WHY "GREEN DREAMS" SHOULD NOT COME TRUE: KEEPING BOARDS OF CONTRACT APPEALS OFF THE SCALES OF JUSTICE

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What's in a name that which we call a rose?
By any other name would smell as sweet.[1]

I. Introduction

In contracts, precise terms matter. Fraud, by any other name, does not change its form. Whether raised as an affirmative claim, defense, or to argue that a contract never existed, the underlying issue is still fraud.

Tied to fraud are "green dream" claims for money. Cases like *Green Dream*[2] call for a change in how claims involving fraud are resolved. A

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[1] WILLIAM SHAKESPEARE, ROMEO AND JULIET, Act II, Scene ii (1600). This quotation symbolizes the central struggle and tragedy of Shakespeare's love story between Romeo and Juliet. It is often referenced to mean that names or labels do not change the nature of what something really is. Juliet professes her love of Romeo regardless of his family name. Ironically, however, Shakespeare reveals that names do matter and can lead to struggle and tragedy. In contracts, the lesson is that fraud should be taken for what it is, even when it is labeled as something else or cloaked as an affirmative defense. Any claims or disputes involving fraud should be resolved by a court of law.

[2] Green Dream Grp., ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272.

board of contract appeals (BCA) should not have jurisdiction of any claims involving fraud. Instead, a contractor's right to forum selection should be restricted to the U.S. Court of Federal Claims (COFC).

On its face, the Contract Disputes Act (CDA) of 1978 prohibits BCAs from having jurisdiction over claims or disputes involving fraud.[3] Such matters fall within the sole authority of the Department of Justice (DoJ).[4] In practice, however, BCAs have adjudicated cases based on how the term "fraud" is raised. If, for example, the government raises fraud as an affirmative defense, a BCA will retain jurisdiction over the contractual issues, but will not make findings of fraud unless a contractor engaged in fraud to procure the contract.[5]

Green Dream exemplifies the need for bright-line rules that take all forms of fraud out of a BCA's jurisdiction. Despite asserting claims involving alleged fraud, Green Dream successfully appealed its case, receiving over $925,000.[6] The termination contracting officers (TCOs) had denied its claims believing that the costs were false.[7] At the Armed

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[3] 41 U.S.C. § 7103(a)(5), (c)(1) (2016).

[4] *Id.* § 7103(c); *see infra* Part II.B. for a discussion of the legislative history of the Contract Disputes Act (CDA) excluding fraud from a board's jurisdiction.

[5] *See infra* Parts III.A, D. for further discussion on a board's jurisdiction over claims involving fraud in void *ab initio* cases compared to cases pending criminal or civil actions.

[6] *Green Dream*, 13-1 BCA ¶ 35,272, at 173,143. In *Green Dream*, the issue of fraud was not investigated by the U.S. Army Criminal Investigation Command (CID) and the Department of Justice (DoJ) did not take criminal or civil action on this case. *See id.*, at 173,141. Similarly, based on the opinions of the U.S. Court of Federal Claims (COFC) and the Court of Appeals for the Federal Circuit, the issue of fraud was not investigated by CID in *Daewoo*. Daewoo Eng'g & Constr. Co. v. United States, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009). Yet, in *Daewoo*, the DoJ pursued a civil action in the form of filing counterclaims at the COFC. *Id.* It is clear from the COFC's opinion that the DoJ was able to prove fraud through the discovery process, and the testimony of witnesses at trial. *Id.* 569–570, 572–576, 582, 584. In the same manner, the DoJ could have arguably proven that at least one of Green Dream's claims was fraudulent despite the lack of a criminal investigation. This would have affected Green Dream's ability to recover on any of its claims under the same contract. 28 U.S.C. § 2514. Presumably, the DoJ did not pursue a cause of action in Green Dream based on the lack of an investigation, the relatively low dollar amount of Green Dream's claims, and the cost of litigation. *See infra* note 123 and accompanying sources. This article attempts to remedy the issue of forum selection and DoJ's involvement by requiring all claims in which probable cause exists for fraud to be filed at the COFC for the DoJ to defend and/or file counterclaims. *See infra* Part V.

[7] *Id.* at 173,139, 173,141. For one of the claims, despite believing the "sum requested for rental equipment is a false claim actionable under [U.S.] Law," the termination contracting officer (TCO) issued a final decision allowing $69,452.32 of the $224,400 total amount the appellant claimed. *Id.* at 173,138–39.

Services Board of Contract Appeals (ASBCA), the government argued that Green Dream falsified documents to support its claims and fabricated costs.[8] The ASBCA, however, restricted it from proving that the claims were false.[9] The ASBCA asserted it lacked jurisdiction over (1) a misrepresentation of fact or fraud by the contractor under the CDA; and (2) a government claim (that would arise from a finding of fraud) under both the CDA and the False Claims Act (FCA).[10] With the government's hands tied jurisdictionally as to the issue of fraud, Green Dream realized its "green dream." Yet, in other cases, the ASBCA has asserted jurisdiction and even made its own findings of fraud.[11]

This article addresses when fraud is really fraud at the ASBCA and ultimately argues that all claims involving fraud should be resolved in a court of law. Following Part I of the introduction, Part II provides background on the CDA and forum selection. It highlights the laws and legislative history that exclude fraud from a BCA's jurisdiction. Part III focuses on ASBCA decisions, criticizing how it justifies jurisdiction contrary to legislative intent. Part IV argues the importance of keeping fraud outside of a BCA's jurisdiction. It compares and contrasts the ASBCA's decision in *Green Dream* to the COFC's decision in *Daewoo*,[12] underscoring the disparate and unfair outcomes. Finally, Part V suggests reforms to ensure all forms of fraud are resolved in a court of law. This entails restricting the choice of forum to the COFC if there is probable cause for fraud. It suggests ways to implement this change by requiring a coordinated legal review for fraud, engaging the DoJ in significant contract or claim decisions, and enjoining contractors from seeking claims tainted by fraud.

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[8] *Id.* at 173,141.

[9] *Id.* at 173,142.

[10] *Id.* at 173,141–43.

[11] *See infra* Part III.A. for a discussion of void *ab initio* cases where the board made its own findings of fraud.

[12] Daewoo Eng'g & Constr. Co. v. United States, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009). In *Daewoo*, the United States Army Corps of Engineers solicited bids to construct a fifty-three-mile road around the island of Babeldaob in the Republic of Palau. *Id.* at 1334. The government awarded the contract to Daewoo, the lowest bidder. Daewoo initially proposed building the road for $73 million. *Id.* Daewoo sought equitable adjustment of the contract price alleging defective specifications, superior knowledge, and impossibility of performance. *Id.* These allegations were related to the humid, rainy weather, and moist soil in Palau, which required increased amounts of soil compaction for Daewoo to be compliant with the contract specifications that, in turn, caused delays and Daewoo's alleged damages. *Id.* In total, Daewoo claimed $63,978,648.95 in damages. *Id.*

II. Background

Before analyzing ASBCA decisions, this section gives a brief overview of the ASBCA's jurisdictional limits with regard to fraud. It reviews the CDA, a contractor's right to appeal a claim to the ASBCA or the COFC, and the legislation that excludes fraud from a BCA's jurisdiction. It provides context to better understand how the ASBCA is, in practice, retaining jurisdiction of fraud contrary to legislative intent.

A. The Contract Disputes Act and Forum Selection

The CDA governs disputes arising from federal government contracts.[13] Under the CDA, all claims, except those involving fraud, must first be submitted to the contracting officer (CO) for a decision.[14] A contractor then has two avenues to appeal a CO's final decision (COFD) or failure to issue a decision. The contractor can appeal either to the appropriate BCA within ninety days or to the COFC within one year.[15] A contractor has the right to elect either forum, but once chosen, that decision is binding.[16]

In selecting a forum, contractors weigh various factors. A BCA offers a quasi-judicial forum that is generally less formal, less expensive, and more expedient than the COFC.[17] Board judges tend to have more

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[13] 41 U.S.C. §§ 7101–09 (2016).

[14] *Id.* § 7103(a)(1), (a)(4)(B), (a)(5). Under the Federal Acquisition Regulation (FAR), the contracting officer (CO) must prepare a written decision that includes a description of the claim or dispute, a reference to pertinent contract terms, a statement of factual areas of agreement and disagreement, the CO's decision with supporting rationale, and the contractor's appeal rights. FAR 33.211 (2016). Submission of a claim to the CO for a final decision is a jurisdictional prerequisite to appealing a claim. 41 U.S.C. § 7103(a).

