Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations

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Introduction

A natural tension exists between the procurement fraud and contracting communities. Fraud investigators and litigation attorneys want sufficient time to investigate allegations of fraud and are concerned that contracting officers will neglect to bring suspected fraud to their attention. Furthermore, investigating agents and attorneys assigned to pursue any potential civil or criminal action against a contractor will be wary of any contracting officer's efforts to address the fraud for fear that the case will in some way be compromised, if not legally, then at least in terms of jury appeal, the creation of potential defenses,[1] or evidentiary issues. In contrast, the agency contracting office usually wants to move the procurement forward, often sees misunderstandings and mistakes rather than fraud, and is culturally oriented toward working issues out with its "partners" in the private sector. Indeed, as noted in the applicable portion of the Federal Acquisition Regulation (FAR): "[t]he Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level."[2]

This article provides guidance on resolving a reoccurring issue raised during procurement fraud investigations: what authority does a contracting officer (CO) retain once fraud is suspected on a claim? Depending upon the specific stage of the investigation or litigation, the primary restrictions on the CO are contained in section 605(a) of the Contract Disputes Act (CDA), FAR section 33.210, the Department of Justice's (DOJ) statutory litigation authority (28 U.S.C. § 516), and agency policy directives and regulations.[3]

Limitations on the Contracting Officer's Authority

Once a claim is suspected of being fraudulent, a number of responsibilities and restrictions come into play. For ease of organization, this note addresses those rights and responsibilities through the various stages of litigation.

Prelitigation

General Overview of the Law

Federal regulations impose mandatory reporting requirements on a CO whenever a claim is suspected of being fraudulent. The FAR mandates that whenever "the contractor is unable to support any part of a claim and there is evidence that the inability is attributable to misrepresentation of fact or fraud on the part of the contractor, the CO *shall* refer the matter to the agency official responsible for investigating the fraud."[4] Similarly, when a Termination Contracting Officer (TCO) "suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures."[5] Further, individual agency regulations or policies may trigger reporting requirements. For example, by regulation the Army requires a "Procurement Fraud Flash Report" whenever (1) the procuring agency has referred the matter for investigation, or (2) "there is a reasonable suspicion of procurement fraud or irregularity."[6]

In addition to mandatory reporting requirements, the CO loses a significant degree of authority over a tainted claim. Federal Acquisition Regulation section 33.210(b) removes from

1. For example, it is a defense to the scienter element of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000), that relevant employees of the United States had knowledge of the alleged falsity at issue, at the time the false claim was submitted to the United States. United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

2. General Servs. Admin. et al., Federal Acquisition Reg. § 33.204 (June 1997) [hereinafter FAR]. Additionally, one purpose of the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000), was to "induce resolution of more contract disputes by negotiation prior to litigation." Contract Disputes Act of 1978, S. Rep. No. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

3. *See* 41 U.S.C. § 605(a); FAR, *supra* note 2, § 33.210; 28 U.S.C. § 516 (2000).

4. FAR, *supra* note 2, § 33.209 (emphasis added); *see* United States *ex rel.* Biddle v. Bd. of Trustees of Leland, 161 F.3d 533, 542 (9th Cir. 1998) (Navy ACO had a duty to detect and "refer possible fraud to the appropriate authorities"), *cert. denied*, 526 U.S. 1066 (1999) (citing FAR section 33.209 and the Navy Acquisition Procedures Supplement); UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) ("a contracting officer cannot find fraud, but must refer suspected cases of fraud to the Department of Justice for review pursuant to 41 U.S.C. § 605(a) (1994)"), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001).

5. FAR, *supra* note 2, § 49.106.

6. U.S. Dep't of Army, Reg. 27-40, Litigation para. 805 (19 Sept. 1994) [hereafter AR 27-40]; *see also* Army Federal Acquisition Reg. Supp. § 5109.406-3 (Oct. 2001) [hereinafter AFARS]. Of note, the FAR links the reporting requirement for suspected fraud involving "advance, partial or progress payments" to agency regulatory reporting requirements. FAR, *supra* note 2, § 32.006-3(b).

the CO's authority "[t]he settlement, compromise, payment or adjustment of any claim involving fraud."[7] Similarly, CDA section 605(a) prohibits the agency head from administratively resolving a claim involving fraud.[8] The same section of the CDA also removes from the CDA's contract dispute resolution process "a claim or dispute for penalties prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine."[9] Falling within that exclusionary language are section 604 claims[10] and False Claims Act disputes and claims,[11] both of which fall within the exclusive authority of the DOJ.

Although the FAR addresses the authority of the CO, and the last sentence of section 605(a) restricts the authority of the agency head, the two provisions are related. The CDA's prohibition on an agency head's administrative resolution of a claim involving fraud was added by Congress "to insure that cases involving fraud [were] not subject to the [contract dispute resolution] provisions of [§605(a)]."[12] Similarly, FAR section 33.210(b) was intended to interpret section 605(a) and further "admonishes the CO not 'to decide or settle . . . claims arising under or relating to a contract subject to the [CDA] . . . involving fraud.'"[13] Courts have relied upon section 605(a), as well as FAR section 33.210(b), when discussing the *contracting officer's* lack of authority to resolve fraudulent claims.[14] Section 605(a)'s fraud exclusion for agency heads necessarily encompasses subordinate COs.[15]

Court opinions in various areas of the law provide some guidance to help establish the parameters of a CO's authority.[16] Many of the restrictions seem obvious. Government employees have neither the authority to permit contractor violations of federal statutes or regulations,[17] nor to waive such violations once they have occurred.[18] Procurement officials should not make statements concerning a contractor's *lack* of potential criminal or civil liability,[19] but a CO may express "concern about the

7. FAR, *supra* note 2, § 33.210(b).

8. 41 U.S.C. § 605(a). Section 605(a) states, in relevant part, "This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." *Id. See* United States *ex rel.* Johnson v. Shell Oil Co., 34 F. Supp. 2d 429, 432 (E.D. Tex. 1998) ("Federal agencies are specifically prohibited by statute from adjudicating or compromising civil fraud claims.").

9. 41 U.S.C. § 605(a).

10. Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 545 (Fed. Cir. 1988) ("Section 604 . . . was never intended to be within the purview of the CO."); *see* Appeal of TDC Mgmt. Corp., Dkt. No. 1802, 1989 DOT BCA LEXIS 26, at *25 (Oct. 25, 1989) ("[A] contracting officer has no authority to issue a decision under the Act setting forth a government claim under § 604, a fraud claim . . .[;] the Contract Disputes Act in general and the second sentence of § 605(a) in particular do not apply in fraud determinations.") (citation omitted). In relevant part, 41 U.S.C. § 604 provides:

> If a contractor is unable to support any part of his claim and it is determined that such liability 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 in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.

41 U.S.C. § 604.

11. *Simko Constr., Inc.*, 852 F.2d at 547-48.

12. United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996) (citation omitted). *See also* United States v. EER Sys. Corp., 950 F. Supp. 130, 134 (D. Md. 1996) ("The last sentence of 605(a) expresses Congress' intent that all government contract disputes involving fraud were not to be affected by the CDA.").

13. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 549 n.11 (1999).

14. *See, e.g.*, UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) (citing 41 U.S.C. § 605(a)); Defense Logistics Agency—Request for Advance Decision, B-230095, 1988 U.S. Comp. Gen. LEXIS 275, at *4 (Mar. 16, 1988) ("Under the CDA, as reflected in the FAR, a contracting agency shall not settle, compromise, pay or otherwise adjust any claim involving fraud.") (citing 41 U.S.C. § 605(a)); *see also Medina Constr., Ltd.*, 43 Fed. Cl. at 550 (citing 41 U.S.C. § 605(a)); FAR, *supra* note 2, §§ 33.209-.210, 49.106); *Unified Indus.*, 929 F. Supp. at 950 (citing 41 U.S.C. § 605(a)).

15. United States v. United Techs. Corp., No. 5:92-CV-375 (EBB), 1996 U.S. Dist. LEXIS 17398 (D. Conn. Oct. 11, 1996) ("To begin with, the court rejects the distinction Sikorsky draws between the contracting officer and agency heads. The statute's restriction on the authority of agency heads should be read as encompassing their subordinates."); *see also Unified Indus.*, 929 F. Supp. at 950 ("[T]he contracting officer is not an independent third party arbiter, but an agent of the agency itself."); *cf.* S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5253 ("However, it is not the intent of this section to authorize Agency heads, contracting officers, or agency boards to settle or compromise claims independent of their legal or contractual merits . . . ."). *Contra* Appeal of Hardrives, IBCA-2319; 1991 IBCA LEXIS 19, at *17 (Feb. 6, 1991) ("Finally, an 'agency head' is not the same thing as a contracting officer, or a Board of Contract Appeals.").

