No. 08-09-3 JUN 26 2009

IN THE

Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Contract Disputes Act provides that, "[i]f a contractor is unable to support any part of his claim [for relief under a government contract] and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for *an amount equal to such unsupported part of the claim*." 41 U.S.C. § 604 (emphasis added). In this case, the Federal Circuit concluded that petitioner had submitted a claim for projected damages under a contract without properly determining the scope of the government's fault. The court of appeals held that the government was entitled to a penalty equal to the full amount of petitioner's projected claim under the Act – $50.6 million – as opposed to the far smaller amount by which the projection was actually overstated.

The question presented is:

When a government contractor submits a claim without sufficiently determining the amount of the government's liability, is the proper measure of the penalty the amount of the entire claim or instead the narrower amount by which the claim is found to overstate the government's liability?

RULE 29.6 DISCLOSURES

Petitioner Daewoo Engineering & Construction Co., LTD. states that Kumho Asiana Group owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daewoo Engineering & Construction Co., LTD. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Federal Claims (App. 22a) is published at 73 Fed. Cl. 547 (2006). The opinion of the U.S. Court of Appeals for the Federal Circuit (App. 3a) is published at 557 F.3d 1332 (2009).

JURISDICTION

The court of appeals denied a timely petition for rehearing and rehearing en banc on April 27, 2009. *See* App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

41 U.S.C. § 604 provides:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

STATEMENT OF THE CASE

The United States contracted with petitioner Daewoo Engineering & Construction Co., LTD. (DWEC) to build a road on the island nation of Palau. While the project was underway, DWEC submitted a certified claim alleging that the original contract specifications were flawed and requesting that the government pay certain additional costs, some of which were already incurred and some of which were projected to occur in the future. The Federal Circuit concluded that petitioner had submitted the projected portion of its claim without sufficiently determining the scope of the government's liability. The court of appeals acknowledged that claims for projected costs are permissible and that the legal theories underlying petitioner's projected claim were not themselves fraudulent. Nonetheless, the court of appeals held that the government was entitled to a penalty equal to the entire amount of the projected portion of petitioner's claim, rather than the far smaller amount by which the claim actually overstated the government's liability.

1. Petitioner DWEC is one of the world's leading construction companies. The company is regularly retained to complete projects in some of the most challenging environments in the world. DWEC has been cited as the top domestic contractor by Korea's Ministry of Construction and Transportation (since 2008, the Ministry of Land, Transport and Maritime Affairs) and the Construction Association of Korea on multiple occasions.

In 1999, the United States retained DWEC to build a fifty-three-mile road on the island of Babeldaob in the Republic of Palau. The U.S. Army

Corps of Engineers (Corps) specified to the bidders that the road could be built in 1080 days using the construction methodology specified by the contract. *See* Request for Proposal – Specifications for Palau Compact Road § 800-31. The Corps also specified the amount of weather-related delay the contractor should expect. *See id.* at § 800-1. The Corps failed to fully account, however, for the tremendous volume of rain in Palau, which saturated the ground and seriously impeded the critical construction of earthen embankments. As a consequence, completion of the road took an extraordinary seven years. DWEC ultimately incurred roughly $100 million in losses on the project.

A government contractor may seek to recover unanticipated costs by submitting a "request for equitable adjustment" setting forth a "claim." *See* 41 U.S.C. § 605. During the course of construction, in 2002, DWEC submitted a claim to the Corps. *See* App. 50a. The focus of DWEC's submission was that the Corps had severely underestimated the anticipated weather-related delays that it required DWEC to rely on in preparing its schedule. DWEC maintained that the problem could best be solved through a change in the standard for the "compaction" of soil.

According to DWEC's calculations in its claim, the project would take an extra 928 days to complete beyond the Corps' initial estimate, producing significant cost overruns. DWEC's claim explained that it had incurred 153 days of delay to date, resulting in $13.3 million in "damages incurred." DWEC further stated that, if the contract specifications were not modified, it anticipated a

further 775 days of delay, resulting in "projected damages" of $50.6 million that it "reserve[d] the right" to pursue. Regarding the latter projection, DWEC openly sought to persuade the government to change the construction specifications to avoid the anticipated delays and tens of millions of dollars in costs.