[15] *Id.* § 7104(a)–(b). Under the Tucker Act, however, the Court of Federal Claims (COFC) has concurrent jurisdiction with the district courts for contractual monetary claims against the United States that are less than $10,000. 28 U.S.C. § 1346(a)(2). Although administrative remedies should normally first be exhausted, Congress intended to give contractors a "right to a day in court—a fully judicialized totally independent forum which historically has been the forum within which contract rights and duties have been adjudicated," allowing contractors to "bypass administrative disputes forums and seek review of adverse contracting officer decisions directly in the Court of Claims." S. Rep. No. 118, 95th Cong., 2d Sess. 29 (1978).

[16] Nat'l Neighbors, Inc. v. United States, 839 F.2d 1539, 1542 (Fed. Cir. 1988); Holly Corp., ASBCA No. 24975, 80-2 BCA ¶ 14,675.

[17] *See* 41 U.S.C. § 7105(f)–(g); *compare* Rules of the Armed Services Board of Contract Appeals (July 21, 2014), http://www.asbca.mil/Rules/forms/Final%20Rule%20

experience in contracts given their appointment requires at least five years of experience in public contracts law and they only hear contract claims.[18] In contrast, the COFC is a "legislative court" under Article I of the U.S. Constitution that hears a variety of claims, but gives contractors more due process rights.[19] Its procedural rules are predominately based on the Federal Rules of Civil Procedure and it is bound by the Federal Rules of Evidence.[20] Contractors also consider any relevant precedent established in each forum. In the area of fraud, the jurisdictional limits of each forum affects not only precedent, but the risk of loss.

Unlike the BCAs, the COFC has jurisdiction to hear government counterclaims, which can subject the contractor to heavy penalties.[21] By asserting jurisdiction over contractual issues yet limiting the affirmative defense of fraud, the BCAs further incentivize contractors to forum shop. As discussed later, this leads to disparate and unfair outcomes.[22]

B. Exclusion of Fraud from a BCA's Jurisdiction

Under the CDA, two provisions exclude fraud from a BCA's jurisdiction. First, the CDA expressly provides that jurisdiction "does not extend to 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."[23] Second, the CDA does not authorize

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Formatting%20pgl.pdf, (hereinafter ASBCA Rules), *with* Rules of the United States Court of Federal Claims (Aug. 3, 2015), http://www.uscfc.uscourts.gov/sites/default/files/150803-Final-Version-of-Rules_0.pdf [hereinafter RCFC].

[18] 41 U.S.C. § 7105(a)(2), (b)(2), (e); *compare Administrative Judge Biographies*, ARMED SERVICES BOARD OF CONTRACT APPEALS, http://www.asbca.mil/Bios/biographies.html (last visited Nov. 11, 2016), *with Judges—Biographies*, U.S.COURT OF FEDERAL CLAIMS, http://www.uscfc.uscourts.gov/judicial-officers (last visited Nov. 11, 2016).

[19] 28 U.S.C. § 165; *see supra* note 15 and accompanying sources. By executing a government contract, a contractor waives its right to a jury trial or an Article III district court. Gregory Timber Res., AGBCA No. 84-319-1, 87-3 BCA ¶ 20,086, at 101,685 (concluding that "[D]ispute resolution under a Government contract need not be vested in any court, let alone an Article III court."). "[A]s a matter of grace," however, Congress allowed contractors to sue the sovereign at the COFC. Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1565 (Fed. Cir. 1990).

[20] *See* RCFC, *supra* note 17, at 1, 52, 55, 71.

[21] *See infra* Part IV.A. for a discussion of forfeitures and penalties available at the COFC via counterclaims.

[22] *See infra* Part IV.B. for a comparison of an appeal filed at the COFC versus the Armed Services Board of Contract Appeals (ASBCA).

[23] 41 U.S.C. § 7103(a)(5).

an "agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud."[24]

The legislative history of the CDA clearly shows Congress's intent to exclude fraud from a board's jurisdiction.[25] During the 1978 congressional hearings, several agencies, to include the DOJ, asserted fraud should not be part of the dispute resolution process.[26] In response, Congress made changes intending to exclude fraud from an agency's jurisdiction.[27] The Senate report stated the CDA excludes "issues of fraud against the United States from the authority of contracting agencies to consider or resolve . . . ."[28] It further states, the DOJ is solely responsible for enforcing its rights related to any claim involving fraud, which would be "instituted by the United States in a court of competent jurisdiction."[29]

Courts have interpreted the aforementioned provisions of the CDA to apply to a wide range of claims involving fraud, and not only causes of action for fraud.[30] The BCAs, however, have limited the CDA's exclusion to an "affirmative claim" of fraud, or a criminal or civil cause of action for fraud.[31]

III. Decisions Related to Fraud at the ASBCA

Despite Congress's intent to exclude all matters of fraud under the CDA, the ASBCA has frequently asserted that the existence of fraud alone does not deprive it of jurisdiction.[32] This section reviews and criticizes

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[24] *Id.* § 7103(c)(1).

[25] Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 543–45 (Fed. Cir. 1988) (citing *Contract Disputes Act of 1978: J. Hearings Before the Subcomm. on Fed. Spending Practices & Open Gov't of the Comm. on Gov'tl Affairs, and the Subcomm. on Citizens & S'holders Rights & Remedies of the Comm. on the Judiciary*, 95th Cong., 210–13 (1978)).

[26] *Id.* at 543–44.

[27] *Id.* at 543–45.

[28] *Id.* at 544 (citing S. REP. NO. 1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5254).

[29] *Id.*

[30] *E.g.*, United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996) (concluding that Congress intended to except from the CDA not only causes of action for fraud but also "non-fraud claims," to include breach of contract and unjust enrichment claims that factually involve allegations of fraud); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131, 1135 (N.D. Ga. 1992) (interpreting the CDA to deprive agencies authority over claims "involving fraud" and not just over "causes of action for fraud").

[31] *See infra* Part III. for an overview of ASBCA decisions related to fraud.

[32] *E.g.*, SIA Constr., Inc., ASBCA No. 57693, 14-1 BCA ¶ 35,762, at 174,986 (stating "the existence of fraud alone is insufficient to deprive the Board of jurisdiction"); Public

how the ASBCA has been adjudicating fraud.

A. When Fraud Is "Not Really" Fraud—Void *Ab Initio* Cases

The ASBCA has frequently retained jurisdiction to determine whether a contract is void *ab initio* (from its inception).[33] Under this principle, procuring a contract by fraud nullifies its very existence and thus precludes any claim arising from it.[34] To determine that a party engaged in fraud, the ASBCA relies not only on pleas and convictions from a court of competent jurisdiction (CCJ),[35] but makes its own findings of fraud.[36] In making its findings, the ASBCA has applied an unclear standard of proof based on unrebutted evidence, as the below four cases demonstrate.

In *C & D Construction, Inc.*, the ASBCA found that the appellant *intentionally* misrepresented its status as a small business by failing to disclose its affiliation and joint venture with other entities.[37] It further found that had it made this disclosure, the CO would have considered the appellant to be non-responsible for lacking business integrity.[38] The ASBCA made its findings based on "unrebutted documentation," the demeanor of the company president, Ms. Carolyn Sur, and negative inferences drawn from her refusal to answer numerous questions.[39] Of

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Warehousing Co. K.S.C., ASBCA No. 58078, 13-1 BCA ¶ 35,460, at 173,897 (asserting jurisdiction over any adjustments entitled for "performance based distribution fees" despite pending criminal and civil actions in district court); Nexus Constr. Co., Inc., ASBCA No. 51004, 98-1 BCA ¶ 29,375 (asserting jurisdiction over any entitlement under the termination for convenience clause despite allegedly submitting a fraudulent claim for costs).

[33] *See infra* notes 34, 37, 42, 45, 47 and accompanying sources.

[34] *E.g.*, Supreme Foodservice GmbH, ASBCA Nos. 57884, 58666, 58958, 58959, 58982, 59038, 59164, 59165, 59391, 59392, 59393, 59418, 59419, 59420, 59481, 59615, 59618, 59619, 59636, 59653, 59675, 59676, 59681, 59682, 59683, 59811, 59830, 59863, 59867, 59872, 59879, 60017, 60024, 60250, 60309, 60365, 2016 ASBCA LEXIS 201, at *64–71 (Mar. 17, 2016); Int'l Oil Trading Co., ASBCA Nos. 57491, 57492, 57493, 13-1 BCA ¶ 35,393.

