

WHERE FRAUD IS ALLEGED IN THE CONTRACT, BUT NOT IN CLAIM ITSELF, BOARD HAS JURISDICTION

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In a jurisdictional case, the Armed Services Board of Contract Appeals again reaffirmed that it had jurisdiction to consider claims when there are allegations of fraud in the contract, as long as there aren't allegations of fraud in the claim itself, and the Board does not need to make factual findings of fraud. *Tetra Tech, Inc.*, ASBCA Nos 62449 & 62450, June 11, 2001.

First, a review of what happens when a Contracting Officer ("CO") fails to make a final decision on the claim asserting fraud. This was reviewed in a recent blog, "Mere Suspicion Of Fraud Insufficient To Defeat Finding Of Jurisdiction Of Board" (August 24, 2021).

It is well known that "[a] final decision by a CO on a 'claim' is a prerequisite for Board jurisdiction." *Reflectone, Inc. v. Dalton*, 60 F 2d 1572, 1575 (Fed. Cir. 1995). The CO's decision can be either an actual decision or a "deemed denial" under 41 USC § 7103(f) (Contract Disputes Act). If the CO lacks authority to issue a decision, the CO's decision cannot confer jurisdiction on the Board, and there can be no deemed denial. *Case Inc. v. United States*, 88 F3d 1004, 1009 (Fed. Cir. 1996). FAR 33.210 provides the CO with the following authority:

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute. []. The authority to decide or resolve claims does not extend to -

- (a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
- (b) The settlement, compromise, payment or adjustment of any claim involving fraud.

FAR 33.210. Note the last sentence (b) which CO's often lean upon to fail to issue a final decision on a claim.

In *Tetra Tech*, the claims were simply based on a disagreement over performance evaluations (the Contractor Performance Assessment Reports—or CPAR). The contractor had a contract with the Navy for performing radiological remediation. During performance, the Navy (using the Nuclear Regulatory Commission) conducted an investigation to determine if Tetra Tech employees deliberately falsified soil samples. In fact, two employees ultimately pled guilty in connection with the soil sample issue. Apparently, the soil sample issues led to a negative CPAR rating by the Navy, which is what Tetra Tech disputed and appealed. The CO refused to issue a final decision on the claims alleging that the claims could not be separated from fraud. For that reason, the Navy argued that there was no final decision and the Board lacked jurisdiction.

The ASBCA noted that the Contract Disputes Act jurisdictional prohibition applies to fraud related to the claim, and does not apply to fraud believed to be involved somewhere else in the formation or performance of the contract. The Board stated it had jurisdiction involving allegations of fraud so long as the Board is not required to make factual determinations of fraud,

and the CO's failure to issue a final decision does not divest the Board of jurisdiction after the period for making such a final decision has passed. At that point the claim is "deemed denied" by law. The Board noted that the issues in the complaint only concern whether the Navy properly complied with CPAR procedures. The Navy had failed to establish that the case would require the Board to make fraud related findings.

The Board also refused to suspend proceedings in this appeal until a False Claims Act litigation against Tetra Tech was concluded because the circumstances did not merit suspending the appeals.

Takeaway: Boards have jurisdiction to consider claims when there are allegations of fraud in the contract, as long as there aren't allegations of fraud in the claim itself, and the Board does not need to make factual findings of fraud. A contracting officer cannot "paint with a broad brush" and refuse to make a final decision on a claim under such circumstances. The Boards will accept jurisdiction under the "deemed denied" provisions of the Contract Disputes Act.

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