After the Corps' contracting officer denied DWEC's claim, petitioner timely appealed by filing a complaint in the U.S. Court of Federal Claims. *See* 28 U.S.C. § 1491(a)(1). After the close of petitioner's case at trial, the United States asserted, *inter alia*, that DWEC's claim was fraudulent under Section 604 of the Contract Disputes Act. That statute provides for a penalty in strict proportion to the false elements of a claim submitted by a contractor:

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

41 U.S.C. § 604.

The Court of Federal Claims received extensive evidence on the validity of petitioner's claim. DWEC submitted significant evidence that the claim was meritorious.[1] The court found, however, that certain

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[1] *See, e.g.*, U.S. Army Corps of Engineers Briefing dated Nov. 7, 2001; After Action Review dated Nov. 5, 2001; Memorandum for Record from R. Kong dated Jan. 5, 2002; Expert Report of H. Fredrich dated April 30, 2004; Exponent Expert Report dated May 31, 2004; and SKD Engineers Expert Report dated April 30, 2004.

specific components of petitioner's projection were false or inflated. App. 140a n.80. For example, the court found that petitioner improperly measured its cost for acquiring certain replacement equipment based on figures in a government manual rather than its own actual acquisition costs, whereas "rates used in the Manual are generally higher than actual costs." App. 139a.

But the court went further and deemed the entirety of petitioner's projection – even those elements that accurately stated the government's liability – to be "fraudulent" because petitioner's *purpose* in submitting the claim was to persuade the government to change the contract terms. The court reasoned that this purpose rendered the claim a fraudulent "negotiating ploy": DWEC "made the claim for purposes other than a good faith belief that the Government owed Daewoo that amount. Plaintiff in fact did not believe that the Government owed it $64 million as a matter of right." App. 119a. The court reasoned:

> The "part of [the] claim" that is fraudulent without question is $50,629,855.88 [*i.e.*, the projection]. Plaintiff's authorized official certified this claim and presented it to the contracting officer as costs "to be incurred after December 31, 2001." The certifying official, Mr. Kim, testified that he submitted the claim to get the Government's attention. He wanted the Corps to know how much it would cost the Government if [the Corps' official] did not approve the new compaction method that plaintiff preferred.

App. 148a.

The U.S. Court of Appeals for the Federal Circuit, which has exclusive jurisdiction to hear appeals under the Act, affirmed. App. 3a. The court of appeals noted that the trial court had accepted testimony proffered by the government that "*certain specific items* in the incurred costs portion of Daewoo's certified claim, including duplicate costs, overstated equipment costs, and overhead rates, were fraudulent." App. 12a n.5 (emphasis added). But it furthermore recognized that the "portion of the claim found to be fraudulent represented the projected costs of completion of the contract" *in toto*, rather than particular elements found to have been inflated. App. 7a.

The Federal Circuit did not, however, embrace the Court of Federal Claims' view that petitioner's purpose in seeking to persuade the government to change the contract terms was fraudulent, and hence justified imposing damages in the full amount of the projection. Petitioner had argued that it is in fact essential to preserving the public fisc that contractors submit projections in order to alert the government as soon as practicable to projected cost overruns if the contract terms remained unchanged. The government similarly agreed that such "claims for future costs are permissible." App. 8a. The Federal Circuit accordingly accepted that a contractor may permissibly seek projected future costs in a CDA claim. *Ibid.*

The Federal Circuit nonetheless held that the proper measure of the damage award was the entirety of the projection, rather than the assertedly false individual components. The court of appeals acknowledged that the trial court did not find the

legal theories underlying Daewoo's claim to be fraudulent, but rather found the "calculation" of the projected damages to be fraudulent. App. 13a. The court of appeals reasoned that "it is well established that a baseless certified claim is a fraudulent claim." App. 16a. Here, the panel reasoned, petitioner had submitted a claim "without even considering whether there was any contractor-caused delay or delay for which the government was not responsible. The calculation then simply assumed that Daewoo's current daily expenditures represented costs for which the government was responsible." App. 13a. The court of appeals accordingly affirmed the award of more than $50 million and refused to consider petitioner's argument that the Court of Federal Claims erred in finding that individual components of its claim were fraudulent. App. 12a n.5, 16a.

