

## **BOARD AGAIN REFUSES TO DISMISS CLAIM BASED ON LATE FRAUD ALLEGATION**

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In a recent Armed Services Board of Contract Appeals (“ASBCA”) case, the Board rejected the government’s right to remove a case where the government rescinded a final contracting officer’s decision based upon a late determination of fraud. *Mountain Movers/Ainsworth-Benning, LLC*, ASBCA No. 62164, August 7, 2020. This case is very similar to the theory discussed in another recent blog about a late fraud determination, “Allegation of Fraud 16 Months After Claim Was Filed Does Not Divest the Board of Jurisdiction” (Oct. 21, 2020).

In both cases, the government sought to divest the Board of jurisdiction because of one section of the Contract Disputes Act, 41 U.S.C. § 7103(c)(1), which 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.”

Here is the sequence of events in *Mountain Movers*:

- In September 2014, the Army awarded a task order to Mountain for repairs to the Fort Peck Dam
- In November 2014, the government terminated Mountain for default because it was delinquent in obtaining required bonding
- In January 2015, Mountain obtained the required bonds, the government rescinded the termination for default, and Mountain performed
- On June 27, 2019, Mountain filed a claim for certain additional work on the project,
- In August 2019, the contracting officer issued a final decision finding partial merit in the claim
- On August 26, 2019, Mountain filed a timely appeal
- On October 29, 2019, the contracting officer attempted to rescind the August 2019 decision, asserting that Mountain had made misrepresentations in December 2014 following the termination for default.

The Board rejected the government’s motion to dismiss. The Board stated that the government’s motion to dismiss was based on the novel theory that it should be entitled to unilaterally remove litigation from the boards of contract appeals whenever it suspects fraud—permitting a contracting officer to withdraw a final decision at any time and thereby divesting jurisdiction from an agency board. The ASBCA stated that the plain language of the Contract Disputes Act (cited above) applies to “any claim involving fraud” and not to “any contract.” Thus the alleged fraud must relate to a claim, and not just the belief that there was fraud somewhere in the contract. The Board went even further, stating that “[e]ven if the contracting officer issues a final decision on a contractor claim involving fraud, the Board possesses jurisdiction to review that final decision if the final decision asserts a basis that the contracting officer is permitted to assert—that is, a basis other than fraud.” [citations omitted].

Finally, the board concluded that “a contracting officer may issue a final decision resolving a claim on a basis other than fraud, and the Board possesses jurisdiction to review such a decision, and further stating that “[o]nce the Board is vested with jurisdiction over a matter, the contracting officer cannot divest it of jurisdiction by his or her unilateral action.” [citations omitted]

Takeaway. The Board refuses to allow an appeal to be dismissed based on 41 U.S.C. § 7103(c)(1) even if the contracting officer attempts to divest the Board of jurisdiction by alleging fraud. If permitted, the agencies could defeat any appeal before a 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.

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