[35] *E.g.*, Atlas Int'l Trading Corp., ASBCA No. 59091, 15-1 BCA ¶ 35,830; *see infra* Part III.B. for a discussion of the ASBCA's reliance on findings of fraud from a court of competent jurisdiction.

[36] *See infra* notes 37, 42, 45, 47 and accompanying sources.

[37] C & D Constr., Inc., ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,683.

[38] *Id.*

[39] *Id.* The "unrebutted documentation" included the guilty plea of Mr. Derwin Au, the appellant's brother and executive vice president of Au's Plumbing. *Id.* Mr. Au pleaded guilty to making false statements to the Small Business Administration to obtain contracts subject to the small business set-aside for Au's Plumbing. *Id.* at 116,679. Mr. Au's

note, Ms. Sur was never convicted of fraud, and, had she disclosed all her affiliations in the bid, could have still qualified as a small business.[40] The ASBCA, however, found that her misrepresentation constituted a "material and substantial inducement" to enter into the contract, and that a "but-for" test need not be satisfied.[41]

In *Orc, Inc.*, the ASBCA found that the appellant *purposefully* made false representations of the technical qualifications of research personnel in its proposal.[42] In particular, it found that a key employee did not have a Ph.D. degree in physics as certified by the appellant and that this misrepresentation was intended to obtain a more favorable evaluation.[43] The ASBCA did not describe the standard of proof that it used, but the evidence of the false Ph.D. degree was verified by the university and unrebutted.[44]

In *Servicios y Obras Isetan*, the ASBCA found "enough evidence" to conclude that the appellant materially misrepresented its business relationship with another company, Heliopol, to secure its award of the contract.[45] The evidence included a private contract between the appellant and Heliopol, which Heliopol asserted it never signed or entered into.[46]

More recently, in *Vertex Construction*, the ASBCA found that the appellant materially misrepresented a master electrician certification that was "proved to be fraudulent" with no "realistic intention" of employing a master electrician as required by the solicitation.[47] The ASBCA decision was based on "uncontested evidence," to include incriminating findings and admissions from a report completed by the U.S. Army Criminal Investigation Command (CID).[48]

In each of the above cases, the ASBCA cites to the definition of common law fraud or case law for the proposition that a "[g]overnment

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conviction did not directly involve C & D. The board found, however, that Au's Plumbing exercised control over and was an affiliate of C & D. *Id.* at 116,683.

[40] *Id.*

[41] *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 167 (AM. LAW INST. 1981)).

[42] Orc, Inc., ASBCA No. 49693, 97-1 BCA ¶ 28,750, at 143,488.

[43] *Id.* at 143,491.

[44] *See id.* at 143,490.

[45] Servicios y Obras Isetan S.L., ASBCA No. 57584, 13-1 BCA ¶ 35,279, at 173,162.

[46] *Id.* at 173,159.

[47] Vertex Constr. & Eng'g, ASBCA No. 58988, 14-1 BCA ¶ 35,804, at 175,110.

[48] *Id.* at 175,107.

contract tainted by fraud or wrongdoing is void *ab initio*."[49] But it avoids making a specific finding of fraud despite the government alleging fraud as an affirmative defense.[50] Of significance, is *how* the ASBCA expands its authority to find that the appellant had the scienter to commit a material misrepresentation, albeit not calling it "fraud."[51] It does this by relying on cases that were based on either a conviction or a finding of fraud by a CCJ, namely, the COFC.[52] It justifies this approach based on the logic that the contract would be void *ab initio* despite drawing this conclusion only after it makes its findings of fraud.

By concluding that a contract is void *ab initio* without a finding of fraud by a CCJ, the ASBCA ultimately made its own findings of fraud in the above cases, contrary to the jurisdictional limits intended under the CDA.[53] Of note, to support its authority to void a contract absent a criminal conviction, the ASBCA relies on two U.S. Supreme Court decisions, *United States v. Acme Process*[54] and *United States v. Mississippi Valley*.[55] These decisions, however, reversed the judgment of the COFC, holding that a contract tainted by kickbacks or an illegal

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[49] *Id.* at 175,108 (quoting Godley v. United States, 5 F.3d 1473, 1476 (Fed. Cir, 1993); *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279, at 173,162; *Orc, Inc.*, 97-1 BCA ¶ 28,750, at 143,491; C & D Constr., Inc., ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,683.

[50] *C & D Constr., Inc.*, 90-3 BCA ¶ 23,256, at 116,678; *Orc, Inc.*, 97-1 BCA ¶ 28,750, at 143,487; *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279, at 173,157; *Vertex Constr. & Eng'g*, 14-1 BCA ¶ 35,804, at 175,105.

[51] *C & D Constr., Inc.*, 90-3 BCA ¶ 23,256, at 116,683; *Orc, Inc.*, 97-1 BCA ¶ 28,750, at 143,488; *Vertex Constr. & Eng'g*, 14-1 BCA ¶ 35,804, at 175,110. In *Servicios y Obras Isetan S.L.*, however, the board avoids explicitly finding that the appellant had the *scienter* to commit a material misrepresentation by simply relying on elements of proof that render a contract voidable to conclude the contract was void *ab initio*. *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279, at 173,161–62. Yet, the government properly alleged the appellant *knowingly* submitted fictitious documents to procure the contract as would be required to support its fraud in the inducement defense. *See id.*

[52] The preceding cases relied on *J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988) and/or *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993). In *J.E.T.S.*, the Federal Circuit affirmed the judgment of the ASBCA denying appellant's claim for equitable adjustment. *J.E.T.S.*, 838 F.2d at 1201. Its decision was based on the criminal conviction of the vice president of its corporate parent, Mr. Thomas Gibbs. Mr. Gibbs had falsely certified J.E.T.S.'s small business status under the contract at issue, as he did for four other contracts for which he was convicted. *Id.* In *Godley*, the Federal Circuit vacated the COFC's judgment in favor of the appellant. *Godley*, 5 F.3d at 1476. It remanded the case to the COFC to make specific findings as to whether the contract was void *ab initio* due to fraud rather than simply voidable. *Id.*

[53] *See supra* Part II.B. for a discussion of the jurisdictional limits of the board.

[54] United States v. Acme Process Equip. Co., 385 U.S. 138 (1966).

[55] United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

conflict of interest is voidable despite the lack of a criminal conviction.[56] Unlike the COFC, the ASBCA is not a CCJ.[57] To date, the appellate courts have not recognized the ASBCA's authority to make its own findings of fraud.[58]

B. When Fraud Is Fraud—Criminal Conviction or Civil Liability

If a CCJ finds that a contractor committed fraud, the ASBCA will use these findings to deny or dismiss a contractor's claim in its entirety.[59] Although the ASBCA has often emphasized that issues other than fraud could affect the contract rights of parties,[60] its decisions consistently show that there is rarely any contractual right that could defeat a criminal conviction or civil fraud violation adjudicated by a CCJ.[61] Accordingly, the ASBCA has consistently denied claims *in toto* regardless of whether the fraud was committed in the procurement,[62] performance, and/or submission of a claim.[63]

Thus, with a finding of fraud by a CCJ, various arguments raised by contractors have failed. This includes unjust enrichment for work

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[56] *Acme Process*, 385 U.S. at 148 (reversing the COFC's judgment with directions to sustain the government's right to cancel the contract despite the appellant's acquittal under the Anti-Kickback Act based on violating the public policy against contracts tainted by kickbacks); *Mississippi Valley*, 364 U.S. at 563 (reversing the COFC's judgment for the contractor and concluding that protection of the public from corruption can be fully accorded only if contracts tainted by a conflict of interest may be disaffirmed by the government).

[57] Charter, ASBCA (May 14, 2007), 48 C.F.R. Ch. 2, Appx. A, Part 1 (2016).

[58] *See* Laguna Constr. Co. v. Carter, 828 F.3d 1364 (Fed. Cir. 2016).

[59] *See infra* notes 62–65 and accompanying sources.

[60] *See supra* note 32 and accompanying sources.

[61] *See infra* notes 62–65 and accompanying sources.

[62] *E.g.*, Atlas Int'l Trading Corp., ASBCA No. 59091, 15-1 BCA ¶ 35,830 (denying the appeal based on convictions for bribery used to secure a contract of an unsolicited proposal for a zip kit); Dongbuk R & U Eng'g Co., ASBCA No. 58300, 13-1 BCA ¶ 35,389 (denying the appeal based on a conviction in a Korean court for forging technician licenses to procure a contract for maintenance services).