16. In the context of general agency law, as applied to the United States, the sovereign is bound generally only by the authorized conduct of its agents acting within the scope of their actual authority. Fed. Crop. Insur. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); *see* California v. United States, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("an agent acting *ultra vires* cannot bind the federal government"); *see also* Starflight Boats v. United States, 48 Fed. Cl. 592, 598 (2001); American Anchor & Chain Corp. v. United States, 331 F.2d 860, 861-62 (Ct. Cl. 1964) (employee's apparent authority binds a contractor, but only actual authority of a government employee binds the United States). The actual authority of an employee of the United States is usually articulated, or restricted, by applicable federal statutes and regulations. *Fed. Crop Ins. Corp.*, 332 U.S. at 384; *see also Starflight Boats*, 48 Fed. Cl. at 598 (express actual authority must be found in the Constitution, statutes or regulations; actual authority may be implied "when such authority is an 'integral part of the duties assigned to a [g]overnment employee'"). For government contracting personnel, the FAR and its agency supplement are the primary sources for defining the limits of their authority.

possibility of fraud."[20] Clearly, making a determination whether fraud actually exists is beyond the CO's authority.[21]

In the False Claims Act (FCA)[22] context, at least one case has addressed the impact of unauthorized conduct of a CO on subsequent litigation. In *United States v. National Wholesalers*,[23] a defense contractor delivered falsely labeled and nonconforming generator regulators to the Army. After about two-thirds of the required regulators had been accepted and paid for, the CO discovered the nonconformance, issued a stop work order, and had the regulators tested. When the test results proved favorable to National Wholesalers, the CO issued a letter to the contractor advising it "that the counterfeit labeled product would be accepted as 'or equal.'"[24] The contractor furnished the remaining regulators and was paid for them.[25]

Subsequently, the U.S. Attorney's Office filed an FCA suit. The district court ruled in the defendant's favor, relying, in part, on the CO's authority to resolve contract disputes.[26] The U.S. Court of Appeals for the Ninth Circuit reversed and entered judgment for the United States.[27] First, the court noted that the time for measuring whether a claim was false is when the claim was submitted, and that every invoice the defense contractor submitted to the Army before the CO became aware of the fraud was false.[28]

Next, the court discussed the conduct of the Army CO. The court recognized the CO's authority to modify the contract to permit a regulator equal to that called for in the contract. Any retroactive modification that permitted acceptance of the initial delivery of nonconforming and falsely labeled regulators, however, was "void as against public policy."[29] With regard to the effect of the CO's unauthorized conduct on the FCA lawsuit, the court stated: "In such palming off as we have here we do not believe that the Congress ever intended that COs should have the power to vitiate the False Claims statute."[30]

Consistent with *National Wholesalers*, a CO is not authorized to directly or indirectly waive a false claim. Accordingly, a CO cannot permit a contractor to withdraw a claim suspected

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17. *See* United States *ex rel.* Mayman v. Martin Marietta Corp., 894 F. Supp. 218, 223 (D. Md. 1995) ("Even assuming that Martin Marietta did inform the Government of its precise actions, a government officer cannot authorize a contractor to violate federal regulations.") (False Claims Act case); Brown v. United States, 207 Ct. Cl. 768, 782-83 (1975) (agent of the government cannot authorize a contractor to violate contractual provisions or government regulations); United States v. Fox Lake State Bank, 225 F. Supp. 723, 724 (N.D. Ill. 1963) ("However, [a government] employee could not be said to be acting within the scope of his authority in telling that one can file a false claim 'with the understanding that the sanctions of Congressional legislation (False Claims Act) will not apply thereto.'"); *cf.* Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928) (field auditor had no authority to tell taxpayer that he was not obligated to observe the requirements of a statute or regulation).

18. United States v. Nat'l Wholesalers, 236 F.2d 944 (9th Cir. 1956); *see* JAMES B. HELMER, JR., ANN LUGBILL, & ROBERT C. NEFF. JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION § 3-19, at 121 (2d ed. 1999) ("Government contracting officers do not have the authority to waive statutory civil or criminal responsibility."); *cf.* United States v. Woodbury, 359 F.2d 370, 376 (9th Cir. 1966) ("doubtful" that agency or its officials possess the authority to compromise a false claim.).

19. *Cf.* Strauch v. United States, No. 78 C 375, 1979 U.S. Dist. LEXIS 10844 (N.D. Ill. July 23, 1979) (postal inspector, who allegedly made a statement concerning the liability of a party, acted beyond his authority as an inspector); Cooper Agency v. McLeod, 247 F. Supp. 57, 60 (E.D. S.C. 1965) (alleged concession of a revenue agent and chief auditor concerning taxpayer's liability were beyond the scope of their authority and was not binding on the United States). *But cf.* FED. R. EVID. 801(d)(2)(D); note 77 *infra* and accompanying text.

20. Appeals of Schleicher Community Corrections Ctr., Inc., Dkt. Nos. 3046, 3067, 1998 DOT BCA LEXIS 19, at *19 (Aug. 6, 1998) ("[T]here is nothing in the statute or applicable regulations prohibiting a contracting officer from expressing concern about the possibility of fraud.").

21. UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) ("Moreover, the contracting officer was without authority to determine fraud without referral to the Department of Justice."), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001); Int'l Potato Corp. v. United States, 142 Ct. Cl. 604, 607 (1958); United States v. U.S. Cartridge Co., 78 F. Supp. 81, 83-85 (D. Mo. 1948), *aff'd*, 198 F.2d 456 (8th Cir. 1952); Defense Logistics Agency—Request for Advance Decision, B-230095, 1988 U.S. Comp. Gen. LEXIS 275, at *3 (Mar. 16, 1988) (responsibility of determining the existence of bid collusion rests with DOJ).

22. 31 U.S.C. §§ 3729-3733 (2000).

23. 236 F.2d 944 (9th Cir. 1956).

24. *Id.* at 946. Originally, the solicitation called for a specified catalogue item, or equal, but if the offeror was going to use an equal item, it had to specifically inform the Army. *Id.* at 945-46. National Wholesalers elected not to offer an equal; "the contract required the bidder to furnish the proprietary . . . regulator and nothing else." *Id.* at 946.

25. *Id.* at 948.

26. *Id.* at 949-50.

27. *Id.* at 951.

28. *Id.* at 950.

29. *Id.*

30. *Id.*

of being partially fraudulent, and then permit the contractor to resubmit the claim after having deleted any questionable portions. In effect, such action would constitute an attempt by the CO to waive the fraudulent claim by circumventing the statutory and regulatory restrictions on the CO's authority.[31]

Additionally, if the CO cannot settle, compromise, pay, or adjust a claim involving fraud, he may not separate a claim into fraudulent and legitimate portions and then pay the undisputed portion.[32] One rationale for this limitation on the CO's authority is that such action "would defeat the intent and purpose of the Forfeiture Statute which is based on the sound principle that fraud destroys the validity of everything into which it enters and vitiates the most solemn contracts and documents, even judgments."[33] Further, a plain reading of the statutory and regulatory restrictions on the CO suggest that if the CO is without authority to resolve the *entire* claim, then the CO lacks authority to settle, pay, compromise, or adjust any *part* of it.[34]

Definitional Ambiguity

Less obvious is the CO's authority to take contractual action that affects, directly or indirectly, the claim suspected of being fraudulent and any related claims, before resolution of the fraud allegation. Much of the confusion derives from the lack of explanation of key terms, such as "claim involving fraud"[35] and "settle, compromise, pay or otherwise adjust."[36]

When Does the Claim Involve Fraud?

Neither the CDA nor the FAR explain the amount or type of evidence of fraud required to trigger section 605(a)'s agency head prohibition or FAR section 33.210(b)'s withdrawal of CO authority. Requiring that the claim be proven fraudulent to trigger section 605(a) and FAR section 33.210(b)'s prohibitions, however, would be nonsensical.[37] Were it otherwise, the CO could resolve the claim before an investigation was even initiated.

Dicta in several cases suggest that the fraudulent claim resolution preclusion is relatively low, being triggered by the mere suspicion of fraud.[38] Further, precedent exists positing that, at least during the pendency of an ongoing investigation by a federal law enforcement agency, a CO lacks authority to settle, compromise, pay, or adjust the claim.[39] Within the Army, the trigger for initiating such an investigation is a "determination that credible information exists that an offense has been committed."[40]

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31. Similarly, if evidence suggests that the contractor knowingly provided nonconforming goods, the CO should not unilaterally accept the defective goods and resolve the dispute by merely agreeing to an equitable adjustment in price. *But cf.* JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 882, 882 (3rd ed. 1995) (after acceptance, the CO retains the option of requiring an equitable reduction in price upon discovering nonconformities rather than have the defect corrected); *see* FAR, *supra* note 2, § 52.246-2(h)(2) ("Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction.").

32. *See* To The Secretary of the Army, B-154766, 1964 U.S. Comp. Gen. LEXIS 88, at *14 (Aug. 29, 1964); *cf.* Matter of: Fraudulent Travel Vouchers, B-245282, 1992 U.S. Comp. Gen. LEXIS 1173, at *10 (Apr. 8, 1992) ("When suspicion of fraud taints one item on a claim, the entire claim is tainted.").

33. *To The Secretary of the Army*, 1964 U.S. LEXIS 1173, at *14. The Forfeiture Statute, also known as the Special Plea in Fraud, is codified at 28 U.S.C. § 2514. Pursuant to this statute, which only applies when raised in the Court of Federal Claims, the contractor forfeits all claims arising out of a contract tainted by fraud. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 435 (1994), *aff'd without opinion*, 57 F.3d 1084 (Fed Cir. 1995); Crane Helicopter Serv., Inc. v. United States, 45 Fed. Cl. 410, 431 (1999).

34. The legislative history of the CDA, however, indicates that, at least for jurisdictional purposes involving section 604 claims, the agency boards and the Court of Federal Claims may adjudicate those portions of a claim severable from the tainted portion. S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254 ("other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency board or in the Court of Claims where the claim originated"). Any claim to be paid to the contractor remains subject to a set off to reflect an adverse FCA judgment against that contractor. *Id.*

35. *See, e.g.*, Appeal of Hardrives, Inc., IBCA-2319, 1991 IBCA LEXIS 19, at *17 (Feb. 6, 1991) ("Also, the phrase 'involving fraud' is nebulous.").

