A claim against the US shall be forfeited to the US by any person who corruptly practices or attempts to practice fraud against the United States in the proof, statement, establishment, or allowance thereof. (28 U.S.C. § 2514.)

We've written about this special government defense before. See **this article** , which was a two-parter. In that article, we discussed
Daewoo Engineering and Construction Co., Ltd. v. USA
, a rather infamous case at the U.S. Court of Federal Claims. (Apparently, that is the only legal forum at which the US Government may assert that special defense.) We quoted many parts of the Court's opinion regarding Daewoo's claim; however, the following seems to sum it up nicely:

The Contract Disputes Act requires that an authorized corporate official certify that the contractor's claims are 'made in good faith.' See 41 U.S.C. § 605(c)(1). 'The supporting data must be accurate and complete to the best of [the official's] knowledge and belief, [and] the amount requested [must] accurately reflect[] the contract adjustment for which the contractor believes the government is liable. . . .' Id.

Congress provided that claims against the United States must be certified by an authorized corporate official, to 'discourag[e] the submission of unwarranted contractor claims.' … Plaintiff's Project Manager, Mr. Kim, certified Daewoo's claim. He testified repeatedly that the claim totaled $64 million. He expected the Government to pay the entire amount. …

Daewoo's experts could have performed an important service by checking plaintiff's books and records concerning operating costs and acquisition costs of equipment. They could have found the duplicated and scrapped equipment in the claim …. See *United States v. TDC Mgmt Corp.*, 24 F.3d at 292, 298 (D.C. Cir. 1994) ('[E]very party filing a claim before the contracting officer and this court has a duty to examine its records to determine what amounts the Government already has paid or whether payments are actually owed to subcontractors or vendors. . . . [A] failure to make a minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act.').

As we wrote at the time, Daewoo forfeited its claim because the Court found it to be fraudulent. The Judge noted that "The forfeiture counterclaim carries no monetary penalties other than the

forfeiture itself." However – and this is critical – the Government had other remedies available and Daewoo found itself facing (1) $50 million in civil penalties for filing a false claim under the Contract Disputes Act, and (2) one count of filing a false claim under the False Claims Act. So, not a great outcome for Daewoo. (The decision was affirmed on appeal.)

With all that in mind, let's discuss a recent Department of Justice **press release** , in which it was announced that Islands Mechanical Contractor, Inc. (IMC) had agreed to pay the U.S. $1.1 million to settle allegations that IMC "improperly submitted claims for standby or delay costs associated with construction contracts at Naval Station Guantanamo Bay."

According to the DoJ press release—

IMC agreed to construct a facility at Guantanamo Bay, but delays occurred. IMC submitted requests for equitable adjustment for additional stand-by and delay costs, but the United States alleges that IMC's claims for equipment and labor costs were inflated and based on misrepresented, incomplete, and insufficient data

What was wrong with IMC's REAs?

The Defense Contract Audit Agency (DCAA) determined that the claimed equipment was not needed for the relevant project, the actual age of the equipment did not match the claimed equipment age, and that the equipment was diverted to other projects instead of being placed on stand-by. Similarly, the DCAA found that the workers claimed to be on stand-by were reallocated to other projects, and the payroll records supporting their standby status were falsified.

The moral of the story here is that when one submits a Request for Equitable Adjustment or a claim to a contracting officer, the cost and other data underlying the REA/claim must be as accurate as possible. Treat the REA or claim as if it were a sole-source proposal; and, like most sole-source proposals, expect it to be thoroughly audited. If the audit turns up problems with the data, you should not expect your REA or claim to fare well with the contracting officer.

In extreme cases, you may find yourself negotiating a settlement and paying money when you expected the government to pay you money.