[63] *E.g.*, Laguna Constr. Co., ASBCA No. 58324, 14-1 BCA ¶ 35,748 (denying the appeal based on convictions of senior officials for soliciting and receiving kickbacks during the performance of a cost-reimbursable contract), *aff'd*, 828 F.3d 1364 (Fed. Cir. 2016); Techno Eng'g & Constr., Ltd., ASBCA No. 47471, 94-3 BCA ¶ 27,109 (denying recovery for equitable adjustments based on a conviction for submitting false certified payroll forms); Nat'l Roofing & Painting Corp., ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936 (holding the contract void because the contract was tainted with fraud from its inception and during performance via bribes and false work orders).

adequately performed[64] and equitable adjustments for improper contract changes performed under protest.[65] It even includes circumstances where the government extended the performance period despite being aware of the fraud and suspending the contractor from future contracts.[66] Moreover, if the fraud occurred during the performance or submission of a claim, the degree to which it or various claims under the same contract were inflated by fraud does not matter.[67]

Common to all of these decisions is the overriding public interest in preserving the integrity of the procurement process and deterring fraud.[68] As a result, the law enforces harsh consequences for even a minimal level of fraud.[69] The boards and courts have established that "any degree of fraud is material as a matter of law"[70] and that a "'balancing test' between the fraudulent act and the work free of fraud is contrary to precedent."[71]

Under this lofty public policy objective, the framework of the CDA that preserves a contractor's forum selection rights is off balance. For cases involving criminal convictions or civil liability, parallel actions at

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[64] Schuepferling GmbH, ASBCA No. 45564, 98-1 BCA ¶ 29,659. In *Schuepferling*, the appellant was convicted in a German court for bribery. *Id.* at 146,952. Prior to the conviction, the government suspended the appellant from *future* contracts based on an investigation that corroborated fraudulent conduct. *Id.* at 146,949–50. Instead of terminating the *current* contract at issue, however, the government modified it to extend the performance period. *Id.* at 146,950. Despite adequate performance, the ASBCA held the contract was void *ab initio* because the contract was tainted by bribery in the inducement. *Id.*

[65] J.E.T.S., Inc. v. United States, 838 F.2d 1196 (Fed. Cir. 1988). In *J.E.T.S.*, the ASBCA found that the government improperly exercised its option to extend the contract and originally sustained the appeal for equitable adjustments in the contract price. *Id.* at 1197. It reversed its decision, however, after the corporate parent was convicted for falsely certifying its small business status. *Id.*; *see supra* note 52 for further details of the case.

[66] *Schuepferling*, 98-1 BCA ¶ 29,659, at 146,949–50.

[67] *E.g.*, Laguna Constr. Co., ASBCA No. 58324, 14-1 BCA ¶ 35,748, at 174,950 (determining that the government need not prove that the kickbacks, for which appellant's principle officers were convicted, were paid under every task order or voucher because any degree of fraud is material as a matter of law), *aff'd*, 828 F.3d 1364 (Fed. Cir. 2016); *AAA Eng'g & Drafting Co.*, ASBCA Nos. 48729, 48575, 47940, 01-1 BCA ¶ 31,256, at 154,367 (concluding that the falsification of thirteen work orders, as determined by a district court, permeated the entirety of the claims under the contract despite constituting a fraction of the 8080 total work orders and not quantifying the extent to which the false work orders inflated the claims).

[68] *See supra* notes 62–65 and accompanying sources.

[69] *E.g.*, *Laguna*, 14-1 BCA ¶ 35,748.

[70] *Id.* at 174,950 (quoting Christopher Village, L.P. v. United States, 360 F.3d 1319, 1335 (Fed. Cir. 2004)).

[71] *Id.* (quoting Joseph Morton Co. v. United States, 757 F.2d 1273, 1278 (Fed. Cir. 1985)).

the BCA unfairly allow contractors to continue to seek monetary gain without being subject to a counterclaim. It also inefficiently intertwines and unnecessarily prolongs the legal battle. It is a waste of time and resources for the ASBCA to assert jurisdiction only to dismiss or deny claims *in toto* without the potential consequence of a counterclaim.

C. When Fraud Is on Hold—Pending DoJ Action

If there are parallel criminal or civil actions against the contractor, the ASBCA may stay or dismiss an appeal.[72] The mere existence of a pending criminal or civil case is insufficient to stay or dismiss an appeal.[73] Also, it is improper to argue that an appeal is premature by continuously delaying a COFD pending the outcome of a criminal or civil action.[74] The government has the burden of showing a "clear case of hardship or inequity in being required to go forward."[75] This requires the U.S. Attorney to establish that the prejudice to the government outweighs the prejudice to the appellant, which is generally more difficult to establish in civil than criminal parallel proceedings.[76]

In parallel civil actions, the ASBCA's differing position and the judicial inefficiency for claims involving fraud are especially pronounced. On the one hand, the ASBCA recognizes that it does not have jurisdiction over claims or disputes that the DoJ is authorized to "administer, settle, or determine," such as those under the FCA.[77] Yet, even when the DoJ has filed a civil action for violations under the FCA, the ASBCA will not

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[72] *See infra* notes 73, 80 and accompanying sources.

[73] *E.g.*, Suh'Dutsing Techn., LLC, ASBCA No. 58760, 15-1 BCA ¶ 36,058 (highlighting that a DoJ investigation, rather than an active litigation, overlapping only one common issue, did not justify staying or dismissing the appeal); Public Warehousing Co. K.S.C., ASBCA No. 58078, 13-1 BCA ¶ 35,460 (denying motion to dismiss despite pending criminal and civil action in district court), *amended by*, 14-1 BCA ¶ 35,574; TRW, Inc., ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 (denying motion to suspend pending the outcome of a False Claims Act (FCA) civil fraud suit).

[74] *Public Warehousing*, 13-1 BCA ¶ 35,460, at 173,896.

[75] *TRW*, 99-2 BCA ¶ 30,407, at 150,332.

[76] *Public Warehousing*, 14-1 BCA ¶ 35,574, at 174,338, 174,340.

[77] *E.g.*, Green Dream Grp., ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272, at 173,143 (stating that the CDA does not extend to 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") (citing 41 U.S.C. § 7103(a)(5)); Envtl. Sys., Inc., ASBCA No. 53283, 03-1 BCA ¶ 32,167 (concluding that it does not have jurisdiction over an affirmative defense that closely tracks the language of the FCA despite the government not demanding any penalties set forth in the Act).

dismiss the case based on jurisdictional grounds.[78] This conflicting position is noteworthy because, had the contractor filed its appeal at the COFC, the government could potentially avoid litigating two civil actions by simply filing a counterclaim. At the BCAs, however, this strategic and cost-saving avenue is unavailable.[79]

A comparison of two ASBCA decisions pertaining to Kellogg Brown & Root Services, Inc. (KBR) accentuates the complexity of fraud cases and the judicial inefficiency of the ASBCA. In two separate appeals filed two years apart, the ASBCA took opposing positions on whether to grant a stay/dismissal despite involving the same appellant, the same contract, and the same two of three ASBCA judges who decided each case.[80]

In the first case, the ASBCA denied the government's motion to stay the appeal pending the outcome of a civil fraud action under the FCA.[81] The government argued that the parallel proceedings would be a waste of time and resources because the cases involved the same issues, facts, and witnesses.[82] The ASBCA denied the motion, reasoning that the FCA suit was "much wider in scope."[83] It found that requesting a stay for an indefinite period until the resolution of the civil suit was unreasonable.[84] It took judicial notice that the district court took 35.6 months to resolve a case, and that this delay would likely harm the appellant.[85]

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[78] *E.g.*, Palm Springs Gen. Trading, ASBCA No. 56290, 10-1 B.C.A. ¶ 34,406, at 169, 866–67 (disregarding the government's assertion that because the DoJ exercised its authority in filing a civil fraud action in district court, the board lacks jurisdiction under the CDA).

[79] *See* Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 543–45 (Fed. Cir. 1988); Supreme Foodservice GmbH, ASBCA Nos. 57884, 58666, 58958, 58959, 58982, 59038, 59164, 59165, 59391, 59392, 59393, 59418, 59419, 59420, 59481, 59615, 59618, 59619, 59636, 59653, 59675, 59676, 59681, 59682, 59683, 59811, 59830, 59863, 59867, 59872, 59879, 60017, 60024, 60250, 60309, 60365, 2016 ASBCA LEXIS 201, at *64–68 (Mar. 17, 2016).

