after award and whether *filed* directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal *Claims*. (See 19.302 for *protests* of small business status, 19.305 for *protests* of disadvantaged business status, 19.306 for *protests* of *HUBZone* small business status, and 19.307 for *protests* of service-disabled veteran-owned small business status, and M) for *protests* of the status of an economically disadvantaged *women-owned small business concern* or of a *women-owned small business concern* eligible under the Women-Owned Small Business Program.)

(b) If, in connection with a *protest*, the head of an agency determines that a *solicitation*, proposed award, or award does not comply with the requirements of law or regulation, the *head of the agency may*-

(1) Take any action that could have been recommended by the Comptroller General had the *protest* been *filed* with the Government Accountability Office;

(2) Pay appropriate costs as stated in 33.104(h); and

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward *protest* is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government *may* collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a *protest* is sustained by GAO under circumstances that *may* allow the Government to seek reimbursement for *protest* costs, the *contracting officer* will determine whether the *protest* was sustained based on the awardee's negligent or intentional misrepresentation. If the *protest* was sustained on several issues, *protest* costs *shall* be apportioned according to the costs attributable to the awardee's actions.

(ii) The *contracting officer shall* review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the *contracting officer shall* notify the contractor *in writing* of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the *contracting officer shall* afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the *head of the contracting activity*.

(iii) When appropriate, the *contracting officer shall* also refer the matter to the agency *suspending and debarring official* for consideration under subpart 9.4.

(c) In accordance with 31 U.S.C.1558, with respect to any *protest filed* with the GAO, if the funds available to the agency for a contract at the time a *protest* is *filed* in connection with a *solicitation* for, proposed award of, or award of such a contract would otherwise expire, such funds *shall* remain available for obligation for 100 days after the date on which the final ruling is made on the *protest*. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award.* The *contracting officer may* stay performance of a contract within the time period contained in paragraph 33.104(c)(1) if the *contracting officer* makes a written determination that-

(1) A *protest* is likely to be *filed*; and

(2) Delay of performance is, under the circumstances, in the best interests of the *United States*.

(e) An interested party wishing to *protest* is encouraged to seek resolution within the agency (see 33.103) before filing a *protest* with the GAO, but *may protest* to the GAO in accordance with GAO regulations (4 CFR Part 21).

(f) No person *may* file a *protest* at GAO for a *procurement* integrity violation unless that person reported to the *contracting officer* the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 2106).

33.103 Protests to the agency.

(a) *Reference.* Executive Order 12979, Agency *Procurement Protests*, establishes policy on agency *procurement protests*.

(b) Prior to submission of an agency *protest*, all parties *shall* use their best efforts to resolve concerns raised by an interested party at the *contracting officer* level through open and frank discussions.

(c) The agency *should* provide for inexpensive, informal, procedurally simple, and expeditious resolution of *protests*. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable *protest* resolution methods.

(d) The following procedures are established to resolve agency *protests* effectively, to build confidence in the Government's *acquisition* system, and to reduce *protests* outside of the agency:

(1) *Protests shall* be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section *may* be grounds for dismissal of the *protest*.

(2) *Protests shall* include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) *Solicitation* or contract number.

(iii) Detailed statement of the legal and factual grounds for the *protest*, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an *interested party for the purpose of filing a protest*.

(viii) All information establishing the timeliness of the *protest*.

(3) All *protests filed* directly with the agency will be addressed to the *contracting officer* or other official designated to receive *protests*.

(4) In accordance with agency procedures, interested parties *may* request an independent review of their *protest* at a level above the *contracting officer*; *solicitations should* advise potential bidders and *offerors* that this review is available. Agency procedures and/or *solicitations shall* notify potential bidders and *offerors* whether this independent review is available as an alternative to consideration by the *contracting officer* of a *protest* or is available as an appeal of a *contracting officer* decision on a *protest*. Agencies *shall* designate the official(s) who are to conduct this independent review, but the official(s) need not be within the *contracting officer*'s supervisory chain. When practicable, officials designated to conduct the independent review *should* not have had previous personal involvement in the *procurement*. If there is an agency appellate review of the *contracting officer*'s decision on the *protest*, it will not extend GAO's timeliness requirements. Therefore, any subsequent *protest* to the GAO *must* be *filed* within 10 days of knowledge of initial adverse agency action (4 CFR21.2(a)(3)).

(e) *Protests* based on alleged apparent improprieties in a *solicitation shall* be *filed* before bid opening or the closing date for receipt of proposals. In all other cases, *protests shall* be *filed* no later than 10 days after the basis of *protest* is known or *should* have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a *protest* raises issues significant to the agency's *acquisition* system, *may* consider the merits of any *protest* which is not timely *filed*.

(f) Action upon receipt of *protest*.

(1) Upon receipt of a *protest* before award, a contract *may* not be awarded, pending agency resolution of the *protest*, unless contract award is justified, *in writing*, for urgent and compelling reasons or is determined, *in writing*, to be in the best interest of the Government. Such justification or determination *shall* be approved at a level above the *contracting officer*, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the *protest*, the *contracting officer* will inform the *offerors* whose *offers* might become eligible for award of the contract. If appropriate, the *offerors should* be requested, before expiration of the time for acceptance of their *offers*, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of *offers*, consideration *should* be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a *protest* within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the *contracting officer shall* immediately suspend performance, pending resolution of the *protest* within the agency, including any review by an independent higher level

official, unless continued performance is justified, *in writing*, for urgent and compelling reasons or is determined, *in writing*, to be in the best interest of the Government. Such justification or determination *shall* be approved at a level above the *contracting officer*, or by another official pursuant to agency procedures.

(4) Pursuing an agency *protest* does not extend the time for obtaining a stay at GAO. Agencies *may* include, as part of the agency *protest* process, a voluntary *suspension* period when agency *protests* are denied and the protester subsequently files at GAO.

(g) Agencies *shall* make their best efforts to resolve agency *protests* within 35 days after the *protest* is *filed*. To the extent permitted by law and regulation, the parties *may* exchange relevant information.

(h) Agency *protest* decisions *shall* be well-reasoned, and explain the agency position. The *protest* decision *shall* be provided to the protester using a method that provides evidence of receipt.

33.104 Protests to GAO.

Procedures for *protests* to GAO are found at 4 CFR Part 21 (GAO Bid *Protest* Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) General procedure.

(1) A protester is required to furnish a copy of its complete *protest* to the official and location designated in the *solicitation* or, in the absence of such a designation, to the *contracting officer*, so it is received no later than 1 *day* after the *protest* is *filed* with the GAO. The GAO *may* dismiss the *protest* if the protester fails to furnish a complete copy of the *protest* within 1 *day*.

(2) Immediately after receipt of the GAO's written notice that a *protest* has been *filed*, the agency *shall* give notice of the *protest* to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the *protest* is denied. The agency *shall* furnish copies of the *protest* submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the *contracting officer shall* obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)

(i) Upon notice that a *protest* has been *filed* with the GAO, the *contracting officer shall* immediately begin compiling the information necessary for a report to the GAO. The agency *shall* submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a *protest* has been *filed*, or within 20 days after receipt from the GAO of a determination to use the express *option*, unless the GAO-

(A) Advises the agency that the *protest* has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is

documented in the agency's file.

(ii) When a *protest* is *filed* with the GAO, and an actual or prospective *offeror* so requests, the procuring agency *shall*, in accordance with any applicable protective orders, provide actual or prospective *offerors* reasonable access to the *protest* file. However, if the GAO dismisses the *protest* before the documents are submitted to the GAO, then no *protest* file need be made available. Information exempt from disclosure under 5 U.S.C.552 *may* be redacted from the *protest* file. The *protest* file *shall* be made available to non-intervening actual or prospective *offerors* within a reasonable time after submittal of an agency report to the GAO. The *protest* file *shall* include an index and as appropriate-

(A) The *protest*;

(B) The *offer* submitted by the protester;

(C) The *offer* being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The *solicitation*, including the specifications or portions relevant to the *protest*;

(F) The abstract of *offers* or relevant portions; and

(G) Any other documents that the agency determines are relevant to the *protest*, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has *filed* a request for specific documents, the agency *shall* provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents *must* be *filed* with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO *shall* include-

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The *contracting officer*'s signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The *contracting officer*'s statement *shall* set forth findings, actions, and recommendations, and any additional evidence or information not provided in the *protest* file that *may* be necessary to determine the merits of the *protest*; and

(C) A list of parties being provided the documents.

(4)

(i) At the same time the agency submits its report to the GAO, the agency *shall* furnish copies of its report to the protester and any intervenors. A party *shall* receive all relevant documents, except-

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order *shall* be released only in accordance with the terms of the order. Examples of documents the agency *may*

decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; *classified information*; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(i) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or *should* have known, the agency *shall* provide the requested documents to the GAO within 2 days of receipt of the request.

(A) The additional documents *shall* also be provided to the protester and other interested parties within this 2-*day* period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order *shall* be provided only in accordance with the terms of the order.

(B) The agency *shall* notify the GAO of any documents withheld from the protester and other interested parties and *shall* state the reasons for withholding them.

(5) The GAO *may* issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of *procurement* sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the *United States* Congress or an *executive agency*.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order *shall* file its request with the GAO as soon as practicable after the *protest* is *filed*, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party *may* file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request *shall* be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party *may* request that these additional documents be covered by the protective order. Any party to the protective order also *may* request that individuals not already covered by the protective order be included in the order. Requests *shall* be *filed* with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO *may* impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO *may* also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express *option* is used, after receipt of the report, with copies provided to the *contracting officer* and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies *shall* furnish the GAO with the name, title, and telephone number of one or more

officials (in both field and headquarters offices, if desired) whom the GAO *may* contact who are knowledgeable about the subject matter of the *protest*. Each agency *shall* be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests* before award.

(1) When the agency has received notice from the GAO of a *protest filed* directly with the GAO, a contract *may* not be awarded unless authorized, in accordance with agency procedures, by the *head of the contracting activity*, on a nondelegable basis, upon a written finding that-

(i) Urgent and compelling circumstances which significantly affect the interest of the *United States* will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award *shall* not be authorized until the agency has notified the GAO of the finding in paragraph (b)(1) of this section.

(3) When a *protest* against the making of an award is received and award will be withheld pending disposition of the *protest*, the *contracting officer should* inform the *offerors* whose *offers* might become eligible for award of the *protest*. If appropriate, those *offerors should* be requested, before expiration of the time for acceptance of their *offer*, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of *offers*, consideration *should* be given to proceeding under paragraph (b)(1) of this section.

(c) *Protests* after award.

(1) When the agency receives notice of a *protest* from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the *contracting officer shall* immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

(2) In accordance with agency procedures, the *head of the contracting activity may*, on a nondelegable basis, authorize contract performance, notwithstanding the *protest*, upon a written finding that-

(i) Contract performance will be in the best interests of the *United States*; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the *United States* will not permit waiting for the GAO's decision.

(3) Contract performance *shall* not be authorized until the agency has notified the GAO of the finding in paragraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the *contracting officer should* attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a *protest filed* with the GAO after the dates contained in paragraph (c)(1), the *contracting officer* need not suspend contract performance or terminate the awarded contract unless the *contracting officer* believes that an award *may* be invalidated and a delay in receiving the *supplies* or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the *contracting officer shall* include the written findings or other required documentation in the file. The *contracting officer* also *shall* give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO *may* hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies *may* be obtained from the GAO. All parties *may* file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a *protest* within 100 days from the date of filing of the *protest* with the GAO, or within 65 days under the express *option*. The GAO attempts to issue its recommendation on an amended *protest* that adds a new ground of *protest* within the time limit of the initial *protest*. If an amended *protest* cannot be resolved within the initial time limit, the GAO *may* resolve the amended *protest* through an express *option*.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a *solicitation* for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the *head of the contracting activity* responsible for that contract *shall* report the failure to the GAO not later than 5 days after the expiration of the 60-*day* period. The report *shall* explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) Award of costs.

