

MERE SUSPICION OF FRAUD INSUFFICIENT TO DEFEAT FINDING OF JURISDICTION OF BOARD

Copyright 2021 Richard D. Lieberman, Consultant & Retired Attorney

What does it take to divest a Contracting Officer (“CO”) of his/her authority to decide or resolve claims? In a recent case at the Civilian Board of Contract Appeals (“CBCA”), the Board held that a mere suspicion of fraud was insufficient to defeat a finding of board jurisdiction. *Widescope Consulting & Con’t’g Servs, v. Department of Health and Human Servs*, CBCA 6894, March 17, 2021.

First, consider the following on CO final decisions. “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). 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.

In *Widescope*, the CO refused to issue a decision on two unpaid invoices that the company had claimed they were entitled to payment for. The CO reviewed the claim and other material submitted by the contractor and concluded there was a misrepresentation or fact or fraud on the claim, and therefore, the CO was without authority to decide the claim. The agency asserted that the Board lacked jurisdiction to hear the appeal because there had been no CO final decision and no deemed denial.

The Board held that it had jurisdiction, and distinguished an earlier case (*Savannah River Nuclear Sol. LLC v. Dept of Energy*, CBCA 5287, 17-1 BCA ¶ 36,749) in which, prior to a jurisdictional motion, the Department of Justice had already filed a fraud action in District court. Here, the CO only expressed a suspicion of fraud on the claim, and under the circumstances, the Board held that mere suspicion was “insufficient to defeat a finding of jurisdiction.” Therefore, the CO has not been divested of the authority to issue a decision, and because he could have decided it, the appeal was properly before the board on the basis of a deemed denial.

Takeaway: Mere suspicion of fraud, without more, will not satisfy the requirements of FAR 33.210(b) which divests the CO of his/her authority to decide or resolve claims. However, the

filing of a fraud action by the Department of Justice in an appropriate court, will divest the CO of authority to issue a decision on a claim.

For other helpful suggestions on government contracting, visit:

Richard D. Lieberman's FAR Consulting & Training at <https://www.richarddlieberman.com/>, and Mistakes in Government Contracting at <https://richarddlieberman.wixsite.com/mistakes>.