36. *See id.* (The last sentence of subsection 605(a) "is unclear. For example, the terms 'settle, compromise, pay, or otherwise adjust' do not include the word 'decide.'"); United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996) ("Arguably, some ambiguity infects this language.").

37. *See* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 550 (1999) ("It is concluded under the circumstances of this case . . . the CO was expressly prohibited from settling the claim because of the outstanding, unproven allegations of fraud.") (citing 41 U.S.C. § 605(a); 42 C.F.R. § 33.210); *cf.* UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 510 (1999) ("without authority to address suspected fraudulent claims, a contracting officer must turn to the [Department of Justice]").

38. *UMC Elec. Co.*, 45 Fed. Cl. at 509 ("suspected cases of fraud"); *Medina Constr., Ltd.*, 43 Fed. Cl. at 555 ("Pursuant to the FAR, the suspicion of fraud is considered to be of such a sensitive nature that CO's are specifically admonished not 'to decide or settle . . . claims arising under or relating to a contract subject to the [CDA] . . . involving fraud.'") (citing FAR, *supra* note 2, § 33.210(b)); *see To The Secretary of the Army*, 1964 U.S. LEXIS 1173 (agency authorized to refuse payment to contractor when there is a reasonable suspicion of fraud.); *see also* FAR, *supra* note 2, § 49.106 ("If the TCO *suspects* fraud . . . the TCO shall discontinue negotiations and report the facts under agency procedures."); *cf.* Matter of: Fraudulent Travel Vouchers, B-245282, 1992 U.S. Comp. Gen. LEXIS 1173, at *9-10 (Apr. 8, 1992) ("a certifying or disbursing officer has an affirmative duty to withhold payments on any doubtful claims, including those for which there is a *reasonable suspicion of fraud*") (emphasis added).

39. *Medina Constr., Ltd.*, 43 Fed. Cl. at 550; *see* Appeal of TRS Research, ASBCA No. 51712, 2000 ASBCA LEXIS 162, at *12 & n.2 (Oct. 24, 2000).

In *Medina Construction, Ltd. v. United States*, the Air Force suspected a contractor of submitting false invoices in support of progress payment requests on a hangar repair contract in the Azores Islands.[41] After the Air Force Office of Special Investigations (AFOSI) initially concluded that evidence supporting the fraud allegations was insufficient to terminate the contract for cause, the CO terminated for convenience.[42] The DOJ also declined to prosecute.[43] The contractor submitted its termination settlement proposal (TSP) to the CO, but ultimately elected to file suit against the United States in Portuguese courts seeking the TSP money.[44] The DOJ moved to dismiss and, in the alternative, pled fraud as an affirmative defense.[45]

Unaware of the Portuguese litigation, the CO issued a final decision denying the claim for additional payments because of the "apparently fraudulent invoices," determining that the claim was subject to forfeiture "under the Forfeiture Claims Act'"; and opining that the termination for convenience claim was otherwise unsupported.[46] The contractor then filed suit under the CDA in the Court of Federal Claims (COFC), the DOJ counterclaimed in fraud, and the contractor then moved to delay or dismiss the CDA litigation.[47]

The COFC discussed the legal effect of the CO's final decision. The COFC noted that the AFOSI investigation continued after the initial determination that available evidence did not support a termination for cause. Under such circumstances, the CO was precluded from negotiating a settlement of the TSP. Specifically, the court stated: "So long as the fraud investigation was continuing, the CO was statutorily precluded from carrying out any action which would cause the claim to be administratively settled, compromised, paid, or otherwise adjusted."[48] This prohibition remained in effect even though the DOJ had declined to prosecute the case and even though the allegations remained unproven.[49] Additionally, the court held that the CO's final decision was invalid because the CO based the denial predominately, if not entirely, on unproven allegations of fraud.[50]

What Is the Claim?

There is some confusion concerning what constitutes the "claim" when determining what actions the CO may take, or not take. Part of the confusion results from the differing definitions of a claim for purposes of the CDA and the FCA.

The CDA does not specifically define the term "claim."[51] Instead, FAR section 33.201 defines a claim for purposes of the CDA.[52] Significantly, a routine request for payment, such as a voucher, invoice or progress payment request, is not a claim when submitted.[53] Nonroutine requests for payment "which do not seek payment as a matter of right," such as cost proposals, are also not CDA claims.[54] Additionally, even a written demand for money, seeking as a matter of right a sum certain in excess of $100,000 is not a claim for CDA purposes if the demand is not certified.[55]

40. Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, Army Law., Aug. 1998, at 2 (citing U.S. Army Criminal Investigative Command, Reg. 195-1, Criminal Investigation Operation Procedures para. 7-11(o) (1 Oct. 1994) [hereinafter CID Reg. 195-1]).

41. *Medina Constr., Ltd.*, 43 Fed. Cl. at 542.

42. *Id.* The AFOSI continued to investigate the alleged fraud. *Id.*

43. *Id.* at 543.

44. *Id.* at 541.

45. *Id.* at 544.

46. *Id.*

47. *Id.* at 545. The DOJ counterclaimed under the Special Plea in Fraud, 28 U.S.C. § 2514 (2000); the anti-fraud provision of the CDA, 41 U.S.C. § 604 (2000); and the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). *Medina Constr., Ltd.*, 43 Fed. Cl. at 545. In its motion to dismiss, the contractor argued that the court lacked jurisdiction because the TSP was not a valid claim and, therefore, the CO's final decision was "improper and ineffectual." *Id.* The court held that the TSP had ripened into a valid CDA claim, but that the court lacked jurisdiction because the CO's final decision was invalid and there was no legitimate deemed denial of Medina's claim. *Id.* at 552.

48. *Medina Constr., Ltd.*, 43 Fed. Cl. at 550.

49. *Id.*

50. *Id.* at 556.

51. D.L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997); Kanag'iq Constr. Co. v. United States, 51 Fed. Cl. 38, 43 (2001); Weststar Eng'g, Inc., ASBCA No. 52484, 2002 ASBCA LEXIS 14, at *9 (Feb. 11, 2002).

52. Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1372 (Fed. Cir. 2000) ("The FAR definition merely elaborates that set forth in the CDA itself."); *see* Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995); *cf.* James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1542 (Fed. Cir. 1996) (relying on FAR definition of a claim); *Weststar Eng'g Inc.*, 2002 ASBCA LEXIS 14, at *9 (relying on FAR definition of a claim).

In contrast, the FCA uses a very broad definition of a claim.[56] Under the FCA, a claim is defined as:

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[57]

The falsity of the claim is measured at the time it is submitted.[58] False claims for FCA purposes have included vouchers,[59] invoices,[60] progress payment vouchers,[61] monthly progress and expenditure reports,[62] and checks falsely presented for payment.[63]

Some confusion is generated by the application of FAR section 33.201, which not only defines a claim for purposes of the CDA, but also for FAR subpart 33.2, which necessarily includes FAR sections 33.209 and 33.210. To illustrate the problem, assume that the contractor knowingly produces nonconforming goods and then submits an invoice for payment. Unaware of the defective nature of the goods, and concomitantly the falsity of the invoice, the United States accepts the goods and pays the invoice. Arguably, the invoice, which is not in dispute at the time of submission, constitutes a routine request for payment, and does not qualify as a claim for CDA purposes. Because the false invoice is not a claim as defined by FAR section 33.201, the CO, who subsequently learns of the defective nature of the goods and falsity of the invoice, may argue that he is not bound by the prohibition of FAR section 33.210(b) and elects to resolve the matter contractually. The absurd result in such a case is that the false invoice would constitute a claim for FCA purposes, which the CO could not resolve, but not a claim for CDA purposes, permitting CO resolution.

Such a literal reading of FAR section 33.201 would circumvent the intent behind section 604 and 605(a) of the CDA and FAR section 33.210(b). In effect, the CO would be settling, compromising, or otherwise adjusting a fraudulent claim, which could serve as the basis for a potential False Claims Act claim or counterclaim.[64] Unless a fraudulent claim is considered to be either nonroutine or in dispute for purposes of FAR

53. *See* FAR, *supra* note 2, §§ 33.201 ("A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim."), 52-233-1(c); *see also Reflectone*, 60 F.3d at 1577 ("Thus we hold that FAR 33.201 does not require that 'a written demand . . . seeking, as a matter of right, the payment of money in a sum certain' must already be in dispute when submitted to the CO to satisfy the definition of 'claim,' *except* where that demand or request is a 'voucher, invoice or other routine request for payment.'"). In *Reflectone*, the court also characterized progress payment requests as routine requests for payment. 60 F.3d at 1577. A routine request for payment may be converted into a CDA claim, however, "by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time." FAR, *supra* note 2, § 33.201.

54. *Reflectone*, 60 F.3d at 1577 n.7.

55. *D.L. Braughler Co.*, 127 F.3d at 1480 & n.5; *see Weststar Eng'g, Inc.*, 2002 ASBCA LEXIS 14, at *10, 15 (monetary claim must be certified); *see also* FAR, *supra* note 2, §§ 33.201, 52.233-1(c).

56. *See* United States v. Inc. Village of Island Park, 888 F. Supp. 419, 439 (E.D.N.Y. 1995). "The provisions of the False Claims Act are to be read broadly and 'reaches beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.'" *Id.* (citations omitted).

57. 31 U.S.C. § 3729 (2000).

