

FINAL DECISION MUST SOLELY ASSERT FRAUD TO DEFEAT BOARD JURISDICTION

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The Armed Services Board of Contract Appeals refused to dismiss appeals for lack of jurisdiction where the government had argued that the final decisions of the contracting officer were invalid because the decision's basis for denying the claims purportedly was a suspicion of fraud. *PROTEC, GMBH*, ASBCA Nos. 61161 et al., March 20, 2018. The Board found that a suspicion of fraud was not the basis of the final decisions, that there were other bases for denying the claims, and therefore the Board had jurisdiction to consider the appeals.

PROTEC submitted a certified claim regarding its Contractor Performance Assessment Reporting System ("CPARS") evaluation, which rated its performance as unsatisfactory. The government also refused to pay certain PROTEC invoices, and PROTEC submitted a second and third claim for the unpaid invoices. The contracting officer issued a final decision that addressed both the CPARS evaluation and the unpaid invoice claims together. The contracting officer's final decision never mentioned that the claims were denied based upon a suspicion of fraud, or even mentioning fraud or false statements. PROTEC appealed these denials to the Board. However, the contracting officer reported his suspicion of fraud to the Army Criminal Investigation command, whose investigation was on-going.

The government asserted that the contracting officer did not have authority to issue the final decision because he knew that PROTEC was under investigation for fraud at the time the decision was issued. Therefore, said the government, the final decision was a nullity and the Board did not have jurisdiction over the appeal.

The Board rejected this argument, stating that the final decisions were not based upon—let alone solely based on—a suspicion of fraud, so they were valid. The Board noted that the contracting officer's authority "to decide or resolve claims does not extend to...[t]he settlement, compromise, payment or adjustment of any claim involving fraud." FAR 33.210(b). Instead, if there is evidence of misrepresentation of fact or fraud by the contractor, the contracting officer shall refer the matter to the agency official response for investigating such fraud. FAR 33.209. The Court of Appeals for the Federal Circuit has ruled that a final decision is only invalid if it is based *solely* upon a suspicion of fraud. *Daff v. United States*, 78 F. 3d 1566, 1572 (Fed. Cir. 1996). *Daff* held that even if one reason for denying a claim was suspicion of fraud, if another reason is a failure to perform according to the contract terms, this is a rationale the contracting officer was authorized to assert.

The Board noted that the final decision on PROTEC's claims were not even based on a suspicion of fraud—nothing stated there was intentional falsification or fraud. The mere fact of an ongoing criminal investigation was insufficient to divest the Board of its jurisdiction. Note that a final contracting officer's decision or a "deemed denial" is a prerequisite for Board jurisdiction under the Contract Disputes Act.

The Takeaway: If a contracting officer suspects fraud, he or she should not issue a final decision on a claim, but simply refer the matter to the agency's official that is responsible for investigating fraud.

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