

ALLEGATION OF FRAUD 16 MONTHS AFTER CLAIM WAS FILED DOES NOT DIVEST BOARD OF JURISDICTION

Copyright Richard D. Lieberman, Consultant & Retired Attorney

One section of the Contract Disputes Act, 41 U.S.C. § 7103(c)(1), states that “[t]his section does not authorize an agency head to settle, compromise, pay or otherwise adjust any claim involving fraud.” Similar language is found in FAR 33.210(b) which states that “[the Contracting Officer’s authority to decide or resolve claims does not extend to] settlement, compromise, payment or adjustment of any claim involving fraud.” In a recent case, *ESA South, Inc.*, ASBCA no. 62242 & 3, June 10, 2020, the Armed Services Board held that the Contracting Officer’s allegations of fraud 16 months after an underlying claim had been filed did not divest the Board of its jurisdiction to consider the appeal.

ESA filed two claims in September 2018, and when they were deemed denied by the Contract Disputes Act without a Contracting Officer’s decision, the contractor filed appeals at the Board in October 2019. In late January 2020, sixteen months after the claims had been filed, the Contracting Officer sent a letter to the contractor stating that he would not issue final decisions on the claims because he had “a reasonable suspicion that [appellant] made fraudulent representations [in executing the contract].”

The government sought to have the appeals dismissed because of lack of jurisdiction based on 41 U.S.C. § 7103(c)(1) (cited above). The Board refused, stating that the contracting officer’s letter in 2020 does not divest the board of jurisdiction. Noting that the claims had already been “deemed denied,” the Board stated “We do not agree that the contracting officer’s 2020 letter divests us of jurisdiction to entertain these 2019 appeals. If it did, the government presumably could defeat any appeal before this board simply by presenting to the Board a letter from the contracting officer written after the filing of the appeal articulating the contracting officer’s suspicion that the claim underlying the appeal was fraudulent. We do not agree that Section 7103(c)(1) goes that far.”

In refusing to dismiss the appeals, the Board noted that the mere fact that there might be an ongoing criminal investigation which involves the same contract or claim pending before the Board is not enough to divest the Board of jurisdiction if the claim is properly before the Board. Furthermore, an ongoing criminal investigation which involves events which were the basis for the contracting officer’s decision being appealed is not enough to divest the Board of its jurisdiction.

Takeaway. It is clear that the Boards do not like contracting officer’s to come up with fraud allegations well after a claim was adjudicated or an appeal was filed. That type of finding cannot be used whenever the government presents a letter of “suspicion of fraud” to the Board well after the claim has been filed or adjudicated.

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>.