[80] *Compare* Kellogg Brown & Root Servs., Inc., ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614, *with* Kellogg Brown & Root Servs., Inc., ASBCA Nos. 57530, 58161, 13-1 BCA ¶ 35,243.

[81] *Kellogg Brown*, 11-1 BCA ¶ 34,614, at 170,602.

[82] *Id.*

[83] *Id.* at 170,603.

[84] *Id.* at 170,604–05.

[85] *Id.* It took the ASBCA forty-three months to decide this appeal, which remains pending a decision on remand that was reversed by the Federal Circuit. *See* Kellogg Brown & Root Servs., Inc., ASBCA Nos. 56358, 57151, 57327, 58559, 14-1 BCA ¶ 35,639, *aff'd in part, rev'd in part, vacated in part, and remanded by* McHugh v. Kellogg Brown & Root Servs., Inc., No. 2015-1053, 2015 WL 5332383 (Fed. Cir. Sept. 15, 2015).

In contrast, the ASBCA dismissed KBR's second appeal.[86] It reasoned that because the issues before the board were narrower than those before the district court, "any Board findings on less than a complete record may have the effect of compromising the government's efforts in the FCA action."[87] The ASBCA conceded that "where [the] evidentiary line would be drawn at a trial at the Board is not altogether clear, and this would likely result in unnecessary confusion."[88] It determined that the appellant would not be harmed because the agency would likely be prohibited from paying the claim pending the resolution of the FCA action.[89] It concluded that the "most expeditious and inexpensive road to final resolution of this dispute goes through the federal district court."[90]

The above contrasting conclusions and justifications reveal the complexity of fraud issues that even the ASBCA, arguably, acknowledges it is not suited to resolve. It further calls for bright-line rules that completely exclude fraud from the jurisdiction of BCAs.

D. When There Is No Department of Justice Action

If the DoJ has not or is not pursing a case against an appellant, the ASBCA will retain jurisdiction to determine the validity of a claim.[91] If the alleged fraud occurs during the performance or presentation of a claim, however, the ASBCA will assert that, under the CDA, it lacks jurisdiction

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[86] Kellogg Brown & Root Servs., Inc., ASBCA Nos. 57530, 58161, 13-1 BCA ¶ 35,243. The dismissal of the appeal was without prejudice subject to reinstatement within three years from the date of its decision. *Id.* at 173,021. The appeal was eventually reinstated due to the ongoing FCA civil action. Kellogg Brown & Root Servs., Inc., ASBCA Nos. 57530, 58161, 16-1 BCA ¶ 36,449, at 177,637.

[87] *Kellogg Brown*, 13-1 BCA ¶ 35,243, at 173,021.

[88] *Id.* at 173,020–21.

[89] *Id.* at 173,021.

[90] *Id.*

[91] ERKA Constr. Co., ASBCA No. 57618, 12-2 BCA ¶ 35,129 (denying motion for summary judgment, stating that an affirmative defense of fraud for claims related to allegedly stolen fuel does not require the board to dismiss rather than decide the appeal); Envtl. Safety Consultants, Inc., ASBCA No. 53485, 02-2 BCA ¶ 31,904 (denying motion to strike allegations of fraud as relevant to appellant's claim for quantum recovery, yet asserting it does not have jurisdiction over criminal or civil fraud); Nexus Constr. Co., Inc., ASBCA No. 51004, 98-1 BCA ¶ 29,375 (denying motion to stay and asserting jurisdiction over alleged fraudulent termination claim); Toombs & Co., Inc., ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,993, at 110,598 (denying motion to dismiss based on alleged fraud, stating that the board need not determine whether incorrect statements made in claims were "made knowingly with intent to deceive").

to make findings of fraud to support an affirmative defense.[92] It will not consider any documents, witnesses, or evidence for the purpose of determining fraud.[93] This is in stark contrast to the void *ab inito* cases previously discussed.[94]

Under such circumstances, a contractor has every incentive to file its appeal at the ASBCA instead of the COFC. This could avoid issues of fraud from affecting the outcome of its appeal as it did in *Green Dream*. In this case, the appellant submitted three claims (two for rental equipment and one for security services) related to road construction projects in Iraq.[95] For one claim, the TCO had records and reports from interviews of trainers and students who confirmed that certain claimed rental equipment was never on site or used.[96] The existing equipment was only available for two days instead of the four-month period Green Dream claimed.[97] And, no construction or repairs were ever completed.[98] Green Dream also never obtained the CO's approval for the equipment, as required under the contract.[99] Similarly, for the second claim, based on the documents reviewed by the TCO, no equipment was ever rented, used, or approved for use, and the claimed costs were unsubstantiated.[100]

The third claim for security services also appeared fraudulent. Green Dream submitted a subcontract signed by "Sheik Jamal" to support its claim that it paid for six months of security services.[101] But Sheik Jamal's identity could not be verified.[102] Instead, "Sheikh J'afar Hussein Danam Al-Masudi" asserted he provided the security services but was never paid.[103] The TCOs denied all three claims as false and actionable under

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[92] Range Tech. Corp., ASBCA No. 51943, 03-2 BCA ¶ 32,290 (concluding lack of jurisdiction to decide an affirmative defense based on violating the FCA); Envtl. Sys., Inc., ASBCA No. 53283, 03-1 BCA ¶ 32,167 (concluding lack of jurisdiction over an affirmative defense that closely tracks the language of the FCA); Anlagen-und Sanierungstechnik GmbH, ASBCA No. 37878, 91-3 BCA ¶ 24,128 (denying certain claims for failure of proof rather than for fraud).

[93] *E*.g., Green Dream Grp., ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272.

[94] *See supra* Part III.A. for a discussion on void *ab initio* cases.

[95] *Green Dream*, 13-1 BCA ¶ 35,272, at 173,137–41.

[96] *Id.* at 173,138–39.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 173,140.

[101] *Id.* at 173,141.

[102] *Id.* at 173,140–41.

[103] *Id.* at 173,140.

law.[104]

Despite indicia of fraud, the ASBCA asserted it lacked jurisdiction to determine if the appellant submitted false documents to support its claims.[105] Ultimately, the ASBCA sustained the two claims for rental equipment totaling over $925,000.[106] It denied the third claim for $12,374, by simply concluding that Green Dream did not pay for the security services.[107]

IV. Keeping BCAs off the Scales of Justice

A. Rebalancing the Scales of Justice with Counterclaims

The outcome in *Green Dream* and similar cases might have been starkly different had the contractor been required to file its appeal at the COFC. Unlike the BCAs, the COFC has jurisdiction to determine government counterclaims of fraud.[108] When the government raises fraud as an affirmative defense, the COFC is not precluded under the CDA in making its own findings of fraud.[109] In addition, the COFC can assess forfeitures, penalties, or damages under a variety of civil fraud statutes that is unavailable to a BCA.[110] Typically, at the COFC, the government

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[104] *Id.* at 173,139–41. To be precise, the TCOs originally responded to Green Dream's settlement proposals in connection with the termination for convenience of two task orders under a multiple award task order contract. *Id.* at 173,137–39. Green Dream's first claim stemmed from the TCO's final decision that allowed $69,452.32 of the $224,400 total amount the appellant claimed. *Id.* at 173,138–39. With regard to Green Dream's second and third claims, the TCO eventually denied these claims in their entirety. *Id.* at 173,140. Prior to the TCO's final decision, however, a different TCO had prepared a draft response indicating partial payment would be authorized. *Id.* When fraud was suspected, the TCOs should have referred the case to law enforcement. Arguably, based on the suspected fraud, the TCOs did not have authority to determine which part of Green Dream's claims were allowable. *See* 41 U.S.C. § 7103(a)(4)(B), (a)(5),(c)(1) (2016).

[105] *Id.* at 173,142.

[106] *Id.* at 173,143.

[107] *Id.* at 173,142.

[108] *E.g.*, Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 542–45 (Fed. Cir. 1988).

[109] *E.g.*, Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009); Ralph C. Nash & John Cibinic, *Fraudulent Claims: A Phalanx of Government Remedies*, 14-4 NASH & CIBINIC REP. ¶ 21 (2000).