(1) If the GAO determines that a *solicitation* for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO *may* recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the *protest*, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency *shall* use funds available for the *procurement* to pay the costs awarded.

(2) The protester *shall* file its *claim* for costs with the *contracting* agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the *claim* within that time *may* result in forfeiture of the protester's right to recover its costs.

(3) The agency *shall* attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO *may*, upon request of the protester, recommend to the agency the amount of costs that the agency *should* pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency *should* pay the protester, the agency *shall* notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency *shall* pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, "Small business concern"), costs under paragraph (h)(2) of this section-

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C.3109 and 5 CFR 304.105; or

(ii) For attorneys' fees that exceed $150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of

living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel *should* consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section *shall* not be the subject of subsequent proposals, billings, or *claims* against the Government, and those exclusions *should* be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward *protest* is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government *may* require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government *may* collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

33.105 Protest at the U.S. Court of Federal Claims.

Procedures for *protests* at the U.S. Court of Federal *Claims* are set forth in the rules of the U.S. Court of Federal *Claims*. The rules *may* be found at https://www.uscfc.uscourts.gov/rules-forms.

33.106 Solicitation provision and contract clause.

(a) The *contracting officer shall* insert the provision at 52.233-2, Service of *Protest*, in *solicitations* for contracts expected to exceed the *simplified acquisition threshold*.

(b) The *contracting officer shall* insert the clause at 52.233-3, *Protest* After Award, in all *solicitations* and contracts. If a cost reimbursement contract is contemplated, the *contracting officer shall* use the clause with its *Alternate* I.

Subpart 33.2 - Disputes and Appeals

33.201 Definitions.

As used in this subpart-

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the *claim*, were known or *should* have been known. For liability to be fixed, some injury *must* have occurred. However, monetary damages need not have been incurred.

Alternative dispute resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures *may* include, but are not limited

to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

Defective certification means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the *claim*. Failure to certify *shall* not be deemed to be a *defective certification*.

Issue in controversy means a material disagreement between the Government and the contractor that-

(1) *May* result in a *claim*; or

(2) Is all or part of an existing *claim*.

Misrepresentation of fact means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

33.202 Disputes.

41 U.S.C. chapter 71, Disputes, establishes procedures and requirements for asserting and resolving *claims* subject to the Disputes statute. In addition, the Disputes statute provides for-

(a) The payment of interest on contractor *claims*;

(b) Certification of contractor *claims*; and

(c) A civil penalty for contractor *claims* that are fraudulent or based on a *misrepresentation of fact*.

33.203 Applicability.

(a) Except as specified in paragraph (b) of this section, this part applies to any express or implied contract covered by the Federal *Acquisition* Regulation.

(b) This subpart does not apply to any contract with-

(1) A foreign government or agency of that government; or

(2) An international organization or a subsidiary body of that organization, if the *agency head* determines that the application of the Disputes statute to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to *contracting officer* decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCAs) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, Disputes, recognizes the "all disputes" authority established by the Disputes statute and states certain requirements and limitations of the Disputes statute for the guidance of contractors and *contracting* agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals under the

Disputes statute.

33.204 Policy.

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the *contracting officer*'s level. Reasonable efforts *should* be made to resolve controversies prior to the submission of a *claim*. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, *may* make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C.571, *etseq*.) agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies *may* also elect to proceed under the authority and requirements of the ADRA.

33.205 Relationship of the Disputes statute to Pub. L.85-804.

(a) Requests for relief under Public Law85-804 (50 U.S.C. 1431-1435) are not *claims* within the Disputes statute or the Disputes clause at 52.233-1, Disputes, and *shall* be processed under subpart 50.1, Extraordinary Contractual Actions. However, relief formerly available only under Public Law85-804; *i.e.,* legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the *contracting officer* under the Contract Disputes statute and the Disputes clause. In case of a question whether the *contracting officer* has authority to settle or decide specific types of *claims*, the *contracting officer should* seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake *shall* be treated as a *claim* under the Disputes statute. A contract *may* be reformed or rescinded by the *contracting officer* if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, *contracting officers shall* make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A *claim* that is either denied or not approved in its entirety under paragraph (b) of this section *may* be cognizable as a request for relief under Public Law85-804 as implemented by subpart 50.1. However, the *claim must* first be submitted to the *contracting officer* for consideration under the Disputes statute because the *claim* is not cognizable under Public Law85-804, as implemented by subpart 50.1, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

33.206 Initiation of a claim.

(a) Contractor *claims shall* be submitted, *in writing*, to the *contracting officer* for a decision within 6 years after *accrual of a claim*, unless the *contracting* parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1,1995. The *contracting officer shall* document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a *claim* by the *contracting officer*.

(b) The *contracting officer shall* issue a written decision on any Government *claim* initiated against a

contractor within 6 years after accrual of the *claim*, unless the *contracting* parties agreed to a shorter time period. The 6-year period *shall* not apply to contracts awarded prior to October 1,1995, or to a Government *claim* based on a contractor *claim* involving fraud.

33.207 Contractor certification.

(a) Contractors *shall* provide the certification specified in paragraph (c) of this section when submitting any *claim* exceeding $100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a *claim*.

(c) The certification *shall* state as follows:

I certify that the *claim* is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the *claim* on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs *shall* be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding *certified cost or pricing data*).

(e) The certification *may* be executed by any person authorized to bind the contractor with respect to the *claim*.

(f) A *defective certification shall* not deprive a court or an agency BCA of jurisdiction over that *claim*. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA *shall* require a *defective certification* to be corrected.

33.208 Interest on claims.

(a) The Government *shall* pay interest on a contractor's *claim* on the amount found due and unpaid from the date that-

(1) The *contracting officer* receives the *claim* (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on *claims shall* be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which is applicable to the period during which the *contracting officer* receives the *claim* and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the *claim*. (See the clause at 52.232-17 for the right of the Government to collect interest on its *claims* against a contractor.)

(c) With regard to *claims* having *defective certifications*, interest *shall* be paid from either the date that the *contracting officer* initially receives the *claim* or October 29,1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29,1992, after submission of a defective certificate, interest *shall* be paid from the date of receipt by the Government of a proper certificate.

33.209 Suspected fraudulent claims.

If the contractor is unable to support any part of the *claim* and there is evidence that the inability is attributable to *misrepresentation of fact* or to fraud on the part of the contractor, the *contracting officer shall* refer the matter to the agency official responsible for investigating fraud.

33.210 Contracting officer's authority.

Except as provided in this section, *contracting officers* are authorized, within any specific limitations of their warrants, to decide or resolve all *claims* arising under or relating to a contract subject to the Disputes statute. In accordance with agency policies and 33.214, *contracting officers* are authorized to use ADR procedures to resolve *claims*. The authority to decide or resolve *claims* does not extend to-

(a) A *claim* or dispute for penalties or forfeitures prescribed by statute or regulation that another *Federal agency* is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment, or adjustment of any *claim* involving fraud.

33.211 Contracting officer's decision.

(a) When a *claim* by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the *claim* is necessary, the *contracting officer shall*-

(1) Review the facts pertinent to the *claim*;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration officer or *contracting office*, as appropriate; and

(4) Prepare a written decision that *shall* include-

(i) A description of the *claim* or dispute;

(ii) A reference to the pertinent contract terms;

(iii) A statement of the factual areas of agreement and disagreement;

(iv) A statement of the *contracting officer*'s decision, with supporting rationale;

(v) Paragraphs *substantially as follows*:

"This is the final decision of the *Contracting Officer*. You *may* appeal this decision to the agency board of contract appeals. If you decide to appeal, you *must*, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the *Contracting Officer* from whose decision this appeal is taken. The notice *shall* indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you *may*, solely at your election,

proceed under the board's-

(1) Small *claim* procedure for *claims* of $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less; or

(2) Accelerated procedure for *claims* of $100,000 or less.

Instead of appealing to the agency board of contract appeals, you *may* bring an action directly in the *United States* Court of Federal *Claims* (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

(vi) Demand for payment prepared in accordance with 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The *contracting officer shall* furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement *shall* apply to decisions on *claims* initiated by or against the contractor.

(c) The *contracting officer shall* issue the decision within the following statutory time limitations:

(1) For *claims* of $100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the *claim* if the contractor does not make such a request.

(2) For *claims* over $100,000, 60 days after receiving a certified *claim*; provided, however, that if a decision will not be issued within 60 days, the *contracting officer shall* notify the contractor, within that period, of the time within which a decision will be issued.

(d) The *contracting officer shall* issue a decision within a reasonable time, taking into account-

(1) The size and complexity of the *claim*;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The *contracting officer shall* have no obligation to render a final decision on any *claim* exceeding $100,000 which contains a *defective certification*, if within 60 days after receipt of the *claim*, the *contracting officer* notifies the contractor, *in writing*, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the *contracting officer* in rendering a decision on a *claim*, the contractor *may* request the tribunal concerned to direct the *contracting officer* to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the *contracting officer* to issue a decision within the required time periods will be deemed a decision by the *contracting officer* denying the *claim* and will authorize the contractor to file an appeal or suit on the *claim*.

(h) The amount determined payable under the decision, less any portion already paid, *should* be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment *shall* be without prejudice to the rights of either party.

33.212 Contracting officer’s duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the *contracting officer shall* provide data, documentation, information, and support as *may* be required by the agency BCA for use on a pending appeal from the *contracting officer*’s decision.

33.213 Obligation to continue performance.

(a) In general, before passage of the Disputes statute, the obligation to continue performance applied only to *claims* arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance in accordance with the *contracting officer*’s decision pending a final resolution of any *claim* arising under, or relating to, the contract. (A *claim* arising under a contract is a *claim* that can be resolved under a *contract clause*, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such *claim* can also be sought under the clause at 52.233-1. A *claim* relating to a contract is a *claim* that cannot be resolved under a *contract clause* other than the clause at 52.233-1.) This distinction is recognized by the clause with its AlternateI (see 33.215).

(b) In all contracts that include the clause at 52.233-1, Disputes, with its AlternateI, in the event of a dispute not arising under, but relating to, the contract, the *contracting officer shall* consider providing, through appropriate agency procedures, financing of the continued performance; provided, that the Government’s interest is properly secured.

33.214 Alternative dispute resolution (ADR).

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include-

(1) Existence of an *issue in controversy*;

(2) A voluntary election by both parties to participate in the ADR process;

(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and

(4) Participation in the process by officials of both parties who have the authority to resolve the *issue in controversy*.

(b) If the *contracting officer* rejects a contractor’s request for ADR proceedings, the *contracting officer shall* provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor *shall* inform the agency *in writing* of the contractor’s specific reasons for rejecting the request.

(c) ADR procedures *may* be used at any time that the *contracting officer* has authority to resolve the *issue in controversy*. If a *claim* has been submitted, ADR procedures *may* be applied to all or a portion of the *claim*. When ADR procedures are used subsequent to the issuance of a *contracting officer*’s final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the *contracting officer*’s final decision and does not constitute a

reconsideration of the final decision.

(d) When appropriate, a *neutral person may* be used to facilitate resolution of the *issue in controversy* using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings *shall* be protected consistent with 5 U.S.C. 574.

(f)

(1) A *solicitation shall* not require arbitration as a condition of award, unless arbitration is otherwise required by law. *Contracting officers should* have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration *shall* be *in writing* and *shall* specify a maximum award that *may* be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, *may* be agreed to only as specified in agency guidelines. Such guidelines *shall* provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an *issue in controversy* through binding arbitration.