The court of appeals denied petitioner's timely request for rehearing and rehearing en banc. App. 1a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the court of appeals' authoritative interpretation of the principal federal statute governing claims brought by and against government contractors is in direct conflict with Congress's intent. The ruling below will discourage companies from contracting with the government, for fear that they will be exposed to crippling multi-million-dollar penalties if they ever submit claims that are later deemed even partially inaccurate. Because the Federal Circuit has exclusive appellate jurisdiction to hear appeals under the Contract Disputes Act, and the court has denied

petitioner's request for rehearing en banc, only this Court can correct this seriously flawed ruling.

1. The Contract Disputes Act provides that, if a government contractor submits a claim that it cannot "support [in] part" due to a "misrepresentation of fact or fraud," then it "shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. § 604. The statute could not be clearer: in such a case, the penalty to which the government is entitled is limited to the amount of the "unsupported" part of the claim that results from fraud. The contractor is not thereby rendered liable for a penalty in the entire amount of its claim, which (as in this case) may be vastly larger.

A hypothetical illustrates the statute's plain meaning. If a contractor submits a claim for reimbursement of five pieces of equipment, inflating the cost of the fifth, its liability under the Contract Disputes Act is measured by that specific exaggeration of the cost, which is the "unsupported *part* of the claim." To be sure, the contractor may *also* be liable under other statutes, and may in certain circumstances be subject to debarment as a government contractor (*see, e.g.*, 28 U.S.C. § 2514 and 31 U.S.C. § 3729), but the penalty applicable under the Contract Disputes Act extends no further.

Congress's determination to adopt a calibrated scheme for determining the scope of contractors' liability is obvious. Congress imposed a penalty only to the extent a contractor seeks payment for "an amount beyond which can be legitimately claimed." S. Rep. No. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254. By contrast, "[t]o the extent that contractors set forth claim items and

costs on which they can submit a legitimate argument for recovery, [the Act] would not apply." *Id.* at 5254. The statute notably does not include a more punitive provision – common to other statutory schemes (*e.g.*, 15 U.S.C. § 15 (treble damages available under the antitrust laws)) – that would impose a multiple of damages.

2. The Federal Circuit's decision in this case cannot be reconciled with the plain text of the Contract Disputes Act or Congress's clear purpose in enacting the statute. Petitioner submitted a request for equitable adjustment of its contract that included a projection of roughly $50 million in future costs. As the court of appeals recognized, the Court of Federal Claims did not find that the underlying legal theories were fraudulent, such that *all* the amounts claimed would be fraudulent. The trial court moreover found only that "certain specific items" in petitioner's claim were unsupported. App. 140a n.80. The trial judge deemed it improper, for example, for petitioner to measure its costs for acquiring equipment based on amounts set forth in a government manual, rather than attempting to measure its own expenses. App. 139a. The trial evidence showed that much of the petitioner's projection was accurate, or at least non-fraudulent. *See, e.g.*, Exponent Expert Report dated May 31, 2004; Rubino & McGeehin Expert Report dated May 23, 2005; and Cotton Expert Report dated July 15, 2004.[2]

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[2] As noted, although the trial judge labeled the $50.6 million "fraudulent" in toto (App. 148a), that characterization rested on the incorrect legal premise that it was impermissible for

Assuming the trial court's finding that certain elements of petitioner's projection were false – despite the court of appeals' refusal to consider petitioner's challenge to that finding (App. 12a n.5) – the government should have been awarded a penalty measured by the specific amount by which petitioner's claim was inflated. But the Court of Federal Claims never even bothered to determine the extent to which petitioner's claim was unsupported. Indeed, as the Federal Circuit acknowledged, the trial judge concluded that the $13.3 million incurred cost claim could have been supported by "alternative methodologies" that were not necessarily fraudulent. App. 16a. That same logic applies to the projected $50.6 million future costs and underscores the lower courts' failure to determine the "part" of petitioner's claim that was "unsupported."

The trial judge no doubt deemed that calculation unnecessary based on his view that petitioner's entire projection was fraudulent because petitioner submitted it with the intent of persuading the Army Corps of Engineers to "approve [a] new compaction method." App. 148a. But it defies all logic to hold that a contractor commits fraud merely by trying to persuade the government to change the terms of the contract – particularly when motivated by the prospect of cost overruns. It is therefore not surprising that the court of appeals did not adopt that reasoning.