58. United States v. Nat'l Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956); *see also* United States v. Southland Mgmt. Corp., No. 00-60267, 2002 U.S. App. LEXIS 6751, at *34 (6th Cir. Apr. 11, 2002).

59. United States v. Job Resources for the Disabled, No. 97 C 3904, 2000 U.S. Dist. LEXIS 6343, at *8 (May 5, 2000) (vouchers for wage reimbursement for people placed in an on-the-job training program conceded by defendants to be claims for FCA purposes).

60. United States v. Bornstein, 423 U.S. 303 (1975) (subcontractor caused prime to submit false invoices); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999) (invoices submitted for reimbursement claims for FCA purposes); BMY-Combat Sys. Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 124-25 (1997) (Department of Defense Form 250 used as an invoice); United States v. Advanced Tool Co., 902 F. Supp. 1011 (W.D. Mo. 1995) (government paid invoices for nonconforming tools); *aff'd without opinion*, 86 F.3d 1159 (8th Cir. 1986).

61. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994), *aff'd without opinion*, 57 F.3d 1084 (Fed. Cir. 1995); *cf.* United States v. Chilstead Bldg. Co., 18 F. Supp. 2d 210, 214 (N.D.N.Y. 1998) (FCA suit based on allegedly false "progress payment 'claims'").

62. United States v. TDC Mgmt. Corp., 24 F.3d 292, 294 (D.C. Cir. 1994) (TDC was reimbursed "monthly for documented expenditures").

63. United States v. Savaree, 19 F. Supp. 2d 58 (W.D.N.Y. 1997) (presentation of checks on the bank account of a deceased retiree, which contained electronically deposited federal annuity funds); *see* United States v. McLeod, 721 F.2d 282, 284 (9th Cir. 1983) ("the endorsement and deposit of a government check known to be issued by mistake is the presentation of a false claim under the Act").

64. *See, e.g.*, United States v. Nat'l Wholesalers, 236 F.2d 944 (9th Cir. 1956) (for purposes of the FCA, a CO lacked the authority to waive fraud as part of a contract modification).

section 33.201, then it would be nonsensical to apply this definition to the term "claim involving fraud." As a matter of law, a claim that is false when submitted—even if the government is unaware of the falsity at the time—should be treated as a claim for purposes of FAR section 33.210. Alternatively, FAR section 33.201 should be read to define a claim for purposes of the CDA, but not for claims falling outside the CDA's dispute resolution process, that is, claims involving fraud.

Finally, as a general rule, a CO is not precluded from taking action on other claims not involving fraud, which arise from the same contract as the claim alleged to be fraudulent.[65] In some cases, however, whenever it is discovered after award that a contract involves fraud, the entire contract will be considered tainted by fraud, depriving the CO of authority to resolve *any* claims under the contract. Contracts tainted by fraud at their inception are considered to be *void ab initio*.[66] In the FCA context, these cases, labeled by some courts as "fraud-in-the-inducement cases," arise "when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct."[67] *Every* claim submitted under such a contract may be considered false or fraudulent for FCA purposes,[68] contractually unenforceable, and falling outside the CO's resolution authority.

What Constitutes Settling, Compromising, or Otherwise Adjusting a Claim?

The intent behind FAR section 33.210(b) and the last sentence of section 605(a) was to remove all contractual disputes involving fraud from the contract disputes resolution procedures of the CDA.[69] In short, Congress did not want agencies, particularly their COs and boards of appeals, intruding into the DOJ's legal turf by deciding whether fraud existed, or by interfering with fraud investigations or subsequent fraud-related litigation by addressing allegations of fraud through some form of contractual mechanism. These terms must be interpreted in light of that intent rather than attempting to split semantical hairs.[70] Accordingly, the terms settle, pay, compromise, and adjust should be treated as being virtually synonymous with such terms as determine, dispose of, resolve, waive, or adjudicate.[71]

Although decided before the enactment of the CDA, the court's decision in *United States v. U.S. Cartridge Co.*[72] provides an illustration of an impermissible settlement of a claim involving fraud. At the conclusion of World War II, the United States terminated an ammunition contract and then resolved the contractor's termination claim. As part of that resolution, the CO and the contractor entered into a "supplemental contract" that stated the contractor had satisfactorily performed all of its work and contractual obligations and "expressly relieved and released [the contractor] from all accountability and responsibility therefor or in any way connected therewith."[73] Subse-

65. *See* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 553 (1999).

66. J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1200 (Fed. Cir. 1988); K & R Eng. Co. v. United States, 616 F.2d 469, 477 (Ct. Cl. 1980); Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 ASBCA LEXIS 20, at *18 (Jan. 30, 2001) (contract obtained through bribery "is void ab initio and cannot be ratified"); *see* Godfrey v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993).

67. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 (4th Cir. 1999); *see* United States *ex rel.* Schwelt v. Planning Research Corp., 59 F.3d 196, 199 (D.C. Cir. 1995). An example of a fraud-in-the-inducement case occurs when the contract was obtained through collusive bidding. *Harrison*, 176 F.3d at 787 (citing United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943)); *see* Medina, S.A., No. PCC-142, 2000 Eng. BCA LEXIS 8, at *21 (Jan. 11, 2000) (Contract modification obtained by bribing the CO "was tainted by wrongdoing at its inception. As such Mod 4 is void ab initio.").

68. *Harrison*, 176 F.3d at 787 (citing *Hess*, 317 U.S. at 543-44).

69. United States v. EER Sys. Corp., 950 F. Supp. 130, 134 (D. Md. 1996) ("The last sentence of § 605(a) expresses Congress' intent that all government contract disputes involving fraud were not to be affected by the CDA."); *see also* Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 544-45 (Fed. Cir. 1988); United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996); United States v. JT Constr. Co., 668 F. Supp. 592, 594 (W.D. Tex. 1987).

70. *See, e.g.*, Appeal of Hardrives, IBCA-2319, 1991 IBCA LEXIS 19, at *17 (Feb. 6, 1991) (The last sentence of 41 U.S.C. § 605(a) was "unclear. For example, the terms 'settle, compromise, pay, or otherwise adjust' do not include the word 'decide.'").

71. *See* UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) ("Moreover, the contracting officer was without authority to *determine* fraud without referral to the Department of Justice.") (emphasis added); Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 549 n.11 (1999) ("not 'to *decide* or *settle*'") (emphasis added; citation omitted); United States v. United Techs. Corp., No. C-3-99-093, 2000 U.S. Dist. LEXIS 6219, at *9 (Mar. 20, 2000) ("[c]onsistent with the limitations expressed in section [605(a),] excluding issues of fraud against the United States from the authority of contracting agencies to *consider or resolve*") (emphasis added; citing legislative history of the CDA); TDC Mgmt. Corp., 1989 DOT BCA LEXIS 26, at *25 (Oct. 25, 1989) (CO's decision authority under the CDA does not apply to "fraud determinations"); 41 U.S.C.A. § 604 (West 2002), Historical and Statutory Case Notes ("consider or resolve"); Report of the Acquisition Law Advisory Panel to Congress, sect. 2.6.7.1, at 2-177 (Jan. 1993) (Section 605 "does not permit the contracting officer to *resolve* any claim involving fraud") (emphasis added); *cf.* United States v. U.S. Cartridge Co., 78 F. Supp. 81, 83-85 (D. Mo. 1948) ("a Contracting Officer has no authority to *determine* or settle liability"), 85 ("without authority in law to settle and *dispose of* the liability") (emphasis added).

72. 78 F. Supp. 81, 84 (D. Mo. 1948), *aff'd*, 198 F.2d 456 (8th Cir. 1952).

73. *Id.* at 82.

quently, the United States brought suit alleging that the contractor had submitted false claims before the contract termination associated with the production of defective ammunition.[74]

In defense, the contractor posited that the CO was authorized to resolve contractual disputes, including factual disputes, which he did in the contractor's favor. Additionally, the contractor argued that the CO had "compromised and finally settled" all matters raised in the government's complaint and had "released the defendant from all liability for any act mentioned in the complaint."[75] The court rejected these arguments, holding that the CO lacked authority to either "determine or settle liability."[76]

Some in the procurement fraud community have read the term "compromise" very broadly to inhibit COs or other agency procurement officials from taking any action that would create potential evidentiary issues, defenses, or otherwise undermine the successful litigation of a procurement fraud case. There is good reason for their concern. To illustrate, there is a danger that statements of government employees concerning the fraudulent claim may be admitted as admissions against the United States if the trial judge determines that the statements "concern a matter within the scope of the agency or employment made during the existence of the relationship."[77] Even though COs cannot waive fraud, if the CO or other relevant officials allow nonconforming goods or services to be provided, the contractor may acquire a defense to any subsequent FCA lawsuit.[78]

The term compromise, however, does not appear to extend that far, at least at the pre-complaint or pre-indictment stage.[79] The legislative history of the CDA indicates that Congress used the term "compromise" in two contexts: (1) that the CDA did not affect "the current procedures being used for 'compromising' claims as identified under 31 U.S.C. [§] 952"; and (2) the agency's prohibition on compromising claims currently contained in section 605(a).[80] The term compromise appears to be more synonymous with "resolve" or "settle" than with "jeopardize" or "undermine."[81] To some extent, the Department of Defense (DOD) has addressed the legitimate concerns of the procurement fraud community that the CO's actions will somehow undermine a fraud investigation or subsequent litigation by requiring advanced notice and coordination of remedies.[82]

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74. United States v. U.S. Cartridge Co., 198 F.2d 456, 458 (8th Cir. 1952).