33.215 Contract clauses.

(a) Insert the clause at 52.233-1, Disputes, in *solicitations* and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any *claim* arising under or relating to the contract, the *contracting officer shall* use the clause with its AlternateI.

(b) Insert the clause at 52.233-4 in all *solicitations* and contracts.

United States Court of Appeals for the Federal Circuit

2007-5129

DAEWOO ENGINEERING AND CONSTRUCTION CO., LTD.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Thomas P. McLish, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for plaintiff-appellant. With him on the brief were Thomas C. Goldstein and Paul W. Killian.

Donald E. Kinner, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Jeanne E. Davidson, Director, and J. Reid Prouty, Trial Attorney, and Michal L. Tingle, Assistant Director, Civil Fraud. Of counsel on the brief was Brian S. Smith, Division Counsel, United States Army Corps of Engineers, of Ft. Shafter, Hawaii.

Appealed from: United States Court of Federal Claims

Judge Robert H. Hodges, Jr.

United States Court of Appeals for the Federal Circuit

2007-5129

DAEWOO ENGINEERING AND CONSTRUCTION CO., LTD.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 02-CV-1914, Senior Judge Robert H. Hodges, Jr.

DECIDED: February 20, 2009

Before MAYER, FRIEDMAN, and DYK, Circuit Judges.

DYK, Circuit Judge.

Daewoo Engineering and Construction Co., Ltd. ("Daewoo" or "the contractor") brought suit in the Court of Federal Claims, alleging that the United States breached a contract between Daewoo and the United States to build a road in the Republic of Palau. The United States counterclaimed, alleging violations of the False Claims Act, 31 U.S.C. § 3729, and the Contract Disputes Act, 41 U.S.C. § 604, and seeking forfeiture of Daewoo's claims pursuant to 28 U.S.C. § 2514. Daewoo Eng'g & Constr. Co. v. United States, 73 Fed. Cl. 547, 597 (2006). The Court of Federal Claims held that Daewoo had committed fraud.

The court awarded the government $10,000 for Daewoo's False Claims Act violation and $50,629,855.88 for Daewoo's Contract Disputes Act violation. Id. at 597. It also held that Daewoo's claims were forfeited under 28 U.S.C. § 2514. Id. We affirm.

BACKGROUND

In 1998, pursuant to a 1994 treaty between the United States and the Republic of Palau, the United States Army Corps of Engineers ("government") solicited bids for the building of a fifty-three-mile road around the island of Babeldaob in the Republic of Palau. The government estimated that the price of constructing the road would be between $100 million and $250 million. Daewoo initially proposed to build the road for $73 million. Daewoo was the lowest bidder by far, with the next lowest bidder proposing $100 million. After the government questioned this price, Daewoo revised its proposal and submitted a final bid of $88.6 million. On March 30, 1999, the government awarded Daewoo the contract for constructing the road. The contract required completion of the road within 1080 days, a period which began in October 2000.

Construction of the road was subsequently delayed. Daewoo attributed these delays to the humid and rainy weather and moist soils in Palau, and urged the government to reduce the amount of soil compaction required by the contract. After discussing these delays with Daewoo, the government reduced the amount of soil compaction the contract had specified for parts of the road.

On March 29, 2002, Daewoo submitted to the Government a request for equitable adjustment. In this certified claim, Daewoo sought adjustment of the contract price and the time to perform the contract, alleging that the contract used defective specifications, that the government breached its duties to cooperate and to disclose

superior knowledge, and that the contract was impossible to perform within the originally specified time period. Daewoo requested $13,348,793.07 in "additional costs as of December 31, 2001" and, in the government's view, also requested $50,629,855.88 in "costs January 1, 2002 [and] [f]orward," a total of $63,978,648.95 ("$64 million"). Daewoo rejected the government's offer of a bilateral time adjustment, and the contracting officer denied Daewoo's claim in August 2002.

Daewoo filed a complaint with the Court of Federal Claims in December 2002, seeking, "with respect to damages suffered through December 31, 2001," an increase in the "compensable and non-compensable contract performance time" of 8 non-compensable and 122 compensable days and "monetary relief in the amount of $13,348,793.07," and "with respect to damages suffered from January 1, 2002, through contract completion," an increase in the "compensable contract performance time" of 776 days and "monetary relief in the amount of $50,629,855.88." Compl. 19-21. The government counterclaimed for damages, seeking $64 million under the Contract Disputes Act and $10,000 under the False Claims Act. The government also entered a special plea in fraud and sought forfeiture of Daewoo's claims under 28 U.S.C. § 2514.

The Court of Federal Claims awarded the government $10,000 under the False Claims Act and $50,629,855.88 ("$50.6 million") under the Contract Disputes Act, and forfeited Daewoo's claims under § 2514. Daewoo Eng'g, 73 Fed. Cl. at 597. The Court of Federal Claims concluded that the government "showed by clear and convincing evidence that the contractor knowingly presented a false claim with the intention of being paid for it," thus supporting the $50.6 million penalty under the Contract Disputes Act, the $10,000 award under the False Claims Act, and forfeiture of Daewoo's claims.

Id. at 584. Alternatively, the Court of Federal Claims analyzed and rejected on the merits Daewoo's claims that the road construction contract had contained a misleading weather-delay clause and defective road design specifications, that the government breached its duty to disclose its superior knowledge of its weather-delay calculation methods, and that the contract was thus impossible to perform. See id. at 561-68.

Daewoo timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal conclusions of the Court of Federal Claims de novo, and we review its factual findings under a clearly erroneous standard. See UMC Electronics Co. v. United States, 249 F.3d 1337, 1339 (Fed. Cir. 2001).

I

Under the antifraud provision of the Contract Disputes Act, 41 U.S.C. § 604, "[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." A "misrepresentation of fact" is "a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead." 41 U.S.C. § 601(9). The government must establish this falsity and intent by a preponderance of the evidence. Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998).

The Court of Federal Claims held that Daewoo "filed at least $50 million of the [$64 million certified] claim in bad faith" and consequently assessed a $50.6 million penalty against Daewoo under the Contract Disputes Act. Daewoo Eng'g, 73 Fed. Cl.

at 597. The $50.6 million portion of the claim found to be fraudulent represented the projected costs of completion of the contract. Daewoo challenges this assessment on three theories: (1) that Daewoo's certified claim was not a "claim" for $64 million under the Contract Disputes Act; (2) even if it was a claim for that amount, it was not fraudulent; and (3) even if the claim was in part fraudulent, it was not shown to be fraudulent to the extent of $50.6 million.

A.

We first address whether the contractor claimed approximately $64 million under the Contract Disputes Act.

A "claim" under the Contract Disputes Act, 41 U.S.C. §§ 601-13, must be "(1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain." Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (citing FAR 33.201, 48 C.F.R. § 33.201). Daewoo urges that the $50.6 million in future costs detailed in its certified claim were not sought as a matter of right, but instead were merely estimates provided to encourage the government to adjust the contract specifications.

Both the government and Daewoo agree that claims for future costs are permissible. Thus, the fact that not all of the costs recited in Daewoo's certified claim had been incurred does not prevent it from being construed as a claim for $64 million, including such projected costs. See UMC Electronics, 249 F.3d at 1339 (describing a claim including both incurred and projected costs). The Court of Federal Claims has noted that "a contractor may claim future expenses; however, when a contractor submits a claim that includes future expenses, projected costs should be in good faith."

UMC Electronics Co. v. United States, 43 Fed. Cl. 776, 803 (1999), aff'd, 249 F.3d 1337 (Fed. Cir. 2001).[1]

We think that the construction of Contracts Disputes Act claims should follow the general rules for the construction of written instruments. We note that Daewoo agrees that the claim should be construed using these general rules.

We look first to the plain language of the document, which the government urges is on its face a claim for $64 million and which Daewoo equally forcefully argues is plainly a claim for only $13 million.

Some of the language in the claim document supports the government's argument that the claim was for $64 million in incurred and projected costs. The claim document's "Certification of Request For Equitable Adjustment" stated that "the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable." Certified Claim at 7. The claim stated that "[t]his request for equitable adjustment is separated into past and future impacts," Certified Claim at 55, and that "[Daewoo] is requesting . . . costs applied to" the period after December 2001, Certified Claim at 66. The claim then detailed these post-2001 costs, which included subtotaled costs for Daewoo and/or each of its subcontractors for equipment, overhead, profit, haul road maintenance, erosion control, escalation, vehicles, bonds, insurance, and so on. Certified Claim at 67-88. The claim stated that the "Total Costs January 1,

[1] We have held that the Contract Disputes Act permits interest to be awarded on a contractor's projected costs before the contractor actually incurs such claimed costs. See Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381, 1382-83 (Fed. Cir. 1998).

2002 & Forward" were $50,629,855.88 and that the "Grand Total Past and Future Costs" was $63,978,648.95. Certified Claim at 89.

On the other hand, some of the claim document's language favors Daewoo's argument that the claim was only for $13 million in incurred costs. For example, the Executive Summary of the claim document referenced only the $13 million incurred costs. Certified Claim at 8. The claim document later advised that "estimates of future cost and time impacts anticipated to be incurred . . . are provided as a guide to the Government for considering alternate specifications." Certified Claim at 51. The Memorandum portion of the claim concluded that "Daewoo expressly reserves it[s] right to seek damages subsequently incurred." Certified Claim at 50.

We conclude that, standing alone, the claim document is unclear. Under such circumstances, its meaning is a factual question.[2] The Court of Federal Claims here made a factual finding that Daewoo made a claim for the full $64 million. That finding is not clearly erroneous.

[2] See Beta Sys., Inc. v. United States, 838 F.2d 1179, 1183 (Fed. Cir. 1988) ("The question of interpretation of language and conduct—the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law." (quoting 3 Arthur Linton Corbin, Corbin on Contracts § 554 (1960))); 11 Richard A. Lord, Williston on Contracts § 30:7 (4th ed. 1999) ("Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions . . . .").

Where the meaning of a written instrument is unclear, courts look to extrinsic evidence to resolve the question.[3] The extrinsic evidence unquestionably supports the Court of Federal Claims' factual finding that the contractor intended to make a claim for $64 million, the full amount of the pre-2002 and post-2001 costs. In its complaint filed in the Court of Federal Claims, Daewoo stated that its March 29, 2002, claim "requested damages for the added costs incurred from October 13, 2000, through December 31, 2001, in the amount of $13,348,793.07 and for the added costs incurred and to be incurred after December 31, 2001, in the amount of $50,629,855.88, for a total monetary damage claim of $63,978,648.95." Compl. ¶ 32. At trial in February 2005, Daewoo's project manager, J.W. Kim, who had certified the claim, testified that the claim was for nearly $64 million.[4] The government itself thought Daewoo's certified

---

[3] See, e.g., Teg-Paradigm Envtl., Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006) ("When a provision in a contract is susceptible to more than one reasonable interpretation, it is ambiguous, and we may then resort to extrinsic evidence to resolve the ambiguity." (citations omitted)); 11 Richard A. Lord, Williston on Contracts § 30:7 (4th ed. 1999) ("Where a written contract is ambiguous . . . the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning." (footnotes omitted)). The parties' own construction of an ambiguous written instrument is important when determining its meaning. See DDB Techs., L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284, 1292 (Fed. Cir. 2008); 11 Richard A. Lord, Williston on Contracts § 32:14 (4th ed. 1999) ("[T]he parties' own practical interpretation of the contract—how they actually acted, thereby giving meaning to their contract during the course of performing it—can be an important aid to the court.").

[4]
Q. Mr. Kim, you certified the claim to the U.S. Government where Daewoo was asking the government to pay Daewoo over $60 million, right?
A. We—yeah, I certified over 60 million, yeah.
. . . .
Q. This was not a $13 million claim and we'll submit another claim later for our future damages, right? It was a $63 million claim.
A. Yes.

