

Recent Court Of Federal Claims Decision Demonstrates The Peril To Federal Contractors Of Submitting Inflated Claims

Over the last few years, government contracting practitioners have noted an increase in the federal Government's efforts to combat contractor fraud. At the Court of Federal Claims (COFC) Judicial Conference in November 2012, several practitioners lamented that the Department of Justice (DOJ) may have developed the unofficial policy of actively searching for fraud in every case before the COFC and filing a fraud counterclaim if potentially supportable in order to gain a litigation advantage. The harm to government contractors caused by a finding of fraud can be severe, as the Government has several potent anti-fraud remedies in its arsenal.

The False Claims Act is, of course, the Government's most effective vehicle for pursuing remedies for contractor fraud. In addition, the Government frequently employs the Procurement Integrity Act and Sarbanes-Oxley Act of 2002 to pursue fraud. Another particularly powerful weapon in the Government's arsenal is the filing of a counterclaim under the anti-fraud provision of the Contract Disputes Act (CDA) which states:

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

41 U.S.C. § 7103(c)(2). As the Federal Circuit articulated in *Daewoo Engineering & Construction Co., Ltd. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009), the Government need only establish the "misrepresentation of fact" necessary for fraud by a preponderance of the evidence (i.e., it is more likely than not). Furthermore, the "misrepresentation of fact" can be established merely by the contractor's submission of a baseless or overinflated claim. This relatively low hurdle is of particular concern to construction contractors where claims, such as those for delay damages, may be moving targets dependent upon several factors that may be adjusted over time. If the court determines the claim is overinflated, the contractor not only forfeits the fraudulent or overinflated portion of the claim, but also affirmatively owes the Government the amount of the fraudulent portion plus the costs attributable to reviewing the unsupported part of the claim.

The question of what constitutes "costs" under the CDA's anti-fraud provision was addressed for the first time by the COFC in November 2012 in *Veridyne Corp. v. United States*, 107 Fed. Cl. 762 (2012). Earlier in 2012, the court determined that \$500,000 of Veridyne's \$2.5 million claim was fraudulent, therefore entitling the Government to its "costs" in reviewing that portion of Veridyne's claim. The Government then introduced evidence that it had incurred almost \$400,000 in "costs" to review the fraudulent portion of the claim, which was comprised of DOJ-attorney and agency-employee review time, Defense Contract Audit Agency (DCAA) review, and third-party contractor services to perform forensic imaging of Veridyne's computers during discovery. The court examined each category of claimed fees in detail.

First, the court considered whether DOJ attorneys and agency employees - who did not contemporaneously record time entries for the case - could apportion the amount of their annual salary to the review of the fraudulent claim using only after-the-fact time entries for the entire case and estimates of how much time they each spent reviewing the fraudulent portion of the claim. Relying upon the Federal Circuit's decision in *Tip Top Construction, Inc. v. Donahoe*, which required contractors seeking attorney's fees incurred in negotiating change orders to provide contemporaneous time entries and sworn declarations describing the work, the court stated there was "no reason why the Government should be held to a different standard when it seeks costs of review pursuant to the CDA." However, the court tempered this holding by limiting the DOJ's obligation to contemporaneously record and apportion time to the period of time commencing on the date that the DOJ begins considering filing a CDA fraud counterclaim. Attorney time spent prior to that point could be reconstructed from prior emails, calendars, and notes. The court applied the same holding to agency employee time. Here, the failure of the DOJ or agency employees to record their time once they learned of the potential fraud counterclaim barred the Government's claim for these fees.

Conversely, the court awarded all of the requested DCAA auditor fees. Key to the court's differential treatment of these fees was the fact that the auditor kept contemporaneous certified time records and was specifically employed to analyze the fraudulent portion of the claim. Furthermore, as an auditor with accounting expertise, the court could be certain that his time was used for "reviewing" the claim, rather than time spent upon litigation tasks which would not be a recoverable expense.

Finally, the court examined the agency's claimed costs for a third-party contractor to perform forensic computer imaging. Because the court had ordered the forensic imaging, it knew that the service had been employed to review the entirety of the government's claim, not merely the fraudulent portion of the claim. However, because the nature of the service made it difficult, if not impossible, to segregate the services related only to the fraudulent portion of the claim, and the court had been thoroughly involved in overseeing the requirement for the examiner, the court reasoned that a 40% allocation of the examiner fees was reasonable and appropriate.

As *Veridyne* demonstrates, the DOJ has powerful weapons at its disposal to retaliate against fraudulent or overinflated claims submitted to the Government. In total, the Government recovered from *Veridyne* only approximately 25% of the fees and costs it sought by way of the CDA anti-fraud provision. Nevertheless, the dollar amount of the recovery was still quite substantial and serves as an important lesson. Contractors must use extreme care to certify only claims with a factual basis supported by carefully calculated recoverable costs; otherwise, the contractor risks not only losing its potentially valid claim but also incurring a substantial penalty that could exceed the amount originally claimed. Under the relaxed standard for seeking its fees and costs articulated in *Veridyne*, the Government need only begin separately tracking and recording its fees and costs once it considers filing a fraud counterclaim, all prior fees and costs can be determined from reconstruction. Furthermore, the Government will likely not be held to the same standard of itemization to which a private attorney would be similarly held in recovering his or her fees. Thus, as the Government becomes more experienced in presenting cost claims, the percentage of recoverability of such costs will increase. With the recent increase in fraud counterclaims by the DOJ, and the impact of *Veridyne*, a careful review of a claim by an

attorney or other outside expert is crucial not only for ensuring an affirmative recovery but also for avoiding forfeiture of “fraudulent” portions of the claims and liability for costs incurred by the Government to review the “fraudulent” portion of the claim.