[110] Nash & Cibinic, *supra* note 109, ¶ 21. Granted, a denial of a claim at a BCA based on an affirmative defense of fraud, in effect, constitutes forfeiture. *E.g.*, Laguna Constr. Co., ASBCA No. 58324, 14-1 BCA ¶ 35,748, at 174,948, *aff'd*, 828 F.3d 1364 (Fed. Cir. 2016). The government, however, cannot seek statutory or regulatory remedies as an affirmative

pursues claims under the Forfeiture of Fraudulent Claims Act (FFCA), the CDA, and the FCA.[111] A brief description of each statute follows.

The FFCA allows the government to seek forfeiture of *all* claims under a fraudulent contract.[112] The fraud must be tied to the submission of a claim, to include submitting false proof to support a claim or falsely establishing a claim despite not fulfilling a contract specification; simply establishing that fraud occurred in the performance of a contract is insufficient.[113] The government must prove, by clear and convincing evidence, that the contractor knowingly submitted a false claim with the intent to defraud it; reliance on the claim or injury from it is not required.[114] If any part of a claim under a contract is fraudulent then *all* claims under the contract are forfeited.[115]

Under the anti-fraud provision of the CDA, a contractor may be imposed a penalty equal to the unsupported part of a fraudulent claim plus costs in reviewing the claim.[116] The government must prove fraud, or a

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fraudulent claim without filing a separate cause of action in a court of competent jurisdiction. 41 U.S.C. § 7103(a)(5) (2016).

[111] Matthew Solomson, *When the Government's Best Defense is a Good Offense: Litigating Fraud and Other Counterclaims Before the U.S. Court of Federal Claims*, 11-12 BRIEFING PAPERS 9 (2011).

[112] 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. In such cases the *United States Court of Federal Claims shall specifically find such fraud or attempt* and render judgment of forfeiture.

Id. (emphasis added).

[113] Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1366 n.18 (Fed. Cir. 2013) (rejecting a broad application of the statute without ties to the "proof, statement, establishment, or allowance" of a claim).

[114] Long Island Sav. Bank, FSB v. United States, 467 F.3d 917 (Fed. Cir. 2007), *withdrawn and vacated*, 503 F.3d 1234 (Fed. Cir. 2007) (changing the basis for reversing the COFC's decision from violating the Forfeiture of Fraudulent Claims Act (FFCA) to holding that the contract was void *ab initio*).

[115] Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1341 (Fed. Cir. 2009); UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 790–91 (1999), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001).

[116] 41 U.S.C. § 7103(c)(2).

> 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 a substantive fact with intent to deceive or mislead, by a preponderance of the evidence.[117]

The FCA imposes treble damages and a civil penalty[118] on "any person" who, among other offenses, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[119] Liability, including damages, requires proof by a preponderance of the evidence.[120]

None of the above remedies are available to BCAs even if a BCA denies a contractor's appeal based on a criminal conviction for fraud.[121] Instead, an agency would have to pursue a separate cause of action, coordinating it with the DoJ.[122] The DoJ, however, often declines to pursue "small-dollar" cases because of litigation costs.[123]

> 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.

Id. Congress intended this remedy to supplement the FCA and FFCA so that "the larger the fraud attempted, the greater is the liability to the Government." S. REPT. NO. 95-1118, at 7–8 (1978).

117 41 U.S.C. § 7101(9); 48 C.F.R. § 33.201 (2016); *Daewoo*, 557 F.3d at 1335.

118 31 U.S.C. § 3729(a)(1). The civil penalty is $5,000 to $10,000 per violation, but when adjusted for inflation is $5,500 to $11,000 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890. 28 C.F.R. § 85.3(a)(9).

119 31 U.S.C. § 3729(a)(1)(A)–(B). "Knowingly" is defined as "actual knowledge," "deliberate ignorance," or "reckless disregard" of the truth or falsity; specific intent to defraud is not required. *Id.* § 3729(b)(1).

120 *E.g.*, Veridyne Corp. v. United States, 758 F.3d 1371, 1378 (Fed. Cir. 2014).

121 *See supra* notes 62–65 and accompanying sources.

122 *See supra* notes 73, 78–80 and accompanying sources.

123 For these cases, Congress created the Program Fraud Civil Remedies Act (PFCRA). *See* H.R. REP. NO. 99-1012, at 258 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 3903. This act is similar to the FCA, but involves an administrative process to recover civil remedies for claims or group of claims that do not exceed $150,000. 31 U.S.C. § 3803(c)(1). Few agencies, however, have used the PFCRA primarily because of its administrative hurdles, low claim threshold, and the fact that recovered funds go to the U.S. Treasury instead of to the agency. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-275R, PROGRAM FRAUD CIVIL REMEDIES ACT: OBSERVATIONS ON IMPLEMENTATION 2 (2012) [hereinafter GAO-12-275R]; *see also* Trevor B. A. Nelson, *A Restitution Alternative for Department of Defense Agencies to Combat Program Fraud Civil Remedies Act–Level Cases under FAR 9.4*, 44 PUB. CONT. L.J. 469 (2015). From fiscal years 2006–2010, only 141 cases were referred to the DoJ for approval. GAO-12-275R, at 2.

B. Uneven Scales—*Green Dream* Versus *Daewoo*

In contrast to *Green Dream*, in *Daewoo*,[124] the appellant filed its appeal at the COFC instead of at the BCA. Daewoo's claim for equitable adjustment sought $63,978,648.95 for alleged weather and soil conditions that affected its ability to construct a fifty-three-mile road.[125] The government asserted that the contractor's claim was fraudulent and filed counterclaims seeking forfeitures and penalties under the FFCA, the CDA's anti-fraud provision, and the FCA.[126]

Under the FFCA, the COFC found, by clear and convincing evidence, that Daewoo knowingly presented a false claim with the intent of being paid for it.[127] As mandated by statute, the COFC specifically found that Daewoo committed fraud.[128] It determined that $50,629,855.88 of its $63,978,648.95 certified claim was falsely presented as a "negotiating ploy."[129] It therefore forfeited Daewoo's *entire* claim.[130] Under this statute, Daewoo could not obtain $13,168,793.07 of its claim that appeared to be supported by the record and not found to be fraudulent.[131]

Furthermore, the COFC adjudged a penalty of $50,629,855.88 under the CDA finding, by a preponderance of the evidence, that at least that portion was unsupported and in bad faith.[132] It also entered costs for the government for reviewing the claim.[133]

Lastly, under the FCA, the COFC assessed a $10,000 penalty, as authorized per claim.[134] It found, by a preponderance of the evidence, that Daewoo presented at least one false claim for payment and knowingly used false records or statements to support it.[135] It did not impose damages for which it could not determine the government had suffered.[136]

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[124] Daewoo Eng'g & Constr. Co. v. United States, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009).
[125] *Id. See supra* note 12 and accompanying notes.
[126] *Id.*
[127] *Id.* at 584.
[128] *Id.* (citing 28 U.S.C. § 2514).
[129] *Id.* at 570, 584–85, 595–97.
[130] *Id.* at 584.
[131] *Id.* at 584, 596.
[132] *Id.* at 584–85, 597.
[133] *Id.* at 585.
[134] *Id.*
[135] *Id.*
[136] *Id.*

In total, the United States was awarded $50,639,855.88 plus interest on its counterclaims and costs for reviewing the claim.[137] The government won its case primarily by cross-examining the plaintiff's witnesses; it did not have to call new witnesses or hire new experts.[138]

The outcome in *Daewoo* highlights how forum selection can have disparate and unfair results. Had Daewoo elected to file its appeal at the ASBCA, the government would not have been able to cross-examine witnesses or attack evidence in the same manner.[139] The ASBCA would assert, as it did in *Green Dream*, that it lacks jurisdiction to determine if a document is fraudulent or to make other findings of fraud.[140] Without a finding by a CCJ that Daewoo engaged in fraud, the ASBCA would have likely sustained the $13 million portion of its claim that was supported by the record and denied the rest as simply unsupported.

Moreover, the ASBCA would not have jurisdiction to consider counterclaims.[141] Granted, the agency could pursue a separate cause of action in coordination with the DoJ. But even then, this would unnecessarily bifurcate the proceedings, wasting time and resources.

Conversely, if *Green Dream* had been required to file its appeal at the COFC, the result could have been more favorable to the government. With the ability to make findings of fraud with established standards of proof, and the ability to file counterclaims, the government's approach and strategy would have been significantly different. Arguably, out of the three claims that Green Dream filed, there was clear and convincing evidence that at least one of them was fraudulent. The ASBCA denied the claim for security services given that the subcontractor stated he had never

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[137] *Id.* at 597.

[138] *Id.* at 582.