Tr. 9431:9-13, 9544:1-4, Feb. 25, 2005.

claim was for $64 million, and after it received the certified claim in March 2002, it informed Daewoo's bonding company in June 2002 that Daewoo had filed a request for equitable adjustment with the government for $64 million.

The contrary evidence includes the testimony of J.W. Kim, who, after testifying repeatedly that he had certified the claim for $64 million, later attempted to recant and testified that he had certified only $13 million. However, the Court of Federal Claims found this revised testimony, and the related testimony of other witnesses given after J.W. Kim's attempted recantation, not to be credible. See Daewoo Eng'g, 73 Fed. Cl. at 570. We review witness credibility determinations made by the trial court under a highly deferential standard. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985); UMC Electronics Co., 249 F.3d at 1340. There is no basis for rejecting the Court of Federal Claims' credibility findings.

We conclude that the Court of Federal Claims did not err in concluding that Daewoo submitted a certified claim for $64 million.

B.

We next address Daewoo's theory that the Court of Federal Claims erred in finding that the $50.6 million portion of the certified claim, the amount of claimed future costs, was fraudulent and in assessing a penalty in that amount.[5]

[5] Here the government retained Cotton & Company ("Cotton") as a certified fraud examiner. Cotton determined that certain specific items in the incurred costs portion of Daewoo's certified claim, including duplicate costs, overstated equipment costs, and overstated overhead rates, were fraudulent. The Court of Federal Claims agreed. See Daewoo Eng'g, 73 Fed. Cl. at 592, 596. In light of our disposition, we need not address Daewoo's challenges to these determinations.

The Court of Federal Claims did not find that Daewoo's theories of the government's breach of the contract—based on alleged defective specifications, failure to disclose superior knowledge, and impossibility—were fraudulent (though it ultimately found these theories to be without merit). Rather, the Court of Federal Claims found that Daewoo's $50.6 million projected cost calculation was fraudulent. That calculation assumed that the government was responsible for each day of additional performance beyond the original 1080-day contract period, without even considering whether there was any contractor-caused delay or delay for which the government was not responsible. The calculation then simply assumed that Daewoo's current daily expenditures represented costs for which the government was responsible.[6] Daewoo apparently used no outside experts to make its certified claim calculation, and at trial made no real effort to justify the accuracy of the claim for future costs or even to explain how it was prepared. See Daewoo Eng'g, 73 Fed. Cl. at 573, 582. Indeed, Daewoo's damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it. See id. at 573. The Court of Federal Claims pointed out that Daewoo's claim preparation witnesses inconsistently referred to and interchanged actual, future, estimated, calculated and planned costs. See id. at 572, 574-76. The court found that J.W. Kim, who certified the claim, gave

[6] Daewoo stated that it calculated the $50.6 million in projected costs by using its own weather parameters, rather than those supplied by the government during the bidding period, to re-calculate the number of days needed to complete the contract as 2008 rather than 1080 days. Certified Claim at 32, 54. Daewoo next calculated that 153 of the additional 928 days had occurred before January 1, 2002, and that the remaining 775 were projected to occur after December 31, 2001. Id. at 66. Daewoo stated that it averaged "the last three months of costs, October, November and December 2001" and then applied that monthly average to the projected additional 25.5 months (775 days) "as an estimate for costs extending into the future." Id.

false testimony. Id. at 569-70, 584 n.63. The court also found that the testimony of Daewoo's witness Mr. Richardson regarding the calculation of Daewoo's certified claim "left no doubt that [Daewoo's] case was unsupportable and was pursued by Daewoo with fraudulent intent." Id. at 573 n. 45.

The Court of Federal Claims ultimately found that the certified claim was simply a "negotiating ploy," and that Daewoo "did not honestly believe that the Government owed it the various amounts stated when it certified the claim." Id. at 588, 590. The court concluded,

> [T]he extra $50 million claim was a means to get the Government's attention, and to show the Government what would happen if it did not approve the new compaction method that plaintiff wanted. Daewoo did not file that part of the claim in good faith; it was not an amount to which plaintiff honestly believed it was entitled. Whether Daewoo wanted the money or wanted the Government's attention, $64 million was not an amount the Government owed plaintiff at the time of certification, and plaintiff knew it.

Id. at 596.[7] On appeal Daewoo makes virtually no effort to show that the Court of Federal Claims' findings of fraud are clearly erroneous.

Daewoo argues, however, that the findings of the Court of Federal Claims somehow must be set aside, because the court found that the claim was fraudulent in the amount only of $50.6 million rather than $64 million. Daewoo argues that this is so

[7] The Court of Federal Claims stated that "Daewoo's case against the United States is wholly without merit; its claims are fraudulent," Daewoo Eng'g, 73 Fed. Cl. at 550; "[t]he certified claim itself was false or fraudulent and plaintiff knew that it was false or fraudulent," id. at 585; "[Daewoo] did not honestly believe that the Government owed it the various amounts stated when it certified the claim," id. at 590; "[Daewoo's] claim is fraudulent," id. at 595.

because the government had attempted to prove the fraudulence of both the past and future damages "based on the same theory." Pl.-Appellant's Reply Br. at 10.

Daewoo's premise is incorrect. The Court of Federal Claims found Daewoo's entire $64 million calculation likely was fraudulent,[8] but concluded that a penalty of only $50.6 million should be assessed because the remaining $13 million incurred cost claims could have been ultimately supported by alternative methodologies which, while incorrect, would not necessarily have been fraudulent. Daewoo Eng'g, 73 Fed. Cl. at 595-96. The court found that the "'part of [the] claim' that is fraudulent without question is $50,629,855.88." Id. at 595 (alteration in original). The court's decision to award only $50.6 million as a penalty does not undermine its factual findings.

Finally, Daewoo appears to argue that a claim can be fraudulent only if it rests upon false facts rather than on a baseless calculation. We disagree. Here Daewoo certified, as required by 41 U.S.C. § 605(c)(1), that "the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable." Certified Claim at 7. By certifying a claim for damages in the amount of $64 million, Daewoo represented that the claim was made "in good faith." It is well established that a baseless certified claim is a fraudulent claim. For instance, the First Circuit has held that if a party knows that its claim that it is entitled to funds under a letter of credit "has no plausible or colorable basis," then the

[8] The Court of Federal Claims held that the government proved that Daewoo "did not believe that the Government owed it $64 million as a matter of right" and that "Daewoo's entire $64 million claim was an attempt to defraud the United States." Daewoo Eng'g, 73 Fed. Cl. at 585. The court also stated that "[w]e suspect that Daewoo's entire claim is fraudulent." Id. at 595-96.

party's "effort to obtain the money is fraudulent." Itek Corp. v. First Nat'l Bank of Boston, 730 F.2d 19, 25 (1st Cir. 1984); see also Ward Petroleum Corp. v. Fed. Deposit Ins. Corp., 903 F.2d 1297, 1301 (10th Cir. 1990).

Congress specifically enacted the fraud provision of the Contract Disputes Act "out of concern that the submission of baseless claims contribute[s] to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic." S. Rep. No. 95-1118, at 20 (1978), as reprinted in 1978 U.S.C.C.A.N. 5235, 5254. We have noted that the "purpose of the certification requirement is to trigger[ ] a contractor's potential liability for a fraudulent claim under section 604 of the [Contract Disputes] Act." Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759, 763 (Fed. Cir. 1993) (internal quotation marks omitted) (first alteration in original).

Daewoo also contends that the $50.6 million penalty was unconstitutional under the Eighth and Fifth Amendments. This assertion is meritless. Under the Eighth Amendment, a penalty is unconstitutional only if it is disproportionate to the possible harm resulting from the conduct. See United States v. Bajakajian, 524 U.S. 321, 334 (1998) ("[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."). Here the potential harm was Daewoo's securing a $50.6 million payment from the government; under these circumstances a $50.6 million penalty is not disproportionate. The fact that the fraud may have been unlikely to succeed does not suggest that a penalty is inappropriate. The same standard and result would follow under the Fifth Amendment, if the penalty here were to be treated as equivalent to punitive damages (an issue we do not decide).

See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581 (1996) (noting that in a due process challenge to a punitive damages award, "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred" (internal quotation marks omitted)).

II

Daewoo also argues that the $10,000 penalty under the False Claims Act was not supported.

Under the False Claims Act, "[a]ny person who . . . knowingly presents" to the government "a false or fraudulent claim for payment or approval" "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a). "Knowingly" is defined as (1) "actual knowledge," (2) acting "in deliberate ignorance of the truth or falsity" of information, or (3) acting "in reckless disregard of the truth or falsity" of information; no proof of specific intent to defraud is required." Id. § 3729(b). The government must establish a violation of the False Claims Act by a preponderance of the evidence. Id. § 3731(c); Commercial Contractors, 154 F.3d at 1362.

To support its conclusion that Daewoo violated the False Claims Act, the Court of Federal Claims cited the findings underlying Daewoo's liability under the Contract

Disputes Act. See Daewoo Eng'g, 73 Fed. Cl. at 585.[9] A certified claim may be a source of liability under both the Contract Disputes Act and the False Claims Act. See UMC Electronics, 249 F.3d at 1339-40; Commercial Contractors, 154 F.3d at 1375. The Court of Federal Claims did not err in concluding that Daewoo violated the False Claims Act. Because the court did not find that the government incurred damages from Daewoo's false claim, the court properly assessed only the statutory penalty.

III

Finally we turn to the contractor's affirmative claims listed in its complaint.

Daewoo's complaint alleged that the government owed it money damages and an increase in the contract's performance time, due to defective specifications in the contract's weather and embankment clauses, breach of the government's duty to disclose its superior knowledge, and the impossibility of performing the contract. See Compl. ¶ ¶ 34-76.

Under 28 U.S.C. § 2514, "[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." Section 2514 further states that "[i]n such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture." To prevail under § 2514, the government must "establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and

[9] Daewoo asserts that the Court of Federal Claims improperly applied a negligence standard when holding that Daewoo violated the False Claims Act, but in fact the court recited the correct standard and stated that "[t]he Government proved by any standard that Daewoo's $64 million claim was fraudulent." Daewoo Eng'g, 73 Fed. Cl. at 585.

that it intended to defraud the government by submitting those claims." Commercial Contractors, 154 F.3d at 1362.

Unlike the antifraud provision of the Contract Disputes Act, 41 U.S.C. § 604, under which a contractor may incur liability only for the unsupported part of a claim, forfeiture under 28 U.S.C. § 2514 requires only part of the claim to be fraudulent. For instance, in Young-Montenay, Inc. v. United States, we held that because a contractor had submitted a claim to the government for $153,000 when the contractor knew the government was liable only for $104,000, such a knowingly false claim forfeited the contractor's later damages claim against the government under the contract. 15 F.3d 1040, 1042-43 (Fed. Cir. 1994).

The Court of Federal Claims held that the government "showed by clear and convincing evidence that [Daewoo] knowingly presented a false claim with the intention of being paid for it" and thus that Daewoo's claims against the government were forfeited under § 2514. Daewoo Eng'g, 73 Fed. Cl. at 584. Daewoo itself concedes that if the $50.6 million Contract Disputes Act penalty is correct, then the forfeiture of its $13 million is also correct. Since we have upheld the $50.6 million award, we also uphold the forfeiture under § 2514.[10]

AFFIRMED

[10] In light of our disposition, we need not address the alternative holding of the Court of Federal Claims rejecting Daewoo's claims on the merits. See Commercial Contractors, 154 F.3d at 1362 (affirming the holding of the Court of Federal Claims that a contractor's claims were forfeited under § 2514 without reaching the contractor's affirmative claims). We also need not address the finding of the Court of Federal Claims that Daewoo fraudulently induced the government to award the road construction contract, since, as the court correctly concluded, fraudulent inducement in this case causes "[n]o additional monetary damages [to] apply." See Daewoo Eng'g, 73 Fed. Cl. at 588.