75. *U.S. Cartridge Co.*, 78 F. Supp. at 83.

76. *Id.* at 83-85.

77. Federal Rule of Evidence (FRE) 801(d)(2)(D); *cf.* United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996) (FRE 801(d)(2)(D) applies to the federal government as a party opponent in a criminal case); United States v. Am. Tel. & Tel. Co., 498 F. Supp. 353, 356-58 (D.D.C. 1980) (FRE 801(d)(2)(D) applies to the United States as a party). *But cf.* Cooper Agency v. McLeod, 247 F. Supp. 57, 60 (E.D.S.C. 1965) (United States not bound by oral concession of agent acting outside scope of his authority).

78. Robin P. West, *Handling the False Claims Act Case*, 9 PRACTICAL LITIGATOR 45, 57 (Mar. 1998) ("Defendants have on a number of occasions successfully argued that a claim cannot be 'knowingly false' if the government acquiesced in allegedly false billings, using the rationale that if the government acquiesces, a defendant lacks the requisite knowledge that he is billing falsely. . . . Other cases reject this view . . . .").

79. Once litigation is actually pending, the DOJ's authority to control agency action that may affect the outcome of the case is much more extensive. Executive Bus. Media v. U.S. Dep't of Def., 3 F.3d 759, 762 n.1 (4th Cir. 1993) ("when the Attorney General represents an agency in litigation, it is the Attorney General, rather than the agency, who has the final authority to determine the litigation position of the United States") (citation omitted); *see also infra* notes 83-84 and accompanying text.

80. S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5253. 31 U.S.C. § 952 is now codified at 31 U.S.C. §§ 3701, 3711, 3717-3718. 31 U.S.C.A., tbl., at xxv (West 1983).

81. The CDA's legislative history indicates that the term was added to section 605(a) in response to concerns that within the proposed legislation "current procedures such as excluding fraud from the disputes process, the limitations now imposed on compromise, and the role of the Justice Department were not spelled out." S. REP. NO. 95-1118, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5239. Then existing law addressing the government's ability to compromise included Executive Order (EO) 6166, which confirmed the DOJ's authority over any case referred to it. United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283, 1287 (4th Cir. 1978) ("The Attorney General's authority to *compromise* or settle any case referred to the Department of Justice was expressly confirmed by § 5 of Executive Order No. 6166, June 10, 1933, 5 U.S.C. § 901.") (emphasis added); *see also* Halbach v. Markham, 106 F. Supp. 475, 480 (D. N.J. 1952) ("authority to compromise Government litigation"), *aff'd*, 207 F.2d 503, 504 (3d Cir. 1953) (Attorney General and Alien Property Custodian "were legally authorized to make the compromise settlement in question"); *accord* United States v. Sandstrom, 22 F. Supp. 190 (N.D. Okla. 1938). Executive Order 6166 states in relevant part:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to *compromise*, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

5 U.S.C.A. § 901 note, at 263 (West 1983) (emphasis added). The current language precluding settlement or compromise of claims involving fraud was added to clarify what is now section 605(a). S. REP. NO. 95-1118, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5242.

82. *See infra* notes 95-97 and accompanying text.

Litigation

It is axiomatic that, absent "explicit statutory language vesting independent litigation authority in another agency," once the United States, or one of its client agencies, is embroiled in litigation, the DOJ possesses exclusive authority to control the case.[83] Inherent in the DOJ's authority to control litigation is its authority to settle.[84] Furthermore, the DOJ's litigation authority "includes the power to determine all decisions concerning whether to defend an action, and, if so, in which manner to defend it."[85] Significantly, "if the Department of Justice is defending a CO's decision, the CO lacks jurisdiction to render a decision on the same claim."[86] Indeed, this legal maxim has been extended to preclude "the contracting officer from taking any action on a claim that is the subject of pending litigation."[87]

For purposes of triggering the DOJ's exclusive statutory authority over a case, "[l]itigation becomes pending upon the filing of a complaint with the court."[88] Some courts have noted that the DOJ's litigation authority does not extend to other matters not yet pending, even if related.[89] The legislative history of the CDA, however, suggests that for fraud claims, Congress intended that the DOJ control the matter from the point of agency referral. Specifically, the legislative history noted that "language was added to prohibit agency heads from 'settling [or] compromising . . .' claims independent of the legal or contractual merits of the claims after the claims *have been referred to the Attorney General* or litigation has commenced."[90]

If not as a matter of law, then certainly as a matter of policy, the DOJ's exclusive authority should extend before the point that it actually files a civil complaint or obtains a criminal indictment. The Justice Department should be able to control agency action affecting potential litigation at the point it becomes actively involved with a criminal or civil case.

From a policy perspective, sound reasons exist supporting expanded DOJ authority during periods of pre-filing investigation. Even though the specific claim involving fraud may affect only a single contract from an individual agency, the underlying fraud may permeate numerous contracts from several different agencies, both within and without the DOD. A centralized authority is necessary to determine if fraud exists; otherwise subsequent litigation may be handicapped by different agencies taking inconsistent positions on the same alleged misconduct. As the authors of one legal treatise observed: "Because these [Government] agencies are run by different people, one agency may conclude that fraud has occurred and that the Government was significantly damaged. Another agency, looking at essentially the same facts, but different contracts, may reach an opposite conclusion."[91]

As a centralized litigation authority, the DOJ can "coordinate the legal involvements of each 'client' agency with those of other 'client' agencies as well as with the broader legal interests of the United States overall."[92] Further, because criminal, civil, administrative, and contractual remedies may be pursued concurrently in a procurement fraud case, the potential exists for one remedy to interfere with another; such as when government officials prematurely seek or disclose evidence, or when they assert conflicting or inconsistent legal theories, factual positions, or damages calculations.[93] A coordinated govern-

83. Mehle v. Am. Mgmt. Sys., Inc., 172 F. Supp. 2d 203, 205 (D.D.C. 2001) ("Only explicit statutory language vesting independent litigation authority in another agency creates an exception to [28 U.S.C. § 516]."); Johnson Controls World Serv., Inc. v. United States, 43 Fed. Cl. 506, 510 (1999) ("Once a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation.") (citation omitted); *see also* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 552 (1999); *accord* Exec. Order No. 6166, 5 U.S.C.A. § 901 note, at 263; United States *ex rel.* Johnson v. Shell Oil, 34 F. Supp. 2d 429, 432 (E.D. Tex. 1998) ("Further, according to Executive Order 6166 . . . the Department of Justice has exclusive authority over civil fraud claims.").

84. United Techs. Corp., ASBCA No. 46880, 95-2 BCA ¶ 27, at 698; *Settlement Authority of the United States in Oil Shale Cases*, 4B Op. O.L.C. 756 (1980).

85. Durable Metals Prods., Inc. v. United States, 21 Cl. Ct. 41, 45-46 (1990).

86. *Johnson Controls*, 43 Fed. Cl. at 510; *see also* Case, Inc. v. United States, 88 F.3d 1004, 1009 (Fed. Cir. 1996) ("The 'exclusive authority' given to the Department of Justice 'divests the contracting officer of his authority to issue a final decision on the claim.'") (citation omitted).

87. Volmar Constr., Inc. v. United States, 32 Fed. Cl. 746, 757 (1995); *see* Ervin & Assocs., Inc. v. United States, 44 Fed. Cl. 646, 654 (1999) ("divests the contracting officer of any authority to rule on the claim"); Medina Constr., Ltd., 43 Fed. Cl. 537, 552 (1999) ("divests the CO of authority to act in the matter").

88. *Ervin & Assocs.*, 44 Fed. Cl. at 654 (citing Sharmon Co. v. United States, 2 F.3d 1564, 1571 (Fed. Cir. 1993), *rev'd in part on other grounds*, Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

89. *Johnson Controls*, 43 Fed. Cl. at 511; Hughes Aircraft Co. v. United States, 534 F.2d 889, 901 (1976) ("In our view, it is limited to the conduct of pending litigation against the Government, and does not encompass exclusive control of other matters which, albeit related, are not yet so pending.").

90. S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5242 (emphasis added); *see id.* at 5253 ("It is not the intent of this section to change the current procedures for settlement of claims by the Justice Department once the claim has been turned over to that body or litigation has commenced in court."); *cf.* United States v. Sandstrom, 22 F. Supp. 190, 191 (N.D. Okla. 1938) ("[Executive Order] 6166 invests in the Attorney General the exclusive control of any case after it has been referred to his department.").