[139] This is due to the jurisdictional limits that prohibit factual determinations of the underlying fraud and counterclaims at the ASBCA. *See supra* Parts II–III for a discussion of the jurisdictional limits of the ASBCA. As demonstrated in *Daewoo*, however, at the COFC, the government was able to establish not only that it was not liable for Daewoo's claim but that Daewoo's claims were fraudulent and thereby pursue its counterclaims for forfeiture and penalties. *Daewoo*, 73 Fed. Cl. 547 at 582. Of significance, the COFC emphasized that the government accomplished this primarily through cross-examination of Daewoo's witnesses. *Id.* This effectively absolved the DoJ from having to pursue a separate civil cause of action. *See id.*

[140] Green Dream Grp., ASBCA Nos. 57413, 57414, 57565, 13-1 BCA ¶ 35,272, at 173,143.

[141] 41 U.S.C. § 7103(a)(5) (2016). *See supra* Part II.B. for a discussion of the exclusion of fraud from a board's jurisdiction.

been paid.[142] Yet, to support its claim, Green Dream submitted a contract signed by a different and unverifiable person as proof of its incurred costs.[143] If the COFC determined the claim to be fraudulent, then under the FFCA, *all* the claims under the contract would be forfeited, precluding over $925,000 that the ASBCA had sustained.[144] It would likely have assessed a penalty of $12,374 plus costs and interest for the unsupported amount of the security claim under the CDA, and a penalty of $10,000 under the FCA.[145]

The stark difference in outcomes is especially highlighted in the above types of cases where the alleged fraud was committed during the performance and/or submission of a claim, and there is no prior determination of fraud by a CCJ. It is inapposite for the ASBCA to assert jurisdiction over cases involving fraud, yet bar jurisdiction to make findings of fraud that support an affirmative defense. Its contrary approach in void *ab initio* cases on the rationale that those contracts never legally existed further highlights the lopsided outcomes that shifts on technicalities. Moreover, the dichotomy in remedies that are unavailable at the ASBCA supports the very reason Congress never intended it to address fraud.

C. Countervailing Issues—Tipping Point for Contractors?

From a contractor's perspective, it is apparent that it does not want matters of fraud to be addressed at all in contract disputes.[146] Critics argue that counterclaims at the COFC fall outside the scope of the CDA and infringe on a contractor's due process rights, to include the right to a jury trial.[147] Suing the government versus being sued by the government involves separate legal issues and procedural rights that should not be comingled.[148] In this vein, restricting forum selection to the COFC could be the tipping point that discourages future business with the government.

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142 *Green Dream*, 13-1 BCA ¶ 35,272, at 173,142.
143 *Id.* at 173,140, 173,142.
144 *Id.* at 173,143. The board sustained $266,587 and $658,627 for the two separate rental equipment claims with interest pursuant to the CDA from August 13, 2009, and July 9, 2009, for the respective claims. *Id.*
145 *See id.* at 173,142.
146 *E.g.*, Int'l Oil Trading Co., ASBCA Nos. 57491, 57492, 57493, 13-1 BCA ¶ 35,393.
147 Elizabeth W. Fleming & Rebecca Clawson, *Fraud Counterclaims in the Court of Federal Claims: Not So Fast, My Friend*, 46-WTR PROCUREMENT LAW. 3, 3 (2011).
148 *Id.* at 4–5.

Yet, it may also encourage good faith and fair dealings that reduce civil litigation involving fraud.

As addressed throughout this article, the countervailing issues of upholding the public policy against fraud and preventing disparate or unfair outcomes call for reforms. Perhaps amending the CDA to expand a BCA's jurisdiction could be a compromise. Admittedly, BCA judges have similar judicial authority to issue subpoenas, require discovery, and conduct trial hearings, as do COFC judges.[149] Further, BCA judges generally have more expertise in contract law.[150] In addition, BCAs have already adjudicated claims involving fraud, so expanding its authority appears logical.[151]

Nonetheless, the right balance overall requires restricting a BCA's authority. First, the very nature of fraud allegations complicates issues. Due to its quasi-judicial function, BCAs have already been criticized for not being as expedient as Congress envisioned.[152] Broadening the BCA's jurisdiction even more would only further protract its proceedings. This goes against the very purpose of the BCA, which is to provide an informal, inexpensive, and expedient forum.[153] As Congress intended, BCAs should hear routine contract appeals while more complex issues like fraud should go before the COFC.[154]

Second, BCAs are not structured to provide due process rights as it is at the COFC. If BCAs were authorized to hear government counterclaims that could impose harsher penalties, more formal procedures of a court would be warranted. And, simply allowing BCAs to make findings of fraud without the ability to hear counterclaims unnecessarily hampers the DoJ's coordination of remedies to counter fraud.

Lastly, limiting forum selection to only fraud-related matters balances the interests of contractors and the government more fairly. The heightened requirements and risk of liability will promote the public policy against fraud. It would deter contractors from appealing claims

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149 *See* ASBCA Rules, *supra* note 17 (focusing on ASBCA Rules 8, 10 and 22) and accompanying sources.
150 *See supra* note 18 and accompanying sources.
151 *See supra* Part III. for an overview of board decisions involving fraud.
152 Ralph C. Nash, *Boards of Contract Appeals: Are They Meeting the Need?*, 26-11 NASH & CIBINIC REP. ¶ 63 (2012).
153 41 U.S.C. § 7105(g) (2016).
154 *See* S. REP. NO. 95-1118, at 29 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

tainted with fraud, and may even encourage alternate dispute resolutions. At the same time, contractors continue to have the flexibility to resolve disputes at a BCA for all other matters.

V. Reforms[155]

Contractors who engage in fraud should be held accountable in a consistent, fair, and efficient manner. To accomplish this, all claims and disputes involving fraud should be resolved in a court of law. This section suggests several reforms to help implement this process.

A. Certified Coordinated Legal Review

The CO plays a critical role in identifying and reporting fraud. The Federal Acquisition Regulation (FAR) should, at minimum, require the CO to certify in the COFD that she or he has conducted a review for fraud in consultation with the local procurement fraud advisor (PFA).[156] Without this requirement, the CO can easily overlook issues of fraud, fail to refer the matter for investigation, or even decide to make partial payments on a claim as occurred in *Green Dream*.[157] If the PFA believes there is a reasonable basis to suspect fraud, the CO should notify the contractor that his right to forum selection may be restricted. The CO should also be required to deny the claim. The denial would be based on the CO's inability to approve the claim and not based on any conclusion that the contractor actually engaged in fraud.[158]

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[155] The ideas in this section were drawn, in part, from discussions with Raymond Saunders, Chief Trial Attorney, USALSA, KFLD; Frank March, Trial Attorney, USALSA, KFLD; and Trevor B. A. Nelson, Attorney, Advisor, USALSA, Procurement Fraud Division (PFD). The intent of this section is to provide a broad overview of suggested reforms. A detailed analysis of specific changes to statutes and regulations are beyond the scope of this article.

[156] Interview, Trevor B. A. Nelson, Attorney Advisor, USALSA, PFD, in Fort Belvoir, Va. (Jan. 24, 2017). Currently, certification with regard to a claim is only required by a contractor if a claim is over $100,000. 41 U.S.C. § 7103(b)(1); FAR 32.207 (2016).

[157] *See supra* notes 6, 104 and accompanying sources.

[158] *See generally* 41 U.S.C. § 7103(a)(5), (c)(1), (e); Joseph Morton Co. v. United States, 757 F.2d 1273, 1280–81 (Fed. Cir. 1985); SIA Constr., Inc., ASBCA No. 57693, 14-1 BCA ¶ 35,762, at 174,986–87. This avoids potential litigation as to whether the CO or agency is inappropriately settling, compromising, paying, or otherwise adjusting any claim involving fraud.

To restrict forum selection, however, the PFA must confer with the DoJ for its endorsement.[159] The DoJ must affirmatively determine that there is probable cause that a contractor is unable to support any part of a claim and that its inability is attributable to a misrepresentation of fact or to fraud by the contractor.[160] The FAR should require that the DoJ's affirmative determination that there is a probable cause basis for fraud presumptively restricts forum selection to the COFC.