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

VERIDYNE CORPORATION,
Plaintiff-Cross-Appellant,

v.

UNITED STATES,
Defendant-Appellant.

2013-5011, -5012

Appeals from the United States Court of Federal Claims in No. 06-CV-0150, Judge Christine O.C. Miller.

Decided: July 15, 2014

MARC LAMER, Kostos and Lamer, P.C., of Philadelphia, Pennsylvania, argued for plaintiff-cross-appellant.

ROBERT E. CHANDLER, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were STUART F. DELERY, Acting Assistant Attorney General, JEANNE E. DAVIDSON, Director, STEVEN J. GILLINGHAM, Assistant Director, and DOUGLAS T. HOFFMAN Trial Attorneys.

Before DYK, CLEVENGER, and WALLACH, *Circuit Judges*.

DYK, *Circuit Judge*.

Veridyne Corporation ("Veridyne") sued to recover on its contract with the government. The Court of Federal Claims ("Claims Court") held that Veridyne's contract claim was forfeited under the Forfeiture of Fraudulent Claims Act, 28 U.S.C. § 2514, also known as the Special Plea in Fraud Statute, but awarded Veridyne partial recovery under a quantum meruit theory. The government appeals the quantum meruit award. The Claims Court also awarded penalties to the government under the False Claims Act, 31 U.S.C. § 3729, and the antifraud provision of the Contract Disputes Act, 41 U.S.C. § 604 (2006) (recodified at 41 U.S.C. § 7103). Veridyne cross-appeals the award of penalties. We reverse the Claims Court's quantum meruit award to Veridyne and affirm the award of penalties to the government under the False Claims Act and Contract Disputes Act.

BACKGROUND

The contract in question was awarded pursuant to the Small Business Administration's ("SBA") 8(a) program. 15 U.S.C. § 637(a). This program is designed to help small, disadvantaged businesses. The program sets aside government contracts for businesses that are owned and controlled at least 51% by socially and economically disadvantaged individuals. To administer the program, the SBA contracts with federal agencies to provide goods and services, and subcontracts the actual performance of the work to disadvantaged businesses that have been certified by SBA as eligible for such contracts. Although the SBA has delegated the authority to negotiate with the SBA-qualified contractor to the Department of Transportation, and by extension, the Maritime Administration ("MARAD"), "the SBA is responsible for approving the resulting contract before award," and the formal contract is between the SBA and the SBA-qualified contractor. 48

C.F.R. ("FAR") §§ 19.808-1(c), *id.* 19.811-1(b). In June 1989, Veridyne, then Shepard-Patterson & Associates, Inc., was certified by the SBA for participation in SBA's 8(a) program. Veridyne's admission to the 8(a) program was for the standard nine-year term, and it was scheduled to "graduate" from the program in June 1998.

In March 1995, MARAD awarded to the SBA an indefinite delivery, indefinite quantity cost-plus-award-fee contract for services related to MARAD's logistics program. Later that month, the SBA awarded a subcontract containing the same terms as its contract with MARAD to Veridyne for one base year and up to four option years. The subcontract required Veridyne to provide services to MARAD "as needed in accordance with authorized written work orders." Pl.'s App'x ("P.A.") 10, 363. MARAD paid Veridyne $20,324,289.15 for the services performed under the initial contract period.

In late 1997 or early 1998, Veridyne approached MARAD about extending the contract. MARAD was satisfied with Veridyne's performance and preferred to work with Veridyne rather than switch to another SBA-qualified business. Veridyne wanted to extend the contract before Veridyne graduated from the 8(a) program in June 1998. At the time, if the new contract award price exceeded $3 million, it would be subject to open competition between SBA-qualified businesses and could not be awarded as a sole-source contract. 15 U.S.C. § 637(a)(1)(D)(i)(II). If MARAD opened the new contract to competition, the process would delay the award until after June 1998, *i.e.*, until after Veridyne's graduation from the program.

In March 1998, Veridyne submitted a proposal to MARAD for a new indefinite delivery, indefinite quantity, cost-plus-award-fee contract. Correspondence between Veridyne and MARAD before the submission specified

that estimates for the new contract would not exceed "$3,000,000 in the aggregate." P.A. 139. As a result, the "proposed" cost specified in the proposal, including the five additional option years, was $2,999,949.00. P.A. 171. The proposal specified that "[a]ll contract terms and conditions are the same, and the original scope and technical content remain intact [as the original contract]." P.A. 147. Veridyne's representative certified in the proposal that "to the best of [his] knowledge and belief, the cost or pricing data (as defined in [FAR] 15.801 . . . [*i.e.*, 'all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs']) submitted . . . in support of [the new contract], are accurate, complete and current." P.A. 165 (citing FAR 15.801 (1994)). These statements were inaccurate. Veridyne well knew that the services to be provided under the extension would cost far in excess of $3,000,000, indeed, in excess of ten times that amount. P.A. 4. Veridyne even admitted that "the costs established in [the proposal] were never intended to reflect MARAD's actual needs, but were developed to meet SBA's $3 million limit." P.A. 36.

Similarly, although some MARAD officials did not believe that the $3,000,000 estimated cost represented the actual value of the services described in the proposal, other officials openly conceded that Veridyne had explicitly written the proposal "to remain within SBA's $3,000,000 threshold." P.A. 204. The Claims Court concluded that "MARAD personnel knew that the $3-million amount was merely a pretext to get around having to award [the new contract] subject to competition." P.A. 60; *see also* P.A. 11 ("MARAD contracting officials knowledgeable in approving the proposal vehicle and fully aware of the need to befog the SBA in order to obtain its approval actively participated in securing that approval.").

In April 1998, MARAD officials approved the new contract and submitted a letter to SBA proposing that SBA approve the new contract without opening it to competition. Although Veridyne's proposal was not sent to the SBA, MARAD's letter to the SBA included Veridyne's misleading data and figures taken directly from the proposal and noted that "[t]he statement of work is unchanged from the current contract" and "[t]he total estimated amount of this requirement is $3,000,000." Resp. to Panel Request, Attachment A at 2, May 7, 2014, ECF No. 73. In May 1998, MARAD, Veridyne, and the SBA executed the new contract extending the service contract, known as Modification ("Mod") 0023, which had been drafted by MARAD to reflect Veridyne's proposal.

By 1999, even though the stated cost of Mod 0023 was about $3,000,000, MARAD's projected internal logistics budget for the years covered by Mod 0023 and the final year of the original Contract was $35,974,779. The work orders issued to Veridyne far exceeded the scope of Mod 0023. From 2001 to 2004, MARAD issued additional work orders to Veridyne, Veridyne completed the work, and MARAD paid Veridyne $31,134,931.12 for this work. The government does not now seek to recover these payments.

In part due to MARAD's cost overruns, the Department of Transportation Office of Inspector General began investigating the execution of Mod 0023 in July 2003. By September 2004, the Inspector General concluded that Veridyne had obtained Mod 0023 through fraud. In October 2004, MARAD's Chief Counsel instructed MARAD officials that, "[e]ffective immediately, MARAD is to make no payments to Veridyne on any contract, without express approval by me." P.A. 337. MARAD did not notify Veridyne until December 2004, when MARAD issued a stop order suspending contract performance and informed Veridyne of its view that Mod 0023 was void *ab initio*. At the time of the December stop order, invoices

numbered 260–264 were outstanding to MARAD and had not been paid. After the stop order, Veridyne continued to do work for MARAD and submitted three additional invoices, numbered 265–267. MARAD never paid Veridyne the amounts invoiced in 260–267.

On June 13, 2005, Veridyne submitted invoices 260–267 as certified claims pursuant to the Contract Disputes Act ("CDA"), 41 U.S.C. § 604 (2006) (recodified at 41 U.S.C. § 7103). MARAD informed Veridyne that it would not issue a final decision on these claims because the matter involved allegations of fraud, and Veridyne treated this as a "deemed denial." 41 U.S.C. § 7103(f)(5). On February 28, 2006, Veridyne filed a complaint in the Claims Court to recover $2,267,163.96 on invoices 260–267, among other claims.

Insofar as is pertinent to this appeal, the government entered a defense under the Special Plea in Fraud statute, 28 U.S.C. § 2514, that Veridyne had forfeited its contract claim. In addition, the government counterclaimed for a civil penalty under the False Claims Act ("FCA"), 31 U.S.C. § 3729, for each fraudulent claim presented and for a penalty under the antifraud provision of the CDA, 41 U.S.C. § 604 (2006) (recodified at 41 U.S.C. § 7103), for the unsupported portion of Veridyne's CDA claims.

After a trial on the merits, the Claims Court rendered a somewhat confusing opinion. It concluded that because Veridyne's invoices contained false information, its direct contract claims were forfeited under the Special Plea in Fraud statute. But the Claims Court also concluded that because Veridyne had conferred a benefit on the government by performing the contract, it could recover in quantum meruit. The Claims Court determined that Veridyne was owed $1,068,636.22 in quantum meruit for the work performed before MARAD issued the stop order.

On the government's FCA counterclaim, the Claims Court concluded Veridyne's proposal for the Mod 0023 extension was a false claim. Because the Claims Court treated each invoice that Veridyne submitted under Mod 0023 as a separate false claim, each claim incurred an additional penalty under the FCA. The Claims Court imposed the maximum penalty of $11,000 per claim for each invoice submitted under Mod 0023, or 127 false claims. Thus, the government was awarded $1,397,000.00 in FCA penalties. The Claims Court also concluded that "[n]o evidence of record suggests that the SBA was aware that Mod 0023 was a pretext aimed at avoiding SBA's competition requirements." P.A. 60. Finally, the Claims Court found that Veridyne's CDA claims for invoices 265–267 were unsupported and concluded that the government was entitled to CDA damages in the amount of $568,802.09.[1]

The government appealed the Claims Court's quantum meruit award. Veridyne did not appeal the Claims Court's forfeiture finding on its direct contract claim. However, Veridyne cross-appealed the Claims Court's imposition of penalties under the FCA and the CDA. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). We review legal conclusions of the Claims Court de novo and its factual findings for clear error. *Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1335 (Fed. Cir. 2009).

---

[1] Veridyne asserted various other claims that were rejected, and Veridyne does not appeal. The Claims Court also rejected the government's common law fraud defense, and the government does not appeal.

DISCUSSION

I. VERIDYNE'S AFFIRMATIVE RECOVERY IN QUANTUM MERUIT

The Special Plea in Fraud Statute 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.

28 U.S.C. § 2514. To prevail under section 2514, the government must "establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and that it intended to defraud the government by submitting those claims." *Daewoo*, 557 F.3d at 1341 (quoting *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998)). The Claims Court found that Veridyne's affirmative contract claim was forfeited under section 2514. Veridyne does not appeal the forfeiture finding.

Even though the Claims Court found that Veridyne had forfeited its affirmative contract claim, it awarded quantum meruit recovery to Veridyne for the value of the services performed by Veridyne before MARAD's stop order. The Claims Court relied on *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986), stating that "binding Federal Circuit precedent permits a contractor to recover for services already rendered where the situation does not involve a bribe or conflict of interest." P.A. 45; *see also* P.A. 38–39. On appeal, the government argues that it was improper for the Claims Court to allow Veridyne to recover in quantum meruit when its claims

have been forfeited under the Special Plea in Fraud Statute. We agree.