91. HELMER, LUGBILL & NEFF, *supra* note 18, at 261.

92. *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 54 (1982).

ment approach, with the DOJ as the authoritative head of the government's efforts, will serve to avoid these remedial conflicts.[94]

At present, the DOD requires only advanced coordination with the DOJ during the prelitigation stage of a procurement fraud case. *Department of Defense Directive 7050.5* states only that "advanced knowledge" of applicable contractual and administrative action be provided to DOJ legal counsel.[95] Current Army policy mandates not only prior coordination with the DOJ,[96] but also "cooperation" and "reasonable deference," at least with respect to criminal investigations.[97] In recent years, however, the Army practice appears to be one of deference to the DOJ's litigation-related desires during the pre-filing stage of procurement fraud cases. Similarly, once the DOJ accepts a procurement fraud case with a view towards prosecution, the Navy's practice has been to relinquish control of the investigation to the federal prosecutor.[98] Although committed to the simultaneous pursuit of criminal, civil, and administrative remedies, the Air Force has historically deferred to the DOJ on litigation-related matters, given priority to the pursuit of criminal proceedings, and coordinated administrative actions with the DOJ to avoid potential conflict.[99]

Significantly, even if the DOJ lacks statutory authority to control the conduct of potential litigation during the pre-filing stage, other statutory and regulatory restrictions on the CO's authority will force the same result, at least in part. An ongoing DOJ investigation of alleged fraud will trigger or continue the prohibition against a CO settling, compromising, paying, or adjusting the claim under investigation.[100] Further, as noted above, DOD regulations mandate advanced coordination with the DOJ before any contractual or administrative action is taken. Finally, because the penultimate sentence of section 605(a) removes FCA and section 604 claims and disputes from the CO's authority, only the DOJ can ultimately "'administer, settle, or determine' such claims or disputes.'"[101] Any CO resolution of a claim involving fraud that ultimately ripens into the basis for an FCA lawsuit or counterclaim, or a government counterclaim brought under the anti-fraud provision of the CDA (section 604), would be *ultra vires* and not binding on the United States.[102]

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93. Colonel Jerald D. Stubbs, *Fighting Fraud Illustrated: The Robins AFB Case*, 38 A.F. L. Rev. 141, 161, 164, 167 (1994).

94. *See id.* at 156-76 (advocating a coordinated team approach with priority given to pursuit of criminal remedies).

95. U.S. Dep't of Defense, Dir. 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities para. 4.3 (June 7, 1989).

> During an investigation and before prosecution or litigation, and when based in whole or in part on evidence developed during an investigation, ["appropriate civil, contractual, and administrative actions"] shall be taken with the advance knowledge of the responsible DoD criminal investigative organization and, when necessary, the appropriate legal counsel in the Department of Defense and the Department of Justice (DoJ).

Id.

96. *Army Regulation 27-40* states: "In cases which are pending review or action by DOJ, [procurement fraud advisors] *should* coordinate with the DOJ attorney handling the case prior to initiating any contractual or administrative remedy. In the case of ongoing criminal investigations, this coordination *will* be accomplished through the appropriate DOD criminal investigation organization." AR 27-40, *supra* note 6, para. 8-10(b) (emphasis added).

97. *Id.* para. 8-5(d) ("All personnel will cooperate to ensure that investigations and prosecutions of procurement fraud are completed in a timely and thorough manner.") ("When the conduct of criminal investigations and prosecutions conflict with the progress of procurements, reasonable deference will be given to criminal investigators and prosecutors whenever possible.").

98. *See* GAO/NSIAD-97-117, *Naval Criminal Investigative Service: Fraud Interview Policies Similar to Other Federal Law Enforcement Agencies* 7 (Apr. 1997).

> According to the Navy's General Counsel, once a case is accepted for prosecution in federal court, the Assistant U.S. Attorney assumes responsibility for the investigation and determines the need for further investigation, the witnesses who will be interviewed, and the timetable for referring the case to the grand jury for indictment.

Id.; *cf.* Weststar Eng'g, Inc., ASBCA No. 52484, 2002 ASBCA LEXIS 14 (Feb. 14, 2002) (after the U.S. Attorney's Office began a civil investigation, the Navy ceased negotiations of the contractor's Request for Equitable Adjustment, at the direction of DOJ).

99. *See* Stubbs, *supra* note 93, at 156-57, 164, 177; Steven A. Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, Rep. 4, 8-9 (Mar. 1999).

100. *See* UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999); Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 550 (1999); Appeal of TRS Research, 2000 ASBCA LEXIS 162, at *12 & n.2 (Oct. 24, 2000).

101. Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 548 (Fed. Cir. 1988) ("Section 605(a) does not limit the CO's authority only if another federal agency has exclusive authorization under a statute or regulation. Rather, the penultimate sentence of section 605(a) requires only that another federal agency (in this case the Department of Justice) have *specific* authority to 'administer, settle, or determine' such claims.").

102. *See, e.g.*, United States v. Nat'l Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956) ("[W]e do not believe that the Congress ever intended that contracting officers should have the power to vitiate the False Claims statute.").

Post-Declination

A thorny area of the law concerns the authority of the CO to settle, compromise, pay, or adjust a claim found fraudulent by law enforcement officials,[103] but declined criminally and civilly by the DOJ.[104] This situation is not unusual and may arise in a number of different circumstances. The allegations of fraud may be supported by the evidence, but the attorney handling the case may believe that the requisite level of evidence does not exist to win at trial and/or may believe that the case, although supported by sufficient evidence, lacks jury appeal. Also, the fraudulent nature of the claim may have been discovered before disbursement of any government funds. Accordingly, the DOJ may determine that the minimal monetary liability or likely criminal sentence does not warrant the expenditure of its limited resources to pursue the case.[105]

The declination scenario casts COs into a gray area of the law. The determination by law enforcement agents that fraud exists triggers the loss of CO authority, but the ultimate resolution of the claim may be paralyzed by the DOJ's election not to pursue the case. Contracting officers in such a situation may perceive themselves as having to choose between potentially acting *ultra vires* to resolve the claim, or risk angering the parent agency or a subsequent reviewing tribunal by doing nothing.[106]

Unfortunately for the CO, the available law in this area indicates that a CO may not unilaterally resolve a claim found fraudulent by investigative agents, but declined by the DOJ. As discussed earlier, in *Medina*, the court determined that the CO was prohibited from resolving the contractual dispute while an ongoing AFOSI investigation was in process, even though the DOJ had declined to prosecute the case.[107] In that case, the fraud was unproven at the time of the initial DOJ declination.[108] It follows then that if a criminal investigative organization determines that a claim is fraudulent, the statutory and regulatory prohibition against resolving the claim remains, even though the DOJ has elected not to pursue the matter in court. In short, the mere fact that the DOJ has declined to pursue a claim involving fraud does not, by itself, lift the statutory and regulatory restrictions on the CO's authority to resolve the claim.

At least one good policy reason exists to support the retention of exclusive DOJ authority over the claim, even when the DOJ elects not to exercise its authority. The possibility remains that the contractual dispute, or a related dispute involving the same or different agency, may be raised at a later time in a different forum. The United States must preserve its ability to raise fraud as a defense or counterclaim in any such proceeding.

Further, it has been suggested that law enforcement officials within an agency may reconsider a finding of fraud in response to a DOJ declination. For example, Army Criminal Investigative Division (CID) could reevaluate the available evidence and change its characterization of the allegations from "founded" to "insufficient evidence," or a reviewing attorney may opine that the offense is unsubstantiated.[109] This course of action is fraught with peril. Agency officials may elect to determine that fraud does not exist for collateral reasons that are not dependent upon a determination that the claim is untainted by fraud. Additionally, the DOJ may be placed in an awkward litigation position if it subsequently raises fraud as a defense or counterclaim only to learn that the agency has determined that no such fraud exists.

The best course of action is for the CO to coordinate any contractual remedies with both the Army Procurement Fraud

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103. Army CID will make an investigative determination that an allegation of fraud is "founded" if it believes a criminal offense has been committed. Ham, *supra* note 40, at 1 n.7. Alternatively, Army CID may determine that the offense did not occur ("unfounded") or that insufficient evidence exists to make a determination. *Id.*

104. Presumably, once the relevant law enforcement agency has determined that the allegations of fraud are unfounded, the claim is no longer one involving fraud and the statutory and regulatory restrictions on the CO are lifted.

105. Under the False Claims Act, the United States may recover civil penalties and three times the amount of actual damages proven at trial. 31 U.S.C. § 3729(a) (2000); *In re* Schimmels, 85 F.3d 416, 419 n.1 (9th Cir. 1996); *see* United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty."). Absent actual damages, the United States may recover civil penalties between $5500 and $11,000 for each false claim or statement submitted to the United States. 28 C.F.R. § 85.3(9) (2000). In criminal procurement fraud cases, a significant sentencing consideration under the federal sentencing guidelines is the amount of loss. UNITED STATES SENTENCING COMMISSION, COMMISSION MANUAL sect. 2B1.1 (Nov. 2001). The Guidelines increase the offense level on a graduated scale for any loss exceeding $5000, up to a twenty-six level increase. *Id.* sect. 2B1.1(b). Before 1 November 2001, the amount of loss was calculated under section 2F1.1, which has now been consolidated with section 2B1.1. *See id.* sect. 2F1.1 [Deleted], Historical Note.

106. *Cf.* E.W. Eldridge, Inc., No. 5269-F, 1991 Eng. BCA LEXIS 19, at *14 (Aug. 30, 1991) ("The Board notes that the Government had initiated a fraud investigation of the Contractor in 1984 and the Respondent informed the Board in December, 1987, that no action would be taken as a result of the fraud investigation. This continued allegation of fraud as a supposed defense pursued by Respondent bewilders, angers actually, the Board, since the Government has failed to follow up its own investigation with any timely or official action.").

107. 43 Fed. Cl. 537, 543, 550 (1999).

108. *Id.* at 543.

109. An investigative determination of "insufficient evidence" means that CID is unable to determine if the offense occurred or is unable to establish probable cause that a specific entity committed the offense. Ham, *supra* note 40, at 1 n.7 (citing CID REG. 195-1, *supra* note 40, para. 7-25c(3)(a)-(b)). After the investigation is complete, the CID agent must coordinate with an attorney to determine if, based on probable cause, the offense is substantiated. *Id.* at 1.