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petitioner to submit a projection in an effort to persuade the government to change the contract terms.

The Federal Circuit nonetheless approved a penalty equaling the entire $50.6 million projection, based on different reasoning. The panel stated that, in submitting the projection, petitioner measured the potential costs based on delays in completing the project without determining if there "was any contractor-caused delay or delay for which the government was not responsible." App. 13a. That is to say, petitioner potentially overstated the government's liability.

The court of appeals' reasoning conflicts directly with the Contract Disputes Act. In holding that the award was proper – notwithstanding that only "certain" elements of the projection were unsupported (App. 12a n.5) – the court of appeals collapsed the distinct questions of petitioner's liability and the proper size of the resulting penalty under the Act. Congress directed the courts to determine the "part" of the claim that is "unsupported," and to impose a penalty in that amount, not more.

In support of its startlingly broad penalty theory, the Federal Circuit did not cite any provision of the Contract Disputes Act or any case decided under that statute. Rather, it criticized petitioner for submitting its claim without "considering whether there was any contractor-caused delay or delay for which the government was not responsible." App. 13a. Even assuming that is accurate, at most it establishes that petitioner may have *liability* under the Act for submitting a claim that was erroneous in part because of a "misrepresentation of fact or fraud." 41 U.S.C. § 604. The court of appeals' reasoning ignores, however, the critical requirement that by statute the

resulting *penalty* is limited to "an amount equal to such unsupported part of the claim." *Id.*

The ruling below cannot be sustained on the alternative theory that petitioner's supposed failure to fully investigate the government's responsibility for cost overruns renders it liable for the complete amount of the projection, without regard to the amount by which the faulty investigation caused the claim to be erroneously inflated. On that theory, a contractor that submitted a *completely valid* claim without sufficiently investigating the government's liability would not only have that claim denied, but would be forced to pay the government damages in the full amount of the claim. That result would fly in the face of Congress's command to limit the amount of damages to the specific "unsupported part" of the claim (41 U.S.C. § 604).

The appropriate course, accordingly, was to remand this case to the trial court for a revised assessment of the penalty in the amount by which petitioner's claim was unsupported.

3. Certiorari is also warranted in light of the undeniable importance of the question presented. The federal government annually awards hundreds of billions of dollars in contracts. *See* http://www.usaspending.gov ($526 billion in contracts awarded in FY2008). That figure is rapidly expanding. *Id.* (showing dollar value of annual contract awards has more than doubled since FY2000). Every claim by a contractor seeking an award of additional costs must proceed under the provisions of the Contract Disputes Act, which governs all executive agency contracts for the procurement of property (except real property),

services and construction, as well as contracts for the disposal of personal property. 41 U.S.C. § 602. Thousands of such claims are submitted every year. *Cf.* U.S. Court of Federal Claims – Cases Filed, Terminated, and Pending for the 12-Month Period Ending September 30, 2008 http://www.uscourts.gov/judbus2008/appendices/G02ASep08.pdf (for the twelve-month period ending September 30, 2008, 14.7% of the cases filed in the Court of Federal Claims were contracts cases). The ruling in this case governs every one of those disputes. The Federal Circuit's denial of rehearing en banc firmly commits that court to the ruling below. *Compare Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003) (review granted to decide far narrower question whether Contract Disputes Act applies to concession contracts); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (review granted "because of the importance of [questions about the coverage of government contract disputes clause] in the administration of government contracts").

As Congress explained in enacting the Contract Disputes Act:

> How procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors – or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. Rep. No. 95-1118, at 4, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238. The failure to reverse the ruling below will materially undercut the government's ability to accomplish the vital missions of innumerable projects that depend on private contracting. Would-be contractors will reasonably fear being subjected to enterprise-threatening liability on the theory given precedential sanction in this case – a *post hoc* determination that the contractor submitted a claim without complete accuracy, triggering not merely a denial of the claim but affirmative liability in the amount of the entire claim rather than just the far narrower component deemed to be unjustified. At the very least, contractors worried at the prospect of such a crippling award will be far less likely to submit claims that identify projected cost overruns that could give the government advanced notice that could result in contract modifications and significant savings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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