One of our predecessor courts, the Court of Claims, decided this issue in *Mervin Contracting Corp. v. United States*, 94 Ct. Cl. 81, 87 (1941). There, the court found that the contractor's claim was forfeited for fraud. *Id.* at 86. The court held that quantum meruit recovery was unavailable to the contractor, finding that the contract claim and the quantum meruit claim "were for the same services, and the claims for those services were forfeited, regardless of the theory or form in which the claims were asserted. The second causes of action in *quantum meruit* are therefore no more enforceable than the first causes of action based on the express contracts." *Id.* at 86–87. The Court of Claims in *Little v. United States* followed *Mervin*, recognizing that,"where, as in the present case, fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it." 152 F. Supp. 84, 87–88 (Ct. Cl. 1957).

The legislative history of the Special Plea in Fraud Statute confirms the correctness of the *Mervin* decision. The Special Plea in Fraud Statute was originally enacted as part of the Court of Claims Act in 1863, which expanded the jurisdiction of the Court of Claims to include "private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government" and gave it the power to issue final judgments. Court of Claims Act of 1863, §§ 2–3, 12 Stat. 765, 765 (1863). One particular concern was that expanding the Court of Claims's jurisdiction would enable litigants to perpetrate fraud on the government. Vol. 32 pt. 2 Cong. Globe, 37th Cong., 2d Sess. 1671, 1672 (1862). In the floor debate, bill sponsors explained that the special plea provision was intended "to give [the claimants] to

understand by formal provision of law, that any attempt at fraud upon their part shall so taint their claim, *no matter whether there be equity in it or not*, as to forever forfeit it to the Government of the United States." *Id.* at 1674 (emphasis added).

Neither the *Amdahl* case, relied on by the Claims Court, nor *Miller v. United States*, 550 F.2d 17, 25–26 (Ct. Cl. 1977), cited by Veridyne, counsels an alternative result. In *Amdahl*, pursuant to the Brooks Act, Pub. L. No. 89-306 (codified as amended at 40 U.S.C. § 759 (1982)), the government procurement agency had delegated to the Department of Treasury the authority to procure computer equipment, and Treasury contracted with the Federal Home Loan Mortgage Corporation ("Freddie Mac") for this purpose. *Amdahl*, 786 F.2d at 390. But in doing so Treasury had violated the statute and regulation in two respects—it improperly paid for the equipment upon signing but before physical delivery and failed to determine whether suitable equipment was available from other sources. *Id.* at 391. Because Treasury had acted beyond the scope of its authority, we held that the contract was void, and Freddie Mac could not recover under an illegal contract. *Id.* at 392–93. However, we concluded that Freddie Mac could recover under quantum meruit for the services performed as an "innocent contractor." *Id.* at 395. There is no suggestion in *Amdahl* that quantum meruit recovery is available where the contract claim has been forfeited under a Special Plea in Fraud. To the contrary, *Amdahl* contemplated that quantum meruit recovery "may be different in a case involving fraud or the like, a matter not involved here." *Id.* at 395 n.8. Similarly, *Miller* did not address whether quantum meruit recovery was available for forfeited claims, but concluded that a contractor could obtain quantum meruit recovery because there was no fraud and the contractor

was only liable under the FCA on a negligent misrepresentation theory. 550 F.2d at 24.

Therefore, we reverse the Claims Court's award of $1,068,636.22 for quantum meruit recovery to Veridyne.

II. THE GOVERNMENT'S FALSE CLAIMS ACT COUNTERCLAIM

Under the FCA, "[a]ny person who . . . knowingly presents" to the government "a false or fraudulent claim for payment or approval" "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than [$11,000], plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a)(1), as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461; *see also* 28 C.F.R. § 85.3. To recover under the FCA, the Government must show "(1) the contractor presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; (3) the contractor knew the claim was false or fraudulent; and (4) the United States suffered damages as a result of the false or fraudulent claim." *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994). The government must establish a violation of the FCA by a preponderance of the evidence. 31 U.S.C. § 3731(d); *Daewoo*, 557 F.3d at 1340.

The Claims Court found that Veridyne's proposal to MARAD for the extension of the contract, the Mod 0023 proposal, was a false claim because it misrepresented the cost of the services that Veridyne agreed to provide in the proposal. The Claims Court awarded the government the maximum penalty for each of the 127 invoices submitted pursuant to Mod 0023 for a total penalty of $1,397,000.00.

Veridyne first argues that its proposal did not contain false statements because "the costs established in Modification 0023 were never intended to reflect MARAD's

actual needs." P.A. 36. We disagree. The original contract had covered all of MARAD's logistics needs and the language in the proposal indicated that Mod 0023 would have the same scope—that "[a]ll contract terms and conditions are the same, and the original scope and technical content remain intact." P.A. 147. In addition, Veridyne's representative had certified "to the best of [his] knowledge and belief, the cost or pricing data [in the proposal] (as defined in [FAR] 15.801 [*i.e.*, 'all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs']) submitted . . . in support of [Mod 0023] are accurate, complete and current." P.A. 165 (citing FAR 15.801 & FAR 15.804-2 (1994)). The fact that this was an indefinite cost, indefinite quantity contract does not render the misrepresentations in Veridyne's proposal irrelevant. In light of the SBA's $3,000,000 threshold for awarding sole-source contracts, these misrepresentations were highly material. Therefore, the Claims Court did not err in finding that Veridyne's proposal meets the first criterion of the FCA of being a "false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A).

Second, Veridyne argues that even if the proposal contained false statements, Veridyne did not have the requisite intent to defraud MARAD because MARAD knew that these statements were false, relying on *United States ex rel Ubl v. IIF Data Solutions*, 650 F.3d 445, 452–53 (4th Cir. 2011), *United States. ex rel Durcholz v. FKW, Inc.,* 189 F.3d 542, 544–45 (7th Cir. 1999), *United States ex rel Hagood v. Sonoma County Water Authority*, 929 F.2d 1416, 1421 (9th Cir. 1991).

Although Veridyne may be correct that MARAD had knowledge that the Mod 0023 proposal contained false statements, the FCA inquiry does not end with MARAD's knowledge. Veridyne's contract was with the SBA, not with MARAD. And it is undisputed that "[n]o evidence of

record suggests that SBA was aware that the Mod 0023 proposal was a pretext aimed at avoiding SBA's competition requirements." P.A. 60. In other words, regardless of *MARAD's* knowledge, the *SBA* did not have knowledge that Veridyne's statements were fraudulent.

Even though the Mod 0023 proposal was never sent to the SBA, SBA was aware of and relied on the fraudulent cost data in the proposal. When MARAD requested permission from SBA for the extension of the Contract with Veridyne, it transmitted the false statements and figures from Veridyne's Mod 0023 proposal, stating that "[t]he total estimated amount of this requirement is $3,000,000" and assuring SBA that "[t]he acquisition for the incumbent [Veridyne] will be a follow-on or renewal contract with *no change* in the scope of work." Resp. to Panel Req., Attachment A at 2–3, May 7, 2014, ECF No. 73 (emphasis added). Even if Veridyne believed that MARAD officials were not misled by its proposal, it is clear that these false statements, certified as true by Veridyne, misled the SBA to enter the contract with Veridyne and that Veridyne intended that the SBA rely on the false statements. As a result, Mod 0023 was infected with fraud.

Third, Veridyne argues that even if the Mod 0023 proposal was procured by fraud, the invoices submitted pursuant to Mod 0023, on which the FCA penalties were based, did not contain any false statements and cannot support FCA penalties. Veridyne's contentions are unavailing. The Supreme Court has held that claims submitted pursuant to a fraudulently obtained contract are FCA violations even if the claims themselves do not contain false statements. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543–44 (1943), *superseded by statute on other grounds as recognized by Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1893–94 (2011). In *Marcus*, the electrical contractors, in obtaining

contracts with local governments that were funded by the federal government, used collusive bidding to obtain the contracts while certifying that these bids "were genuine." *Id.* at 540, 543 (internal quotation marks omitted). The contractors then drew checks from a joint federal and local government bank account to pay for the work. *Id.* at 543. Each check was treated as a separate claim. *Id.* Even though it was undisputed that the contractors had actually performed the contracted-for work, and these checks were not independently fraudulent, the initial fraud to obtain the contracts tainted all the claims. *Id.* at 543–44. The Supreme Court held that a contractor's "fraud [does] not spend itself with the execution of the contract. . . . The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded." *Id.* Because Mod 0023 was obtained by fraud, each invoice submitted pursuant to that contract was tainted by that fraud.[2] *See also United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352

---

[2] Veridyne also relies on *United States v. Bornstein* for the proposition that each invoice should not constitute a separate penalty. 423 U.S. 303, 311–12 (1976). In *Bornstein*, even though the subcontractor United sent only *three* shipments of falsely marked tubes to contractor Model, Model incorporated those tubes into kits it shipped to the government and sent the government *thirty-five* invoices for payment. *Id.* at 307. The *Bornstein* Court distinguished *Marcus*, finding that United was only liable for the three false claims it had filed because the statute "penalizes a person for his own acts, not for the acts of someone else." *Id.* at 312. Here, *Bornstein* is inapplicable, as it is Veridyne and not another party that has submitted 127 tainted invoices to the government, and the statute penalizes that conduct.

F.3d 908, 920 (4th Cir. 2003) ("[T]he initial false certification by [the contractor] tainted all of the following invoices, and the district court properly determined that [the contractor] could be held liable on all twenty-six of the submissions by [the contractor] seeking government funding."); *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 298 (D.D.C. 1996) ("It has been established that claims for payment submitted to the government pursuant to a fraudulently obtained contract violate the FCA, even if the claims themselves do not contain false statements.").

Veridyne also contends that these 127 invoices were only submitted to MARAD, not to the SBA, and therefore, these invoices were not sent to the contracting party. *Marcus* held it irrelevant that the contractors' false claims were made to the bank holding federal funds and not to the federal government directly; it is not necessary that the SBA be misled with respect to each of the 127 invoices. *Marcus*, 317 U.S. at 543–44. It is equally irrelevant here that Veridyne submitted its claims for payment to MARAD rather than the SBA directly, when the claims would be paid from federal funds.

We affirm the Claims Court's award of $11,000 for each FCA violation, or $1,397,000.00 for Veridyne's 127 false claims.

III. THE GOVERNMENT'S CONTRACT DISPUTES ACT COUNTERCLAIM

The Contract Disputes Act requires that an authorized corporate official certify that "the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, [and] that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." 41 U.S.C. § 605(c)(1) (2006) (recodified at 41 U.S.C. § 7103(b)(1)(A)–(D)). Under the antifraud

provision of the CDA, 41 U.S.C. § 604 (2006) (recodified at 41 U.S.C. § 7103(c)(2)),

> [i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim.

A "misrepresentation of fact" is "a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead." 41 U.S.C. § 601(9) (2006) (recodified at 41 U.S.C. § 7101(9)). "The government must establish this falsity and intent by a preponderance of the evidence." *Daewoo*, 557 F.3d at 1335. Congress enacted the fraud provision of the CDA "out of concern that the submission of baseless claims contributes to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic." *Id.* at 1340 (alterations in original omitted) (quoting S. Rep. No. 95-1118, at 20 (1978) *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5254). Here, Veridyne's chief executive officer certified with respect to each claim that the claim was "made in good faith, that the supporting data [were] accurate and complete . . . , [and] that the amount requested accurately reflect[ed] the contract adjustment for which the contractor believe[d] the government was liable." 41 U.S.C. § 605(c)(1), (5) (2006) (recodified at 41 U.S.C. § 7103(b)(1)). The Claims Court found that invoices 265–267, where Veridyne billed for the work completed after MARAD's stop order, were unsupported.[3]

---

[3] The Claims Court also found that these misrepresentations in invoices 265–267 would have supported FCA

MARAD relied on Veridyne's submitted invoices to show how funds for the Contract were allocated so that they could be paid. The Claims Court found that invoice 265 was unsupported because Veridyne misrepresented MARAD's own allocation of funds and falsely communicated to MARAD that MARAD had sufficient funds to pay invoice 265. Veridyne argues that it had no opportunity to confirm its fund allocation with MARAD because MARAD had stopped communicating with Veridyne before invoice 265 was submitted. But the failure of MARAD to communicate with Veridyne does not excuse Veridyne's conduct.