Division (PFD) (or other applicable agency equivalent) and with a representative from the civil section of the DOJ or U.S. Attorney's Office that declined the case. Army PFD is charged with monitoring all significant Army fraud cases and coordinating applicable remedies,[110] and may be aware of actual or potential litigation involving the claim in another forum, in which fraud may be raised as a defense, counterclaim,[111] or as the basis for affirmative litigation. Having the DOJ approve the CO's proposed course of action should satisfy the requirements of the CDA and the FAR, and legitimize any CO's final decision.[112]

Permissible Contractual and Administrative Remedies

To the extent this area of the law enjoys some clarity, it is in the fact that a large number of contractual and administrative remedies are available to the CO in response to fraudulent claims during the investigative stage of a procurement fraud case. Beyond those limited actions that constitute settling, paying, compromising, or adjusting a claim, few legal constraints exist on the CO's authority. As a general rule of thumb, the CO may safely assume that most adverse actions taken against a contractor suspected of fraud will not run afoul of the statutory and regulatory restrictions on the CO's authority for claims involving fraud. Within this zone of contractual remedies include: (1) discontinuing settlement negotiations "related to the settlement of a terminated contract;"[113] (2) withholding payment of claims suspected of being fraudulent;[114] (3) denying the claim;[115] (4) terminating the contract for default;[116] and (5) determining the contractor nonresponsible.[117]

Indeed, the unsettling recent decision of the COFC in *Lion Raisins, Inc. v. United States*[118] has provided agencies with an incentive to make COs aware of the existence of fraud investigations and to encourage them to rely on such investigations for nonresponsibility determinations. In *Lion Raisins*, the COFC

110. AR 27-40, *supra* note 6, para. 8-2(c).

111. Additionally, albeit rarely used, the Army PFD may elect to pursue administrative action against the contractor under the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812 (2000). AR 27-40, *supra* note 6, para. 8-12.

112. "A contracting officer's final decision is invalid when the contracting officer lacked authority to issue it." Case, Inc. v. United States, 88 F.3d 1004, 1009 (Fed. Cir. 1996). Further, "an invalid final contracting officer's decision may not serve as the basis for a CDA action." *Id. See also* Ervin & Assocs., Inc. v. United States, 44 Fed. Cl. 646, 655 (1999). If the CO lacks authority to issue a final decision, "there can be no valid deemed denial of the claim so as to confer CDA jurisdiction under 41 U.S.C. [§] 605(c)(5)." *Case*, 88 F.3d at 1009. *See also Ervin & Assocs.*, 44 Fed. Cl. at 656.

113. *See* FAR, *supra* note 2, § 49.106 ("If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations . . . ."); *see also* Medina Constr., Ltd., 43 Fed. Cl. 537, 555 (1999); Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1372 (Fed. Cir. 2000). *But cf.* Gen. Constr. & Dev. Co., ASBCA 36138, 1988 ASBCA LEXIS 200 (May 17, 1988) (contracting officer's initial determination of costs actually incurred, contained within the CO's final decision and clarifying letter, was within the CO's jurisdiction despite alleged fraud and the language of FAR section 33.210(b)).

114. *See* To The Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).

> Furthermore, under the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, it is the plain duty of administrative, accounting and auditing officers of the Government to refuse approval and prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken.

Id. See also Defense Logistics Agency—Request for Advance Decision, Comp. Gen. B-230095, 88-1 CPD ¶ 273 (DLA may withhold payment until allegations of bid collusion are resolved); *cf.* Fraudulent Travel Claims, B-245282, 1992 U.S. Comp. Gen. LEXIS 1173, at *9-10 (Apr. 8, 1992) ("a certifying or disbursing officer has an affirmative duty to withhold payment of any doubtful claims, including those for which there is a reasonable suspicion of fraud") (citing *To The Secretary of the Army*, 44 Comp. Gen. at 110).

If the agency remedy coordinating official (RCO) finds that substantial evidence exists to believe that a contractor's payment request is based on fraud, he must recommend to the agency head, or delegated official, that the contractor's progress payments be reduced or suspended. 10 U.S.C.A. § 2307(I)(1) (West 1998 & Supp. 2001); *see* FAR, *supra* note 2, § 32.006-4(a). The agency head may take such action if he determines that substantial evidence of fraud in fact exists. 10 U.S.C.A. § 2307(I)(2); FAR, *supra* note 2, § 32.006-1(b), -4(c). Within the Army, this authority has been delegated to the Assistant Secretary of the Army (Acquisition, Logistics and Technology). AFARS, *supra* note 6, § 5132.006-1. The Army's RCO is the Chief, Procurement Fraud Division. *Id.* § 5132.006-2.

115. Appeal of Hardrives, Inc., IBCA-2319, 1991 IBCA LEXIS 19, at *16 (Feb. 6, 1991) ("such denials of a contractor's claims do not constitute settling, compromising, paying, or otherwise adjusting any claim involving fraud—to the contrary"); *cf.* Application Under the Equal Access to Justice Act Aislamientos y Construcciones Apache S.A., ASBCA No. 45437, 1997 ASBCA LEXIS 235, at *5-6 (Dec. 2, 1997) (although the investigation did not reveal fraud, discrepancies in the contractor's claim "were so pervasive as to justify the position of the Government in denying the claim in total").

116. Defrauding the United States on a contract constitutes "a material breach justifying a termination of the entire contract for default." Ricmar Eng'g, Inc., ASBCA Nos. 44260, 44673, 1997 ASBCA LEXIS 109, at *11 (June 23, 1997) ("A contractor which engages in fraud in its dealing with the government on a contract has committed a material breach justifying a termination of the entire contract for default . . . .") (citing Cosmos Eng'g, Inc., ASBCA No. 23529, 84-2 BCA ¶ 17, at 268); *see* Stubbs, *supra* note 93, at 159 (may cancel the contract); *see also* Joseph Morton Co. v. United States, 3 Cl. Ct. 120, 122 (1983), *aff'd*, 757 F.2d 1273, 1279 (Fed. Cir. 1985); Umpqua Excavating & Paving Co., AGBCA No. 84-185-1, 1990 AGBCA LEXIS 41, at *31 (Oct. 26, 1990); Michael C. Avino, ASBCA No. 31752, 89-3 BCA ¶ 22, at 156.

held that the U.S. Department of Agriculture (USDA) acted arbitrarily and capriciously when its Suspension Authority suspended a contractor after USDA COs had previously found the contractor responsible.[119]

The court's opinion is particularly unsettling for two reasons. First, the COFC appears to posit that an individual CO's responsibility decision binds an agency for purposes of determining whether a contractor is responsible in the suspension and debarment context.[120] Second, the court appears to extend the collective knowledge doctrine to the USDA by imputing the knowledge of an agency investigation to the COs.[121] Significantly, the court's opinion failed to indicate whether the COs, which found Lion Raisin a responsible contractor for five contracts following the initial agency investigation, were even aware of the investigation, its result, or the underlying basis for the allegations. Notwithstanding the CO's apparent ignorance of these facts, the court found that the *agency* had determined that the contractor was responsible, following the completion of an initial agency investigation, because these individual COs had made responsibility determinations.[122] If the COFC actually intended to reach the conclusions that its opinion suggests, then the mere existence of an investigation will require a non-responsibility determination,[123] and agencies will more readily publicize the existence of ongoing investigations to their COs.

Agencies may certainly take administrative action to suspend or debar the fraudulent contractor, or any of its employees, subject only to meeting the FAR's requirements for taking such action.[124] In addition to serving to protect the integrity of the procurement system, suspension or proposed debarment would be consistent with any future DOJ litigation position that the United States had been defrauded in some manner. Further, responsible contractors faced with the potential loss of future government business will be encouraged to identify miscreant employees, correct any systemic problems giving rise to the fraud, and cooperate with the government's investigation and subsequent litigation.[125] Because the suspension and debarment process requires notice to the contractor and the release of some information,[126] however, advanced coordination with the assigned DOJ attorney, if applicable, or some other authoritative body is critical.[127]

Remaining constraints are generally policy driven, such as the requirement for advanced notice and coordination of remedies so that contractual and administrative actions do not interfere with fraud investigations and subsequent litigation. Also,

117. FAR, *supra* note 2, § 9.104-1; *see also* Garten-und Landschaftsbau Gmbh Frank Mohr, B-237276-7, 1990 U.S. Comp. Gen. LEXIS 189 (Feb. 13, 1990) (protest denied; CO determined contractor had an unsatisfactory record of business integrity based on information obtained during Army CID and German investigations). Repeated nonresponsibility determinations, however, may constitute an impermissible de facto debarment or suspension. *Garten-und*, 1990 U.S. LEXIS 189, at *8; *cf.* TLT Constr. Corp. v. United States, 50 Fed. Cl. 212, 215 (2001) ("De facto debarment occurs when an agency bars a contractor from competing for government contracts for a period of time without following the applicable debarment procedures found in the Federal Acquisition Regulations.").

118. 51 Fed. Cl. 238 (2001).

119. *Id.* at 249.

120. *See id.* at 247, 248 n.7, 249. *But cf.* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1339 (Fed. Cir. 2001) ("The decision at issue [a responsibility determination] is not the decision of the agency or agency head, but the decision of the contracting officer—an individual within the agency.").

121. Pursuant to the collective knowledge doctrine, an entity is charged with all the knowledge of any of its employees who are acting within the scope of their employment. *See, e.g.*, United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987) (criminal case); United States v. U.S. Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (FCA case).

122. *Lion Raisins, Inc.*, 51 Fed. Cl. at 247.