B. Engaging the DoJ

Absent exigent circumstances, when the DoJ determines that there is probable cause to suspect fraud, a CO should be required to coordinate significant decisions affecting a contract or claim with the PFA, who in turn, should be required to consult with the DoJ. A CO's decision to deny a claim, terminate a contract, modify contract terms, or suspend payments prior to a judicial determination of fraud is bound to have lengthy legal ramifications. Care must be taken as the CO's decision not only impacts contractual disputes but various criminal or civil forfeitures, penalties, and damages that may be available.[161] As such, when fraud is suspected the CO, local PFA, and the DoJ should be required to work as a tiered team, with the CO and PFA on one level, the PFA and CID on another level, and the PFA and DoJ on the next level. This tiered approach can foster better communication and oversight over the CO's decisions.

If there is direct evidence of fraud, this tiered approach can assist the CO in determining whether termination of the contract is appropriate. It would also prevent the CO from rashly terminating a contract for the convenience of the government rather than terminating for default (T4D).[162] If there is insufficient evidence, but the investigation is on-going, the CO should consider a non-fraud related basis to T4D (i.e., false progress payment requests).[163] This would not disrupt any subsequent action pursued by the DoJ because case law supports that evidence of fraud

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[159] Interview, Raymond Saunders, Chief Trial Attorney, USALSA, KFLD, in Fort Belvoir, Va. (Dec. 7, 2016).

[160] *See* 41 U.S.C. §7103(c)(2).

[161] *See supra* Part IV.A. for a discussion of potential remedies.

[162] Unlike a termination for default, a termination for convenience entitles a contractor to reasonable profits and reasonable costs of termination. FAR 49.202, 49.206, 49.402-2.

[163] The submission of false progress payments may constitute a material breach of contract justifying a default determination, which is distinct from finding that as a matter of law fraud was committed. Envtl. Sys., Inc., ASBCA No. 53283, 03-1 BCA ¶ 32,167.

discovered after termination of a contract can also support a default termination, even if the fraud was then unknown.[164]

The CO should include an assessment of the claim in the COFD, which would be coordinated through the PFA with the DoJ. The CDA and FAR should clarify that assessing or denying a claim does not constitute settling or adjusting any claim involving fraud in violation of the CDA.[165] The assessment would simply serve to calculate any unsupported amount of a contractor's claim or the amount of any government claim, which could be useful in any future litigation or settlement.

C. Restrict Forum Selection to the COFC

The CDA should be revised to clearly restrict forum selection to the COFC based on probable cause for fraud. The CDA should explicitly state that a BCA does not have jurisdiction over fraud in any form to include affirmative defenses. Ideally, through the coordinated efforts of the CO, CID, PFA, and DoJ described above, probable cause for fraud can be established before a contractor appeals a claim. If not, there should still be a mechanism to restrict forum selection. If, for example, the government believes there is probable cause as discovery unfolds after an appeal has already been filed at a BCA, the DoJ should be able to file a petition at the COFC to transfer the appeal. Any proceedings before the BCA should be stayed pending the COFC's decision on forum restriction.

A contractor can challenge the forum restriction through a preliminary hearing at the COFC. The parties should be bound by the COFC's decision. If the COFC determines that forum restriction was improper, the contractor can elect to have the COFC transfer its appeal to the ASBCA.

To account for restricting the right to forum selection that contractor's would normally have, certain remedies should be available if the contractor substantially prevails on its appeal. Similar to payments authorized under the Equal Access Justice Act,[166] a small business contractor can be entitled to certain costs of litigation.[167] The contractor

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[164] Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985).

[165] *See generally* 41 U.S.C. § 7103(a)(5), (c)(1).

[166] 28 U.S.C. § 2412(d)(1).

[167] Interview, Frank March, Trial Attorney, USALSA, KFLD, in Fort Belvoir, Va. (Jan. 20, 2017).

would have to substantially prevail on a claim in which probable cause existed for fraud, and the government's position must not have been substantially justified. The recoverable costs, for example, could include attorney's fees specifically for time defending unsuccessful counterclaims for fraud, which the government would not have been able to pursue at the ASBCA.

These changes would help clarify and finally terminate the on-going litigation as to whether a BCA has jurisdiction over claims involving fraud. More importantly, it would greatly reduce the likelihood of disparate outcomes in cases like *Green Dream* and *Daewoo*. It would more consistently uphold the public policy against fraud in a manner that would not depend on forum selection, the value of a claim, or the cost of litigation. After all, with forum restriction at the COFC, even relatively small claims could lead to large penalties and treble damages. It would also avoid having three separate proceedings at the criminal, civil, and BCA level at substantially the same time. The COFC could resolve civil and contractual disputes for claims and counterclaims in one forum.

D. Enjoin Contractors from Seeking Claims Tainted by Fraud

To the extent a CCJ finds that a contractor engaged in fraud, it should also identify the affected contracts and enjoin contractors from seeking fraudulent claims. In concert with the DoJ, the court should identify the contracts tainted by fraud with as much specificity as possible. As part of the punishment or remedy, the court should have the authority to enjoin contractors from seeking any claims associated with a tainted contract. This would require withdrawal of any outstanding claims on appeal. The CDA should be revised to facilitate this process, creating a rebuttable presumption to challenge the enjoinment.

The above action by a criminal or civil district court would better enforce the doctrines of *res judicata*[168] and *collateral estoppel*.[169] It is also

[168] A second suit will be barred under the doctrine of *res judicata* or "claim preclusion" if (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. AAA Eng'g & Drafting, Inc., ASBCA Nos. 48729, 48575, 47940, 01-1 BCA ¶ 31,256, at 154,366 (citing, Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1362 (Fed. Cir. 2000)).

[169] The doctrine of *collateral estoppel* or "issue preclusion" requires proof that (1) the identical issue was previously adjudicated; (2) the issue was "actually litigated" in the prior

in keeping with established case law that supports denying *all* claims tied to a contract tainted by fraud even when only one claim is proven fraudulent.[170] With the above remedies in mind, contractors like Laguna Construction Company, Inc., would be enjoined from seeking any claim tainted by fraud.

In *Laguna*, the principle officers of the company were found guilty of soliciting and accepting kickbacks during its performance of a contract in which Laguna received sixteen cost-reimbursable task orders.[171] Laguna had claimed approximately three million dollars for tax expenses under various task orders of the contract some of which included inflated costs to compensate for the kickbacks.[172] The ASBCA denied its claim despite the government not proving that the kickbacks were paid under *all* the claimed task orders.[173] Merely showing that the principle officers committed the criminal acts under the same contract within the scope of their employment was sufficient.[174] The recommended reforms would allow a criminal or civil district court to make findings and enjoin contractors like Laguna from seeking a claim through the contract dispute resolution process. This would save considerable time and resources in cases like *Laguna* and even more so in less complex cases that rely on a CCJ's findings to determine that a contract is void *ab initio*.

VI. Conclusion

Fraud is fraud, and referring to it by any other name or context does not change its insidiousness. All forms of fraud, whether committed during the procurement, performance, or submission of a claim, or whether raised as an affirmative defense does not transform its existence. By asserting jurisdiction over contractual issues while barring factual determinations of the underlying fraud in cases like *Green Dream*, the ASBCA is tipping the "scales of justice." Even when it finds fraud in void

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case; (3) the determination of that issue was necessary to the earlier judgment; and (4) the party being precluded was fully represented in the prior action. *Id.* at 154,367 (citing Thomas v. GSA, 794 F.2d 661, 664 (Fed. Cir. 1986)).

[170] *E.g.*, Veridyne Corp. v. United States, 758 F.3d 1371, 1378 (Fed. Cir. 2014). *See supra* Part III.B. for a discussion of how a finding of fraud by a court of competent jurisdiction impacts contractual disputes.

[171] Laguna Constr. Co., ASBCA No. 58324, 14-1 BCA ¶ 35,748, at 174,948, *aff'd*, 828 F.3d 1364 (Fed. Cir. 2016).

[172] *Id.*

[173] *Id.* at 174,950.

[174] *Id.*

ab initio cases or acknowledges a finding of fraud from a CCJ, the ASBCA lacks jurisdiction over government counterclaims to provide adequate civil relief. The DoJ, on the other hand, is passively allowing the "scales" to be tipped by not pursuing "small-dollar" cases because of litigation costs. This has led to disparate and unfair outcomes.

As Congress intended, a BCA should not have jurisdiction over any claims involving fraud. All contract disputes or claims involving fraud should be restricted to the COFC. Limiting the right to forum selection to only fraud-related matters would balance the interests of contractors and the government more fairly. It would lead to more consistent and fair outcomes, preserve judicial economy overall, and uphold the high public policy objective against fraud. It would more effectively stop "green dreams" tainted with fraud from coming true.