Veridyne's misrepresentations in invoices 266 and 267 are equally clear. A CDA claim requires a certification that the claimant has acted in good faith in claiming compensation for work performed. 41 U.S.C. § 605(c)(1) (2006) (recodified at 41 U.S.C. § 7103(b)(1)). In invoice 266, Veridyne charged MARAD its actual overhead rate, even though Veridyne had assured MARAD that it would only charge a "discounted" overhead rate, and had used that rate for the previous ten years. The Mod 0023 proposal also stated that

> [t]he overhead rate . . . is anticipated to be no greater than [the historic 64.5% overhead rate] in years 4 & 5 of the current contract vehicle . . . . For this current proposal, [Veridyne] will bid and cap the overhead rates at 64.4%, 62.5%, 61%, 58%, and 56% for Option Years 5, 6, 7, 8, and 9 respectively.

P.A. 147–48. Therefore, Veridyne was not entitled to payment at the higher overhead rate, and invoicing at that rate was a misrepresentation.

---

penalties, but declined to impose two penalties for the same claim.

In invoice 267, Veridyne had rebilled MARAD for previously unpaid expenses. But instead of making clear that the expenses were rebilled expenses, Veridyne included the rebilled lease expenses as part of overhead, making it difficult to identify these as twice-billed items. Therefore, while it is not unsupported to rebill for unpaid expenses, Veridyne's invoice could have induced the government to pay twice for the same expenses. Veridyne's invoicing violated the statute.

Finally, we consider whether a single claim can be the source of liability under both the FCA and the CDA, as the Claims Court found here. We have previously considered this question, and have held that the same false act in "[a] certified claim may be a source of liability under both the Contract Disputes Act and the False Claims Act." *Daewoo*, 557 F.3d at 1340–41 (citing *UMC Elecs. Co. v. United States*, 249 F.3d 1337, 1339–40 (Fed. Cir. 2001)); *Commercial Contractors*, 154 F.3d at 1375.

Therefore, we hold that the Claims Court did not err in finding that invoices 265–267 were unsupported, and affirm the Claims Court's award of $568,802.09 to the government as a CDA penalty.

CONCLUSION

We affirm the Claims Court's award of $1,965,802.09 to the government on its FCA and CDA counterclaims.[4] We reverse the Claims Court's award of $1,068,636.22 to Veridyne under a quantum meruit theory.

AFFIRMED-IN-PART, REVERSED-IN-PART

---

[4] Veridyne also argued that it relied on the advice of counsel in taking its actions with respect to Mod 0023 and in its actions with respect to invoices 265–267. We find no error in the Claims Court's rejection of this defense.

COSTS

Costs to the United States.

In the United States Court of Federal Claims

No. 13-978C
(Filed: September 25, 2014)

* *

LACHANA WILLIAMS and
RUPERT WILLIAMS,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Contract Disputes Act; Claim; Certification; Contracting Officer's Final Decision; Subject Matter Jurisdiction; GSA Online Auction

* *

Rupert Williams, Richmond, CA, and *Lachana Williams*, Pomona Park, FL, *pro se*.

Antonia Ramos Soares, Civil Division, Department of Justice, Washington, DC, for defendant.

OPINION

BRUGGINK, *Judge*.

This case involves a contract between the General Services Administration ("GSA") and *pro se* plaintiffs, Lachana and Rupert Williams, ("the Williamses") for the sale of an airplane. After submitting the winning bid for the airplane on GSA's online auction platform, GSAAuctions.gov, plaintiffs paid for and made arrangements to collect the airplane. When Rupert Williams inspected and took custody of the airplane, he found that it

was missing essential parts and that it could not be flown. Plaintiffs subsequently filed suit in the United States District Court for the Northern District of California, the location of the governmental entities the United States Department of Agriculture ("USDA") and the Fire Department of Kern County, California which had possession of the airplane prior to the Williamses. The District Court found that it had jurisdiction over the Williamses claims against Kern County, but in the interest of justice and pursuant to 28 U.S.C. § 1631 (2012), transferred their claims against the USDA to this court. *Williams v. U.S. Dep't of Agric.*, No. 13-cv-508, 2013 WL 5567486 (N.D. Cal. Oct. 7, 2013). Plaintiffs' case was transferred to the Court of Federal Claims in December of 2013 and we received plaintiffs' amended complaint on April 29, 2014.

In their amended complaint, the Williamses allege that the government intentionally misrepresented the value of the airplane during the auction by failing to disclose its condition and its lack of flight certification. Specifically, plaintiffs argue that it was false to advertise that the aircraft had only 2,900 airframe hours. Also, plaintiffs assert that defendant intentionally mislead them because upon "delivery of said aircraft to Plaintiff(s) the Defendant and their co-owner intentionally gave the Plaintiff(s) a current registration for and [sic] aircraft that was in good standing with the FAA [(Federal Aviation Administration)]," which was not the correct registration. Pls.' Am. Compl. 2. Plaintiffs also allege that defendant "knowingly and willfully removed [m]ajor components from aircraft . . . with the intent to defraud and deprive the Plaintiff(s) of the entire aircraft they purchased." Pls.' Am. Compl. 2. As a remedy, plaintiffs seek $99,230, which is the estimated cost of repairs needed to make the plane airworthy. Additionally, plaintiffs request damages of $65,000 for the cost of storing the aircraft, sales tax, freight charges, and the costs of this lawsuit.

We are currently faced with defendant's motion to dismiss, which challenges our jurisdiction. Specifically, defendant alleges that plaintiffs failed to satisfy the requirements of the Contract Disputes Act[1] ("CDA"), 41 U.S.C. §§ 7101-7109 (2012), which they must do before this court may exercise jurisdiction under 28 U.S.C. § 1491(a)(2) (2012). Defendant's motion

[1] "The [Contract Disputes Act] provides for the resolution of contract disputes arising between the government and contractors." *England v. Swanson Grp., Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004).

is fully briefed and we heard oral argument on September 24, 2014. For the reasons explained below, we grant defendant's motion and dismiss plaintiffs' complaint for lack of jurisdiction.

BACKGROUND[2]

On November 14, 2011, plaintiffs purchased for $16,300 an airplane from the USDA through an online GSA auction. The advertisement on GSA's auction website, GSAAuctions.gov, described the airplane that the Williamses purchased as follows:

> AIRCRAFT, FIXED WING: 1967 ROCKWELL COMMANDER 680 FL(P), ENGINES ARE LYCOMING MODEL 10720 BIB, RIGHT ENGINE HAS 30HRS SINCE OVERHAUL, LEFT ENGINE HAS 1390 SINCE OVERHAUL, AIRFRAME HAS 2900 HOURS,[]N911KC REPAIRS REQUIRED INCLUDING BUT NOT LIMITED TO: PLANE HAS NOT BEEN FLOWN IN OVER FIVE YEARS; RIGHT ENGINE HAS METAL IN OIL. BIDDERS ARE STRONGLY ENCOURAGED TO INSPECT PRIOR TO BIDDING. . . .

Pls.' Resp. A034.[3] Specific information regarding inspection was also given in the advertisement, which provided that "INSPECTION WILL BE THE WEEK OF 10/31/11 BY APPOINTMENT ONLY[.] RECORDS ARE

---

[2] The facts are taken from plaintiffs' complaint and are presumed correct. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). We also draw facts from the documents that the parties attached to their filings. *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985) ("In deciding a Rule 12(b)(1) motion, the court can consider . . . evidentiary matters outside the pleadings."). All reasonable inferences are made in plaintiffs' favor for the purposes of defendant's motion to dismiss. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

[3] The filing referred to in this citation is titled "Plaintiffs' Answer to Defendant's Motion to Dismiss Pro Se Complaint." For the sake of brevity, we will refer to this document as plaintiffs' response. When the pinpoint citation is preceded by an "A," these are the page numbers handwritten by plaintiffs on the attachments to their response.

AVAILABLE FOR VIEWING DURING INSPECTION OF THE AIRCRAFT ONLY." Pls.' Resp. A034. Despite the tone of the description, plaintiffs did not inspect the airplane prior to bidding and winning the auction.

GSA's auction website also has a link called "Terms & Conditions" in which the following relevant terms are provided:

- Photographs may not depict an exact representation of the bid item(s) and should not be relied upon in place of written item descriptions or as a substitute for physical inspection.

- Bidders agree to physically inspect the property upon which they bid or thereby waive the opportunity to conduct a physical inspection. In waiving their inspection rights, bidders bear the risk for any gross omissions regarding the functionality of items, failure to cite major missing parts and/or restrictions with regards to usage that would have been revealed by physical inspection. There are times when access to property may be limited due to property being located in a restricted area. GSA will do all that it can to ensure that photos and detailed descriptions are provided in these instances.

- Contracts resulting from the sale of any offer in the GSAAuctions.gov website are subject to the Contract Disputes Act of 1978 (41 USC 7101-7109), as amended.

- Condition of property is not warranted. Deficiencies, when known, have been indicated in the property descriptions. However, absence of any indicated deficiencies does not mean that none exists. Therefore, the bidder should ascertain the condition of the item through physical inspection.

- The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to its written description. Features, characteristics, deficiencies, etc. not addressed in the description are excluded from this warranty. GSA

further cautions bidders that GSA's written description represents GSA's best effort to describe the item based on the information provided to it by the owning agency. Therefore, gross omissions regarding the functionality of items, failures to cite major missing parts and/or restrictions with regards to usage may occur.

- Claims for Misdescription

  If items have been awarded but not paid for and the successful bidder feels that the property is mis-described, he/she must follow these procedures: A written claim needs to be submitted to the **Sales Contracting Officer within 15 calendar days from the date of award** requesting release of contractual obligation for reasons satisfying that of a mis-description. No verbal contact with the custodian or the Sales Contracting Officer or any other federal official will constitute a notice of misdescription.

  When items are awarded and payment has been received, regardless of the removal status (removal may or may not have occurred), the successful bidder must submit a written notice to the Sales Contracting Officer within 15 calendar days from the date of payment email notification (the Purchaser's Receipt). If property has been removed and the claim is accepted by the Sales Contracting Officer, the purchaser must maintain the property in its purchased condition and return it at their expense to the location designated by the Sales Contracting Officer or any other federal official.

  A request for refund must be substantiated in writing to the Contracting Officer for issues regarding mis-described property, missing property and voluntary defaults within 15 calendar days from the date of award.

  The refund is limited to the purchase price of the misdescribed property.

- The Government does not warrant the merchantability of the property or its purpose. The purchaser is not entitled to any payment for loss of profit or any other money damages - special, direct, indirect, or consequential.

Def.'s Mot. to Dismiss A5-A8 (emphasis in original).

Mr. Williams traveled from his home in Florida at the end of January 2012 to take custody of the airplane, which was located in California. After accepting custody and upon inspection of the airplane, Mr. Williams discovered that it was missing essential parts. On February 1, 2012, the Williamses sent an e-mail to Shirley Tarkington, the contracting officer ("CO"), requesting a price reduction because the condition of the aircraft had been misrepresented.[4] In this e-mail, plaintiffs describe how they were surprised by the "cannibalized state of the aircraft" and when they spoke with the custodian responsible for delivering the aircraft to plaintiffs, who was also the aircraft mechanic, the custodian informed plaintiffs that "he was never asked about the overall condition of the aircraft and missing items, so he never said anything about it until now." Pls.' Resp. A032; Def.'s Mot. to Dismiss A14. Two days later, the CO responded via e-mail with the terms governing a claim of misdescription, a notation that plaintiffs' written claim was received after the 15-day period, and a statement that plaintiffs' failure to assert a timely misdescription claim meant an automatic denial. The CO, however, "agreed to refund $1,000.00 dollars as a courtesy for any inconvenience." Pls.' Resp. A033; Def.'s Mot. to Dismiss A14. Ms. Williams replied with thanks, agreement, and acknowledgment "that you didn't have to give us anything back." Def.'s Mot. to Dismiss A13. Plaintiffs, in fact, received $1,000 from GSA in February of 2012. Def.'s Mot. to Dismiss A15-A17.