123. The CO must make an "affirmative determination of responsibility." FAR, *supra* note 2, § 9.103(b). "In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall male a determination of nonresponsibility." *Id. But cf.* Computer Data Sys., Inc. v. Dep't of Energy, GSBCA No. 12824-P, 1994 GSBCA LEXIS 481, at *150 (July 15, 1994) (CO is not required to make nonresponsibility determination based on knowledge of an ongoing investigation; "[p]rotestor has cited no statute, regulation, or other authority which has been violated by the contracting officer in declining to rely on open investigations or a settlement").

124. *See, e.g.*, Russek & Burkhard Gmbh, Gebaudereinigung, B-244692.2, 1991 U.S. Comp. Gen. LEXIS 994 (Aug. 27, 1991) (protest denied; Army suspension upheld based on statements made by contractor to German police during ongoing investigation); *see generally* FAR, *supra* note 2, subpt. 9.4.

125. *See, e.g.*, Stubbs, *supra* note 93, at 146 (contractor suspended). "The Air Force made it plain to [the contractor] that ending the suspension depended in part, on the company's willingness to cooperate in the Government's investigation and to make restitution. Cooperation is a legitimate factor in debarment and suspension decisions." *Id.* at 160 (citing FAR, *supra* note 2, §§ 9.406-1(a)(4)-(5), 9.407-1(b)(2) (1992)).

126. FAR, *supra* note 2, §§ 9.406-3(c) ("[a] notice of proposed debarment shall be issued"), 9.407-3(c) ("[w]hen . . . suspended, they shall be immediately advised"); *see* Stubbs, *supra* note 93, at 164; *cf. Lion Raisins, Inc.*, 51 Fed. Ct. at 248 ("The court does not disagree with the proposition that '[t]here may be circumstances where substantial Government interests would be prejudiced even by disclosure of enough facts to show 'adequate evidence' for the suspension.'") (citation omitted); Horne Brothers Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972) ("There may be reasons why the Government should not be required to show any of its evidence to the contractor, particularly reasons of national security, or, more likely, the concern that such a proceeding may prejudice a prosecutorial action against the contractor.").

127. *See supra* notes 93-97 and accompanying text. The FAR contemplates coordination with the DOJ before a hearing for fact based suspensions. *See* FAR, *supra* note 2, § 9.407-3(b)(2).

CO action is restricted by various practical limitations, such as being able to meet the government's burden of proof if any action is challenged before the completion of the investigation or initiation of litigation. Accordingly, one particularly salient consideration for the agency is determining when, and under what circumstances, the agency or CO may employ these remedies.

Agency regulations provide little guidance on the issues of timing and proof. For example, *AR 27-40* lists twelve contractual and six administrative remedies to "be considered in response to *confirmed* fraudulent activity."[128] Unfortunately, *AR 27-40* does not explain when the fraudulent activity has been "confirmed" or by whom. One would think that the fraud has been confirmed following a judicial determination to that effect, but the follow-on regulatory provision encourages DOJ coordination for "cases which are pending review or action by DOJ" and "[i]n the case of an ongoing investigation."[129] When read in its entirety, the section suggests that fraud can be "confirmed" well short of a civil judgment or criminal conviction.

One particular contractual option that does not violate the statutory and regulatory restrictions on the CO, but which raises important timing and proof considerations, is revocation of acceptance. A CO may revoke acceptance based on latent defects, fraud, or gross mistakes amounting to fraud.[130] The decision to revoke acceptance implicates timing considerations during a procurement fraud investigation. First, the revocation must occur in a timely manner,[131] but it may be necessary to delay revocation so as not to alert the contractor prematurely or to obtain the requisite proof to support such action.[132] The nonconforming nature of the goods does not, by itself, constitute fraud or support revocation.[133] Delaying revocation for a reasonable period to determine if the parts are indeed nonconforming, or during the pendency of an investigation, should not prejudice the government's right to revoke acceptance.[134]

After the revocation, the United States enjoys a number of additional rights, including having the contractor replace or repair the defective goods.[135] Requiring the replacement of defective goods should only be accomplished after prior coordination with applicable law enforcement officials, the procurement fraud advisor, and/or the assigned DOJ attorney. The defective parts must be preserved as evidence of fraud.[136] Further, replacement or repair of nonconforming goods may inject an unnecessary quantum issue in the damages portion of any subsequent litigation.[137] Finally, depending upon the DOJ's litigation strategy, permitting replacement or repair may be inconsistent with, and undercut, the government's case with a jury.

Conclusion

The normally broad authority of a CO to resolve a contract dispute is severely curtailed for claims involving fraud. This loss of authority, which is grounded in both statutory and regu-

128. AR 27-40, *supra* note 6, para 8-10(a) (emphasis added). *Cf.* SECNAVINSTR. 5430.92A, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY encl. 1 (20 Aug. 1987) ("Examples of Civil, Contractual, and Administrative Remedies That Can Be Taken in Response to *Evidence* of Procurement Fraud.") (emphasis added).

129. AR 27-40, *supra* note 6, para. 8-10(b).

130. Chilstead Bldg. Co., ASBCA No. 49548, 2000 ASBCA LEXIS 163, at *21-22 (Aug. 30, 2000); *see also* FAR, *supra* note 2, §§ 52.246-2(k) ("Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract."), 246-7(f); *see id.* § 52.246-3(h)(1), -6(h)(1); *see generally* CIBINIC & NASH, *supra* note 31, at 872-76.

131. *Chilstead Bldg. Co.*, 2000 ASBCA LEXIS 163, at *23 ("Revocation of acceptance must be done within a reasonable time after the latent defect, gross mistake, or fraud is discovered, or could have been discovered with ordinary diligence."); Ordinance Parts & Eng. Co., ASBCA No. 40293, 90-3 BCA ¶ 23, at 141; *see* Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672, 674 (2000) (latent defect).

132. To sustain a revocation of acceptance based on fraud, the United States must prove, by a preponderance of the evidence, "(1) a misrepresentation of a material fact; (2) an intent to deceive; and (3) reliance on the misrepresentation by the government to its detriment." BMY-Combat Sys., Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 116 (1997); *see Chilstead Bldg. Co.*, 2000 ASBCA LEXIS 163, at *24-25 (similar criteria before the boards of contract appeals); CIBINIC & NASH, *supra* note 31, at 872. For gross mistake amounting to fraud, the elements are essentially the same, except that the United States is not required to prove intent to deceive or mislead. *BMY-Combat Sys. Div.*, 38 Fed. Cl. at 123; *Chilstead Bldg. Co.*, 2000 ASBCA LEXIS 163, at *25; CIBINIC & NASH, *supra* note 31, at 873.

133. CIBINIC & NASH, *supra* note 31, at 873 ("Performance of nonconforming work, in and of itself, does not constitute fraud and overcome final acceptance.") (citing Henry Angelo & Co., ASBCA No. 30502, 87-1 BCA ¶ 19, at 619).

134. Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672, 674-75, 677 (2000); *see* Umpqua Excavation & Paving Co., AGBCA No. 84-185-1, 1990 AGBCA LEXIS 41, at *30 (Oct. 26, 1990) (government did not forfeit right to revoke by waiting until corporate officer pled guilty).

135. CIBINIC & NASH, *supra* note 31, at 881 ("Normally, the Government seeks to have the contractor repair or replace the defective work at the contractor's expense.") (citations omitted); *see* FAR, *supra* note 2, § 52.246-2(l).

136. *Cf.* Stemaco Prods., Inc. ASBCA No. 45469, 1994 ASBCA LEXIS 221, at *13-15 (July 29, 1994) (noting that a criminal Assistant U.S Attorney had instructed the CO to retain defective life preservers as evidence; the board reasoned that normally the goods should be returned following a revocation of acceptance, but the failure to do so does not "automatically negate revocation as a matter of law"). *But cf.* CIBINIC & NASH, *supra* note 31, at 883 ("Upon proper revocation of acceptance, the Government also has the right to return the items to the contractor and demand the return of the purchase price . . . . The work must be returned to the contractor unless it is utterly worthless.") (citations omitted).

latory law, is triggered by the initiation of an investigation and probably as early as when the CO reasonably suspects, or should suspect, that the claim is fraudulent. Furthermore, once the claim becomes the subject of litigation for the DOJ, the CO loses even more authority.

The CO continues to retain authority to administer the contract, and resolve other claims arising from it, with the possible exception of contracts void at their inception. As a matter of policy and practice, however, COs must coordinate their contractual and administrative actions with applicable law enforcement agency and DOJ officials to avoid interfering with ongoing investigations and potential litigation. When responding to suspected procurement fraud, the United States is best served when the contracting and fraud communities coordinate and use the full range of remedies at the government's disposal.

137. Under federal contract law, the contractor is normally credited with any benefit received by the United States resulting from the use of the defective goods or work. CIBINIC & NASH, *supra* note 31, at 883. In some cases, the CO may elect to negotiate "an equitable reduction in price where the Government decides not to have the defect corrected." *Id.* at 882; *see also* FAR, *supra* note 2, § 52.246-2(h). By comparison, in an FCA case, the DOJ will take the position that the defendant is to be credited for any repair or replacement *after* the government's original damages are trebled. *See* United States v. Bornstein, 423 U.S. 303, 314 (1976); United States v. Thomas, 709 F.2d 968, 972 (5th Cir. 1983); United States v. Entin, 750 F. Supp. 512, 519 (S.D. Fla. 1990). As a prophylactic measure, the CO should consider including language that mirrors FAR section 33.210(b), clearly indicating that any replacement or repair does not settle, compromise, or adjust the disputes claim or resolve any fraud matters.