When plaintiffs attempted to register the airplane, the FAA informed them on August 14, 2012, that the previous owners (USDA & the Fire Department of Kern County) had cancelled the registration on December 4, 2009, because the airplane was destroyed or scrapped. Plaintiffs claim that the government gave them a seemingly valid FAA registration after the sale when they took custody of the aircraft. *See* Pls.' Resp. A010. The Williamses subsequently sought out professionals to assess the airplane and approximate how much it would cost to make the necessary repairs. Plaintiffs received an estimate in 2012 for the replacement of missing parts, which totaled $48,230.00. Plaintiffs were also informed that the engine would need at least

[4] The actual wording of the plaintiffs' e-mail is "This email shall serve as my formal request for a price reduction off the purchase price of said item, on the grounds that it was misrepresented." Pls.' Resp. A032.

$30,000 of work before the aircraft would be flight-worthy. The Williamses continue to store the airplane in the condition it was received.

DISCUSSION

The Court of Federal Claims is a court of limited jurisdiction and it "possesses only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 373 (1994). Plaintiffs must establish that their claim falls within the subject matter jurisdiction of this court before we may consider the merits of their claim. "While a *pro se* plaintiff is held to a less stringent standard than that of a plaintiff represented by an attorney, the *pro se* plaintiff, nevertheless, bears the burden of establishing the Court's jurisdiction by a preponderance of the evidence." *Riles v. United States*, 93 Fed. Cl. 163, 165 (2010) (internal citation omitted); *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (stating that general allegations made by a *pro se* plaintiff are held to a "less stringent standard[] than formal pleadings drafted by lawyers"); *see also Henke*, 60 F.3d at 799 ("The fact that [plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures, if such there be.").

Under the Tucker Act, we have limited jurisdiction to adjudicate "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2012). Specifically, the Tucker Act provides that this court "shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41 [the CDA], . . . on which a decision of the contracting officer has been issued under section 6 of that Act." 28 U.S.C. § 1491(a)(2). Essentially, this second provision permits this court to review *de novo* the CO's decision made under the procedures outlined in the CDA. *Id*; 41 U.S.C. § 7104 (2012). The key to the method of establishing jurisdiction pursuant to § 1491(a)(2) is compliance with the CDA.

The CDA requires a contractor to submit a written claim against the federal government to the CO for decision. 41 U.S.C. § 7104. A claim is defined as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 2.101 (2013). In sum, a claim must:

"be (1) a written demand, (2) seeking, as a matter of right, 3) the payment of money in a sum certain." *Daewoo Eng'g & Contstr. Co. v. United States*, 557 F.3d 1332, 1336 (Fed. Cir. 2009) (quotation and citation omitted). If the claim made by the contractor is for more than $100,000, the contractor must certify[5] the claim. 41 U.S.C. § 7103(b)(1). Generally, the CO has sixty days from the receipt of a claim to render a decision. 41 U.S.C. § 7103(f). If the CO does not issue a decision during that time then the lack of decision "is deemed to be a decision by the contracting officer denying the claim." 41 U.S.C. § 7103(f)(5). It is only upon receipt of the CO's final decision or after sixty days have passed and the CO's inaction qualifies as a denial that the contractor may seek review of the CO's decision in this court. 41 U.S.C. §§ 7103(f)(5), 7104(b). Thus, pursuant to the CDA, our jurisdiction over a claim "is lacking unless the contractor's claim is first presented to the contracting officer and that officer renders a final decision on the claim." *England*, 353 F.3d at 1379.

Defendant asserts that the Williamses failed to comply with the requirements of the CDA and therefore the court does not have jurisdiction over their claim.[6] In response, plaintiffs asks the court to construe their interaction with the CO, Ms. Tarkington, as a claim and final decision. Alternatively, plaintiffs argue that they were not subject to the requirements

---

[5] To certify, one must confirm formally that

> (A) the claim is made in good faith; (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which the contractor believed the Federal Government is liable; and (D) the certifier is authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 7103(b)(1).

[6] Defendant initially argued that we also lack jurisdiction under the Tucker Act to hear any of plaintiffs' claims against the Kern County Fire Department, which co-owned the aircraft with the USDA. Plaintiffs' later explained that they were not asserting any claims against Kern County in this suit, but were simply including Kern County to give a complete recitation of the facts. Defendant subsequently conceded this argument, noting that plaintiffs agree that this court lacks jurisdiction over claims against Kern County, California.

of the CDA because they have an express contract with the federal government that is not for a procurement or service. We are thus presented with two issues–the first is whether plaintiffs satisfied the requirements of the CDA by presenting a claim to and receiving a final decision from the CO, and second, whether plaintiffs' contract is subject to the CDA–which we will address in turn.

First, defendant argues that plaintiffs' request for a price reduction does not satisfy the CDA requirement that a claim include a sum certain.[7] Plaintiffs do not respond directly to the government's argument that their request for a price reduction does not satisfy the requirement that a CDA claim contain a

---

[7] Defendant draws our attention to two additional ways that plaintiffs failed to comply with the requirements of the CDA. The first is that plaintiffs seek approximately $164,230 in damages through this suit but have not certified their claim. Plaintiffs argue that a defect in the certification of their claim is not fatal to the court's jurisdiction. 41 U.S.C. § 7103(b)(3) ("A defect in the certification of a claim does not deprive a court . . . of jurisdiction over the claim. Prior to the entry of a final judgment by a court . . . , the court . . . shall require a defective certification be corrected."). Plaintiffs are correct in their reading of 41 U.S.C. § 7103(b)(3) except for the fact that there is a significant difference between a defective certification and a nonexistent one. 48 C.F.R. § 33.201 (2013) ("Defective certification means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification."). Failure to include any certification of a claim for over $100,000 operates as a bar to this court's jurisdiction. *Scan-Tech Sec. L.P. v. United States*, 46 Fed. Cl. 326, 339 (2000) ("[48 C.F.R. 33.201] effectively prevents a contractor from completely circumventing the certification requirement by asserting that its failure to certify merely constituted a defect in certification that should not deprive the court of its jurisdiction."). We need not decide whether plaintiffs' claim required certification because we hold below that plaintiffs' failed to submit a CDA claim to the CO. Additionally, defendant argues that even if the court construes the e-mail correspondence between plaintiffs and the CO as a proper claim and denial, plaintiffs did not timely appeal from the CO's February 3, 2012 decision because plaintiffs filed their case in federal court on February 5, 2013. It is not necessary for us to reach this argument because we find that plaintiffs never submitted a claim to the CO.

sum certain. Instead, plaintiffs broadly assert that they did, in fact, comply with the CDA "when they filed their certified claim in good faith to the contracting officer via email on February 1, 2012." Pls.' Resp. 1.

The purpose of the CDA requirement that a claim contain a request for a sum certain is to provide the CO with "adequate notice of the basis and amount of [the] claim." *Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010) (holding also that the claim must put the CO on notice that the claimant seeks a final decision). Here, the CO was not provided with adequate notice of the amount and basis of plaintiffs' claim. In Ms. Williams' e-mail to the CO, she requested a reduction in the purchase price of the aircraft without mentioning any dollar amounts.[8] *See RCS Enter., Inc. v. United States*, 46 Fed. Cl. 509, 514 (2000) ("The problem is that plaintiff's claim letter failed to ask for any amount based on such a claim."). This request was insufficient under the CDA, which requires that a claim assert a right to a sum certain.

We also note that the basis and amount of plaintiffs' claim changed from their initial request to the CO to their prayer for relief in this court. While the Williamses' initially sought and received a reduction in the purchase price of the airplane, they now ask us to order GSA to pay for repairs to the airplane and their costs of transport, storage, and litigation in total amount of $164,230. Although the latter is a sum certain, it was not presented to the CO and cannot be construed to satisfy the sum certain element of a CDA claim.

Second, in their sur-response, plaintiffs raise the theory that their contract with GSA is not subject to the CDA and therefore, they did not need to obtain a CO's final decision before filing suit. The CDA applies to "any express or implied contract . . . made by an executive agency for– (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property." 41 U.S.C. § 7102(a).

---

[8] Plaintiffs argue that the CO did not inform them that their claim was defective and that this somehow relieves them of the obligation to comply with the CDA. The Williamses do not identify any authority to support their assertion and we know of no legal support for their rationale.

Plaintiffs characterize their contract as a "purchase contract" rather than a procurement or a contract for services and, citing *Terry v. United States*, 98 Fed. Cl. 736 (2011), conclude that the CDA does not apply to purchase contracts. Plaintiffs, however, misread the court's holding in *Terry*. After discussing the four types of contracts covered by the CDA, the court in *Terry* concludes that

> A concession contract does not fall within these categories. *See* 31 C.F.R. § 51.3 (2008) ("Concession contracts are not contracts within the meaning of [the] Contract Disputes Act[] and are not service or procurement contracts within the meaning of statutes, regulations, or policies that apply only to federal service contracts or other types of federal procurement actions.").

98 Fed. Cl. at 737. While plaintiffs would have us read "purchase contract" where the *Terry* court refers to "concession contracts," this passage actually articulates that while concession contracts are exempt from the CDA, contracts for the disposal of personal property, or "purchase contracts," are squarely subject to the CDA's administrative requirements.

Defendant argues that each of the cases that plaintiffs cite[9] represent a carve out in the law that applies only to concession contracts. Simply put, defendant asserts that while plaintiffs have identified an exemption from the CDA for contracts to provide concession, plaintiffs' contract does not fit within this exemption. We agree. Plaintiffs' contract is for the purchase of personal property that the government had purposed for disposal. The CDA expressly includes this type of contract within its reach. 41 U.S.C. § 7102(a)(4) ("[The CDA] applies to any express or implied contract . . . made by an executive agency for– . . . (4) the disposal of personal property.").

---

[9] *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1293-94 (Fed. Cir. 2002) (concluding that a contract to provide fast food services at a Marine Corps air station was not covered by the CDA); *Coffee Connections, Inc. v. United States*, 113 Fed. Cl. 741, 751 (2013) ("Though contract claims are generally subject to the CDA, the CDA does not apply to concession contracts."); *Terry*, 98 Fed Cl. at 737 (holding that concession contracts are exempt from the CDA). Plaintiffs also point to *SUFI Network Services, Inc. v. United States*, 102 Fed. Cl. 656 (2012), which is not relevant to this case because the applicability of the CDA was not at issue.

CONCLUSION

The Williamses' contract is governed by the CDA, which requires that a contractor first submit a claim to the CO before filing suit in the Court of Federal Claims. The claim must be for a sum certain, and if for an amount over $100,000, must be certified. Without a final decision from the CO, this court lacks jurisdiction to consider claims based on a contract for the disposition of personal property. We therefore grant defendant's motion and dismiss plaintiffs' complaint, without prejudice,[10] for lack of subject matter jurisdiction. The Clerk is directed to enter judgment. No costs.

ERIC G. BRUGGINK
Judge

[10] The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of a claim." 41 U.S.C. § 7103(a)(4)(A). If plaintiffs elect to file a claim with the CO, receive a decision or a deemed denial, and then decide to challenge the CO's decision in the Court of Federal Claims, the filing fee shall be waived.